

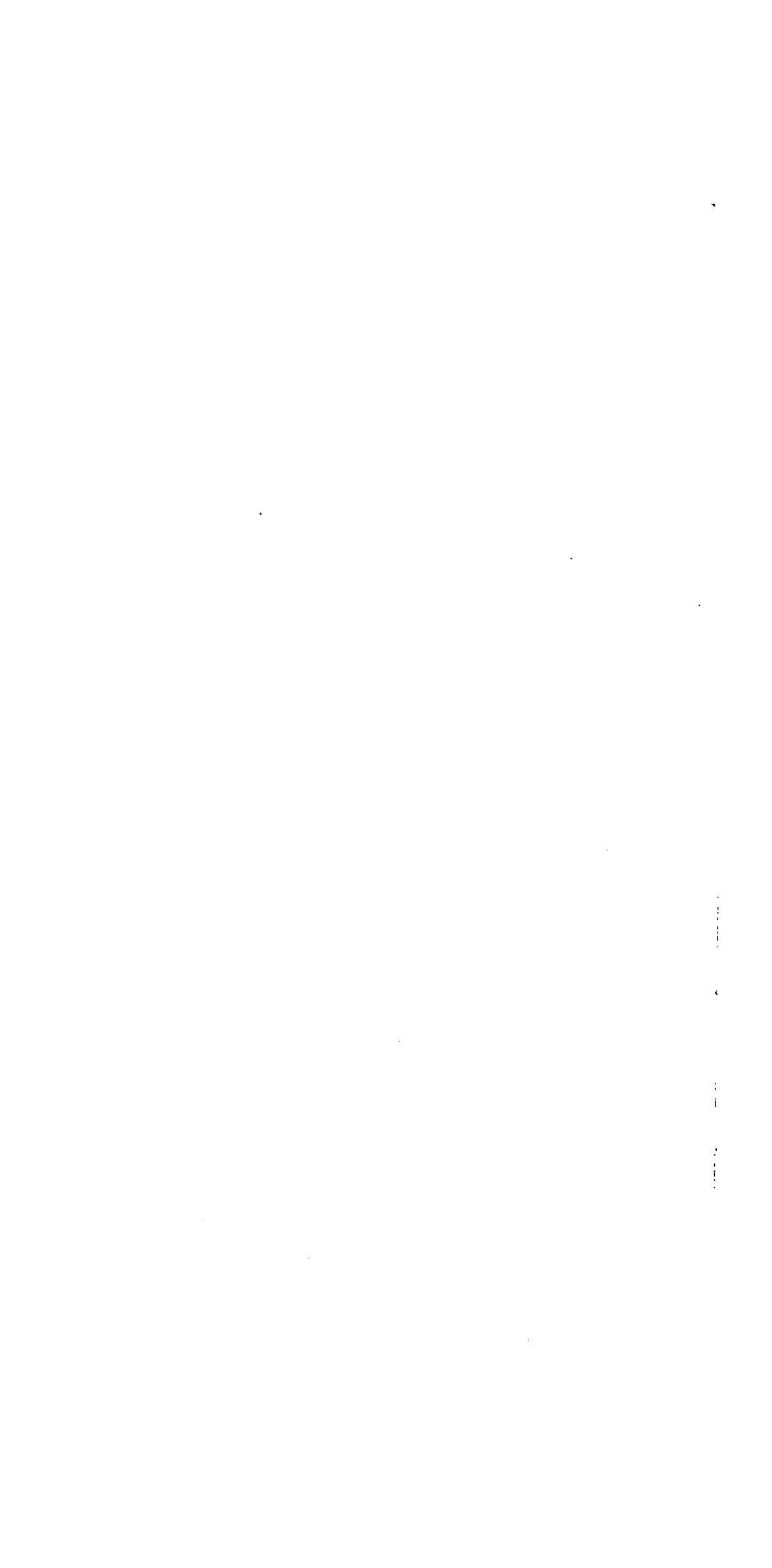
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State Trials.

VOL. XIV.



A
COMPLETE COLLECTION
OF
State Trials

AND
PROCEEDINGS FOR HIGH TREASON AND OTHER
CRIMES AND MISDEMEANORS

FROM THE
EARLIEST PERIOD TO THE YEAR 1783,
WITH NOTES AND OTHER ILLUSTRATIONS:

COMPILED BY
T. B. HOWELL, Esq. F.R.S. F.S.A.

INCLUDING,
IN ADDITION TO THE WHOLE OF THE MATTER CONTAINED IN THE
FOLIO EDITION OF HARGRAVE,
UPWARDS OF TWO HUNDRED CASES NEVER BEFORE COLLECTED;

TO WHICH IS SUBJOINED
A TABLE OF PARALLEL REFERENCE,
RENDERING THIS EDITION APPLICABLE TO THOSE BOOKS OF AUTHORITY IN
WHICH REFERENCES ARE MADE TO THE *FOLIO* EDITION.

IN TWENTY-ONE VOLUMES.

VOL. XIV.

12 WILLIAM III. TO 7 ANNE.....1700—1708.

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A COMPLETE COLLECTION

OF

STATE TRIALS,

&c. &c.

414. THE CASE* OF THE BANKERS in the Court of Exchequer, and afterwards in the Exchequer-Chamber and Parliament: 2 W. & M.—12 WILLIAM III. A. D. 1690—1696—1700.

[“ After the Restoration, it was usual with a few great Bankers, to accommodate the crown with large sums of money on the credit of the growing produce, either of taxes granted by parliament, or of the hereditary revenue; the mode being, not as it now generally is, to charge the public revenue with annuities in perpetuity for the interest redeemable on payment of the principal, but to give tallies and orders of the Exchequer, for paying both principal and interest out of the first monies from the funds pledged as a security. Lord Clarendon particularly explains, how such business was transacted between the crown and the bankers. 2 Clarend. Contin. fol. ed. 315. The good faith for some time observed by the crown had established so much confidence on the part of the Bankers, that they lent their money without the least suspicion of seeing a misapplication of the revenue appropriated to repay them. Other circumstances, too, concurred to inspire confidence; for in 1667, the king issued a Declaration, by which he solemnly promised, that he would not ‘on any occasion whatsoever,’ suffer an interruption of payment on these orders of the Exchequer;† and about the same time they received the sanction of a statute to make them transferable proper-

* See Skinner, 601.

† The words are, “ We will not upon any occasion whatsoever, permit or suffer any alteration, anticipation, or interruption to be made of our said subjects’ securities; but that they shall from time to time, receive the monies so secured unto them, in the same course and method as they were charged and ought to be satisfied. Which resolution we shall likewise hold firm and sacred, in all future assignments and securities, to be by us granted upon any other advance of money by any of our subjects, upon any future occasion for our service.”

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ty. Bankers’ Case by Turnour, 3d ed. 135, 19 Cha. 2, c. 12. Keble’s Stat. But notwithstanding thus pledging his royal word, the Bankers were finally deceived.* In 1671, when the debt to them was above a million of money, the king, having resolved on a new war with the Dutch, and knowing that his parliament would be averse to the measure, to supply his necessities resorted to the violent expedient of shutting the Exchequer; which was executed, by postponing the payments there on orders before issued, with a very limited exception. The disgrace of first suggesting this step is attributed to the earl of Shaftesbury, that of proposing it to the king is given to lord Clifford; both of which lords were members of the then confidential council so well known by the name of the Cabal. At first the postponement of payment was only for a year; but it was afterwards continued so as to exclude the Bankers from all hope of ever receiving the principal of their great debt. These proceedings involved the Bankers, particularly sir Robert Vyner, in the greatest distress; nor was the mischief confined to them, great part of the monies they had lent

* “ The Duke shall wield his conquering sword,

The Chancellor make a speech,
The King shall pass his honest word,
The pawn’d revenue sums afford,
And then come kiss my breech.”

The Young Statesmen, written in 1680. See a note to lord Danby’s case, vol. 10, p. 599 of this Collection.

“ The pecuniary profit to Charles 2, by shutting up the Exchequer in 1672, (and instead of repaying any principal sums that had been advanced upon its security, issuing only the legal annual interest of six per cent.) was 1,328,526l.” Sinclair’s Hist. of Revenue, 1785, p. 196.

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to the crown belonging to other persons; so much indeed, that the number of creditors to the Bankers was computed to be near 10,000. However, after various postponements of payment to the Bankers and their creditors, it was at length agreed by the crown to relieve the Bankers; for which purpose the king, in 1677, granted annuities to them out of the hereditary Excise, equal to six per cent. interest on their several debts, but redeemable on payment of the principal. This interest was accordingly paid till 1683; but it then became in arrear, and continued so at the Revolution; and the suits, which were commenced to enforce the payment of these arrears, are the subject of the following case.

"The first proceeding was a Petition to the barons of the Exchequer for payment of the arrears of the annuities granted; to which petition the Attorney General demurred. Two points were made, first, Whether the grant out of the Excise was good, and secondly, Whether a petition to the barons of the Exchequer was a proper remedy. On the first point the whole court agreed, that in general the king could alienate the revenues of the crown; but Mr. baron Lechmere differed from the other barons, by thinking, that this particular revenue of the Excise was an exception to the general rule. But all agreed, that the Petition was a proper remedy. Judgment was therefore given for the petition, by directing payment to the complainants at the receipt of the Exchequer.

"A Writ of Error was brought on this judgment by the Attorney General in the Exchequer chamber. There all the judges, who argued, held the grant out of the Excise good. A majority of them, including lord chief justice Holt, also approved of the remedy by petition. But lord chief justice Treby was of opinion, that the barons of the Exchequer were not authorised to make order for payments on the receipt of the Exchequer, and therefore that the remedy by petition to the barons was inapplicable. In this opinion he was seconded by lord keeper Sommers, who distinguished himself by one of the most elaborate Arguments ever delivered in Westminster-hall. A doubt then arose, Whether the lord chancellor and lord high treasurer were at liberty to give judgment according to their own opinion in opposition to that of a majority of the attendant judges; in other words, whether the judges called by the lord treasurer and lord keeper, were to be considered as mere assistants to them without voices. The Opinion of the judges being taken on this point, seven against three held, That the lord treasurer and lord chancellor were not concluded by the opinions of the judges: and therefore that the lord keeper in the case in question, there being then no lord treasurer, might give judgment according to his own opinion. Lord Sommers, concurring in this idea re-

versed the judgment of the court of Exchequer. But the case was afterwards carried by error into parliament, and there the lords reversed the judgment of the Exchequer chamber, and affirmed that of the Exchequer. However, notwithstanding this final decision in favour of the Bankers and their creditors, it appears by a subsequent statute, that they were to receive only one half of their debt; the 12 and 13 W. 3, after appropriating certain sums out of the hereditary Excise for public uses, providing, that, in lieu of the annuities granted to the Bankers and all arrears, the hereditary Excise should after the 26th of December, 1701, be charged with annual sums equal to an interest of 3 per cent. till redeemed by payment of one moiety of the principal sums, 12 and 13 W. 3, c. 12 and 15. Why such a composition of the debt, after prevailing in the suits commenced to enforce payment, should be accepted, we are unable to account.—It is observable, that part of one article of the Impeachment of lord Sommers is founded on his reversing the Judgment of the Exchequer without calling the barons before him; the 31 E. 3, c. 12, particularly requiring, that they should be called to give the reasons of their Judgment. The same article crimines him for saying, that particular subjects might have rights and interests without any remedy for the recovery, unless by petition to the person of the king; a position to which effect occurs in the course of his Argument in this case of the Bankers.*

"There are several printed reports of this case. Mr. Freeman, afterwards lord chancellor of Ireland, gives a short note of the Arguments in the Exchequer. The fifth volume of Modern Reports contains a full state of the Pleadings in the case, and of the Arguments of the chief justices Holt and Treby in the Exchequer-chamber. Holt's Argument is also in Skinner's Reports, 601. Lord Sommers's Argument in the Exchequer-chamber was printed separately in 1733. All these, except the report by Skinner, we shall introduce in their respective order. We shall then add a copy of the printed Case which was delivered to the Lords by the plaintiff on error in parliament; for which we are obliged to the kind communication of Mr. Serjeant Hill, whose valuable treasure of parliamentary cases is well known to gentlemen of the law. It was out of our power to give the printed Case on the part of the crown; † it not being in the collection to which we were permitted to have recourse, though esteemed by far the most perfect of

* See the Proceedings against lord Sommers, in the present volume.

† Mr. Rose very obligingly, (July 1811), caused inquiry to be made in his office for this printed case, but without success. The earliest printed cases preserved there appear to be of the year 1728.

any existing. The whole of what we shall offer to the reader will conclude with the Judgment in parliament, and the Protest entered upon the occasion, both taken from the Journals of the Lords.

“About a year after the determination of the Case of the Bankers by the Lords, a controversy arose about the disposition of the forfeited estates in Ireland, in the course of which the question, as to the right of the king to alienate the hereditary estates and revenues of the crown, was considered. Dr. Davenant commenced the disputes, by publishing his Discourse on Grants and Resumptions. The object of the discourse was to evince, that the Grants made by king William of the Irish forfeitures should be resumed, and that those forfeitures should be applied towards payment of the public debts. In enforcing this advice, though the author argues for the propriety of a parliamentary resumption of royal grants, when they are exorbitant, and the necessities of the state are urgent, yet he rather insinuates a doubt of, than directly denies the ancient right of the crown to alienate its hereditary estates. But then he cites a record of parliament of the 11 Hen. 4, which never occurred in the Argument of the Case of the Bankers, and which he construes to be a statutory prohibition of future alienations, except when the king shall be out of debt: adding, that the force of this law had been evaded by clauses *oppono obstantes*, but that these were condemned by the Bill of Rights. The great ability and learning conspicuous in this performance rendered it of too much importance, not only to those interested in the grants of the Irish forfeitures, but to all deriving under regal alienations of a modern date, to suffer the impressions from it to remain unresisted. The subject was accordingly undertaken by a writer, whose name is not transmitted to us, but whose work proved him very adequate to the contest. The piece we allude to was published early in 1701, by the title of “*Jus Regium, or the King's Right to grant forfeitures, and other Revenues of the crown, &c.*” It is reprinted in the 2d volume of the Collection of State Tracts during the reign of king William. The author lays a great stress on the concurrence of all the Judges in the case of the Bankers, that in general the king could alienate; and gives a short history of the several opinions advanced in the progress of that case. He also denies the application of the record of 11 Hen. 4, cited by Davenant. The result of the controversy was unfavourable to the grantees of the Irish Forfeitures: for by an English act of parliament, such lands as had been forfeited since the Revolution were vested in trustees to be sold for the public benefit; all previous grants of the forfeitures were made void; and the rents, directed to be reserved to the crown on sale by the trustees, were appointed to be for support of the govern-

ment of Ireland, and to be unalienable, 11 and 12 W. 3, c. 2. Such readers, as are disposed to inform themselves further on the contest in parliament about these Irish forfeitures, may consult Mr. Harris's Life of king William, and the Journals of the English parliament for the years 1699 and 1700, with the 2d volume of State Tracts during the reign of king William.

“The “Bankers' Case by Mr. Turnour,” which we have referred to in the preceding part of this note, was published by that gentleman soon after the first stoppage of payment to the Bankers, in order to expose the injustice and illegality of that measure, and to persuade the re-opening of the Exchequer. It is written with great ability and learning, and well deserves to be read by every lawyer. The author animadverts on those, who advised shutting the Exchequer, with great severity; but at the same time observes great decorum towards the king personally.” Hargrave.

EXTRACT FROM 1 FREEMAN'S REPORTS,
391.

UPON THE PETITION OF HORNBEER, WILLIAMSON, SMITH, and STONE. Hill. 1691. In Scaccario.

KING Charles the 2nd, having taken up great sums of money of the petitioners, or their testators, who were Bankers, in consideration thereof granted to them and their heirs several annuities, chargeable upon the hereditary revenue of excise, given to the king by the statute of 12 Car. 2, cap. 24.

The said annuity being for many years arrear, the petitioners exhibited their petition to the barons of the Exchequer for the said arrears; whereupon two questions did arise,

1st. Whether this grant of the king were good to bind the successor, so as to continue a charge upon the said revenue?

2d. Whether the petitioners had taken their proper remedies for recovery of the said arrears?

Ad primam Quest', Atkins, Turton and Powell, were of opinion, That the grant was good to charge the successor.

It was admitted, that the king could not grant away his kingdom, nor put it in vassalage or subjection to the pope or any other, as is said in 4 Inst. 13, 14, 83, 202, 357.

That the king may grant an annuity or charge his revenue. 2 Cro. 78, 5 Co. 56, 7 Co. 21, 9 H. 7, 12. 2 Inst. 58. Vaugh. 161, 4 Inst. 29, Dyer 92, 9 H. 6, 12 Bro. Quinz. 7, 2 Rol. 176, 198, 10 H. 6, 6, 4 Inst. 126, 6 Co. 73, 2 Rol. 98, Moor 833, 2 H. 7, 8, Reg. Orig. 198, 266, 307, 21 Ed. 3, 47.

That it must be said of whose hands to be received, or else it is not good, for he cannot charge his person. Nat. Brev. 52, Dy. 92, Hob. 148.

Obj. That it was out of an incorporeal inheritance.

Ans. It is good notwithstanding. 1 Inst. 47.

Obj. It was pretended, that the king was deceived in his grant, as to the consideration.

Ans. If the king be deceived in a consideration real executory, it will void the grant, but not in a consideration personal executed. Plow. 454, Lane 3, 76, 108, 10 Co. 47, 6 Co. 56, 1 Co. 43, Yelv. 1, 11 Co. 90, Hob. 230.

That there have been acts of resumption shews that the grants were good, because they could not be avoided but by act of parliament.

Obj. This is but an authority, and so void by death, because revocable.

Ans. It is an interest; and a licence coupled with an interest is irrevocable. Dy. 176, Nat. Brev. 223, Plow. 457, Palm. rep. 171, 172, Dyer 49.

Ad secund' Quest', all the barons held, that the remedy by petition to the barons was a proper remedy, and that it was in their power to relieve the petitioners, and give judgment for them. Kielw. 178, Stamford. 73, 75.

A petition of right lies as well for a personal as a real due, Plow. 377, 434, Wroth's case, and Nevill's case, 9 H. 6, 13, 1 Roll. 539, Lane 38, 4 Inst. 415.

Baron Lechmere *e contra*: that the king could not alien or charge this revenue. Fleta 183, 3, 549. Selden, Grotius, Pryn 9, 390. Vindication of the liberties of Engl. Freeman.

1. It was given in lieu of a revenue unalienable but by act of parliament, viz. the court of Wards.

2. If the king may alien part, he may alien all, and then the subjects will bear the burden, for they must grant new supplies to support the crown.

3. This charge was granted by the king at a time when he had no occasion for money, but merely for to gratify his prodigality, being at a time when the parliament rained golden showers into his lap.

It appears by the answer Edward the third gave the pope, that it is not in the power of the king to alien his kingdoms, &c. 4 Inst. 13, 14.

4. The very words of the act of parliament shew, that it was the intent of the parliament it should continue in the crown unalienable, there being the words 'for ever hereafter to remain to the king and his successors,' several times in the act.

5. A power in the act, to enable the king to let to farm for three years, shews the parliament never intended he should have power to alien as he pleased.

6. Where the parliament intended a power in the king to alien, it is otherwise worded; as in the acts that give monasteries to the crown it is said, 'to do therewith as he pleased.'

But judgment was given for the petitioners, upon the opinion of the other three judges.

EXTRACT FROM 5 MODERN REPORTS, 29.

The King and Hornby's Case. Term. S. Trin. 7 W. 3.

A Petition to the treasurer and barons of the Exchequer, exhibited by Joseph Hornby, Ter. Hill. 1 Gulielmi et Marie, for the allowance of letters patents granted by king Charles 2, for payment of an annuity out of the Excise, &c.* The Attorney-general demurs generally. The court gave judgment for the petitioner Hornby; whereupon the Attorney-general brought a writ of error.

Argued in the Exchequer-chamber, where the judgment was reversed.

Record. petition. et morac. superiade et iudicium, et brevis de error'.

The Arguments of the lord chief justice Treby for the reversal, and the lord chief justice Holt for the affirmance.

Termino Sancti Hillarii anno 1 Gulielmi et Marie, regis et reginæ.

Lond. Mid. "Memorandum, quod Josephus Hornby de Lond. gen' venit coram baronibus de Scaccario vicessimio primo die Octobr. hoc termino in propria persona sua et exhibuit coram hic quasdam literas patentes dom. Caroli secundi nuper regis Angliæ, &c. sub magno sigillo Angliæ confect. geren. dat. tricesimo die Aprilis anno regni dict. dom. Caroli nuper regis Angliæ vicessimio nono eid. Josepho Hornby, hæred. et assignat. suis confect. de annuali reddito sive summa mille trecent. quinquagint. et duar. libr. septendecim solid. et decem denar. annuatim solvend. recipiend. et percipiend. [Anglice taken] per præd. Josephum Hornby, hæred. et assign. suos in perpetuum de redditibus reventionibus proficuis et perquisit. et emolument. et solutionibus reservat. surgen. crescen. et provenien. eid. nuper dom. regi Carolo secundo hæred. et successoribus suis de pro ex sive ratione debiti Excisæ [Anglice duty of Excise] super potum lupulat' et illopolat' et alios liquores infra regn. Angliæ, domin. Walliæ; et vill. Barwici super Twedam (virtute actus parliamenti fact. anno regni ejusdem nuper regis Caroli secundi) duodecimo, intitul. 'An Act for taking away the court of Wards and Liveries, and tenures in capite, and by knights service and purveyance, and for settling a revenue upon his majesty in lieu thereof.' Dat. et conoca. solvend. quarteriatim (viz.) ad festum Annunciationis beatæ Mariæ Virginis, Nativitatis sancti Johannis Baptist', sancti Mich. Arch. et Nativitatis Dom. per æquas et æquales portiones sub fiducia in iisdem literis patentibus expressâ. Et præd. Josephus Hornby petiit literas patent. de recordo hic irrotulari. Quas quidem literas patent. barones hic recuperant et illas legi et sub serie verborum in iisdem literis

* Vide Shower's M. S. Rep.

patent. content. irrotulari præceperunt. Et tenor earund. literarum patent' sequitur in hæc verba. (Scilicet:)

“ Charles the second, by the grace of God of England, Scotland, France, and Ireland, king, defender of the faith, &c. to all to whom these presents shall come, greeting. Whereas since the time of our happy restoration, we have been involved in great and foreign wars, as well for the safety of our government, as for the vindication of the rights and privileges of our subjects; in the prosecution whereof, we have been constrained for some years past, contrary to our inclination, to postpone the payment of the monies due from us to several goldsmiths and others, upon tallies struck, and orders registered on, and payable out of several branches of our revenue, and otherwise: and although the present posture of our affairs cannot reasonably spare so great a sum as must be applied to the satisfaction of those debts, yet considering the great difficulties which very many of our loving subjects, who put their monies into the hands of those goldsmiths and others; from whom we received it, do at present lie under, almost to their utter ruin for want of their said monies; we have rather chose, out of our princely care and compassion towards our people, to suffer in our own affairs, than that our loving subjects should want so seasonable relief: and having seriously considered of the way and means to effect this our present purpose, we could not find any more effectual and less prejudicial to us in the present posture of our revenue, than by granting to each of them the said goldsmiths and others, to whom we are indebted as aforesaid respectively, and to his and their heirs and assigns, an annual sum or payment answerable, in value yearly to the interest of their respective debts, at the rate of six pounds per cent. per annum, for all such monies as are due unto them: the consideration whereof induced us to command our high treasurer of England, to cause all the accompts of the said goldsmiths to be stated and made up by Richard Aldworth, esq; one of our auditors, to the 1st day of January, 1676, which having been accordingly cast up and settled, it appears thereby that there is due and owing by us unto our trusty and well beloved subject, Joseph Hornby of London, goldsmith, the sum of 22,548*l.* 5*s.* 6*d.* In satisfaction whereof, according to our intent in these presents expressed, we have resolved to grant unto him the sum of 1,352*l.* 17*s.* 10*d.* per annum, out of that part of our revenue of Excise which was granted to us, our heirs and successors for ever by an act of parliament made in the 19th year of our reign, intituled, ‘ an act for taking away the court of wards and liveries and tenures in capite, and by knights service and purveyance, and for settling a revenue upon his majesty in lieu thereof.’ Know ye therefore, that we, for the consideration aforesaid, and in satisfaction or lieu of the said debt, or sum of 22,548*l.* 5*s.* 6*d.* by us owing to the said Joseph Hornby, and of our especial grace, certain knowledge,

and mere motion, have given and granted, and by these presents, for us, our heirs and successors, do give and grant unto the said Joseph Hornby, his heirs and assigns, the annual or yearly rent or sum of 1,352*l.* 17*s.* 10*d.* of lawful money of England, to be yearly had, received and taken by the said Joseph Hornby, his heirs and assigns for ever, out of the rents, revenues, profits and perquisites, emoluments and payments reserved, arising, accruing or coming, or that hereafter shall or may be reserved, arise, accrue or become due or payable to us, our heirs and successors, out of, for or by reason of the duty of excise upon beer, ale, and other liquors, within our kingdom of England, dominion of Wales, and town of Berwick upon Tweed, by virtue of the said act of parliament; the said sum of 1,352*l.* 17*s.* 10*d.* per annum, to be paid quarterly at the four most usual feasts in the year, that is to say, at the feast of the Annunciation of the blessed Virgin Mary, the Nativity of St. John the Baptist, St. Michael the archangel, and the birth of our Lord God, commonly called Christmas, by even and equal portions, in trust for such of the creditors of the said Joseph Hornby, as within one year next ensuing the date hereof shall, upon notice of these presents, deliver up their securities, and accept of assignments of proportionable parts of the said yearly sum of 1,352*l.* 17*s.* 10*d.* for satisfaction of their respective debts, according to the true intent and meaning of the covenant in that behalf herein-after contained for so much as their proportionable parts shall amount unto, and in the mean time shall not sue or prosecute the said Joseph Hornby, his heirs, executors or administrators, for such their debts: and the residue and overplus of the said yearly sum of 1,352*l.* 17*s.* 10*d.* to remain and be to and for the proper use and benefit of the said Joseph Hornby, his heirs and assigns, without any trust or account whatsoever; the first payment of the said sum of 1,352*l.* 17*s.* 10*d.* to commence from the feast of the birth of our Lord God 1676. And we do hereby, for us, our heirs and successors, authorize, direct and appoint our high treasurer, chancellor, under treasurer, chamberlain and barons of our Exchequer, and the high-treasurer and commissioners of the treasury, chancellor, under-treasurer, chamberlain and barons of the Exchequer, of us, our heirs and successors that hereafter shall be, and all other officers and ministers of the said court, and of the receipt thereof, now being, or that hereafter shall be, that they and every of them, in their respective places, do from time to time, upon request of the said Joseph Hornby, his heirs or assigns, respectively perform all acts necessary for the constant and due payment of the said yearly rent or sum of 1,352*l.* 17*s.* 10*d.* to the said Joseph Hornby, his heirs or assigns, as the same shall grow due and become payable, and of every such part and parts as the said Joseph Hornby, his heirs or assigns, shall grant or assign to any person or persons from time to time, according to the

trust and agreement in that behalf herein contained; and as occasion shall be, levy or strike, or cause to be levied or stricken in the receipt of the Exchequer, of us, our heirs and successors from time to time, tallies of pro or assignment, or other tallies, as the case may require, and as shall be desired, upon the commissioners, treasurers, receivers, collectors or farmers of the said duty and revenue for the time being, or upon such other person or persons as ought to be charged or chargeable therewith, or accountable to us, our heirs and successors for the same, who are hereby required and directed from time to time to make due payment thereof accordingly, so that the said Joseph Hornby, his heirs and assigns respectively, of all or any part thereof, may certainly and duly, and on every of the said quarterly feast days afore-mentioned, for ever hereafter have and receive the said yearly rent or sum of 1,352*l.* 17*s.* 10*d.* hereby granted out of our said revenue, without any further or other warrant to be sued for, had or obtained from us, our heirs and successors, in that behalf, and without any account, imprest, or other charge to be set upon the said Joseph Hornby, his heirs or assigns, or any of them, for the same. And if it shall happen at any time hereafter, that the rents, issues or profits of our said revenue shall be paid into the receipt of our Exchequer, or elsewhere, to the use of us, our heirs or successors, before the levying of such tallies, or before payment be made to the said Joseph Hornby, his heirs or assigns respectively, of the said yearly rent or sum of 1,352*l.* 17*s.* 10*d.* or any part thereof, according to the true intent of these our letters patents; then and in such case our express will and pleasure is, and we do hereby of our further especial grace, certain knowledge, and mere motion, for us, our heirs and successors, authorize and require the high-treasurer and commissioners of the treasury, chancellor or under-treasurer, chamberlain and barons of the exchequer, of us, our heirs and successors for the time being, and all other officers and ministers of the exchequer, and of the receipt thereof, that they or such of them to whom it appertains, do from time to time, as often as need shall be, well and truly pay or cause to be paid unto the said Joseph Hornby, his heirs and assigns respectively, out of such monies as shall be so paid into our exchequer, or elsewhere, to the use of us, our heirs and successors, all such or so much of the said yearly rent or sum of 1,352*l.* 17*s.* 10*d.* as shall from time to time be in arrear or unpaid after the feast days or times of payment aforesaid, or any of them, without any further or other warrant to be sued for, had or obtained in that behalf, and without any account, imprest, or other charge to be set upon him the said Joseph Hornby, his heirs or assigns, for the same or any part thereof. And these our letters patents, or the exemplification, entry or inrollment thereof, shall be unto the high-treasurer, commissioners of the treasury, chancellor and under-treasurer, chamberlain

and barons of the exchequer, of us, our heirs and successors, and all other officers and ministers of the said exchequer, and to the commissioners, treasurer, receivers, collectors, farmers, and all other officers and ministers of our said revenue of excise, a good and sufficient warrant and discharge for all and whatsoever they or any of them respectively shall do or cause to be done in or about the premises, pursuant to our will and pleasure herein-before declared. And our farther will and pleasure is, and we do hereby of our especial grace, certain knowledge, and mere motion, grant, direct and appoint, that all such tallies of pro or assignment, or other tallies as shall be hereafter levied or struck upon our said revenue of excise at the instance and desire of said Joseph Hornby, his heirs or assigns respectively, for or towards the satisfaction or securing the payment of the said yearly rent or sum of 1,352*l.* 17*s.* 10*d.* or any part thereof, shall be well and truly paid and satisfied out of the said revenue quarterly, and every quarter as aforesaid, and shall be preferable and preferred before any other quarterly payments out of the same, by virtue or colour of any warrant, order or direction whatsoever of any after-date, excepting only such yearly sums as are necessarily payable for the management of our said revenue, and except the yearly sums amounting to 12,209*l.* 15*s.* 4*d.* or thereabouts, payable therout unto our dearest consort the queen, as parcel of her jointure, and the yearly sum of 24,000*l.* payable to our dear brother James duke of York; which said several sums, we will and do hereby direct, shall be paid and satisfied unto our said dearest consort, and to our said most dear brother, out of the said revenue, duly, constantly, and in the first place before any of the said payments, or any other payments whatsoever to be made out of the same. And our will and pleasure is, and the said Joseph Hornby, for himself, his heirs, executors, and administrators, covenant, grant and agree, to and with us, our heirs and successors, that he the said Joseph Hornby, his heirs and assigns, shall and will at any time or times, within one year next ensuing the date hereof, grant and assign proportionable part and parts of the said yearly rent or sum of 1,352*l.* 17*s.* 10*d.* unto such of his creditors or others by their appointment, as will be content to deliver up their securities, and take such assignments in satisfaction of their debts, according to the trusts herein-before expressed; and that he the said Joseph Hornby, his heirs or assigns, shall not, nor will, during the said space of one year, make any grant or assignment of all or any part of the said yearly sum of 1,352*l.* 17*s.* 10*d.* unto any person or persons but such as are creditors of the said Joseph Hornby, or others by their appointment as aforesaid: and that if any difference shall at any time or times, within the space of one year and an half now next coming, arise between the said Joseph Hornby, his heirs, executors, administrators or assigns, or any of them, and the said creditors, or any of them,

touching the assigning or disposing of all or any part or parts of the said annuity or yearly sum of 1,352*l.* 17*s.* 10*d.* that then the said Joseph Hornby, his heirs, executors, administrators and assigns, shall and will from time to time submit themselves, and all matters and things relating thereunto, to the comptrol of the lord high treasurer, or the commissioners of the treasury for the time being, and shall and will observe and fulfil all such order and directions as the lord high treasurer, or the commissioners of the treasury, shall from time to time make or give concerning the same. Provided always, and our further will and pleasure, intent and meaning is, and is hereby declared to be, that all assignments to be made as well before as after the said space of one year, of any part or parts of the said yearly sum of 1,352*l.* 17*s.* 10*d.* hereby granted, shall, within the space of 30 days next after the execution thereof, be enrolled before the auditor of the receipt of the Exchequer, or the clerk of the Pells for the time being, to the end it may appear what assignments have been granted, and payments may be made thereupon according to the intent of these presents, and that every assignment not so enrolled, shall be of none effect. Provided also, that when we, our heirs or successors, shall at entire payments have actually paid the full sum of 22,548*l.* 5*s.* 6*d.* of lawful money of England, to the said Joseph Hornby, his heirs and assigns, and to such person or persons to whom such assignment or assignments shall be made as aforesaid respectively in proportion amongst them, after the rate of 100*l.* principal money, for each and every 6*l.* per ann. which they, every, or any of them respectively shall or ought to have and enjoy of the said yearly sum of 1,352*l.* 17*s.* 10*d.* hereby granted by virtue of these presents, or such assignment or assignments as shall be made and enrolled as aforesaid, and so after those proportions and rates for greater or lesser sums as the respective cases shall happen, and also the arrears of the said yearly sum of 1,352*l.* 17*s.* 10*d.* if any be; that then these presents, and the grant of the said yearly sum of 1,352*l.* 17*s.* 10*d.* shall cease and be void, any thing herein before contained to the contrary notwithstanding. And we do hereby of our further especial grace, certain knowledge and mere motion, for us, our heirs and successors, grant unto the said Joseph Hornby, his heirs and assigns; and our express pleasure is, that these our letters patents, and every clause, article, and sentence therein contained, whereupon any ambiguity or doubt shall or may arise, that the same shall be at all times expounded and taken most favourably and beneficially for the advantage of the said Joseph Hornby, his heirs and assigns; and that these our letters patents shall be good and effectual in law, and shall be available to the said Joseph Hornby, his heirs and assigns respectively, for his and their receiving and enjoying the said yearly rent or sum of 1,352*l.* 17*s.* 10*d.* with all the arrearages thereof in manner aforesaid, notwithstanding the not re-

citing or not mentioning, or not truly and certainly reciting or mentioning of any act or acts of parliament, whereby the said revenue was given and granted unto us, our heirs and successors, or by what title we have received or enjoyed the same: and notwithstanding the not reciting or not mentioning in this our grant, any lease or leases, grant or grants, charge or charges, made of or upon, or out of the said revenue, or any part thereof alone on the said revenue, or on the same, and any other part or parts of our revenue of excise, or generally on our revenue, or the date or contents of such leases or grants, or of the persons to whom the same are made: and notwithstanding that no mention be herein of the direct and certain yearly and other rents and profits of the premisses, or of the certain, true or direct nature of such rents and profits, or how or in what manner they arise, become due, or payable unto us, our heirs and successors: and notwithstanding the not mentioning how, and in what manner the said debts due from us to the said Joseph Hornby ariseth particularly, or any mistake in the stating, or in the quantity or sum of the aforementioned debt due, or herein mentioned to be due by us to the said Joseph Hornby: and notwithstanding the statute of Henry the 4th, late king of England, published in the first year of his reign: and notwithstanding the statute of Henry the 6th, late king of England, made and published in the 18th year of his reign: and notwithstanding the statute of Henry the 8th, late king of England, made and published in the 26th year of his reign: and notwithstanding the statutes or acts of this present parliament, made and published in the 12th year of our reign, whereby the said revenue was, or was mentioned or intended to be granted, settled, and confirmed unto us, our heirs and successors, or any article, clause, sentence, or restraint therein contained: and notwithstanding any defect in this our grant, or any act, statute, ordinance, proclamation, provision or restraint whatsoever made or provided, or any other act, matter, or thing whatsoever to the contrary hereof, in any wise notwithstanding. And lastly, our will and pleasure is, and we do hereby of our more abundant grace, certain knowledge, and mere motion, for us, and our heirs and successors, covenant and grant to and with the said Joseph Hornby, his heirs and assigns, that due payment shall be made of the said yearly sum of 1,352*l.* 17*s.* 10*d.* hereby granted, and all other things hereby directed to be done on our part, shall be from time to time done and performed, according to the true intent and meaning of these presents: and that if at any time hereafter, any defect or question shall be found or made of or in the validity of this our present grant, that then upon the humble petition of the said Joseph Hornby, his heirs and assigns, we, our heirs and successors, will be graciously pleased to make such further grant, assurance and confirmation of the said yearly rent or sum of 1,352*l.* 17*s.* 10*d.* to the said Joseph Hornby,

his heirs or assigns, as by our attorney-general shall be approved of and advised, and by the counsel learned in the law, of the said Joseph Hornby, his heirs or assigns, shall be advised and desired, and with such beneficial clauses therein to be contained, as shall be thought expedient and most conducing to the performance of our will and pleasure herein before declared. In witness whereof, &c.

Quibus quidem literis patentibus lectis præd. Josephus Hornby dicit, quod vigore præmissorum ipse idem Josephus Hornby scisit. fuit de et in præd. annuali reddito sive summa mille trecent. quinquagint. et duarum libr. septendecim solid. et decem denar. ut de feodo et jur. et sic inde scisit. existen. ipse idem Josephus Hornby postea, scilicet quinto die Augusti anno regni domini (nuper regis) Caroli secundi tricesimo tertio apud Westm. præd. per quoddam scriptum suum sigillo suo sigillat. et in cur. hic de record. debet. modo et debet. Juris forma irrutat. cujus dat. est eisdem die et anno ult. mentionat. pro consideration. in eodem script. mentionat. relaxavit præfat. domino Carolo secundo, hæredibus et successoribus suis annual. sum. sexcent. libr. parcel. præd. annual. sum. mille trecent. quinquagint. duar. libr. septendecim solid. et decem denar. præfat. Josepho ut præfert. concess. prout per record. cur. il. liquet et apparet, et ipse idem Josephus Hornby continuavit, et adhuc scisit. exist. ut de feodo et jure de et in annuali reddito sive summa septingent. quinquagint. duar. libr. septendecim solid. et decem denar. resid. præd. annualis redditus sive summa mille trecent. quinquagint. duar. libr. septendecim solid. et decem denar. in literis patentibus præd. mentionat. et per eandem eid. Josepho ut præfert. concess. et eundem annualem redditum sive summam septingent. quinquagint. et duar. libr. septendecim solid. et decem denar. resid. præd. annualis redditus sive summa mille trecent. quinquagint. duar. libr. septendecim solid. et decem denar. de jure habere et recipere debuit et debet vigore literarum patentium præd.

Et præfat. Josephus alterius dicit, quod ipse recepit et satisfactus fuit, et existit de et pro omnibus arrearagiis præd. annualis summae septingent. quinquagint. et duar. libr. septendecim solid. et decem denar. debet. et solubil. ad festum et pro festo Annunciationis beate Mariæ Virginis, anno regni domini (nuper regis) Caroli secundi tricesimo quinto, et quod summa quinque mille octogint. et duar. libr. quatuor denar. et unius oboli, pro arrearagiis ejusdem annualis summae septingent. quinquagint. et duar. libr. septendecim solid. et decem denar. post præd. festum Annunciationis beate Mariæ Virginis, anno tricesimo quinto supradict. debet. et solubil. ad festum et pro festo natalis domini, communiter vocat. Christmas ult. præterit. anno primo regnum dictorum domini regis et domine reginae nunc modo debet. et

insolubil. existit præfat. Josepho Hornby, scilicet sum. cent. octogint. et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno quarterio anni finit. ad festum Nativitatis sancti Johannis Baptiste, anno regni dicti (nuper regis) Caroli secundi tricesimo quinto, et simil. sum. centum octoginta et octo librarum quatuor solidorum quinque denariorum et unius oboli, pro uno alio quarterio anni finit. ad festum sancti Michaelis Archangeli anno tricesimo quinto supradict. et simil. sum. centum octoginta et octo librarum quatuor solid. quinque denariorum et unius oboli, pro uno alio quarterio anni finit. ad festum natalis domini anno tricesimo quinto supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno quarterio anni finit. ad festum Annunciationis beate Mariæ Virginis anno regni dicti (nuper regis) Caroli secundi tricesimo sexto, et simil. sum. cent. octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis sancti Johannis Baptiste anno tricesimo sexto supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Natalis Domini anno tricesimo sexto supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Annunciationis beate Mariæ Virginis anno primo (nuper regis) Jacobi secundi, et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis sancti Johannis Baptiste anno primo supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum sancti Michaelis Archangeli anno primo supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis Domini anno primo supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Annunciationis beate Mariæ Virginis anno secundo regni ejusdem nuper Jacobi secundi regis, et simil. sum. cent. octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis sancti Johannis Baptiste anno secundo supradict. et simil. sum. centum octoginta et octo librarum quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum sancti Michaelis Archangeli anno secundo supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni

finit. ad festum Natalis Domini anno secundo
 supradicto, et simil. sum. centum octoginta et
 octo librarum quatuor solid. quinque denar. et
 unius oboli, pro uno alio quarterio anni finit.
 ad festum Annunciationis beate Mariæ Vir-
 ginis anno tertio regni ejusdem (nuper regis)
 Jacobi secundi, et simil. sum. centum octo-
 ginta et octo librarum quatuor solid. quinque
 denar. et unius oboli, pro uno alio quarterio
 anni finit. ad festum Nativitatis sancti Johannis
 Baptistæ anno tertio supradict. et simil. sum.
 centum octoginta et octo libr. quatuor solid.
 quinque denar. et unius oboli, pro uno alio
 quarterio anni finit. ad festum sancti Michaelis
 Archangeli anno tertio supradicto, et simil.
 sum. centum octoginta et octo libr. quatuor
 solid. quinque denar. et unius oboli, pro uno
 alio quarterio anni finit. ad festum Natalis
 Domini anno tertio supradicto, et simil. sum.
 centum octoginta et octo libr. quatuor solid.
 quinque denar. et unius oboli, pro uno alio
 quarterio anni finit. ad festum Annunciationis
 beate Mariæ Virginis anno quarto regni præd.
 (nuper regis) Jacobi secundi, et simil. sum.
 centum octoginta et octo libr. quatuor solid.
 quinque denar. et unius oboli, pro uno alio
 quarterio anni finit. ad festum Nativitatis sancti
 Johannis Baptistæ anno quarto supradicto, et
 simil. sum. centum octoginta et octo libr. qua-
 tuor solid. quinque denar. et unius oboli, pro
 uno alio quarterio anni finit. ad festum sancti
 Michaelis archangeli anno quarto supradicto,
 et simil. sum. centum octoginta et octo libr.
 quatuor solid. quinque denar. et unius oboli,
 pro uno alio quarterio anni finit. ad festum
 Natalis Domini anno domini millesimo sexcen-
 tessimo octogesimo octavo, et simil. sum. cen-
 tum octoginta et octo librarum quatuor solid.
 quinque denar. et unius oboli, pro uno alio
 quarterio anni finit. ad festum Annunciationis
 beate Mariæ Virginis anno regnorum præd.
 Gulielmi et Mariæ (nunc regis et reginæ)
 primo, et simil. sum. centum octoginta et octo
 libr. quatuor solid. quinque denar. et unius
 oboli, pro uno alio quarterio anni finit. ad
 festum Nativitatis sancti Johannis Baptistæ
 anno primo supradicto, et simil. sum. centum
 octoginta et octo libr. quatuor solid. quinque
 denar. et unius oboli, pro uno alio quarterio
 anni finit. ad festum sancti Michaelis archan-
 geli anno primo supradicto, necnon aliis con-
 sil. sum. centum octoginta et octo libr. quatuor
 solid. quinque denar. et unius oboli, pro uno
 alio quarterio anni finit. ad festum Natalis
 Domini nunc ult. præterit. et anno primo su-
 pradicto, attingen. in toto ut supra: et petit
 idem Josephus Hornby, quod præd. breve.
 paten. in forma præd. fact. juxta tenor. et
 effect. earundem præsent. Josepho Hornby
 allocentur, et quod præd. sept. alia quar-
 teriales summæ centum octoginta et octo
 librarum quatuor solid. quinque denar. et
 unius oboli, a festo Annunciationis beate
 Mariæ Virginis anno regni dicti (nuper regis)
 Caroli secundi tricesimo quinto usque ad fes-
 tum et pro festo Natalis Domini nunc ult. præ-
 terit. attingen. ut supra, ad quinque mille oc-
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toginta et duas libr. quatuor denar. et unum
 obulum, sicut præfertur debet. et aretro, et
 insolut. existen. præfat. Josepho Hornby
 solventur, quodque etiam præd. annual. reddit.
 sive sum. septingent. quinquaginta et duarum
 libr. septendecim solid. et decem denar. resid.
 præd. annual. reddit. sive sum mille trecent.
 quinquaginta et duarum libr. septendecim
 solid. et decem denar. in literis patentibus
 præd. mentionat. a præd. festo Natalis Domini
 ult. præterit. præfat. Josepho Hornby, hæred.
 et assign. suis, ad præd. separalia festa in
 dictis literis patentibus specificat. in posterum
 per æquas et æquales portiones secundum for-
 mam et effectum literarum patentium præd.
 solvetur, quodque talis toties quoties casus re-
 quireret, levand. ad receipt. hujus scaccar. præ-
 dicto annuali redditu sive summa septingent.
 quinquaginta et duarum libr. septendecim
 solid. et decem denar. resid. præd. sum. mille
 trecent. quinquaginta et duarum libr. septen-
 decim solid. et decem denar. quando et quoties
 idem resid. reddit. sive sum. seu aliqua pars
 vel parcel. inde deveniret, debet. levarentur se-
 cundum formam, effectum et directionem
 earundem literarum patentium, et secundum
 cursum receipt. hujus scaccarii, et quod omnes
 potestat. remed. et res quæcumque in et per
 dict. liter. patent. concess. et mentionat. tan-
 gen. solution. denar. sum. in dictis literis
 patent. mentionat. et pro beneficio præfat.
 Josephi Hornby, hæred. et assign. suorum
 exequerentur et capiant effectum secundum
 formam et effectum liter. patent. præd. cum
 hoc quod idem Josephus Hornby verificare
 vult, quod ad præd. festum Natalis Domini ult.
 præterit. sufficien. fuer. et ad hoc sufficien.
 existunt de reddit. revention. proficuis, per-
 quisition. [Anglice perquisites] emolumen.
 et solution. renovan. provenien. receipt. et
 solut. de et pro debito de l' Excise præd. virtute
 actus parliamenti præd. ad solvend. et satis-
 faciend. præfat. Josepho Hornby præd. sum-
 mam septingent. quinquaginta et duarum
 libr. septendecim solid. et decem denar. sicut
 præfertur ei debet. et aretro existen. ultra et
 præter omnes annual. sum. necessar. et so-
 lubil. usque tempus illud pro gubernation.
 [Anglice management.] dict. revention. et
 ultra et præter præd. sum. duodecim. mille
 ducent. et novem libr. quindecim solid. qua-
 tuor denar. et unius oboli, aut eo circiter, so-
 lubil. exinde Catharinæ reginæ, tunc consort.
 nunc reginæ dotal. dicti domini (nuper regis)
 Caroli secundi, ut parsel. juncturæ suæ, in
 literis patentibus præd. mentionat. et ultra et
 præter præd. sum. viginti et quatuor nullo
 libr. solubil. præd. Jacobo, tunc duci Eborac.
 fratri domini (nuper regis) Caroli secundi, in
 literis patent. præd. concess. cum hoc etiam
 quod præd. Josephus Hornby verificare vult,
 quod nec præd. dominus Carolus secundus,
 nuper rex Angliæ. &c. nec præd. dominus
 Jacobus secundus, nuper rex Angliæ, nec
 præd. dom. Willielmus et Maria, modo rex et
 regina Angliæ, aut eorum aliqui vel aliquis
 huc usque non solverit seu solvit præfat.

Josepho Hornby aut assignat. suis præd. sum. viginti duar. mille quinquagint. quadraginta et octo libr. quinque solid. et sex denar. in dictis literis patent. mentionat. seu aliquam inde partem seu parsel. ultra seu præter sum. decem mille libr. existen. consid. indiet. script. relaxat. per præfat. Josephum Hornby præfat. Carolo secundo, nuper regi Angliæ, &c. ut præferatur fact. et pro qua sum. ipse idem Josephus Hornby relaxavit eidem domino nuper regi præd. annual. sum. sexcent. libr. præd. annual. sum. milletrecent. quinquaginta et duarum libr. septendecim solid. et decem denar. superius mentionat.

To this the Attorney General demurs generally, and the said Joseph Hornby the petitioner joined in demurrer.

And the court gave Judgment for the petitioner Joseph Hornby; whereupon the Attorney General brought a Writ of Error in the Exchequer chamber.

Note, the Judgment is recited in the Writ of Error; which is as follows:

Dom. rex et dom. regina nunc Gulielmus et Maria mandaverunt thesaurario et baronibus de scaccar. suo breve suum clausum in hæc verba, scilicet; Gulielmus et Maria Dei gratia Angliæ, Scotiæ, Franciæ et Hiberniæ, rex et regina, fidei defensores, &c. thesaur' et baronibus suis de scaccar. suo salutem quia in record. et process. ac etiam in redditione iudicii loquelæ ejusdem petitionis ejusdam Josephi Hornby, quæ fuit in curia nostra coram vobis præfat. baronibus nostris de scaccar. nostro præd. termino sancti Hillarii anno regni nostri primo exhibit. de allocatione quarundam literarum patent. dom. nuper regis Caroli secundi præd. Josepho Hornby, et hæredibus suis confect. et solution. ejusdam annual. reddit. per easd. literas patent. per eundem nuper regem eidem Josepho Hornby, et hæredibus suis concess. solvend. et percipiend. de revention. proficuis et solution. surgen. et provenien. nobis, hæred. et successores, de pro et ratione debit. excise, sup. potum lupulat. et illupulat. et alios liquores, nec non arrearag. ejusdem annual. reddit. pro sepeal. quarter. anni finit. ad festum nativitat. domini anno primo supradict. error. intervenit manifestus ad grave damnum nostrum. Ac cum in statuto in parlamento dom. Edward. nuper regis Angliæ tertii, progenitoris nostri apud Westm. anno regni sui tricesimo primo tent. edit. inter cæterum concordat. fuit et stabilit. quod in omnibus casibus regem aut alias personas tanger' ubi quis queritur de errore facto in scaccar. cancellar. thesaur. venire fac. coram eis in aliquam cameram consilii juxta scac. record. et process. hujusmodi extra dict. scaccar. et assumptis sibi justiciariis et aliis peritis talibus quales sibi videbitur fore assumen. vocari fac. coram eis baron. de scaccar. præd. ad audiend. informationes suas et causas judiciorum suorum et super hoc negotium hujusmodi debite fac. examinari. Et

si quis error invent. fuit illum corrigi et rotulos emendari ac postea eos in dict. scaccar. ad executionem inde faciend. rounit. fac. sicut pertinet prout in eod. statuto plenius continetur. Nos igitur volentes errorem si quis fuerit juxta formam stat. præd. corrigi et celerem justitiam fieri in hac parte vobis mandamus quod si iudicium inde redditum sit tunc record. et process. præd. cum omnibus ea tangen. coram dom. commissionerariis ad custod. sigillum magnum Angliæ et vobis vos præfat. thesaur. in cameram consilii juxta scaccarium præd. [vocat le Council-chamber] die martis videlicet nono die instantis mensis Februarii venire fac. Ut quod dom. commissionerarii et vos præfat. thesaur. visis et examinatis record. et process. præd. auditisq; informationibus vestris vos præfat. barones ulterius in hac parte de consilio justitiam et aliorum peritor. hujusmodi fieri fac. quod de jure et secundum formam stat. præd. fuerit faciend. T. nobis ipsis apud Westm. 1^o die Februarii, anno regni W. 3. Fish. alloc. R. Atkins.

Record. et process. de quibus in brevi de errore fit mentio sequitur, &c.

Et super hoc Georgius Treby miles attorn' dictor. dom. regis et dom. regine, nunc general. quæ pro eisdem dom. rege et dom. regina in hac parte sequitur, præsen. hic in curia in propria persona sua pro eisdem dom. rege et dom. regina dicit quod in record. et in process. præd. nec non in redditione iudicii præd. de et super præd. morac. in lege manifeste est errat. In hoc videlicet quod præd. literas patent. superius recitat. et materia in eisdem content. et specificat. ac præd. materia per dict. Josephum Hornby, in forma præd. allegat. minus sufficien. in lege existunt ad ipsos dom. regem et dom. reginam nunc de aut cum solution. denar. prædict. de arrearag. pro præd. separabilibus quarteris anni aut cum præd. solution. præd. annual. reddit. sive sum. præfat. Josepho Hornby in forma præd. operand'. Eo tamen non obstante adjudicat' existit' per barones præd. quod præd. literas patent. præfat. dom. nuper regis Caroli secundi præfat. Josepho Hornby, ut præferatur concess. et superius recitat. et irrotulat. juxta tenorem et effectum earundem ipsi præfat. Josepho Hornby allocar'. Et quod præd. summa quinq; mille octogint. et duarum librarum quatuor denar. et un. obol. pro arrearagiis dict. annual. reddit. sive sum. septingent. quinquagint. duarum librarum septendecim solidor. et decem denar. resid. præd. annual. reddeite sive sum. mille trescentar. quinquagint. duar. librar. decem solidor. et decem denar. ut literis patent. præd. mentionat. a præd. festo Annunciationis beate Mariæ præd. Virginis anno regni dict. dom. nuper regis Caroli secundi tricesimo quarto, usque ad festum et pro festo Natalis dom. anno primo regni dom. Gulielmi et dom. Mariæ nunc regis et reginæ supradict. sic ut præferatur aretr. et insolut. existen' ipsi præfat. Josepho Hornby ad recept. hujus scaccar. per

man. commissionar. thesaur. et camerar. ejusdem. recept. qui modo sunt et per man. commissionar. thesaur. et camerar. ejusdem recept. pro et tempore existen. de thesauro provenien. accrescen. ex illa parte revention. de le excise in literis patent. præd. mentionat. fore concess. dicto nuper regi Carolo secundo, hæred. et success. suis imperpetuum per actum parliament. fact. anno regni ejusdem nuper regis duodecimo in man. eorund. commissionar. thes. et camerar. jam exist. et in manus commissionar. thes. thesaur. et camerar. imposteriorum existen. solvetur post et ultra annual. sum. necessar. solubil. pro gubernation. [Anglice management] dict. revention. de le excise, et post et ultra annual. sum. attingen' ad duodecim mille ducent. et novem libras quindecim solid. et unum obol. seu eo circiter in literis patent. prædict. mentionat. fore solubil. exinde annuatim Catherinæ nuper reginæ consort' dicti nuper regis Caroli secundi et modo dom. reginæ dotissæ Angliæ et parcel. juncturæ suæ, et post et ultra præd. summam vigint. et quatuor mille librarum in literis patent. præd. mentionat. fore solubil. Jacobo tunc duci Ebor. fratre dict. dom. nuper regis Caroli secundi et quod præd. annual. reddit. sive summa septingint. quinquagint. et duarum librarum septendecim solid. et decem denar. resid. præd. annual. reddit. seu sum. mille trescentar. quinquagint. et duarum librarum septendecim solid. et decem denar. in præd. literis patent. mentionat. eidem Josepho Hornby sic ut præfertur concess. a præd. festo Natalis dom. anno regni dict. dom. Gulielmi et dom. Mariæ nunc regis et reginæ Angliæ, &c. primo supradict. ipsi eidem Josepho Hornby, hæred. et assign. suis ad recept. hujus scaccar. per manus commissionar. thes. thesaur. et camerar. ejusdem recept. pro tempore existen. de thesauro de tempore in tempus provenien. accrescen. et emergent. de præd. hereditar. revention. de le excise in man. suis de tempore in tempus existen. post et ultra annual. summam necessar. solubil. pro gubernation. [Anglice management] dict. revention. de le excise, et post et ultra annual. summam attingen. ad duodecim mille ducent. et novem libras quindecim solid. et unum obol. aut eo circiter in dictis literis patent. mentionat. fore solubil. exinde annuat. præfat. Catharinæ modo reginæ dotissæ Angliæ ut parcel. junctur. suæ et post et ultra annual. summam viginti quatuor mille librarum in eisdem literis patent. mentionat. fore annuat. nuper solubil. præfato Jacobo duc. Ebor. et modo annuat. solubil. dom. regi et dom. reginæ nunc ad præd. seperal. festa Annunciationis beatæ Mariæ Virginis, natiuitatis sancti Johannis Baptistæ sancti Michaelis Archang. et Natiuitat. dom. Dei nostri [communiter vocat' Christmas] per æquas et æquales portiones annuatim solvetur. Et quod tall. toties quoties casus requiret levand. ad dict. recept. scaccar. pro præd. annual. redditu sive sum. septingent. quinquaginta et duarum librarum septendecim solid. et decem

denar. resid. præd. annualis redditus mille trecentarum quinquagint. duarum librarum septendecim solid. et decem denar. idem resid. redditus seu aliqua inde parcel. deveniret debet. secundum formam et effectum literarum patent. præd. super commissionarium thesaurarium receptor' collector' sive firmarium dict. hæreditariarum revention. de l' excise per officiar' recept. hujus scaccar. pro tempore existen. ad quos Levat. Tallior. in ead. recept. pertinet seu pertinebit de tempore in tempus ad requisition. ejusdem Josephi Hornby hæred. et assign. suorum leventur secundum formam effectum et directionem literar. patent. prædict. et secundum cursum dict. recept. scaccar. salvo semper jure regis et reginæ nunc si, &c. Ideo in eo manifeste est erratum. Errat' est etiam in hoc quod per record. præd. apparet quod judicium præd. in forma præd. reddit. reddit. existit pro præfat. Josepho Hornby versus eosdem dom. regem et dom. reginam ubi per legem terre hujus regni Angliæ judicium ill. reddi debuisset pro eisdem dom. rege et dom. regina nunc versus præfat. Josephum Hornby. Ideo in eo manifeste est erratum. Et sic idem attornat. general. pro eod. dom. rege et dom. regina dicit quod in record. et process. præd. ac in recordo judicii præd. manifeste est errat. et super inde idem attornat. dictor. dom. regis et dom. reginæ pro eodem dom. rege et dom. regina petit quod judicium illud ob errores præd. et alios in record. et process. existen. revocetur annulletur et penitus pro nullo habeatur, ac etiam breve dictor. dom. regis et reginæ ad premuniend. præfat. Josephum Hornby. essend. coram præfat. dom. custod. magni sigill' Angl' et domino thesaurario ad certum diem auditur. record. ac process. præd. errores. Et ulterius ad faciend. et recipiend. quod fuit justum in premissis, &c. Et ei conceditur, &c.

Super quo idem Joseph Hornby dicit quod nec in record. et process. præd. neq; in redditione judicii præd. de et super præd. morac. in lege in ullo est erratum. Et petit, quod curia dict. dom. regis et dom. reginæ nunc hic procedat tam ad examinationem record. et process. præd. quam materiæ præd. superius pro erroribus assignat. Sed quis curia vult advisari in premissis antequam, &c. idco dies dat. est partibus præd. in statu quo nunc sicut usq; a die Pasch. in unum mensem proximum anno quarto regni dom. Gulielmi et dom. Mariæ nunc regis et reginæ de judicio suo modo audiend. eo quod curia dict. dom. regis et dom. reginæ nunc inde nondum, &c. Ad quem diem vener. hic partes præd. et ob causam præd. habend. diem ulterior. in statu quo nunc usq; in octab. sanct. Trin. ad judicium suum inde audiend. eo quod curia hinc inde nondum, &c.

THE ARGUMENT

OF

LORD CHIEF JUSTICE TREBY.

There are two points in this case :

1. Whether these letters patents are valid in law, and sufficient to bind the king ?

2. Whether that the remedy that these petitioners have taken be proper ?

As to the first, I am of opinion, that the letters patents are valid and sufficient to bind the king.

It is objected, that the word 'successors' in the statute by which this revenue is given, intends that it shall be fixed in the crown, and unalienable. To this I answer, that there are several other statutes by which lands and other revenues were given to the king by the same words that are in this statute ; and yet the kings of England had always power to alien them, as appears by Berkley's case in Plowd. and by the statute of Monasteries, Vaugh. 62. 3 Rol. Abr. 198, &c. So king Charles 2, having an estate of inheritance in this branch of his revenue, had the same power to alien this, as he had to alien any other part of it. [Vide Plowd. 234 to 248.]

It has been strongly objected, that if the king should have a power to alien all his lands and revenues, it might be of pernicious consequence to his subjects ; and that then our exchequer in England would be like the Spanish exchequer, of which it is said, that it receives taxes and revenues from the general, only to pay them out to some particular persons. [Skin. Rep. 601, 602, 603, &c.]

To this I answer, that this might be some reason to induce the making an act of parliament to restrain the king's power of alienation ; but since here the parliament has thought fit to give the king such a power, we ought to acquiesce and submit to it.

But that, which I shall chiefly proceed on, is the judgment, which I think to be very extraordinary, and such as the barons could not give ; for I do not think, that they can award the king's treasure out of the exchequer. Then I take this judgment to be very erroneous and deficient in several particulars.

1. It leaves out the treasurer, who is the chief officer concerned in disposing the king's money.

2. The chamberlain of the exchequer ought to have been mentioned as well as the treasurer ; and so is the judgment in Nevile and Wroth's case in Plowd. and also in Cotton's Records. [Plow. 378, 381, 457, 458.]

3. This judgment appoints tallies to be struck from time to time, and orders the method of payment of the several sums of money, which I take it the barons cannot do ; for they seem to undertake to do what is proper work for an act of parliament, which only can appoint the treasurer to make payments in such an order, 9 H. 4, 28.

In the next place, I take it that this judgment cannot be amended, because these are faults in substance, and the law is very nice and curious in judgment. So if a 'misericordia' be entered for a 'capiatur,' the judgment is erroneous. So it is if it be 'concessum est,' instead of 'consideratum est,' &c. Latch. 177, so is Poph. casu ultimo. [Poph. 203, 211. Noy 89. Lat. 176, 177, 188. Vide 8 Roll. Ab. 771, 774. 1 Rol. R. 278. Yelv. 130. 2 Cro. 386, 632. Hob. 194. 3 Cro. 442.]

Now I come to the remedy, which I take to be the great and difficult point of the case.

And I am of opinion, that no judgment can be given upon this petition to the barons ; for I do not think that the court of exchequer has any power to dispose of the king's treasure, and therefore I cannot see how this judgment can have any effect. Indeed it is said, that the petitioner will have a writ to the officers of the treasury, or to the treasurer himself ; and if they do not obey this 'liberate,' that then they will enforce to it by action. But this they cannot do ; for I hold that the treasurer may choose, upon a bare warrant, to pay in what order he thinks fit.

Then they have shewn no precedent that ever any such action was brought ; though indeed my lord Coke, in his 4th Inst. 116, seems to hint at it, and so does Plo. Com. 186, and 2 H. 7, 8, 9, 10. But there the 'liberate' always went to the subordinate officer, but never to the treasurer himself. By the treasurer, I mean the treasurer of the exchequer, and not the lord high treasurer of England ; for that great officer has long been discontinued ; and when he was in being, the greatest use of him was when he had the honour to have been your lordship's colleague in this place.

So that I take it, that the treasurer may if he pleased pay these annuities to the petitioners ; but whether he will do it or no, is left to his conscience and discretion ; but he cannot be compelled to it but by authority of parliament.

Then this remedy is not warranted by the course of the exchequer. If there were any such usage there, I agree it would be the law of the land ; and so is Rawlin's case, 4 Rep. and Plo. 32. But there has been no such usage there ; and in this point I concur with my brother Lechmere, who perhaps has the greatest experience in the court of Exchequer of any judge that ever sat there ; for I think I lately heard him say, it was 60 years since he practised there.

I have reason to think, whatever Mr. Plowden says, [5 Mod. 13, 14.] that these 'liberate' rates were granted upon petitions to the king himself, and not to the barons. You may see abundance of them in Ryley's Pacita Parliamentaria. It appears indeed in Broke, tit. Talley de Exchequer, pl. 4, that upon delivery of this writ to the officer, and assets in the exchequer, an action lay against the officer for non-payment. But that ever it could be brought against the treasurer or chamberlain, was never heard of.

But, say they, there is a clause in the patent, which empowers the treasurer, &c. to make payments, &c. and this they call a perpetual warrant.

But this makes against the petitioners: for if it is so, why do they prefer a petition to the barons of the exchequer? If they can have their debt without a petition barely upon this patent, where there is a grant, a command, and warrant to the treasurer and officers to pay the money, (which, say they, amounts to a 'liberate,') then it is a vain thing to sue in the exchequer for a judgment: for it cannot be presumed, that a 'liberate' under the seal of the exchequer, 'teste' chief baron, should be of more force than a 'liberate' under the seal of England, 'teste meipso,' Reg. 192.

To clear this point, it is necessary to enquire into the power of the court of the exchequer.

I do agree that they are supreme auditors, and have authority over the king's treasure; but it is 'in transitu,' as upon the sheriff's accounts, or any other of the king's officers concerning the bringing in of the king's revenues into the exchequer; but when the money is there, it is in its centre, and the barons have nothing to do with it. They are only conduits, but not products, 2 Inst. 197. 4 Inst. 115. And it would be of dangerous consequence for so many to have to do with the treasury, lest (as Vernon says in his book) there be too many leaks in the cistern.

I confess, the court of exchequer does use to enrol charters in the exchequer, and that is the foundation of the accounts, &c. and so is Plowd. But whether the barons of the exchequer have a power to comptrol and command the treasurer is a great and arduous point. It is in effect, whether the barons shall have the power to turn out the treasurer when they please; and whether the petitions, that were formerly preferred to the king, shall be now exhibited to the barons of the exchequer? Which matters I must own I cannot be brought to imagine, though I would think as favourably as possible in this case; for I give this opinion, not because I would, but because I must.

But I take this power in the barons, to be against the nature and institution of the court of exchequer; for they are originally empowered by the king to get in his revenue, and it is for the sake of the revenue that they have any thing else to do. And all they do is to convey the king's treasure to its proper place; but they cannot dispose of it; for there is no correspondence between the barons and the officers of the treasury.

Upon reversal of attainders, we know there is no restitution of the money paid to the king; and the reason is, because the barons cannot in such case comptrol the treasury. I remember several years since, there was a solicitor, who brought the rolls of a forfeited estate in dispute into court; and they ordered the money to be put into the hands of the remembrancer; for they said, if it was once paid into the treasury, there was no getting it out again.

The case in short is no more than this:

Suppose the king be indebted to the petitioners, and also to the army, the fleets, &c. Now who shall direct the payment of these debts, the barons, or the treasurer? Who is the best judge of the state of the kingdom, and of its necessities? So that suppose there was only 4,000*l.* in the exchequer, and we were threatened with a foreign invasion, how shall this money be disposed? Says the treasurer, to raise men to pay the army and our fleets, that by their assistance we may prevent the enemy from coming amongst us. No, say the barons, we must pay the bankers with this money, though at the same time we open the gates, and let in Hannibal to our utter ruin and destruction. My lord Coke, in his 4th Institut. treating of the court of the exchequer, takes notice of the oaths taken by the treasurer, and also by the barons. In the treasurer's oath it is mentioned, that he is to keep and dispense the king's treasure safely; but in the baron's oath, there is not a word of this matter taken notice of: which to me is an argument that the treasurer is judge in point of issuing money, whether it be due and payable or not, and to whom, in what manner, and when it shall be paid, &c. And this I take to be the true reason why no action can be brought against the treasurer, because he acts as a judge, and not as a minister of the court; for he is not attendant to it, as sheriffs, bailiffs, &c. are. So I take it, 'may be paid,' is enough for the barons to say; but 'must be paid,' is only for the treasurer to say. Cro. El. 545, Babington's case. [Vide Moore 475, 11 Co. 90, 92.]

Then it is treason to counterfeit the great or privy-seal, because they only have to do with the king's revenue; but it was never thought treason to counterfeit the exchequer seal, which has nothing to do with it. Plowd. Com. 223.

In the contests heretofore between the king and people, what was meant when they complained that the king's treasure was mis-spent and mis-employed? Not that it was paid away without letters patents, or taken away without the king's grant; but it was this: They blamed the treasurer, because he paid away the king's treasure to persons unworthy, to minions and favourites, though they had grants from the crown by letters patents: but yet it was left to the treasurer's discretion to have paid them or not; which he should not have done, when perhaps the public good required it.

Now I come to our authorities in our books.

I shall begin with 2 Ed. 3, 25 and 38, Ass. pl. 20, wherein it is said by the chief baron, that we shall take cognizance of all matters that may turn to the king's advantage, but not a word concerning the disposal of the treasury. Vid. 19 H. 6, 62, 63, and 2 Roll. Rep. 301, are express.

So in Stradling and Morgan's case, Plowd. 207, it is said, That no pleas shall be held in the exchequer, but for the advantage of recovery of the king's debts, and bringing in his revenues; so that the common pleas in the exchequer,

are only founded on getting in of the king's revenue. I choose to cite Mr. Plowden, because his book is so mightily relied on the other side, I mean the case of Nevil and Wroth.

I believe it was the authority of those cases that raised all this dust, but I shall answer them by and by; and at present shall only observe, that there is not one law book that gives these cases the credit to mention them, I mean as to this point of proceeding by petition to the barons, &c. So in the earl of Devonshire's case, 11 Rep. 92, there is no notice taken of Nevil's or Wroth's case, though there was opportunity enough to have mentioned them, if they thought they had been of any weight and authority. So 2 Rol. Abr. 160, and 180, and 183, the resolution in the earl of Devonshire's case is cited, but not a word of Nevil's or Wroth's. Vide Moore 476, 2 Inst. 555, Lit. R. 91, 2 Ro. R. 183.

In the next place, I shall mention some treaties concerning the court of exchequer.

1. There is Gervasius Tilburienis 'de rebus in scaccario gestis;' who sets forth the jurisdiction of the court of exchequer, but mentions nothing of this power in the barons to comprul the treasury. The 'capitalis justiciarius Anglie' had indeed a control over the treasurer himself, as appears from Spelm. Gloss. 71, 331. So when Hugo de Burgo, who was the last great justiciary, was in disgrace, he was charged to render an account of the mis-spending of the king's revenue, which shews that he had a power over the treasurer. But ever since this great office has been discontinued, the treasurer has acted according to his own discretion.

The next book that I shall quote, is called the Diversity of Courts. It is mentioned in my lord Coke's preface to the 10th Report; but there is nothing of this power in the barons mentioned there, neither is it taken notice of in the Mirror of Justices, c. 1, sect. 14, 4 Inst. 110, Fleta, lib. 2, c. 25, Britt. 2, 6. Crompt. Jurisdiction of Courts, 105, which book was printed 15 years after Mr. Plowden's, nor in 2 Inst. 551, nor in 4 Inst. where the full authority of this court is fully set forth. And I can but also observe, that Mr. Prynne, in a book which he printed on purpose to animadvert on my lord Coke, 4 Inst. does not take notice of any such power. I shall beg leave also to mention Vernon's Consideration on the Court of Exchequer, and Mr. Cambden and sir Tho. Smith, who were great and learned men, though their books I confess are not of authority. But if there had been any such power in the barons of the exchequer, it is probable they would have taken notice of it.

Next, there are Savil's Reports, Lane's and my brother Hardress's Reports, which treat chiefly of the court of exchequer; but yet they give not the least countenance to any such power. So in 1 Rol. Abr. 538, 539, in Lane's case, 3 Rep. 2 Rol. Rep. 294, there is not one syllable of it.

I shall conclude this point with this observ-

tion: that since there were two great powers in the barons, (as is pretended) one of bringing in money into the exchequer, and the other of paying it out, that yet these books should be all silent as to the greatest power of paying it out, is very strange and unaccountable: which indeed does induce me to believe, that there is no such power in the barons, and that those petitioners have mentioned in their petition the only way of having their annuities; that is, as their former payments were made (viz.) by warrant from the lord treasurer.

Now I come to the objections.

1. They quote Ryley's Pla. Parl. pa. 251, 253, 257, 262, 337, 526, 529, &c. but, if I can apprehend them, those words make against the petitioners.

Then Margery Parker's case, 9 II. 6, 12, 13, was mightily insisted on; and indeed at first I thought there was something in it; but, upon a strict perusal, I find it is consistent enough with my opinion; indeed Babington mentioned here a remedy by petition to the barons, but this was only a word slipped out; but the court gave no regard to it, and were of opinion against it, that there was no such remedy. And it is observable, that Brook in his Abridgment takes no notice of Babington's opinion, though he does of all the rest of the case.

The next thing objected is, that the barons do every term send a *liberate* to the officers of the treasury under the exchequer seal, to pay money for paper, pens, and other necessaries for the court of the exchequer; the charge of which, I am told, comes to 2 or 300*l.* per ann.

To this I answer, that first this writ goes without any judgment at all: so that according to this, the petitioners needed not have had any judgment. But the true reason of issuing forth this writ is grounded on this. In the treasurer's commission there is this clause, that he shall pay out such sums of money as are required *pro necessariis scaccarii*: but of this writ they take no further notice than as a certificate, when they make up their accounts.

Now for the precedents.

The court of exchequer is guided by multitudes of precedents, 2 Rep. Lane's case, Mo. 565, but here they have not one precedent for such a power over the king's revenue, to which the law has so great a regard; for there is nothing in the law so fenced, so guarded, and so secured, as the king's inheritance. Where that is concerned, there must be petition *de droit*, an inquisition found, besides searches, &c. so careful is the law of the king's inheritance and revenue. [Plow. 230, 320, 2 Rol. 524, Cro. Car. 513, 528.]

But now here the king must lose his freehold without trial, which his subjects shall not do, as appears by Magna Charta. [9 H. 3, stat. 1, c. 29, 3 Ed. 1, c. 24, 25 Ed. 3.]

In the next place, I shall answer the cases which indeed give life to the present case, and are the foundation of it. First, as to Nevil's case, I observe the petitioners counsel do not

agree in their title to it. Some say, it was grounded on a petition of right; others, that it was a *monstrans de droit*; and others, that it was a complaint against the officers of the treasury. But true it is, Mr. Plowden is precise and express in the point, though it seems to me to be but his own private opinion: and I must take the boldness to say, that he is mistaken, as will appear from these books, 13 H. 7, Pl. 15, 4 Ed. 4, 23 b. 1 Leo. 190, 1. And. 253, Savile 125, all which cases happened but twelve years after Nevil's, and yet are contrary to it. By the same books and the same reasons it appears, that Wroth's case ought to have no more weight than Nevil's, &c. [Stat. 5, c. 4, 28 Ed. 3, c. 3, 52 H. 3, c. 22, 15 R. 2, c. 12, 16 R. 2, c. 2.]

Therefore I conclude, that this judgment given by the barons of the Exchequer is an erroneous judgment, and ought to be reversed.

Vide infra, the argument of the lord chief justice Holt, *contra*.

THE ARGUMENT

OF THE

LORD CHIEF JUSTICE HOLT.

Holt C. J. In this case, here have been two points made:

1. Whether this grant be good.

2. Whether here be a proper course taken by the patentees.

There has indeed been a third point started by my brother that argued last, and that does respect the entering of the judgment.

As to the first question, I hold the grant to be good; and all, that have argued here, have concurred in the same opinion. I do confess this is the great point of the case; but so much has been said to it, that little more can be added: but I must say something to it, though I cannot but repeat. [Comb. 270, 271, 272.]

I hold that king Charles 2 might charge this branch of his revenue, and my reason for my opinion is but short.

It is, because the king was seised of an estate in fee of this revenue; for to such an estate a power of alienation is incident. Lit. Sect. 360. And I take it to be the intent and the express words of the act, that the king should have a right and liberty of alienating and charging this estate.

It is no objection, that this revenue was given to the king under a trust; for notwithstanding that, he might alien it. So several kings of England have founded corporations of charitable uses, and yet these persons incorporated might, notwithstanding such trust, alien their estates; so may a dean and chapter theirs; so may a bishop with the consent of dean and chapter; so a parson, with the consent of the patron and ordinary, might have aliened the land of which he was seised in the right of his church: but the king has nobody required to

consent to his alienations. To say that he may alien by the consent of the estates of the realm, is as much as to say, he cannot alien without an act of parliament, which he may clearly do. [Vide Co. Lit. 19 b. 2 Inst. 681, 1 Co. 44, b. 7 Co. 12 b. 11 Co. 72, 1 Rol. R. 167, Noy 182, Mor. 416, Godb. 317, Dav. 75, Cro. Argum. 60, Plo. 246, 487, b. 13 Ed. 4, 8, 1 H. 7, 10.]

And indeed this revenue comes to the king by purchase; for he gave a recompence for it, viz. part of his standing revenues, it being the profits that did arise from his wards and liberties.

But it is objected, that this power in the king of alienating his revenues may be a prejudice to his people, to whom he must recur continually for supplies. I answer, that the law has not such dishonourable thoughts of the king, as to imagine he will do any thing amiss to his people, in those things in which he hath power so to do.

But that which I insist on is, that it is absurd in its nature to restrain the king from a power of aliening his revenues of which he is seised in fee. It is against the nature of the being of a king, that he should have less power than his people; for before he was king, he had power to alien. Now when the crown descended upon him, he is seised in *jure coronæ*; and shall he then have less power over those very lands than he had before the descent of the crown? Shall he now be disabled to alien by being a king? This would be against a common principle of law, that the descent of the crown takes away all disability. Plo. 105, Dier. [2 Sid. 137, 138, 139, 140, 141, 142, vol. 1, Hales Pl. C. 61, 101, Co. Lit. 16. a.]

Then it is repugnant to the constitution of the government. Suppose a king should be under a present danger of being invaded: if the king could not raise money by alienating his revenue, the nation might perish; for he cannot otherwise raise money than by an act of parliament, for which there might not be time: and therefore heretofore the kings of England have borrowed several sums of money by mortgaging their lands. Cotton's Posthum. 175.

And there ought to be a power in all governments to reward persons that deserve well; for rewards and punishments are the supporters of all governments; and it has been the constant usage of the kings of England to reward persons deserving of the government out of the crown revenues, by pensions, and giving estates to support the titles of earl and other dignities. Seld. Tit. of Honour, 838. 7 Rep. 12, Calvin's case. And this has been allowed of by act of parliament, as appeareth by 34 H. 8, c. 20.*

* It seems probable that Mr. Burke had on his mind an indistinct impression of this passage, when he composed the following part of his Speech, (Feb. 11, 1780. See 3 Burke's Works, 310, 8vo ed. of 1808, and the Par-

But some perhaps will say, I have been talking little to the purpose; for that they do not deny that the king might alien his own demesnes, or any lands that came to him by descent or purchase: but say they, this revenue was settled by act of parliament on the crown, and therefore it cannot be aliened. But I do not find any such distinction in our law-books, nor any authority from common or statute law, that restrains the kings of England from aliening any sort of their revenues.

As for the lands in ancient demesne, they seemed most appropriated for the king's use of any of his revenues; for they had several privileges, all relating to the king; as, not to be impleaded out of the manor, to be free of toll for all things concerning their sustenance and husbandry, not to be impanelled on any in-

liamentary History of England, A. D. 1780) on introducing his Bill for Economical Reform:

"Conceiving it to be a fundamental part of the constitution of this country, and of the reason of state in every country, that there must be means of rewarding public service, those means will be incomplete, and indeed wholly insufficient for that purpose, if there should be no further reward for that service, than the daily wages it receives during the pleasure of the crown.

"Whoever seriously considers the excellent Argument of lord Sommers, in the Bankers Case, will see he bottoms himself upon the very same maxim that I do; and one of his principal grounds of doctrine for the alienability of the domain in England,* contrary to the maxim of the law in France, he lays in the constitutional policy of furnishing a permanent reward to public service; of making that reward the origin of families; and the foundation of wealth as well as of honours. It is, indeed, the only genuine unadulterated origin of nobility. It is a great principle in government; a principle at the very foundation of the whole structure. The other Judges who held the same doctrine, went beyond lord Sommers with regard to the remedy, which they thought was given by law against the crown, upon the grant of pensions. Indeed, no man knows, when he cuts off the incitements to a virtuous ambition, and the just reward of public service, what infinite mischief he may do his country, through all generations. Such saving to the public may prove the worst mode of robbing it. The crown, which has in its hands the trust of the daily pay for national service, ought to have in its hands also the means for the repose of public labour, and the fixed settlement of acknowledged merit. There is a time, when the weather-beaten vessels of the state ought to come into harbour. They must at length have a retreat from the malice of rivals, from the

* "Before the statute of queen Anne, which limited the alienation of land."

quest. And yet notwithstanding all this, those lands were always alienable: And if these lands are alienable, what estates in the crown are not alienable? And our books do take notice that these estates are alienable? and so is Fitz. N. B. 13 c. 166 f. and 226, Stamford Prer. 38.

Then what reason can be given why some estates should be aliened, and others not? Why may not the king as well alien these estates as he may the flowers of his crown, as appears in the abbot of Strata Marcella's case, 9. Co. 24.)? For he may grant a county-palatine, which has *jura regalia*; so he has granted a power to pardon treason or felony, &c. Indeed these prerogatives are reassumed to the crown by the statute H. 8, but the grants were not void. See 27 H. 8, c. 24.

Then if an estate be settled on a subject by

perfidy of political friends, and the inconstancy of the people. Many of the persons, who in all times have filled the great offices of state, have been younger brothers, who had originally little, if any fortune. These offices do not furnish the means of amassing wealth. There ought to be some power in the crown of granting pensions out of the reach of its own caprices. An entail of dependence is a bad reward of merit.

"I would, therefore, leave to the crown the possibility of conferring some favours, which, whilst they are received as a reward, do not operate as corruption. Where men receive obligations from the crown, through the pious hands of fathers, or of connexions as venerable as the paternal, the dependencies which arise from thence, are the obligations of gratitude, and not the fetters of servility. Such ties originate in virtue, and they promote it. They continue men in those habitudes of friendship, those political connections, and those political principles in which they began life; they are antidotes against a corrupt levity, instead of causes of it. What an unseemly spectacle would it afford, what a disgrace would it be to the commonwealth that suffered such things, to see the hopeful son of a meritorious minister begging his bread at the door of that treasury, from whence his father dispensed the oeconomy of an empire, and promoted the happiness and glory of his country! Why should he be obliged to prostrate his honour, and to submit his principles at the levee of some proud favourite, shouldered and thrust aside by every impudent pretender, on the very spot where a few days before he saw himself adored?—obliged to cringe to the author of the calamities of his house, and to kiss the hands that are red with his father's blood?—No, Sir, these things are unfit—they are intolerable."

Lord Sommers, in his Judgment, avoids all discussion [of the general principles concerning the alienability of crown property. He himself says, "I shall not speak at all at this time to either part of the first question."

act of parliament, it will not be denied but that he may alien such estate; and why shall not the king have the same privilege? It appears in fact, that he has always done it. So all the lands that belonged to the abbies and monasteries were aliened by the king, and yet they were given to him by act of parliament, and by general words, as it is here. So the customs have been always granted and charged by the king, and yet they were granted to him by act of parliament. The authorities in our books are full to this purpose, as 21 Ed. 3, 47, 29 Ed. 3, Pl. 1, 2, 4 Inst. 45, Davis 7, 14. Knighton 1684. [27 H. 8, c. 28, 31 H. 8, c. 13, 32 H. 8, c. 24.]

But it is objected, that this revenue was given in lieu of inheritances that were unalienable, viz. the wards, liveries, purveyances, &c.

Though how the nature of these inheritances can affect inheritances of another nature, I cannot see. But even these inheritances were always in effect alienable, for they might have been released. The king's grant to be free of prison, sir Thomas Waller's case; and so were services *in capite*, and purveyances, &c.

Some opinions have been urged, which say that the crown revenues could not be alienated, as Fleta and Bracton. But these books are only ornaments to the law; they are not looked on as authentic, especially where the practice has been always to the contrary. But Britt. 87, is otherwise, and so is Selden 549, and 552. And Bracton himself in his second book, c. 57, seems to be of another opinion, where he saith, that even *res sacre* are alienable by the common law, though perhaps by the canon law they are not to be aliened. So the statute of Bigamis, c. 7, also admits, that the king may grant away his revenues. Fortescue in his book 'de Laudibus Legum Angliæ' says, that the government is not only regal, but legal and political, and then discourses of the particulars wherein the regal power is restrained: and if our constitution had been so that the king could not alien his lands or revenues, it cannot be imagined but that he would have mentioned a thing so remarkable, especially in a time when there were so many grants made by the crown, though indeed at that time there were many acts of resumption made, as they were before and after, as in G H. 4, 14, and in the time of king Henry the eighth, &c. which are a great demonstration that those grants could not be revoked or avoided but by act of parliament.

It is objected, that the *fee-farm* rents in the time of king Charles the second were granted by act of parliament. But they might have been granted without that act. It was only made to encourage purchasers to make good the letters patents beyond all scruple, and to give power to sue for the arrears of rent, and to distrain, &c.

Then it is objected, that if this grant of the revenue should be alienable to the subjects, that then the king's officers of excise would be the subjects officers.

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But that does not follow; they are only a means to convey to their fellow subjects their right, and that which is granted to them by the king's letters patents. So the justices in eyre, and of oyer and terminer, &c. are the king's justices; and yet they convey justice to the people. 4 Inst. 162.

As for these letters patents themselves, it is plain by the whole tenour of the patents, that the king was not deceived in his grant; and the consideration being executed, though it be false, yet that will not avoid the grant. Pl. 554.

So that I conclude this point, that these letters patents which charge this branch of the revenue, are good and firm in law.

I come now to the second point; and that is, concerning the remedy taken by the patentees.

And I hold they have taken a very proper and legal remedy. We are all agreed that they have a right; and if so, then they must have some remedy to come at it too.

The remedies at common law, to recover against the king, were by petition, or 'monstrans de droit.'

Indeed, there is a new remedy now given by stat. 2, Ed. 6, c. 8, and that is by way of traverse to the king's title, 4 Rep. 54, 2 Inst. 688. [Skin. Rep. 608, 609.]

But first, a petition of right is not necessary in this case: not but that a man may proceed in this way, and admit himself out of possession if he pleaseth. But it is not necessary, for two reasons;

1. Because a petition of right is grounded always upon a naked matter of fact suggested, and not of record; and upon such a suggestion, there is a commission issues out of Chancery, Cok. Entr. 462, 9 H. 4, 4.

But here the title is derived by letters patents which are of record; so that here is no matter of fact to be enquired of.

2. The patentees do not endeavour to destroy the king's title: but petitions of right do so, and are generally inconsistent with the king's title.

Then this annuity is not turned to a right, as if there had been an attainder, &c. Therefore why should there be a petition of right?

I take this remedy to be by a 'monstrans de droit;' and this remedy is to be sued at common law, when the party's title appeared of record. Kell. 178. 'Monstrans de droit,' or 'ouster le maine,' (which is all one in effect) always lies where the title or right of the subject appears as well by matter of record as the king's title; and this appears fully, Sadler's case, 4 Rep. and Hob. 334.

Also it is plain, that a 'monstrans de droit' lies in the Exchequer: I think there is no doubt of that.

It is objected, that the petition should be first sued to the king: but by the records in Ryly's Placita Parl. 351, 257, Staundf. 72, it appears, that these petitions of right have been sued to the court of King's-bench. But indeed this

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petition differs from those ; for this being only by way of complaint, there needs no indorsement, as in the other cases.

The next objection is, that in this precedent there was a liberate.

1. This writ is in its nature a writ of allowance, Reg. 192. But this writ does not give any manner of jurisdiction ; for the court may hold plea, and proceed without it.

2. But the next answer that I give to this, and which may be satisfactory to any body, is the statute of 5 R. 2, c. 9, which directs the barons of the Exchequer to answer every demand, without any writ or letter from the king. So is 4 Inst. 110. So that I take it to be very plain, that the barons might proceed here without any writ at all.

But it is objected, that the writ should have been directed to the treasurer, &c.

But this needs not be ; for the treasurer hath nothing to do with civil pleas. Reg. 137.

Indeed, Fitzh. N. B. 129, doth mention the treasurer : but that is a common error, and the writs need not be so directed.

It is true, as my lord Coke observes, that the legitimation of any case may be suspected that has no case of kin to it ; and I agree to that rule. But I think I have found out some kindred to this present case, and that is the case in Coke's Entries, 93, Tit. Claim of Liberties ; for there the barons did allow certain liberties, and also the payment of a rent-charge granted by the king to my lord Hunndon. So the case of Margery Parker in 9 H. 6, 13, is a considerable authority to this point. She had an annuity out of the Magna Custuma of London, granted by the queen out of a sum assigned for her dower to receive of the customers. The queen shall not have action against the customers, but must sue to the barons of the Exchequer ; and Margery Parker may sue for it in the Exchequer, in the same manner as the queen might for her portion. Then there is my lady Braughton's case, which happened in 25 Car. 2. My lady Braughton forfeited the keeper's place of the New-Prison to the king, who thereupon made a seizure : upon this the dean and chapter of Westminster came into the court of Exchequer, and claimed the inheritance, and the king's hands were removed. Indeed this matter was first stirred in the King's-bench, for they gave judgment to seize the prison. Now if the court of King's-bench might hold plea there of a *monstrans de droit*, because the seizure was there ; why may they not as well proceed in the Exchequer by *monstrans de droit*, because the money is there ?

It is true, money comes into and issues out of the Exchequer without the barons : but, with submission, the right of bringing in, and issuing out of the money, belongs to the barons. And if you make the barons only judges of the right of coming in of the king's money, you make them judges but of half their business which belongs to that court ; for the barons

have the judicial power over the whole court of Exchequer. And to say that the treasurer and his officers have no correspondence with the barons, is not true ; for all the books take notice of them, as persons that all belong to the Exchequer.

Some have objected, that this court ought regularly to hold pleas only where the king is party ; and that this court used to be prohibited to proceed in any pleas that do not concern the king. 2 Inst. 551. There you may see what pleas they may hold.

But here the plea does concern the king ; for here is the king's grant, and the suit is to the king : and this determination of the barons in this case is not thus any judgment of their own ; but the king himself, by reason of such his letters patents, hath obliged himself to make such payments. As in the case of an obligation where debt is brought upon it, and a recovery is had ; it is not so much the judgment of the court as binds the property, as the obligor himself, who by his bond has subjected his property to be determined by the judgment.

Now as to the authorities which seem directly to govern this point, and the objections against them.

1. There is sir Tho. Wroth's case in Plowden, which I rely upon as a clear and full authority in this case, notwithstanding all the objections that have been made against it.

King Hen. 8, had appointed sir Tho. Wroth to be gentleman-usher of the privy chamber to prince Edward ; and he granted to the said sir Thomas for the exercise of the same office an annuity of 20*l.* to be had and yearly taken to the said sir Thomas, from Lady day then last past, during his natural life, by the hands of the treasurer of his court of Augmentations of the revenues of the crown for the time being, of such his treasure of the same revenues, as should remain in the hands of the treasurer at two times in the year, &c.

The chief objection against this case is, that there the grant was under the seal of the court of Augmentations, which was incorporated with the court of exchequer. But that I deny, for that court was never legally united to the court of exchequer, as was adjudged in Dier, 216. So that the objection, that sir Tho. Wroth's grant was under the seal of the Augmentation court, and under the survey of it, is gone.

Then it does not appear to me, that ever the court of Augmentations had any power expressly given them to relieve the grantees of such rents. I have looked over the act of parliament, by which that court is constituted, but I cannot find any such power. But I think, the court of Augmentations did proceed in such manner, that it might be also reputed a court of exchequer ; and the court of Augmentations is by express words made a court for the new revenues that should come to the crown, which are exempted from the jurisdiction of the other court : but that which I infer from hence is, that if this new court of exchequer

did in some cases relieve grantees of rents, &c. certainly the old court of exchequer shall have the same privilege.

There are other courts which have also proceeded in the same manner; as the court of Wards did usually hold plea of these matters, 2 Croke 78, queen Elizabeth granted to Allen under her great seal, an annuity of 40*l.* per ann. to be paid by her receiver of the court of Wards. This, being payable by the receiver, is in the nature of a rent-charge. So the court of Surveyors, erected by 33 Hen. 8, did proceed in the same manner, and did relieve grantees of rent charges, &c.

As to Nevil's case, also in Plowden, I take it likewise to be a full authority in point. An yearly rent charge of 3*l.* 10*s.* was granted to sir H. Nevil and another for the exercise of the office of keeper of a park, out of a manor for their lives. One is attained. The manor comes to the possession of the king. The king shall neither have the office nor the rent: and the arrears of the said annuity were paid to sir H. Nevil at the receipt of the exchequer, by the hands of the treasurer and the chamberlain. I grant that those lands were also under the survey of the court of Augmentations; but that I conceive makes nothing against me for the reasons before mentioned.

There are several other records which have been already quoted, but I shall not trouble you with the repetition of them. I shall only mention some few which I think have been omitted, as Trin. 1^o. Mar. Rot. 126, 2 El. Rot. 145, Mich. 13, Q. Rot. 347; Hill. 13, El. Rot. 143, P. 1 Q. Rot. 108. In all these records it also appears, that money issued out of the exchequer by order of the court of exchequer, and it is highly reasonable that they should have such a power.

Suppose the king purchased land that is charged with a rent, the king must take the land together with its burden: but in such case it would be too hard to drive the grantee of the rent to his petition of right to the king. No, certainly he may come to the court of exchequer by way of petition to the barons, who may give him relief.

It has been objected, that money which once comes into the exchequer can never be taken out. Reg. 193. But if this is true in a general sense, that none of the king's revenues that are brought into the exchequer can be paid out, this would destroy all annuities, rent-charges, and other payments which the crown is obliged to make.

It is true, if a man be outlawed in the King's-bench, and the party's goods are seized into the king's hands, and then the outlawry is reversed, there can be no restitution. The reason of this is, for that the court of King's-bench cannot send a writ to the treasurer, and the court of exchequer have no record before them to issue out a warrant for a restitution. So if an attainder be reversed, the mean profits taken into the exchequer cannot be restored for the same reason; and also for that the king can-

not be made a disseisor, and the statute gives a remedy only as to parliament.

There remains after all a great objection, had it any weight, and that is, *cui bono*? If the patentees should have judgment for them, what will it signify if they cannot come at any money?

As to this, I do think, that as soon as the writs are delivered to the officers of the exchequer, I mean the treasurer and chamberlain, the property is altered, and the officers become debtors to the parties, as appears by 2 H. 7. So as soon as a *feri fac*' is delivered to the sheriff, and upon it goods are levied, the property of the goods is altered, and the sheriff becomes a debtor to the plaintiff. So an action of debt will lie upon a liberate, and so it has been adjudged. [Action of debt on a liberate, and why. Vide 5 Mod. 13, 14, 48, Skin. Rep. 257, 1 Salk. 321, 2 Vent. 95, 2 Sand. 47, 344.]

I shall only observe one thing more, and so conclude; and that is in answer to my brother who argued last, for he struck very hard at the judgment given by the barons. He thought that it was very erroneous, and therefore void. But with submission, I take this judgment to be as well as it can be. And whereas it is said in the judgment, that the money shall be paid by the commissioners and chamberlain of the treasury, it must be understood of the receipt of the treasury, and not of the lord high treasurer, which office is long since expired.

As for the levying of the tallies mentioned in the judgment, it does not hurt; it is at most but surplussage. But that which I insist on is, that though this judgment, in respect of form, or any material point of it, should be erroneous, yet if your lordships should be of opinion in the two first points with me, you will then give a new judgment, such as the court of Exchequer ought to have given; for that is the law of this place, as appears by 31 Ed. 3, c. 12. And this last point was so ruled upon a debate in the House of Lords, and was the case of the king and Sainthell, 30 Car. 2.

So that upon the whole I am of opinion, that the Judgment given by the Barons ought to be affirmed.

But afterwards the Lord Keeper was of opinion to reverse the Judgment, and accordingly it was reversed. The ground upon which he gave his opinion was, That the patentees had not taken a proper remedy by Petition to the barons, who have no power or controul over the king's treasury, &c. and that their only remedy was by petition to the king himself. He insisted much upon the same reasons and grounds which my lord chief justice Trehy went on.*

* "To avoid repetition we have omitted Skinner's report of Holt's Argument. But we think it proper to apprise the reader, that in several parts it is more full than the report which we have extracted from 5th Modern." Hargrave.

THE ARGUMENT

OF THE

LORD KEEPER SOMMERS,*

ON HIS GIVING JUDGMENT IN THE BANKERS' CASE: DELIVERED IN THE EXCHEQUER-CHAMBER.

The four following causes depending in the Exchequer-Chamber, stood for the judgment of the court.

The Attorney-General against
Joseph Hornby,
Robert Williamson,
Thomas Smith, and
Sir Jeremy Snow.

Lord Keeper. These cases differ in several particulars; but as to the points which have been chiefly spoken to, they are the same.

I shall therefore only put the case, as it stands upon the record where Williamson is party; which I will do shortly, because it has been opened so often already, upon the several arguments.

Robert Williamson comes before the barons, and exhibits letters patent under the great seal, dated 30 April, 29 Car. 2, granting to sir Robert Vyner, his heirs and assigns, the yearly rent or sum of 25,003*l.* 9*s.* 4*d.* to be yearly paid, received, and taken, of the rents, revenues, and profits arising to the king, his heirs and successors, out of the duty of excise, by virtue of the act made 12 Car. 2. for taking away the court wards and liveries, &c. and settling a revenue in lieu thereof; and prays that these letters patent may be inrolled of record.

The barons cause them to be read and inrolled; and the letters patent are set forth at large in the record.

The effect of them is:

The king takes notice, that he had been constrained to postpone the payment of monies due to the goldsmiths, and others, upon tallies and orders registered.

That he could not spare such a sum, as would satisfy those debts; but was willing to grant to the persons to whom he was indebted, an annual sum answerable to the interest of their debts, after the rate of 6*l.* per cent.

To that end he had commanded the accounts to be stated to the first of January, 1676; whereupon there appeared due to sir Robert Vyner, 416,724*l.* 13*s.* 1*d.* In satisfaction whereof, the king resolved to grant him 25,003*l.* 9*s.* 4*d.* per annum, to be had and taken by him, his heirs and assigns, out of the rents, revenues and profits, which should arise or become due or payable to the king, his heirs and successors, out of, for, or by reason of the duty of excise, and by virtue of the said act, to be paid quarterly, in trust for such of his creditors, as within a year after the date of the

* Lord Sommers is said to have expended several hundred pounds in collecting books and pamphlets for his Argument.

letters patent should deliver up their securities, and accept assignments of proportionable parts of the said yearly sum, in satisfaction of their debts respectively due, and in the mean time should not sue sir Robert Vyner for their debts; the residue thereof to the use of sir Robert Vyner and his heirs.

The king directs the high-treasurer, chancellor, under-treasurer, chamberlains and barons of the exchequer, which then were, and the high treasurer, commissioners of the treasury, &c. which should be, and all other officers and ministers of the court of exchequer, and of the receipt thereof, in their respective places, upon request, to perform all acts necessary for the due payment of the said rent to the said sir Robert Vyner, his heirs and assigns; and to strike tallies of pro or assignment, or other tallies, as the case shall require, or as shall be desired, on the commissioners, treasurers, receivers, collectors, or farmers of the duty, who are required to make due payment accordingly; so as the said yearly sum may be received without other warrant. And if the profits of the said revenue should be paid into the receipt before the levying such tallies, or payment made, then he authorizes and requires the high treasurer, and commissioners of the treasury, chancellor, under-treasurer, chamberlains, and barons, and other officers and ministers of the exchequer, and of the receipt thereof, to whom it appertains, to pay out of such monies as shall be paid into the exchequer, the said yearly sum, without other warrant: and the letters patent shall be a sufficient warrant for the purposes aforesaid.

That tallies of pro, or assignment, or other tallies struck upon the excise, at the desire of sir Robert Vyner, his heirs or assigns, shall be preferable to other quarterly payments; except such yearly sums as are payable for the management of the said revenue; and except certain sums payable to the queen, and the duke of York, which are to be paid in the first place.

Sir Robert Vyner covenants at any time within a year, to make assignments of proportionable parts of the said rent to such of his creditors as will take the same in satisfaction of their debts, and will deliver up their securities; and that he will not, during the year, assign any part of the said yearly sum, except to creditors, or others by their appointment; and if, within one year and an half, any difference arise between him and his creditors, touching the assigning any part of the said yearly sum, to submit the matter to the high treasurer, or commissioners of the Treasury, and to perform such orders as he or they should make.

It is provided, that all assignments be inrolled within thirty days after the execution thereof, before the auditor of the receipt, or clerk of the pells; to the end it may appear what assignments have been granted, or otherwise to be of no effect.

And also, that when the king, his heirs or

successors, shall, at entire payments, have paid the sum of 416,724*l.* 13*s.* 1*d.* to sir Robert Vyner, his heirs or assigns, in proportion among them, after the rate of 100*l.* principal money, for every 6*l.* per cent. per ann. and also the arrears of the said yearly sum of 25,003*l.* 9*s.* 4*d.* then the grant should be void.

The letters patent are to be favourably taken for sir Robert Vyner, his heirs and assigns; and to be good *non obstante* the not reciting of that act of parliament, whereby the revenue is granted, or the not mentioning any former grants or charges of or upon the said revenue, or the not mentioning the certain yearly rents or profits of the said revenue, or the certain nature thereof, or how the debts due to sir Robert Vyner did particularly arise; and notwithstanding the statute 1 H. 4, or 18 Hen. 6, or 26 H. 8,* or the act of 14 Car. 2, whereby the revenue was granted, or any other defect.

The king covenants, that due payment shall be made, and all things done on his part: and that if there be any defect in the present grant, he, his heirs and successors, upon petition, will make a further grant, as the attorney general shall advise.

Then Williamson sets forth, that by virtue of the letters patent sir Robert Vyner was seized *ad de feodo et jure*, and was indebted unto him in 1,000*l.* And that the 9th of April, 32 Car. 2, by deed of assignment (which he brings into court) reciting that he had delivered up his securities to sir Robert Vyner, and had discharged him, the said sir Robert Vyner, grants and assigns to him and his heirs 60*l.* part of the said yearly sum, being his proportionable part, in satisfaction of the said debt, under the condition in the letters patent; and prays the assignment may be read and inrolled; which is ordered, and the tenor is entered.

Williamson further says, that he delivered up his securities and accepted the assignment, in satisfaction of his debt, according to the intent of the letters patent; and that he never after sued sir Robert Vyner; and that the assignment was inrolled within thirty days before the auditor of the receipt; and that the principal sum is not paid; and that the arrears of the yearly sum of 60*l.* were paid to Lady-day 35 Car. 2, and that from that time 405*l.* is due for six years and three quarters, ending at Christmas last.† Then he prays the letters patent and assignment may be allowed, and the arrears paid, and the yearly sum paid for the future; and that tallies may be struck as it becomes due; and that he may have the benefit

* "The stat. meant, seems to be 6 H. 8, cap. 15, for there is no stat. of 26 H. 8, applicable to the case: but the patents have been searched, and in them it is 26 H. 8." Hargrave.

† "I. e. For the remainder of the reign of king Charles 2, and the whole reign of king James 2, and not quite a year of the reign of king William and queen Mary." Hargrave.

of the remedies and powers mentioned in the letters patent: and avers that at Christmas last there was sufficient to pay his arrear, besides what was payable for management, and to queen Catharine, and the duke of York.

To this the Attorney General demurs; and Williamson joins in demurrer.

Whereupon the barons of the exchequer give this judgment: that the letters patent to sir Robert Vyner, and the assignment to Williamson, 'juxta tenorem et effectum aruudem 'eidem Roberto Williamson allocentur:' and that the sum of 405*l.* being the arrears to and for Christmas 1 W. & M. so as aforesaid in arrear, be paid to him at the receipt of the exchequer, by the hands of the commissioners of the treasury, and chamberlains of the receipt who now are, and by the hands of the commissioners of the treasury, treasurer and chamberlains of the receipt for the time being, out of the treasure arising from that part of the excise in the letters patent mentioned to be granted to king Charles 2, his heirs and successors, and in the hands of the commissioners of the treasury now being, and in the hands of the commissioners of the treasury and chamberlains for the time being; to be paid after, and besides the necessary sums for the management of the said revenue, and the annual sums payable to the queen dowager and the duke of York. And that the said yearly sum of 60*l.* from Christmas 1 W. & M. be paid to Williamson and his heirs, at the receipt of the exchequer, by the hands of the commissioners of the treasury, treasurer and chamberlains of the said receipt for the time being, out of the said treasure arising from the said hereditary revenue of excise in their hands being, *ultra et post*, &c. And that tallies *toties quoties*, &c. be struck at the said receipt, for the said yearly sum upon the commissioners, treasurer, receivers, collectors or farmers of the said hereditary revenue of excise, by the officers of the receipt of excise to whom it belongs, upon request, &c. according to the letters patent, and the course of the exchequer, 'salvo jure loci mini regis, et dominæ reginæ nunc si, &c.

Upon this Judgment the Writ of Erroris brought.

There have been two principal questions made in the arguments upon these cases.

1st. Whether the grants, made by king Charles 2, of the several annual sums out of the hereditary excise, to the goldsmiths, the heirs and assigns, be effectual in law, and if charge this revenue in the time of his successors?

2nd. Whether the remedies which the parties have pursued in this case be proper, and such as are warranted by law, or justified by the course of the court of exchequer?

I do not take notice at present of the objections which have been made to the form of the judgment, as it is entered, that being a matter of a different consideration: because, admitting the law to be for the parties who demand the arrears and growing payments of these annui-

ies in this manner, if there be any error in the entering of the judgment, that is to be reformed in this court, and we are to make it such as it ought to have been in the court of exchequer.

The first general question has been divided, as well by the counsel at the bar, as by my lords the judges, who argued this case, into two points.

1st. If this revenue of excise be such an inheritance, that the king could alien the whole, or any part of it, in perpetuity from the crown?

2dly. Admitting that he might, whether it be effectually done by the grants to the goldsmiths?

My lords the judges, who have argued these cases upon the writs of error, have all agreed in opinion, that the letters patent are good in law to pass an interest to the patentees and their heirs, and to bind king Charles 2, and his successors.

Mr. baron Lechmere was of another opinion in the court of exchequer.

The first of these points is a subject of the highest importance, at least as to the consequences of its determination either way; and perhaps is not to be discoursed of adequately to the extent of it in an ordinary court of law.

As to my own part, being extremely desirous, as far as is possible, to avoid the repetition of what has been already said very often; and having formed the opinion which I shall deliver in these cases, upon the second general question; I shall not speak at all at this time to either part of the first question.

As to the second general question, whether this manner of suit, and the proceedings in it, be warranted by the course of the exchequer; so that the parties here can come immediately to the barons, and demand their annuities, and that upon the barons by their judgment, can in regular course prescribe to the treasurer and chamberlains to issue money out of the receipt?—this is what I cannot hitherto be convinced of, either by what I have heard in the debate of this matter, or by what I have been able to observe upon the best endeavours I could use to inform myself, in which I have spent no pains.

I take this to be a point of as great moment as ever came to be discussed in Westminster-hall: not so much in respect of the value of what is in demand, and of what does depend upon the same question, (though that amounts to about 2,385*l.* 17*s.* 6*d.* per annum, besides the arrears;) as because it does in so high a degree concern the government, and disposal of the public revenue, and the treasure of the crown; whereof the law has always had a superlative care, as that upon which the safety of the king and kingdom must, in all ages, depend.

I esteem it a great unhappiness, that I cannot be so far convinced in my thoughts upon this point, as to concur with the greater number of the judges who have assisted in this court: for though my own understanding must be my guide, which I am bound to follow in delivering my judgment; yet I am so sensible of my de-

fects as to distrust myself exceedingly, when I differ from so many learned men; and should be extremely well satisfied, that my opinion was not to be the measure by which the judgment is to be given in this case.

And therefore, having heard that some judges have made a doubt of this matter, I have already proposed it as a point for the consideration of all of them; whether in this court the judgments ought to be affirmed or reversed according to the opinions of the chancellor, or the chancellor and treasurer, when there is one; or according to the opinions of the majority of the judges, who are called to assist?

Before I proceed to deliver the reasons, upon which I think myself obliged to conclude the same way with my lord chief justice of the Common Pleas as to this second question, I will take notice of two things.

1st. That the nature of the debate as to this question seemed to me to be very much changed upon his argument.

All the judges who spoke before him, did, as to this point, in a manner rely upon the two cases of Nevil and Wroth to warrant their opinions. These cases, which are reported in Plowden's Commentaries, I shall be obliged to put at large hereafter, and do therefore only name them at present.

My lord chief justice Treby particularly applied himself to shew, that the proceedings in those cases were adjudged upon particular reasons, and not at all upon the course of the exchequer, or any power lodged originally in the barons by the common law; and were therefore not applicable to the cases before the court: and therefore, as he expressed himself, 'proceeding upon new topics, be differed from them in the conclusion.'

My lord chief justice of the King's-bench only has had the opportunity of saying any thing in answer to his arguments. What weight they have had with any of the other judges, I do not know.

2dly. The second thing I will take notice of is, that in several of the arguments much was said of the subjects property; how it was concerned in the event of these cases, and what regard there ought to be had of it.

With this I do readily agree. No man can be more tender of property, and careful to preserve it than I have been always, and always shall be: but I freely own, that we, who are concerned in judicature in this reign, ought to ascribe less merit to ourselves for our care of property, than most of those who went before us. We run no hazard in doing of it: no man has cause to think he shall be ill looked upon for giving his judgment for the subject according to law, though it be against the interest of the crown.

No man can think more hardly than I do, of the arbitrary shutting up of the Exchequer, as it is commonly called, which was the unhappy occasion of raising the present question: no man can have more commiseration for the persons concerned; I mean those who only

trusted the goldsmiths with their money; and had no share in the temptation to trust, from the unjust and unreasonable profit which was made from the crown.

But I think the word property could hardly be brought into any case less aptly than it is into this.

There has been no difference of opinion, as to the interest and property which the subject takes by the letters patent, amongst the judges who have argued in this court.

We are all agreed that the subject has, in this case, all the same remedies for recovering his right, which in any such case the common law of England did ever allow, or which are given to him by any statute; so that the subject is as safe in his property, and as secure in the method of coming at it, if it be detained from him, as by the English constitution he ought to be.

The only question is, whether this be such a remedy as the law allows, for recovering from the king the arrears, and growing payments of the annual sums in question?

If it be not, I am sure none of us ought to make the parties case better than the law has made it. We must judge of property according to the rules which the law has fixed, and can make no new ones, nor invent new remedies, however compassionate the case may appear, or however popular it may seem to attempt it.

The question then is, if an annual sum be granted by the king, under the great seal, out of any branch of the revenue, to a subject and his heirs, in the manner of these grants, and the annual payments happen to be in arrear; whether by any law, now in force, the party may come to the barons of the exchequer immediately, and they upon prayer to them, may inroll and allow the letters patent, and may thereupon order the treasurer and chamberlains to pay out of the Exchequer the arrears and also the growing payments for the future?

I think it may be proper to premise, that we are not now speaking of the Exchequer in general, as it comprehends that great college of the revenue made up of all the officers of the upper and lower Exchequer; nor of the jurisdiction of the Exchequer-chamber before the lord treasurer and chancellor; nor of the court of equity before the treasurer, chancellor, and barons; but only of the authority of the court of pleas holden before the barons: nor is the question now of the barons' power over the receivers, collectors, and other officers of the revenue; but of their power over the king's treasure, when it is lodged in the receipt of the exchequer, and over the treasurer and chamberlains, in whose custody it is.

In speaking to this matter, I shall proceed by these steps:

First, to observe that no authors ancient or modern, who have wrote of the jurisdiction and business of the court of Exchequer, have mentioned any such power to be lodged in the

barons of the Exchequer, as will be sufficient to warrant the judgments in these cases.

Secondly, that these judgments cannot be defended by any thing which I can find, upon the best search I can make, in any records or acts of parliament:

Nor 3dly, by any authorities in our law books.

1. As to the first, I will not go about to repeat a catalogue of writers who have published particular discourses of the court of Exchequer. My lord chief justice of the Common Pleas was very large in this matter, and I will avoid the affectation of naming them over again: I believe I have perused all of them. I have also looked over several manuscripts, yet unpublished, treating of that court, which were written in the time of king James the first, and king Charles the first: and I can nowhere find the least mention of any power in the barons, to command the issuing of any money out of the receipt of the Exchequer.

Since then so many authors of learning and judgment have set themselves to write, with express design, of the jurisdiction of the court of Exchequer, and not one of them but does treat in particular of the power of the barons, in bringing in the treasure and revenue of the crown, and of their power over it whilst it is *in transitu*, though some of them more argently than others; and yet there is not one word to be found in any of them, which implies a power in the barons over the treasure, when it is once lodged in the receipt; what can be more reasonably inferred, than that such a power was wholly unknown to them?

It must be admitted, that the power to command the issuing of the king's treasure is of the highest nature, and of the greatest consequence; and therefore it cannot be believed that it was forgotten by all of them, if it had been remembered, that it could be passed by without remark or observation:

By what was said in some of the arguments in this case, it seemed to be taken, as if the barons of the Exchequer had been invested by law with a general superintendency over the treasure of the crown, and were to take care to see it distributed and answered to all such, at least, as made any just demand upon it, whether it was or was not brought into the king's coffers: but this is to make them much greater officers than the law has yet made them.

My lord chief justice Coke, when he comes to treat of the court of Exchequer in his fourth Instit. c. 11, seems to choose out two ancient authors, who had wrote of that court, as the foundation of his discourse; which is, for the most part, as a commentary upon them: I mean Britton, and the Mirror of Justice.

Britton's account is shortly this; 'our treasurers and barons from henceforth shall have jurisdiction of all causes, which touch our debts, and our fees, and the incidents thereof, and to take conuzance of debts which are owing to our debtors, that we may come at our debts the sooner.' [Britt. c. 1, fol. 2, b.]

When my lord chief justice Coke has set down these words, he then proceeds to set down the words of the Mirror; viz. that the Exchequer 'is only ordained for the king's profit, to hear and determine torts done to the king and his crown, in right of his fiefs and franchises, and the accounts of bailiffs, and of the receivers of the king's money, and the administrators of his goods, by the view of a sovereign, who is the treasurer of England.' [Mirr. cap. 1, § 14.]

These words of the Mirror are a short, but effectual description of the court of Exchequer; and my lord chief justice Coke comments upon and expounds them in their full extent: nothing falls from aim as if this account were defective, or did include only one part of the business of the court.

In the Mirror, cap. 1. § 14, we are told what is the use of the seal in the Exchequer, viz. 'to make acquitances, and to seal writs and estreats under green wax, issuing out of this place 'pour le prou le roy,' i. e. for the king's profit. The use of the seal, to command the treasurer and chamberlains to issue monies out of the receipt, was unknown when the Mirror was wrote, & this was a very defective account.

II. And as these ancient authors have thus confined the business of the court, so it does appear in the second place, by the ancient record, that the barons of the Exchequer have not intermeddled in other matters, than what my lord chief justice Coke, and these ancient authors assign to their jurisdiction: unless as their power has been from time to time enlarged by act of parliament; or in cases where they have acted by particular authority given to them by writs under the great or privy seal; or where they have acted by virtue of the king's answer indorsed upon petitions made to his person, either in or out of parliament; which answers to such petitions generally order a writ to issue out of Chancery, which gave a jurisdiction to the treasurer and barons respectively, to act according to the effect of the answer. And upon this ground it is, that amongst the abuses and usurpations in the several courts, which are enumerated in the Mirror, in that chapter which is entitled, 'Abusion de la Commen Ley,' this which follows is mentioned for one; 'abusio est que les ministeres del escheque eient jurisdiction de autre chose que des deniers le roy, de ses fiefs, et ses franchises, sans bre' original de le chancellery south blanche ctre.' [Cap. 5, § 1. No. 27.]

It is so far from appearing by any ancient author or record, that the barons of the Exchequer had such a power as is contended for in these cases, that on the contrary it appears, their authority was very much restrained in that which was immediately their business, viz. matters of account depending before them; in which they could make very few allowances, however just and reasonable in themselves, without a particular authority under the great or privy seal.

By the statute of Rutland, 10 Ed. 1, notice is taken, 'that upon suggestion of the king's bailiffs, writs for divers allowances had been made to the king's grievous damage;' it is therefore ordained, 'that of such allowances to be made from thenceforth, view shall be in our Exchequer; and the same view being faithfully made, the same treasurer and barons shall certify our chancellor of the due allowances to be made, and that writs of allowances shall be made according to the same certificate.'

The statute directs that it should be considered in the Exchequer, what allowances were proper to be made, and that the treasurer and barons should certify the lord chancellor what they found was justly to be allowed; and after all, the great seal was to issue thereupon to warrant the allowance.

Here was a new use appointed for the seal of the Exchequer, viz. to make the certificate; but the parliament would not innovate so far as to make the Exchequer seal more than a certificate, whereupon the chancellor might issue a writ of allowance under the great seal.

This would have been a strange circuit, if it had been imagined at that time, that the barons could have made the allowance by their own jurisdiction, and have sent a writ accordingly to the treasurer and chamberlains.

There are many instances to be found how much the jurisdiction of the barons was restrained, even in particulars, which one would think to be most properly of their cognizance.

I will at present only instance some few, which are printed in Mr. Ryley's Placita Parliamentaria.

The executors of John Basin petition the king, that whereas the king 'teneatur dicto Joh' in 34*l.* for wax delivered to his use, by the hands of Roger Lisle clerk of the great wardrobe, and for which they had a bill signed by the then master of the great wardrobe; and that a like sum of 34*l.* was demanded of the said Basin by extents of the green wax, 'quod placeat d'no regi dictorum debitorum hinc inde debitam facere allocacionem:' the answer is, 'habeant bre' de Cancellaria thes. et baronibus de scacc. quod si ipsi inveniant debitum esse clarum, quod tunc facient allocacionem de uno deb'o ad aliud'. 35 Ed. 1, Ryley 334.

An answer of the same nature is given to another petition, very much of this kind, made by the executors of Robert de Baynges. Ryley 326.

The citizens of York petition for an allowance of 8*l.* 4*s.* 10*d.* and 102*l.* 12*s.* 11*d.* with which they are charged in the Exchequer, for wines sold to them by Robert de Dacre the king's butler, who had acknowledged the receipt of the money before the barons: the answer is, 'man-detur per bre' de Cancellaria thes. et baron' quod scrutatis rotulis videant, si recognitio sit sic facta ut dicunt, tunc exonerentur civis de eadem pecunia et Rob'tus de Dacre inde onetur.' 33 Ed. 1, Ryley 252.

In the same year, Ryley 248. Harcla pe-

tituted the king for an allowance of his arrears for the time when he was sheriff of Cumberland, for that he could not levy the same by reason of the waste and destruction which the Scots have made; and also for an allowance of 38*l.* which the king owed him for wool taken to the king's use; and the answer is, 'de damnis quæ instituit habeat gratiam per bre' de canç' thesaurario et baronibus se scaccario dirigendum secundum discretionem thesaurarii et baron'. Et de lanis captis examinentur et allocentur in arreariis suis. Et super hoc fiat breve de Canç' cellaria thesaurario et baronibus de scaccario.'

In the same book, p. 249, 250, 258, there are petitions for allowances of sums laid out for the king's use, and writs under the great seal ordered, requiring allowance to be made by the treasurer and barons.

Plomier petitioned that he might be permitted to account for the time he was *custos* of the Templars land in Essex; 'et unde incept' computari coram Rogero de Wingfield sub cuius sigillo rotuli sui adhuc restant signati.' The answer is, 'habeat bre' de canç' thes. et bar' de scac' in quo contineatur ista petitio, et per idem bre' mandetur, quod inspecta petitione, si suggesta vera sint, procedant ad computum suum audiend' et ulterius faciant in hac parte justitie complementum.' 14 Ed. 2. Ryley, 419.

Upon petition of the tin merchants, to be allowed two days for payment of their coinage, this being also certified to be for the king's profit; the answer is, let there be a writ to the treasurer and barons for that purpose, and the like to the sheriff of Cornwall. Ryley 248.

Upon petition for installment of debts, the answer is sometimes, let a writ go, commanding the treasurer and barons to do it, 'juxta discretionem,' Ryley 291, and at other times, 'quod scrutari faciant debita, et inde certificent regeth, et quod interim habeant respectum, sed non atterminetur sine rege.' Ryley 254.

And that the jurisdiction of the barons was originally very restrained, will appear yet plainer, by the statute made the 26th of Ed. 1. Ryley 225. Whereby it is enacted, 'that the treasurer and chamberlains of the exchequer make a roll indented of all sums of money delivered for the king's use, without warrant, since the beginning of the war between the king and the king of France; one part to remain with them in the exchequer, and the other part with the chancellor, pro warranto suo ad faciend' super hoc br'ia in debita forma predictis thes. et camerariis de predictis parcellis.'

I might proceed to very great numbers of instances where the subject was put to his petition, for the allowance of just and reasonable pleas by way of discharge, upon accounting in the exchequer; some few I thought necessary to mention; but I will not enlarge on this matter, because I think the statute 5 R. 2, cap. 9, which increased the authority of the court of

exchequer in this point, shews plainly, how defective the jurisdiction of that court was, before that time, even in that which seemed absolutely requisite for the doing justice upon accounts.

That statute takes notice, 'that persons impeached in the exchequer of debts and accounts, though they have offered to plead for discharge of those impeachments according to law, have not always been received thereto heretofore, without having express commandment by writ or letter of the great or privy seal, to their mischief and delay, and no advantage to the king.' And it is thereby ordained, 'that the barons shall from henceforth have full power, to hear every answer of every demand made in the exchequer, so that every person, that is impeached or impeachable of any cause by himself, or by any person, shall be from henceforth received to plead, sue, and have his reasonable discharge, without tarrying for, or suing any writ or other commandment.'

By this act of parliament, a power for the future is given to the barons of the exchequer to allow a lawful discharge when pleaded. The natural inferences which were to be drawn from this statute were so plain, that, to elude the force of them, two things have been urged in the speaking to these cases.

1st, 'That this act gives no new power, but was only made in affirmance of the common law.'

2dly, 'That this act might be extended so as to give an authority to the barons of the exchequer, to relieve the subject in the cases which we have before us.'

But I think both of these assertions are mistakes; at least it must be yielded, upon second thoughts, that if this act was merely a declaration of what was law before, such declaratory laws are not to be extended by equitable constructions beyond the words themselves.

As to the first, to prove that this act did not introduce a new law, my lord chief justice Coke, in his fourth Inst. fol. 110, has been cited: I confess in that place he says two things upon occasion of this statute.

1st, 'That it does appear by this statute that the parties ought, by law, to have been received to have pleaded their discharges, without any such writ or letter.'

2dly, 'That from thence it may be collected, that such course of the exchequer as tends to the disquietness, mischief, and delay of the subject, and no advantage to the king, is against law.'

The first of these two conclusions of his, upon this act, is contrary to his observations immediately preceding in the same page, viz. 'that so great care was taken by the court of exchequer, (which is the centre of the king's revenue and profit), that no man might plead for his discharge of any debts, account, or other demand, without having an express commandment by writ or letter of the great seal.'

As to his second conclusion, it is not very easy to apprehend what is meant by saying, 'that a conclusion may be drawn from this act, 'that such course of the exchequer, as tends 'to the delay of the subject, and no advantage 'to the king, is against law.' If the meaning be no more, than that such course is fit to be remedied by a law, it may be justly collected from the act, which was made expressly for that purpose: but that it can be inferred from that act, either that any thing can be the course of the exchequer which is against law; or that the act declares it to be against law, to refuse the receiving such pleas without being authorised under the great or privy seal, may be denied upon good grounds; because there is nothing to be found in that act, to warrant either of those inferences.

1st. That the act was introducing of a new law, as to one point, viz. the admitting of persons to plead by attorneys in the exchequer, (which they could not do before, unless by a special writ under the great seal,) is agreed by my lord chief justice Coke (4 Inst. 110.); and is plain that it was so, by the Mirror of Justices, Abuse N^o. 29.

2dly, The words of this statute are enacting, and not declaratory. They give a new power; 'from henceforth the barons shall have power, 'and every person that is impeached shall be 'from henceforth received.'

3dly, The words seem to be mistranslated from the original French, 'touts voyes n'out 'mye este receutz,' which should not be rendered 'have not always been received;' but thus, 'always have not been received;' that is, 'have never been received.'

But 4thly, The petition of the Commons, upon which this act is framed, and which is Rot. Parl. 5 R. 2, N^o. 97, shews this matter plainly beyond all question.

The petition does not complain of any abuse in the barons, or officers of the exchequer, but of a defect in the law, which the Commons pray may be amended for the ease and quiet of the king's people.

And it is remarkable, that as the preamble of the statute is drawn up, as far as it goes, almost in the words of the petition; so the enacting part is framed in the words of the king's answer. As the words are printed in English in the statute book, they run thus; 'when 'they offered to plead in discharge according 'to law, they have not been always thereto received heretofore:' But the original French words of the petition are, 'n'ont mye este a ce 'receutz nient foits devant ces heures,' i. e. 'they have never heretofore been received;' which, as to this point, is a very material variance, and shews plainly how the French words in the statute itself ought to have been translated.

The petition does in express terms give as a reason why they had heretofore never been received; viz. that the barons of the exchequer declared, that they had no power to hear the pleas and answers of the said impeachments

without writs or letters of the great or privy seal, commanding the treasurer and barons to do right to the said parties impeached. This is what the barons had then declared to be law; nor is this declaration complained of by the petition, nor censured by the parliament; but a law is made to remedy this for the future, giving the barons a new power: and therefore this act, one need not doubt to say, was more than an affirmance of the common law.

The next chapter of this statute, 5 R. 2, c. 10, is a farther explanation of the matter we are now speaking of.

Notice is taken, 'that persons retained to 'serve the king, received money at the receipt, 'or elsewhere by assignment, which sums had 'been put upon them as received by way of 'loan; and although they, or their heirs, or 'executors, have demanded to be admitted to 'account of the said sums, the same had not 'been granted, but they were constrained to 'pursue their grant by the great or privy seal 'to the treasurer and barons, commanding 'them to account with them in that behalf,' &c. And it is ordained, 'that of all persons, 'who shall be retained to serve the king, their 'covenants shall be put into writing, and sent 'into the Exchequer to remain on record: so 'that when persons come to account thereof at 'the Exchequer, they shall be received, and 'have allowance on their account, according 'to the contents of their covenants; so that by 'the sight of the same the barons shall do right 'to the party, according as reason demandeth. 'And if any thing be due to them on the said 'account, that thereof, by certificate of the 'same Exchequer, the treasurer and the chamberlains shall make payment or assignment, 'without any other warrant by the great or 'privy seal.'

This shews what the course was before; and in this particular case makes a provision which is wholly new, viz. that upon a certificate of the barons the treasurer and chamberlains may pay: in all other cases the law is left open, and a great or privy seal is requisite to warrant a payment, notwithstanding any certificate of the barons.

So much to shew the stat. 5 R. 2, did introduce a new law.

As to the other thing which was mentioned, as if the stat. 5 R. 2, might be extended by an equitable construction to give the barons power to order the payment of money out of the receipt, in such manner as in the cases now before the court; I must say, I cannot see any the least colour for such a notion.

The power is most directly restrained to the receiving of pleas in discharge of persons impeached for debts, or accounts; and can never be extended to cases where parties come as plaintiffs, to recover demands originally against the king; nor is there the authority of any law-book pretended to warrant such interpretation.

If then the power of the barons was so short and restrained, in matters relating to the tak-

ing and stating the accounts of the revenue, (which is acknowledged to have been their ancient and proper business,) that they were in so very many cases to expect an additional authority under the great or privy seal; can it be thought, that at the same time they were intrusted with such a jurisdiction as is now contended for, of sending orders requiring the treasurer and chamberlains to make payment at the receipt, when persons demanded of them to inroll and allow their grants and order such payments?

I have caused the liberatè rolls, and the bundles of petitions at the Tower to be searched from the beginning of king John's time, as low as the records there go, and have had some extracts made of them; and during all that time, I cannot find that any payments were made at the receipt of the Exchequer, but by warrant under the great or privy seal.

There are infinite numbers of writs to be found, for payment of sums of money for wages, for service done, for debts owing, and for almost all occasions which can be imagined to occur; but for every one of these, how small soever, the warrant is either a great or privy seal.

In like manner, the warrants for payment of all annuities, fees, and salaries, though granted by letters patent under the great seal, yet were, from time to time, directed to be paid by writs under the great or privy seal.

If the payment was, by the letters patent, to be at the receipt of the Exchequer, the liberate went to the treasurer and chamberlains: if it was to be paid by the customers, or the sheriff, there was a liberate directed to the officer who was to pay, and a writ 'de allocatione facienda,' directed to the treasurer and barons, to allow of such payment by the sheriff or customer, which writ of allowance recited the liberate. Reg. 192, 193.

Rot. lib. 43 H. 3, m. 1. There is a liberate 'de thesauro nostro dilecto et fideli nostro Hugoni de Bigod, justiciario nostro mille marcas, quæ sibi per magnates de concilio nostro sunt provis', percipiend' per annum ad scaccarium nostrum, ad se sustentandum in officio justiciarii nostri.'

The great station of the person, and the authority by which the annuity was granted, was not enough without a particular warrant for payment from the king under his seal.

So all along in the liberate rolls, 55 H. 3, m. 1, 1 E. 3, m. 3, 1 E. 2, m. 4, 4 E. 3, m. 3, &c. there are liberates for the salaries of judges: 'liberate de thesauro nostro dilecto et fideli nostro Stephano Heyne, uni justiciar' nostrorum' in banco, vigint' libr' de termino 'St. Mich' prox' præterito de annuo feodo suo '40 librar', quas ei concessimus percipiend' 'per annum ad scaccarium nostrum ad sustentationem suam in officio justiciar', quamdiu 'steterit in eodem.' Nay the barons of the Exchequer themselves, in those ages, never once thought of directing the treasurer and chamberlains to pay annuities and salaries,

though granted to themselves under the great seal; but pursued the same method that others did, and procured liberates for their salaries of 40 marks, as all other subjects, in the like cases did.

Rot. lib. 1 Ed. 2, m. 2, 'Liberate Will'o de 'Carlton, uni baron' nostrorum de scaccario 'nostro, vigint' marcas de termino paschæ 'prox' præterito, de annuo feodo suo quadragint' marcarum, quod ei concessimus per litteras patentes percipiend' in officio suo supra dicto.'

The like are to be found, 4 Ed. 1, m. 3, 1 R. 2, m. 15, 1 H. 4 m. 7, 1 H. 5, m. 6. And when payment was not made according to the command of these writs, the method was not then to go to the barons of the Exchequer, but to apply to the king by petition for another writ to enforce the former. Rot. lib. 2 Ed. 1, 20 m. 4. 'Mandamus vobis, quod dilecto et fideli nostro Roger de Brabanzon, super capituli justiciario Edwardi, quondam regis Angliæ, patris nostri, ad placita coram eadem 'patre nostro, liberetis, juxta tenorem brevium dicti patris nostri de liberate quæ penes vos inde resident in scaccario antedicto.'

And the like writ may be found to enforce a former liberate in the case of the earl of Oxford, Rot. lib. 1 Ed. 3, m. 1, and in other places.

The like course also appears to be taken in the case of the converted Jews. 2 Ed. 2, Ryley 517.

I will make mention of one more precedent, which is the letters patent granted 2 H. 6, which are to be found in the patent rolls of that year, and also in a schedule annexed to the parliament roll. In which the king takes notice of the treaty of peace between his father and grandfather, the kings of England and France; and also of the marriage articles of his mother, queen Katherine, the French king's daughter, with king Henry the fifth, A. D. 1420; whereby it was agreed that she should have for her dower to the value of 40,000 scuta per annum, of which two were to make a noble; which treaty and articles were confirmed in parliament; and then proceeds, by consent of parliament, to grant to the queen divers lands, parcel of the duchy of Cornwall, and county palatine of Chester, and also several annuities out of the alnage, and 2,274*l.* 18*s.* 1*d.* out of the first profits of the sheriffs and escheators at the receipt of the Exchequer, and out of any other revenue that should be ordered there, to be paid by the hands of the treasurer, in full of her dower, until the king or his heirs, should grant to her lands and tenements to the same value: 'et quod eadem mater nostra habeat tot et talia brevia de liberate curren', et allocat' dorman', ac alia brevia et warran', quot et qualia 'et in hac parte, pro solutione summarum sibi, 'ut præmittitur, concessarum et assignatarum, 'et pleniori executione præmissorum, necessaria fuerint et opportuna: et quod cancellarius noster Angliæ, ac custos privati sigilli nostri, et hered' nostrorum, pro tempore ex-

'isten', brevia et warranta illa de tempore in
'tempus, quoadocunque et quotiescunque ex
'parte prefat' matris nostre racionaliter
'fuerint requisit', tenore presentium fieri fa-
'ciant indilate. Per ipsum regem in concil'
'in parl.'

It appears by these, and the former records mentioned, what was the ancient and constant method of proceedings in these cases; and that it was not enough to have letters patent under the great seal, for granting the annuity or sum, but that there must be an authority under the great seal or privy seal, to warrant any payment thereupon: otherwise the parliament, when they had been making such an extraordinary provision for the security of the queen, would have taken a shorter method, and have sent her to the barons of the Exchequer for ready payment in case of arrears.

I might also mention the case of another queen, Johan' the relict of Hen. 4th, who in her petition in parliament, in the second year of Hen. the 6th, Rot. Parl. 2 H. 6. 11, 35, (whereby she prays to be restored to her dower, which had been seized in the 7th year of Hen. the 5th, and was afterwards ordered to be restored in the 10th year of his reign, but could not be done effectually without the assistance of an act of parliament), concludes with a prayer, that for the time to come she may have 'en la concellerie nostre seigneur le roy, 'et ses heirs et successors, si bien lettres de 'liberate currantes, et allocate dominantz, come 'autres lettres patentes, et choses en celle partie 'al dite royne besoignable;' which is granted.

This was then the method, and has been continued to this day; and no treasure is, or can be issued out of the receipt, without such a warrant under the great or privy seal.

It is true, in time *liberates* current, and dormant writs of allowance grew more common, so that the suing out of new writs in every particular case became less frequent. And it is also true, that of later times, more general privy seals have been brought into use, authorizing at once the issuing of several payments; which has been practised especially since the beginning of the reign of queen Elizabeth. But the thing in substance is the same: no money is issued out of the receipt, without the authority of the great or privy seal; nor is there any more waiving the applying to the person of the king than before: no payments being made upon those general privy seals, but by virtue of the king's particular warrants counter-signed by the lord treasurer, or commissioners of the treasury.

I have shewn what were the methods anciently taken by subjects for obtaining payment of annuities granted by the crown; and that these methods, in the manner I have mentioned, have been continued down to this time.

It has also been observed, how narrow the jurisdiction of the barons of the Exchequer was at common law; unless where their authority was enlarged by writs under the great seal, or by the king's answer to petitions in parlia-

ment: and that the enlargement of their jurisdiction by the stat. 5 R. 2, added no new powers in relation to the matters in question.

The next statute, which does considerably enlarge the jurisdiction of the Exchequer, is that of 33 H. 8, c. 39; which gives several new powers, of great consequence, to the Exchequer, and to several other courts which were then in being: but I did not observe that it was insisted on, that any of the clauses of that act extend to this case; and therefore I will not go about to answer what is not, nor I think can be objected.

Indeed, if I did not mistake my lord chief justice, he insisted that the power which the barons of the Exchequer have taken upon them to exercise in this case, must be warranted by the common law, as originally incident to a court of revenue.

But, upon the best search I could make into the records of the Exchequer, I have not found any thing which does in the least countenance this power supposed originally incident to a court of revenue, which has been exercised in these cases, but was never exercised before: unless about the time of the dissolving of the court of Augmentations, in the first year of queen Mary, and the annexing it to the court of Exchequer; when somewhat of this nature was done in the court of Exchequer, with respect to some cases which were formerly under the survey of the court of Augmentations; the reason of which I shall shew hereafter, and that the same is no way applicable to the causes before us.

I do not forget that it was urged, as of weight to prove this power in the barons, that the course is, at the end of every term, for the barons to send *liberates* down to the receipt for necessities of the Exchequer. But of that an account was given by my lord chief justice of the Common Pleas; and I shall shew yet more clearly, that the writ imports no more than a certificate of the *quantum* of the expence, and has been never looked upon as a warrant for the payment.

It is strange, if this power was vested in the barons by the common law, that no subject should once apply to them for relief. It is plain there were occasions for such applications. Annuities we see were in arrear, and writs of *liberate* were disobeyed; and yet nothing does appear, before the first year of queen Mary, that the barons sent down writs to the treasurer and chamberlains to do their duty, and issue money out of the receipt.

Since the 15th of queen Elizabeth, when sir Thomas Wroth's case was, one hundred and twenty years are past; and since that time, especially since the beginning of the reign of king James the first, more and greater annuities and pensions have been granted than from the foundation of this monarchy, and with as full and liberal clauses as in the cases now in question; and annuities and pensions have been worse paid than in ancient times. Yet no man, since that time, has come to the barons to re-

cover his arrears, according to these precedents of Nevil and Wroth: and yet, the remedy (admitting the law to have been so settled in those cases) is more ready and easy to be had than in any action against a common subject in any case. Admitting this jurisdiction might have slept unobserved in the more ancient times, yet after two cases settled so solemnly as those of Wroth and Nevil, it seems very strange that no patentee, who was unpaid, and could not recover the arrears of his annuity any other way, should once think of desiring the barons to inquire and allow his letters patent, and order payment to him out of the receipt.

As therefore a constant and fixed course of the Exchequer is the law of that court, and indeed the law of the land; so the negative argument hath its force, that what has not been at all practised in the court, especially in relation to cases which happen very frequently, cannot be taken to be the law, or course of the court.

So far are we from having infinite precedents, (which, by what is said in the case in *Plowd.* 321, a, and *Lane's case*, 3 Co. 16, 17, and in *Agard's case*, Mo. 565, appear to be requisite to give a practice the denomination of the course of the Exchequer), that we are to seek for a precedent; except some few cases, which, as I said, happened upon the union of the court of Augmentations to that of the Exchequer; and of these not one has been cited in any law book, as an authority to prove this jurisdiction in the Exchequer; which is the matter for which they have been so much urged in the arguing of these cases.

III. And now I will proceed to the third thing I mentioned, which was; that as none of the authors, who wrote *ex professo* upon the jurisdiction of the Exchequer, asserted any such power as this in the barons, and as nothing did appear in any act of parliament, or by any record, which did make out such a power; so I conceived, that no authorities were to be found in any of our law books, which did warrant the judgments in these cases. I shall reserve myself as to the cases of Nevil and of Wroth, and the precedents about that time till hereafter; and shall at present speak to the other cases, which have been urged as authorities, more ancient in point of time.

And those, as I remember, were three; *Everle's case*, the abbot of Warden's case, and *Margery Parker's case*.

Some others were spoken of, but they are (as I think) directly against what they were brought to support; and as these three only have been insisted on by my lord chief justice, I shall not think it worth while to take any notice of the rest.

Everle's case was 83 Ed. 1, and is in *Ryley*, 681. The case is this. He petitions king Edward the first, that he would command that an annuity of ten marks, which king Henry, father of the king who now is, had granted to him, and John his brother, 'et quod dunum

' rex nunc eis per literas suas confirmavit, et unde habet bre' currens de liberate in custodia thesaurarii et camerariorum de scaccario,' should be paid to him with the arrears. Ita responsum est, habeat bre' de cano' thes. et baronibus de scaccario, quod videant cartam et faciant justitiam, habito respectu ad breve currens.'

Upon this case two inferences were made.

1st. That the court of Exchequer might hold plea of an annuity granted by the king, and might relieve the party.

2dly. That the court of Exchequer might compel the treasurer and chamberlains to make payment of such an annuity.

Let us see if either of these conclusions are warranted from this case; and whether upon examination it will not appear to be a strong authority to shew, that there is no legal course to enforce the payment of an annuity, though granted under the great seal, without applying to the person of the king by petition.

No circumstance is wanting to make that case stronger than the cases before us.

There was a grant of an annuity under the great seal from the king's predecessors, as there is in this case: there was also a confirmation from the king then reigning, which is wanting in the cases before the court: and, more than that, there was a liberate current lodged with the treasurer and chamberlains.

If in any case of a demand of the arrears of an annuity, granted by the crown, the party might go to the barons for an order for payment, *Everle* was ripe for it.

But such a method of enforcing payment was unknown at that time, as has been shewn already, and therefore *Everle* proceeds in the common course: he applies by petition to the king, and the king endorses the petition, that a writ under the great seal should be directed to the treasurer and barons, empowering them to consider the letters patent, and do him right, respect being had to the liberate.

No jurisdiction in the barons can be inferred from thence, nor power of commanding the treasurer. The great seal is the commission by which they act. The same writ, which empowers the barons to consider the letters patent, impowers the treasurer to issue the money; and that not as the barons should appoint, but it was to be with respect to the liberate, which was to determine where the payment was to be made; whether at the receipt of the Exchequer, or by levying tallies on the inferior officers concerned in the receipt of particular branches of the revenue.

But to take off the force of such an answer, it was urged, that this petition was not a petition of right, but of complaint against the king's officers. And to shew that it was so, it was said, that if it had been a petition of right, it must have had another indorsement, viz. 'soit droit fait al partie,' and then have been sent into Chancery; and that in such cases the petition is the original upon

which the proceeding is; and that petitions of right must be so answered.

As to this; in the first place, there needs not much labour to shew that this was not a petition of complaint. It imports nothing like it. The petitioner states his case; he prays what he wanted, and what was necessary, and it was granted him; that is, a warrant under the great seal, empowering the respective proper officers, the barons, to see if he had right, and the treasurer, if it were so, to pay him his arrears. Nobody is complained of in the petition, and nobody is blamed in the answer: a writ is to go, the charter is to be seen, and justice is to be done.

In the second place, the answer given to this petition is a very proper answer to a petition of right. And therefore there was no ground to say that this was not a petition of right, because the answer was not general, 'soit droit fait.'

There are more petitions to the king in Ryley's *Placita Parliamentaria*, than in all the books which are printed; and throughout the whole book there is not one in twenty which is so answered; and yet nothing is so plain as that these were petitions of right.

It were endless to cite particulars, there being scarce a leaf in the book which does not shew what I assert.

And if more authorities were wanting, the bundles of petitions in the Tower, which I have caused to be looked into, are full of petitions of right, otherwise answered than in those general words.

The truth is, the manner of answering petitions to the person of the king was very various: which variety did sometimes arise from the conclusion of the party's petition; sometimes from the nature of the thing; and sometimes from favour to the person: and according as the indorsement was, the party was sent into Chancery, or the other courts.

If the indorsement was general, 'soit droit fait al partie,' it must be delivered to the chancellor of England, and then a commission was to go to find the right of the party; and that being found, so that there was a record for him, thus warranted, he is let in to interplead with the king; but if the indorsement was special, then the proceeding was to be according to the indorsement in any other court. This is fully explained by Stamford in his *Treatise of the Prerog.* cap. 22. [3 Inst. 215, 216, 13 Co. 19, Mo. 639, Co. Ent. 419, b. 422 a.]

The case Mich. 10 H. 4, 4, n. 3, is full as to this matter. [Fitz. Travers. 51, Bro. pet. 34.] The king recovers in a *quare impedit* by default against one who was never summoned; the party cannot have a writ of deceit without a petition. If then, says the book, he concludes his petition generally, 'que le roy luy face droit,' and the answer be general, it must go into the Chancery, that the right may be inquired of by commission; and, upon the inquest found, an original writ must go directed to the justices to examine the deceit; otherwise the justices, before whom the suit was, cannot meddle: but if he conclude his petition espe-

cially, 'that it may please his highness to command the justices to proceed to the examination,' and the indorsement be accordingly, that had given the justices a jurisdiction. They might in such case have proceeded upon the petition without any commission, or any writ to be sued out; the petition and answer indorsed giving a sufficient jurisdiction to the court to which it was directed. And as the book I have mentioned proves this, so many other authorities may be cited.

Ex Bund. Pet. Parl. an. 4 Ed. 3, n. 64, John Ibe, abbot of Feversham, petitions the king, setting forth that his predecessor, in the reign of Ed. 2, in regard of the good service of sir Barth. de Baddlesmere, had released to the said sir B. B. for his life 4l. 16s. 4d. of the rents, customs and services of 300 acres which he held in gavelkind of the abbot and convent; and that the land remained in the king's hands by the forfeiture of the said sir B. B.; and that the rents and customs were in arrear, after the death of the said sir B. B. for four years whilst the land so remained in the king's hands: and prays, that the king would be pleased to send to the barons of the exchequer, that if by inquest to be taken, it should be found that this rent was due to the abbot and his successors, as the right of the church, after the death of sir Bartholomew, the king's officers, who were in possession of the lands during the minority of the heir, might answer them the rent for that time. And the petition is indorsed, 'suit creste petition mande as treasurer et barons de l'eschequer, que eux appellez que sont entre appellez, et oyes les reasons, facent droit.'

To the like effect is the answer to the petition of Maunt Franceys in the same year, n. 9.

And as the indorsements upon petitions of right were various, according to the nature of the case, so above all others they were different in the cases belonging to the revenue; and, I think, there is not an instance to be found where such petitions were answered, 'soit droit fait aux parties.'

Sometimes the indorsement is, 'mandetur ista peticio thes. et bar' de scaccario et acquatur coram eis.' Ryley 408. Or, 'acquatur coram thesaur' et baronibus de scaccario et ibi faciant eis justitiam super contentis in petitione.' Ryley, 408, 423.

So upon the petition of the abbot of Feversham the indorsement is, 'soit creste petition mande devant tres. et barons del Eschequer, et mande a eux que oye la pleynte le dit abbe face droit.' Ryley 646.

Sometimes, 'mandetur per breve de magno sigillo thes. et baron' de scac' quod continent effectum petitionis,' &c. Cottingham's case, Ryley 402.

Sometimes, 'habeat bre' de cane' thes. et baronibus de scacc' quod fiat secundum formam petitionis, et ita rex vult.' Walter's case, Ryley 259.

When there was no doubt likely to arise of the parties title, as in Aynsham's case, (who

petitioned for money due for work done at Carnarvon castle,) the barons are not taken notice of, but the answer is, 'fiat bre' de canc' de li-
'berate thesaurario et camerariis quod liberent
'ei tantam summam et onerent Hugonem Ca-
'merarium de Carnarvan.' Ryley 251.

Sometimes the chancellor of the Exchequer is joined: as in Ryley 249. The bishop of Ely petitions the king, that one Pecche his tenant, who held of him four knights' fees, parcel of his barony, had granted the same fees to the king; and that he, the bishop, was ready to make out his title: the answer is, 'sequatur
'coram thesaurario cancellario et baronibus de
'scaccario, et si ita sit tunc thes. et bar' conve-
'niant cum eo super hoc, ita quod ecclesia con-
'servetur indemnita, et super hoc fiat bre' de
'canc': et prius inquiratur per que servicia
'maneria tenentur et de quo, &c. cum omnibus
'circumstantiis.'

Sometimes the justices are joined, as in the case of the abbot and convent of Hide, Ryley 256. Who petition, that they had, by mistake, acknowledged the king's title upon a 'quare
'impedit' brought in the king's name; and pray that they might be admitted to prosecute their right to the said advowson, or that the king upon a gracious fine would restore them to the advowson: the answer is, 'fiat bre'
'canc' thes. et bar' de scacc' quod vocatis jus-
'ticiariis audient rationes abbat. Et si abbas
'ostendere poterit coram eis per cartas vel mo-
'numenta vel alias evidencias quod habet jus
'in dicta advocacione, tunc vult rex quod thes.
'et bar' per consilium justiciariorum capiant
'aliquem finem de abbate et conventu, et red-
'datur eis dicta advocatio non obstante iudicio
'inde prius reddito pro rege.'

And in the like manner on the petition of Floris, the widow of Thomas Belhous, the answer is, 'habeat bre' de canc' thes. et bar' de
'scacc' quod visa carta sua de conjuncto feofa-
'mento, &c. faciant secundum quod de jure
'fuerit faciendum, et secundum quod hactenus
'usitatum fuerit in regno: et quod hoc fiat per
'consilium justiciariorum.' Ryley 253.

That these were petitions of right of several natures is not to be denied, and yet the general answer is given to none of them.

So that when Everle's case is considered, it seems to be a good authority to prove, that in cases of this nature the subject had a proper remedy by a petition of right to the person of the king. And if in these cases now depending, the parties had taken the course to have used by such petition, and had been so answered, Everle's case might have been properly cited as an authority: but then, as in almost an infinite number of other cases, the answer to the petition is a warrant for a writ under the great seal; and that writ gives a jurisdiction to the treasurer and barons to act according to the tenor of it.

The next case insisted on, was the abbot and convent of Warden's case, Ryley 262. That case is thus: the petitioners pray a remedy,
'quod ubi rex Henricus, pater regis nunc, per

'cartam suam eis concessisset viginti marcas
'annuas pro damnis que fecit in boscis ipsorum
'tempore obsidii castri de Bedeford, de quibus
'vigint' marcis annuis seisiti fuerunt ad totam
'vitam dicti regis Henrici, et etiam tempore
'regis nunc usque ad viginti annos ex nunc,
'&c. The answer is, 'veniant per bre' ad scac-
'carium et ostendant cartam, et ubi assignatio
'facta fuit ejusdem pecunie, et fiat justitia per
'thes. et bar'.'

Here was an annuity granted upon a valuable consideration by the king's father: it had been answered during the time of the king who granted it, and for 13 years during the reign of king Edward himself; and yet the payment had been stopped for 20 years together. No other remedy was then thought of for the grantee, but to apply by petition of right to the king: and the king's answer is, 'let a writ
'under the great seal go to the treasurer and
'barons; let the charter be produced; let the
'petitioner shew upon which branch of the re-
'venue the annuity is charged; and let them
'do justice.'

One might challenge any body to produce a case in itself more like the present cases than this of the abbot of Warden, or more different in the remedy taken by the parties. If the same method had been pursued in the cases before us, as was by that abbot and convent, this case would have been a good precedent. But here the suitors pass by the king, and come directly to the barons; who proceed to act without being authorised under the great seal, as in that case, and command their superior officers, who, according to the precedent, ought to have been authorised, together with them, to have done their respective parts for the relief of the petitioner.

The next book that was cited was Trin. 9 H. 6, 12, 13, Margery Parker's case; and this was an authority upon which much weight was laid.

The case, as it appears in the book, was thus:

Margery Parker brought a writ of annuity against the queen, for 20*l.* which she had granted to her for life, to receive 'de quadam
'summa assignata in partem dotis ipsius regi-
'ne de magna custuma London,' by the hands
of the collectors of the same customs.

The question in the case was, if this grant, so worded, was an annuity, and did charge the person of the queen.

In the debate of that question it is said by Babington, 'that the letters patents, in that
'case, were no more than an acquittance to the
'customers to discharge them of so much;
'and that if the customers did not pay the
'queen, she had no action against them, but
'must sue for her payment to the barons of the
'Exchequer.'

Cottesmore says, 'if that be so, then the
'queen's person must be charged, otherwise
'the grantee would be without remedy.'

Rolf said, 'the grantee might sue in the Ex-
'chequer for her pension, as the queen might.'

But after all this discourse amongst them, the plaintiff had judgment to recover the annuity and the arrears: so that no regard was had to this supposed remedy mentioned by Babbington, but the judgment was given against the queen.

This, at most, was but a thing dropt by Babbington, in the debate of the case, and seems to be very crude and undigested: for he neither says how she was to sue, nor whether he meant more than that she was to sue by a motion to the court, (in which vulgar sense sometimes the word suit is taken, as my lord chief justice Treby observed;) nor what remedy the barons could give her.

It appears to be but a sudden saying: and, perhaps, the judges of the Common Pleas might not be so perfectly ready in the course of proceedings relating to the revenue, upon the sudden starting of the question.

All that can be concluded of certainty from that case; as far as I see, is, that Margery Parker brought a writ of annuity against the queen, and had judgment to recover.

IV. Having insisted thus far in shewing that I have met with nothing in the authors, who have wrote upon the jurisdiction of the Exchequer, or in the law books, or in the records, which countenance such a power as is assumed by the barons of the Exchequer in these cases; I shall mention a fourth thing which confirms my opinion, viz. that in the oath of the barons, there is nothing expressed which does relate to any such trust lodged in them.

And, perhaps, there is not a better measure to be taken of what is the natural and proper business of these ancient officers, than what is compendiously and significantly expressed in the oaths, which have with great care and wisdom been formed and instituted for them to take.

The oath of the lord chancellor, the oath of the lord treasurer, and of the treasurer of the Exchequer, (which are both the same,) of the keeper of the privy seal, of a privy counsellor, of the chamberlains and other officers of the Exchequer, are as adequate descriptions of the duty and business of those several officers, as can be met with elsewhere.

The oath of the judges does amount to a very conclusive account of their duty: and the barons of the Exchequer have a known and undisputed jurisdiction as to all matters contained in the oath which they take.

'They are truly to charge and discharge the people: they are upon no consideration, nor by any ingene to let the king's right; nor to disturb or respite the right of any other persons contrary to law; nor to put the king's debts in respite, where they may be levied: they are to speed the king's business before all others: for no gift to conceal, disturb, or let the king's profit: to take nothing of any person to delay or deliver the people, but to do it, as they may, without hurt to the king: to redress what they think may turn to the prejudice of the

king, and if they cannot to discover it to him.'

But this great and important point of commanding the treasurer, and other officers of the receipt to do their duty, and to issue money out of the receipt of the Exchequer, according to their opinions, is not mentioned in the oath; nor such guard, for the king's security, set upon this transcendent power as there is upon all the rest of their business: and yet, if they have such a power, it is of a higher nature, and much greater consequence, than all the rest of their duty taken together.

The public treasure is of the highest estimation in the consideration of the law. Sir Edward Coke, 11 Rep. 91, b. says, 'it is the ligament of peace, the sinews of war, and the preserver of the honour and safety of the realm:' consequently the power of issuing this treasure is of the highest importance.

The lord treasurer (whose known business it is,) is expressly sworn 'truly to keep and dispend the king's treasure;' but if this notion prevails, he must from time to time dispend that treasure according to the opinion and directions of other officers, who are unsworn in that point.

V. In the fifth place I shall observe, that to suppose a power lodged in the barons to issue writs requiring the lord treasurer, or the treasurer of the Exchequer to do their duty, is to suppose a direct absurdity in the original institution of the Exchequer; since it is to invest the barons, who are subordinate, with a right of commanding their superior officers.

In the Mirror, cap. 1. § 14, it is said, 'that the business of the barons is done under the view or inspection of a sovereign, who is the treasurer of England.'

The words of Gervasius Tilburianus, speaking of the treasurer in his chapter of that officer, are; 'in omnibus enim et per omnia, quae vel in inferiori scaccario vel insuperiori gerantur, ipsius sollicita diligentia necessaria est.' Dial. de Scacc. lib. 1, c. 5.

Upon the constitution of a treasurer, there goes a writ under the great seal to the barons, as well as other officers, to be attendant upon him, as my lord chief justice Coke sets it down. 4 Inst. 105.

The phrase that he uses to the barons is, 'we will and require you;' so it appears ex parte Remem. regis, pasch. 3 Ed. 6, Rot. 4, where sir Roger Cholmley brings into court a writing under the seal of the duke of Somerset, then lord treasurer, in that form.

The next officer in order is the treasurer of the Exchequer, who is commonly the same person with the treasurer of England.

These two offices have gone so long together, that it is no easy matter to distinguish what is the proper business of the one and of the other. It seems to be the treasurer of the Exchequer, to whom the record, which is cited by sir Edward Coke, 4 Inst. 105, is to be applied; because he mentions that his letters patent are recited in the writ: for it is the

treasurer of the Exchequer, who is constituted by letters patent; as the lord treasurer is by delivery of the white staff, and, as the same sir Edward Coke says, in former times by delivery of the keys of the treasury. 4 Inst. 104.

Mich. 14 Eliz. Rot. 355, *ex parte* Remem. reg. The queen sends her writ to the barons, informing them that she had constituted sir William Cecil, lord Burleigh, treasurer of the Exchequer, and commands them to be attending upon him, *prout decet*.

I might add, if it were necessary in a matter so very plain, that his superiority appears in all the writs directed to them, in all which he is first named.

The next officer, in point of order, is the chancellor of the Exchequer.

After him are the chamberlains; which was anciently an office of very high dignity, and trusted to persons of the highest quality in the kingdom: but the office being such as might be executed by deputies, the chamberlains by degrees made themselves useless, by leaving all the business to their deputies; the consequence of which was, the office itself sunk by degrees to little more than a name. This might be easily shewn, if it were not to digress; but that they are named before the barons in divers writs and acts of parliament is certain.

The act of 26 H. 8, c. 3, which gives the first-fruits to the crown, observes that order throughout, treasurer, chancellor, chamberlains and barons.

I could mention many other acts and authorities. But I am sensible it is but an ungrateful subject to be lessening the rank of officers, who preside in one of the great courts of Westminster, and at the same time that this is not very necessary; since it will be granted that the treasurer of England, and the treasurer of the Exchequer, are certainly superior to the barons; which is enough for me to found myself upon, in saying that it carries a very great absurdity, that superior officers, in the proper business of their office, should be under the command of other officers of the same court, who are acknowledged to be inferior to them.

It must be confessed to be true, as my lord chief justice observed, that if my lord chief baron has a suit in the court of Exchequer, he must submit to the judgment of the barons: and I readily own the treasurer himself, and every body else who comes into that court as a suitor, must submit to the judgment of the court; for as a suitor he can be considered no otherwise than any other private person, and is not acting in his office. But then it must be granted, that all the other barons together have no power of commanding the chief baron as such; and consequently nothing can be inferred from thence to take away the absurdity which must ensue in supposing that the barons of the Exchequer, who in the order of the Exchequer are placed below him, can command the treasurer to do his duty, and issue out the king's money according to their judgments.

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It has been said upon this occasion that it is not the barons, but the king's writ, which the treasurer must obey. And it is most true, when the king's pleasure comes signified to him under the great or privy seal, he must obey it; because these are the fixed methods whereby the king's pleasure is to be known for the issuing of money: but that is no answer to the impropriety of his being commanded to act by writ, which comes to him under the *teste* of his subordinate officers only; nor a proof that such writ is an authority for him to act by, much less an obligation upon him to act according to the tenor of it.

I will only add, to shew the absurdity of the notion that the barons can command the treasurer by their judgment, that even that judgment of theirs is put under the correction of the treasurer; for the law has made the lord chancellor and treasurer the judges, who are to determine whether the judgments of the barons be erroneous, or not. Can any thing be more incongruous than to say, the barons by their judgment can require the treasurer to do a thing, and the treasurer can review that judgment, and determine whether it be fit for him to do it, or not?

It was said further, that the treasurer of the Exchequer is inferior to the court held before the barons, and that he is only ministerial as to Common Pleas. All that I shall say to this assertion is, that it was only said, and not proved; and therefore, till I shall hear upon what reason the assertion is founded, I will consider it no further.

VI. The sixth thing which I shall mention is, that the Exchequer, if it be considered as it comprehends the whole business of the revenue, as well relating to the *exitus* as the *introitus*, may be taken as one entire body, of which the treasurer is the head, and all the subordinate officers are parts and members; and in this extent and latitude it is treated of by Gervasius Tilburiensis: but if it be considered in its several parts, as to what is entrusted distinctly to the treasurer, and chamberlains, and what is put under the direction and government of the barons, it comprehends distinct courts, and such as have no proper communication one with another; though perhaps, as to some things, the treasurer, chamberlains, and barons, are intrusted jointly; as my lord chief justice Coke, 4 Inst. 105, says they are with the custody of the judicial records.

That the Receipt of the Exchequer is a court, and wholly under the treasurer, appears by the oaths of the officers belonging to it.

Particularly in the Black Book, the oath of the writer of the tallies is, 'truly to write all the tallies, and counter-tallies of all payments and assignments in the court of Receipt; and to give attendance and dispatch, according to the ancient custom of that court.'

Officers of the receipt are sworn 'to be faithful and true to the lord treasurer;' as appears by the oath of the lord treasurer's

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clerk, or auditor of the receipt. *Book of Oaths*, 20, 21.

The under-treasurer is sworn, 'to serve the king in the Exchequer, and in the receipt of the same; and to survey and order the receipts of all sums of money paid to the king's use in the said receipt, and the issue of the same.' *Book of Oaths*, 212.

The chamberlains are 'to enter and ingross the receipts of all monies received to the king's use at the receipt, as also the payments of the same; and not to assent to the deliverance of any of the king's money in the Treasury, without sufficient warrant.' *Book of Oaths*, 219.

If any orders are fit to be abolished or altered in the receipt, or any new orders to be made, it is to be done by the lord treasurer; and usually with the concurrence of the chancellor and under-treasurer: but the barons are not consulted, or consenting. This appears in the *Black Book*, fol. 76, 13 Eliz.

If the king thinks fit to command by privy seal, which has been often done, that any new order or method should be observed in any part of the receipts, it is usually directed only to the treasurer and the chancellor and under-treasurer. And if it be thought proper that it should be published and inrolled in the court of Exchequer, to the end that all officers and accountants might the better take notice of it, the lord treasurer and chancellor and under-treasurer come into the court of Exchequer, and the treasurer commands it to be published and inrolled, together with his own assent to it, and the assent of the chancellor and under-treasurer. But no notice is taken of the barons, though present, in any part of the business.

The whole form of this is particularly mentioned in the *Black Book*, fol. 82, 39 Eliz. when the lord Burleigh was treasurer.

Add to this, that according to the constitution of the Exchequer, the barons are not at all privy to the state of the treasure in the receipt, nor by law ought to be made privy; so that all they act must be merely as suitors apply to them, without any knowledge of what there is in the receipt to answer the writ, or of the public occasions of the state, from which it may be fatal to divert the money in the king's coffers.

VII. Seventhly, This method of proceeding does directly break through several received notions, which have been looked upon, in all ages, as maxims and rules of law.

As first, that no part of the king's treasure should be issued but by warrant under the great or privy seal; for which reason it is, that the law has put such guard upon these seals, that the counterfeiting them is high treason.

Gervase of Tilbury says in direct terms, *Dial. de scacc. lib. 1, c. 6*, 'thesaurarius et camerarii, nisi regis expresso mandato, vel presidentis justiciarii, susceptam pecuniam non expendant: oportet enim ut habeant auctoritatem rescripti regis de distributa pecunia.'

The 'president justiciarius' was the 'comes regni;' that great officer was sometimes called by that name, and sometimes by other names. And lest there should be a mistake of what is said of the president justiciary, he is careful to set the matter right by adding, that what was said as to him is only to be understood 'de brevibus presidentis justiciarii cum rex absens sit, et cum sigilli ejus impressione jura regni statuuntur.' *Ibid.*

I will not trouble myself to cite authorities to prove so known a position, as that no money can be issued out of the receipt but by warrant of the great or privy seal. I will only mention what was said by my lord chief justice Coke, in his report of sir Walter Mildmay's case, in the earl of Devonshire's case: and I choose to mention it, because the reporter was cotemporary to the judgment, given in the case of Wroth, if not in that of Nevil; and that his book was published several years after those judgments were given.

Sir Edward Coke says, 11 Rep. 91, b. 'That it was resolved in that case, that no officer of the king, nor all of them together, can issue out or dispose of the king's treasure ex officio, though it be for his honour or profit, unless by a warrant from himself.' These words are as apposite to the present occasion, as if they had been framed on purpose to destroy such a notion as is contended for in the cases before us.

The law has intrusted the king himself only with his treasure, when once it comes into his coffers, which is the receipt; and only he, or such as are empowered by his warrant, can dispose of it: no court has any thing to do with it.

This case of sir Walter Mildmay was adjudged, Mich. 37 and 38 Eliz. after the two cases of Nevil and Wroth; but not so long after as that it could be possible either of those cases should be forgotten: and therefore, the barons, who had sir Walter Mildmay's case before them, could not but know it, if the point, now in question, of the authority of the seal of the Exchequer, had been settled in those cases of Wroth and Nevil; or if in the debate of those cases it was taken to be known law, and the course of the Exchequer. According to sir Edw. Coke's report, the question was directly before them, 'what seals of the king might be a sufficient warrant to issue out the king's treasure.' One would think upon such a question they should not have forgot the seal of the Exchequer, which, as it seems now to be insisted on, is not only a sufficient warrant, but a better and higher authority than any other, and such as can enforce the issuing of the king's treasure, when the great seal itself fails. Yet there is not the least notice taken of the Exchequer seal in the book. It is laid down there first negatively, that every warrant of the king's is not sufficient: as for instance; his warrant by word of mouth is not; his warrant under the signet is not; and yet, as it is observed there, in some cases the law

takes notice of the signet; then, affirmatively, the book says in express words, 'the warrant which is sufficient in law to issue the treasure of the king, ought to be under the great or 'privy seal.' 11 Co. 92, a.

To evade the force of this argument, it has been suggested, as if what was found in the law books, to the effect which I have mentioned, was to be understood only of the common and ordinary methods of issuing the king's treasure.

The truth is, if the method now insisted on was a legal method, one would wonder it should not have been a very usual and ordinary one, since it is so very easy and ready for the subject.

I think it might be a sufficient answer to this suggestion to say, that it is an evasion to serve a purpose only, and has no proof or foundation for it to be found in the books.

But if the case, which was then before the court, be considered, there will appear to be no pretence for such a surmise. For the question there was, whether a warrant under the hands of the treasurer, and under-treasurer of the Exchequer, directed to the four tellers, for the payment of 100*l.* per annum to the chancellor of the Exchequer for his extraordinary and necessary services, was good in law; payments having been made according to such a warrant, and the money being demanded back again of the executors of the chancellor of the Exchequer.

Nothing could have been more natural than to have taken notice, upon such an occasion as this, that though the treasurer and under-treasurer could not by their warrant empower any payment out of the receipt, yet the barons by their judgment, and by issuing thereupon a writ under the Exchequer seal, could do it. And if the barons, on so fair an opportunity, had omitted to assert this power, yet it is very unlikely that sir Edw. Coke (who in his Reports does not confine himself to the case before the court, but does generally lay together all the learning in the law which comes under that title, so as to make them in the nature of common-places,) should omit to take notice of it: and it is yet more unlikely, that he should again make the same omission in his 4th Institutes; where he particularly treats of the jurisdiction of the Exchequer, and where it was not only proper but necessary to take notice of it, if he did not intend to leave his work imperfect.

There was another thing said by way of answer to this objection: that, in the case now depending, the judgment of the barons was not properly an issuing of the king's revenue, but that the revenue was issued by virtue of the great seal, and the authority of the letters patent: so that what the court did was but a determining of the right, a judgment that the letters patent were legal, and did bind the successor; and therefore the barons command that the revenue be issued out according to the letters patent.

If it be so, that the letters patent, and not the judgment of the court, are the warrant for issuing the money in this case, then the authority of the barons, as to the issuing of money out of the receipt, is given up.

But what then becomes of the authority of those cases of Nevil and Wroth? What was the warrant upon which the money was issued there? For in neither of those cases was there a warrant of the great or privy seal. And therefore, either those judgments must be founded upon some particular reason proper to those cases; and consequently those cases are not to be applied as precedents for warranting the judgments now in question; or else they prove a direct power in the barons of commanding the treasure out of the receipt, by no other warrant but the Exchequer seal.

If this answer be considered the other way, and it be taken, that the great seal is to be the warrant to the commissioners of the Treasury, in this case, for issuing the money, and not the judgment, or the Exchequer seal, what does this whole proceeding signify? What is done by this judgment? And what is to be done by the writ that is to issue upon it?

The authority of the great seal for the issuing money was the same before the judgment as it continues after: the judgment is drawn up in the words of the letters patent; and what was said before under the great seal, is now said again under the seal of the Exchequer; a seal much less considered in the law: and if after all it be admitted, that the money, if issued, must be by warrant of the great seal, the consequence then must be, that after all these proceedings the thing is but just where it began.

If it be understood, that this writ is no more than a certificate to the lords of the Treasury of the barons' opinion, that the letters patent are good in law, and continue in force in the time of the successor, it is perhaps what the barons might properly do: especially, if the question had come judicially before them in any suit depending; or, according as the ancient course was, if a direction had gone under the great seal to the treasurer and them, to have looked into the letters patent, and considered of their validity. But then, it is but a certificate: it is not a judgment upon which a writ of error will lie; and we are all in a mistake, while we are debating here as if a proper judgment was regularly brought before us.

Therefore, I take it for granted, this was said only to make the thing a little more plausible. It looked not only new, but harsh, I will not say absurd, to affirm directly, that if the barons issued out a writ under the Exchequer seal, commanding the lord treasurer to pay a sum out of the receipt, he must obey it; and therefore the letters patent were mentioned. But I think it is plain, unless a writ under the seal of the Exchequer be a good warrant and discharge to the treasurer and chamberlains in point of law if it be obeyed, and be compulsory upon them to obey it, the whole proceedings in this case are ineffectual, and carry things no

farther than just where they were when the suits began.

Secondly, The judgments given by the barons in these cases, are not consistent with another known maxim; that when once money is paid into the receipt of the Exchequer, no court has any power over it, nor is there any legal method to fetch it back again; although, in several cases, if it had not been actually paid into the receipt, it might have been restored to the party.

To this purpose nothing can be more strong than the common cases of reversals of outlawries and judgments; where, though by the judgment of reversal, the party is to be restored to all that he has lost; yet whatever has been actually brought into the receipt of the Exchequer is gone past redemption: and yet when the outlawry, or judgment is reversed, it is to all purposes as if it had never been. And these are cases of restitution which are most favoured in law, and the relief extended as far as possible.

In like manner, when upon an office, or inquisition, a title is found for the king, and the mean profits are paid into the receipt, if upon a 'traverse,' or 'monstrance de droit,' judgment be afterwards given for the subject, and an 'amoveas-manus' awarded, yet as to profits paid into the receipt there shall be no restitution.

This is so known, that in cases before the barons, where there is a question touching the profits of an estate whereof the title is found for the king, if they conceive a doubt upon a suggestion of a subject's right, which may hereafter appear, they will in discretion direct the money to remain in the chamberlain's hands for a time, and not to be paid immediately into the receipt; because when it is once there, it is out of their power, and cannot be brought back again.

It cannot be but that in these cases the law is so. But my lord chief justice endeavoured to assign several reasons, which might distinguish these from other cases. He said, that judgments and outlawries are reversed in the King's-bench, and that the King's-bench cannot send a writ to the treasurer and chamberlains requiring them to pay money out of the receipt; it is only the barons can do it; nor can the barons do it in those cases, because the record of the judgment is in the King's-bench, and there is only a transcript in the Exchequer, upon which they cannot send a writ.

I can easily agree, that the King's-bench cannot send a writ to the treasurer and chamberlains to command money out of the receipt of the Exchequer; and I think I have proved there is no such power in the barons; but if the barons have such a power in any case, I am inclined to think it would be no good reason why they might not exercise it in these cases, that they have not the record itself, but only the transcript of the record; because the process of the Exchequer issues every day

upon estreats, which are transcripts, or indeed extracts of records only.

As to the other cases, of money levied upon offices or inquisitions found, my lord chief justice observed, that there was a difference between a judgment upon a petition of right, and a judgment upon a traverse, or a 'monstrance de droit.' That in the first case, the judgment was general, 'that the king's hands should be removed, and the party restored to the possession;' but in the other case the judgment was, 'that the party should be restored, una cum exitibus et proficuis inde medio tempore perceptis;' and so he compared a judgment on a petition of right to a real action at common law against a subject, in which there were no damages; and a judgment on a 'monstrance de droit' to a possessory action, in which damages were recovered at common law.

To this I answer, that the cases of subjects are not to be compared to the case of the king; and that at the common law, before the statute of 'articuli super chartas,' the subject, in no case of an *amoveas manus*, could have any judgment for restoring issues, however false the office appeared, as sir Edward Coke expressly affirms. But be that as it may, yet this distinction makes nothing to the present question. For in cases of 'monstrance de droit' or traverses, where the judgment is to restore the party to the mean profits, it is generally expressed 'unde dicto domino regi nondum est responsum;' and where these words are omitted, the same are understood. If the profits remain in the tenants hands, or if they are *in transitu* in the hands of the receivers, though the receivers have accounted for them, the party is restored to them: but if they are answered into the receipt, they are lost to him. This is affirmed by my lord chief justice Coke, in his commentary upon the statute of 'articuli super chartas,' c. 19, [2 Inst. 572, 573,] which act was made 28 Ed. 1, and the statute *de excheatoribus*, which was made the year following. And yet the words of the statute are very full, that upon an 'ouster le main,' because there was no cause to seize, 'soient les issues pleinement rendus a celui a que la terre demurt, et avert le damage reative.'

It is not a very difficult matter to find out a seeming reason to support a conclusion one is determined to make; but it is lost time to dispute of the strength of such arguments, where it is easy to come to as much certainty as is consistent with the nature of the thing.

There are many of these judgments upon traverses and 'monstrance de droit' to be found upon record, where the party is to be restored to the possession, 'una cum exitibus et proficuis inde medio tempore perceptis.' If it could be made appear, that upon any such judgment money was paid back out of the receipt of the Exchequer, or if any writ could be produced, requiring the treasurer and chamberlains to make restitution, it would be to me

a much more cogent argument, than any new plausible reason which may be assigned. But of this there is no footsteps in any ancient or modern book. If it never was done, the old known reason will best serve our turn, that it was because the money was paid into the receipt, and then no court had power to intermeddle with it.

VIII. Eighthly, This does seem to be an extraordinary and anomalous method of proceeding, and such as has nothing like it in any other court, either when the subject sues the king, or any other subject.

This method of proceeding takes from the king all possibility of making a defence: for the attorney-general does not come in till the barons have commanded the letters patent to be enrolled: after which the attorney-general could not plead *non concessit*, as he might have done before; or if he could have pleaded that plea, no venue is laid, and consequently no trial could be had on such issue. And a proper defence being thus taken away, or, which is all one, the trial of it rendered impracticable, no course of any court can make such a proceeding good.

It was confessed, that the legitimization of a case is to be suspected unless there be another like it.

But it was said, that in other courts cases might be found, which might properly be resembled to the proceeding in this case; and the case in Co. Ent. 93, was instanced. I will put that case as it stands upon the record.

A claim is put in by the lord Hunsdon, to a sum of 18*l.* 11*s.* 8*d.* which is charged upon the accounts of the several sheriffs of Kent and Dorset for the last year, for issues out of the Common Pleas and King's-bench; and for fines and amerciaments before the justices of assize; and for issues and amerciaments before the barons of the Exchequer, &c. (the particulars are expressed in the claim;) which were severally set upon his tenants, or resiants within his manor and hundred of Sevenoakes, and Coddesheth: all which he claims to belong to him, the persons, upon whom they were severally set, being tenants or resiants within his manor and hundred, as the said sheriff of Kent had testified upon his account.

And he sets out letters patent of Ed. 4, granting to the archbishop of Canterbury and his successors the return of writs, and all fines and amerciaments of tenants and resiants within the manor, &c. and so proceeds to shew a title in the archbishop to the fines, &c. with which the sheriff was charged: and then shews the inrollment of these letters patent in the Exchequer, in the third year of Ed. 4; and that Cranmer was seized in right of his archbishopric, of the said manor, hundred, and liberties, &c.

Then he sets forth the act for erecting the court of Augmentations, whereby all manors, &c. which H. 8 should purchase, were put under the government of that court: after

which act, Cranmer by deed inrolled conveyed the manor and liberties to H. 8, and his heirs; which grant was confirmed by the prior and convent of Canterbury. And then he sets forth the act of 32 H. 8, c. 20, for reviving and continuing liberties and privileges in the hands of the king; by virtue whereof, &c. H. 8 was seized, and died seized: and so conveys a title to Ed. 6, and queen Mary: and that upon her death queen Elizabeth became seized; and that she granted the manor, hundred, and liberties, to him and his heirs males; and that he entered and was seized. He then proceeds to plead an allowance in the Exchequer of these fines and amerciaments to the archbishop of Canterbury, in the time of Ed. 4: and so makes his claim; which the attorney-general confesses.

And thereupon, on view of several records, and for that the sheriff of Kent, upon oath, did testify the matter of fact, that the several persons, on whom the fines and amerciaments were set were tenants and resiants in the manor and hundred of the lord Hunsdon, the barons adjudge, that the sheriff of Kent should be discharged of 10*l.* 6*s.* 4*d.* with which he stood charged upon his account: and that the same be allowed to the lord Hunsdon; and thereupon the sheriff had his quietus.

Upon this case I observe.

1st, That it has no relation to any money in the receipt of the Exchequer.

2dly, This is a proceeding in discharge of the sheriff upon his account: the question being only, if the sheriff should be charged with so much as payable to the king, contrary to what he had testified upon his account on oath. So that this question was the proper business of the barons to determine.

3dly, This claim of the lord Hunsdon's was by way of defence to a demand on the king's part, and not by way of suit of the subject to recover from the king: and this demand, on the king's part, is so far from being founded on the record, that it is contrary to what the sheriff had sworn upon his account.

4thly, This was not a claim which came at that time originally before the court; but was founded upon antient allowances, before made in the court of Exchequer.

5thly, Here was no positive record for the king; it being only a general charge upon the sheriff and he having discharged himself by oath.

6thly, This is a case directly within the statute 5 R. 2, which impowers the barons to allow the matter pleaded by way of discharge upon account.

By all which it appears, that there is no manner of resemblance in that claim of my lord Hunsdon, to the cases before the court; where the subject comes originally as a plaintiff, and makes a demand of money out of the receipt of the Exchequer.

Another case, cited by my lord chief justice, as a proceeding that might be resembled to the

cases now before the court, was that of the lady Broughton; which is entered Trin. 24 Car. 2, Rot. 58, B. R.

There an information was exhibited against the lady Broughton, for divers misdemeanors committed by her, as keeper of the Gatehouse prison at Westminster. Upon not guilty pleaded, a verdict was found against her; and judgment was given that she should be fined 100 marks, 'Et quod officium custodis prisonæ prædictæ capiatur in manus domini regis, quousque curia hic constiterit cui vel quibus officium illud de jure spectat, vel quousque curia hic ulterius ordinauerit, salvo jure cujuscunque,' &c.

Whereupon the dean and chapter of Westminster come in, and set forth their title to be a corporation; and that king James 1, granted to them and their successors, 'habere prisonam et arrestacon' et imprisonment' omnium hominum arrestat' infra civitat' et libertat' Westm' adeo libere quiete et integre ac in tam amplissimo et forma prout ultimus abbas, &c. in premissis habuit,' to hold to them and their successors to their use for ever, &c. by virtue whereof they were seized 'de libertatibus habendi prison' et arrestacon' et imprisonment' omnium hominum infra civitat' et libertat' Westm', ut de feodo et jure, in jure ecclesiæ, &c.'

And then they set forth the grant by them to sir Edward Broughton and Mary his wife, of the office 'custod' prisonæ sue prædictæ, simul cum omnibus feodis, &c. habend' to them, their executors and assigns, for forty years; by virtue of which they were possessed, &c. and that sir Edward died: and that Mary, as survivor, was possessed; and for divers offences, by her committed in the execution of the said office, (whereof she was convicted,) forfeited the said office, prout the record.

'Et ea de causa prædictæ dec' et capitul' petunt et calumniant libertat' habendi et disponendi officium prædictæ, &c. Et petunt allocationem libertat' prædictæ, secund' concessionem sic ut præfertur factam; and make the proper averments. The attorney-general confesses their claim, and thereupon they have judgment.

I acknowledge that I am much to seek as to any thing appearing in this record, which is in the least to be resembled to the cases before us.

Judgment was given against the keeper of a prison, of forfeiture of the office for a misdemeanour: by that judgment the office was vacant; but it did not appear to the court in whom the right was of disposing, or exercising the office. Upon such an avoidance, it was necessary for the sake of public justice, and to prevent the escape of the prisoners, that the office should be taken into the king's hands, till it might appear to the court in whom the right was; but it was only quousque, and with a salvo jure. So that no title to the office is found, or so much as alledged for the king: and when the dean and chapter, in pursuance of the very direction of the judgment, come in,

and set out their title, the attorney-general confesses it, and they are put into possession.

I do not see but notwithstanding either of these two instances, the cases before us stand by themselves; and that the argument against these kind of proceedings does still remain in force, because they are unusual, and of an unprecedented nature, and such as the counsel can scarce find a name for.

In their arguments upon these cases some of the counsel said, that the proceeding was in the nature of a 'monstrance de droit.'

Others, with more circumlocution, stiled it, 'an application to the court of Exchequer, setting forth a right to part of a revenue in charge before them, which the officers under their power refuse to pay.'

Others said it was neither a petition, nor a 'monstrance de droit;' for those were only proper when the suit is in disaffirmance of the king's title, but here the subject claims from the king, and complains only of the officer; but they gave it no name.

My lord chief justice was pleased to say that this suit was a 'monstrance de droit;' and, I think, I may affirm that to be the first time it had a certain name. Plowden calls sir H. Nevil's case, 'a report of a judgment given by the barons, upon the exhibiting to the court of Exchequer, by sir H. Nevil, a deed of grant of the office of keeper.'

My lord chief justice said, that a 'monstrance de droit' was a common law remedy. He owned that though several statutes had enlarged the relief, which the subject might have in many cases where there was occasion to interplead with the crown; yet the cases in question did not come within the relief of any of those statutes, but remained the same as at common law. But he said, this suit was a 'monstrance de droit' maintainable at common law, and was the subject's proper remedy when his title appeared upon record. And that the party might in this case maintain his 'monstrance de droit,' and was not put to his petition of right to admit himself out of possession.

1st, Because the right he claimed is not grounded on a matter of fact, but by matter of record; Williamson claiming by a deed inrolled, and that inrollment directed by the letters patent, which is a matter of record.

2dly, Because the party does not go about to destroy the king's title, but his claim subsists upon the king's title to the excise.

3dly, Because his annuity is not turned to a right, nor devested; and therefore it was not necessary he should go by way of petition.

I will not, at this time, enter into the particular consideration of those reasons. Though I cannot but say, in the first place, it is far from being clear to me, when letters patent direct, that the assignment of one subject to another should be inrolled within thirty days before the auditor of the receipt, or clerk of the pells, for a particular purpose, (viz. that it may appear what assignments have been granted,) that

such an inrollment does make a record ; much less such a record as is equal to that record which intitles the king. And if it be not a record of as high a nature, the subject is put to his petition, and in no case can have a 'monstrance de droit ;' as is resolved in *Piers Partifield's case*, 29 Ass. 31 ; and is agreed, and declared to be law in the commonalty of *Sadler's case*, 4 Co. 55, b. and 56, a.

In the second place, I cannot understand, but that a person, who sets up a title to the inheritance of a part of the excise, and seeks to recover it from the king, does go about to defeat the king's title to that part of the revenue.

Nor will I, in the third place, enter into the debate, whether, as this case is, the annuity be divested or turned to a right. Though I cannot but observe, that a writ of annuity, (and this suit is in the nature of such a writ,) is the highest writ which such a person can pursue ; and the judgment given upon that writ is for the whole inheritance, for the time to come, as well as for the arrears : and therefore it might seem, that he who brings it doth admit himself to be divested of the whole.

But I will very plainly own, that after consideration of this argument, with the best application I could use, several doubts remain with me as to the force of it.

As 1st. Whether a 'monstrance de droit,' in the sense it is now taken, and commonly understood, and as it seems to be applied to these cases, did lie at the common law.

2dly, If that were to be admitted, because I would not dispute about words or names, yet I am not satisfied that this suit can properly be called a 'monstrance de droit.'

3dly, Let this suit have what name it will, yet I think it is not the proper common law remedy, to which the subject was entitled in a case of this nature ; but that the party was put to his petition of right.

I. The first thing I shall do, is to shew why it seems doubtful to me, whether such a suit as a 'monstrance de droit,' as it is now understood, did lie at the common law.

I will not be thought to mean, that the subject had not, in several cases, a proper way of defending himself at common law against the king, and by proper application to the courts to obtain an 'ouster le maine.' But I do say, wherever the king had a direct title of freehold, or inheritance, appearing for him by matter of record ; (whether that record was judicial, or ministerial ; or was a conveyance of record ; or was a matter of fact found by office of record ;) the subject at common law was put to his petition of right, and could not interplead with the king, either by traversing the king's title, or avoiding it by setting up any title of his own : and in this I say no more than what was agreed in the commonalty of *Sadler's case*, 4 Co. 55, a.

It is very true, if the office did not entitle the king to the possession, but only to the bringing of a *scire facias* ; (as if a 'cessavit per bien-

'nium,' or a fine by collusion, or the committing of waste, was found against the king's tenant by inquisition ;) upon a *scire facias* brought, the party at common law might come in and defend the possession, by shewing his title, and denying the matter found against him. For it was what the writ itself expressly required : and it would have been very absurd to say he should not be admitted to do that which the very writ required him to do : and by the *scire facias* he was made privy, and had a day to plead. *Kelw. 155, p. 158, a. b. 4 Co. 56, a. b.*

And therefore such a traverse, or, if that name be better liked, such a 'monstrance de droit,' lay at common law.

In like manner, where the office contained the whole special matter ; so that though there might be such matter found, as if it stood alone, would make a title for the king ; yet, if there was also found, in the same office, sufficient upon the whole to shew a good title in the subject, the subject might insist upon this matter, and might pray an 'amoveas manum :' because in truth the very record, upon which the king seized, made a title for the party. 4 Co. 55, a.

As suppose it to be found, that A. did disseize me of lands holden of the king, and that A. aliened in mortmain, or died without heir ; in this case, I may pray an 'ouster le main' upon the very record. So, if it be found that the king's tenant, at the time of his death, held an acre of land of me by lease for his life. *Kelw. 156, b. 157, a. 158, a. 4 Co. 55, a.*

In like manner, if the title found for the king appears, by the record, to be determinable upon performance of a condition, and that condition appears upon the record to be performed, the party might take advantage of it. 4 Co. 55, a. b.

But as the common law stood, wherever a title for the king only was found by matter of record, though it was false, the party could not traverse it, so where a title was found for the king which was true, but it was disclosed in the record, that the subject had a good right, which would avoid the title found for the king ; yet in that case the subject could not have been admitted to shew it, but was so far concluded as to be put to his petition of right. 4 Co. 56, a.

I need not mention *Bracton's* words for this purpose. [Lib. 1, c. 8, et lib. 4, c. 10.]

Stamford's opinion is expressly, that a 'monstrance de droit' was given by the statute 36 Ed. 3, and did not lie at common law. *Prer. Reg. cap. 21, fol. 71.*

And in the case of the Corporation of *Sadlers*, which has been mentioned before, as it is reported by my lord chief justice *Anderson*, 1 And. 180, 181, num. 216, it is expressly affirmed, 'that the 'traverse' and 'monstrance de droit' are both given by that statute.' Nor do I see, that any thing to the contrary of what I have said is affirmed in the report of this case, by my lord chief justice *Coke*. Unless it be, that he gives the name of a 'mon-

'strance de droit' to those proceedings, which were always admitted to have been at the common law; that is, where the special matter was so found, as that, upon the same record, it did appear, that the right was in the party, and not in the king: whereas, in proper speaking, it is not the subject there who comes in and shews his right, but the king's own record shews it.

But I think it very plain, that the statute 36 Ed. 3, cap. 13, which gives a 'traverse' in case of offices found, does also give the 'monstrance de droit'; which my lord chief justice Coke himself, in the commonality of Sadler's case, does agree was not given by the statute 34 Ed. 3, cap. 14. For though that statute gave the subject a 'traverse' in some cases, where the office was found by virtue of a writ, or a commission; yet it was defective, even in those cases: for upon the 'traverse' taken, though the issue was found for the subject, yet no judgment could be given without a new commission 'de procedendo ad iudicium.' 4 Co. 56, 57.

The words of the stat. 36 Ed. 3, are, 'that if any one will put in a claim to lands seized by office, the escheator is to send the inquest into Chancery, and a writ is to be delivered to him to certify the cause of the seizin there.' And there the party 'soit oye sans delaye de traverser l'office, ou autrement monstrer son droit, et illoques maunde devant le roy, a faire final discussion sans autre maundement.'

These words, as I take it, gave the name of 'monstrance de droit' to that sort of proceeding; and I think I may affirm, with Stamford, that no book before this statute did treat any thing of a 'monstrance de droit.' *Stamf. c. 21, Prer. Regis.*

That it was this statute which gave the subject a right of interpleading with the king, where an absolute title was found for the king by office; and that the subject is still put to his petition in all cases out of the remedy of that statute, (as in all cases where the king is entitled by a judicial record;) is what appears plainly by the lord Hungerford's case, which is 4 Ed. 4, 21, 22, and also by 9 Ed. 4, 52, and 13 Ed. 4, 8, and by many other cases. I need not be at the trouble of citing them all.

II. But in the second place, suppose it should be admitted, that a 'monstrance de droit' did lie at common law, yet still it remains a doubt to me, how the proceeding in this case can be called by that name.

In cases where an office is found by which the king is entitled to the possession, by the stat. 36 Ed. 3, (and take it for granted at present, in some cases at common law,) the subject may come in and interplead with the king; either by denying the title found for the king, or by shewing his own right, whereby he does avoid the title found for the king.

This is that kind of proceeding which is called a 'monstrance de droit.' And in this sort of proceeding, the subject is in the nature of a defendant, and comes in and pleads to a

title found for the king: and the judgment is, 'quod manus domini regis amoveantur.' This appears, 1 Co. 157 in Digg's case; 4 Co. commonality of Sadler's case; and by the cases in Co. Entries. So is the case of Coningsby and Malham, in *Kelway's Reports*, 154. In which case it is said, 'that the amoveas manes is the end of every suit, where a man comes in to interplead with the king; for without that judgment the land will still remain in the king's hands.' *Kelw. 158, a.*

And therefore, where that judgment cannot be given, the party shall not be admitted to traverse a false office, or to interplead with the king, though the case be otherwise such as comes within the remedy of the statute of 36 Ed. 3.

As, where a man has a remainder, or reversion, expectant upon an estate of freehold, without any rent, or profit, and a false office is found of the dying seized of such a remainder, or reversion; he shall not be admitted to traverse this false office, because the judgment cannot be given, 'quod manus domini regis amoveantur;' as was adjudged in the case of the countess of Rutland, 2 Inst. 688.

But in these cases before us, neither does the party ask any such judgment; nor are the judgments, which are brought before the court by these writs of error, any thing like it.

If this be a 'monstrance de droit,' the judgment ought to be such as the law hath ordained in cases of that nature: but here the suit is plainly in the nature of a writ of annuity; the party concludes his demand in the same manner as in a declaration for an annuity, and the judgment is given accordingly.

III. The third thing I will consider is, supposing it were taken for granted, that a 'monstrance de droit' did lie at common law; and that this suit of Williamson's is such a 'monstrance de droit,' whether yet this 'monstrance de droit' be the proper remedy maintainable at common law in a case of this nature? For, as Fineux says, in the case of Coningsby and Malham, *Kel. 157, b.* 'though the parties have ever so good a right, yet they must come to the possession of what they have a right to by the ordinary method of law; for,' says he, 'if a man owes me money, I cannot take it out of his purse, nor can I recover it by an improper action.'

Let us see then what this suit is for; and what was the course taken at common law to recover a thing of this nature.

The suit is for the arrears of an annuity, granted to sir Robert Vyner and his heirs, by the king's predecessors, out of a branch of the hereditary revenue of the crown, and by him assigned to Williamson; as also for the growing payments, that they may be answered from time to time, as they become due.

Now, as far as I can find, by the common law, in all cases where arrears of an annuity, or annual rent or sum, were demanded by the subject from the crown; (whether it was ori-

ginally granted by the crown out of any part of the revenue; or was issuing out of lands which afterwards came to the crown;) the only remedy, which the subject had for recovering thereof, was by petition to the king.

The authorities are very express and full in this matter.

Suppose a man hath a rent-charge, or a rent-service, or other rent, issuing out of land by prescription, or grant; and this land comes to the king by grant, or forfeiture: in all such cases the owner of the rent is put to his petition to the king, and hath no other remedy whatsoever.

In like manner, if a man be seized of land, and acknowledges a statute, or recognizance, and before execution taken, the estate comes to the king by attainder: or the tenant grants to the king by deed inrolled: in either case the couzee is put to his petition, and has no other remedy; unless the whole matter be specially found in the office. 4 Ed. 4, 23. Stamford de Prerog. Regis 75, c. 22. Kelway, 155, b.

A man holds lands of the king in chief; and other lands, by knights service and rent, of other lords; and dies, leaving his heir within age: the king seizes the body and lands held in chief; and also the other lands, which the ancestor held of other lords. The heir shall pay his relief to the other lords when he comes to age: and as to the rent during the nonage of the heir, the lords shall sue to the king by petition to have the rent of the lands which are held of them by the heir, who is in ward to the king; and shall have it by this means. So is 13 H. 7, 15, pl. 11. 24 Ed. 3, 24, pl. 5.

And that the law is so, is affirmed in all the abridgments of the case; and particularly Bro. title Pet. 43, makes a special reference to the statute 2 and 3 Ed. 6, c. 8, of offices. [Fitz. relief 7, traverse 43.]

And that the law continued so till the making of that statute, does sufficiently appear by the statute itself. For in the seventh branch of that act, it is expressly taken notice of, that, in the case abovementioned, 'the mesn lords would spare the rents due to them for the lands holden of them during the king's possession; and after the heir had sued his livery, would distrain upon him for the arrearages, where they should have sued by petition to the king's majesty, to have obtained the same out of the king's hands.' And that statute enacts a new relief for the mesn lords; 'that they should receive the rents, during the wardship, from the king's officers appointed to receive the profits of the warr's lands: and that such officers' payment, and the acquittance of the mesn lord, should be a good discharge to the officers.'

From hence it is plain, that before this act, there was no remedy for the mesn lords, but by petition. And it may be observed, that the remedy given is by sending them to the receivers in the country, and not to the receipt of the Exchequer. And this clause does ex-

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plain the general words of the preamble of that statute: which takes notice, 'that persons having any rent, common, fee, or other profit fit apprender, out of lands, or tenements, specified in such offices, or inquisitions, were without remedy to obtain or have the same, by any traverse, or other speedy mean, without great and excessive charges, during the king's interest therein.'

And since that statute, in the case of Wicks and Dennis, 31 & 32 Ed. 1 Leon. 190, it was holden by the whole court, that during the queen's possession of the land, the rent charge issuing out of it is only recoverable by petition: although the demand of the rent was agreed to be good; because in his petition the party must shew that he did demand the rent.

And as the law is plainly so, where a person has a title to a rent, by grant of a subject, out of lands which come to the possession of the king; so the case is to all purposes the same, where he has a title to a rent, or yearly sum, by letters patent from the crown.

18 Ed. 4, 5, pl. 15. The king grants a rent out of his manor: 'the manor is not charged, but the king by petition.' These are the words of the book.

And as that book is an express authority that this was the law, so was the practice accordingly.

In 18 Ed. 1, Ryley's Placita Parliamentaria, 52, the abbes de Fonte Eboraldi sues to the king by petition for the arrears of an annuity of 10*l.* per ann. granted by H. 3, to the abbes of that place, and her successors.

In 35 Ed. 1, Ryley 329, is the petition of John Hernigod for the arrears of a rent of 7*s.* 8*d.* So also was Everle's case, and the abbat and convent of Warden's case, before mentioned.

In like manner, it appears by the same book, that the same method was to be taken for recovering a rent, &c. granted by a subject out of lands which afterwards came to the crown.

33 Ed. 1, Ryley 256, 257, Elsefend's case; & 245, the abbat and convent of Oseney's case. So were Peche, the tenant of the bishop of Ely, who held of the bishop, as part of his barony, four knights fees, granted these lands to the king, the bishop was put to his petition to recover his services. 33 Ed. 1, Ryley 249.

Upon the exile of the Jews, in the time of Ed. 1, divers lands came to the king's hands by way of excheat: the chief lords, of whom those lands were holden, had no remedy to recover their services in arrear, but by petition. 21 Ed. 1, Ryley 129.

By all these authorities, and by many others which I could cite, both ancient and modern, it is plain, that if the subject was to recover a rent, or annuity, or other charge, from the crown; whether it was a rent, or annuity, originally granted by the king, or issuing out of lands, which by subsequent title came to be in the king's hands; in all cases the remedy to come at it was by petition to the person of the king: and no other method can be shewn to have been practised at common law.

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Indred I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff, to recover any thing from the king, his only remedy at common law, is to sue by petition to the person of the king. I say, where the subject comes as a plaintiff. For, as I said before, when, upon a title found for the king by office, the subject comes in to traverse the king's title, or to shew his own right, he comes in in the nature of a defendant; and is admitted to interplead in the case with the king in defence of his title, which otherwise would be defeated by finding the office. And to shew that this was so, I would take notice of several instances.

That, in cases of debts owing by the crown, the subject's remedy was by petition, appears by Aynesham's case, Ryley 251, which is a petition for 19*l.* due for work done at Carnarvon castle.

So Ryley, 251, the executors of John Estratelen petition for 152*l.* due to their testator for wages. The answer is remarkable; for there is a latitude taken, which will very ill agree with the notion that is taken up in this case: 'Habeant bre' de liberate in cane' 'thes. et camerar' de 32*l.* in partem solutionis.'

So the case of Yerward le Galeys for 50*l.* Ryley, 414.

In like manner, in the same book, 253, 33 Ed. 1, several parties sue by petition for money and goods taken for the king's use; and also for wages due to them; and for debts owing to the king. The answer is, 'Rex ordinavit per consilium thesaurarii et baronum de scaccario, quod satisfiet iis quam citius fieri poterit; ita quod contentos se tenebunt.' And this is an answer given to a petition presented to the king in parliament; and therefore we have reason to conclude it to be warranted by law. They must be content, and they shall be paid, 'quam citius fieri poterit.'

The parties, in these cases, first go to the king by petition: it is by him they are sent to the Exchequer; and it is by a writ under the great seal, that the Exchequer is impowered to act. Nor can any such writ be found, (unless in a very few instances, where it is mere matter of account,) in which the treasurer is not joined with the barons.

So far was it from being taken to be law at that time, that the barons had any original power of paying the king's debts; or of commanding annuities, granted by the king or his progenitors, to be paid, when the persons applied to them for such payment.

But perhaps it may be objected, that it is not to be inferred, because petitions were brought in these cases, that therefore it was of necessity that the subject should pursue that course, and could take no other way. It might be reasonable to require from those who object thus, that they should produce some precedents at least, of another remedy taken.

But I think there is a good answer to be given to this objection. All these petitions which I have mentioned, are after the stat. v

Ed. 1, Ryley, 442, where notice is taken 'that the business of parliament was interrupted by a multitude of petitions, which might be redressed by the chancellor, and justices.' Wherefore it is thereby enacted, 'that petitions which touch the seal should come first to the chancellor; those which touch the Exchequer, to the Exchequer; and those which touch the justices, or the law of the land, should come to the justices: and if the business be so great, or 'si de grace,' that the chancellor, or others, cannot do them without the king, then the petitions shall be brought before the king to know his pleasure; so that no petitions come before the king and his council, but by the hands of the chancellor, and the other chief ministers; that the king and his council, may attend the great affairs of the king's realm and his foreign dominions.'

This law being made, there is reason to conclude that all petitions brought before the king in parliament after this time, and answered there, were brought according to the method of this law; and were of the nature of such petitions as ought to be brought to the person of the king.

And that petitions did lie for a chattel, as well as for a freehold, does appear 37 Ass. pl. 11. Bro. Pet. 17. If tenant by statute merchant be ousted, he may have a petition, and shall be restored. Vide 9 H. 4. 4 Bro. Pet. 9.

9 H. 6. 21. Bro. Pet. 2. If the subject be ousted of his term, he shall have his petition.

7 H. 7. 11. Of a chattel real, a man shall have his petition of right, as of his freehold.

34 H. 6. 51. Bro. Pet. 3. A man shall have a petition of right for goods and chattels; and the king indorses it in the usual form.

It is said indeed, 1 H. 7. 3. Bro. Pet. 19, that a petition will not lie of a chattel.

And, admitting there was any doubt as to that point, in the present suits we are in the case of a freehold.*

I will now enter into the consideration of the two cases, which have been principally insisted upon, as warranting the proceedings in the suits which are now depending. I mean the cases of sir H. Nevil and sir T. Wroth: both of them reported by Plowden; and both adjudged in the reign of queen Elizabeth.

Indeed the pleadings in the cases before us have been formed upon these precedents.

Sir H. Nevil exhibits to the barons a writing of the late archbishop of Canterbury, dated the 15th of Nov. 22 H. 8, purporting to be a grant to him, and one sir Edward Nevil, (lately attainted for treason), of the office of keeper of Aldington park, and of the rent of 3*l.* 10*s.* for the exercise of the office, to be received out of

* As to this, Mr. Serjeant Hill, in a MS. Note, observed, that "according to the tenor of lord Sommers's Argument, he thought a Petition of Right would lie, but no benefit was derived from it, and parliament was afterwards obliged to provide a particular fund towards payment of the debts."

the manor of Aldington, *habendum* for their lives and the life of the survivor; which grant was confirmed by the prior and covent; and prays it may be inrolled. (Plowd. Com. 377.)

The barons receive the writing, and cause it to be read and inrolled. And thereupon sir H. Nevil alleges, that he is three years in arrear, and that during that time the manor has been, and does remain in the king's hands; and prays that the writing may be allowed, and the arrears paid him, and the growing rent during his life.

The attorney-general demurs. And after eight or nine years depending, judgment is given, 'that the writing should be allowed, and the arrears paid at the receipt of the Exchequer, and also the growing rent.'

Then sir Henry prays a writ to the treasurer and chamberlains of the receipt to execute the judgment; which is granted.

It has been observed, that the questions made in this case were only,

1. If the office was forfeited by the attainder of sir Edward?

2. Whether the annuity was not gone, though the office was not forfeited?

Not one word is said touching the nature and manner of the proceedings throughout the whole debate of the case, though it lasted so many years.

It is true, Plowden adds a remark of his own, 'that thereby might be seen the order and form, how one, who has a rent out of lands in the king's hands, may come to it by petition to the court of Exchequer, without petition to the person of the king: and how he shall have the judgment executed. For it is not the order to command by word of mouth that the payment be made; but a writ in form aforesaid shall be awarded by the barons: which is a judicial writ under the seal of the Exchequer, and is a sufficient warrant to the treasurer and chamberlains to pay the arrears, and growing rent.'

This observation of Plowden's hath been variously interpreted in speaking to these cases, according as the persons concluded differently.

It may be said, his observation is an argument that he approved of the method, and looked upon it as law.

But it may be also inferred,

1. That it is an observation which he founded only on that case; for he says from this record you may see, good reader.

2. That it was new to him; otherwise he had not added such a remark to his report.

3. That he looked on the other way by petition, as the known method in cases of that nature.

4. That this was purely a reflection of his own. For he is so exact a reporter, that he sets down particularly when the point is debated in court, and when he has it in private from one of the judges; as appears in the case of sir Thomas Wroth, fol. 455, h.

5. He only says this writ is a sufficient warrant to the treasurer and chamberlains of the

receipt to pay the money, not that it is compulsory to enforce the payment.

The other case of sir Thomas Wroth was this:

He exhibits to the barons letters patent, dated the 13th of October, 38 H. 8, whereby the king appointed him gentleman usher of the privy chamber to prince Edward, and granted to him, for the exercise of the office, an annuity of 20*l.* per ann. during life, to be received by the hands of the treasurer of the court of Augmentations, out of such of the treasure of the said revenues as should be in his hands. And whereas he had served the prince from Lady-day, 36 H. 8, to that time, and had received no allowance, the king thereby grants for his attendance for the time past, as much money as the said annuity of 20*l.* per ann. from Lady-day, 36 H. 8, to that time amounted to, to be received as aforesaid. And he prays the letters patent may be inrolled: and the same are received by the barons, and ordered to be read and inrolled. (Plowd. Com. 452.)

Then he alleges that king H. 8 died the 28th of January 38 regni sui; and that he exercised the office during the life of king Edward. And then sets forth the clause in the act of 1 Mar. for the alteration, union, transposing, or determination of the court of Augmentations, &c. whereby it was provided, that 'that act should not extend to extinguish or take away any annuity, which any person had title to, or ought to have, by letters patent, or other writing sufficient, under the seal of the court of Augmentations, before the 7th of July then last: but that the same should be paid out of the treasure of the queen, in the court to which the court of Augmentations should be annexed; or in any new court which should be erected instead of the court of Augmentations; or, in default thereof, in any court where there should be sufficient of the queen's treasure.'

He says the annuity was so many years in arrear; and prays as in sir H. Nevil's case.

And there is a demurrer; and judgment 'for allowing the letters patent, and for paying the arrears, and growing payments;' and a writ to the treasurer and chamberlains of the receipt accordingly.

There were five points debated, and determined in this case.

1. If there did not want an averment of the service done to the prince, in order to entitle himself to the sum granted for his attendance for the time past?

2. If the annuity was determinable by the nonfeazance of the service to the prince?

3. If the service might be done to the prince, when king?

4. If the annuity was payable during the life of sir Thomas Wroth?

5. If this grant did bind the successor, it not being granted by king H. 8, for him, his heirs and successors? And this seems to be the great point of the case; the judgment being ex-

pressed to be given upon view of several judgments, where, without those words, such letters patent had been allowed.

Plowden sets down the effect of the writ of execution; and the writ itself is to be seen at large, Co'in Scac. Pasc. 4. Eliz. Rot. 52.

He says, 'afterwards payment was made of the arrears according to the effect of the writ.'

I observe, it is not said by force of the writ.

The truth is, upon that writ nothing was paid, sir Thomas Wroth dying not long after.

But the 5th of November, 15 Eliz. Osborn, Morris, Wroth and Clerk his executors, produced the former writ in the court, and surmised that sir Thomas Wroth was dead, having made his will, and them executors; and that sir Thomas Wroth had not received any part of the arrears: and so prayed another writ, which was granted; and afterwards the arrears were paid.

The same observation lies upon this case as on the other, that in the whole debate, which lasted so long, nothing was said as to the nature and manner of the suit. But by the points made in the case, and by the judgment itself, and by what Plowden tells us that Sanders chief baron added to the report, it is plain the only question was upon the matter in law whether the annuity was determined or not.

All the judges who argued before my lord chief justice Treby, seemed to lay the great stress of their arguments upon these cases.

He applied himself to shew, that the proceedings in these two cases are founded upon particular reasons, and not upon the common law, or the course of the Exchequer. And for that cause it was, that they had never been cited in any law book as precedents, warranting any such jurisdiction in the court of Exchequer, as was exercised in those cases.

He observed that both these cases were for annuities payable in the court of Augmentations. Sir Thomas Wroth's case being for an annuity granted under the seal of that court; and Nevil's annuity being also payable there. For all lands purchased, or to be purchased by king Henry the 8th, were by the stat. 27 H. 8, c. 27, put under the jurisdiction of that court; and the manor of Aldington was purchased afterwards by him, of the archbishop of Canterbury, in the 32d year of his reign; the deed of bargain and sale being dated the 11th of Feb. in that year, and inrolled in the court of Augmentations: consequently that manor was under the survey of that court. And in the covenant against incumbrances, which was in that deed of bargain and sale, there was an exception of this fee payable to sir H. Nevil.

He observed further, that by the act made the first of queen Mary, cap. 10. and that queen's letters patent thereupon, this court was united to the court of Exchequer: and that by a clause in that act, all the annuities payable in the court of Augmentations were saved; 'and all such unitings and annexations, &c. and all orders made by the queen touching the

revenues of such court, and expressed in such letters patent, are enacted to be of the same force, as if declared by parliament.'

That after the union, in these cases the Exchequer acted according to the power given by that statute, and the letters patent.

That the court of Augmentations proceeded in a summary way; and that many decrees of the same nature with these were to be found in the records of that court.

And he took notice, that it was remembered by a very learned judge, who argued the same way with him in the court of Exchequer, that my lord chief justice Hale had formerly declared that these cases of Nevil and Wroth did depend on particular reasons; and were not to be urged for precedents of the jurisdiction of the Exchequer.

My lord chief justice of the King's-bench in his argument, did very particularly apply himself to take off the force of this objection.

The first thing I observed him to urge, as an argument that these cases were adjudged by the proper jurisdiction of the court of Exchequer, and not by any power derived to it by the union of the court of Augmentations, was drawn from Nevil's case; in the pleadings of which, no mention is made of the court of Augmentations, or of any statute relating to it.

He did admit, that the manor of Aldington, which was charged with the rent, was purchased by king Henry the 8th, and so under the survey of the court of Augmentations; but that being made no part of the case, he said that case was no otherwise to be regarded than as an ordinary proceeding in the court of Exchequer, by a grantee of a rent issuing out of lands which came afterwards to the crown.

I shall not here repeat what I have already shewn, that a grantee of a rent issuing out of lands, which come to the crown subsequent to his grant, could not proceed in this manner to recover it.

But I will observe as to this case of Nevil; First, that it is not denied, but if the court of Augmentations had subsisted, it had been under the survey of that court, and the court of Exchequer could have had no jurisdiction over it; so that it came not into the governance of the Exchequer, till the dissolution of that court.

3dly, That the court of Augmentations had a power of ordering payments of such fees, or annuities, will appear plainly, I think, by what I shall shew presently.

3dly, It appears that this fee, or annuity, had been paid not only during the reigns of Henry the 8th, and Edward the 6th, when the court of Augmentations subsisted; but also during the whole reign of queen Mary, which was for several years after the dissolution of that court. The arrears sued for being only for three years, from Michaelmas, 5 & 6 Philip & Mary, (which was the Michaelmas before the death of queen Mary, who died the 17th of November 1559,) to Michaelmas the third of queen Elizabeth.

So that this grant had been allowed before in

the court of Exchequer, and payments had been made upon it there for several years: and therefore there was no occasion to take any notice of the court of Augmentations on the one side, or, of the other side, to object that it was not set out. But the matter of law only came under the consideration of the court, whether, by the attainder of one of the grantees, the annuity and the office were determined. Which objection to the payment of the annuity, as it is probable, had been but lately observed, although sir Ed. Nevil had been attainted 30 H. 8. for a fact alleged to be committed the 12th of July, 39 H. 8.

But my lord chief justice of the King's-bench did principally insist upon two other points, in answer to what was said by my lord chief justice of the Common Pleas as to this matter.

1. That the court of Augmentations was never united to the court of Exchequer.

2. That the court of Augmentations had no such special power given to it, either by act of parliament, or letters patent, for relief of grantees of rents; and consequently, though there had been an union of that court to the court of Exchequer, yet the court of Exchequer could not derive any power of acting in such a manner from that union.

To prove the first of these positions, Dyer 216, a. and Coke's 4th Inst. 122, were cited. Where it is said to be resolved by all the judges, 4 Edw. that the union was but in shew, and was really void. For queen Mary, by her letters patent of the 23rd of January in the first year of her reign, having dissolved the court of Augmentations, and by other letters patent, dated the next day, uniting the same to the court of Exchequer, the second letters patent came too late, and were utterly void. And therefore it was argued, there could be no occasion of power to the court of Exchequer, by a union that was absolutely void: but by the dissolution of the court of Augmentations, the revenues of that court fell naturally under the government of the Exchequer; and sir T. Wroth, and sir H. Nevil came to the court of Exchequer, as to an original court of Revenue.

But notwithstanding these books, and the weight such a resolution may seem to have, I think I shall be able to make it out clearly, that the authority, given by the act of parliament *primo Marie*, was well executed by her two several letters patent of the 23d and 24th of January; and that the court of Augmentations was thereby effectually united to the Exchequer.

For, first, The act of parliament did empower the queen to 'alter, change, unite, transpose, dissolve, or determine the court of Augmentations and revenues of the king's crown, and the other courts therein mentioned; and to reduce the same or any of them into one, two or more courts; or unite, or annex the said courts, or any two, or more of them together, or to any other of her courts

'of Record; or to erect out of the same any other new court.'

Secondly, The queen did intend to execute her power, by uniting that court to the Exchequer. That appears most plainly by both the letters patent, which recite the act, and declare that the queen did intend to put the act in execution. And the letters patent of the 24th do recite, 'that it was with that intent,' viz. of putting the act in execution, 'that she had, by letters patent of the day before, dissolved the said court:' and she did thereby 'unite, transpose and annex the said court dissolved to the court of Exchequer; and did thereby appoint all the lands and hereditaments, which, at the time of the dissolution of the said court, were in the order or survey thereof, to be in the order or survey of the court of Exchequer, according to the articles and ordinances in the schedule annexed to those letters patent.'

Thirdly, Every thing ought to be expounded favourably, that the queen's intention might take effect; especially, when she acts in pursuance of an act of parliament, and for the more speedy and sure answering of her revenue, as the intent of the act is declared to be.

Fourthly, The letters patent, though bearing several dates, may, and ought to be expounded as one and the same act, as in many other cases; especially when done in execution of an act of parliament.

Fifthly, As to the 'quasi absurdum et impossibile,' in Dyer; we are not now discoursing upon a subject of philosophy, nor speaking of the natural existence of things. There indeed, it would be absurd to say, that what was dissolved and annihilated one day should yet have such an existence as to be united to any thing the day following: but we are speaking upon a legal subject, touching the construction of a law, where fictions, and relations, and conclusions have place.

That which one act of parliament says shall be dissolved to day, another act may say shall be to all intents revived and united tomorrow; and all men are concluded to say, that the union is not real to all intents of law. And as this may be done by several acts, so the same act may say, that a court shall be dissolved, and that the said court so dissolved, shall be united; or, in other words, may say that the queen by her letters patent may dissolve a court to day, and by letters patent of the next day may unite the same court to another: and when that is done, notwithstanding the seeming absurdity, it will be as really united to all intents as if it had never been dissolved. Now that in effect is said here. The act says, 'the queen may alter, change, dissolve or determine the court; and may reduce the courts to one or more, or unite and annex the same to any other court.' Here the queen literally pursued both parts: she did dissolve it; and she united and annexed it.

The act further says, 'such alterations, dissolvings, and annexings, declared and set

'forth in such letters patent shall be of the same force to all intents, as though the same were set forth and declared by authority of parliament;' and if this had been done by act of parliament, nobody could have said but that it had been well united.

Sixthly, All the parts and business of the court of Augmentations were actually distributed and settled in the respective offices of the Exchequer, according to the order of the schedule annexed to the letters patent of union, and have been continued to this day under these orders. And would it not be strange, that the letters patent of the 24th should be taken to be wholly void, but the schedule annexed to them should be good and effectual, and take place, and be put in execution to all purposes?

Seventhly, It is expressly and fully declared by act of parliament, that the court of Augmentations was united to the court of Exchequer. I mean the stat. 1 Eliz. cap. 4, § 15, for restitution of the first-fruits to the crown.

That stat. takes notice that queen Mary, by the act primo Mariæ, cap. 10, was empowered 'to alter or determine the courts of First-fruits, Augmentations and other courts there- in expressed, or to unite the said courts or any of them together, or to any other courts of Record, as should be thought most convenient for the answering of her revenues; by authority of which act the late queen by four letters patent, whereof two bear date the 23d of January, in the first year of her reign, and the other two the 24th day of the same January, did not only dissolve, determine, and extinguish the said court, commonly called the court of Augmentations and revenues of the crown, and the courts of First-fruits and tenths, and the jurisdiction and authority thereof; but also did unite, transpose and annex the said courts so dissolved, to the said court of Exchequer, there to be and continue as a member and parcel of the said courts and did appoint the revenues then answerable in the said courts to the order, rule, survey, and governance of the court of Exchequer, there to be answered and accounted for ever, in such order and form, as in the said letters patent, and two schedules thereto annexed, is mentioned and declared.'

Had the act rested there, unquestionably it had done enough to make good what I hold: but the act goes on further and says; 'by reason of which premises, the said perpetual revenues of First-fruits and tenths,' (which was the subject matter of that act,) 'and the revenues relating thereto, were ordered and accounted for in the court of Exchequer.'

Then the act proceeds to recite the act 2 & 3 Phil. & Mary, for taking away the first-fruits and tenths from the crown, and repeals that act: and enacts, 'that the same shall be revived and united to the crown in the same estate, degree and condition, and in as ample manner as the same were in queen Mary before the act of repeal: and that the said re-

'venue should be in the order, survey, rule, and governance of the said court of Exchequer, in every degree, sort, and condition, as they were, at and before the said 8th day of August, in the 2 & 3 of Phil. and Mary;' from which day that act took effect.

Now whether we are to depend upon the authority of an act of parliament, which does expressly declare, that by the force of the act primo Mariæ, and by virtue of the letters patent of the 23d and 24th days of January in the same year, the court of Augmentations was united, transposed and annexed to the court of Exchequer; or whether we are to believe the judges in Dyer, who say that it was not united, does seem no difficult question to decide.

These two things must be observed.

1st, That by this act the first-fruits and tenths are put under the survey and governance of the Exchequer, only as they were at the time of the act 2 and 3 Phil. and Mary; and by the same act it is declared, in what manner they were then annexed, and put under that governance; that is, according to the letters patent primo Mariæ: so that they are annexed to the court of Exchequer, in the form, and by virtue of those letters patent, or not at all. And the annexation of the court of Augmentations being exactly in the same manner as that of the first-fruits, if the one was good, the other must be so.

2dly, That if there was not such an union, it may be questionable, if the Exchequer at this day has any jurisdiction as to the revenues which were under the survey of the court of Augmentations; there being a clause in the act 27 H. 8, cap. 27, that, 'all process out of the Exchequer, to or against any persons, for any rents, issues or profits, relating to any of the lands, which by that act were limited, to be under the survey of the court of Augmentations, should be clearly void, and of none effect.'

If any thing more was necessary to be added after such an authority, it is plain, that it was the received opinion of the whole kingdom, and of the court of Exchequer itself, that the court of Augmentations was united to that court. This will abundantly appear by the case of the executors of sir Walter Mildmay, chancellor of the Exchequer, reported in the earl of Devon's case, 11 Co. 91, which case arises upon a warrant of the lord treasurer, and under-treasurer, for allowing to sir Walter Mildmay 140l. yearly, in consideration of the increase of his business, by reason of the annexation of the court of Augmentations and First-fruits to the court of Exchequer.

I will yet add one more authority to prove this; and it is in the office of the king's remembrancer, Mich. 1 and 2 Phil. and Mar. Rot. 175, and was the case of a lord chief justice of the King's-bench.

There it is found in the accounts of the late treasurer of the court of Augmentations, that there had been granted to sir Thomas Brunley, chief justice of the king and queen's

bench, an annual fee of *6l. 13s. 4d.* quarterly, out of the treasure in the hands of the treasurer of that court, for divers causes therein mentioned; which fee had been paid to Michaelmas primo Marie. And thereupon sir Thomas Bromley comes 'in propria persona sua, et pro eo quod dicta domina regina nunc annexavit et vivit dictam nuper curiam Augmentationum et revencionum corone regie huic curie scaccarii sui, (prout in memorandis hujus scaccarii de anno primo regni sui, viz. inter record' determino sci' Hill' rotlo' &c. ex parte hujus remem', plenius liquet de recordo,) petit quod ipse tam de dicto annuali feodo *6l. 13s. 4d.* &c. durante vita sua, quam de *10l.* sibi de arrearagiis ejusdem feodi a festo Annunciacon' B. Marie Virginis anno 7 Ed. 6. debit' et ad hoc minime solut', ad recept' hujus scaccarii de thesauro dominorum regis et regine ibidem de tempore in tempus remanere contingen' satisfiat. Super quo, pro eo quod scrutatis rotulis et mem' dict' cur' Augu' &c. in hoc scaccario modo remanen', it did appear that the said fee was granted, and that it had been answered and paid at the court of Augmentations, and that he was not satisfied his arrears, as he had alleged in his petition: 'considerat' est per barones quod eidem Thome Bromley de dicto feodo de *6l. 13s. 4d.* per annum ad dictos quatuor anni terminos durante vita sua una cum arrearagiis præd' sibi debit' ad recept' hujus scaccarii de thesauro, &c. ibidem de tempore in tempus remanere contingen' satisfiat,' &c.

Here is a judgment founded upon this very point of the union and annexation of these courts.

I have mentioned this case, because it seems to me a very full authority; at least the lord chief justice Bromley thought so. But the same thing does appear by the whole tenor of the proceedings of the court of Exchequer, in relation to cases which were before of the jurisdiction of the court of Augmentations; wherein, the summary way, practised in that court, was taken up, and a great variation made from the ancient manner of proceedings in the Exchequer; which amounts to a plain proof of this matter, that the court of Augmentations was really united to the court of Exchequer.

I proceed now to the second thing insisted on by my lord chief justice. That, admitting it to be true that the court of Augmentations was united to the court of Exchequer, and so the powers of that court transferred to the Exchequer, yet it would have no consequence to make good the point for which it was urged; viz. that in these two cases of Nevil and Wroth, the court of Exchequer acted as the court of Augmentations, and by a power supposed to be vested in the Exchequer by that union: because the court of Augmentations itself had no especial powers given to it, either by act of parliament, or by letters patent, to determine of, and give relief to grantees of annuities, and rents, in the manner it is done in Nevil's, and

Wroth's cases; but that all which was done in the erecting of that court was to make it a court of Record, and a court of Revenue to such and such lands: the consequence of which was, that it had all the powers incident to a court of Revenue, and as such could give relief in these cases; because in the like cases the court of Exchequer could, and always had given relief.

And to make this out, several cases of the like nature, decreed in the court of Augmentations, wherein relief had been given to grantees of fees and annuities, (which were found in a book of that office,) were cited as so many authorities for this opinion. And that, in like manner, relief was given in the court of Wards, and in the court of Surveyors, to grantees who came thither for their annuities; which were new erected courts of Revenue, and therefore, if those several new erected courts acted in that matter without a special authority, it was argued, that it might be concluded to be by a right incident to them as courts of Revenue, and in imitation of what the court of Exchequer, which was the old court of Revenue, could do before by the common law.

This is an ingenious turn of an argument, which was drawn by my lord chief justice Treby to a contrary purpose, from the practice of those new erected courts, if it will hold; but I think it will not.

For if it cannot be shewn that anciently, or at any time before the union of the courts of Augmentations and First-fruits to the court of Exchequer, the barons of the Exchequer did give relief to persons who had grants of annuities out of the revenue, or out of lands in the hands of the king, upon application made to them immediately, in the manner we are now speaking; unless, in cases where the party applied to the king by petition, and the treasurer and barons were authorised by the great or privy seal, or by special indorsement upon the petition: and on the other side, if it must be confessed, that as soon as ever these new courts were erected, they did constantly exercise this power: and if it also cannot be denied, but that as soon as the courts of Augmentations and First-fruits were united to the court of Exchequer, and not before, the court of Exchequer began to proceed in the same manner as those courts did, as to cases which were before under the survey of those courts: the proper inference must be, not that those courts, in the exercising these powers, did pursue the course of the Exchequer; but on the contrary, that the court of Exchequer, in taking up a new course after the union, did act according to the manner of the courts of Augmentations and First-fruits.

To examine this matter a little further, three things are properly to be considered.

1st, If the barons, as such, did at any time exercise this power of giving judgment for the grantees of rents issuing out of lands in the king's hands, or of annuities granted out of the revenues of the crown, to be paid by the trea-

surer and chamberlains at the receipt of the Exchequer, upon application to them.

I speak of what the barons have done in the court of Pleas; for in the Exchequer Chamber, upon matters of equity, and other grounds upon which the chancellor and barons are impowered to proceed, some relief may be given in cases of annuities, and rents.

2dly, If a power was vested in the court of Augmentations, to give relief in such cases.

3dly, If by the union that power was sufficiently transferred to the court of Exchequer.

As to the first of these points, I have spoken in great measure already, by shewing,

1st, The method taken heretofore by suitors, who applied by petition to the person of the king.

2dly, By the authorities I cited to shew, that in such cases the party had no relief but by petition.

3dly, By shewing that amongst the records of the Exchequer, upon all the search I could make, I have not found any thing of this kind before the time of the union.

I have been more particular in my search during the reigns of H. 8, and Edw. 6. And in the king's remembrancer's office I find, during those reigns, and so afterwards during the reigns of queen Mary and queen Elizabeth, writs of liberate to the treasurer, and also to inferior officers, and writs 'de allocatione facienda' to the treasurer and barons, passing the great seal in the same manner as anciently, for annuities made payable at the receipt of the Exchequer, without any alteration from the old course; and likewise writs of privy seal for making allowances upon accounts in the same manner as formerly: so that, as to matters properly of the jurisdiction of the court of Exchequer, the proceedings are the same.

I shall proceed therefore to the second point, to shew that by act of parliament, and letters patent, the court of Augmentations and revenues of the crown was fully invested with this power to give relief in such cases as those of Wroth and Nevil.

In order to this I will premise, that Henry the eighth, affecting power as much as any of our kings, and having great designs, did early in his reign endeavour to get some parts of the revenue of his crown more immediately under his private and personal direction, than the old regular constitution of the Exchequer would allow of.

To that end, in his fourteenth year, he procured an act of parliament, for putting divers lands under the survey of persons, commissioned by him, and stiled his general surveyors.

In his 26th year, when the first fruits and tenths were given him in parliament, he prevailed to have them answered in a new method, and not in the Exchequer.

The compositions for the first fruits might be made with the lord chancellor; and the money, or securities were, in that case, to remain in the banaper: or the compositions might

be made with commissioners under the great seal; and then the securities taken, and the monies paid, were to be paid and remain with the treasurer of the king's chamber.

The value of ecclesiastical revenues were to be enquired of by commissions under the great seal, and a certificate was to be returned thereof, and on such certificate the tenths were to be assessed by the treasurer, chancellor, chamberlains, and barons of the Exchequer; but the money was to be paid to the treasurer of the chamber, or as the king should appoint, and his acquittances were made full discharges.

The treasurer of the chamber is accountable only to the king, and not in the Exchequer. 4 Inst. 113.

This act, and the act in the next year for dissolving the lesser monasteries, having made a great change; and the king finding himself obliged to reward those who assisted his designs, as well as to provide for the subsistence of the abbots, priors and monks, who were turned out of their houses: and that these matters would be very troublesome, if the old common law method was to be pursued; did procure by the act 27 H. 8, cap. 27, the court of Augmentations to be erected, and made a court of record. And there were appointed for it two seals, and a chancellor to have the keeping of them, who is the chief officer; and a treasurer, attorney, and solicitor, and ten auditors, and seventeen receivers.

The duties of these officers are described in the oaths appointed for them.

And it is plain by the whole frame of the act, that nothing was farther from the intention of the law makers, than to form this court upon the model of the Exchequer; on the contrary, it is made a court of Equity.

The oath of the chancellor is, in effect, the same with that of the chancellor of England. The oath of the treasurer is, in effect, the same with that of the treasurer of England. And the attorney and solicitor are sworn to be ready, at the calling of the chancellor, to bear and determine causes depending before the chancellor.

The clerk is made register for all decrees and orders made by the chancellor and council.

The chancellor is impowered to take recognizances, which are to have the effect of recognizances taken in Chancery; and such process as in Chancery is to go upon them.

And upon issues joined in the court, the record is to be delivered by the hands of the chancellor to the justices of the King's bench, as upon issues joined in Chancery.

The process of the court is to be after the manner of the court of the duchy of Lancaster: and the fees of the officers, &c. are to be such as in the duchy court. And all process out of the Exchequer, as to any lands put under the jurisdiction of this court, is enacted to be void.

I think then, as to the first matter upon this act, nothing can be more clear, than that it was not intended, that this court should be another such court of revenue as the Exchequer was.

For, 1st, the very institution of it had been useless and absurd; for the Exchequer could have done the business as well.

2ndly, It is in part conformed to the court of Chancery, but principally to the court of the Duchy; both which are courts of Equity.

3dly, It was plainly intended to be a court of Equity in its institution, and to proceed by way of decrees, and act according to discretion: and therefore not to be like the court of Exchequer, which is a court of law: I mean the court of Pleas, held before the barons; for the court of Equity in the Exchequer is quite of another consideration, and the present cases have no relation to it.

This statute, for erecting the court of Augmentations, proceeds to appoint the treasurer to account before the chancellor, and two of the auditors.

The treasurer is to be allowed 'all such sums as he shall pay to patentees of any offices, fees, or annuities to be granted under the seal of that court: or to any other persons, by virtue of the king's warrant, or by bill signed: or as he shall be commanded to pay by any bill signed with the hands of the chancellor, attorney and solicitor, or any two of them, upon such consideration as shall be thought convenient by their discretions.'

See then how far this court is empowered to give relief to grantees of fees and annuities.

1st, The treasurer is put under the direction of the chancellor, attorney and solicitor, or any two of them; and to account before the chancellor.

2dly, He is to be allowed 'such sums as he shall pay to patentees for offices, fees and annuities granted under the seal of the court;' which is directly the case of sir Thomas Wroth.

3dly, He is to pay such sums 'as he shall be commanded to pay by any bill signed and subscribed with the hands of the chancellor, attorney and solicitor, or any two of them, upon such consideration as shall be thought convenient by their discretions.'

By the act 37 H. 8, cap. 4, and 1 Ed. 6, cap. 14, the Chantry lands are put under the survey of the court of Augmentations, or such other court as the king pleased.

My lord chief justice Treby did observe, that the decrees themselves of this court were signed on the record by the chancellor, attorney and solicitor, or two of them; which not being practised in any other court, might be very well taken up in pursuance of this clause, that so they might, within the letter of the act, be warrants to the treasurer for payment.

I have a full authority, which will give strength to this observation of his, that these decrees were looked upon as bills signed within the meaning of the act; which I find, amongst the decrees of the court of Augmentations, 4 Ed. 6, made in the behalf of the poor of St. John's, Walbrooke, upon a petition of the parson and church-wardens, reciting a petition to the chancellor of the court of Augmentations in the same year, and an order

upon, for the payment of some money which the king had given and appointed for the relief of poor people: and it is decreed thereupon, that the parson and church-wardens shall have the sum demanded, to be paid by the hands of the treasurer of this court; 'and this bill signed by the hand of the chancellor, &c. shall be to the treasurer of the said court a sufficient warrant.'

Now without going further, I think we may reasonably conclude sir H. Nevil's case to have come within this clause. For the manor of Aldington came into the king's hands, 31 H. 8: and sir H. Nevil's annuity having been answered till Michaelmas before the death of queen Mary, there is little doubt to be made, but that he had a decree in the court of Augmentations for it; which was the warrant for payment thereof, and which continued so before and after the union of that court to the Exchequer, till the objection upon the attainder of sir Ed. Nevil was made, and taken off.

As a farther confirmation of what I said, relating to the design which king Henry the 8th had, of making himself more absolute master of his revenue, by excluding it from the regular jurisdiction of the Exchequer; in the 32nd year of his reign, c. 45, the court of First-fruits and Tenths is erected, according to the model and scheme of the court of Augmentations: and in the same year the court of Wards is set up; being formed much after the same manner, and the whole revenue to be answered to the treasurer of the chamber.

In the 33rd year of H. 8, cap. 39, an act, taking notice of the former act, made in the 14th year of his reign, about general surveyors, forms another court of General Surveyors of the King's Lands, much after the manner of the court of Augmentations, only with some larger powers.

The same act does also enlarge the power of the court of Augmentations, by enacting, 'that all payments made by the treasurer of the said court by decree or commandment of the chancellor, by assent of the council, for buying lands, or for recompence or satisfaction of debts and expences, not exceeding 200*l.* to one person, shall be good against the king. And if persons pretend title to lands sold, or exchanged by the king, upon which a rent is reserved payable in the court of Augmentations; or demand any rent out of such lands: or if the king shall claim right to lands by him sold, or exchanged, upon which a rent is reserved payable in the court of Augmentations; or to any charge upon lands appointed to the court of Augmentations: the chancellor and council of the court of Augmentations shall have power to examine such demands, and by their discretions to hear and determine the same; and to decree recompences, &c. out of the king's treasure,' where equity shall appear, in the cases mentioned in that statute.

Afterwards, by letters patent, in 38 H. 8, - of the several courts of

Augmentations and General Survey, and that the rules for governing of them were not sufficiently certain, the king does thereby determine and dissolve those courts; and erects a new court to be called the court of Augmentations and Revenues of the King's Crown: and directs that all revenues under the survey of the former courts, should be put under the government of this new court: and appoints the officers, and their business; and in particular, the chancellor, and general surveyors to take the accounts of the treasurer, and other officers; and to make allowances for all payments of annuities, fees, &c. and to give discharges: and that the treasurer shall pay all monies, fees, or annuities, directed by the king's letters patent; or mentioned in any warrant directed by the king; or in any warrant, or decree, or order to be made by the court, or heretofore made in the court of Augmentations, or General Survey; or granted by any letters patent sealed with the seal of either of the said former courts. But pensions to religious persons, or fees, or annuities chargeable upon monasteries, were to be paid by the receivers of the counties.

And these letters patent are confirmed by act of parliament. 7 Ed. 6, cap. 2.

I have been somewhat long in shewing the powers vested in the court of Revenues and Augmentations of the Crown, by the several acts of parliament, and letters patent: but I thought it material to shew, that a power was clearly vested in the chancellor and council of that court, (and that to be exercised in a summary way, according to their discretions,) to relieve persons who came before them for fees and annuities; and to require the treasurer of that court to make payment, and to discharge the treasurer by their bill signed. Which was the thing to be proved.

I will not spend time to shew that they did constantly exercise this power, during the continuance of that court.

I have perused a vellum book of decrees of the court of Augmentations, in the time of H. 8, which contains the first proceedings after the erection of the court; and also a book of decrees of that court, during the first four years of Ed. 6, which was cited by my lord chief justice; and also many decrees in the same reign entered upon parchment rolls, all remaining in the court of Augmentations: by which it does appear, that court acted merely as a court of Equity.

The bills, (of which there is one entered at large, with the proceedings upon it, and the minutes of the decree, and, after that, the decree itself drawn up,) are in English, in the form of a petition, and the case comes to hearing in a summary way, and the decree is made; and if it be for payment of money, it is decreed to be paid by the treasurer of the court, and this decree is always mentioned to be his sufficient warrant and discharge; and the decree is signed by the chancellor, and a quorum of the council.

These proceedings sure are not in imitation of the court of Exchequer before the barons.

Amongst these proceedings there are hundreds of decrees for annuities, pensions, rents, fees, &c. So that this court was in full possession of this authority at the time of the uniting it to the court of Exchequer.

Thirdly, The only thing which remains, is to shew that, by the union, this power was sufficiently transferred to the Exchequer.

The same power, which the act 1 Mariae, cap. 10, did give to queen Mary, for dissolving the court of Augmentations, and uniting it to any other court, was by the act 7 Ed. 6, cap. 2, given to him, in almost the same words; except only that there is a new proviso, for the further saving of annuities payable out of the court of Augmentations, added in the statute of queen Mary.

I suppose it will be granted, that the words of that statute are sufficient to save the fees and annuities, payable in the court of Augmentations, from being lost by the dissolving, or annexing of that court.

Then the letters patent of queen Mary, which do unite, transpose, and annex that court to the Exchequer, there to be and continue as a member and parcel of that court, do seem sufficient to carry over the business and power of that court to the court of Exchequer, under such orders and form as is expressed in the schedule annexed thereto.

By the 15th article of that schedule, sheriffs and other accountants are to pay all annuities, fees, pensions, and corodies, according to grants allowed and inrolled; unless they shall have special commandment to the contrary by the court. And as for payments of that kind to be made at the receipt, besides that the act itself gave an authority, there was a general dormant privy seal lodged with the treasurer and chamberlains.

And as the powers of the court of Augmentations were sufficiently vested in the court of Exchequer, by the act of parliament and the letters patent; so were the same, from the time of the union, exercised accordingly.

On the 26th of January, 1 Mariae, the lord chancellor in open court delivers the letters patent for dissolving and uniting the court of Augmentations; which were received by the lord treasurer, chancellor, and under treasurer, and barons, and were inrolled 1 Mariae, Rot. 80, in the office of the king's remembrancer.

And the next Easter term the grantees of rents come in great numbers, and exhibit their letters patent under the seal of the court of Augmentations, and pray that a search may be made for the decrees of that court, whereby they are intitled; and it is done: and thereupon, without more formality, the barons order that the arrears, and growing payments of the annuities should be paid at the receipt of the Exchequer. The entry is 'Quod satisfiat.'

Pasch. 1 Mar. Rot. 92. Pope's case, and very many others. Trin. 1 Mar. Rot. 37.

And all the proceedings are summary;

sometimes upon the oath of the party, that he was not paid in the same manner as in the court of Augmentations. For this, see Glascie's case, 1 Mar. Rot. 29; Pantwentworth's case, 1 & 2 Phil. & Mar. Rot. 158; Mich. 1 & 2 Phil. & Mar. Rot. 175. Sir Thomas Bromley's case; Rot. 210. Thompson's case.

And very great numbers of these cases are entered in the rolls of the king's remembrancer's office in the time of queen Elizabeth: Pasch. 2 Eliz. Rot. 145. Bashe's case; Mich. 2 Eliz. Rot. 196. Badcock's case; Hill. 3 Eliz. Rot. 148, and downwards for some time; though by degrees the number did lessen, as the grantees died.

I shall spend no more time in shewing, that these decrees, or orders of the barons, of which so many are to be found after the union of the court of Augmentations, were founded upon the power transferred by the union to the court of Exchequer.

I will only add, that as the case stood upon the act 1 Mariae, admitting the court of Augmentations had been utterly dissolved, and the revenues, which were under the survey of that court, had fallen under the government of the Exchequer as the original court of Revenue; yet, nevertheless, the barons were sufficiently authorized to order the payment of annuities, which were payable in the court of Augmentations, by the clause in the statute 1 Mariae, which says, 'that such fees and annuities shall not be extinct, but in default of such annexation, &c. shall be paid out of the queen's treasure, in any of the queen's courts where sufficient revenue shall be to answer the same, by the hands of the officers of the same court, in such manner as the same might have been done, or been paid, in any other court or place, if this act had not been made.'

The consequence of which would have been, that as the annuities were payable before by the treasurer of the court of Augmentations, by the order of that court; so, by the special authority given by this act, the court of Exchequer might direct the same to be paid by the treasurer of the Exchequer; and such direction, in those particular cases, would be a good warrant in point of law. And yet, no argument would be deducible from thence to maintain the judgments now before us, which relate to grants which never were under the survey of the court of Augmentations.

But besides what might be inferred from this statute, the treasurer and chamberlains of the Exchequer had a full and ample authority, under the privy seal, for payment of the annuity to sir Thomas Wroth. The privy seal bore date the 19th of March, 2 Eliz. and, indeed, it is the same privy seal, which is mentioned in the report of sir Walter Mildmay's case, cited in the earl of Devonshire's case, 11 Co. 91, a.

I have not been able to recover a copy of that privy seal; and the entries of the Pell of that year are lost, or burnt, as most of them are. But it is recited in a privy seal, bearing

date the 27th of April, 1 Jac. 1, to contain, among many other things, a general authority to the treasurer, chamberlains, and undertreasurer for the time being, to make payment of all annuities, fees, wages, diets and rewards, and the arrearages of the same, as should be due to any persons whatsoever by any assignment, act of parliament, letters patent, or otherwise howsoever: and, by the same privy seal, king James does command payments to be made according to the tenor and effect of the said privy seal of the 19th of March, 2 Eliz.

So that though the original privy seal is not to be found, yet it is sufficiently recited in this privy seal of king James; and mention is made of it in the entries of the Pell in many hundred places. And the privy seal of the 10th of June, 1 Jac. 1, does again take notice of the same; and does give the like large and general power for payment of annuities, fees, &c.

And therefore, it was not at all strange that the arrears of sir Thomas Wroth's annuity were paid, when the writ of the Exchequer had certified the treasurer and chamberlains that it had a continuance, and what was the sum to which the arrears did amount: but it was paid by force of the privy seal.

It might be said, as Plowden expresses it, according to the effect of the writ, but not by the authority of it.

And upon the same reason it is, that the objection drawn from the *liberate*, which goes from the barons to the treasurer and chamberlains every term, 'pro necessariis scaccarii, (as if that inferred any authority in the barons to direct the issuing of money out of the receipts), does fall to the ground. My lord chief justice Treby did observe, that in the payments made of those sums, 'pro necessariis scaccarii,' never any notice was taken of the *liberate*, but the warrant was formed upon the privy seal, authorizing such payments.

And in the entries, which are in the Pells, of this payment, all along queen Elizabeth's reign, (I mean from the 14th year downwards, for the other books are lost), the constant entry is, 'To Mr. William Billersby, usher of the Exchequer, upon the general privy seal, the 2d of March, 2 Eliz. and by *liberate* directed to the treasurer and chamberlains, for the charges of the court of Exchequer, for such a term.'

Indeed in one place I find there is an omission of mentioning the privy seal, but that is but the negligence of the clerk: and I find such omissions too often made in those entries, in other cases; though it be plain, there was an authority under the great or privy seal, by other entries of like payments in the same books.

So that this *liberate* amounts to no more than a certificate of what the sum is: the warrant for payment is the privy seal. Though, perhaps, in that particular case, the treasurer and chamberlains have a greater latitude, than in any other: for Gervase of Tilbury reckons up those payments, 'de minutis necessariis

'accarii,' as payments they might make, 'sine brevi regis.' [Dial. de Scac. Lib. 1, c. 5.]

I have been too long already; but I will add one consideration more, which does arise from the inconvenience; no considerable argument in law: which is that if the king's treasure be so far subject to the administration of an ordinary court of justice, as that it must be regularly issued upon the application of the subject, who has a demand thereupon for an annuity, or any other debt. (for I do not see but the reason is the same:) this may turn to the weakening of the public safety to a very high degree.

The barons of the Exchequer cannot, as such, be consant of the necessities of the state; and if they were, and knew them to be ever so pressing, they must act according to one rule; and must order a pension, granted upon no consideration, or perhaps, upon a very ill one, and for a pernicious end, to be paid with the very money, which ought to be employed, and possibly was provided by parliament, for suppressing a rebellion, or resisting an invasion, or setting out a fleet.

For they, as a court of justice, have no judgment of discretion allowed them: whenever the party comes to pray it, the grant must be enrolled and allowed, and the judgment given, and the writ go.

And what is the treasurer to do in such a case? Is he to obey the great or privy seal, which requires the money for the uses of the war, and the necessary defence of the realm; or the Exchequer seal, which requires it to be paid for the use of a private subject?

He would be under a great difficulty; especially if there be ground to think, that such a writ would be the foundation of an action against him, which if I did not misapprehend, was affirmed by one.

The law books may say, that the king's treasure is sacred; that it does 'respicere regem, et regnum;' that it is 'anima reipublice, firmitamentum belli, et ornamentum pacis.' [Co. Lit. 106.] It is, after all, at the disposition of the barons of the Exchequer. Nay it is, in some sort, at the disposal of the subject; who takes his own time to make his demands, may suffer his arrears to run as long as he pleases, and, at his pleasure, call for them, in the midst of a war, and to the disappointment of the public safety.

What should hinder, but that all the arrears of the annuities and pensions, granted in the reigns of king James the first, and king Charles the first, should be demanded in this manner; and all the debts secured during the late civil war? At least, so far as the old branches of the hereditary revenue would extend to pay.

The truth is, this method does, in effect, set aside the lord treasurer, one of the greatest officers of the kingdom. My lord chief justice Coke (4 Inst. 110.) has a fancy, that his white staff was given him, to drive away importunate suitors. But this would be to little purpose; they have a more certain place to re-

sort to: it is but going to the barons of the Exchequer and they will command the treasure from him.

But the popular objection is, that to say this suit will not lie, is to leave the property of the subject precarious; and that if he has a right, he must have a remedy.

The answer is, that all I have said goes only to this particular manner of proceeding, as being altogether new. It only relates to the new assumed power of the barons immediately over the revenue in the receipt of the Exchequer. It does in no sort lessen their known power over the revenue, while *in transitu*; nor does exclude them from any legal course, whilst the revenue is in the hands of any inferior officer. It does not preclude the subject from suing to the person of the king, by petition of right. Consequently, it does not tend to hinder him from the known and ordinary methods, which have been used in all ages, in cases of this nature, and in which the subject has acquiesced for so many hundred years.

It does not appear to me, that this method was ever known or practised; and under a pretence of assisting property, a new course of legal proceedings is not to be introduced; nor a new power placed in the barons of the Exchequer, to which none of their predecessors pretended.

The law must remain as it is, till some new law hath changed it. And I should much doubt, whether a new law, for the more easy recovery of pensions granted by the crown, would be for the good either of king, or people.

If, as the common law stood, grants of pensions and annuities out of the revenue, be, in some sort, depending upon the justice and honour of the crown, as to the time and manner of payment, I do not see that the public is hurt by it; the revenue is likely to remain the longer with the crown.

If it be said, that the subject has a hardship in this case, and must go far about to recover his right; let it be considered how much better his case is, than it was at common law.

It was hard, indeed, before the statute of Edward the third, when he could not interplead with the king, upon an office found. It was hard, before the statute of Richard the second, when he could not be allowed to shew his discharge, when he was impeached in the Exchequer, without going to the king: and so it was before the stat. 2 Ed. 6, when he had no way to save his term, &c. upon an office found. But yet after all the law was so: and whilst it continued, the courts were to judge accordingly. And if, in cases like this, it be thought that a better remedy should be provided, the same method must be taken, of procuring a new law.

The patentees in these cases, I believe, had no notion of this remedy, when the grants were made to them: this is of a later invention.

They were contented to apply for payment in the ordinary course, and did obtain warrants,

from the lord treasurer for some arrears, with an express clause in those warrants, forbidding to levy further tallies, without further order.

Nor is it to be said that in the method, where the application is to be made to the person of the king, the subject is precarious; for it is to suppose, what is not to be supposed in law. It is a supposition contrary to the principles upon which the English constitution is framed, which depends upon the honour and justice of the crown.

Such kind of suppositions may be carried much further. You may as well say all property is precarious, because you may suppose the king will make no judges; or will adjourn the terms from time to time; or will suffer no writs to issue, without which no suits can be.

It must be presumed the crown will pay its just debts. But to say the king is not to have the ordering the course of payments, when the money is in his own coffers, is to deny him that, which is in every subject's power. It is to take from him the judgment of public necessities, or, at least, the means of relieving them.

I have shewn the reasons for which I cannot give my opinion for the affirming of these judgments. But much the greater part of my lords the judges having delivered their opinions for the affirmance of them, I shall defer doing any thing further, till I hear the opinion of the judges upon the point referred to them,

'Whether, as this court is constituted, judgment ought to be given according to the opinion of the greater number of the judges, who are called by the lord chancellor and lord treasurer to their assistance, notwithstanding they themselves are of a different opinion?'

Afterwards, on Tuesday, November 24, 1696, the Lord Keeper came again into the Exchequer-chamber, and declared, That he had received a Paper from the lord chief justice Holt, containing the Opinion of the Judges upon the question referred to them; and that three Judges were of opinion, 'That the Lord Keeper was bound to give Judgment in these cases, according to opinions of the majority of the Judges by him called to his assistance;' but that seven Judges were of opinion, 'That he was not bound by such majority of opinions, but was at liberty to give judgment according to his own;' and declared, 'That as to this question, he himself concurred in opinion with the seven Judges.' And accordingly pronounced Judgment, 'That the Judgments given in these causes, by the court of Exchequer, be reversed.'

PROCEEDINGS ON ERROR IN PARLIAMENT

FROM THE EXCHEQUER-CHAMBER, BY ROBERT WILLIAMSON, PLAINTIFF, AGAINST THE ATTORNEY-GENERAL, DEFENDANT, BEING A CONTINUATION OF THE CASE OF THE BANKERS.

*The Case of the Plaintiff, one of the Assigns of Sir Robert Vyner for 60*l.* per annum, and the Arrears thereof out of the hereditary Revenue of Excise.*

Several goldsmiths and others having lent and advanced great sums of money to the crown upon the credit of the Exchequer, and by encouragement of an act of parliament for assigning orders in the Exchequer without revocation, passed in the year 1667,* for which monies so lent, the goldsmiths were debtors to great numbers of his majesty's subjects, and particularly sir Robert Vyner, one of the goldsmiths, was debtor to the plaintiff for money really lent, the sum of 1,000*l.*

And there having been in January, 1671, a stop put to the payments in the Exchequer, whereby the said sir Robert Vyner and the rest of the goldsmiths were rendered unable to pay their creditors.

His then majesty king Charles the 2nd, (in justice and compassion to the goldsmiths and their creditors, and to remove the miseries which attended the said stop) was pleased to give directions in April, 1676, to the then lord high treasurer, to cause the accounts of the said goldsmiths to be truly examined and exactly stated; which was accordingly done by the then chancellor of the Exchequer, auditor of the revenue, and other proper officers of the crown (most of them being then members of the House of Commons), and a report thereof being made to the king in council, in February, 1676.

His then majesty in and about April, 1677, by letters patents under the great seal of England, did grant unto each of the several goldsmiths, their heirs and assigns, and for the benefit of their creditors, in lieu and satisfaction of the monies due to them from his said majesty, a yearly rent or sum for ever out of the hereditary revenue of excise, equal in value to the interest of their respective debts, after the rate of 6*l.* per cent. per annum, with a clause of redemption upon his majesty's paying the principal money with the arrears of rent; the said rents or annual sums to be paid quarterly upon tallies to be struck in the receipt upon the commissioners, &c. of the excise; and directs and commands the treasurer, &c. barons and officers of the Exchequer of the king, his heirs and successors, that they do from time to time perform all acts necessary for the constant

* "19 Cha. 2, c. 12, Koble's ed. of Stat." Hargrave.

payment of the money, and from time to time to levy and strike tallies without any further warrant, so that the yearly sums may be constantly paid, without any further or other warrant to be sued for from the king, his heirs or successors. And if the money should happen to be paid into the receipt of the Exchequer, then that the high treasurer, and commissioners of the Treasury, under-treasurer, chamberlains, and barons of the Exchequer for the time being, and all other officers and ministers of the Exchequer, and of the receipt thereof, are authorised and required to pay out of such monies as shall be so paid into the Exchequer or elsewhere, so much as shall be in arrear, without any further or other warrant; and the said payments to be preferred before any other payment out of the same, by virtue or colour of any warrant, order, or directions whatsoever of any after-date, excepting for the management of the said revenue, and about 36,209*l.* 15*s.* 4*d.* a year to the then queen consort and the duke of York. Also his majesty thereby granted, that the letters patent should be expounded and taken most favourably and beneficially for the grantees, and covenanted to make further assurance if required; and on the 23d of May, 1677, ordered in council that the said letters patent should be printed and made public for the information and satisfaction of the creditors of the said goldsmiths.

Also the right honourable the House of Peers were pleased on the 10th of July, 1678, to pass a bill for the confirming the said letters patents; but that session ended before the said bill was read in the House of Commons.

Whereupon many of the creditors of the goldsmiths (amongst others the plaintiff Mr. Williamson) delivered up their securities for their debts to the goldsmiths, and the plaintiff accepted of an assignment from Vyncer in lieu of his 1,000*l.* debt, pursuant to the said letters patents, of a proportionable part of the annual sums so granted, and which sums were accordingly paid in the reigns of king Charles the 2d, and the late king James the 2d, to Lady Day, 1683. And in regard no tallies or monies could afterwards be obtained upon due and repeated application for that purpose:

The plaintiff, Mr. Williamson, in Hilary term, 1689, did commence his suit in the Exchequer by way of 'monstrance de droit,' (as had formerly been very often practised) thereby setting forth his title as assignee under sir Robert Vyncer to the said 60*l.* per annum (being his proportionable part of the said annual sum so granted by the said letters patents), and prayed that the arrears thereof might be paid unto him, and that the future growing sums might also be paid according to the said letters patents.

Unto which suit the then Attorney-General (now lord chief justice of the Common Pleas) had several days and terms given him to plead or demur as he should think best for the crown: and at last a demur being by him put in thereunto,

The cause had a long agitation, and was argued for about two years by the then Mr. Attorney, Mr. Solicitor, and others of the king's counsel for the crown, and also by counsel for the plaintiff Mr. Williamson. And the court after long deliberation and view of the precedents and book cases produced and cited on both sides in Hilary term, 1691, gave judgment for the plaintiff, that the letters patents were good and bound the revenue; and that the plaintiff ought to be paid the arrears of the said 60*l.* per annum, and the growing duty for the future.

Whereupon the then Attorney General, on the behalf of his majesty, brought a writ of error returnable before the then commissioners of the great seal, who thereupon ordered all the judges to be attended with copies of the proceedings, and that they should give their assistance at the argument of the case: and after the cause had been long and many times argued by counsel at the bar, at last the judges assistants severally and solemnly argued the same, and were all of opinion (except the lord chief justice of the Common Pleas) that the letters patents were good in law, and that the plaintiff had a good title, and that the judgment given in the Exchequer was good and ought to be affirmed, and that the plaintiff Mr. Williamson ought to be paid his arrears and the future duty according to the said letters patents and judgment. But the lord chief justice of the Common Pleas was of opinion, that although the grant or letters patents were good in law, yet that the plaintiff had not taken a proper remedy, and that the court of Exchequer had no jurisdiction in this cause. And the right honourable the then lord keeper, (now lord chancellor) having publicly argued the said cause, and being of the same opinion as to the jurisdiction of the court, for that and several other reasons offered by his lordship, was pleased to reverse the judgment.

Upon which judgment of reversal, the plaintiff Mr. Williamson hath brought his writ of error in the House of Lords, and humbly hopes their lordships will be pleased to reverse the judgment given by the lord chancellor, and affirm the judgment given for the plaintiff in the court of Exchequer. Considering,

I. That the plaintiff is a purchaser upon a full and valuable consideration from sir Robert Vyncer the patentee, having delivered up the security he had for his debt, and accepted the 60*l.* per annum in lieu thereof.

II. That the court of Exchequer (who are always exceeding careful of the revenue, and the king's interest, being more immediately bound thereunto by the oaths than the rest of the judges are,) upon mature and great deliberation, and search and view of many ancient precedents, did solemnly adjudge and declare the law to be, that the letters patents were good, and that the plaintiff had taken a proper remedy, and ought to be paid his annuity and the arrears thereof.

III. That all the judges called to the lord chancellor's assistance (except the lord chief justice of the Common Pleas,) upon several days solemn arguments and debates, gave their opinions for the plaintiff in affirmance of the judgment in the Exchequer; and that the said letters patents were good, and ought to be complied with in paying the said annuity, and that the plaintiff had taken a proper remedy to recover the same.

IV. Even the opinion of the lord chief justice of the Common Pleas was (as is humbly conceived) that the grants and letters patents were good, and conveyed a legal right and title to the patentee; yet that this right was without a remedy; for that the court of Exchequer had no power over the king's money, when it was brought into the receipt, their power being over it as was alledged *in transitu*, before paid in, and only to enforce the payment thereof; whereas a right and title without a remedy (and no other legal remedy was pretended to be pointed out to the plaintiff) seems contrary to all laws, and to the rules of justice and reason: and indeed it would be a hard thing to say that the court of Exchequer can relieve the king against the subject, and not help and relieve the subject when he produces a legal title against the king. This hath not been the practice of that court for near the last 200 years.

V. The objections so much insisted upon, that the lord treasurer is superior to the barons, and therefore not to be commanded by them to pay monies; and that in case the barons can dispose of the king's money, it may weaken and prevent the public security when the necessities of the state require it to be otherwise employed, are thus answered. That although the lord treasurer is a greater person, yet he and all the subjects are inferior to the king's courts. That the barons send this command, as they are a court of justice, and in the name of the king himself; so that it is the king by his writs, and not the barons that command the lord treasurer in this case. The barons have no power to dispose of the king's money, but where they have a warrant under the great or privy seal (as in this case by the grant and letters patents they have) for the doing thereof; so that the court of Exchequer in this case only takes care that the king's grant and letters patents be made effectual, and that the officers of the crown do their duties for that purpose, as by the said letters patents they are enjoined to do.

VI. This cause in consequence must affect all persons claiming under the crown, or having any tallies or orders upon or payments out of the Exchequer; for all those will be made much better or worse by the judgment of the lords in this case.

Wherefore the plaintiff humbly prays that the judgment of the reversal may be reversed, and that the judgment of the court of Exchequer may be affirmed.

Samuel Dodd.

EXTRACT FROM THE JOURNAL OF THE LORDS, A. D. 1699—1700.

April 4, 1699.

This day Mr. baron Hatsell, in the usual manner, brought in a writ of error from his majesty's court of Exchequer; viz. Robert Williamson plaintiff, against the Attorney General defendant.

December 6, 1699.

Upon reading the petition of Robert Williamson merchant; shewing, "That, on the 4th of April, 1699, by a writ of error, the petitioner brought a record before this House, for the reversal of a judgment given for the king, in the Exchequer-Chamber, by the lord keeper, now lord chancellor; and that the petitioner hath assigned errors on the said judgment of reversal; and praying a day may be appointed, for Mr. Attorney General to reply or demur to the said errors assigned:" It is ordered, that Mr. Attorney do reply or demur to the said errors, on or before Wednesday, the 20th of this instant December.

January 19, 1700.

After hearing counsel, this day, for Robert Williamson, plaintiff in a writ of error depending in this House, whereunto his majesty by his attorney general is defendant: It is ordered, that this House will hear counsel for his majesty thereupon, to-morrow.

January 20, 1700.

After hearing this day counsel for his majesty, upon the writ of error depending in this House, wherein Robert Williamson is plaintiff; and his majesty, by his attorney general, defendant: It is ordered, that this House will hear the Judges, to this matter, on Monday next.

January 22, 1700.

After hearing the Judges this day, to give their opinion upon the writ of error depending in this House, wherein Robert Williamson is plaintiff; and his majesty, by his attorney general, defendant: It is ordered, that the debate of what hath been offered in this matter shall be resumed to-morrow; and all the Judges to attend.

January 23, 1700.

After hearing counsel at the bar, to argue the errors assigned upon the writ of error depending in this House, wherein Robert Williamson is plaintiff; and his majesty, by his attorney general, defendant; and debate thereupon: This question was put, "Whether the Judgment of reversal shall be reversed?" It was resolved in the affirmative.

Leave being asked, and given, for any lord to dissent; these lords, whose names are hereunto subscribed, do dissent, for the Reasons

“ For that we conceive it did not appear that ever any such judgment was given by the Exchequer, before the annexing the court of Augmentations to the Exchequer.

“ For that, since the dissolving and annexing of the said court of Augmentations, there hath no such judgment been given, unless in such cases which were in the cognizance of the court of Augmentations before it was dissolved.

“ That the judgments, in the cases of sir Henry Nevil and sir Thomas Wroth, and others of the like nature cited, seem to be by virtue of the powers of the court of Augmentations being annexed to the court of Exchequer.

“ That those courts were duly annexed, appears by the preamble of the statute 1 Eliz. cap. 4, by the lord chief justice Bromley's case, and by the case of the earl of Devonshire in Cook's Reports; and for that the court of First Fruits and Tenths was dissolved, and annexed in like manner to the Exchequer, as the court of Augmentations was; which powers, by that annexation, subsist in that court to this day.”

Signed “ Lonsdale, C. P. S. Stamford, Rivers, J. Culpeper, Bergavenny, Audley, Haversham, W. Wigorn, Gi. Sarum, Sy. Eliens, Ric. Petriburg.”

WILLIAMSON V. REGEM

JUDGMENT OF REVERSAL REVERSED.

Whereas, by virtue of his majesty's writ of error, returnable into the House of Peers in parliament assembled, a record of the court of Exchequer was brought into this House, the 4th day of April, 1699, wherein a Judgment given by the barons of the said court, in Hilary term, 1691, for Robert Williamson, against his majesty's Attorney General, for the payment of an annual sum of 60*l.* and the arrears thereof, out of the hereditary revenue of excise, was in Michaelmas term, 1696, reversed in the Exchequer chamber, by the Lord Keeper of the great seal of England, now Lord Chancellor:

After hearing counsel several days, to argue the errors assigned upon the said writ of error; and due consideration of what was offered on either side; It is this day ordered and adjudged, by the Lords spiritual and temporal in parliament assembled, That the said Judgment of Reversal shall be, and is hereby, reversed; and that the said Judgment, given by the barons of the Exchequer for the said Robert Williamson, shall be, and is hereby, affirmed.

The tenor of which Judgment, to be affixed to the record to be remitted, followeth:

“ Postea, scilicet, quarto die Aprilis, anno regni domini regis nunc undecimo præd. record. et process. præd. cum omnibus ea tangent. dicto domino regi in presenti parlamento apud Westm. in com. Midd'x. præd. assemblat. secundum exigent, brevis præd. miss. sunt: posteaque, scilicet, undecimo die

ejusdem mensis Aprilis, coram eodem domino rege in cur. parliamenti præd. ven. præd. Rob'tus Williamson in propria persona sua, et dic. quod in recordo et process. habit. in præd. camera concilii juxta scaccarium, vocat. Le Councell Chamber, ac etiam in redditione præd. judicii, sic, ut præfertur, per dict. dominum custodem magni sigilli Angl. in eadem camera concilii juxta scaccarium præd. reddit. manifest. est, errat. in hoc videlicet, quod præd. literæ patent. et præd. script. assignationis in forma præd. superius recitat. ipsi eodem Rob'to Williamson juxta tenorem et effectum eorundem allocari debent; quodque præd. summa quadringint. et quinque librar. de arretrag. pro præd. separal. quarter. ann. eidem Rob'to solvi debet; et quod præd. annual. reddit. sive summa sexagint. librar. eisd. in Rob'to, hæredibus et assignatis suis, annuatim solvi debet, modo et forma præd. præd. barones de scaccario dicti domini regis et dictæ domine reginæ consideraverunt et adjudicaverunt, eo tamen non obstant. considerat. existit, per dictum dominum custodem magni sigilli Angl. in præd. camera concilii juxta scaccarium præd. quod judicium præd. sic, ut præfertur, per præd. barones de scaccario dicti domini nunc regis et dictam nuper domine reginæ Mariæ reddit. revocatur, annulletur, et penitus pro nullo habeatur: ideo in eo manifeste est errat. Erratum est etiam in hoc, quod per record. ejusdem judicii per eundem dominum custodem magni sigilli Angl. in præd. camera concilii juxta scaccarium præd. reddit. apparet, quod idem judicium per eundem dominum custodem magni sigilli Angl. in præd. camera concilii juxta scaccarium præd. reddit. in forma præd. reddit. existit. pro dicto domino rege nunc, versus eundem Rob'tum, ubi per leg. terre judicium illud reddi debuisset pro ipso eodem Rob'to, versus præfatum dominum nunc regem, et ubi per leg. terre judicium reddit. per barones in cur. scaccarii affirmari et non reversari debuisset: ideo in eo manifesto est errat. Et sic idem Rob'tus dicit, quod in recordo et process. præd. in præd. camera concilii juxta scaccarium præd. vocat. Le Councell Chamber, ac etiam in redditione judicii præd. sic, ut præfertur, per dictum dominum custodem magni sigilli Angl. in eadem camera concilii juxta scaccarium præd. reddit. manifeste est errat. Et super inde idem Rob'tus petit, quod judicium illud, sic, ut præfertur, per dict. dominum custodem magni sigilli Angl. in eadem camera concilii juxta scaccarium præd. reddit. ob errores præd. et al. in record. et process. præd. in eadem camera concilii juxta scaccarium prædict. vocat. Le Councell Chamber habit. existent. revocetur, annulletur, et penitus pro nullo habeatur. Et modo, ad hanc sessionem parliamenti tent. per prorogationem decimo sexto die Novembris, anno undecimo supra dicto, coram eodem domino rege, in eadem curia parliamenti apud Westm. in com. Midd'x. assemblat. ven. tam prædict. Rob'tus

Williamson in propria persona sua, quam Thomas Trevor Miles, attornat. domini regis nunc general. qui pro eodem domino rege in hac parte sequitur, in propria persona sua; et super hoc idem Robertus Williamson, allegando error. præd. per ipsum Rob'tum superius in forma præd. allegat. pet. quod præd. Thomas Trevor, qui sequitur, &c. ad error. præd. respondeat, &c. Et super inde dictus attornat. domini regis nunc general. qui sequitur, &c. dic. quod nec in record. et process. præd. habit. in præd. camera concilii juxta scaccarium prædict. vocat. Le Councell Chamber, nec in redditione præd. judicii, sic, ut præfertur, per dictum dominum custodem magni sigilli Angl. in eadem camera concilii juxta scaccarium præd. reddit. in ullo est errat. Et pet. quod curia parlamenti præd. hic procedat ad examinationem tam record. et process. præd. habit. in præd. camera concilii juxta scaccarium præd. et reddition. judicii præd. sic, ut præfertur, per dictum dominum custodem magni sigilli Angl. in eadem camera concilii juxta scaccarium præd. reddit. quam mater. præd. per prædict. Rob'tum Williamson superius pro erroribus assignat. et allegat. et quod judicium prædict. ut præfertur, per dictum dominum custodem magni sigilli Angl. reddit. in omnibus affirmetur, &c. Thomas Trevor. Et quia cur. parlamenti nunc hic, scilicet, apud Westm. præd. in com. Midd'x assemblat. de judicio suo de et super præmissis reddend. nondum adviatur, dies inde dat. est tam præd. Rob'to Williamson, quam præd. Thom. Trevor militi, qui pro eodem domino rege in hac parte sequitur, &c. coram domino rege, in eadem cur. usque ad diem Martis, vicesimum tertium diem Januarii ex tunc prox. sequen. apud Westm. in com. Midd'x, de judicio suo inde audiendo, eo quod ea-

dem cur. nondum, &c.; ad quem diem, coram domino rege, in cur. parlamenti. præd. ven. tam præd. Rob'tus Williamson quam præd. Thomas Trevor, qui pro eodem domino rege in hac parte sequitur, in propriis personis suis; super quo, vis. et per eandem cur. parlamenti nunc hic plenius intellectis omnibus et singulis præmissis. maturaque deliberatione inde habita, videtur eidem cur. parlamenti nunc hic, quod in recordo et process. præd. habit. in præd. camera concilii juxta scaccarium, ac etiam in redditione judicii per dictum dominum custodem magni sigilli Angl. in eadem camera concilii juxta scaccarium præd. reddit. manifeste est errat. Ideo cons. est per eandem cur. parlamenti, quod præd. judicium revocation. in præd. camera concilii juxta scaccarium vocat. Le Councell Chambet, per dictum dominum custodem magni sigilli Angl. reddit. revocetur, adnulletur, et penitus pro nullo habeatur; et quod præd. judicium per prædict. baron. de scaccario prædict. in forma præd. reddit. in omnibus affirmetur, et in omni suo robore stet et effectu; et quod idem Rob'tus Williamson ad omnia que ipse occasione præd. judicii revocation. in prædict. camera concilii juxta scaccarium reddit. amisit restitatur, &c. Super quo, record et process. præd. in eadem cur. parlamenti in præmissis. habit. in cur. scaccarii præd. pro executione super prædict. judic. baron. præd. in præd. cur. scaccarii præd. pro præfat. Rob'to Williamson fiend. et exequend. juxta formam et effectum judicii præd. remittuntur.

See an observation of lord Mansfield's concerning this case in *Macbeath v. Haldimand*; 1 Term Rep. 172. See, too, the Proceedings against lord Sommers and others, A. D. 1701.

415. Proceedings against CHRISTOPHER PHILLIPSONE, for drinking the Healths of the late King James and the Prince of Wales, and for treacherously wounding Ensign Loudoun:* 9 WILLIAM III. A. D. 1697. [Now first printed from the Records of Justiciary at Edinburgh.]

December 6, 1697.

Information for his Majesty's Advocat and Abram Loudoun, Ensign in the Lord Lorn's Regm't AGAINST Christopher Phillipson.

THE said Christopher Phillipson being indyted at the instance of his majestie's advocat and Abram Loudoun, upon the lawes and acts of parliament, by which all persones are

oblidged to acknowledged and recognise king William as king of this realm, and that none presume to owne or acknowledge the late king James for their king under all highest pains; and that it is declaired treasons in any of the subjects of this kingdom, by wryteing, speaking, or any other manner of way to disowne, quarrell, or impugne his majestie's royull power and authority, or right and title to the crowne,* and that the beating and wounding any persones, especially with a mortall weapon, and in a treache-

* As to cumulation of crimes in one dittay, see in this Collection the Case of Nairne and Ogilvy, A. D. 1765.

* See the acts printed in the Case of Alexander Pitcairne, vol. 13, p. 1450.

sons and clandestine manner, is a high crime and severely punishable; and the said Christopher Philipson, in November or December, 1688, being in the house of ———— Rodger, merchant, in Edinburgh, with the said Abraham Lowdon, did maliciously utter severall treasonable and undutyfull speeches against the king and his government, disowning him and his authority and title to the crowne, or at least quarrelling or impugning the same, and particularly did drink the late king James's health as king, or at least did drink king James's health, and the health of the prince of Wales; which when challenged and refused by ensigne Lowdon, Philipson quarrelled with him; but after the quarrell was accomodate, and in appearance over, and the pannall and ensigne Lowdon were still sitting in apparent friendship and in good termes, the pannall drew his sword privately, and treacherously thrust the said ensigne Lowdon beneath the table, wounding him in the lower part of the belly, and then fled away, leaving the said ensigne Lowdon with his sword sticking in his belly, and bleeding of his wounds in such a dangerous manner that he was judged by all to be in hazard of his life.*

It was alledged for the pannall, that he denyed the disowning of king William and his authority, or that he did quarrell and impugne the same, and that the drinking of the healths of the late king James, or the prince of Wales, was noe disowning of king William's authority, nor did it fall under the act of parliament lybelled upon.

Secundo, The indytmnt could not be sustained, in so far as concerned the wounding of the said ensigne Lowdon, because he was not present to insist in the actione, and the king's advocat had noe interest to insist for any private injury or wrong done to ensigne Lowdon.

Tertio, If the indytmnt should be sustained in so far as concerned ensigne Lowdon, yet the pannall ought to be assolied, because ensigne Lowdon was the first aggressor, having first beat the pannall with his hand, and then thrust at him with his sword before the pannall drew his sword, soe that what he did was in his own defence.

It was answered for the pursuer,

Primo, That the lybell was opponed as to the pannall's disowning and impugning king William's authority and title to the crowne, and the pannall's drinking the late king James his health as king, at least the drinking of the late king James's health and the prince of Wales, under these designations, was a clear owning of the late king James, and so must necessarily infer the disowning of king William, and the quarrelling and impugning his right and title to the crowne, which is directly contrary to the act recognizing the king's royall authority, and the indytmnt is offered to be proven in the termes lybelled.

* The libel in this Case is not preserved in the Record. The orthography of the Record is followed here as in other cases.

2. Ensigne Lowdon was present, and advyced with his majestie's advocat, in order to the raising of the indytmnt, but he being ano officer in the lord Lorne's regiment, in Flanders, he was necessitat to goe to his charge before the day of the pannall's appearance, and the king's advocat has good interest to insist in his criminall actions, even as to the injurie and wrong done to ensigne Lowdon, seeing his majestie's advocat may insist in all actions, as well in these cases where ther is *vis privata* or *vis publica*, but more especially in this case, where the injury and violence done to ensigne Lowdon had its ryse from his refusing to drink the health of king James and the prince of Wales, the pannall having quarrelled with him upon the acco't; as also the violence done to ensigne Lowdon was accompanied with most aggravating circumstances, in that the pannall did endeavour to assassinate him, and did most barbarously and treacherously wound him, by thrusting his sword in his body under the table, which is evident he did out of purpose, that the ensigne might not see the sword, nor put himself in a posture to defend; and it cannot be contraverted, that even in the case of private injuries done to any man, especially when ther is blood, the king's advocat has good interest to pursue, which is clear from the 9th act, parliament 11th, James 6th; by which it is provided, that the advocat may pursue all crimes, albeit the parties should be silent and agree; and therfor it is that in the case of simple ryots, proces will be sustained in inferior courts at the instance of the pro'r fiscal, albeit none of the parties be complaining, but much more ought the indytmnt be sustained at his majestie's advocat's instance as to the violence done to the pannall to ensigne Lowdon, the pannall having certainly had a designe to have killed him by the thrust, but that Providence soe ordered it that the wound did not prove mortal.

3. The alledgeance of selfe defence cannot liberat the pannall, because always denying that ensigne Lowdon was the first aggressor, and that he did first beat the pannall with his hand, or drew his sword upon him; it is offered to be proven that the said proceeding quarrell, if any was, was accomodate and taken away, and the pannall and the said ensigne Lowdon were sitting together as good friends, and thereafter when the ensigne was expecting noe harme, the pannall did, as it were under trust, most basely wound the ensigne, by a thrust of his sword underneath the table.

In respect of all which the defence ought to be repelled, and the indytmnt found relevant, and the pannall ought to pass to the knowledge of ane assyze.

INFORMATION and DEFENCES for Christopher Philipson, against the Lybell and Information raised and insisted in by his Majestie's Advocat for the publick interest, and in the name of ensigne Lowdon against libel.

The lybell being holden as repeated, it was answered for the pannall,

Primo, that this indytmnt in sua far as relates to any wrong or injury alleadged done to ensigne Lowdoun cannot be sustained, because the said ensigne Lowdoun is neither compeiring to insist therein, nor is ther any pro'rie from him to any other persone to compear and insist in the same, and albeit the king may have very good interest where any of his subjects are either killed or mutilat, or otherwayes disabled, from doing him service, to insist 'ad vindictam publicam,' yet where noe such thing is lybelled, it is thought a thing extraordinary and unparalleled to sustaine proces at the king's advocate's instance for a private scuffle, where the persone alleadged injured is neither compeiring personally to insist, nor any mandat from him, because if he were compeiring and personally insisting, the pannall could exclude him by unanswerable and relevant defences, which he could prove at the barr, by the oath and depositions of Lowdoun himselfe.

2. It is absolutely denyed, that ever Loudoun himselfe did either consult or advyae with my lord advocat aenent the raising of this lybell, he haveing gone off the kingdome severall moneths before the raising therof, and not yet returned, but the true occasione of all this lybell is a designed contryveance by Lare's friends to force the pannall to give aue abatement of the yearly joynture payable to his lady out of Laires his estate, and it is thought more than ordinary presumptione in them to gett such a villainous contryveance authorized by any judicature in the nation; and the pannall (albeit a stranger) is soe confident of his own innocence and of your lordships' justice, that befor he condescend to any thing which may reflect either upon his own innocence and the justice and integrity of your lordship's bench, that before he enter into any unjust and sordid transactione, he will very freely subject himselfe to the outmost severity of law, confiding only in his own innocence and yor lordship's knownen impartiall justice as to all persones, upon which (next to God Almighty), I confidently depend and relye.

3. As to the indytmnt itselfe, the pannall denying the same, and hail members and qualifications thereof, it is offered to be proven, that if any scuffle happened betwixt the pannall and ensign Loudoun, that the said ensign Loudoun was the first agressor, in sua farr as he did beatt the pannall upon the face and nose to the great effusions of his blood, and thereafter drew his sword before the pannall offered to draw his, and that befor the pannall's sword was drawn, he was wounded by the said ensign Loudoun in the arme, which demonstrats that the pannall was 'constitutus in discrimine vite'; Soe that what he did thereafter against the said ensigne Lowden was clearly done in selfe defence, the pannall being evidently *in discrimine vite* at the tyme. *Secundo*, it is denyed as most calumnious, that ever the pannall was in any termes of freindship with ensign Lowdoun after he was beatt, bleed, and

abused as said is, but that the wound given to the said ensigne Lowdoun (if any was given, which is denyed) was *ex incontinenti* immediately after the pannall was beatten and bleed in the face and wounded in the arme, as aforesaid.

4. As to the alleadged expressions, it was answered,

Primo, that denying the same, yet the indytmnt cannot be sustained, because primo, it is nottour and undenyable that the pannall hath alwayes owned his present majestie as his king, and for clearing thereof he can produce severall commissiones direct to him for taking depositions in the countrey from the soveraigne courts of England, and for removeing disaffected persones out of the bounds where he lived, and your lordships are to judge whither any such commissiones would have been granted to any suspect of disaffection to the present government.

2. The pannall denyes that he named king James in the alleadged health, and albeit he had named both king and prince of Wales, yet where the king hath noe sone, prince of Wales is knowne to be one of the undoubted titles due to the king, soe that the drinking of the prince of Wales' health can import noe more than the drinking of king William's own health, prince of Wales being a title competent to the king of England, ay and whyll he have a sone of his own, and if need beis, the pannall can prove that at the same tyme he declared he mean'd by the king and prince of Wales, king William only.

Tertio, noe man will pretend that it is criminal to wish health to any of his majestie's nearest relationes, and my lord advocat will not pretend but that if the pannall had added the word (late), that ther had bein any ground for this indytmnt, soe that all the guilt and cryme lybelled is only stretched from the omissione of that monosyllable, which being only a simple and inadvertant omissione of a syllable, can by noe law be stretched to inferr a capitall cryme or guilt; but the pannall absolutely denyes the nameing of king James at that tyme; in respect whereof he ought to be assoziized from this unjust and calumnious complaint.

December 30, 1697.

Intran'

Christopher Phillipson, prisoner, indyted for assassinating Abram Loudoun, ensigne in lord Lorne's regiment, and drinking king James's health, and the prince of Wales.

Pursuer.—*Sir Patrick Hume*, his maj't's solicitor.

Pro'rs in Defence.—*Sir David Thoires*, *Mr. John Frank*.

INTERLOCUTOR.

The Lords Commissioners of Justiciary having considered the indytmnt pursued be his majestie's advocat against Christopher Phillipson, with the debate therupon, they find the drinking of king James's health

as king, relevant to infer the paine of treason, but finds the drinking of king James's health and the prince of Wales relevant only to infer ane arbitrary punishment, and finds that part of the indytmēt aent the wounding ensigne Lowdoun with a drawen sword, relevant to infer ane arbitrary punishment; but finds the defence, that ensigne Lowdoun was the first aggressor, and had wounded the pannall with a drawen sword, and that what the pannall did was for selfe defence, relevant to elide that part of the indytmēt, and finds the reply, that the preceding quarrell was taken away, and that ensigne Lowdoun and the pannall were sitting in termes of friendship before the pannall wounded ensigne Lowdoun, relevant to elide the forsaide defence, and repells all the other defences proponed for the pannall, and remitts the poynts found relevant to the knowledge of the assyse.

Sic Subscibitur, J. FALCONAR, I. P. D. C.

ASSISE.

Alexander Haiggs, wright.
Mr. Charles Dallas, merchant.
William Somervell, merchant.
Thomas Crombie, merchant.
William Sheills, merchant.
Alexander Forbes, goldsmith.
Alexander Hay, merchant.
Thomas Chrystie, brewer.
Olipher Merstoune, wright.
John Dobbie, vintner.
James Kerr, taylor.
John Yorkstoune, baxter.
George Gilchrist, vintner.
John Henrysone, wright.
John Turnbull, of Carpair.

The Assyse lawfully sworne, noe objections of the law in the contrair.

James Rowand, merchant, in Greenock, aged twenty seven yeares, unmarried, purged of malice, partiall councill, &c. and solemnly sworne, depones that about the tyme lybelled, the deponent being in company with Christopher Phillipson the pannall, and ensigne Lowdoun, in the house of William Rodger, in Ed'r, wher the pannall and ensigne Lowdoun falling in warme words, and contradicting each other, ensigne Lowdoun gave the pannall two or three blows upon the face with his fist, wherby the pannall was bled, and thereafter they both satt doun at the table as in friendship, but does not remember whither they drunk or not, and within a short tyme thereafter, the pannall drew his sword privately under the table, they both sitting on one syde of the table, and thrust ensigne Lowdoun in the upper part of the thigh, he having bowed himself a little doun when he drew his sword; depones he saw the wound, but the sword was not left sticking in the wound, and the pannall therupon went away; depones that ensigne Lowdoun did not draw his sword till after he had received the said wound; and depones that the wound was quyte through the thigh. As to the drinking of healths, the

deponent depones that they were drinking healths, but he cannot be positive what healths they were, nor what words past therant; and this is the truth, as he shall answer to God.

Sic Subscibitur, JAMES ROWAND.

William Roger, merchant, in Ed'r, aged thretty years or therby, married, purged and aworne; depones that about the tyme lybelled, the pannall and ensigne Lowdoun being drinking in the deponent's cellar, the deponent heard the pannall propose the drinking of the prince of Wales's health, which ensigne Lowdoun refused, seing he had a commissione from king William, but if he offered to drink king William's health, he would pledge it, to which the pannall replied that whoever was king William or king of England was prince of Wales, and thereupon the deponent withdrew and left them, and within lesse than a quarter of an hour, ensigne Lowdoun having come up to the deponent's house, told him that the pannall had sticket him, and shewe him the wound, which was from the bellie scilencing downwards through the thigh; and this is the truth as he shall answer to God.

Sic Subscibitur, WILL. RODGER.

Jean Walker, late servitrix to William Rodger above designed, now indweller in Leith, aged twenty eight years or therby, unmarried, purged and sworne; depones that the tyme lybelled the deponent was in William Rodger's cellar, wher she was taverner, and the pannall and ensigne Lowdoun and James Rowan being drinking there, they were drinking healths, but knowes not what healths they were, and that there were high woris in the company amongst them, but does not know what the words were; that she saw Lowdoun bow down his body and expresse some such words as these, 'That he had gott it,' but cannot be positive of the expressions, and afterwards she heard them say in the house that ensign Lowdoun was wounded, but she saw noe sword out nor any blood; depones she saw the pannall goe out of the cellar, she being standing at the stair-head, and that he went without hatt or sword, or periwick, all which he left behind him in the cellar, and that she saw the hatt and wig, but not the sword, being lying under the table; depones she cannot wryte.

Sic Subscibitur, DAVID HOME.

Griusell Mitchell, spouse to William Rodger, merch't in Ed'r, depones, nihil novit.

John Wallace, chirurgeon in Edinburgh, aged thretty one yeare, married, purged and sworne; depones that the tyme lybelled, the deponent was called to ensigne Lowdoun in William Rodger's house, that he might pauase his wound, which Lowdoun told him was given by the pannall; depones that the wound was throw the rimb of the bellie doun by the side of the thigh and through the thigh, and that he was called about ane hour after Lowdoun received the wound, as they told him, and also James Rowan told him that the pannall had

wounded Lowdon; and this is the truth as he shall answer to God.

Sic Subscibitur, J. WALLACE.

James Broune, chirurgeon, in Ed'r, aged fourty fyve yeares, married, purged and sworne; depones that the tyme lybelled, the deponent was called by John Wallace, the other witnes, to visite ensigne Lowden, about half a day, as he was informed, after Lowden was wounded; and depones that the wound was in the lower part of the belly towards the groine, and in the thigh, and as appeared to him through the thigh; depones that he heard thorrow the house that esquyre Philipsonne, the pannall, had given the wound; and this is the truth as he shall answer to God.

*Sic Subscibitur, JAMES BROUN,
DAVID HOME,
the immediat being
gone out.*

The Lords ordaines the Assyse to inclose and returne their verdict.

December 22, 1697.

The persones who past upon the Assyse of Christopher Philipsonne, prisoner, returned their verdict in presence of the saids Lords, wherof the tenor followes: The Assysers having chosen William Sheills, merchant, their chancellor, and Mr. Charles Dallas, merchant, their clerk, and having considered the Lords' interloquitorient the relevancy of the lybell pursued at the instance of Abram Lowdoune, ensigne, and his majestie's advocat against Christopher Philipsonne, and the points therein remitted to their verdict, have, after considering the witnesses depositions, all with one voyce found noe poynt of the Lords' interlocutor proven thereby.

*Sic Subscibitur, WILLIAM SCHELL, Chanc'l.
CH. DALLAS, Clerk.*

January 21, 1698.

The said day, anent aue petition given in be dam Anna Stewart lady Lawrs, makeand mention, That where it having bein her misfortune to be insnared by Christopher Philipsonne, indyted befor the saids Lords, who pretending to be ane esquyre of a considerable family and fortune in England, by the deceitfull designes and practices of himselfe and severall of his emissaries, she was betrayed and induced to mary him, since which tyme having lived with him in a most lamentable conditione, she was oblidged for selfe preservatione to represent to the saids Lords how barbarously and inhumanely she had bein used by her said husband at sundry tymes since their marriage, in soe much that she had noe subsistence for herself or family, nor security of her lyfe, he having within a short tyme of their marriage, robbed her of any money, jewells, rings, or other valuable goods she had, yea to that height that he panaded in tavernes some of her body cloaths and household pleennishing, and so long as this money lasted, he absented himselfe from his house for a considerable tyme together, with

out the least mean of subsistence left to her and her poor family, and what he left in the house was frequently poynded by his creditors; but not thinking this sufficient to effectuat his designe, in the dead of the night when all the neighbourhood were in bed, most furiously dragged her out of bed and attempted to murder her, which in all probability he designed to effectuat, if she had not bein rescued from his cruelty by the neighbours, who by her fearfull and horrid cryes were alarmed and came and often relieved her out of his hands, and at severall other times he bolted the doors upon her and him alone, and most cruelly dragged her through the house by the hair of the head, and did beatt her with hands and feet, and at other tymes did endeavour to strangle her by tying her to the bed stoupe, which oblidged the neighbours sometyme to call the town guard, and sometymes the minister of the Canogate, and severall other honest people to relieve her out of his hands, all which can be made appear by the captain of the guard, minister, and other famous witnesses; lyk as the said Christopher Philipsonne did not only maltreat her in manner forsaide, but after he had proffigately spent and squandered away all her means, and exposed her and her family to starve, he did most unjustly raise inhibition against her as if she had bein a prodigall and spendthrift, and finding that she could not live in security of her life, she designed before he was committed to prisonne to appeal to the Lords of his majestie's privy councill, that she might separate from him, and might be allowed her own joynture for the alimnt of herselfe and family; and being indyted before the saids Lords, and that severall tymes after he was committed to prisonne he had threatened to murder her, or at least to starve her, she was necessitate in her great distress to apply to the saids Lords of Justiciary for protectione; and therefore craving the saids Lords in respect of the forsaide maltreatment, with many others that she was ashamed to represent, and which she was ready instantlie to instruct by severall famous witnesses, to ordaine her said husband before he might be sett at liberty, to find sufficient cautione acted in their lo'p's books, that he should keep her harmeless in her persone, that she might be in securitie and freedome to prosecute her necessary actione against him befor the privy councill, which she hoped their lo'ps would think just and reasonable, seing she designed not to prosecute him for the injurie she received, noe further than for her own protection and preservation, as the said petition at length bears: And which petition being read in presence of the saids Lords, they ordained the samyne to be sein and answered, which was accordingly done, and the said dam Anna Stewart being solemnly sworne upon the nyneteinth day of January instant, she made faith in presence of their lo'ps, that she dreaded Christopher Philipsonne her present husband, ^{he} according as is represented, and ⁱⁿ her petitione, which she de-

posed to be a truth as she should answer to God; and this day the Lords Commissioners of Justice having considered the above wryten petitione given in by the lady Lawrs, and answer made thereto, and her oath above mentioned, they ordaine Christopher Phillip-

some her present husband to find caution of lawburrows to his said lady, under the paine of one thousand pound Scots, and ordaines him to be apprehended, arrested and detained in prison till he find the samyne, be masera, messengers at armes, and keepers of prisoners.

416. The Trial of Captain WILLIAM KIDD, at the Old-Bailey, for Murder and Piracy upon the High Seas; and of NICHOLAS CHURCHILL, JAMES HOWE, ROBERT LAMLEY, WILLIAM JENKINS, GABRIEL LOFF, HUGH PARROT, RICHARD BARLICORN, ABEL OWENS, and DARBY MULLINS, for Piracy: 13 WILLIAM III. A. D. 1701.*

May 8, 1701.

THE King's Commission for holding the court being first read, they proceeded to call the gentlemen summoned upon the Grand-jury, and the persons sworn were the seventeen following, viz. William Broughton, Thomas Hanwell, Daniel Borwell, Humphry Bellamy,

Nath. Rolston, sen. Joshua Bolton, Benjamin Pike, Joseph Marlow, Benjamin Travis, Stephen Thompson, Thomas Cooper, Robert Gower, Robert Clement, Thomas Sesson, William Goodwin, Robert Calow, Thomas Haws.

Cl. of Arr. Gentlemen of the Grand-jury, stand together, and hear the charge.

* This Trial appears to have been had in consequence of an Address of the House of Commons voted on March 29, 1701; respecting which I find in the Journal, the following entries:

March 16, 1700. The House being informed, That captain Kidd is sent for home, from the West-Indies;

Resolved, That an humble Address be presented to his majesty, that the said captain Kidd may not be tried, discharged, or pardoned, until, the next session of parliament; and that the earl of Bellmont, governor of New England, may transmit over all commissions, instructions, and other papers, taken with, or relating to, the said captain Kidd.

March 25. Mr. Secretary Vernon acquainted the House, That their Address having been presented to his majesty, his majesty had been pleased to give directions therein.

April 8. Mr. Secretary Vernon acquainted the House, That he having presented an Address to his majesty concerning captain Kidd; his majesty had commanded him to acquaint the House, that his majesty having received an account of the arrival of captain Kidd in the isle of Lundy, by a ship which the lords of the admiralty had sent to fetch him, which was bound for the Downs; his majesty had ordered a yacht to be sent to the Downs, in order for the bringing him up: and that the commissioners of the admiralty were likewise directed to send their marshal to take him into his custody.

March 6, 1701. Ordered, That the examinations, instructions, and also all other papers, transmitted from the earl of Bellmont, relating to captain Kidd, be laid before the House, by

the commissioners for executing the office of lord high admiral of England.—On the following day the said Papers were presented.

March 17. Ordered, That such of the Papers relating to captain Kidd, as came from the commissioners for executing the office of lord high admiral of England, sealed up, be opened. And the private examinations of captain Kidd, before the said commissioners, were opened accordingly, and read.

Ordered, That the said examinations do lie upon the table, to be perused by the members of the House.

Also a packet, sealed up, was opened, wherein were several other packets, or letters, sealed up.

Ordered, That the said packet be again sealed up.

March 20. Ordered, That a committee be appointed to inspect the Papers delivered in from the commissioners for executing the office of lord high admiral of England, relating to captain Kidd; and to collect and report to the House, what relates to the said captain Kidd therein.

March 24. A petition of Cogi Babba, on behalf of himself, and other Armenians, inhabitants of Chulfa, the suburb of Spahaw, and subjects to the king of Persia, was presented to the House, and read; setting forth, That the petitioners freighted a ship, called the Karry-Merchant, from Surat to Bengal, and to return to Surat: that she went to Bengal, where the petitioners loaded upon her, at prime cost, to the value of 400,000 rupees, besides 20,000 rupees, the cost of the ship; which was all taken, and carried away, by captain Kidd, on the ship's returning to Surat, about February

"The King's majesty commands all justices of the high court of Admiralty, that have any authority to take any inquisitions, recognizances, examinations, or informations of offences committed within the jurisdiction of the Admiralty of England, to deliver the records of the same into this court, &c. And

all others are commanded to keep silence, upon pain of imprisonment."

Then Dr. Oxenden gave the charge to the Grand-jury, explaining the nature of the commission, and the crimes enquirable by virtue of it by the Grand-jury.

1697: and praying, that captain Kidd may be examined touching the premises, and the petitioners relieved concerning the same.

Ordered, That captain Kidd be examined, at the bar of this House, upon Thursday morning next. That Mr. Speaker do issue his warrant to the keeper of Newgate, to bring captain Kidd to this House, upon Thursday morning next. That the committee appointed to inspect the Papers delivered in from the commissioners for executing the office of lord high admiral of England, relating to captain Kidd, and collect and report to the House what relates to captain Kidd therein, do sort the said Papers; and report to the House what of them relate to captain Kidd, upon Thursday next. That Bolton be summoned to attend this House upon Thursday morning next, in order to his examination in relation to captain Kidd. That the petitioner Cogi Babba do attend this House upon Thursday morning next, with such evidences as he hath, in order to make out the matter of his Petition.

March 27. Sir Humphrey Mackworth, according to order, reported from the committee, who were appointed to sort the Papers delivered in from the commissioners for executing the office of lord high admiral of England, relating to captain Kidd, and report to the House what of them related to the said captain Kidd; That they had sorted the same accordingly, and divided the same into two parcels; those which relate, and those which do not relate, to the said captain Kidd. And he delivered the same in at the clerk's table.

Then captain Kidd's private examinations, taken before the commissioners for executing the office of lord high admiral of England, were read: and captain Kidd being brought by the keeper of Newgate, according to order, was called in: and the petition of Cogi Babba, formerly presented to the House, was again read: and the said captain Kidd was examined; and then he withdrew. And several letters from the earl of Bellamont, and also from captain Kidd, were read. And he was again called in, and examined. And then withdrew.

Ordered, That captain Kidd be remanded to the prison of Newgate.

Resolved, That this House will, to-morrow morning, take into consideration the patent commissions, and instructions to capt. Kidd.

Ordered, That sir Edmund Harrison, in the said examinations and letters, do attend this House to-morrow morning.

March 28. The House proceeded to take in commissions, and the House being

mund Harrison attended, according to order; he was called in, and examined. And then he withdrew.

And a motion being made, and the question being put, That a grant, passed under the great seal of England, to Richard earl of Bellamont and others, of all the goods, merchandizes, treasure, and other things therein granted, which should be taken by captain Kidd from Thomas Too, John Ireland, and others in the said grant mentioned as pirates, before their conviction, is illegal and void; the House divided: Yeas 185; Noes 198. So it passed in the negative.

March 29. Resolved, That an humble Address be presented to his majesty, by such members of this House as are of his majesty's most honourable privy council, that he will please to give order, that captain Kidd may be proceeded against according to law.

March 31. The House being informed, that captain Kidd desired to be brought again to the House, having something to say to the House;

Ordered, That captain Kidd be sent for to attend this House immediately: and that Mr. Speaker do issue his warrant to the keeper of Newgate for that purpose.

The House being informed, that capt. Kidd was brought, according to order, he was called in, and heard; and then withdrew.

Ordered, That captain Kidd be remanded to the prison of Newgate.

April 1. Mr. Secretary Hedges acquainted the House, that their Address having been presented to his majesty, That he would please to give order, that captain Kidd may be proceeded against according to law; his majesty has been pleased to give the necessary directions for the trial of the said captain Kidd.

April 16. The House being informed, that captain Kidd had sent to the commissioners for executing the office of lord high admiral of England, that he may have the use of his commission, and some other papers, at his trial; which things now lie before this House;

Ordered, That the said commission, and such other papers as captain Kidd desires, be delivered, by the clerk of this House, to the secretary of the admiralty.

In the third Volume of the Collection of State Tracts published in the reign of king William

the second

A Full

Account

of the

Proceedings

of the

House of

Commons

in the

Year 1701

Then the Grand jury withdrew, and after some time returned into court, and found the Bill of Indictment against captain Kidd for Murder, and another against him and Nicholas Churchill, James Howe, Robert Lamley, William Jenkins, Gabriel Loff, Hugh Parrot, Richard Barlicorn, Abel Owens, and Darby Mullins, for Piracy. Then proclamation as usual being made, the aforesaid prisoners were brought to the bar, and arraigned.

Cl. of Arr. William Kidd, hold up thy hand.

Kidd. May it please your lordships, I desire you to permit me to have counsel.

Recorder. (Sir Salathiel Lovell.) What would you have counsel for?

Kidd. My lord, I have some matter of law relating to the Indictment, and I desire I may have counsel to speak to it.

Dr. Osenden. What matter of law can you have?

Cl. of Arr. How does he know what it is he is charged with? I have not told him.

Recorder. You must let the court know what those matters of law are, before you can have counsel assigned you.

Kidd. They be matters of law, my lord.

Recorder. Mr. Kidd, do you know what you mean by matters of law?

Kidd. I know what I mean; I desire to put off my trial as long as I can, till I can get my evidence ready.

Recorder. Mr. Kidd, you had best mention the matter of law you would insist on.

Dr. Osenden. It cannot be matter of law, to put off your trial, but matter of fact.

Kidd. I desire your lordship's favour; I desire Dr. Oldish and Mr. Lemmon may be heard as to my case.

Cl. of Arr. What can he have counsel for, before he has pleaded?

Recorder. Mr. Kidd, the court tells you, you shall be heard what you have to say when you have pleaded to your indictment. If you plead to it, if you will, you may assign matter of law, if you have any; but then you must let the court know what you would insist on.

Kidd. I beg your lordship's patience till I can procure my papers. I had a couple of French passes, which I must make use of in order to my justification.

Recorder. That is not matter of law. You have had long notice of your trial, and might have prepared for it. How long have you had notice of your trial?

Kidd. A matter of a fortnight.

Dr. Osenden. Can you tell the names of any persons that you would make use of in your defence?

Kidd. I sent for them, but I could not have them.

Dr. Osenden. Where were they then?

Kidd. I brought them to my lord Bellamont* in New-England.

* He was the prosecutor of lord Coningsby and sir Charles Porter, see vol. 12, p. 1279.

Recorder. What were their names? You cannot tell without book. Mr. Kidd, the court see no reason to put off your trial, therefore you must plead.

Cl. of Arr. W. Kidd, hold up thy hand.

Kidd. I beg your lordships I may have counsel admitted, and that my trial may be put off; I am not really prepared for it.

Recorder. Nor never will, if you can help it.

Dr. Osenden. Mr. Kidd, you have had reasonable notice, and you knew you must be tried, and therefore you cannot plead you are not ready.

Kidd. If your lordships permit those papers to be read, they will justify me. I desire my counsel may be heard.

Mr. Coniers. We admit of no counsel for him.

Recorder. There is no issue joined; and therefore there can be no counsel assigned. Mr. Kidd, you must plead.

Kidd. I cannot plead till I have those papers that I insisted upon.

Mr. Lemmon. He ought to have his papers delivered to him, because they are very material for his defence. He has endeavoured to have them, but could not get them.

Mr. Coniers. You are not to appear for any one till he pleads, and that the court assigns you for his counsel.

Recorder. They would only put off the trial.

Mr. Coniers. He must plead to the indictment.—*Cl. of Arr.* Make silence.

Kidd. My papers were all seized, and I cannot make my defence without them. I desire my trial may be put off till I can have them.

Recorder. The court is of opinion they ought not to stay for all your evidence; it may be they will never come. You must plead, and then if you can satisfy the court, that there is a reason to put off your trial, you may.

Kidd. My lord, I have business in law, and I desire counsel.

Recorder. Mr. Kidd, the course of courts is, when you have pleaded, the matter of trial is next: if you can then shew there is cause to put off the trial, you may; but now the matter is to plead.

Kidd. It is a hard case when all these things shall be kept from me, and I be forced to plead.

Recorder. If he will not plead, there must be judgment.

Kidd. My lord, would you have me plead, and not to have my vindication by me?

Cl. of Arr. Will you plead to the indictment?

Kidd. I would beg that I may have my papers for my vindication.

Cl. of Arr. Nicholas Churchill, hold up thy hand.

Churchill. My lord, I desire I may have the benefit of the proclamation; I came in upon the king's proclamation.

Recorder. If you do not plead, the court must pass judgment upon you. You can have no benefit in what you say, till you have pleaded. If you were indicted for felony, and

you will not plead, the law takes it in nature of a confession, and judgment must pass, as if you were proved guilty.

Cl. of Arr. Nicholas Churchill, hold up thy hand. James Howe, hold up thy hand. Robert Lamley, hold up thy hand. (Which they did.)

Recorder. W. Kidd has not held up his hand.

Cl. of Arr. He does hold up his hand. William Jenkins, hold up thy hand. Gabriel Loff, hold up thy hand. Hugh Parrot, hold up thy hand. Richard Barlicorn, hold up thy hand. Abel Owens, hold up thy hand.

Owens. I came in upon the king's proclamation, and entered myself into the king's service.

Recorder. You must plead first, and then if there be occasion, you will have the benefit of it. (Then he held up his hand.)

Cl. of Arr. Darby Mullins, hold up thy hand. Mullins. May it please your lordships, I came in voluntarily on the king's proclamation.

Recorder. This is the same case with Owens, you must speak to that afterwards.

Cl. of Arr. W. Kidd, you stand indicted by the name of William Kidd, &c. Art thou guilty or not guilty?

Kidd. I cannot plead to this indictment, till my French passes are delivered to me.

Cl. of Arr. Are you guilty or not guilty?

Kidd. My lord, I insist upon my French papers; pray let me have them.

Recorder. That must not be now, till you have put yourself upon your trial.

Kidd. That must justify me.

Recorder. You may plead it then, if the court see cause.

Kidd. My justification depends on them.

Recorder. Mr. Kidd, I must tell you, if you will not plead, you must have judgment against you, as standing mute.

Kidd. I cannot plead till I have these papers; and I have not my witnesses here.

Recorder. You do not know your own interest; if you will not plead you must have judgment against you.

Kidd. If I plead I shall be accessory to my own death, till I have persons to plead for me.

Recorder. You are accessory to your own death, if you do not plead. We cannot enter into the evidence, unless you plead.

Cl. of Arr. Are you guilty or not guilty?

Recorder. He does not understand the law; you must read the statute to him.

Cl. of Arr. Mr. Kidd, are you guilty of this piracy, or not guilty?

Kidd. If you will give me a little time to find my papers, I will plead.

Cl. of Arr. There is no reason to give you time; will you plead or not?

Mr. Coniers. Be pleased to acquaint him with the danger he stands in by not pleading. Whatever he says, nothing can avail him till he pleads.

Recorder. He has been told so, but does not believe it.

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Mr. Coniers. If there be any reason to put off his trial, it must be made appear after issue is joined.

Recorder. If you say guilty, there is an end of it; but if you say not guilty, the court can examine into the fact.

Officer. He says he will plead.
Cl. of Arr. W. Kidd, art thou guilty or not guilty?—*Kidd.* Not guilty.

Cl. of Arr. How wilt thou be tried?

Kidd. By God and my country.

Cl. of Arr. God send thee a good deliverance. (And so of all the rest.)

Kidd. My lord, I beg I may have my trial put off for three or four days, till I have got my papers.

Recorder. The judges will be here by-and-bye, and you may move the court then; we are only to prepare for your trial: We do not deny your motion; but when the court is full, they will consider of the reasons you have to offer.

[Then William Kidd was tried upon the indictment for murder.]

Cl. of Arr. W. Kidd, Hold up thy hand: Thou standest indicted by the name of William Kidd, late of London, mariner, &c.

The first INDICTMENT for Murder.

' The Jurors for our sovereign lord the king
' do, upon their oath, present, That William
' Kidd, late of London, mariner, not having the
' fear of God before his eyes, but being moved
' and seduced by the instigation of the devil,
' the thirtieth day of October, in the ninth
' year of the reign of our sovereign lord, Wil-
' liam the third, by the grace of God, of Eng-
' land, Scotland, France, and Ireland, king,
' defender of the faith, &c. by force and arms,
' &c. upon the high sea, near the coast of Ma-
' labar, in the East Indies, and within the ju-
' risdiction of the admiralty of England, in
' a certain ship, called the Adventure-galley
' (whereof the said William Kidd then was
' commander), then and there being, felon-
' ously, voluntarily, and of his malice afore-
' thought, then and there did make an assault
' in and upon one William Moore, in the peace
' of God and of our said sovereign lord the king,
' to wit, then and there being, and to the ship
' aforesaid, called the Adventure-galley, then
' and there belonging; and that the aforesaid
' William Kidd, with a certain wooden bucket,
' bound with iron-hoops, of the value of eight-
' pence, which he the said William Kidd then
' and there had and held in his right hand, did
' violently, feloniously, voluntarily, and of his
' malice aforethought, beat and strike the
' aforesaid William Moore in and upon the
' right part of the head of him the said Wil-
' liam Moore, a little above the right ear of the
' said William Moore, then and there upon the
' high sea, in the ship aforesaid, and within
' the jurisdiction of the admiralty of England
' aforesaid, giving the said William Moore,
' then and there with the bucket aforesaid, in

' and upon the aforesaid right part of the head
' of him the said William Moore, a little above
' the right ear of the said William Moore, one
' mortal bruise; of which mortal bruise the
' aforesaid William Moore, from the said
' thirtieth day of October, in the ninth year
' aforesaid, until the one and thirtieth day of
' the said month of October, in the year aforesaid,
' upon the high-sea aforesaid, in the ship
' aforesaid, and within the jurisdiction of the
' admiralty of England aforesaid, did languish,
' and languishing did live; upon which one-
' and thirtieth day of October, in the ninth year
' aforesaid, the aforesaid William Moore upon
' the high sea aforesaid, near the aforesaid
' coast of Malabar, in the East Indies aforesaid,
' in the ship aforesaid, called the Adventure-
' galley, and within the jurisdiction of the ad-
' miralty of England aforesaid, did die; and
' so the jurors aforesaid, upon their oath
' aforesaid, do say, that the aforesaid William
' Kidd feloniously, voluntarily, and of his mal-
' lice aforethought did kill and murder the
' aforesaid William Moore upon the high sea
' aforesaid, and within the jurisdiction of the
' admiralty of England aforesaid, in manner
' and form aforesaid, against the peace of our
' said sovereign lord the king, his crown and
' dignity, &c.

How sayest thou, William Kidd, art thou
guilty of this murder whereof thou standest in-
dicted, or not guilty?—*Kidd.* Not guilty.

Cl. of Arr. How wilt thou be tried?

Kidd. By God and my country.

Cl. of Arr. God send thee a good deliverance. Nicholas Churchill, James Howe, Robert Lamley, William Jenkins, Gabriel Loff, Hugh Parrot, Richard Barlicorn, Abel Owens, Darby Mullins, hold up your hands. You the prisoners at the bar, those men that you shall hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of your several lives and deaths. If therefore you, or any of you, will challenge them, or any of them, your time is to speak to them as they come to the book to be sworn, and before they be sworn.

Kidd. My lord, I desire counsel may be assigned me.

Recorder. Captain Kidd, I told you it would be your time, when the jury was called, to offer what you had to offer; therefore, if you have any thing now to say to the court, you had best say it.

Kidd. I beg I may have counsel, Dr. Oldish, and Mr. Lemmon, that they may be heard on my behalf.

Just. Powel. If he desires it, you may be counsel for him, provided there be any matter of law that he has to plead; otherwise he must be tried.*

Dr. Oldish. My lord, he moves that his trial for piracy may be put off for several reasons; one is, there is one Davis, that is a necessary

witness for him; he was taken a passenger into the ship, and therefore could not be concerned in any piracy: now this Davis stands indicted, so that he is deprived of this person, who is a necessary witness for him in this case.

Mr. Coniers. He is not indicted yet; he may call him if he thinks fit.

Just. Powel. If he be indicted, yet he may be a witness.

Dr. Oldish. My lord, we desire he may be here.

Just. Powel. Where is he?

Cl. of Arr. He is in Newgate.

Just. Powel. Let him be sent for.

Dr. Oldish. My lord, it is very fit his trial should be delayed for some time, because he wants some papers very necessary for his defence. It is very true, he is charged with piracy in several ships; but they had French passes when the seizure was made. Now if there were French passes, it was a lawful seizure.

Just. Powel. Have you those passes?

Kidd. They were taken from me by my lord Bellamont; and these passes would be my defence.

Dr. Ozenden. Had you any other passes when you took the Armenian ship?

Dr. Oldish. If those ships that he took had French passes, there was just cause of seizure, and it will excuse him from piracy.

Kidd. The passes were seized by my lord Bellamont, that we will prove as clear as the day.

Mr. Lemmon. My lord, I desire one word as to this circumstance; he was doing his king and country service, instead of being a pirate: for in this very ship there was a French pass, and it was shewn to Mr. Davis, and carried to my lord Bellamont, and he made a seizure of it. And there was a letter writ to testify it, which was produced before the parliament; and that letter has been transmitted from hand to hand, so that we cannot at present come by it. There are several other papers and letters that we cannot get; and therefore we desire the trial may be put off till we can procure them.

L. C. B. Ward. Where are they?

Mr. Lemmon. We cannot yet tell whether they are in the Admiralty-office, or whether Mr. Jodrell hath them.

Just. Powel. Let us see on what you go. You talk of French passes; you should have been prepared to make affidavit of it. What ship was that which had the French passes?

Mr. Lemmon. The same we were in, the same he is indicted for.

Just. Powel. Make out this, Mr. Lemmon.

Mr. Lemmon. My lord, we desire Mr. Davis may be sent for; he will prove it.

L. C. B. Ward. Send for Edward Davis.

Mr. Fell. My lord, will you have him brought into court?—*L. C. B. Ward.* Yes.

Sol. Gen. They have had a fortnight's notice to prepare for the trial.

Dr. Oldish. We petitioned for money, and

* See in this Collection, vol. 5, p. 466, vol. 6, p. 516.

the court ordered 50*l.*; but the person that received it went away, and we had none till last night.

Dr. Orenden. I ordered that the money might be paid into his own hands, that he might be sure to have it.

Mr. Crawley, (Register,) declared, that he paid the 50*l.* into his own hands on Tuesday morning.

L. C. B. Ward. You ought to make it out, that there is a reasonable cause to put off the trial, or else it cannot be allowed.

Mr. Lemmon. My lord, we will be ready to-morrow morning.

L. C. B. Ward. They ought to have had due notice; what notice have they had?

Sol. Gen. A fortnight's notice, this day fortnight.

Dr. Oldish. My lord, he should have had his money delivered to him.

Kidd. I had no money nor friends to prepare for my trial till last night.

L. C. B. Ward. Why did you not signify so much to the king's officers?

Sol. Gen. My lord, this we will do; let Davis be brought into court; and if that be a just excuse, we are contented. In the mean time, let him be tried for the murder, wherein there is no pretence of want of witnesses or papers.—*Officer.* Davis is here, my lord.

Cl. of Arr. Set all aside but captain Kidd. William Kidd, you are now to be tried on the bill of murder; the jury is going to be sworn; if you have any cause of exception, you may speak to them as they come to the book.

Kidd. I shall challenge none; I know nothing to the contrary but they are honest men.

The Jury sworn were, Nathaniel Long, Jo. Ewers, Jo. Child, Ed. Reeves, Tho. Clark, Nath. Green, Henry Sherbrook, Henry Dry, Richard Greenaway, Jo. Sherbrook, Tho. Emms, Rog. Mott.

After proclamation made (as usual) the Court proceeded to the Trial as follows:

Cl. of Arr. W. Kidd, hold up thy hand. (Which he did.) You gentlemen of the jury, look upon the prisoner, and hearken to his cause. He stands indicted by the name of William Kidd, &c. as before in the indictment. Upon this indictment he has been arraigned, and thereunto has pleaded, Not guilty, and for his trial has put himself on God and his country, which country you are. Your charge is to enquire, whether he be guilty of the murder whereof he stands indicted, in manner and form as he stands indicted, or not guilty, &c.

Mr. Knap. My lord, and you gentlemen of the jury; this is an indictment of murder. The indictment sets forth, "That William Kidd, on the 30th of October, on the high sea, on the coast of Malabar, did assault one William Moore, on board a ship called The Adventure, whereof William Kidd was captain, struck him with a wooden bucket, hooped with iron, on the side of the head near the right ear, and that of this bruise he died the next day,

and so that he has murdered the same person." To this indictment he pleaded not guilty: if we prove him guilty, you must find him so.

Sol. Gen. My lord, and gentlemen of the jury, we will prove this as particularly as can be, that William Kidd was captain of the ship, and that William Moore was under him in the ship, and that without any provocation he gave him this blow whereof he died.

Mr. Coniers. My lord, it will appear to be a most barbarous fact, to murder a man in this manner; for the man gave him no manner of provocation. This Wm. Moore was a gunner in the ship, and this William Kidd abuses him, and calls him 'lousy dog;' and upon a civil answer, he takes this bucket and knocks him on the head, whereof he died the next day. Call Joseph Palmer, and Robert Bradinham. (Who appeared, and were sworn.) Joseph Palmer, give my lord and the jury an account of what you saw done by William Kidd, on the coast of Malabar, as to William Moore his gunner.

Palmer. About a fortnight before this accident fell out, captain Kidd met with a ship on that coast, that was called The Loyal Captain. And about a fortnight after this, the gunner was grinding a chissel aboard The Adventure, on the high sea near the coast of Malabar, in the East Indies.

Mr. Coniers. What was the gunner's name?

Palmer. William Moore: and captain Kidd came and walked on the deck, and walks by this Moore; and when he came to him, says, 'Which way could you have put me in a way to take this ship, and been clear?' 'Sir,' says William Moore, 'I never spoke such a word, nor ever thought such a thing.' Upon which captain Kidd called him a 'lousy dog.' And says William Moore, 'If I am a lousy dog, you have made me so; you have brought me to ruin, and many more.' Upon his saying this, says captain Kidd, 'Have I ruined you, ye dog?' and took a bucket bound with iron hoops, and struck him on the right side of the head, of which he died the next day.

Mr. Cowper. What was the gunner doing at that time that he gave him the blow?

Palmer. He was grinding a chissel at the time that he struck him.

Mr. Cowper. Did he give him the blow immediately after he gave him that answer?

Palmer. He walked two or three times backward and forward upon the deck before he struck the blow.

Just. Turton. What did capt. Kidd say first?

Palmer. 'Which way could you have put me in a way of taking this ship, and been clear?' Says the gunner, 'I never said so, nor thought any such thing.'

Mr. Cowper. Hark you, friend, explain that matter.

Baron Hatsell. What was the occasion of those words?

Palmer. It was concerning this ship.

L. C. B. Ward. What ship was it? Name the ship.

Palmer. It was the Loyal Captain. Captain Kidd said to Wm. Moore, 'Which way could you have put me in the way to have taken this ship, and been clear?' Says Wm. Moore, 'I never said such a thing, nor thought it.' Upon that he called him 'lousy dog.'

L. C. B. Ward. Was that ship taken?

Palmer. No, she was gone.

Mr. Coniers. You say he called him 'lousy dog?'—*Palmer.* Yes.

Mr. Coniers. What did William Moore say to him then?

Palmer. He said, 'If I am a lousy dog, you have brought me to it; you have ruined me and many more.' Upon this, says captain Kidd, 'Have I brought you to ruin, you dog?' Repeating it two or three times over, and took a turn or two upon the deck, and then takes up the bucket, and strikes him on the head.

Mr. Cowper. You say he made a turn or two on the deck, and then struck him?

Palmer. Yes.

Mr. Coniers. Tell my lord what passed next after the blow.

Palmer. He was let down the gun-room; and the gunner said, 'Farewel, farewell, captain Kidd has given me my last.' And capt. Kidd stood on the deck, and said, 'You're a villain.'

Mr. Cowper. How near was captain Kidd to him when he said he had given him his last?

Palmer. He was near him.

Mr. Cowper. Was he within hearing of what Moore said?

Palmer. Yes; he was within seven or eight foot.

Sol. Gen. Did you apprehend that he died of that blow?

Palmer. He was in perfect health before that.

Sol. Gen. What did the surgeon think of it?

Palmer. The surgeon is here.

Sol. Gen. Did you see him afterwards?

Palmer. No, I did not see him after, till he was dead.

Mr. Cowper. How did the wound appear when you saw him?

Palmer. After he was dead, the surgeon was called to open his head; and capt. Kidd said, 'You are damn'd busy without orders.'

Mr. Cowper. Though we ask you questions, you must turn your face there, towards the jury. Give the jury an account of what you saw.

Palmer. I felt on his head, and I felt something give way, and about the wound there was a bruise.

Mr. Cowper. You say you saw him when he was carried off, after the blow; how did his head appear then? Was he bloody?

Palmer. There was not much blood came from him.

L. C. B. Ward. Was you by when these words were spoken?

Palmer. Yes, my lord.

L. C. B. Ward. Did you see the prisoner give the blow with the bucket upon those words?—*Palmer.* Yes, my lord.

L. C. B. Ward. How long was it before he went down the deck?—*Palmer.* Presently.

L. C. B. Ward. Did he complain of the wound?

Palmer. He said, 'Farewel, farewell, captain Kidd has given me my last.'

L. C. B. Ward. Was this Moore in a good condition of health before this blow was given him?—*Palmer.* Yes, my lord.

L. C. B. Ward. And afterwards he complained?—*Palmer.* Yes, my lord.

L. C. B. Ward. When he was dead, what marks were on his head?

Palmer. On the right side of his head, on this place (pointing to his own head) it was bruised a considerable breadth; and in one place I could feel the skull give way.

Mr. Cowper. How long after the blow did he die?—*Palmer.* The next day following.

Mr. Cowper. And you say you saw him dead then?—*Palmer.* Yes, Sir.

L. C. B. Ward. Captain Kidd, if you will ask him any questions, you may.

Kidd. My lord, I would ask this man, what this Moore was doing when this thing happened?

L. C. B. Ward. Mr. Palmer, you hear what he says; what was Moore doing?

Palmer. He was grinding a chissel.

Kidd. What was the occasion that I struck him?

Palmer. The words that I told you before.

Kidd. Was there no other ship?

Palmer. Yes.

Kidd. What was that ship?

Palmer. A Dutch ship.

Kidd. What were you doing with the ship?

Palmer. She was becalmed.

Kidd. This ship was a league from us, and some of the men would have taken her, and I would not consent to it; and this Moore said, I always hindered them making their fortunes: was not that the reason I struck him? was there a mutiny on board?

Palmer. No; you chased this Dutchman, and in the way took a Malabar boat, and chased this ship all the whole night; and they shewed their colours, and you put up your colours.

Kidd. This is nothing to the point: was there no mutiny aboard?

Palmer. There was no mutiny, all was quiet.

Kidd. Was there not a mutiny, because they would go and take that Dutchman?

Palmer. No, none at all.

Mr. Coniers. Call Robert Bradinham.

Jury. What was the cause that he struck him?

Palmer. A fortnight before this was done, we met with this Loyal Captain, of which captain Hoar was commander, and he came on board captain Kidd's ship, and captain Kidd went on board his, and then captain Kidd let this ship go. About a fortnight after this, the gunner was grinding his chissel on the deck, and captain Kidd said to him, 'Which way could you have put me in a way to take this ship, and been clear?' To which he replied,

'I never said such a thing, nor thought of such a thing.' Whereupon captain Kidd called the gunner 'lousy dog;' and, says Moore, 'If I am a lousy dog, you have made me so; you have brought me to ruin, and a great many more.' And says captain Kidd, 'Have I brought you to ruin, you dog?' and after struck him with the bucket. These were all the words that passed.

Just. *Powel*. Was captain Kidd aboard that ship?

Palmer. Yes; and captain Hoar was aboard him.

Just. *Powel*. Was there any body nigh at that time?

Palmer. Yes; there were eight or nine men that had muskets and other arms, and they were for taking the ship, and capt. Kidd was against it, and so it was not done.

Kidd. My lord, I was in the cabin, and heard a noise, and came out; and Wm. Moore said, 'You ruin us, because you will not consent to take captain Hoar's ship.' Says a Dutchman, 'I will put captain Kidd in a way to take this ship, and come off fairly.'

L. C. B. *Ward*. You may ask him any questions you have a mind to, but you must reserve what you have to say for yourself till you come to make your defence.

Sol. Gen. Mr. Palmer, do you know of any other provocation to strike him besides those words?

Palmer. I know of no other provocation.

Mr. *Coniers*. Set up Robert Bradinham. (Who appeared) Mr. Bradinham, in what office was you in the ship?

Bradinham. I was surgeon of the ship.

Mr. *Coniers*. Of what ship?

Brad. The Adventure-Galley, whereof captain Kidd was master.

Mr. *Coniers*. Was you there when the blow was given?—*Brad*. No.

Mr. *Coniers*. Was you sent for when capt. Kidd had given the gunner the wound upon the head?

Brad. I was sent for to his assistance after he was wounded, and I came to him, and asked him how he did? He said, 'He was a dead man; capt. Kidd had given him his last blow.' And I was by the gun-room, and captain Kidd was walking there, and I heard Moore say, 'Farewel, farewel, captain Kidd has given me my last blow;' and captain Kidd, when he heard it, said, 'Damn him, he is a villain.'

Mr. *Coniers*. Did you hear him say so?

Brad. I did hear it.

Mr. *Cowper*. Was it in a way of answer to what he said?—*Brad*. Yes.

Mr. *Cowper*. How long did he live after the blow?

Brad. He died the next day. The wound was but small, the skull was fractured.

Mr. *Cowper*. Do you believe he died of the wound?—*Brad*. Yes.

Mr. *Cowper*. Had you any discourse with captain Kidd after this, about this man's death?

Brad. Some time after this, about two

months, by the coast of Malabar, captain Kidd said, 'I do not care so much for the death of my gunner, as for other passages of my voyage; for I have good friends in England that will bring me off for that.'

L. C. B. *Ward*. Mr. Kidd, will you ask him any questions?

Kidd. I ask him whether he knew of any difference between this gunner and me before this happened?

Brad. I knew of no difference between them at all.

Sol. Gen. Mr. Kidd, have you any thing more to ask him?—*Kidd*. No.

Mr. *Coniers*. Then we have done for the king.

L. C. B. *Ward*. Then you may make your defence. You are charged with murder, and you have heard the evidence that has been given, what have you to say for yourself?

Kidd. I have evidence to prove it is no such thing, if they may be admitted to come hitber. My lord, I will tell you what the case was: I was coming up within a league of the Dutchman, and some of my men were making a mutiny about taking her, and my gunner told the people he could put the captain in a way to take the ship, and besafe. Says I, How will you do that? The gunner answered, We will get the captain and men aboard. And what then? We will go aboard the ship, and plunder her, and we will have it under their hands that we did not take her. Says I, This is Judas like, I dare not do such a thing. Says he, We may do it, we are beggars already. Why, says I, may we take this ship because we are poor? Upon that a mutiny arose: so I took up a bucket, and just throwed it at him, and said, You are a rogue to make such a motion. This I can prove, my lord.

L. C. B. *Ward*. Call your evidence.

Mr. *Cowper*. Mr. Palmer, was there any mutiny in the ship when this man was killed?

Palmer. There was none.

L. C. B. *Ward*. Captain Kidd, call what evidence you will.

Kidd. They are prisoners, I desire they may be called up.

L. C. B. *Ward*. Whatever other crimes they may be guilty of, they may be witnesses for him in this case.

Baron *Hatsell*. Mr. Palmer, did he throw the bucket at him, or strike him with it?

Palmer. He held it by the strap in his hand.

Kidd. Call Abel Owens. (Who appeared.) Can you tell which way this bucket was thrown?

Just. *Powel*. What was the provocation of throwing this bucket?

Owens. I was in the cook-room, and hearing some difference on the deck, I came out, and the gunner was grinding a chissel on the grindstone, and the captain and he had some words, and the gunner said to the captain, You have brought us to ruin, and we are desolate. And, says he, Have I brought you to ruin? I have not brought you to ruin, I have not done

an ill thing to ruin you ; you are a sassy fellow to give me these words. And then he took up the bucket, and did give him the blow.

Kidd. Was there not a mutiny among the men ?

Owens. Yes, and the bigger part was for taking the ship ; and the captain said, You that will take the Dutchman, you are the strongest, you may do what you please ; if you will take her, you may take her ; but if you go from aboard, you shall never come aboard again.

L. C. B. Ward. When was this mutiny you speak of ?

Owens. When we were at sea.

L. C. B. Ward. How long was it before this man's death ?—*Owens.* About a month.

Just. Powel. At this time when the blow was given, did Moore the gunner endeavour to make any mutiny ?—*Owens.* No.

Just. Powel. Was there any mutiny then ?

Owens. None at all.

Kidd. Did not he say he could put me in a way to take the Dutch-man, and be clear ?

Owens. I know there were several of them would have done it, but you would not give consent to it.

Kidd. No ; but this was the reason I threw the bucket at him.

L. C. B. Ward. Captain Kidd, he tells you this was a month before you struck him.

Jury. My lord, we desire he may be asked, Whether he did throw the bucket, or strike him with it ?

L. C. B. Ward. Answer the jury to that question.

Owens. He took it with the strap, and struck him with it.

Kidd. Did not I throw it at him ?

Owens. No ; I was near you when you did it.

Mr. Coniers. Did you see the stroke given ?

Owens. I did see the stroke given.

L. C. B. Ward. Captain Kidd, will you call any more ?

Kidd. Yes, my lord. Call Richard Barlicorn.

Just. Powel. What questions would you have him asked ?

Kidd. R. Barlicorn, What was the reason that blow was given to the gunner ?

Barlicorn. At first when you met with the ship, there was a mutiny, and two or three of the Dutchmen came aboard ; and some said, she was a rich vessel, and they would take her : and the captain said, No, I will not take her. And there was a mutiny in the ship, and the men said, If you will not, we will. And he said, If you have a mind, you may ; but they that will not, come along with me.

Kidd. Do you think William Moore was one of those that was for taking her ?

Barlicorn. Yes.

L. C. B. Ward. How long was that before Moore died, do you know ?

Barlicorn. No ; I did not keep a journal.

L. C. B. Ward. Was it after Moore died ?

Barlicorn. No, Sir, it was before Moore died.

Mr. Coniers. How long before ?

Barlicorn. I believe it was about a month or three weeks, I cannot tell which.

L. C. B. Ward. You say there was a mutiny in the ship, what was the mutiny about ?—*Barlicorn.* About taking the ship.

L. C. B. Ward. What was the ship's name ?

Barlicorn. The Loyal Captain. And the captain said, If they take the ship, they should never come aboard again.

L. C. B. Ward. Was you by when Moore received this blow ?

Barlicorn. No ; I was not by then.

Kidd. Did you know of any quarrel between this Moore and I before that accident ?

Barlicorn. No, I did not.

Just. Powel. Was there any mutiny in the ship when this Moore died ?

Barlicorn. They were talking of it.

Kidd. Was there not a Dutchman close by us, when this blow was given ?

Barlicorn. Yes, Sir.

Kidd. He was going to make another mutiny, and I prevented him.

Just. Powel. Did Moore endeavour to make any mutiny at that time ?

Barlicorn. The ship was gone at that time.

Just. Powel. How long had she been gone ?

Barlicorn. About a week.

Baron Hatsell. Was there any mutiny about the Dutch ship you saw ?

Barlicorn. The Dutch ship ? Not that I know of ; but there was a mutiny aboard the Loyal Captain.

Kidd. Do you not know of another mutiny ?

Baron Hatsell. Do you know of any other mutiny.—*Barlicorn.* No.

Kidd. At that very time they were going to make a mutiny.

L. C. B. Ward. Will you ask him any more questions ?

Kidd. What discourse had I with Moore at that time ?

Barlicorn. I was aboard our ship, but did not see the blow given.

Kidd. They were saying they would take her, and he said he could put me in a way to take her, without coming to any harm.

L. C. B. Ward. What occasion could these words be of a mutiny ?

Barlicorn. There were many of the men would have gone with arms, and taken that ship without the captain's consent.

L. C. B. Ward. At that time when this Moore was killed, was there any mutiny ?

Barlicorn. No.

L. C. B. Ward. When was it that Moore said, they might have taken this ship ?

Barlicorn. At the same time when the ship was in company with us.

L. C. B. Ward. That was a week or a fortnight before.

Barlicorn. No, Sir, the Loyal Captain was within sight of us.

Baron Hatsell. What, when Moore was killed ?

Barlicorn. No, not then. William Moore lay sick a great while before this blow was given; and the doctor said, when he visited him, this blow was not the cause of his death.

L. C. B. Ward. Then they must be confronted. Do you hear, Bradinham, what he says? He says you said, That blow was not the cause of his death. Did you ever say so?

Bradinham. My lord, I never said so.

L. C. B. Ward. Did you see that young man there?

Bradinham. Yes; he was aboard the ship.

L. C. B. Ward. Was Moore sick before that blow?

Bradinham. He was not sick at all before.

Barlicorn. He was sick some time before, and this blow did but just touch him; and the doctor said, he did not die on the occasion of this blow.

Just. Gold. Did you ever say so, Mr. Bradinham?

Bradinham. No, my lord.

Sol. Gen. You say he did but just touch him; Were you present when the blow was given?

Barlicorn. No; but I saw him after he was dead, and I was by when the doctor said, he did not die of that blow.

Mr. Cowper. What did he die of?

Barlicorn. I cannot tell, he had been sick before; we had many sick men aboard.

Sol. Gen. How long did he lie after this blow before he died?

Barlicorn. I cannot tell justly how long it was.

L. C. B. Ward. How long do you think? You took notice of the blow; how long did he live after that?

Barlicorn. I believe about a week.

L. C. B. Ward. And the two witnesses swore he died the next day.

Barlicorn. I cannot tell justly how long he lived afterwards.

Jury. We desire to know whether he knew what was the occasion of this blow?

Barlicorn. All the reason I can give is, because it was thought he was going to breed a mutiny in the vessel.

L. C. B. Ward. Did you hear of that by any body?

Kidd. Was Bradinham in the mutiny? Declare that.

L. C. B. Ward. Mr. Kidd, why do you ask that question?

Kidd. I ask him whether Bradinham was not in any mutiny in the ship?

L. C. B. Ward. Why do you ask that?

Barlicorn. If any thing was to be, he was as forward as any one.

L. C. B. Ward. You say he was as forward as any; but it does not appear any one made a mutiny at this time.

Barlicorn. I do not know, Sir.

L. C. B. Ward. Have you any more to call?

Kidd. My lord here is another witness.

L. C. B. Ward. What is your name?

Parrot. Hugh Parrot.

L. C. B. Ward. Mr. Kidd, What do you ask him?

Kidd. I ask you whether Bradinham was in a mutiny in my ship?

Parrot. I cannot say whether he was or no.

L. C. B. Ward. Capt. Kidd, you are tried for the death of this Moore; now why do you ask this question? What do you infer from hence? You will not infer, that if he was a mutineer, it was lawful for you to kill Moore.

Kidd. Do you know the reason why I struck Moore?

Parrot. Yes, because you did not take the Loyal Captain, whereof captain Hoar was commander.

L. C. B. Ward. Was that the reason he struck Moore, because the ship was not taken?

Parrot. I shall tell you how it happened, according to the best of my knowledge. My commander fortun'd to come up with this captain Hoar's ship, and some were for taking her, and some not; and afterwards there was a little sort of mutiny, and some rose in arms, the greatest part, and they said they would take this ship; and the commander was not for it; and so they resolv'd to go away in the boat, and take her. Captain Kidd said, 'If you desert my ship, you shall never come aboard again, and I will force you into Bombay, and I will carry you before some of the council there.' Insomuch as my commander stilled them again, and they remained on board. And about a fortnight afterward, there pass'd some words between this William Moore and my commander; and then says he, 'Captain, I could have put you in a way to have taken this ship, and been never the worse for it.' He says, 'Would you have me take this ship? I cannot answer it, they are our friends;' and my commander was in a passion; and with that I went off the deck, and I understood afterwards the blow was given, but how I cannot tell.

Just. Powel. Capt. Kidd, have you any more to ask him; or have you any more witnesses to call?

Kidd. I could call all of them to testify the same thing; but I will not trouble you to call any more.

L. C. B. Ward. Have you any more to say for yourself?

Kidd. I have no more to say, but I had all the provocation in the world given me; I had no design to kill him, I had no malice or spleen against him.

L. C. B. Ward. That must be left to the jury to consider the evidence that has been given; you make out no such matter.

Juryman. My lord, I desire the prisoner may give an account, whether he did do any thing in order to his cure.

L. C. B. Ward. He is to be tried according to law; the king's evidence hath been heard, and he has the liberty to produce what evidence he can for himself; will you put him to produce more evidence than he can? If he has any more to say, it will be his interest to say

what he can ; the court is willing to hear him as long as he hath any thing to offer for himself, either upon that account, or any thing else.

Kidd. It was not designedly done, but in my passion, for which I am heartily sorry.

L. C. B. Ward. Gentlemen of the jury, the prisoner at the bar, William Kidd, is indicted for the murder of William Moore, and whether he be guilty of this murder, or not guilty, it is your part to determine on the evidence that has been given. The fact charged against him is this, That the prisoner at the bar, William Kidd, being the commander of the ship, called *The Adventure galley*, and the deceased William Moore the gunner in that ship ; that upon the high sea, near the coast of Malabar, in the East Indies, and within the jurisdiction of the Admiralty of England, in October, in the 9th year of his majesty's reign, 1697. the prisoner, William Kidd, out of his malice forethought, did strike the deceased William Moore with a bucket hooped with iron, on the right side of the head, and that the blow was the occasion of the death of the said William Moore ; that this was done on the 30th of October, and that his death ensued on the 31st of October, being the next day. This is the fact charged upon him.

Now you have heard the evidence that has been given on the king's part, and you will weigh it well. You hear the first witness that has been produced on behalf of the king, is Joseph Palmer. He tells you he was present on board this ship at the time when the blow was given : and he says, there had been some discourse between the prisoner William Kidd and the deceased Moore, concerning taking a ship that was called *The Loyal Captain* ; and that captain Kidd said to him, ' How could you ' have put me in a way to take that ship, and ' be clear ? ' ' No,' says Moore, ' I said no ' such thing.' The reply captain Kidd made to him was, ' He was a lousy rogue.' The answer of the deceased was this, ' If I am so, ' you have made me so ; you have ruined me ' and a great many others.' With that, says captain Kidd, ' Have I ruined you, you dog ? ' And up he took a bucket hooped with iron, and gave him a blow on the right side of his head. And thereupon he complained and said, ' You ' have given me my last blow.' And then Moore went down below deck, and he saw him no more till the next day, and then he was dead ; and he felt upon his head, and perceived a bruise in one part of it, as broad as a shilling, and he felt the skull was broke ; and he does take on him to say, that he believes that blow was the occasion of his death. Being asked, whether he knew in what state of health he was before ? he says, he was in a healthy condition ; he was grinding a chissel at that time when the blow was given ; and that blow he believes was the occasion of his death. And being asked, whether he heard any other words, or saw or knew any thing that could be any cause of provocation ? he says, he knew

no more than the reply of the party deceased ; ' If I am a lousy dog, you have made me so, ' and have been my ruin : ' and then having taken two or three turns upon the deck, he gave him the blow ; and then Moore went down the deck, and used these words, ' You ' have given me my last blow,' or to that effect.

Gentlemen, you have heard the surgeon also, Robert Bradinham ; and he tells you, he did not see the blow given, but he was sent for after, and the deceased said, ' Captain Kidd ' had given him his last blow : ' and thereupon he did examine him as a surgeon, and does believe that blow on the head was the occasion of his death ; and he did observe it as well as he could.

Juryman. My lord, I think Bradinham said, he was not then by when the prisoner gave the blow.

L. C. B. Ward. I did not say he was : he says, he was sent for after the blow ; and when he came, the deceased said, he gave it him, and what would be the consequence.

Now these two being cross-examined by the prisoner William Kidd, whether they did not know of some mutiny in the ship, that might be the occasion of his giving this blow ; they have told both their stories, of what discourse there was of taking this ship, *The Loyal Captain*, and of what design there was upon the Dutch ship after. Now the first of these was a fortnight before this happened, and the other a week ; so that there was then no occasion of mutiny, nor do they know of any mutiny at that time.

Now, Gentlemen, he has produced for himself three witnesses. The first that he calls is Abel Owens ; and this witness has not in his testimony made for the prisoner, but in effect confirmed what the other witnesses for the king said : for he tells you he was by when the blow was given, and gives you an account how this thing was ; that there was some discourse between them, much what to the effect aforesaid, both as to what captain Kidd said to Moore, and what Moore replied ; and that captain Kidd should say to Moore, ' You are ' a saucy fellow,' or to that purpose ; and Moore said, ' You have ruined me, and a great ' many others ; ' and with that the prisoner took up the bucket, and struck him with it. And he being asked, if there were any provocation or occasion why this blow was given, and whether there was any mutiny at that time, as he pretended ? he says, he knew of none, only he speaks of one about a month before.

They have called two other witnesses ; one is Richard Barlicorn ; he is the prisoner's servant ; and though he be his servant, yet the law allows him to be a witness for him, and the credit of his testimony is left to you. Now what has he said ? He has told you something different stories. He thinks there was a mutiny in the ship. And being asked about what time ? he thinks it was about a month or three weeks before ; and, upon further examination, saith, there was a mutiny when Moore was

killed. He is willing to say what he can for his master, and believes Mr. Kidd did not design to do any harm to that man; for he heard the surgeon say, that blow was not the occasion of his death. Now, in contradiction to that, Bradinham the surgeon says, he never did say so, but believes that this blow was the occasion of his death. You have heard what objections the young man's testimony is liable to, and you will consider his whole evidence.

The last witness the prisoner has called, is Hugh Parrot. He says, there was something of these words, and that the deceased did say, he could have put the captain in a way to have taken the ship; and hereupon words arose, and the captain was in a passion; and that then he went away, and understood afterwards the blow was given, but how he could not tell.

Now, Gentlemen, this being the matter of fact, the prisoner is indicted upon it for murder. Now to make the killing of a man to be murder, there must be malice prepense, either express or implied: the law implies malice, when one man, without any reasonable cause or provocation, kills another. You have had this fact opened to you. What mutiny or discourse might be a fortnight or month before, will not be any reason or cause for so long continuance of a passion. But what did arise at that time, the witnesses tell you. The first witness tells you, the first words that were spoken, were by Mr. Kidd; and upon his answer, Mr. Kidd calls him 'Lousy dog.' The reply was, 'If I am so, you have made me so; you have ruined me, and a great many more.' Now, gentlemen, I leave it to you to consider, whether that could be a reasonable occasion or provocation for him to take a bucket, and knock him on the head and kill him. You have heard the witnesses have made it out that he was a healthy man, and they are of opinion that the blow was the occasion of his death. Now for the prisoner, on such a saying, and without any other provocation, to take a bucket and knock the deceased on the head, and kill him, must be esteemed an unjustifiable act: for, as I said, if one man kill another without provocation, or reasonable cause, the law presumes and implies malice; and then such killing will be murder, in the sense of the law, as being done out of malice prepense. If there be a sudden falling out, and fighting, and one is killed in heat of blood, then our law calls it manslaughter: but in such a case as this, that happens on slight words, the prisoner called the deceased a 'lousy dog;' and the deceased said, 'If I be so, you have made me so;' can

this be a reasonable cause to kill him? And if you believe them to be no reasonable cause of provocation, and that this blow was given by the prisoner, and was the occasion of Moore's death, as the witnesses allege, I cannot see what distinction can be made, but that the prisoner is guilty of murder.* Indeed, if there had been a mutiny at that time, and he had struck him at the time of the mutiny, there might have been a reasonable cause for him to plead in his defence, and it ought to have been taken into consideration; but it appears, that what mutiny there was, was a fortnight at least before: therefore, gentlemen, I must leave it to you: if you believe the king's witnesses, and one of the prisoner's own, that this blow was given by the prisoner in the manner aforesaid, and are satisfied that it was done without reasonable cause or provocation, then he will be guilty of murder: and if you do believe him guilty of murder, upon this evidence, you must find him so: if not, you must acquit him.

Kidd. My lord, I have witnesses to produce for my reputation.

L. C. B. Ward. Mr. Kidd, we gave you time to make your defence: why did not you produce them? You were asked more than once, if you had any more to say; and you said, you would call no more witnesses.

Kidd. I can prove what service I have done for the king.

L. C. B. Ward. You should have spoken sooner: but what would that help in this case of murder? You said you had no more to say before I began.

Then an Officer was sworn to keep the Jury; and about an hour after the Jury returned, and gave in their verdict.

Cl. of Ar. Gentlemen, answer to your names. *Nath. Long.*—*Nath. Long.* Here, &c.

Cl. of Ar. Are you all agreed of your verdict?—*Omnis.* Yes.

Cl. of Ar. Who shall say for you?

Omnis. Foreman.

Cl. of Ar. William Kidd, hold up thy hand, (which he did). Look upon the prisoner. Is he guilty of the murder whereof he stands indicted, or not guilty?—*Foreman.* Guilty.

Cl. of Ar. Look to him, keeper.

* See East's Pleas of the Crown, c. 5, s. 20. Leach's edition of Hawkins's Pleas of the Crown, b. 1, c. 31, s. 33, and the authorities there cited. See, also, in this Collection, lord Morley's Case, vol. 6, p. 769. Mawgridge's Case, A. D. 1707; and Oneby's Case, A. D. 1786.

The Trial of WM. KIDD, NICHOLAS CHURCHILL, JAMES HOWE, ROBERT LAMLEY, WM. JENKINS, GABRIEL LOFFE, HUGH PARROT, RICHARD BARLICORN, ABEL OWENS, and DARBY MULLINS, for Piracy and Robbery, on a Ship called "The Quedagh Merchant:."* 13 WILLIAM III. A. D. 1701.

May 9, 1701.

THE jurors for our sovereign lord the king do, upon their oath, present, That William Kidd, late of London, mariner; Nicholas Churchill, late of London, mariner; James Howe, late of London, mariner; Robert Lamley, late of London, mariner; Wm. Jenkins, late of London, mariner; Gabriel Loffe, late of London, mariner; Hugh Parrot, late of London, mariner; Richard Barlicorn, late of London, mariner; Abel Owens, late of London, mariner; and Darby Mullins, late of London, mariner; the 30th day of January, in the 9th year of the reign of our sovereign lord, William the Third, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. by force and arms, &c. upon the high sea, in a certain place distant about ten leagues from Cutshbeen, in the East-Indies, and within the jurisdiction of the admiralty of England, did piratically and feloniously set upon, board, break, and enter a certain merchant ship, called The Quedagh Merchant, then being a ship of certain persons (to the jurors aforesaid unknown); and then and there piratically and feloniously, did make an assault in and upon certain mariners (whose names to the jurors aforesaid are unknown) in the same ship, in the peace of God, and of our said now sovereign lord the king, then and there being, piratically and feloniously did put the aforesaid mariners of the same ship, in the ship aforesaid, upon the high sea, in the place aforesaid, distant about ten leagues from Cutshbeen aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, piratically and feloniously did steal, take, and carry away the said merchant ship, called The Quedagh Merchant, and the apparel and tackle of the same ship, of the value of 400*l.* of lawful money of England; 70 chests of opium, of the value of 1,400*l.* of lawful money of England; 250 bags of sugar, of the value of 100*l.* of lawful money of England; 20 bales of raw silk, of the value of 400*l.* of lawful money of England; 100 bales of callicoes, of the value of 200*l.* of lawful money of England; 200 bales of muslins, of the value of 1,000*l.* of lawful money of England; and three bales of romels, of the value of 30*l.* of lawful money of England; the goods and

chattels of certain persons (to the jurors aforesaid unknown) then and there, upon the high sea aforesaid, in the aforesaid place, distant about ten leagues from Cutshbeen aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, being found in the aforesaid ship, in the custody and possession of the said mariners in the same ship, from the said mariners of the said ship, and from their custody and possession, then and there, upon the high sea aforesaid, in the place aforesaid, distant about ten leagues from Cutshbeen aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, against the peace of our said now sovereign lord the king, his crown and dignity, &c.

Cl. of Arr. Set William Kidd, Nicholas Churchill, &c. to the bar (And so of the rest.) Will. Kidd, hold up thy hand. (Which he did, and so of the rest.) You the prisoners at the bar, those men that you shall hear called, and that personally appear, are to pass between our sovereign lord the king and you, upon trial of your several lives and deaths. If therefore you, or any of you, will challenge any of them, your time is to speak to them as they come to the book to be sworn, and before they be sworn.

And there being no challenges, the twelve that were sworn on the jury were as follow: John Cooper, Jo. Hall, Jo. James, Peter Parker, Caleb Hook, R. Rider, P. Walker, William Hunt, John Micklethwait, Richard Chiswell, Abraham Hickman, George Grov.

Cl. of Arr. Crier, count these: John Cooper.

Crier. One, &c. Twelve good men and true, stand together, and hear your evidence.

[Then the usual proclamation for information was made; and the prisoners being bid to hold up their hands, the clerk of arraignments charged the jury with them thus:]

Cl. of Arr. You of the jury, look upon the prisoners, and hearken to their cause. They stand indicted by the names of William Kidd, &c. (as before in the Indictment). Upon this indictment they have been arraigned, and thereunto have severally pleaded, Not Guilty; and for their trial put themselves on God and their country, which country you are. Your charge is, to enquire whether they be guilty of the piracy and robbery whereof they stand indicted in manner and form as they stand indicted, or not guilty, &c.

Nic. Churchill. My lord, I beg your opinion, whether I may not plead the king's pardon?

* See Leach's Hawkins's Pleas of the Cr. b. 1, c. 37. East's Pleas of the Crown, c. 17.

L. C. B. *Ward*. Let us see your pretences ; you shall have all legal defences and advantages allowed to you.

Churchill. I came in upon his majesty's proclamation.

L. C. B. *Ward*. Have you the king's proclamation ? If you have, let us see it.

Churchill. We had notice of it at Guiana : and we delivered up ourselves to col. Bass, governor of East-Jersey, and I have it under his hand. I beg your lordship would appoint me counsel to plead my case.

(The Paper was shewn, and read.)

Mr. *Crawley*. I know not when it was.

Churchill. I had notice of it at Guiana : I have been two years in custody.

L. C. B. *Ward*. How long have you been a prisoner ?

Churchill. Almost two years ; two years next July.

L. C. B. *Ward* and the rest of the Judges. The Proclamation (for what you say yourself) does not reach your case.

Howe, Churchill, Mullins. We came in upon the proclamation all the same day.

Just. *Powel*. How can you make it appear you surrendered.

Prisoners. Here is an affidavit made of it by the governor's secretary ; and there is the gentleman himself, col. Bass.

Just. *Powel*. You must make it out that you have come in within the conditions of that proclamation, if you have any benefit by it.

L. C. B. *Ward*. Let the proclamation be read. (Which was done accordingly and it here follows :)

By the King, a Proclamation.

WILLIAM R.

Whereas we being informed, by the frequent complaints of our good subjects trading to the East-Indies, of several wicked practices committed on those seas, as well upon our own subjects as those of our allies, have therefore thought fit (for the security of the trade of those countries, by an utter extirpation of the pirates in all parts eastward of the Cape of Good Hope, as well beyond Cape Comorin as on this side of it, unless they shall forthwith surrender themselves, as is hereinafter directed) to send out a squadron of men of war, under the command of captain Thomas Warren. Now we, to the intent that such who have been guilty of any acts of piracy in those seas, may have notice of our most gracious intention, of extending our royal mercy to such of them as shall surrender themselves, and to cause the severest punishment according to law to be inflicted upon those who shall continue obstinate, have thought fit, by the advice of our privy council, to issue this proclamation ; hereby requiring and commanding all persons who have been guilty of any act of piracy, or any ways aiding or assisting therein, in any place eastward of the Cape of Good Hope, to surrender themselves

within the several respective times herein after limited, unto the said captain Thomas Warren, and the commander in chief of the squadron for the time being, and to Israel Hayes, Peter Dellanoye, and Christopher Pollard, esquires, commissioners appointed by us for the said expedition, or to any three of them, or, in case of death, to the major part of the survivors of them. And we do hereby declare, that we have been graciously pleased to empower the said captain Thomas Warren, and the commander in chief of the said squadron for the time being, Israel Hayes, Peter Dellanoye, and Christopher Pollard, esquires commissioners aforesaid, or any three of them, or, in case of death, to the major part of the survivors of them, to give assurance of our most gracious pardon unto all such pirates in the East-Indies, viz. all eastward of the Cape of Good Hope, who shall surrender themselves for piracies or robberies committed by them upon the sea or land ; except, nevertheless, such as they shall commit in any place whatsoever after notice of our grace and favour hereby declared ; and also excepting all such piracies and robberies as shall be committed from the Cape of Good Hope eastward, to the longitude or meridian of Socatora, after the last day of April, 1699, and in any place from the longitude or meridian of Socatora eastward, to the longitude or meridian of Cape Comorin, after the last day of June, 1699, and in any place whatsoever eastward of Cape Comorin after the last day of July, 1699 ; and also excepting Henry Every alias Bridgman, and William Kidd.

Given at our court at Kensington, the 8th day of December, 1698, in the 10th year of our reign. God save the King.

Clerk. There is no day mentioned in this paper when they surrendered themselves.

Mr. *Moxon*. My lord, about the year 1698, there was a special commission given to four persons, and they were to proceed in their voyage to the Indies, and they carried a great number of Proclamations, That all the pirates in such and such places should surrender themselves : Now they came to St. Helena with them, and captain Warren was sent to St. Mary's, and he was to deliver some of these proclamations there, and the commissioner had then the ambassador to the Great Mogul on board, and this captain Warren these proclamations. Warren comes and delivers the proclamations out, and, among the rest, the prisoner at the bar having notice of this, he goes to the governor, and confesses he had been a pirate, and desired them to take notice that he surrendered himself ; and we have the governor here, to give an account of this matter.

L. C. B. *Ward*. The proclamation says, They must surrender themselves to such and such persons by name : see if it be so. [Then the proclamation was read again.] Here are several qualifications mentioned ; you must

bring yourselves under them, if you would have the benefit of it.

Dr. Newton. Let them shew that they surrendered themselves to the persons they were to surrender to.

Mr. Moron. My lord, we will prove we gave notice within the time, by this paper.

Sol. Gen. (sir John Hawles) There is no time mentioned in it. (The affidavit was read.) 'Charles Hally, gent. maketh oath, That in the year 1698, there being notice of his majesty's gracious pardon to such pirates as should surrender themselves, James Howe, Nicholas Churchill, and Darby Mullins, in May, 1699, did surrender themselves to Jeremiah Bass, and he did admit them to bail.'

L. C. B. Ward. There are four commissioners named in the proclamation: there is no governor mentioned that is to receive them, only those four commissioners.

Mr. Moron. But, my lord, consider the nature of this proclamation, and what was the design of it, which was, to invite pirates to come in.

Mr. Coniers. We must keep you to the proclamation: here is not enough to put off the trial.

L. C. B. Ward. If you had brought yourselves within the case of the proclamation, we should be very glad: you that offer it, must consider it is a special proclamation, with divers limitations; and if you would have the benefit of it, you must bring yourselves under the conditions of it. Now there are four commissioners named, that you ought to surrender to; but you have not surrendered to any one of these, but to colonel Bass, and there is no such man mentioned in this proclamation.

Mr. Knapp. My lord, and gentlemen of the jury, the Indictment sets forth, that the prisoners at the bar, on the 30th of January, in the 9th year of his majesty's reign, ten leagues distant from Cutsheen, did piratically seize and rob a certain ship called the *Quedagh Merchant*, and put the men in fear of their lives; and the said ship, with her apparel, tackle and goods, did then and there, upon the high sea, take and carry away, against the peace of our sovereign lord the king, his crown and dignity: to this Indictment they have pleaded, not guilty: If we prove it upon them, you must find them guilty.

Dr. Newton, Advocate for the Admiralty. My lord, and gentlemen, the prisoners at the bar, captain William Kidd, late commander of the *Adventure Galley*, and nine other mariners in the same vessel, stand indicted for feloniously and piratically assaulting and taking a ship, called the *Quedagh Merchant*, on the high sea near Cutsheen, in the East Indies, about the 30th of January, in the 9th year of his majesty's reign: The ship was considerable for its force and bulk, being about four hundred ton; and more considerable for its lading, having on board to the value of many thousand pounds.

This captain Kidd, who thus acted the pi-

rate himself, went from England in April, 1696, with a commission, dated the 26th of January preceding, to take and seize pirates in the Indian seas, which were then very much and very dangerously infested by them, to the great hazard, and loss, and ruin of the merchant.

The ship carried thirty guns, and there were on board about eighty men; but the captain being come to New York, in July 1696, pretending, as indeed it was designed he should, and he had undertaken to make that design good, that he was going to Madagascar (which was the known and common receptacle of the pirates in those seas) to take pirates, and free the seas from those disturbers of the commerce of mankind; so many came in to him, being invited by articles publicly set up by him in that place, that his number quickly increased to one hundred and fifty five men; a force sufficient, if he had meant well, to have made him useful to the public; and to prove as mischievous, if his designs were otherwise: And what those were, will quickly appear.

After calling in at several places for provisions, and, among others, at Madagascar, in July, 1697, he sailed to Bob's Key, a small island at the entrance of the Red Sea, and a convenient station for the observing what vessels went from thence to the Indies; and now, instead of taking pirates, he becomes one himself, and the greatest and the worst of all. Here he staid three weeks, in expectation of the *Mocca fleet*, to make his benefit and his fortune out of it; for, whatever he had before pretended, this was his real design, and now so possessed his mind, that he could not refrain from declaring, and that often to his men, That now he should make his voyage, and ballast his ship with gold and silver. After long expectation, the fleet, on the 11th of August, to the number of 14, came by; he fell in with the middle of them, fired several guns at them; but finding they had an English and Dutch convoy, that design happily failed of the wished-for success.

This disappointment however did not discourage him, but that he proceeded on for the coast of Malabar, where he knew the trade was considerable, and hoped his advantage would be proportionable in the disturbing it; and there accordingly, for several months, he committed many great piracies and robberies, taking the ships and goods of the Indians and others at sea, Moors and Christians, and torturing cruelly their persons, to discover if any thing had escaped his hands; burning their houses, and killing, after a barbarous manner, the natives on the shore; equally cruel, drowned and hated both on the land and at sea.

These criminal attempts and actions had rendered his name (to the disgrace and the prejudice of the English nation) too well known, and deservedly detested, in those remote parts of the world; and he was now looked upon as an arch-pirate, and the common enemy of mankind; and accordingly two Portuguese men of war went out in pursuit of him,

and one met with him and fought him for several hours; but Kidd's fortune then reserved him for another manner of trial.

Amongst the great number of vessels he took on that coast, was the ship he stands indicted for, The *Quedagh Merchant*, being then on a trading voyage from Bengal to Surat, the commander English, captain Wright, the owners Armenian merchants, and others. He had taken Moors before, but Moors and Christians are all alike to pirates, they distinguish not nations and religions.

Those on board the vessel offered 30,000 rупees for her ransom, but the ship was too considerable to be parted with, even for so great a sum; so Kidd sold goods out of her, on the neighbouring coast, to the value of 10 or 12,000*l.* out of which he took whatever he could pretend to for ammunition and provisions, with forty shares for himself, and the remainder was disposed of amongst the crew, and particularly those who are here indicted with him, who accompanied him, who assisted him throughout in all his piracies, and who now too share the spoils and the guilt with him.

With this ship and another, and the remainder of the goods not sold on the coast, he sailed once more for Madagascar, where he arrived in the beginning of May, 1698, and there again what was left on board was divided according to the same proportions, and amongst the same persons as before, each mariner having about three bales to his share.

[Then the Jury brought in their verdict against William Kidd, for murder: and Dr. Newton proceeded;]

It is not to be omitted, that at his return to Madagascar, there came on board him some persons from the ship *The Resolution*, formerly the *Mocca frigate* (for the piratically seizing of which vessel there have been formerly trials and convictions in this place), of which captain Culliford, a notorious pirate, now in custody, and against whom two bills have been found for piracy by the grand jury, was the commander. They at first seemed to be afraid of Kidd, but without any ground; as his former actions had demonstrated, and the sequel shewed: they, who were hardened pirates, and long inured to villainies, could scarce think that any man could so betray the trust and confidence the public had placed in him, and said, they heard he was come to take and hang them; but captain Kidd assured them that he had no such design, and that he had rather his soul should hroil in hell, than do them any harm; bid them not be afraid, and swore he would be true to them; and here, indeed, he did not break his word. This was his way of being true to his trust, and making good the ends of his commission, in acting with the greatest treachery, and the greatest falseness, that ever man did: and, to make all that has been represented of him true, captain Kidd and captain Culliford went on board, treated and presented each other; and, instead of taking Culliford,

as it was his duty to have done, and his force was sufficient to have performed it, he gave him money and ammunition, two great guns and shot, and other necessaries to fit him out to sea, that he might be in a condition the better to take and seize other innocent persons.

His own ship he now left, and went on board *The Quedagh Merchant*; several of his men then went from him, but not the prisoners; they were all along well-wishers and assistants to him, fought for him, divided the plunder with him, and are now come to be tried with him.

This, Gentlemen, is the crime he is indicted for, piracy; the growing trouble, disturbance, and mischief of the trading world, and the peaceable part of mankind, the scandal and reproach of the European nations, and the Christian name (I wish I could not say, that the Kidds and the Averys had not made it more particularly so of the English) amongst Mahometans and Pagans, in the extremest parts of the earth; which turns not only to the disadvantage of the immediate sufferers, but of all such as traffic in those countries, whether companies or single merchants, who are to suffer for the misfortunes of others, with whom, it may be, they have no dealings; and for the villainies of such, whom they and all mankind equally and justly detest and abhor.

This is the person that stands indicted at that bar, than whom no one in this age has done more mischief, in this worst kind of mischief; or has occasioned greater confusion and disorder, attended with all the circumstances of cruelty and falshood, and a complication of all manner of ill.

If therefore these facts shall be proved upon him, you will then, gentlemen, in finding him guilty, do justice to the injured world, the English nation (our common country) whose interest and welfare so much depend on the increase and security of trade; and, lastly, to yourselves, whom the law has made judges of the fact.

Sol. Gen. My lord, and gentlemen of the jury, I am of counsel for the king, against the prisoners at the bar, in this case, with the doctor that has opened the matter from the beginning. These prisoners at the bar went out with commissions for good purposes, though they made use of them to very bad ones. Gentlemen of the jury, I must tell you, the charge upon which you are to enquire, is only upon a certain ship, called *The Quedagh Merchant*, and to that we shall apply our evidence. What was taken in her has been opened already: all we will do now, is to call our witnesses, and make out, to your satisfaction, the things charged upon them.

Mr. Conters. My lord, we shall prove this charge by the persons that were evidence before, Robert Bradinham, and Joseph Palmer: they went out with captain Kidd in his voyage, and he began it in April, 1696. I believe it will be necessary, that they give some account before this court, of the things committed, which was

not, in time, till February, 1697. They will give you an account of some plunders that happened before this, and then of the taking of this ship, and the dividing it amongst them.

Just. Powel. When went they out?

Mr. Coniers. They began their voyage in April, 1696, and took this ship in February, 1697. They did, all along that voyage, commit several plunders on several ships they thought a prey: their design was, not to take pirates, but to take what they could get out of any ships, friends or enemies; for in this ship, The *Que-dagh Merchant*, which was a Moorish ship, there were several Armenians; and they offered them a great sum of money to redeem the ship, but they refused it; and they disposed of the goods, and divided the money; and for the proof of that, we will call Mr. *Bradinham*.

Just. Powel. I understand, that he had a commission; therefore if any one has a commission, and he acts according to it, he is not a pirate; but if he take a commission for a colour, that he may be a pirate, it will be bad indeed: and therefore, if you can prove, that he was a pirate all along, this will be a great evidence against him.

Mr. Coniers. My lord, we will prove that; so that the commission was but a colour. Mr. *Bradinham*, pray, give my lord and the jury an account when you began your voyage, and your proceedings afterwards.

Bradinham. Some time in the year 1696, about the beginning of May, I and others were with captain Kidd; and we sailed from Plymouth, designing for New York; and in the way we met with a French banker, and took her.

Mr. Coniers. Tell the court what ship it was you went in, and with whom.

Bradinham. We went with captain Kidd, in the *Adventure galley*.

Mr. Coniers. What number of men had you when you went first out?

Bradinham. About 70 or 80 men.

Mr. Coniers. What force of guns had you?

Bradinham. We had 30 guns.

Mr. Coniers. In what office was captain Kidd in the ship?

Bradinham. He was the commander of her.

Mr. Coniers. Now tell my lord and the jury what time you left England, and how you proceeded.

Bradinham. In May, 1696, we left Plymouth, and went to New-York, and in the way met with a French ship, and took her: and when we came to New-York, captain Kidd put up articles, that if any men would enter themselves on board his ship, they should have their shares of what should be taken; and he himself was to have forty shares.

Mr. Coniers. What number of men did he get after these articles were published?

Brad. He carried from New-York 155 men.

Mr. Coniers. Whither did he sail then?

Brad. To the *Madeiras*, from thence to *Bonavis*, from thence to *St. Jago*, from thence to *Madagascar*, from thence to *Joanna*, from thence

to *Mahala*, from *Mahala* to *Joanna* again, and from thence to the *Red-sea*; and there we waited for the *Mocca fleet*: They passed us one night, and we pursued them, and went among them, but he found they were too strong for him, and was fain to leave them.

Mr. Cowper. How long did you lie in wait for that fleet?

Brad. A fortnight or three weeks.

Mr. Cowper. Did he express himself so, that he did lie in wait for that fleet?

Brad. Yes; he said, that he did design to make a voyage out of them.

Mr. Cowper. Did he not lie in wait for any French effects in that fleet?

Brad. No, only for the Moorish fleet.

Mr. Cowper. What do you mean by the Moorish fleet.

Brad. The natives of India, the *Mahometans*,

Mr. Cowper. Where did you lie in wait for that fleet?—*Brad.* In the *Red-sea*.

Mr. Cowper. In the mouth of it?

Brad. Yes.

Mr. Cowper. Is it a fit place for that purpose?

Brad. Several sail of ships may lie there.

Mr. Cowper. Did you expect them?

Brad. Yes; captain Kidd waited for them.

Mr. Coniers. How long did you stay there?

Brad. About a fortnight.

Mr. Coniers. Did you do any thing in that time to get intelligence?

Brad. Captain Kidd sent his boat three times to *Mocca*, to see if they could make any discovery; and the two first times they could make none; but the third time they brought word the ships were ready to sail; and accordingly they came, and we sailed after them, and fell in with them, and captain Kidd fired at them.

Mr. Cowper. You say, he sent his boat three times for intelligence: Can you remember what answer they brought?

Brad. The two first times they brought no intelligence; but the third time they brought word, that 14 or 15 ships were ready to sail.

Mr. Coniers. What colours did they say they had?

Brad. I cannot tell that. When captain Kidd had fetched them up, he found they were under *convoy*, and so he left them: and then he was going to the coast of *Malabar*, and by the way met with captain *Parker*.

Just. Powel. Did they fire any guns at the *Mocca fleet*?

Brad. Yes; capt. Kidd fired divers guns at them.

Mr. Coniers. After such time as you left the *Mocca fleet*, what happened after that? Recollect yourself.

Brad. We took a ship, that capt. *Parker* was commander of, between *Carawar* and the *Red-sea*.

Mr. Coniers. What ship was this that capt. *Parker* was commander of?

Brad. A Moorish ship; she came from *Bombay*, and capt. *Parker* was the master.

Mr. Coniers. What did you take from this ship?

Brad. Capt. Kidd took out Parker, and a Portuguese for a Linguister.

Mr. Coniers. A Linguister, What do you mean by that?

Brad. An interpreter; he took out of her a bale of coffee, a bale of pepper, about twenty pieces of Arabian gold, and ordered some men to be taken and hoisted up by their arms, and drubbed with a naked cutlace.

Mr. Coniers. Why did he do that?

Brad. That they might confess what money they had.

Mr. Coniers. Were those Frenchmen that were thus used?

Brad. No, they were Moors.

Mr. Coniers. Was there any demand made of those men, capt. Parker and the Portuguese?

Brad. Yes; the English factory sent for this Parker and the Portuguese, and he denied that he had any such persons on board, for he kept them in a hole.

Mr. Coniers. Do you know any thing more?

Brad. Then he went to sea, and that night he met with a Portuguese man of war; the next morning he came up with her, and the Portuguese first fired at capt. Kidd, and he at him again; they fought four or five hours. Capt. Kidd had ten men wounded.

Mr. Coniers. So that there was nothing more than fighting?—**Brad.** No.

Mr. Coniers. Go on. What did you do next?

Brad. We went to the coast of Malabar.

Mr. Coniers. What did you go thither for?

Brad. We went to one of the Malabar islands for wood and water, and captain Kidd went a-shore, and several of his men, and plundered several boats, and burnt several houses, and ordered one of the natives to be tied to a tree, and one of his men to shoot him.

Mr. Coniers. Pray go on: What was the reason of his shooting this Indian?

Brad. One of his men, that was his cooper, had been ashore, and some of the natives had cut this man's throat, and that was the reason he ordered his men to serve this man so.

Mr. Coniers. Pray go on, and give an account of what afterwards.

Brad. Then we came back again to the Malabar coast and cruised; and in October he killed his gunner, William Moore.

Mr. Coniers. Tell what happened next after that.

Mr. Cowper. Was this the October next after he left England, or the year following?

Brad. It was in October, 1697.

Mr. Coniers. Well, go on.

Brad. Some time in November he took a Moorish ship belonging to Surat: there were two Dutchmen belonging to her, the rest were Moors. Captain Kidd chased this ship under French colours; and when the Dutchman saw that, he put out French colours too. And captain Kidd came up with them, and commanded them on board; and he ordered a Frenchman to come upon deck, and to pretend

himself captain: And so this commander comes aboard, and comes to this Monsieur Le Roy that was to pass for the captain, and he shews him a paper, and said it was a French pass. And captain Kidd said, 'By God, have I caught you? You are a free prize to England.' We took two horses, some quilts, &c. and the ship he carried to Madagascar. In December he took a Moorish ketch; she was taken by the boat; we had one man wounded in taking of her.

Mr. Coniers. When was this done?

Brad. In December, 1697.

Mr. Coniers. What did you plunder then?

Brad. Our people took the vessel a-shore, and captain Kidd took out of her thirty tubs of sugar, a bale of coffee, &c. and then he ordered the vessel to be turned a-drift.

Mr. Coniers. What followed in January?

Brad. January the 20th, captain Kidd took a Portuguese that came from Bengal; he took out of her two chests of opium, some East-India goods, and bags of rice, &c.

Mr. Coniers. How long did you keep this ship?

Brad. He kept this Portuguese ship about seven days; he took out of her some butter, wax, and East-India goods: He kept her till he was chased by seven or eight sail of Dutch, and then he left her.

Mr. Coniers. My lord, now we are come to that on which the indictment is founded. Mr. Bradinham, give a particular account of that.

Brad. Some time in January, captain Kidd took The Quedagh Merchant; he gave her chase under French colours: he came up with her, and commanded the master aboard; and there came an old Frenchman in the boat; and after he had been aboard a-while, he told captain Kidd he was not the captain, but the gunner; and captain Kidd sent for his captain on board his ship.

Mr. Coniers. Who was that?

Brad. Mr. Wright.

Mr. Coniers. What countryman was he?

Brad. An Englishman. He was sent for aboard, and he came; and captain Kidd told him, he was his prisoner; and he ordered his men to go aboard, and take possession of the ship, and disposed of the goods on that coast, to the value of 7 or 8,000*l*.

Mr. Coniers. What persons were aboard her?

Brad. There was captain Wright, and two Dutchmen, and a Frenchman, and some Armenians, and the rest Moors.

Mr. Coniers. Did these Armenians make any offer of any money for their ransom?

Brad. Captain Kidd told them, they should be ransomed, if they made an offer that he liked of; so they offered him 20,000 rupees. He told them, that was but a small parcel of money, and the cargo was worth a great deal more.

Mr. Coniers. Who did the cargo belong to?

Brad. To those Armenians, as I was informed by captain Wright.

Mr. Coniers. What did he do with them?

Brad. He disposed of some of them on the coast of India.

Mr. Coniers. What did he do with the proceed of the goods he sold?

Brad. He shared the money.

Mr. Coniers. Had these men (the other prisoners) any of the shares?

Brad. Yes, all of them. You were a half-share man, and you a half-share man, (pointing at two of them).

Mr. Coniers. Mr. Bradinham, you say captain Wright came aboard Kidd's ship?

Brad. Yes.

Mr. Coniers. Did he discourse with him?

Brad. I was not with him, for he kept his cabin to himself.

Mr. Coniers. But you are sure he came aboard?—*Brad.* Yes.

Mr. Coniers. And he was an Englishman?

Brad. Yes.

Mr. Coniers. How did captain Kidd behave himself to the ships or boats there?

Brad. He boarded several ships, and took out of them what was for his turn.

Mr. Coniers. How did he use those that he traded with?

Brad. Some of them came aboard several times, and he traded with them: but some of them came aboard when he was going away, and he plundered them, and sent them ashore without any goods.

Mr. Coniers. What countrymen were those he served thus?

Brad. Mahometans: they had dealt with him before considerably.

Mr. Coniers. How much did he take from them?—*Brad.* About 500 pieces of eight.

Mr. Coniers. How do you know that?

Brad. I saw it told afterwards. We went to Madagascar afterwards, and by the way met with a Moorish ship, and took out of her several casks of butter, and other things.

Mr. Cowper. What were the crew of this ship?

Just. Powell. They are indicted for The Quedagh Merchant. Were all the prisoners in that action? You have given an historical account from the beginning, that he was a mere plunderer: but now you are to come to the Quedagh, for which they are indicted; go not beyond it.

Mr. Coniers. Look on the several prisoners at the bar, and tell, whether any of the prisoners were at the taking of The Quedagh Merchant?

Cl. of Ar. Was William Kidd there at the time the ship was taken?—*Brad.* Yes.

Cl. of Ar. Was Nicholas Churchill there?

Brad. Yes.

Cl. of Ar. Do you know James Howe? Was he there?—*Brad.* Yes.

Cl. of Ar. Had he a share?—*Brad.* Yes.

Cl. of Ar. Had Robert Lamley a share?

Brad. Yes: he was a servant, and had but half a share of the money, and a whole share of the goods.

Cl. of Ar. William Jenkins, was he there, and had a share?—*Brad.* Yes.

Cl. of Ar. Gabriel Loffe, did you know what he had?

Brad. He had half a share of the money, and a whole share of the goods.

Cl. of Ar. Hugh Parrot, what had he?

Brad. Half a share.

Cl. of Ar. Had Richard Barlicorn a share?

Brad. He had half a share of money, and a whole share of goods.

Cl. of Ar. Had Abel Owens any?

Brad. He had half a share.

Abel Owens. Had I any of it?

Brad. You had it: you took it.

Cl. of Ar. What had Darby Mullins?

Brad. He had half a share of the money, and a whole share of the goods.

Mr. Coniers. Now we have fully proved this as to The Quedagh Merchant.

Dr. Newton. When you came to Madagascar, what was done there?

Brad. There came a canoo to us with some Englishmen in her; they were formerly acquainted with captain Kidd, and they told him, they had heard that he was come to take them, and hang them.

Dr. Newton. Who were they?

Brad. They belonged to the Moco frigate.

Mr. Coniers. Give a particular account of that matter.

Brad. When we came to Madagascar, there came a canoo off to us.

Mr. Coniers. From whom?

Brad. From the Moco frigate, captain Culliford was the commander; and there were some white men in her, that had formerly been acquainted with captain Kidd; they heard that he was come to take them, and hang them. He told them it was no such thing, for he was as bad as they.

Mr. Coniers. Were they thought to be pirates?—*Brad.* They were so.

Mr. Coniers. What was it that captain Kidd said?

Brad. He assured them it was no such thing; and afterwards went aboard with them, and swore to be true to them; and he took a cup of bombœ, and swore to be true to them, and assist them; and he assisted this captain Culliford with guns, and an anchor, to fit him to sea again.

L. C. B. Ward. How came you to know all this? Was you aboard then?

Brad. I was aboard then, and I heard the words.

Dr. Newton. Were any of the goods divided at Madagascar?—*Brad.* Yes.

Mr. Coniers. Now look on the prisoners again: you say, after he met with this captain Culliford, you went and had a division made; pray, give an account of it.

Brad. When we came to Madagascar, captain Kidd ordered the goods to be carried ashore, and shared; and he had forty shares himself.

Cl. of Arr. Had Nich. Churchill a share?

Brad. Yes.

Cl. of Arr. Had James Howe a share?

Brad. Yes.

Cl. of Arr. Had Robert Lamley a share?
Brad. Yes.
Cl. of Arr. Had William Jenkins a share?
Brad. Yes.
Cl. of Arr. Had Gabriel Loff a share?
Brad. Yes.
Cl. of Arr. Had Hugh Parrot a share?
Brad. Yes.
Cl. of Arr. Had Richard Barlicorn a share?
Brad. Yes.
Cl. of Arr. Had Abel Owens a share?
Brad. Yes.
Cl. of Arr. Had Darby Mullins a share?
Brad. Yes.
Cl. of Arr. So that you say, every one of the prisoners at the bar had a share?
Brad. Yes.
Mr. Coniers. What became afterwards of the Adventure-Galley?
Brad. She was so leaky, that she had two pumps going; and when she came to shore, they left her, because she was not fit to go to sea again. And so captain Kidd went aboard the Scuddee Merchant, and designed to make a man of war of her.
Mr. Coniers. What is that Scuddee Merchant? Do you mean the Quedagh Merchant?
Brad. Yes.
L. C. B. Ward. What became of that ship afterwards?
Brad. I left him at Madagascar, after the money and goods were divided; and can give no account afterwards.
Dr. Newton. But you say, capt. Kidd went aboard the Quedagh?
Brad. Yes.
Mr. Coniers. My lord, we have done as to this witness; if they will ask any thing they may.
Cl. of Arr. Will any of you ask him any questions?
Kidd. He says, when he went out first from England, he went out of Plymouth in May, which he did not; for he went in April, therefore this is a contradiction.
L. C. B. Ward. Mr. Kidd, if you will ask him any questions, you may. Do you desire he should be positive when you went from Plymouth?
Brad. It was about the 1st of May, my lord.
L. C. B. Ward. What year?
Brad. In the year 1696.
Cl. of Arr. Nicholas Churchill, will you ask him any questions?
Churchill. I would have went ashore at Carrawar, but the captain would not let me.
L. C. B. Ward. It is proved, that you was at the taking of the Quedagh Merchant, and dividing the goods.
Churchill. Yes, my lord; but I could not help it; I was forced to do what the captain ordered me.
Cl. of Arr. James Howé, will you ask him any questions?
Howé. Have not I obeyed my captain in all his commands?
L. C. B. Ward. There is no doubt made

of that. If any of you will ask him any questions, you may.

Kidd. Did you not see any French passes aboard the Quedagh Merchant?

Brad. You told me you had French passes; I never did see them.

Kidd. Did you never declare this to any body, that you saw these French passes?

Brad. No, I never did see any; but I only said, I heard you say you had them.

Churchill. Had I any share?—*Brad.* Yes.

Churchill. How will you prove that?

Jenkins. My lord, I ask him, whether I was not a servant?

L. C. B. Ward. Ask the witness what questions you will.

Brad. My lord, he was a servant.

L. C. B. Ward. Who was he servant to?

Brad. To George Bullen.

Jenkins. My lord, I beg you will examine my indenture, for I have it in my pocket; I had nothing aboard that ship but what my master had.

Brad. But you had a share of the goods: I cannot tell whether your master had it afterwards.

Cl. of Arr. Gabriel Loffe, have you any question to ask him?

Loffe. I have nothing to say to him, but to ask him, Whether I did ever disobey my captain's commands, or was any ways mutinous on board the ship?

Brad. No, I cannot say you did.

Cl. of Arr. Hugh Parrot, do you ask him any questions?—*Parrot.* No.

Cl. of Arr. Richard Barlicorn, do you ask him any more questions?

Barlicorn. I ask him, whether I was not the captain's servant?

L. C. B. Ward. Yes, he says you was.

Cl. of Arr. Abel Owens, will you ask him any questions?

Owens. I have nothing to say; but depend upon the king's proclamation.

Cl. of Arr. Darby Mullins, have you any questions to ask him?

Mullins. My lord, he knows I had nothing but what captain Kidd was pleased to give me.

L. C. B. Ward. Was he a servant to captain Kidd, or no?

Brad. He had a half a share of money, and a whole share of goods.

Just. Powel. What was the reason some had whole shares, and some half shares?

Brad. Some were able seamen, and some landinen or servants. There were in all 160 shares, whereof captain Kidd had 40; and some of the men had whole shares, and some only half shares.

Mr. Cowper. You told us at first, that in your passage to New York, you took a French banker, and that he condemned her at New York.—*Brad.* Yes.

Mr. Cowper. Did he offer to carry any other ships he took to be condemned?

Brad. No, Sir, never.

Mr. Coniers. Call Joseph Palmer. (Who

appeared.) Mr. Palmer, give my lord and the jury an account, whether you were one of the men that went with captain Kidd in the Adventure galley.—*Palmer*. Yes, I was.

Mr. Coniers. Then give an account when you left England; and of your proceedings in your voyage.

Palmer. About the last of April, or the beginning of May, 1696, we went out of Plymouth to New York, and by the way took a French banker. And in July we came to New York. About the 6th of February we went to Maderas.

Mr. Coniers. When you were at New York, was there any publication of any thing, to invite men to come in to captain Kidd?

Palmer. Yes, there were articles set up for men to come aboard captain Kidd's ship: he was to have 40 shares for his ship, and every man was to have a share; and they were to give him 6*l*. a man for their arms.

Mr. Coniers. How many men was his complement?

Palmer. When we came from New York, he had between 150 and 160 men.

Mr. Coniers. Give an account what you did after this: whither did you go then?

Palmer. We went from New York to Maderas, and from thence to Bonavist, and there we took in salt; and from thence we went to St. Jago, and there we bought provisions; and from thence we went to Madagascar. When we were not far from the Cape of Good Hope, he met with captain Warreu, with three sail of men of war besides himself; there was the Tiger, and the King-fisher, and another ship; and captain Kidd kept them company about three or four days, and after that went to Madagascar, and some time in February arrived there; and there we watered and victualled. We came to Malabar about the first of June. Then we went to Joanna, and from thence to Mahala; and from thence to Joanna again; and then we met with some Indian merchants; so we watered the ship there, and did them no harm: and from thence we went to Mahala, where captain Kidd grav'd his ship. We had a great sickness in the ship, and sometimes we lost four or five men in a day. And afterwards we went to Joanna again, and there came aboard several Frenchmen and several Englishmen that had lost their ship. Those Frenchmen lent captain Kidd some money to mend his ship. And after this, we came to a place called Mabbee, in the Red-sea, and took in water, and Guinea corn, that he took from the natives: and from thence we went to Bab's-Key.

Mr. Coniers. What time was it that you came to that Bab's-Key?

Palmer. In July, 1697.

Mr. Coniers. Now, pray tell us what passed there?

Palmer. When captain Kidd came to Bab's Key, he staid there about three weeks.

Mr. Coniers. Why did you stay there? Tell us the reason of it.

Palmer. I heard him say, 'Come, boys, I will make money enough out of that fleet.'

Mr. Coniers. Out of what fleet?

Palmer. The Mocca fleet. When we came to the Key, he ordered some of his men to look out as spies. He sent his boat three times to make a discovery, and he gave them orders, either to take a prisoner, or to get an account what ships lay there. And the boat went twice, and brought no news; but the third time they brought word, that there were 14 or 15 ships lying there ready to sail; some of them had English colours, some Dutch colours, and some Moorish colours; and there was a great ship with red colours, with her fore-top-sail loose, ready to sail. And captain Kidd ordered his men to take care these ships did not pass by in the night.

Mr. Coniers. You say, he ordered his men to watch this fleet: how did he order them?

Palmer. He ordered them by a list in their turns, to look out for the coming of this fleet: and so after four or five days the fleet came down in an evening, about the 14th or 15th of August: the next morning captain Kidd went after them, and he fell into the midst of the fleet, and there was a Dutch convoy, and an English one among them. He went into the midst of the fleet, and fired a gun after a Moorish ship, and the two men of war fired at us, but did no harm, for they did not reach us. So we left the fleet, and from thence went to Carawar.

Mr. Coniers. Tell what passed there.

Palmer. Then we met with a small vessel belonging to Aden.

Mr. Coniers. What country did it belong to?

Palmer. Black people, only there was one Thomas Parker, and a Portuguese, Don Antonio, on board.

Mr. Coniers. Was he the commander of the ship?—*Palmer*. I cannot tell.

Mr. Coniers. What did captain Kidd do with this ship?

Palmer. He took this Parker for a pilot, and the Portuguese for linguister.

Mr. Coniers. What do you mean by that word linguister?

Palmer. An interpreter, to speak Spanish and Portuguese.

Mr. Coniers. Did he take any thing out of the ship besides the men?

Palmer. He took a bale of pepper, and a bale of coffee, and let the ship go. But after this we went to Carawar.

Mr. Coniers. Before you let the ship go, how were the men used by him?

Palmer. He ordered some of the men to be hoisted up by their arms, and drubbed with a naked cutlass: they were laid with their hands backward.

Mr. Coniers. When they were hoisted up, give an account how they were used, and for what reason.

Palmer. They were beat with a naked cutlass, to make them discover what money was aboard.

Mr. Coniers. What was the next thing?

Palmer. He took out this Parker for a pilot, and Antonio, the Portuguese, for a linguister. I heard there was money taken, but I did not see it.

Mr. Coniers. What did he do with those men?

Palmer. He kept them as the other men were kept.

Mr. Coniers. Was there any demand made of these men?

Palmer. When we came to Carawar, the factory demanded them, and he denied them.

Mr. Coniers. What factory is this?

Palmer. An English factory. There were one Harvey and Mason came to demand these men.

Mr. Coniers. And what said captain Kidd to them?

Palmer. He denied that he had any such men; and he kept them in the hold, I believe, a week. Several of his men would have left him if they could.

Mr. Coniers. What did he do after this?

Palmer. He put to sea, and met with a Portuguese man of war, and fought her: he engaged her five or six hours, and afterwards left her, and then he bought some hogs of the natives. After he went from this Carawar, he went to Porto, and took in some hogs there. And then went to the island of Malabar, and watered his ship; and his cooper went ashore, and the natives cut his throat. And after this captain Kidd sent some men ashore, and ordered them, that if they should meet any of the natives, they should kill them, and plunder them.

Mr. Coniers. Go on, Sir.

Palmer. After that they went to the coast of Malabar again, and in November met with a ship, and took her: one Schipper Mitchel was the commander; she was a Moorish ship.

Mr. Coniers. What became of her?

Palmer. Captain Kidd carried her to Madagascar.

Mr. Coniers. What goods were in her?

Palmer. There were two horses, and ten bales of cotton, that he sold to the natives.

Mr. Coniers. Did he send for any aboard at this time?

Palmer. There was a Frenchman that was to pretend himself the captain. He took her under French colours, and hailed her in French; and this monsieur le Roy was to pass for captain, and he shewed his French pass, and—

Mr. Coniers. Give an account of his personating the captain. Who ordered him so to do?

Palmer. Captain Kidd ordered him so to do; and they hailed him in French, and he came aboard, and he had a French pass. And then captain Kidd told him, he was captain.

Mr. Coniers. And he took the ship?

Palmer. Yes, the cotton and horses, and sold them afterwards.

Mr. Coniers. Whither went you next?

Palmer. We coasted about the coast of Malabar.

Mr. Coniers. Did you meet with any boats there?—*Palmer.* Yes, several.

Mr. Coniers. What did you do with them?

Palmer. Captain Kidd robbed and plundered them, and turned them adrift again.

Mr. Coniers. What was the next thing you did?

Palmer. About the 1st of January we met with a Portuguese ship.

Mr. Coniers. Where?

Palmer. On the same coast we took her.

Mr. Coniers. What did you do with that ship?

Palmer. He kept her a week, and took out two chests of Indian goods, and 30 jars of butter, and a tun of wax, and half a tun of iron, and 100 bags of rice.

Mr. Coniers. Did you take those goods you mentioned?

Palmer. Yes, and carried them aboard the Adventure-galley.

Mr. Coniers. What was the next ship you met with?—*Palmer.* The Quedagh Merchant.

L. C. B. Ward. Be very plain and particular in this, and how she was taken; for this is the ship in the indictment, and for taking which the prisoners are tried.

Palmer. About the last of January she was taken: I was not then aboard the galley, for then I was aboard the November, and was ordered to get water. After three or four days I went aboard; but I was not aboard at the time she was taken. About three or four days after, I saw her, and capt. Kidd was aboard; and I believe there were taken out of her goods to the value of 10 or 12,000*l.* which were sold, some before they were put ashore, and some after.

Mr. Coniers. To whom were they sold?

Palmer. To the Banians. Captain Kidd kept the seamen to help to sail the ships.

L. C. B. Ward. What became of the money the goods were sold for?

Palmer. It was shared.

L. C. B. Ward. What share had the captain?—*Palmer.* He had forty shares.

Cl. of Arr. What share had W. Kidd?

Palmer. He had forty shares.

Cl. of Arr. In goods, or money?

Palmer. In both goods and money.

Cl. of Arr. Look upon Nich. Churchill; what had he?

Palmer. He had near 200*l.* of each, which was a man's share.

Cl. of Arr. Look upon James Howe; had he any share?

Palmer. Yes, a whole share.

Cl. of Arr. Had Robert Lamley any share?

Palmer. He had half a share of the money, and a whole share of the goods.

Cl. of Arr. William Jenkins, had he any share?

Palmer. He had half a share of the money, and a whole share of the goods.

Cl. of Arr. Had Gabriel Loffo any share?

Palmer. He had half a share of the money and a whole share of the goods.

Mr. Coniers. Why had they no more?

Palmer. They were land-meas.

Cl. of Arr. Hugh Parrot, had he any?

Palmer. He had a whole share.

Cl. of Arr. Had Richard Barlicorn any share?—*Palmer.* He had half a share.

Cl. of Arr. Had Abel Owens any?

Palmer. He had a whole share.

Cl. of Arr. Had Darby Mullins any share?

Palmer. He had a whole share.

Mr. Coniers. What became of the rest of the goods?

Palmer. They were carried to Madagascar.

Mr. Coniers. Who ordered the goods to be hoisted out and shared? Who ordered that?

Palmer. At the beginning I was not there.

Mr. Coniers. Who ordered it?

Palmer. Capt. Kidd: And most of the goods were ashore before I came back; and before I came back, he had his share, and most of the rest.

Mr. Coniers. How many of the prisoners at the bar had their share of the goods?

Palmer. All these men

Cl. of Arr. Whose shares were divided to them before you went away?

Palmer. None; but only they were prepared in order to be divided.

L. C. B. Ward. Did you hear any of them say, they had any shares.

Palmer. Yes, Hugh Parrot, and Gabriel Loffe.

Cl. of Arr. What say you to William Kidd? Did he own he had any share?—*Palmer.* No.

Cl. of Arr. Did you hear Nicholas Churchill say he had any?

Palmer. No, I did not; I cannot say I heard them say so.

Cl. of Arr. Did you hear Gabriel Loffe and Hugh Parrot say they had any shares?

Palmer. Yes, I heard them say so.

Mr. Coniers. Whither did you proceed next?

Palmer. We left captain Kidd there; I went no further with him.

Mr. Coniers. I ask you, Whether you met with any ships besides what you mentioned?

Palmer. When we came to Madagascar, in the latter end of April, or beginning of May 1696, there was a ship called The Resolution, which was formerly called The Mooca frigate; several of the men came off to capt. Kidd, and told him, they heard he came to take, and hang them. He said, that it was no such thing, and that he would do them all the good he could. And captain Culliford came aboard of captain Kidd, and captain Kidd went aboard of Culliford.

Mr. Coniers. Who was that Culliford?

Palmer. The captain of the ship. And on the quarter-deck they made some Bumboo, and drank together; and captain Kidd said, Before I would do you any harm, I would have my soul try in bell-fire; and wished damnation to himself several times, if he did. And he took the cup and wished that might be

his last, if he did not do them all the good he could.

Just. Powell. Did you take these men to be pirates?—*Palmer.* They were reckoned so.

Dr. Newton. Did captain Kidd make Culliford any presents?

Palmer. Yes, he had four guns of him.

Dr. Newton. Of whom?

Palmer. Of captain Kidd; he presented him with them.

Just. Powell. Was there not a present on the other side?

Palmer. I believe there was, I have heard so? I heard Culliford say, I have presented captain Kidd to the value of four or five hundred pounds.

Mr. Cooper. Were these kindnesses done to Culliford, after Culliford's men said, they heard captain Kidd came to hang them?

Palmer. Yes.

Mr. Cooper. What did captain Kidd do after that?

Palmer. He went aboard the Quodagh merchant.

Mr. Cooper. What did he do with his own ship?

Palmer. She was leaky, and he left her.

Mr. Cooper. Did he carry, or attempt to carry, any of the ships he took, in order to condemn them, besides that French banker.

Palmer. He never did, nor talked of any such thing.

L. C. B. Ward. Mr. Kidd, Will you ask this witness any questions?

Kidd. I ask him, Whether I had no French passes?

Palmer. Indeed, captain Kidd, I cannot tell, I did hear him say, that he had French passes, but I never saw them.

L. C. B. Ward. Those goods that were taken out of the Quodagh merchant, whose goods were they supposed to be?

Palmer. The Armenian merchants. I have heard captain Kidd say several times, he had French passes.

Kidd. And did you hear nobody else say so?

Palmer. No.

Cl. of Arr. Churchill, Will you ask any questions?

Churchill. My lord, I have no questions to ask him.

Cl. of Arr. James Howe, Will you ask him any questions?—*Howe.* No.

Cl. of Arr. Robert Lunsley, will you ask him any questions?—*R. Lunsley.* No.

Cl. of Arr. William Jenkins, Will you ask him any questions?

Jenkins. Had I half a share?

Palmer. You received half a share of money, and a whole share of goods.

Jenkins. You know that I was a servant, and had nothing in this voyage but what my master had.

Cl. of Arr. Gabriel Loffe, Will you ask him any questions?—*Loffe.* No.

Cl. of Arr. Hugh Parrot, will you ask him any questions?—*Parrot.* No.

Cl. of Arr. Richard Barlicorn, Will you ask him any thing?—*Barlicorn.* No.

Cl. of Arr. Abel Owena, Will you ask him any thing?—*Owena.* No.

Cl. of Arr. Darby Mullins, Will you ask him any thing?—*Mullins.* No.

Kidd. It is in vain to ask any questions.

L. C. B. Ward. Then you may make your own defence. Come, Mr. Kidd, what have you to say in your own defence?

Kidd. I had a commission to take the French, and pirates; and in order to the, I came up with two ships, that had French passes both of them. I called you all a-deck to consult: and did not a great many of the men go aboard? Did not you go? You know, Mr. Palmer, I would have given these ships to them again, but you would not; you all voted against it.

Palmer. This man (pointing to the Armenian that was in court) offered you 20,000 rupees for the ship, and you refused it.

Kidd. Did not I ask, where will you carry this ship? And you said, we will make a prize of her; we will carry her to Madagascar.

Palmer. Says captain Kidd to his men, These Armenians make such a noise for the ship, that I must say, my men will not part with her; but there was not a quarter part of the men concerned in it. The Armenians came crying and wringing their hands: upon which, says captain Kidd, I must say, my men will not give them the ship. And so some of the men went on the fore-castle, and pretended, they would not give them the ship; but there was not a quarter part of the men concerned in it.

L. C. B. Ward. Did those goods belong to Frenchmen, or Armenians?

Palmer. To Armenians.

L. C. B. Ward. What was that pretence of a French pass that was on board The Quedagh Merchant?—*Palmer.* I saw none.

Kidd. But you have heard of it.

Palmer. I have heard of it, but never saw it.

L. C. B. Ward. Mr. Kidd, have you any more to say? You speak of a commission that you had; you may have it read, if you please.

Kidd. I desire to have them both read.

L. C. B. Ward. Yes, they shall.

Then his Commission of Reprisals upon the French was read:

William the Third, by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. Whereas we have taken into our consideration the injuries, spoils, and acts of hostility committed by the French king and his subjects, unto and upon the ships, goods, and persons of our subjects extending to their grievous damages, and amounting to great sums; and that notwithstanding the many and frequent demands made for redress and reparation, yet none could ever be obtained: we did therefore, with the advice of our privy council, think fit, and ordered, that general reprisals be granted

against the ships, goods, and subjects of the French king; so that as well our fleets and ships, as also all other ships and vessels, that shall be commissioned by letters of marque, or general reprisals, or otherwise, shall or may lawfully seize, and take all ships, vessels, and goods belonging to the French king, or his subjects, or inhabitants within any of the territories of the French king: and such other ships, vessels and goods, as are, or shall be liable to confiscation, and bring the same to judgment in our high court of admiralty of England, or such other court of admiralty as shall be lawfully authorised in that behalf, according to the usual course and laws of nations. And whereas William Kidd is thought fitly qualified, and hath equipped, furnished, and victualled a ship called The Adventure-Galley, of the burthen of about 287 tons, whereof the said William Kidd is commander: and whereas he the said Wm. Kidd hath given security with sureties by bond to us, in our said high court of admiralty, according to the effect and form set down in certain instructions made the 2nd day of May, 1693, and in the 5th year of our reign, a copy whereof is given to the said captain William Kidd: Know ye therefore that we, by these presents, grant commission to, and do license and authorise the said Wm. Kidd to set forth in warlike manner the said ship called The Adventure-Galley, under his own command, and therewith by force of arms to apprehend, seize, and take the ships, vessels, and goods belonging to the French king and his subjects, or inhabitants within the dominions of the said French king, and such other ships, vessels, and goods, as are, or shall be liable to confiscation, and to bring the same to such port as shall be most convenient, in order to have them legally adjudged in our high court of admiralty, or such other court of admiralty as shall be lawfully authorized in that behalf; which being condemned, it shall and may be lawful for the said William Kidd, to sell and dispose of such ships, vessels, and goods, so adjudged and condemned, in such sort and manner as by the course of admiralty hath been accustomed (except in such cases where it is otherwise directed by the said instructions and the act of parliament thereunto annexed). Provided always, that the said William Kidd keep an exact journal of his proceedings, and therein particularly take notice of all prizes which shall be taken by him, the nature of such prizes, the times and places of their being taken, and the values of them, as near as he can judge; as also of the station, motion and strength of the enemy, as well as he or his mariners can discover by the best intelligence he can get; and also whatsoever else shall come unto him, or any of his officers, or mariners, or be discovered or declared unto him, or them, or found out by examination, or conference with any mariners or passengers of, or in any of the ships or vessels taken, or

by any other person, or persons, or by any other ways or means whatsoever, touching or concerning the designs of the enemy, or any of their fleets, vessels, or parties, and of their stations, ports, and places, and of their intents therein; and of what merchant ships or vessels of the enemy's bound out, or home, or to any other place, as he, or his officers, or mariners shall hear of, and what else material in these cases may arrive to his or their knowledge; of all which he shall from time to time, as he shall, or may have opportunity, transmit an account to our commissioners for executing the office of lord high-admiral of England, or their secretaries, and to keep a correspondence with them by all opportunities that shall present. And further provided, That nothing be done by the said William Kidd, or any of his officers, mariners, or company, contrary to the true meaning of our aforesaid instructions; but that the said instructions shall be by them, and each and every of them, as far as they, or any of them are therein concerned, in all particulars well and duly performed and observed. And we pray and desire all kings, princes, potentates, estates, and republics, being our friends and allies, and all others to whom it shall appertain, to give the said William Kidd all aid, assistance and succour in their ports with his said ship, company and prizes, without doing, or suffering to be done, to him any wrong, trouble, or hindrance; we offering to do the like, when we shall be by them thereunto desired. And we will and require all our own officers whatsoever, to give him succour and assistance as occasion shall require. This our commission to continue in force till farther order to the contrary from us, or our commissioners for executing the office of lord high-admiral of England. In witness whereof we have caused the great seal of our high court of admiralty of England to be hereunto affixed. Given at London the 11th day of December, in the year of our Lord, 1695, and in the 7th year of our reign.

ORLANDO GEE, Reg.

Just. Powel. Capt. Kidd, can you make it appear there was a French pass aboard the Quedagh Merchant?

Kidd. My lord, these men say, they heard several say so.

Mr. Coniers. But all came from you.

L. C. B. Ward. If there was a French pass in the ship, you ought to have condemned her as prize.

Then his other Commission was read for Cruising against the Pirates.

WILLIAM R.

William III. By the grace of God, king of England, Scotland, France, and Ireland, defender of the faith, &c. To our trusty and well-beloved captain William Kidd, commander of the ship Adventure-Galley, or to any other the commander for the time being, greeting. Whereas we are informed, That

captain Thomas Too, John Ireland, captain Thomas Wake, and captain William Mace, or Mace, and other our subjects, natives or inhabitants of New-England, New-York, and elsewhere, in our plantations in America, have associated themselves with divers other wicked and ill-disposed persons, and do against the law of nations, daily commit many and great piracies, robberies, and depredations upon the seas in the parts of America, and in other parts, to the great hindrance and discouragement of trade and navigation, and to the danger and hurt of our loving subjects, our allies, and all others navigating the seas upon their lawful occasions: Now know ye, That we being desirous to prevent the aforesaid mischiefs, and, as far as in us lies, to bring the said pirates, free-booters, and sea-rovers to justice, have thought fit, and do hereby give and grant unto you the said captain William Kidd (to whom our commissioners for exercising the office of our lord high-admiral of England, have granted a commission as a private man of war, bearing date the 11th day of December, 1695,) and unto the commander of the said ship for the time being, and unto the officers, mariners, and others, who shall be under your command, full power and authority to apprehend, seize, and take into your custody, as well the said captain Thomas Too, John Ireland, captain Thomas Wake, and captain William Mace, or Mace, as all such pirates, free-booters, and sea-rovers, being either our own subjects, or of any other nations associated with them, which you shall meet upon the coast or seas of America, or in any other seas or ports, with their ships and vessels, and also such merchandizes, money, goods, and wares, as shall be found on board, or with them, in case they shall willingly yield themselves: but if they will not submit without fighting, then you are by force to compel them to yield. And we do also require you to bring, or cause to be brought such pirates, free-booters, and sea-rovers, as you shall seize, to a legal trial; to the end they may be proceeded against according to law in such cases. And we do hereby charge and command all our officers, ministers, and other our loving subjects whatsoever, to be aiding and assisting to you in the premises. And we do hereby enjoin you to keep an exact journal of your proceeding in the execution of the premises, and therein to set down the names of such pirates, and of their officers and company, and the names of such ships and vessels as you shall by virtue of these presents seize and take, and the quantities of arms, ammunition, provision, and loading of such ships, and the true value of the same, as near as you can judge. And we do hereby strictly charge and command you, as you shall answer the same at your utmost peril, that you do not in any manner offend, or molest any of our friends or allies, their ships, or subjects, by colour or pretence of these presents, or the authority thereby

'granted. In witness whereof, we have caused our great seal of England to be affixed to these presents. Given at our court at Kensington, the 26th day of January, 1695, in the 7th year of our reign.'

L. C. B. Ward Now you have had the commissions read, what do you excuse yourself by? What use do you make of them to justify or defend yourself?

Kidd About this Quedagh Merchant.

L. C. B. Ward What would you have her a French ship?

Kidd Under a French commission. The master was a tavern keeper at Surat: do not you know that, Mr. Palmer?

Palmer I was not on board when this pass came; I never saw it.

L. C. B. Ward But then you should have condemned this ship, if she had been a French ship, or had a French pass.

Kidd The evidence says, It was by my order that the goods were taken out; I was not at the sharing of the goods, I knew nothing of it.

L. C. B. Ward Out of the goods that were taken, some were sold in the country there, and the produce of them was so much money; it is proved, that that money was divided; and pursuant to the articles set up, you were to have forty shares, and the rest of the men whole, or half shares, as they deserved. Now this money, both these men swear it was taken by you: and the first swears, that the goods not sold then, that remained in the ship, were also divided, and that you had forty shares of them: and the other says, he did not see the goods divided, but two of the men acknowledged it.

Kidd My lord, this Frenchman was aboard five or six days before I understood there was any Englishmen aboard. Well, said I, what are you? An Englishman, I am, master. What have you to shew for it? Nothing, says he. When they see a French pass, they will not let the ship go.

Just. Powell You have produced letters patents that impowered you to take pirates: why did you not take Culliford?

Kidd A great many of the men were gone ashore.

Just. Powell But you presented him with great guns, and swore you would not meddle with them.

L. C. B. Ward When the question was put, Are you come to take us and hang us? you answered, I will fry in hell before I will do you any harm.

Kidd That is only what these witnesses say.

L. C. B. Ward Did you not go aboard Culliford?—*Kidd* I was not aboard Culliford.

L. C. B. Ward These things press very hard upon you. We ought to let you know what is observed, that you may make your defence as well as you can.

Kidd I desire Mr. Davis may be called. (He was called accordingly, and appeared.) Mr. Davis, pray give an account whether you did not see a French pass?

L. C. B. Ward You are his witness; you must answer what he asks you.

Davis I came a passenger from Madagascar, and from thence to Amboyna, and there he sent his boat ashore, and this man was ashore; and there was one said, captain Kidd was published a pirate in England; and he gave these passes to him to read. The captain said, they were French.

L. C. B. Ward Who gave them?

Davis Captain Kidd gave them.

L. C. B. Ward Did you know any thing of taking The Quedagh Merchant?

Davis No, no.

L. C. B. Ward Then you cannot say, they have any relation to The Quedagh Merchant?

Davis No, not I.

Kidd You heard capt. Elms say, They were French passes.

Davis Yes, I heard capt. Elms say, They were French passes. Says he, If you will, I can turn them into Latin.

Baron Hatsell Have you any more to say, capt. Kidd?

Kidd I have some papers, but my lord Belamont keeps them from me, that I cannot bring them before the court.

Cl. of Arr. Have you any more to say?

Kidd I have some to call, that will bear testimony to my reputation.

L. C. B. Ward Call whom you please, we will not abridge you.

Kidd Call Mr. Bradinham. I desire this of him, whether he never saw the French passes, and whether he did not tell col. Bass so?

Bradinham I never saw a French pass; I only heard so.

Col. Bass I have heard Mr. Bradinham say, he heard capt. Kidd say, he had French passes on board; but I never heard him say, he saw them passes.

Kidd He just now denied that he ever saw the French passes, or heard of them.

L. C. B. Ward He says so now, that he never saw them, only he heard you say so. Col. Bass, have you heard him say the passes related to The Quedagh Merchant?

Bass He has often said, he heard Kidd say the French passes were aboard.

Cl. of Arr. Have you any more witnesses to call?

Kidd I desire Mr. Say may be called: he is in the prison, I desire he may be sent for.

L. C. B. Ward We will give you all the liberty you can expect. If you have any more, you were best call them all together. In the mean time, what say you, Churchill?

Churchill I desire col. Bass may be called, and that this affidavit may be read.

L. C. B. Ward Col. Bass, what have you to say for N. Churchill?

Bass My lord, I only wait for his question.

L. C. B. Ward Churchill, what will you ask col. Bass?

Churchill Whether I did not surrender myself to him?

L. C. B. Ward If you can make your case

comes within the proclamation, you must make it appear, that you surrendered according to the directions of it.

Churchill. My lord, we came in in the year 1699, and surrendered ourselves to col. Bass.

L. C. B. Ward. If you can make it appear of that, to the persons appointed to receive your surrender, that will be somewhat to the point; but col. Bass had not power by that proclamation to receive your surrender; and therefore you cannot have any benefit by it, unless you bring your case within it. But you may call col. Bass, if you will.

Churchill. My lord, we came in upon that proclamation, and might have gone away any day if we would; but we staid in the country, and we never offered to go away till it was my lord Bellamont's pleasure to send for us.

L. C. B. Ward. You may call col. Bass, and hear what he says.

Churchill. Col. Bass, will you be pleased to tell my lord, whether we did not surrender ourselves to you in pursuance of the king's proclamation?

Bass. My lord, about the 29th of May, 1699, I had an account of some persons, that were supposed pirates, that were come to surrender themselves; and on my landing, these two persons came to me, and surrendered to me the 4th of June, 1699. And I told them, I must refer their case to his majesty at home.

L. C. B. Ward. Who were they that surrendered to you?

Bass. Nicholas Churchill and James Howe.

L. C. B. Ward. Where were you governor?

Bass. At the province of West Jersey.

Dr. Osenden. How came they here?

Bass. I left them under bail.

L. C. B. Ward. Did you send them over?

Bass. No, my lord, I came to England before: I left them in custody. They were sent over prisoners by my successor.

L. C. B. Ward. What did they say to you when they surrendered themselves to you?

Bass. They said they had been in the Indies, and that they had committed several piracies, and desired they might have the benefit of his majesty's proclamation.

L. C. B. Ward. What pirates did they mention to you?

Bass. They mentioned the *Mocca* frigate, and capt. Kidd.

Dr. Osenden. Had you the proclamation?

Bass. No; but I had seen one of them.

L. C. B. Ward. Did you take yourself allowed to receive their surrender?

Bass. No, my lord, I did not.

Cl. of Arr. Nicholas Churchill, have you quite done?

Churchill and Howe. Yes, Sir, we came in upon his majesty's proclamation.

Cl. of Arr. Robert Lamley, what have you to say?

Lamley. My lord, I was but a servant.

L. C. B. Ward. Who was you a servant to?

Lamley. To Mr. Owens.

L. C. B. Ward. How does that appear?

Lamley. The surgeon knows it.

Bradinkham. My lord, he was concerned with the cook.

Lamley. My lord, here is my indenture.

(Which was read.)

Cl. of Arr. William Jenkins, what have you to say?

Jenkins. I have nothing to say, but I was servant to Mr. Bullen.

L. C. B. Ward. Where is your witness to prove it?

Jenkins. Both the king's witnesses know it. *Bradinkham and Palmer.* My lord, he was his servant.

Cl. of Arr. Gabriel Loffe, what say you for yourself?

Loffe. My lord, about the year 1696, I entered myself on board capt. Kidd, and went out with him, and I never disobeyed his command in any thing.

L. C. B. Ward. Did he go out under the first commission?

Palmer. He came aboard at New York.

L. C. B. Ward. Did you take him in before or after the articles were set up?

Palmer. After the articles were set up.

L. C. B. Ward. Did capt. Kidd take any notice of his commission in the articles?

Palmer. Yes, my lord, he did mention them. I have a copy of the articles.

Mr. Crawley. Mr. Palmer, are these articles the copy of the articles set up by capt. Kidd at New York?—*Palmer.* Yes.

Just. Gould. Did you examine them?

Palmer. To the best of my knowledge they were a true copy.

Just. Turton. Did you compare them with the original?—*Palmer.* No, my lord.

Cl. of Ar. Gabriel Loffe, have you any more to say?

Loffe. Yes, a great deal more to ask the evidence.

Cl. of Ar. What will you ask them?

Loffe. Whether I did not obey the captain?

Just. Turton. There is no scruple to be made of that.

Loffe. I went out to serve his majesty under his commission.

L. C. B. Ward. But how came you to take part of the money?

Loffe. I had what they pleased to give me.

L. C. B. Ward. You must needs imagine, that when capt. Kidd did these extravagant things, and divided the money and goods, that he did not act according to his commission. What could you think of it?

Cl. of Ar. Hugh Parrot, what have you to say for yourself?

Parrot. My lord, in the year 1695, in the month of October, I sailed out of Plymouth in a merchant-man, bound for Cork in Ireland, there to take in provisions; thence to the island of Barbadoes; and in sight of the island of Barbadoes, I was taken by a French privateer, and carried to Martinico; and thence coming in a transport ship, I was brought to

Barbadoes; there I shipped myself in a vessel bound to Newfoundland, and thence to Maderas: And then I went to Madagascar, and there I staid some short time after, and came in company with capt. Kidd; and then the commander and I had a falling out, and so I went ashore at that island: And understanding that capt. Kidd had a commission from the king, I came aboard capt. Kidd's ship, and ever since have been with him.

L. C. B. *Ward*. Did you come in after he had been at New York?

Parrot. This was in the year 1697.

L. C. B. *Ward*. You have acted with him, and shared with him. Could you imagine he was acting according to his commission, when he was doing these things?

Parrot. I thought I was safe where the king's commission was.

L. C. B. *Ward*. The commission was to take pirates, and not to turn pirates.

Parrot. Mr. Palmer, did you ever see me guilty of an ill thing? Did I ever disobey my captain?

Palmer. You were always obedient to your commander.

Parrot. Then I came to Madagascar with captain Kidd, where I might have gone aboard a known pirate, but I refused it, and kept close to my captain: And when I came to New England, I might have gone away as others did; but I had my liberty at Boston for about a week, and went up and down, and I surrendered myself.

L. C. B. *Ward*. You did not surrender yourself, but only you had a liberty to go away, and did not.

Parrot. I thought there was no need of it. My lord, I desire you would ask the witnesses, whether I ever disobeyed the captain's commands?

L. C. B. *Ward*. They say no otherwise, but that you went willingly.

Cl. of Arr. Richard Barlicorn, what have you to say?

Barlicorn. My lord, I beg leave that I may produce some evidence for my reputation. Here is a certificate from the parish where I was born.

L. C. B. *Ward*. That will signify nothing; we cannot read certificates; they must speak *viva voce*.

Barlicorn. Call Benjamin Bond, Daniel Phillips, and James Newton.

L. C. B. *Ward*. What do you call these witnesses for?

Barlicorn. To give an account of my reputation, what they know of me.

Bond. I knew him when he was a child, and he was very civil and honest; I lived near him till he was 13 or 14 years old: and he came of honest parents, and behaved himself very civilly all that time.

L. C. B. *Ward*. Have you known any thing of him since?—*Bond*. No, my lord.

L. C. B. *Ward*. What have you to say further?

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Barlicorn. My lord, I was a servant to capt. Kidd, and have been with him six years; and I have a certificate from several of my relations that will testify it.

Cl. of Arr. Have you any thing more to say?

Barlicorn. I am a servant to capt. Kidd.

L. C. B. *Ward*. How long have you been so? Where was it that you came first to be his servant?—*Barlicorn*.—At Carolina.

Cl. of Arr. Abel Owens, what say you for yourself?

Owens. My lord, I desire the privilege of the Proclamation. I entered myself into the king's service. I have been in the king's service, according to his majesty's proclamation. I desire it may be read. (Which was done.)

L. C. B. *Ward*. You desire the benefit of this Proclamation; but you must bring yourself under the qualifications it requires, if you would have any benefit of it.

Mr. Crawley. He has a certificate of it.

L. C. B. *Ward*. Is it within the Proclamation?

Mr. Crawley. The certificate is dated the 15th of March, 1700, from Mr. Riches, a justice of the peace in Southwark.

L. C. B. *Ward*. Mr. Riches, I suppose, did believe he was within this Proclamation.

Just. Gould. The pardon extends to all persons for piracies committed before that time, if they surrender themselves to such and such, and enter themselves on board one of his majesty's ships.

Mr. Coiers. A justice of the peace is not within the Proclamation.

Cl. of Arr. Have you any more to say?

Owens. Only to desire the benefit of the proclamation.

L. C. B. *Ward*. He surrendered himself to justice Riches, and then entered himself aboard one of his majesty's ships: and then there was evidence against him when on board, and he was seized: this may be fit to recommend him to the king's mercy, but it is not a defence against the accusation.

Cl. of Arr. Darby Mullins, What do you say for yourself?

Mullins. I came in upon the king's act of grace; I came ashore with the rest of the people.

L. C. B. *Ward*. What have you to shew, to entitle you to the benefit of the Proclamation?

Mullins. I was ready to die of the bloody-flux, and not able to go myself, but I sent my name in to the governor.

L. C. B. *Ward*. Where was you when you was so sick?

Mullins. In West-Jersey. I came ashore in Cape May. I was sick like to die all the way from Madagascar, expecting every minute to die with the bloody-flux.

Dr. Oxenden. How came you to leave capt. Kidd?

Mullins. He used me very hardly and therefore I left him.

L. C. B. *Ward*. You had a dividend of the money and goods.

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Mullins. He gave it me, and afterwards took it from me.

L. C. B. Ward. Was he your master?

Mullins. I had no master.

Dr. Oxenden. How did you come to Jersey?

Mullins. I came there with capt. Shelley; he is in court.

Dr. Oxenden. You were aboard capt. Culliford.

Mullins. I came home, in hopes to get the king's pardon.

L. C. B. Ward. That which you say is very odd; though you quitted capt. Kidd's ship, you went into Culliford's.

L. C. B. Ward. Capt. Kidd, you said you had more to say just now: if you have, let us hear it.

Kidd. I desire this man may be heard two or three words.

L. C. B. Ward. What is his name?

Kidd. Mr. Say.

Say. I happened to be at the Treasury-office in Broad-street to receive some money, and Mr. White was there; and he asked me, Will you go along with me, and see one Elbury, that is in the Marshalsea for debt? Says I, I am a stranger to him, I do not care to go. Says he, Hear me company. So I went with him; and when I came there I saw capt. Kidd's men. And this Mr. Elbury was in company with capt. Kidd's surgeon. Says I, I am a brother of the quill, I should be glad to drink a glass with you. We stayed there but a little while, and asked what that man was? Says he, He is capt. Kidd's surgeon. Upon this I said, Here is a mighty noise about capt. Kidd. Says he, I believe he has done but what he can answer, or that can do him any hurt. Says I, Where have you been with him? He said at Madagascar.

L. C. B. Ward. Mr. Bradinham was with them, there is no doubt of that. It is not to be questioned, that he would not say any thing ill of them then. Capt. Kidd, have you any thing more to say?

Kidd. Call capt. Humphreys. (Who appeared.)

L. C. B. Ward. What questions would you ask him?

Kidd. What do you know of me?

Humphreys. I knew you, Sir, in the West-Indies in the beginning of the late war; and I know you had the applause of the general, as I can shew by the general's letter. I know nothing further of you.

Kidd. Did you know any thing that I was guilty of any piracies?

Humphreys. No; but you had a general applause for what you had done from time to time.

L. C. B. Ward. How long was this ago?

Humphreys. Twelve years ago.

L. C. B. Ward. That was before he was turned pirate.

Kidd. Call capt. Bond. (Who appeared.)

L. C. B. Ward. What do you call him for?

Kidd. Capt. Bond, Pray, will you give an account what you know of me?

Bond. I know you was very useful at the beginning of the war in the West-Indies.

Baron Hatsell. To be sure, they had a good opinion of him in 1695, when they granted him the commission.

Kidd. There is nothing in the world can make it appear I was guilty of piracy; I kept company with capt. Warren for six days.

Mr. Coniers. I believe you kept company more with capt. Culliford than with capt. Warren.

Kidd. I never designed to do any such thing.

Mr. Coniers. My lord, we will say nothing at all; but leave it to your lordship to direct the jury.

Kidd. I have many papers for my defence, if I could have had them.

L. C. B. Ward. What papers were they?

Kidd. My French passes.

L. C. B. Ward. Where are they?

Kidd. My lord Bellamont had them.

L. C. B. Ward. If you had had the French passes you should have condemned ships.

Kidd. I could not, because of the mutiny in my ship.

L. C. B. Ward. If you had any thing of disability upon you to make your defence, you should have objected it at the beginning of your trial; what you mean by it now I cannot tell. If you have any thing more to say, you may say it, the court is ready to hear you.

L. C. B. Ward. Gentlemen of the jury, the prisoners at the bar, W. Kidd, N. Churchill, J. Howe, R. Lanley, W. Jenkins, Gab. Loffe, Hugh Parrot, Rich. Barlicorn, Abel Owens, and Darby Mullins, in number ten, stand all here indicted for the crime of piracy, charged to be committed by them. And the instance of the crime is, for feloniously and piratically seizing and taking the ship called The Quedagh merchant, with the apparel and tackling thereof, to the value of 400*l.* and divers goods mentioned in the indictment, to the value of 4,500*l.* the goods of several persons unknown, from the mariners of the said ship, and this at high-sea, within the jurisdiction of the court of Admiralty, about ten leagues from Cutsbeen in the East-Indies the 30th of January, 1697, and in the 8th year of his majesty's reign. Now whether all, or any, and which of these prisoners, are guilty of this crime of piracy laid in this indictment, or not guilty, it is your part to determine according to the evidence that has been given on both sides. The crime charged on them is piracy, that is, seizing and taking this ship and goods in it, piratically and feloniously: The time and place is laid also in the indictment. To make good this accusation, the king's counsel have produced their evidence; and two witnesses have been examined in this case, each of them were in the ship which took the Quedagh Merchant, and very well acquainted with all the proceedings; that is, Robert Bradinham and Joseph Palmer. The first has given you an historical account of the whole proceedings of capt. Kidd, from

his first going out of England in the Adventure-galley, to the time of this fact charged on them. They tell you, that about May, 1696, the king intrusted this capt. Kidd with two commissions, and they were both read to you: By one of them, under the admiralty-seal, he was authorized to set out as a privateer the Adventure-galley, and therewith to take and seize the ships and goods belonging to the French king, or his subjects, and such other as were liable to confiscation. And by the other commission, under the broad-seal of England, authority was given for the taking of some pirates by name, and all other pirates in the several places therein mentioned; but in no sort to offend or molest any of the king's friends or allies, their ships or subjects, by colour thereof. And by both commissions, command was given to bring all such ships and goods, as should be taken, to legal trials and condemnations. They tell us, that this ship set out from Plymouth about May, 1696, and that in their passage they did take a French ship, and they did condemn that ship. Now, gentlemen, you must bear this in your minds, that to make it piracy, it must be the taking piratically and feloniously upon the high sea, within the jurisdiction of the admiralty of England, the goods of a friend, that is, such as are in amity with the king. Now, you see what way they went to work, and what measures they took. Captain Kidd goes out, and goes to New-York; and when he was there, he has a project in his head, of setting up articles between himself and the people that were willing to be concerned with him: For now, whether it seems more probable from what followed, that captain Kidd designed to manage himself according to the measures given him, and the powers of his commissions, or any other way, you must consider: for it is told you, that between one hundred and fifty and one hundred and sixty men came in under these articles, whereof the other prisoners were part, and concerned in them. And as to those articles, the import of them was, that whatever should be taken by these people in their expeditions, should be divided into one hundred and sixty parts, whereof captain Kidd was to have forty shares for his part, and the rest were to have according to the merit of each party, some whole shares, and some half shares.

Now after these articles, you perceive what progress they made, and what course they took; they went from one place to another, and used a pretty deal of severity wherever they came. A design they had to go into the Red-sen, and they had expectations of the Mocca fleet that lay at Mocca, and they sent their spies three times to get intelligence: the two first times they could make no discovery; but the third time they made an effectual discovery, that the fleet was ready to sail; and in the mean time capt. Kidd lay there in expectation of this fleet; and, as the first witness tells you, capt. Kidd said, he intended to make a voyage out of this fleet. Well, he had a discovery

of this fleet, and they came accordingly; and they tell you, that he and his men in the ship did attack one of the ships: but these ships being guarded by two men of war, he could make nothing of them; however, he shewed what his intention and design was. Could he have proved, that what he did was in pursuance of his commissions, it had been something: but, what had he to do to make any attack on these ships, the owners and freighters whereof were in amity with the king? This does not appear to be an action suitable to his commission. After he had done this, he came to land, and there, and afterwards at sea, pursued strange methods, as you have heard. The seeming justification he depends on, is his commissions. Now it must be observed how he acted with relation to them, and what irregularities he went by. He came to a place in the Indies, and sent his cooper ashore, and that cooper was killed by the natives; and he uses barbarity, and ties an Indian to a tree, and shoots him to death. Now he went from place to place, and committed hostilities upon several ships, dealing very severely with the people.

But this being something foreign to the indictment, and not the facts for which the prisoners at the bar are indicted, we are confined to the Quedagh Merchant; but what he did before, shews his mind and intention not to act by his commissions, which warrant no such things. Gentlemen, you have an account, that he met with this ship, the Quedagh Merchant, at sea, and took her; that this ship belonged to people in amity with the king of England; that he seized this ship, and divers goods were taken out of her and sold, and the money divided pursuant to the heads contained in those articles set up at New-York. The witnesses that speak to that, come home to every one of the prisoners: they tell you, that the dividend was made; that captain Kidd had forty shares of the money, and the rest of the prisoners had their proportions according to the articles, some whole shares, and some a half share of that money. After they had seized on the ship, you hear of a certain sort of project, that a Frenchman should come, and pretend himself the master, and produce, or pretend to produce a French pass, under a colour that these people's ship and goods, who were Moors, should be Frenchmen's ship and goods, or sailed under a French pass, and so justify what he did under the colour of his commission from the king. Now no man knows the mind and intention of another, but as it may be discovered by his actions. If you would have this to be understood to be his intention, or that it was a reality, that he took this as a French ship, or under a French pass, then he ought to have had the ship and goods inventoried, and condemned according to that he might have had what property belonged to him, and that the king might have had what belonged to him, as his commissions directed: but here was nothing of that; but the money and goods that were taken

shared; and you have an account likewise how some of the goods were sold, and the money disposed of, and how the remaining goods were disposed of; and one witness speaks positively of the distribution of the goods that remained unsold, that they were divided according to the same proportions as the articles mentioned, and every one of the prisoners had his share: there belonged forty shares to capt. Kidd, and shares and half shares to the rest.

Now this is the great case that is before you, on which the indictment turns: the ship and goods, as you have heard, are said by the witnesses to be the goods of the Armenians, and other people that were in amity with the king; and captain Kidd would have them to be the goods of Frenchmen, or at least, that the ship was sailed under French passes. Now if it were so, as capt. Kidd says, it was a lawful prize, and liable to confiscation; but if they were the goods of persons in amity with the king, and the ship was not navigated under French passes, it is very plain it was a piratical taking of them. Gentlemen, it is to be considered what evidence capt. Kidd hath given to prove that ship and goods to belong to the French king, or his subjects, or that the ship was sailed under a French pass, or, indeed, that there ever was a French pass shewn or seen. He appeals indeed to the witnesses over and over again, did you never see it? No, say they: Nor did not you, saith he, say you saw it? No, saith the witness; I said that capt. Kidd said he had a French pass, but I never saw it. Now after all, the taking the Quedah Merchant is brought down to Mr. Kidd, and the prisoners with others, and the distribution of the money produced by the sale of the goods among Mr. Kidd and his crew, whereof every one of these prisoners were present at the same time, and had proportions.

Now gentlemen, this must be observed; If this was a capture on the high sea, and these were the goods of persons in amity with the king, and had no French pass, then it is a plain piracy. And if you believe the witnesses, here is a taking of the goods and ships of persons in amity, and converting them to their own use: such a taking at land as this would be felony, and being at sea it will be piracy; for this is a taking the ship from the right owners, and turning it to their own use. So that you have evidence as to the seizing of the ship, and dividing the money rising from the goods sold, and sharing the remainder according to the articles.

Now, what does captain Kidd say to all this? He has told you, he acted pursuant to his commission; but that cannot be, unless he gives you satisfaction, that the ship and goods belonged to the French king, or his subjects, or that the ship had a French pass; otherwise neither of them will excuse him from being a pirate; for if he takes the goods of friends, he is a pirate; he had no authority for that; there is no colour from either of his commissions for him to take them: And as to the

French passes, there is nothing of that appears by any proof; and, for aught I can see, none saw them but himself, if there were ever any. It is proved, that the people that were owners of the goods made him very large offers to redeem the ship (twenty thousand rupees, as I remember;) but he would not accept their proposal, but said, 'that is a small sum, the cargo is worth a great deal more,' or to that effect: And further said, 'he must answer these people, that his men will not part with it.' And a Frenchman was to be set up for a mock business, as you have heard; and if the witnesses say true, they were said by the captain of the ship to be, and were reputed to be, the ship and goods of friends, and not of enemies; and if they were so, and had no French pass, then is he, and those that were concerned with him, guilty of piratically taking this ship, and of piratically seizing the goods in the ship; and neither of his commissions will justify such an action as this. If he had acted pursuant to his commission, he ought to have condemned the ship and goods, if they were a French interest, or sailed under a French pass; but by his not condemning them, he seems to shew his own mind, and intention, that he did not act in that case by virtue of his commission, but quite contrary to it; for he takes the ship, and shares the money and goods, and is taken in that very ship by my lord Bellamont, and he had continued in that ship till that time; so there is no colour or pretence appears, that he intended to bring this ship to England to be condemned, or to have condemned it in any of the English plantations, having disposed of the whole cargo as aforesaid. Here I must leave it to you to consider, whether, according to the evidence that appears, there is any ground for him to say, he has acted by his commission in taking the Quedah Merchant and goods in her, or whether he has not acted contrary thereto.

Now, for himself, he has called some persons here to give an account of his reputation, and of his services done in the West Indies; and one of them says, about ten or twelve years he did good service there. Why, so he might and might have, and it is very like he had such reputation when the king trusted him with these commissions, else I believe he had never had them; so that whatever he might be so many years ago, that is not a matter to be insisted on now, but what he hath been since, and how he hath acted in this matter charged against him: So that, gentlemen, as to Mr. Kidd, I must leave to you, whether he is guilty of piracy or no? And if you believe him guilty upon the evidence, you will find him so, if not, you will acquit him.

Now for the other prisoners, it is proved they were all concerned in taking and sharing the ship and goods in the indictment; yet their circumstances differ pretty much among themselves. There are three of them, that it has been made out to you, and owned by the king's witnesses, that they were servants, Robert

Lamley, William Jenkins, Richard Barlicorn. All these are made out to be servants, and you have had the indentures of two of them produced, and the king's witnesses prove them so, and they were admitted to be servants. Now, Gentlemen, there must go an intention of the mind, and a freedom of the will, to the committing a felony or piracy. A pirate is not to be understood to be under constraint, but a free agent; for in this case the bare act will not make him guilty, unless the will make it so. Now a servant, it is true, if he go voluntarily, and have his proposition, he must be accounted a pirate; for then he acts upon his own account, and not by compulsion. And these persons, according to the evidence, received their part; but whether they accounted to their masters for their shares afterwards, yea or no, as they pretend, but make no proof of it, I must leave that to you; and therefore there is a consideration to be had of them: for if these men did go under the compulsion of their masters, to whom they were servants, and not voluntarily, and upon their own accounts, it may difference their case from others, who went and acted willingly in this matter, and upon their own accounts. So that as to those that were servants under the command of their masters, that were present with them, I must leave it to you, whether you will distinguish between them and the others, that were not servants, but free agents. It is true, a servant is not bound to obey his master but in lawful things, which they say they thought this was, and that they knew not to the contrary, but that their masters acted according to the king's commission; and therefore their case must be left to your consideration, whether you think them upon the whole matter guilty or no. If you believe them guilty, you will find them so, otherwise you will acquit them.

For the other persons, some of them pretend they came in on his majesty's proclamation, and for that you must consider the evidence, and take it altogether, and consider whether you are satisfied by what they have said or proved, that they have brought themselves within the benefit of the king's favour by that proclamation. You have heard it read, and observed the qualifications and directions by it, and the terms upon which the pardon was promised, which are not made out to you, to be complied with by them; they may apply another way for the king's mercy; this court must proceed according to the rules of law and justice: but then all of them hold on this; we were, say they, under the captain, and acted under him as their commander: and, gentlemen, so far as they acted under his lawful commands, and by virtue and in pursuance of his commissions, it must be admitted they were justifiable, and ought to be justified: but how far forth that hath been, the actions of the captain and their own will best make it appear. It is not contested, but that these men knew, and were sensible of what was done and acted, and did take part in it, and had the benefit of

what was taken shared amongst them: and if the taking of this ship and goods was unlawful, then these men can claim no advantage by these commissions, because they had no authority by them to do what they did, but acted quite contrary to them. What had they to do to enter into such articles, and to act as they did? You must consider the evidence given here, according to the rules of the law; and if you are satisfied, that they have knowingly and wilfully been concerned or partaken with capt. Kidd in taking this ship, and dividing the goods, and that piratically and feloniously, then they will be guilty within this indictment. It is worthy of consideration what appears upon the evidence, that they met with one reputed to be a notorious pirate, called Culliford; he was esteemed an arch-pirate, and known to be so; yet this capt. Kidd, that was commissioned to take pirates, instead of taking him, grows to such an intimacy with him, that he said he would have his soul fry in hell before he would hurt him, or to that effect; and so they made presents one to another; and capt. Kidd left three of his men with him. Whilst men pursue their commissions they must be justified; but when they do things not authorised, or never acted by them, it is as if there had been no commission at all. I have distinguished the evidence as well as my memory serves me, and must leave it to you to determine upon the whole matter, who are guilty, and who not? And such as you are satisfied to be guilty, you will find so, and such as you are not satisfied to be guilty, you will acquit.

[Then the Jury withdrew, and after half an hour's stay, brought in their Verdict.]

Cl. of Arr. Gentlemen of the Jury, answer to your names, John Cowper, &c.

J. Cowper. Here, &c.

Cl. of Arr. Are you agreed of your Verdict? *Omnes.* Yes.

Cl. of Arr. Who shall say for you?

Omnes. Foreman.

Cl. of Arr. William Kidd, hold up thy hand. (Which he did.) How say you, is he guilty of the piracy whereof he stands indicted, or not guilty? (And so of the rest.)

Foreman. Guilty.

Cl. of Arr. Is Nicholas Churchill guilty, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is James Howe guilty, &c.?

Foreman. Guilty.

Cl. of Arr. Is Robert Lamley guilty, &c.?

Foreman. Not guilty.

Cl. of Arr. Is William Jenkins guilty, &c.?

Foreman. Not guilty.

Cl. of Arr. Is Gabriel Loffe guilty, &c.?

Foreman. Guilty.

Cl. of Arr. Is Hugh Parrot guilty, &c.?

Foreman. Guilty.

Cl. of Arr. Is Richard Barlicorn guilty, &c.?

Foreman. Not guilty.

Cl. of Arr. Is Abel Owens guilty, &c.?

Foreman. Guilty.

Cl. of Arr. Is Darby Mullins guilty, &c.?

Foreman. Guilty.

[Then William Kidd and the other nine persons, were further arraigned upon four indictments, in manner following:]

Cl. of Arr. William Kidd, hold up thy hand. (Which he did, and so the other nine.) You stand indicted by the name of William Kidd, late of London, mariner, &c.

The Jurors for our sovereign lord the king do, upon their oath, present, That William Kidd, late of London, mariner; Nicholas Churchill, late of London, mariner; James Howe, late of London, mariner; Robert Lamley, late of London, mariner; William Jenkins, late of London, mariner; Gabriel Loffe, late of London, mariner; Hugh Parrot, late of London, mariner; Richard Barlicorn, late of London, mariner; Abel Owens, late of London, mariner; and Darby Mullins, late of London, mariner; the 20th day of September, in the 9th year of the reign of our sovereign lord William the 3rd, by the grace of God, of England, Scotland, France and Ireland king, defender of the faith, &c. by force and arms, &c. upon the high sea, in a certain place, distant about 50 leagues from the port of Carrawar, in the East Indies, and within the jurisdiction of the Admiralty of England, did piratically and feloniously set upon, board, break and enter a certain ship called a Moorish ship, then being a ship of certain persons (to the jurors aforesaid unknown), and then and there piratically and feloniously did make an assault in and upon certain mariners (whose names to the jurors aforesaid are unknown) in the same ship, in the peace of God, and of our said now sovereign lord the king, then and there being, piratically and feloniously did put the aforesaid mariners of the same ship, in the ship aforesaid then being, in corporal fear of their lives, then and there in the ship aforesaid, upon the high sea, in the place aforesaid, distant about 50 leagues from the port of Carrawar aforesaid, in the East Indies aforesaid, and within the jurisdiction aforesaid, piratically and feloniously did steal, take and carry away 100 pound weight of coffee, of the value of 5*l.* of lawful money of England, 60 pound weight of pepper of the value of 3*l.* of lawful money of England, 1 cwt. of myrrh, of the value of 5*l.* of lawful money of England, and 20 pieces of Arabian gold, of the value of 8*l.* of lawful money of England, the goods, chattels and movables of certain persons (to the jurors aforesaid unknown) then and there upon the high sea aforesaid, in the aforesaid place, distant about 50 leagues from the port of Carrawar aforesaid, in the East Indies aforesaid, and within the jurisdiction aforesaid, being found in the aforesaid ship, in the custody and possession of the said mariners in the said ship, from the said mariners of the said ship, and from their custody and possession, then and there upon the high sea aforesaid, in the place aforesaid, distant about 50 leagues from the port of Carrawar aforesaid, in the East Indies aforesaid, and within the jurisdic-

tion aforesaid, against the peace of our said now sovereign lord the king, his crown and dignity, &c.

How sayest thou, William Kidd, art thou guilty of this piracy and robbery, whereof thou standest indicted, or not guilty?

Kidd. Not guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Kidd. By God and my country.

Cl. of Arr. God send thee a good deliverance. (And so of the other nine.)

Cl. of Arr. William Kidd, hold up thy hand. (Which he did: and so the other nine.) You stand indicted by the name of William Kidd, late of London, mariner. (And so of the rest.)

The Jurors for our sovereign lord the king do, upon their oath, present, that Wm. Kidd, late of London, mariner; Nicholas Churchill, late of London, mariner; James Howe, late of London, mariner; Robert Lamley, late of London, mariner; Wm. Jenkins, late of London, mariner; Gabriel Loffe, late of London, mariner; Hugh Parrot, late of London, mariner; Richard Barlicorn, late of London, mariner; Abel Owens, late of London, mariner; and Darby Mullins, late of London, mariner; the 27th day of November, in the 9th year of the reign of our sovereign lord William the third, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. by force and arms, &c. upon the high sea, in a certain place, distant about four leagues from Callicut, in the East-Indies, and within the jurisdiction of the Admiralty of England, did piratically and feloniously set upon, board, break, and enter a certain ship called a Moorish ketch, then being a ship of certain persons (to the jurors aforesaid unknown), and then and there piratically and feloniously did make an assault in and upon certain mariners (whose names to the jurors aforesaid are unknown) in the same ship in the peace of God, and of our said now sovereign lord the king, then and there being, piratically and feloniously did put the aforesaid mariners of the same ship, in the ship aforesaid then being, in corporal fear of their lives, then and there in the ship aforesaid, upon the high sea, in the place aforesaid, distant about four leagues from Callicut aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, piratically and feloniously did steal, take and carry away the same ship, and the apparel and tackle of the same ship, of the value of 500*l.* of lawful money of England; 11 bales of cotton, of the value of 60*l.* of lawful money of England; two horses, each of them of the price of 20*l.* of lawful money of England; and 50 Indian quilts of the value of 5*l.* of lawful money of England (the goods and chattels of certain persons to the jurors aforesaid unknown) then and there upon the high sea aforesaid in the aforesaid place, distant about four leagues from Callicut aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, being found in the aforesaid ship, in the custody and possession of the said mariners

in the same ship, from the said mariners of the said ship, and from their custody and possession, then and there upon the high sea aforesaid, in the place aforesaid, distant about four leagues from Callicut aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, against the peace of our said now sovereign lord the king, his crown and dignity, &c.

How sayest thou, William Kidd, art thou guilty of this piracy and robbery whereof thou standest indicted, or not guilty?

Kidd. Not guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Kidd. By God and my country.

Cl. of Arr. God send thee a good deliverance.

(And so of the other nine.)

Cl. of Arr. Wm. Kidd, hold up thy hand. (Which he did: and so the other nine.)

You stand indicted by the name of William Kidd, late of London, mariner. (And so the rest.)

The Jurors for our sovereign lord the king do, upon their oath, present, that Wm. Kidd, late of London, mariner; Nicholas Churchill, late of London, mariner; James Howe, late of London, mariner; Robert Lamley, late of London, mariner; Wm. Jenkins, late of London, mariner; Gabriel Loffe, late of London, mariner; Hugh Parrot, late of London, mariner; Richard Barlicorn, late of London, mariner; Abel Owens, late of London, mariner; and Darby Mullins, late of London, mariner; the 23th day of December, in the 9th year of the reign of our sovereign lord William the 3rd, by the grace of God of England, Scotland, France and Ireland, king, defender of the faith, &c. by force and arms, &c. upon the high sea, in a certain place, distant about four leagues from Callicut, in the East-Indies, and within the jurisdiction of the Admiralty of England, did piratically and feloniously set upon, board, break and enter a certain ketch, called a Moorish ketch, then being a ketch of certain persons (to the jurors aforesaid unknown) and then and there piratically and feloniously did make an assault in and upon certain mariners (whose names to the jurors aforesaid are unknown) in the same ship, in the peace of God, and of our said now sovereign lord the king, then and there being, piratically and feloniously did put the aforesaid mariners of the same ketch, in the ketch aforesaid then being, in corporal fear of their lives, then and there in the ketch aforesaid, upon the high sea, in the place aforesaid, distant about four leagues from Callicut aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, piratically and feloniously did steal, take, and carry away the said ketch, and the apparel and tackle of the same ketch, of the value of 50*l.* of lawful money of England; thirty tubs of sugar-candy, of the value of 15*l.* of lawful money of England; six bales of sugar, of the value of 6*l.* of lawful money of England; and ten bales of tobacco, of the value of 10*l.* of lawful money of England, the goods and chattels of certain persons

(to the jurors aforesaid unknown) then and there upon the high sea aforesaid, in the aforesaid place, distant about four leagues from Callicut aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, being found in the aforesaid ketch, in the custody and possession of the said mariners in the same ketch, from the said mariners of the said ketch, and from their custody and possession, then and there upon the high sea aforesaid, in the place aforesaid, distant about four leagues from Callicut aforesaid, in the East-Indies aforesaid, and within the jurisdiction aforesaid, against the peace of our said now sovereign lord the king, his crown and dignity, &c.

How sayest thou, William Kidd, art thou guilty of the piracy and robbery whereof thou standest indicted, or not guilty?

Kidd. Not guilty.

Cl. of Arr. How wilt thou be tried?

Kidd. By God and my country.

Cl. of Arr. God send thee a good deliverance. (And so of the other nine.)

Cl. of Arr. William Kidd, hold up thy hand. (Which he did: and so the other nine.)

You stand indicted by the name of William Kidd, late of London, mariner, &c. (And so of the rest.)

The Jurors for our sovereign lord the king do, upon their oath, present, That William Kidd, late of London, mariner; Nicholas Churchill, late of London, mariner; James Howe, late of London, mariner; Robert Lamley, late of London, mariner; William Jenkins, late of London, mariner; Gabriel Loffe, late of London, mariner; Hugh Parrot, late of London, mariner; Richard Barlicorn, late of London, mariner; Abel Owens, late of London, mariner; and Darby Mullins, late of London, mariner; the 20th day of January, in the 9th year of the reign of our sovereign lord, William the 3rd, by the grace of God of England, Scotland, France, and Ireland king, defender of the faith, &c. by force and arms, &c. upon the high sea, in a certain place, distant about 12 leagues from Callicut in the East Indies, and within the jurisdiction of the Admiralty of England, did piratically and feloniously set upon, board, break, and enter a certain ship, called a Portuguese ship, then being a ship of certain persons (to the jurors aforesaid unknown), and then and there piratically and feloniously did make an assault in and upon certain mariners, subjects of the king of Portugal (whose names to the jurors aforesaid are unknown) in the same ship, in the peace of God, and of our said now sovereign lord the king, then and there being, piratically and feloniously did put the aforesaid mariners of the same ship, in the ship aforesaid then being, in corporal fear of their lives, then and there in the ship aforesaid, upon the high sea, in the place aforesaid, distant about 12 leagues from Callicut aforesaid, in the East Indies aforesaid, and within the jurisdiction aforesaid, piratically and feloniously did steal, take, and carry away

two chests of opium, of the value of 40*l.* of lawful money of England; 80 bags of rice, of the value of 12*l.* of lawful money of England; one ton of bees-wax, of the value of 10*l.* of lawful money of England; 30 jars of butter, of the value of 10*l.* of lawful money of England; and half a ton of iron, of the value of 4*l.* of lawful money of England, the goods and chattels of certain persons (to the jurors aforesaid unknown) then and there upon the high sea aforesaid, in the aforesaid place, distant about 12 leagues from Callicut aforesaid, in the East Indies aforesaid, and within the jurisdiction aforesaid, being found in the aforesaid ship in the custody and possession of the said mariners in the same ship, from the said mariners of the same ship, and from their custody and possession, then and there upon the high sea aforesaid, in the place aforesaid, distant about 12 leagues from Callicut aforesaid, in the East Indies aforesaid, and within the jurisdiction aforesaid, against the peace of our said now sovereign lord the king, his crown and dignity, &c.

How sayest thou, William Kidd, art thou guilty of the piracy and robbery whereof thou standest indicted, or not guilty?

Kidd. Not guilty.

Cl. of Arr. How wilt thou be tried?

Kidd. By God and my country.

Cl. of Arr. God send thee a good deliverance. (And so of the other nine.)

[Then the court adjourned till to-morrow morning eight o'clock.]

THE FURTHER PROCEEDINGS

AGAINST

WILLIAM KIDD, AND THE OTHER NINE PRISONERS, ON THE FOUR INDICTMENTS, MAY THE 9TH, 1701.

Cl. of Arr. Call William Kidd, Nicholas Churchill, James Howe, Robert Lamley, William Jenkins, Gabriel Loffe, Hugh Parrot, R. Barlicorn, Abel Owens, and Darby Mullins to the bar. You the prisoners at the bar, William Kidd, &c. those men that you shall hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of your several lives and deaths: if therefore you, or any of you, will challenge them, or any of them, your time is to speak unto them as they come to the book to be sworn, and before they be sworn. Call William Smith. (Who appeared; and there being no challenges, the twelve that were sworn are as follows.) Will. Smith, Benj. Hooper, Jo. Hibbert, Jo. Pettit, Will. Hatch, Jos. Chaplain, Peter Gray, Rob. Comfort, Tho. Hollis, Will. Ford, Tho. Stephens, J. Dodson.

Cl. of Arr. Crier, count these: William Smith.

Crier. One, &c.

Cl. of Arr. Benjamin Hooper.

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Crier. Two, &c. Twelve good men and true, stand together and hear your evidence.

[Then the usual proclamation for information was made; and the prisoners being bid to hold up their hands, the Clerk of Arraignments charged the jury with them thus:]

Cl. of Arr. You of the jury, look upon the prisoners, and hearken to their cause. They stand indicted by the names of William Kidd, &c. (as before in the indictment.) Upon this indictment they have been arraigned, and thereunto have severally pleaded, not guilty; and for their trial put themselves on God and their country, which country you are. Your charge is to enquire, whether they be guilty of the piracy and robbery whereof they stand indicted, or not guilty, &c.

Churchill. May it please you, my lord, I came in upon his majesty's proclamation; and if that do not do, I throw myself upon the mercy of the honourable bench.

Baron *Hatsell.* If they will withdraw their plea, and confess the indictment, they may.

Churchill and Howe. We refer ourselves to the king's proclamation.

Dr. Orenden. But do you confess the matter of the indictment? You may do that if you will, and then you need not be tried.

Owens. My lord, I came in upon the king's proclamation, and entered myself aboard one of the king's ships.

Dr. Orenden. You must answer first, and come to your defence afterward.

Owens. I hope your honours will grant it me, as well as the rest, I entered myself into the king's service.

Cl. of Arr. You of the jury, look on the prisoners, and hearken to their cause. They stand indicted by the name of William Kidd, &c.

Just. Turton. You may try all the indictments together, if they are the same persons concerned.

Cl. of Arr. They are the same that are concerned in the two first indictments.

Just. Tuiton. Then proceed upon these two together.

Cl. of Arr. They stand a second time indicted by the name of William Kidd, late of London, mariner. (And so of the rest.) Upon these two indictments they have been arraigned, and thereto have severally pleaded, not guilty; and for their trials have put themselves on God and their country, which country you are. Your charge is to enquire, whether they are guilty of the said piracies and robberies whereof they stand indicted, or not guilty, &c.

Mr. Knapp. May it please your lordship, and gentlemen of the jury, these are two several indictments against William Kidd, &c. and they are both for piracy. One sets forth, That the prisoners at the bar, on the 20th of September, in the 9th year of his majesty's reign, 15 leagues from Currawar, did piratically invade and take a ship called the Moorish ketch, and put the mariners in fear of their lives. The other indictment sets forth, That

on the 27th of November, in the 9th year of his majesty's reign, four leagues from Callicut, the prisoners at the bar did seize and take another Moorish ship; to both which indictments they have pleaded, not guilty. If we prove the fact, you must find them guilty. We will call witnesses. The witnesses are the same. The whole story you have heard before, and we will apply ourselves now to these facts mentioned in these two indictments.

Just. Turton. You must open your matter first, because there is a new jury.

Mr. Knapp. Then, my lord, and gentlemen of the jury, this capt. Kidd went out of England in a ship called the Adventure galley. He first went to New York, and there he set out articles to procure men, and promised them that would come into him a share in the adventures they should get. From thence he goes to Bab's-Key, and lies about three weeks there, watching for the Mocca fleet: he sent his boat out three times to see in what condition the ships were. He could get no intelligence the two first times, but the third time he did; they brought him word they were 14 or 15 ships ready to sail, and that their colours were English, and Dutch, and Moorish. He lay in wait for these ships, and watched them; and when they came down, he fell in with them, and fired at them; but he found they were under an English and Dutch convoy, and so away he went and left them. And then he came to cruise on the coast of Malabar, and there he met with his first prize, and that is the Moorish ship mentioned in the first indictment: they seized and took this Moorish ship, and entered her, and took several goods out of her, and then let the ship go away. We will call our witnesses as to this ship first. Call Robert Bradinham and Joseph Palmer. (Who appeared and were sworn.) *Mr. Bradinham,* what have you to say as to this matter?

Baron Hatsell. Tell it from the beginning; from the time you went out of England, to the time of taking this ship, because there is a new jury.

Bradinham. About the beginning of May, 1696, we went out of England, and went to New York, in the Adventure galley, whereof capt. Kidd was commander.

Mr. Knapp. Whither did you go?

Brad. To New York. We took a ship by the way, and carried her to New York, where we condemned her.

Mr. Knapp. What ship was that?

Brad. A French banker. At New York, capt. Kidd put up his articles, that if any would come aboard his ship, they should be welcome, no purchase, no pay, mentioning that he had the king's commission: from thence we went to St. Jauger, then to Maderas, then to Madagascar, then to Bonavis, then to Joanna, and then to the Red-sea, and then to Bab's-Key; there he lay three weeks looking for the Mocca fleet.

Mr. Knapp. Where?—*Brad.* In Bab's-Key.

Mr. Knapp. You say he lay there about a

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fortnight or three weeks: how did he behave himself there?

Brad. He sent out his boat three times; and the two first times they could get no intelligence.

Just. Turton. Tell whose the Mocca fleet was.

Brad. They belonged to the Moors; they were merchantmen belonging to the Moors.

Mr. Knapp. What news did they bring the third time?

Brad. The third time they brought word, that there were 14 or 15 ships in the harbour, ready to sail.

Dr. Newton. What did he say then?

Brad. That he would take as many of them as he could; and did not doubt but to make a voyage out of them.

Just. Turton. What account did the two first boats bring?

Brad. No account at all, my lord.

Just. Turton. What notice did they bring the third time?

Brad. They brought word, that there were about 14 or 15 ships in the harbour, ready to sail.

Just. Turton. Which time was it that they brought that word?

Brad. The third time. Then the fleet came down, and capt. Kidd followed them.

Mr. Knapp. Were there any on shore to watch this fleet?

Brad. There were some sent to the high land of the island, to see if the fleet came; and when they saw it, they were to give a sign with a half-pike and flag, and then the boat was to fetch them off. At last the fleet came down, and capt. Kidd went among them, and fired at them; but finding they were under a convoy, and too strong for him, he was forced to leave them.

Mr. Knapp. Whither did you go then?

Brad. From thence we went to Carrawar, and by the way we met with a Moorish ship, of which captain Parker was commander.

Mr. Knapp. My lord, that is the ship that they are indicted for. Where was it that you met with that ship?

Brad. About 50 leagues from Carrawar.

Mr. Knapp. Pray, what did they do with that ship?

Brad. We took capt. Parker's ship, and took him aboard, and the Portuguese for a linguister: and he took out some of the men, and bound their hands behind them, and ordered them to be drubbed with a naked cutlass; and he took out of her some pepper and coffee, and Arabian gold, and wearing apparel, and several other things.

Mr. Knapp. What did he do with these men, after he had plundered the ship?

Brad. He let the ship go, and kept Parker and the Portuguese aboard.

Dr. Newton. How many men were there aboard the ship?—*Brad.* About 30.

Dr. Orendon. What countryman was this Parker?—*Brad.* He was an Englishman.

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Dr. Ozenden. How do you know that?
Brad. He told me so.
Mr. Knapp. What ship was it?
Brad. A Moorish ship.
Mr. Knapp. What time was this done?
Brad. In September, 1697.
Mr. Knapp. What did he do with the two men he took out of this ship?
Brad. He kept them aboard this vessel.
Mr. Knapp. What ship was captain Kidd in then?—**Brad.** He was in the Adventure galley.
Mr. Knapp. Tell us, whether any other of these prisoners at the bar were in that ship when this was done?
Brad. Every one of them.
Cl. of Arr. Was captain Kidd himself there?
Brad. Yes.
Cl. of Arr. Was Nicholas Churchill there?
Brad. Yes.
Cl. of Arr. Was James Howe there?
Brad. Yes.
Cl. of Arr. Was Robert Larnley there?
Brad. Yes.
Cl. of Arr. Was William Jenkins there?
Brad. Yes.
Cl. of Arr. Was Gabriel Loffe there?
Brad. Yes.
Cl. of Arr. Was Hugh Parrot there?
Brad. Yes.
Cl. of Arr. Was Richard Barlicorn there?
Brad. Yes.
Cl. of Arr. Was Abel Owens there?
Brad. Yes.
Cl. of Arr. Was Darby Mullins there?
Brad. Yes.
Cl. of Arr. You say, you are sure they were all there?
Brad. Yes, I am sure they were.
Just. Turton. What goods did they take out of that ship?
Brad. Several bales of pepper, several bales of coffee, and some myrrh, which is a gum.
Sol. Gen. What did they do with it?
Brad. Capt. Kidd made use of the myrrh to make pitch of.
Sol. Gen. What was the value of the myrrh?
Brad. About 15*l*.
Sol. Gen. Where did they go after the taking of this ship?—**Brad.** To Carrawar.
Sol. Gen. What did they do there?
Brad. There the captain wooded and watered his ship.
Dr. Ozenden. What is Carrawar? Tell the court.
Brad. There is an English factory; they sent some men aboard, and demanded this Parker and the Portuguese; and the captain denied them, and kept them in the hold, and would not let them know he had them on board.
Dr. Ozenden. Had they any notice of Parker's being on board capt. Kidd's ship?
Brad. I suppose they had information from Bombay, by the mariners that went away; for capt. Parker's vessel belonged to that place.
Sol. Gen. How far is that Carrawar from Bombay?—**Brad.** About 40 leagues.
Sol. Gen. Where did you go after that?

Brad. They cruised on that coast, and they went to one of the Malabar islands.
Sol. Gen. What was done there?
Brad. We wooded and watered our ship.
Sol. Gen. Did they take any ships there?
Brad. Captain Kidd went ashore there, and burnt some houses, and plundered several boats.
Sol. Gen. Was there any ship taken there?
Brad. Yes.
Sol. Gen. What ship?
Brad. Some time in November (about the 17th of November) they took a Moorish ship, skipper Mitchell was the commander.
Baron Hatsell. You need go no further now.
Mr. Knapp. We will call the other evidences, if you please, Mr. Solicitor.
Sol. Gen. We will give our evidence upon both indictments together.
Mr. Knapp. They stand charged with taking another ship. You have heard how far we have carried it. Now they went and took another ship about the 17th of November.
Brad. They took a Moorish ship four leagues from Callicut.
Just. Turton. Now go on.
Brad. Capt. Kidd took this Moorish ship on the coast of Malabar, skipper Mitchell was the commander; she was a Moorish ship: he took out of her two horses, some bales of cotton, and some quilts.
Baron Hatsell. What countryman was this skipper Mitchell?—**Brad.** A Dutchman.
Baron Hatsell. What ship was it?—**Brad.** A Moorish ship; she belonged to Surat.
Sol. Gen. What burthen was she?
Brad. About 150 ton.
Sol. Gen. What was found in her?
Brad. Two horses, and about eleven or twelve bales of cotton.
Just. Turton. Was this on the coast of Callicut?—**Brad.** It was on the coast of Malabar.
Mr. Knapp. How far from Malabar?
Brad. Seven or eight leagues.
Sol. Gen. What did they do after this with the ship, and goods, and people?
Brad. The people they set ashore, and kept the ship and carried her to Madagascar.
Sol. Gen. What was the value of the horses taken out of her?
Brad. The horses were worth about 40*l*.
Sol. Gen. What the cotton?
Brad. About 100*l*.
Baron Hatsell. How do you know this skipper Mitchell was a Dutchman?
Brad. He told me so; he came afterwards aboard capt. Kidd, and took arms under him.
Sol. Gen. Were all these persons aboard this ship when she was taken?
Brad. Yes, my lord.
Baron Hatsell. You say, this ship was about 150 ton; what might she be worth?
Brad. About 500*l*.
Baron Hatsell. To whom did she belong?
Brad. To the Moors.
Baron Hatsell. What Moors?
Brad. The Moors that belonged to Surat, as I was informed by the Moors.

Sol. Gen. What did he do with the ship afterwards?

Brad. She was carried to Madagascar.

Sol. Gen. What did they do with the ship?

Brad. They sunk her.

Sol. Gen. Do you know why they sunk her?

Brad. She was sunk voluntarily.

Kidd. This man contradicts himself in an hundred places.

Brad. The ship was sunk purposely.

Dr. Newton. What was done when you came to Madagascar?

Brad. When we came to Madagascar, there came off a canoe with white men aboard, that belonged to the Mocca frigate: some of these men belonged formerly to capt. Kidd. She was supposed to be a pirate ship.

Sol. Gen. What was the reason of sinking that ship?

Brad. They sunk her in the harbour, that she might be convenient for vessels to careen by. Some men came off in this canoe, and they told him, they heard he was come to take them, and hang them. He said it was no such thing.

Dr. Newton. Who was the captain of the Mocca frigate?—*Brad.* Captain Culliford.

Dr. Newton. Was he a pirate?

Brad. Yes, he was reputed so.

Sol. Gen. Well, go on.

Brad. Capt. Kidd swore he would be true to them, and that he would do them no harm.

Sol. Gen. Did you hear all this?

Brad. Yes, he swore to be true to them.

Mr. Knapp. Was there any thing said about capt. Kidd's taking her?—*Brad.* Nothing.

Dr. Newton. What passed afterwards between captain Kidd and Culliford?

Brad. They were very friendly together, and they made presents to one another.

Dr. Newton. What presents were there made?

Brad. Culliford gave to capt. Kidd some pieces of China silk, and Kidd bid Culliford take any thing he had.

Sol. Gen. Did capt. Kidd give Culliford any guns?

Brad. He supplied him with two guns.

Dr. Newton. Was there any division of goods or money?

Brad. After we came to Madagascar, capt. Kidd ordered the goods to be hoisted out, and shared, and capt. Kidd had forty shares for himself.

Sol. Gen. What became of the goods of those ships?—*Brad.* They were sold.

Sol. Gen. What was done with the product of the goods?

Brad. Capt. Kidd kept it; and when there was something worth sharing, he shared it, and he had forty shares for himself.

Cl. of Arr. Had N. Churchill any share?

Brad. He had a whole share.

Cl. of Arr. Had James Howe any share?

Brad. He had a whole share.

Cl. of Arr. Had R. Lamley any share?

Brad. He had half a share.

Cl. of Arr. Had W. Jenkins any share?

Brad. He had half a share.

Jenkins. How can you attest these wicked lies? I had nothing.

Baron Hatsell. Who shared it?

Brad. The captain.

Kidd. He tells a thousand lies.

Cl. of Arr. Look on Hugh Parrot; had he any share?

Brad. Yes, half a share of money, and a whole share of goods.

Cl. of Arr. Had R. Barlicorn any share?

Brad. He had half a share.

Cl. of Arr. Had Abel Owens any share?

Brad. He had a whole share.

Cl. of Arr. Had Darby Mullins any share?

Brad. He had half a share.

Sol. Gen. Now if any of you will ask him any questions you may.

Kidd. Mr. Bradinham, pray what share had you?

Brad. If my lord ask me, I will answer him.

Kidd. Had you any share?—*Brad.* Yes.

Kidd. Did not you come aboard my ship, and rob the surgeon's chest?

Brad. No, I did not.

Kidd. Did not I come to you, when you went away, and met you on the deck, and said, Why do you take the chest away?

Brad. No, I did not do it.

Kidd. You are a rogue.

Just. Turton. It were the same thing for him to confess it, as to deny it, if he had done it.

Kidd. He did certainly do it.

Baron Hatsell. But he says he did not.

Just. Turton. Would any of you ask him any questions?

Cl. of Arr. Nich. Churchill, Will you ask him any questions?

Churchill. I came in on the king's proclamation, and depend wholly on it.

Kidd. Were there not any French passes aboard that ship?

Brad. I heard say there were, I did never see them.

Kidd. I did not divide the things, but the men did what they pleased, and you took your share, and saw the French passes.

Baron Hatsell. What ship is that you mean; that taken in September, or that in November?

Brad. The Moorish ship, that Parker was commander of.

Baron Hatsell. There were two mentioned.

Kidd. Just now he told you of two in November; now he says one in November, another in September.

Baron Hatsell. He says, that in September, that Parker was commander of.

Kidd. There was no such thing in November; he knows no more of these things than you do. This fellow used to sleep 5 or 6 months together in the hold.

Just. Turton. I assure you, he gives a very good account of the matter.

Baron Hatsell. Why did you give him a share then?

Kidd. Because he was surgeon. As for the goods, they took it amongst them, and did

what they pleased, I was never near them. They lay wait for me to kill me. They took away what they pleased and went to the island; and I, with about 40 men, was left in the ship, and we might go whither we pleased.

Sol. Gen. Mr. Kidd, Will you ask him any questions?

Kidd. No, no; so long as he swears it, our words or oaths cannot be taken.

Cl. of Arr. Will you ask him any more questions?—*Kidd.* No, no, it signifies nothing.

Cl. of Arr. N. Churchill, Will you ask him any questions?

Churchill. I came in upon his majesty's proclamation, and rely upon that.

Cl. of Arr. J. Howe, Will you ask him any questions?

Howe. I surrendered myself upon the king's proclamation, and plead guilty.

Cl. of Arr. R. Lamley, Will you ask this witness any questions?

Lamley. Do you say, I had half a share of money?—*Brad.* Yes.

Lamley. No, I had none.

Cl. of Arr. It was your share, and you must make it appear, if you accounted for it to your master.

Lamley. If your lordship please, I was an apprentice.

Baron Hatsell. To whom was you a servant?

Lamley. I was an apprentice to A. Owens.

Just. Turton. Was Lamley an apprentice to Owens?

Brad. My lord, he was a servant to Owens, who was aboard them.

Just. Turton. He had half a share, but perhaps he might account for it to his master afterwards.

Cl. of Arr. W. Jenkins, Will you ask the witness any questions?

Jenkins. My lord, I beg he may speak the truth, whether I was a servant.

Brad. My lord, he was a servant to George Bullen.

Just. Turton. Was this Bullen aboard then?

Brad. Yes.

Just. Turton. When both ships were taken?

Brad. Yes.

Cl. of Arr. Will you ask the witness any questions, G. Loffe?

Loffe. My lord, when I came aboard, the captain opened his commission there: did I ever disobey his commands?

Brad. Not that I know of.

Loffe. Did you see me receive any share?

Brad. Yes, half a share of money, and a whole share of goods.

Loffe. Where?—*Brad.* In great cabin.

Cl. of Arr. What questions will you ask him, Hugh Parrot?

Parrot. May it please your lordship, I will give you an exact account from the time of my going out of England, in the month of October, 1695—

Cl. of Arr. You may make your defence afterwards; in the mean time, will you ask him any questions now?

Parrot. I appeal to him, whether he ever saw me do any such cruelty as he mentions?

Just. Turton. You hear what he says, answer him.

Brad. I cannot say you were the very man that did it, but those men were used so: they were hoisted up, and drubbed with a naked cutlass.

Parrot. And then I ask him, whether I ever went any further than my commander ordered me, or against the king's commission, as I thought?

Brad. I cannot say you did any thing contrary to your commander's orders.

Parrot. I ask him, whether, when I might have went aboard this pirate, I did not stick close to my captain, and come home with him? and whether I had any inclination to leave him?

Just. Turton. He knows not your inclination. Where did you leave capt. Kidd? Will you ask him that?

Parrot. I came home to Boston with capt. Kidd. Doctor, did I go away with them that left capt. Kidd?

Brad. You went with capt. Kidd to Madagascar.

Parrot. I came home with capt. Kidd, and surrendered myself to my lord Bellamont.

Cl. of Arr. Abel Owens, will you ask the witness any questions?

Owens. I ask the witness, whether I did not surrender myself?

Brad. I cannot say any thing to that.

Cl. of Arr. Will you ask him any more questions?

Owens. No, I stand to his majesty's proclamation, and the mercy of the honourable bench.

Cl. of Arr. Darby Mullins, will you ask the king's witness any questions?

Mullins. No: may it please you, my lord, I came in upon the king's gracious proclamation, as the king's evidence knows. Do you not know I came ashore with you about the 28th of May?

Brad. I know he went ashore.

Mullins. I went ashore. I came home upon the king's proclamation. We went ashore at Cape May. I was very sick of the bloody-flux, and not able to travel, and was like to die every day.

Brad. My lord, I know this man was very sick in the passage.

Mullins. I was a passenger on board capt. Shelly's ship.

Just. Turton. How came he to come aboard capt. Shelly? Where did he leave capt. Kidd?

Brad. He left capt. Kidd at Madagascar, and took his passage with capt. Shelly afterwards, after these were taken.

Sol. Gen. How came he to leave captain Kidd at Madagascar?

Brad. He went aboard capt. Culliford's ship. There was about 60 or 70 men went aboard Culliford.

Mr. Knapp. Call Joseph Palmer.

Dr. Orsden. He says, he came in upon

the king's proclamation to Cape May: do you know any thing of that?—*Brad.* Yes.

Dr. Oxenden. Where is that Cape May?

Brad. Off of Maryland, where capt. Shelly's ship was at anchor; and capt. Gravenport came on board capt. Shelly's ship, and said, he heard his majesty's proclamation was out to receive pirates that would come in; and the men rejoiced that there was such a thing, and they went ashore and surrendered themselves.

Dr. Oxenden. Where?

Brad. At Cape May.

Dr. Oxenden. Did he go to the governor?

Brad. I did not see him go ashore.

Cl. of Arr. D. Mullins, will you ask him any more questions?

Mullins. You was aboard when I went ashore.—*Brad.* I did not see you go ashore.

Sol. Gen. Was he sick when he went ashore?—*Brad.* He was sick.

Mullins. I was sick, and expected to die every moment.

Cl. of Arr. All was done before that time.

Sol. Gen. Did he rejoice when he heard the king's proclamation was out?

Brad. I heard him say the king's proclamation was out, and he rejoiced with others.

Sol. Gen. Did he surrender himself to the governor?

Brad. I cannot say that; he went ashore.

Baron Hutsell. Now set up Joseph Palmer.

Just. Turton. Gentlemen, I would not have you under any mistake, that surrendering himself comes not under your consideration; it was after all the facts were done that the prisoner is charged with.

Mr. Knapp. Mr. Palmer, give my lord and the jury an account of what you know concerning capt. Kidd's voyage from England in the Adventure Galley, when he went out of England, and his proceedings afterwards.

Palmer. About the last of April, or beginning of May, he went from Plymouth to New-York, and in the way took a French banker, and carried her to New-York, and condemned her there: and at New-York he set up articles to invite men to come aboard his ship; that if any would come aboard, they should have a share of such treasure as he should take: he was to have forty shares himself, and every man a half or whole share. And about the first of September following, he went from New-York to Maderas, from thence to Bonavis, from thence to St. Jauger, then to Madagascar, then to Malabar, then to Joanna, then to Mahala, then to Joanna again, then to the Red-sea.

Mr. Knapp. Pray, give an account of what was done there.

Palmer. There he watered, and took Guinea corn to victual his ship; and then to Bah's-Key, near the Red-sea.

Mr. Knapp. Give an account of what he did there.

Palmer. He sent out his boat three times to discover the fleet, and likewise some spies on the high land to look out on both sides, to see that the ships did not pass by.

Sol. Gen. What ships?

Palmer. Moorish ships from Mocca.

Sol. Gen. Whose ships were those Moorish ships?

Palmer. They were Turks and Moors together.

Mr. Knapp. What did he do then?

Palmer. He called the men by lot to look out, and he sent his boat out twice and they returned without bringing any tidings. And he sent the boat the third time, with orders to take a prisoner, or to see what ships lay there. And the third time word was brought, that there were about 14 or 15 ships lay in the road ready to sail, with Dutch, English and Moorish colours: and when this news came, capt. Kidd ordered the men to go on the other side, on the high lands, to see that the ships did not pass by in the night; and in 4 or 5 days the ships came down, about the 14th of August. The fleet came down in the evening, and capt. Kidd went after them: and some of the men said, We will go among them to-night: No, says capt. Kidd, we will go in the morning, and then we will take our choice.

Kidd. Did you hear me say so?

Palmer. I heard you say so.

Kidd. I am sure you never heard me say such a word to such a loggerhead as you.

Palmer. These are the words I heard him say. And the next morning he fell in with this fleet, and went through them; and there was a Dutch and English convoy; and they fired at one another.

Kidd. Hear me—

Mr. Knapp. You shall ask him what questions you will presently.

Just. Turton. Who fired first?

Palmer. The Dutch and English fired first. When we lay between the English and Dutch, a Moorish ship came by, and he fired several shot after her: and the English ship flung a shot almost home, and then he made sail, and went out of the fleet: and from thence he went to Carrawar, and in the way met with a ship, whereof Parker was commander, and there was one Antonio, a Portuguese.

Sol. Gen. Where was this done?

Palmer. About fifty leagues from Carrawar.

Sol. Gen. What time of the year was it?

Palmer. It was about September.

Baron Hutsell. The witness is now come to speak to the ship for which the prisoners are indicted.

Sol. Gen. Go on; what did they do with that ship?

Palmer. He fought the ship and took her, and took out of her several bales of coffee, and he retained only one bale, and sent the rest back again: and he took a bale of pepper, and some myrrh to use instead of pitch.

Sol. Gen. What quantity of pepper was there?

Palmer. About 60 pound weight.

Sol. Gen. What myrrh?

Palmer. About 30 pound weight.

Sol. Gen. What value was it of?

Palmer. I cannot tell that.

Sol. Gen. What Arabian gold?

Palmer. I did not see it: I did not see any taken out then; but a pretty while afterwards, when capt. Kidd came to Carrawar, he gave every mess two pieces of Arabian gold.

Mr. Knapp. How long was this after the ship was taken?

Palmer. Ten or twelve days.

Sol. Gen. How was the pepper disposed of?

Palmer. It was divided among the messes.

Sol. Gen. Had these prisoners their part?

Palmer. Yes.

Mr. Knapp. How did they use the men of this ship?

Palmer. There were several hoisted up, and drubbed with a naked cutlass.

Kidd. Where was this done?

Palmer. In your ship.

Kidd. What ship?

Palmer. The Adventure galley.

Kidd. Did not a parcel of rogues go aboard their ship and do it?

Mr. Knapp. For what purpose was this done?

Palmer. Because they thought they had more money in the ship.

Mr. Knapp. What countryman was Parker?

Palmer. An Englishman, born in the north of England. He said so.

Just. Turton. Who else was detained besides Parker?

Palmer. One Antonio, a Portuguese. Parker was detained for a pilot; the other for a linguister.

Just. Turton. What do you mean by a linguister?

Palmer. To speak Moorish and Portuguese.

Sol. Gen. Where did they go then?

Palmer. From thence we went to Carrawar, and watered and wooded the ship; and a great many of his men left him there: And when he saw his men leave him he went to sea; he would not trust any more to go ashore. And the next evening he met a Portuguese man of war, and fought her, but did not take her.

Just. Turton. Did you know any that left him?

Palmer. Peter Lehair, and Churchill, and others; they went to the English factory, to know whether they would entertain them, or no.

Just. Turton. Who went?

Palmer. Mr. Lehair, Nicholas Churchill, and another; they went to know whether they should be entertained; and they told them, they were loth to entertain them, for fear captain Kidd should know of it, and do them an injury.

Kidd. My lord, a parcel of these men went ashore to run away with this ship.

Just. Turton. Were there any more of these prisoners at the bar, that would have gone off besides Churchill?

Palmer. No; but he would have gone off.

Just. Turton. How do you know that?

Palmer. He told me so.

Baron Gould. Had they an opportunity to go off?

Palmer. Some more were taken going afterwards, and had got a boat for that purpose; but they were taken, and capt. Kidd ordered them to be brought aboard, and whipped at the gun.

Kidd. Certainly you have not the impudence to say that!

Palmer. I say, you ordered them to be whipped, for attempting to go ashore.

Sol. Gen. Whither did you go then?

Palmer. That evening we went and met with a Portuguese man of war.

Sol. Gen. You may go on from that. Whither did you go then?

Palmer. To the Malabar islands.

Sol. Gen. What to do?

Palmer. To take in water. His cooper went ashore, and the natives cut his throat: and capt. Kidd sent his men ashore, and ordered them to divide themselves into squadrons, and to burn all the houses they came near, except the houses that had white flags upon them.

Sol. Gen. Why not them?

Palmer. Because they helped us to water the ship.

Mr. Knapp. And were there any houses burnt?—*Palmer.* Yes, a great many.

Mr. Knapp. What did he more?

Palmer. I heard what he did; I did not see it.

Baron Hatsell. What do you know of any other ship?

Palmer. About the 27th of November, he took the ship Maiden, near Callicut. We spied a ship in the night, and chased her all night, and the next morning he took her.

Just. Turton. What ship was that?

Palmer. Skipper Mitchel was commander; it was a Moorish ship, she belonged to Surat; she was taken in November, and after that she was called the November.

Sol. Gen. How was she taken?

Palmer. Captain Kidd chased her under French colours; and this ship had French colours; and when he hailed her it was in French, and this skipper Mitchel answered in French.

Sol. Gen. Had the Moorish ship French colours before capt. Kidd put up French colours, or after?—*Palmer.* After.

Sol. Gen. What colours had she when she was chased at first?

Palmer. It was in the night: in the morning capt. Kidd hoisted up French colours, and then the Moorish ship likewise hoisted up French colours.

Sol. Gen. What followed?

Kidd. Speak true.

Palmer. I will. He fired three or four shot at the ship, and commanded them aboard; and Mitchel did so, and some of his men with him; and he ordered monsieur le Roy to be as captain; and he came from below deck, and received him as captain.

Kidd. Did you see that?

Palmer. I did not see that; but I know he was ordered to do so, and he received him as captain; I was not in the cabin at that time. Monsieur le Roy received him as captain, and carried him aft. They hailed this ship in French, and bid him come aboard in French, and this Frenchman received him as captain; and I heard him say, That he brought a French pass along with him.

Sol. Gen. Who did you hear say so?

Palmer. I heard people on board say so.

Kidd. Palmer, did you see that pass?

Palmer. Indeed, captain, I did not.

Sol. Gen. What did you do with the ship?

Palmer. There were two horses on board, and ten or twelve bales of cotton, and some quilts, and capt. Kidd sold them at Malabar.

Sol. Gen. What goods were there?

Palmer. Two horses.

Sol. Gen. What besides?

Palmer. Ten or twelve bales of cotton, and some quilts.

Just. Turton. What countryman was skipper Mitchel, the captain?

Palmer. A Dutchman.

Sol. Gen. What was the ship worth?

Palmer. I cannot tell the value of her.

Sol. Gen. What burden was she?

Palmer. About 150 ton.

Sol. Gen. What did they do with those horses, and the cotton?

Palmer. They sold them to the Banians.

Sol. Gen. What did they do with the produce of those goods?

Palmer. Captain Kidd kept it till they had a pretty deal of money together, and then they shared it.

Sol. Gen. Had the prisoners at the bar any shares of it?—*Palmer.* Yes.

Cl. of Arr. Had captain Kidd himself any share?—*Palmer.* Yes.

Cl. of Arr. Had Nicholas Churchill any share?—*Palmer.* Yes, he had a whole share.

Cl. of Arr. Had James Howe any share?

Palmer. Yes, a whole share.

Just. Turton. Where did they share it?

Palmer. On the coast of Malabar.

Cl. of Arr. Had Robert Lamley any?

Palmer. Yes, half a share.

Cl. of Arr. Had William Jenkins any share?

Palmer. He had half a share.

Cl. of Arr. Had Gabriel Loffe any?

Palmer. He had half a share.

Cl. of Arr. Had Hugh Parrot any?

Palmer. He had a whole share.

Parrot. Did you see me have any share? Can you speak that to my face now? Did you see any of us have any?

Palmer. When captain Kidd shared this money, I did not actually see him pay their shares; but he called every man by the list, and they came with their hats in their hands, and he gave them their money, and they swept it up, and went away.

Sol. Gen. Were these men called by the list?

Palmer. Yes.

Sol. Gen. And did they miss none?

Palmer. Not that I know of.

Cl. of Arr. What say you to Richard Barlicorn? Had he any?

Palmer. He had half a share: whether his master had it or no afterwards, I know not.

Cl. of Arr. Had Abel Owens any share?

Palmer. He had a whole share.

Cl. of Arr. What had Darby Mullins?

Palmer. He had a half share.

Mr. Knapp. I think you were speaking of Arabian gold that they had in messes: had these prisoners their share of that?

Palmer. Yes, there was no difference; they had all their shares.

Mr. Knapp. Now, if you will ask this witness any question, you may.

Kidd. What signifies it to ask him any questions? We have no witnesses, and what we say signifies nothing.

Cl. of Arr. N. Churchill, will you ask him any questions?

Churchill. No, I have acknowledged all these crimes, and surrendered myself, and rely on the king's mercy.

Cl. of Arr. J. Howe, will you ask him any thing?—*Howe.* No.

Cl. of Arr. R. Lamley, will you ask him any thing?

Lamley. Mr. Palmer, how can you tell I had a half share?

Palmer. There was a half share directed for you.

Lamley. I had not a farthing.

Just. Turton. Was he an apprentice?

Palmer. Yes; he was servant to Mr. Owens.

Jenkins. Can you say, I had any share?

Palmer. I know there was a half share appointed for you; I know not whether your master had it.

Just. Turton. Was his master aboard then?

Palmer. Yes, his master was aboard then.

Cl. of Arr. Gabriel Loffe, have you any questions to ask him?

Loffe. Had I any share?

Palmer. You had a half share; I did not see you take it, but you were in the list.

Cl. of Arr. H. Parrot, have you any questions to ask him?

Juryman. Did you see them come out with the money in their hats?—*Palmer.* Yes.

Sol. Gen. Did Gabriel Loffe come out as contented as the rest?

Palmer. No, because he had but half a share.

Loffe. Did you see me come out with my money?

Palmer. I saw you come out with money in your hat; and I heard you say, you had half a share.

Loffe. As I live I had no hat then.

Cl. of Arr. Have you any questions to ask him, H. Parrot?

Parrot. Did you see me have any share?

Palmer. I did not see you receive any share, but you was called among the rest.

Just. Turton. He says, they were all called, man by man, to take their shares.

Cl. of Arr. R. Barlicorn, have you any thing to ask him?

Barlicorn. I desire of him, whether he saw me have any goods, or take any share?

Palmer. My lord, when the goods were shared at Madagascar, I was at Bonavis; I was not present, but I heard of it afterwards.

Barlicorn. I hope the jury will take notice of this.

Baron Hatsell. Mr. Bradinham, did any of these men complain, that they had not their share?

Bradinham. No, no, I heard nothing of that.

Just. Turton. Were these shares such as were agreed on in the articles at New York?

Palmer. Yes, capt. Kidd ordered the goods to be hoisted out.

Kidd. Did I order the goods to be hoisted out?—*Palmer.* Yes, you did.

Kidd. It was the mutinous men that did it.

Parrot. How do you know that I had any share? You did not see me in a year after.

Palmer. I do not say I saw it given you.

Kidd. My lord, there were 95 men that deserted my ship, and took away what they pleased; we could not stand in defence of any thing.

Barlicorn. Was not I an apprentice to captain Kidd, and waited on him continually in the ship?—*Palmer.* Yes, you were.

Sol. Gen. Had he a share allotted him?

Palmer. Yes; but I am apt to think his master had it.

Just. Turton. Who was his master?

Palmer. Captain Kidd.

Cl. of Arr. A. Owens, have you any thing to say for yourself?

Owens. I refer myself to the king's proclamation.

Cl. of Arr. Darby Mullins, have you any thing to say for yourself?

Mullins. I came to cape May, where I heard of the king's proclamation. Did not you and I come ashore together?

Palmer. Yes, we did, the same day.

Mullins. Did not we come ashore on the king's proclamation?

Palmer. We did hear of it.

Mullins. Did not you hear, that all the men were glad at the news, when they heard of the proclamation?

Dr. Orenden. What did these men say then?

Palmer. They all rejoiced to hear of such a thing.

Mullins. From the time I came from Madagascar I was sick of the bloody-flux; I could not walk a mile in a day.

Palmer. I know you was sick.

Mullins. I have no more to say: I stand to your lordship's mercy, and the king's gracious proclamation.

Just. Turton. If you have any witnesses to call for yourselves, you may call them. Capt. Kidd, what have you to say for yourself? You may make your defence, first for that ship taken in September; then, for that in November.

Kidd. What is it the nearer for me to speak? I have no witnesses for these things.

Baron Hatsell. Yesterday you produced your commissions; if you will, they may be read now.

Kidd. It availed nothing then. Here is all these men saw the French pass.

Palmer. Indeed, captain, I never saw it.

Kidd. You left my ship, with 95 men more, and you went a-roguing afterwards.

Sol. Gen. Why did you go aboard that pirate?

Kidd. My lord, I had a design to take that frigate, and then I designed to come for England. I would not go with such a roguish crew as you were. Was not I threatened to be shot in the cabin by such villains as you, if I would not go along with you? This was the reason I could not come home. Did not you, with others, set fire to the boat, to destroy my ship?

Palmer. I know nothing of that; but I am sure I saved your life on the Malabar island, when you burnt the boat.

Kidd. My lord, they took what they pleased out of this ship, and I was forced to stay by myself, and pick up here a man, and there a man, to carry her home.

Cl. of Arr. Nicholas Churchill, what have you to say for yourself?

Churchill. My lord, I plead guilty, and rely on the king's proclamation.

Cl. of Arr. James Howe, have you any thing to say for yourself?

Howe. I plead guilty, my lord.

Kidd. Here are some gentlemen here, I desire they may be heard as to my reputation. Here is colonel Hewson.

Just. Turton. What do you ask col. Hewson?

Kidd. I ask him what he knows as to my reputation in the West-Indies?

Hewson. My lord, he was a mighty man there. He served under my command. He was sent to me by the order of col. Codrington.

Sol. Gen. How long was this ago?

Hewson. About nine years ago. He was with me in two engagements against the French, and fought as well as any man I ever saw, according to the proportion of his men. We had six Frenchmen to deal with, and we had only mine and his ship.

Kidd. Do you think I was a pirate?

Hewson. I know his men would have gone a-pirateering, and he refused it, and his men seized upon his ship. And when he went this voyage, he consulted me, and told me they had engaged him in such an expedition; and I told him he had enough already, and might be contented with what he had: and he said, it was his own inclination; but my lord Bellamont told him, if he did not go the voyage, that there were great men, and they would stop his brigantine in the river, if he did not go.

Just. Turton. Who told you so? did he?

Hewson. Yes, my lord.

Just. Turton. If he had kept to the honest design of that expedition, he had done very well. Did you apprehend that his intention in that undertaking was to be a pirate?

Hewson. No, my lord. He told me his be-

since was to go a-cruising, and surprize pirates.

Sol. Gen. Did he tell you he had no such design?

Keaton. Yes, he said he would be shot to death before he would do any such thing. I know he was very serviceable in the West-Indies.

Cl. of Arr. Robert Lamley, have you any thing more to say?

Lamley. I can say nothing, for I have none of my friends here.

Kidd. Call Thomas Cooper. (Who appeared.)

Just. Turton. What questions do you ask him?

Kidd. Sir, pray, tell my lord what you knew of me in the Indies.

Cooper. I was aboard the Lyon, and this captain Kidd brought his ship from a place that belonged to the Dutch, and brought her into the king's service at the beginning of the war, about ten years ago; and he took service under the colonel; and we fought monsieur Du Cass a whole day, and, I thank God, we got the better of it; and captain Kidd behaved himself very well in the face of his enemies.

Juryman. How many years ago was this?

Cooper. About ten years ago.

Cl. of Arr. Robert Lamley, have you any thing more to say?

Lamley. I have no friends here, I am an apprentice, my lord.

Cl. of Arr. William Jenkins, Have you any more to say?

Jenkins. I was an apprentice, my lord.

Cl. of Arr. Gabriel Loffe, Have you any thing to say for yourself?

Loffe. My lord, I was a servant under capt. Kidd, and always obeyed his commands, and had no share. I came home with capt. Kidd to Boston, and went to my lord Bellamont, and the men came and told us he had discharged us, and I went about my business. And some days after we were committed to prison, and I was sick, and my lord let me be in the keeper's house, and I was trusted by him four or five months with the keys to look after the prisoners. Mr. Davis can testify this. If I had had a mind to have done any ill thing, I might have done it then. (Then Mr. Davis appeared.) Pray, Mr. Davis, declare what you know of me when I came to Boston, and how the keeper intrusted me with the prisoners.

Davis. I remember when we came there to the Road Island, capt. Kidd sent him home: and when he came to Boston, he was trusted with the keys, and had liberty to go where he pleased not out of the yard.

Just. Turton. Was this after he was a prisoner?—*Davis.* Yes, my lord.

Loffe. I hope the jury will take notice of this.

Kidd. Mr. Davis, did you not hear of any French passes that I had?

Davis. I heard of them, and I saw them.

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Sol. Gen. How do you know they were French passes?

Davis. He told me they were French passes; I did not know it, I could not read them.

Just. Turton. They showed you the papers; did you know what ship they belonged to?

Davis. No, my lord, not I.

Kidd. I desire captain Hunt may be called, to know what my lord Bellamont said of me.

Baron Hatsell. That will signify nothing.

Cl. of Arr. Hugh Parrot, have you any thing to say for yourself?

Parrot. My lord, I had no share of the goods.

Kidd. My lord, I desire this commission may be read.

Baron Hatsell. Is it under the broad seal?

Mr. Crowley. It is a letter of mart and reprisals, my lord. [Then the Commission was read, dated the 11th of December, 1695.]

Kidd. Now, my lord, in pursuance of this commission, I went and took these ships, which had French passes on board, and my lord Bellamont took them by force from me.

Just. Turton. You took one French ship, and acted in a regular manner to condemn her; but, did you do so with the rest?

Kidd. I could not carry these ships home, by reason my men had left me.

Just. Turton. Mr. Bradinham, with what number of men did you go out of England?

Bradinham. With about seventy men.

Just. Turton. What number had you when you went from New York?

Brad. About 155.

Just. Turton. So that your number was increased?—*Brad.* Yes, my lord.

Just. Turton. Was there any other ship condemned, besides the French banker?

Brad. No, my lord.

Kidd. These men were some of them that left me, and took the goods; what was left I carried with me.

Cl. of Arr. Hugh Parrot, have you any more to say?

Parrot. The evidence cannot prove that I had any share: I came with my commander from Madagascar, and he paid me an hundred pieces of eight, and my lord Bellamont seized all: and I had opportunity enough to have gone a-pirating with capt. Culliford, but I told them I would not: and I came to my lord Bellamont, and surrendered myself.

Cl. of Arr. Robert Barlicorn, have you any thing to say in your own defence?

Barlicorn. I desire witness may be called, to know whether I was not a servant aboard?

Just. Turton. The king's evidence say you were.

Cl. of Arr. Abel Owens, what have you to say?

Owens. I own myself guilty; I came in upon the king's proclamation.

Cl. of Arr. Darby Mullins, what have you to say?

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Mullins. I did what I did under the king's commission; I obeyed my captain, and came home with him; I durst not for my life do otherwise. Examine the witnesses, and they will not say otherwise. Mr. Bradinham, did I do any thing against the captain's command?

Brad. I cannot say but he did always obey the captain's commands.

Sol. Gen. Did he not go aboard capt. Culliford afterwards?—*Brad.* Yes, my lord.

Mullins. I went for want.

Ch. of Arr. Have any of you any more to say?

Parrot. My lord, I did not go out of England with capt. Kidd, but I shipped myself on board a merchantman bound for Newfoundland, and I was taken by a French privateer; and afterwards coming to Madagascar, capt. Kidd was there, and he took a pistol to shoot me, but I avoided it: But hearing afterwards that capt. Kidd had the king's commission, I went aboard him.

Just. Turton. Had he any commission to take any goods from the king's subjects?

Baron Hatsell. Capt. Kidd says, the seamen forced him from the ship, and you shared the goods yourselves.

Parrot. He does not say so of us. My lord, with submission, be pleased to ask my commander, whether I ever disobeyed his commands, or was forward to attempt any ill thing, or did any thing of that which is alleged against me?

Kidd. Mr. Bradinham, are not you promised your life, to take away mine?

Just. Turton. He is not bound to answer that question: he is very fit to be made an evidence for the king; perhaps there can be no other in this case, than such who are in his circumstances.

Parrot. With submission, I ask the evidence, whether I ever disobeyed the captain's orders.

Just. Turton. The captain's orders will excuse you in honest things, but not in unlawful actions.

Parrot. As for the ships that were taken, I had no hand in it.

Mr. Knapp. But you received your share, and knew of the robbing of the ships.

Just. Turton. Gentlemen of the jury, here is William Kidd, Nicholas Churchill, James Howe, Robert Lamley, William Jenkins, Gabriel Loffe, Hugh Parrot, Richard Barlicorn, Abel Owens, and Darby Mullins, the prisoners at the bar, who are all indicted for piracy, or piratical and felonious taking a Moorish ship on the high seas, about fifty leagues from Carrawar in the East Indies, and seizing the goods that were in that ship, to a considerable value. And they are also indicted for the piratical and felonious taking another ship, which was likewise a Moorish ship, with the tackle and apparel thereof, to the value of an hundred and five pounds, four leagues from Callicut in the East Indies. Now to these indictments they have pleaded not guilty: And whether they

are guilty or no, you are to determine, on the evidence you have heard.

I need not tell you the heinousness of this offence wherewith they are charged, and of what ill consequence it is to all trading nations. Pirates are called 'Hostes humani generis,' the enemies to all mankind; but they are especially so to those that depend upon trade: and these things that they stand charged with, are the most mischievous and prejudicial to trade that can happen. But as it is not my business to aggravate the offence, so it is yours to consider, whether they or any of them, are guilty or not.

Two witnesses have been produced for the king, and both of them were concerned in all the transactions relating to the prisoners; and by their evidence it appears, That in the year 1696, about the beginning of May, capt. Kidd, who was captain of the Adventure-galley, was fitted out on a very good design; for he was to take pirates, and to seize the ships and effects of the king's enemies: That was the end of this expedition. He went out from Plymouth with about seventy men from England; they sailed to New-York, and in their passage they seized a French vessel, and that vessel was condemned in a due manner, and that was pursuant to their commission.

When they came to New-York, there were other things in contemplation. Then he made a proclamation, to give notice, That if any would come aboard him, he proposed terms for their encouragement; that they should be sharers in all they could acquire; he himself would have forty shares, because the ship, arms, ammunition, and provisions were his; and the rest should be divided proportionable to those that should be aboard him. And whereas they went out with seventy men, there their number was increased to 155, for with that number he sailed from New-York.

Gentlemen, the witnesses tell you whither they went afterwards; I will not mention all the particular places, but only such where any thing remarkable was done. They say, they came to a place called Bab's-Key; and there, it seems, they had an intention to observe a fleet, called the Mocca fleet: there they staid about three weeks, and in that time capt. Kidd sent his boat three times to Mocca, where this fleet was: the two first times they brought no certain account; but the last boat that was sent brought intelligence, that there were 14 or 15 ships lay in the river or harbour there, and were ready to sail; and that they had Dutch colours, English colours, and Moorish colours. And capt. Kidd said then, he expected to make a considerable advantage of them. And after this advertisement he sent some men to the high lands, to observe the motion of this fleet; who, after some time, gave notice that the fleet was coming; and then he went out with his vessel; and as they tell you, he went into this fleet, and discharged some guns at them; but they having a convoy, he found he was not a match for them, and that it would be in vain to

attempt any thing further on so great a disadvantage; and so that design was frustrated. But it must be observed, that these ships were all English, Dutch, and Moorish, and none of them French; which shews capt. Kidd's inclination to take such ships, for which he had no authority by any commission.

But they tell you, after this, when he had met with this disappointment, then he sailed towards the coast of Carrawar, and there they met with the first Moorish ship, that he is now charged with; and this ship they seized, and took one Parker, who was the captain: they seized him, and also a Portuguese, whom they made use of as an interpreter; and some of the men, whom they treated in a barbarous manner. They tell you, that there happening to be an English factory near that place; they of that factory understanding that this Parker and the Portuguese were on board the ship, they sent to demand them, and capt. Kidd denied them, and said, there were no such men on board, and yet he had hid them under the deck. You are also told by the witnesses what they found and seized on board this ship, viz. pepper, coffee, myrrh, and some gold. They have told you, the gold was shared amongst them, and in specie, as I remember; every mess had two pieces, and the rest of the goods were divided amongst them in proportion, according to their original agreement, or they had their shares of the money for which they were sold. This was the first ship that he stands charged with the piratical taking of; and this ship was a Moorish ship, and did belong to the natives of that place.

And then it appears they went to the coast of Malabar, and there they took the other ship that he is charged with by the other indictment; the first was taken in September, and this in November. There was on board that ship two horses, and several bales of cotton, and some other goods, and this also belonged to the Moors, and one skipper Mitchell, a Dutchman, was captain of her. When they had taken this ship, they went to Madagascar, and there, it is told you, they sunk this vessel: and they having several other goods that they had taken out of another vessel, the goods were sold, and divided between the captain and the rest of the men, according to their several proportions. And it is proved to you, that every one of these prisoners had some share of the product of those goods. And now, to shew what capt. Kidd was, and that he was a favourer of those he ought to have opposed, there was another pirate there, one capt. Culliford, who had a vessel that he used to the same purpose, called, The Great Mahomet; and he having heard of Kidd's commission, had a jealousy that capt. Kidd had a design to take him and his company; but he told them, he had no such design; he was so far from that, that he assured them, nay swore, he would be true to them: and there were great appearances of friendship between capt. Kidd and capt. Culliford; they made mutual visits to each other;

and capt. Kidd did accommodate Culliford with some guns, and gave him liberty to take any thing he had; and capt. Culliford likewise presented him with China silks. Now this also is given in evidence, to shew that captain Kidd had a piratical design in all this, and that he did assist those that were engaged in the like design with him, instead of endeavouring to suppress them.

Now, Gentlemen, the first witness, Robert Bradinham, has declared all this to you; and likewise Joseph Palmer has spoken to the same purpose, though something more than the other; and he tells you, how they went ashore on one of the Malabar islands, and how they burnt some houses, and did other very barbarous things; but that concerns not this matter for which they are now indicted. He tells you also, that when they took one of these ships, whereof capt. Parker was commander, they took two of the men on board that ship, and hoisted them up, and used them severely; which they did, to cause them to discover what things of value they had on board; but it seems they had nothing of any considerable worth on board: however, this shews, that captain Kidd had a design to act piratically. The witness gives you an account of all the transactions in taking the two ships, and disposing of the goods, and dividing of the money: indeed, he says, when the distribution was made, he was not in the cabin, but tells you, he heard the list called over, and all the other prisoners severally went in, and brought out their shares in their hats, or otherwise, and did not hear any one complain that he had not his share.

Gentlemen, there are three persons that were servants, that is, Robert Lanley, he was servant to Owens the cook; William Jenkins, he was servant to the mate; and Richard Barlicorn, who was servant to capt. Kidd: now, though these might have their shares delivered them, yet it is to be presumed that they were to be accountable to their masters: and they being servants, I suppose you will think to distinguish them from the rest.

Gentlemen, this is the sum of the evidence given for the king; and, indeed, this seems to be as strong an evidence against the prisoners at the bar as can be: they did endeavour to take the Mocca fleet, but they were too strong for them: and they could have no suspicion that they were French, for they had English, Dutch, and Moorish colours; so that captain Kidd could have no pretence from his commission to look after these ships: there were no French among them, and yet there he lay three weeks waiting for them; but they did actually take these two ships mentioned in the indictments, and disposed of the goods, and shared the product among themselves. Here is all the evidence that can be given of piracy.

Now capt. Kidd, when he comes to make his defence, tells you, he had a commission, and it was produced (and that is no more than what is common in time of war,) whereby he

is authorized to take the ships and goods of any of the subjects of the French king; but it is penned with great caution; he is to take none but the goods and ships of the French king, or his subjects; and he is to keep an exact account of all that he takes, and to procure them to be condemned in the Admiralty. Now, if he had pursued this commission, and gone no further, it had been well: he had done justly, and answered the end on which he was sent out. And it does appear, that the first vessel that he took in his passage to New York was thus condemned: but afterwards I do not find that he had any regard to his commission, but waited for that great *Mocca fleet*, a considerable time, I think about three weeks; and being disappointed there, he afterwards did take these two ships mentioned in the indictment; and it does not appear that they were French ships, neither were there any French passes on board. One of the witnesses indeed says, he heard of French passes; but neither he, or any other person that has been produced, has seen one of them. Now I do not observe that his commission does any manner of way tend to excuse the captain in taking both, or either of these ships: one of them was under an English commander, which was Parker, the other under a Dutchman; there were no Frenchmen aboard, only *Le Roy*, who was made a kind of a mock captain by Kidd, to serve a present turn. But what capt. Kidd has said from his commission, is so far from justifying him, that it seems rather an aggravation of his crime: for he that will go out with the king's commission on a just and laudable design, to take the ships and effects of the French king in war, and also to destroy pirates (which were the principal ends of his being fitted out to sea,) and instead thereof will turn pirate himself, make use of the force with which he was entrusted, for the promoting his piratical purposes, and for the felonious taking the ships and goods of those that were in amity with the king of England, appears to be guilty of a manifest breach and violation of his trust, attended with very aggravating circumstances.

Now, for those three that were servants, I must leave it to you, whether they did act otherwise than they might do. A servant is to obey his master, but it must be in things lawful and honest; if they did any thing else, you, who have heard the evidence, will consider of their guilt, and whether their cases differ from the rest: but there is some probability, that their shares might be accounted for to their respective masters.

Now, as to the rest, there are some of them that do pretend they did surrender themselves; one of them to Mr. Riches, a justice of peace in *Surry*; others, to colonel Bass, who was a commander in *East Jersey*; and it does appear, that they did surrender themselves accordingly; but that does not come under your consideration; you are to consider only, whether they are guilty of the facts they are charged with, or no. As to what effect their

surrendering themselves may have with his majesty, must be left to the king's royal pleasure, but we are to consider the evidence. Now they generally say, they did obey the captain, and that they understood he had the king's commission. Truly, so far as he pursued the king's commission, they were to obey him; but when he acts contrary to the king's commission, in acts of piracy upon the ships, goods and effects of the king's friends and those in amity with the crown of England, they should have been so far from obeying and assisting him, that they should have obstructed him, and seized him, that he might have been brought to justice, and that would have been a greater vindication of their innocencies. But, as the matter now appears, I do not see that any thing they have said tends to their defence, and therefore I must leave it to your consideration.

Indeed, there are some witnesses appear for capt. Kidd. Colonel Hewson gives you this account of capt. Kidd, that he was under his command in the beginning of the war, and that he fought, and behaved himself very well, and was serviceable in the *West Indies*; and he says, he discoursed him about his going out on the expedition he was sent; and that Kidd said, he had no inclination to go. And Mr. Cooper likewise tells you, that about ten or twelve years ago he knew him, and that he fought the French, and behaved himself very well at that time; and that several of his men ran away with his ship when he was at *Antegoa*.

Then there is Gabriel Loffe, he has produced a witness for himself, one Davis; and Davis tells you, he was a prisoner in *New York*, by order from my lord *Bellamont*; and at first they were some days there before they were taken into custody; and there was so little apprehension of his being a dangerous man, that he had some favour allowed him, and had a great deal of liberty. This is that he says, I find not that any of the rest have produced any evidence, only they say they were under the commander, and were to observe him; but if that would excuse them, then all pirates would be excused. Now, as to capt. Kidd, it seems he has woefully transgressed the business of his commission, and acted contrary to the end and design of his being sent out, and in the piratical taking the ships and goods mentioned in the indictments, in which the other prisoners at the bar have joined with him; and they were so far from being the ship and goods of the French king, or his subjects, or pirates, that they were the ships and goods of persons of other nations in amity with the king of England. Now if you believe these witnesses, that capt. Kidd has taken these ships in a piratical manner, and that the other persons assisted him in it, and had their shares of the money and goods, which is an evidence of their consenting to, and spontaneous acting, I believe you will think fit to find them guilty; but I leave it you. And as to these three persons that were servants, I must leave their case

to your consideration, whether you will think fit to distinguish them from the rest, or not.

[Then an officer was sworn to keep the Jury.]

[And after about half an hour the Jury returned, and brought in their verdict.]

Cl. of Arr. Gentlemen, answer to your names: William Smith.

William Smith. Here, &c.

Cl. of Arr. Gentlemen, are you all agreed of your verdict?—*Omnes.* Yes.

Cl. of Arr. Who shall say for you?

Omnes. Foreman.

Cl. of Arr. William Kidd, hold up thy hand. (Which he did.) Look upon the prisoner: how say you? Is he guilty of the piracy and robbery whereof he stands indicted by the first indictment, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is Nicholas Churchill guilty, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is James Howe guilty, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is Robert Lamley guilty, or not guilty?—*Foreman.* Not guilty.

Cl. of Arr. Is William Jenkins guilty, or not guilty?—*Foreman.* Not guilty.

Cl. of Arr. Is Gabriel Loffe guilty, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is Hugh Parrot guilty, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is Richard Barlicora guilty, or not guilty?—*Foreman.* Not guilty.

Cl. of Arr. Is Abel Owens guilty, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is Darby Mullins guilty or not guilty?—*Foreman.* Guilty.

[In like manner Kidd, and six more, were found guilty on the other indictment, and the three servants acquitted.]

THE TRIAL OF WILLIAM KIDD,

AND THE

OTHER NINE PERSONS, UPON TWO MORE INDICTMENTS OF PIRACY: ONE COMMITTED ON A MOORISH SHIP, FOUR LEAGUES FROM CALLICUT; THE OTHER ON A PORTUGUESE SHIP, TWELVE LEAGUES FROM CALLICUT.

The prisoners being called to the bar, and the jury called, and capt. Kidd challenging those that had tried him for the murder, the twelve that were sworn are as followeth: viz. Jon. Watson, Jos. Villers, Geo. Ashby, Ed. Fenwick, Gilbert East, Tho. Humphreil, Tho. Plaisted, Sam. Rows, Marm. Bladder, Jo. Scot, Jo. Reynolds, Rich. Draw.

Cl. of Arr. Cryer, count these: Jo. Watson.

Cryer. One, &c. Twelve good men and true, stand together, and hear your evidence.

Just. Turton. With what will you proceed on now?

Cl. of Arr. With the two other ships.

[Then the usual Proclamation for Information was made; and the prisoners being bid to hold up their hands, the Cl. of Arr. charged the jury with them thus:]

Cl. of Arr. You of the jury, look upon the prisoners, and hearken to their cause. They stand indicted by the names of William Kidd, late of London, mariner, &c. (As before in the Indictment) Upon this Indictment they have been arraigned, and thereunto have severally pleaded not guilty, and for their trial have put themselves on God and their country, which country you are. Your charge is to enquire, whether they be guilty of the piracy and robbery whereof they stand indicted, or not guilty, &c.

Churchill. I plead guilty, my lord, I submit myself to the king's proclamation.

Cl. of Arr. James Howe, do you stand to your plea?

Howe. Guilty, my lord; I submit to his majesty's gracious proclamation.

Cl. of Arr. Robert Lamley, what do you say?—*Lamley.* Not guilty.

Just. Turton. You may enter their retracting their pleas in court.

Cl. of Arr. William Jenkins, what say you? Do you stand to your plea?

Jenkins. Not guilty.

Cl. of Arr. Gabriel Loffe, what say you?

Loffe. Not guilty.

Cl. of Arr. Hugh Parrot, what say you?

Parrot. Not guilty.

Cl. of Arr. Richard Barlicora, what say you?—*Barlicora.* Not guilty.

Cl. of Arr. Abel Owens, what say you?

Owens. Guilty. I came upon the king's proclamation.

Mr. Knapp. The jury is not to be charged with them three then.

Cl. of Arr. Here is a second indictment against them, wherein they stand indicted by the name of William Kidd, late of London, mariner, &c. (as in the former charge.) What must I say now?

Just. Turton. Ask them three, whether they stand to their plea to this indictment, or retract it?

Cl. of Arr. Nicholas Churchill, do you confess this indictment?

Churchill. Yes, my lord.

Cl. of Arr. James Howe, what say you?

Howe. Guilty of that, and all the other.

Cl. of Arr. Abel Owens, what do you say?

Owens. Guilty of that, and all the other.

Cl. of Arr. Set them three by. Gentlemen of the jury, here is one William Kidd, Robert Lamley, Wm. Jenkins, Gabriel Loffe, Hugh Parrot, Richard Barlicora, and Darby Mullins, have been indicted upon two several indictments that have been read; and for trial have put themselves on God and their country, which country you are.

Mr. Knapp. My lord, and gentlemen of the jury, these are two several indictments of piracy, against Wm. Kidd, and the six other prisoners at the bar. The first sets forth, that

these prisoners, the 28th of December, in the 8th year of his majesty's reign, about four leagues from Callicut, did piratically enter a certain ship, called a Moorish ship, and that they took her, with the apparel and tackle, and took out of her several goods that have been read to you in this indictment. To this indictment they have pleaded not guilty. If we prove them guilty, you must find them so. The other indictment sets forth, that on the 9th of January, &c. they took another ship, a Portuguese ship; and to this also they have pleaded, not guilty. If we prove them guilty, you must find accordingly. Call Robert Bradinham and Joseph Palmer. (Who appeared and were sworn.)

Sol. Gen. My lord, and gentlemen of the jury, I am counsel for the king against the prisoners at the bar: they stand indicted for several piracies committed on two ships; and our evidence against them will be to this purpose: captain Kidd had two commissions, one was to take pirates, the other was to take French ships. William Kidd, in his ship The Adventure-Galley, went out of England in the year 1696: he afterwards went to New-York, and there he increased the number of his men: and from thence went away with a resolution to commit the piracies, some of which he has been convicted of already: then he went to Babs-Key, and laid in wait to intercept the Mocca fleet; but was disappointed of that, they being well guarded: he went afterwards to other places, and took two ships, which were not the ships here mentioned. After that, he seized a ship, called a Moorish ship, ten leagues from Callicut, and there seizes one of the ships for which he is now indicted, a Moorish ship, and takes out of her sugar-candy, and other goods, to the value of about 25*l*. In January following, he meets another ship, and seizes her too, and takes out of her to the value of 60*l*. These goods he disposes of, and divides the proceed of it between himself and the crew of the ship. And this is the piracy for which he is now indicted. The matter you are to enquire into, is, whether they be guilty of piracy on these two ships, or no? We will call our witnesses; and, if we prove them guilty, I doubt not but you will do right to your country and them. Mr. Bradinham, these gentlemen have not been upon the jury before; therefore you must give an account of the whole matter from the beginning, from your going out of Plymouth.

Bradinham. In the year 1696, the beginning of May, we went from Plymouth to New-York.

Sol. Gen. What ship did you go in?

Brad. The Adventure-Galley: and by the way he took a French ship, which he condemned when he came to New-York. At New-York he put up his articles, to get men aboard his ship, and they were to have a share of what was taken. About the 6th of Sept. we sailed.

Just. Gould. What number of men had you when you went from England?

Brad. About 70 men.

Just. Gould. How many had you when you went from New-York?

Brad. About 150. The sixth of September we sailed from New-York, and went to Maderas, then to Bonavis, then to St. Jauger, then to Madagascar, then to Joanna, then to Mahala, then to Joanna again, then to Meta in the Red-Sea, and then to Babs-Key.

Sol. Gen. What did you do there?

Brad. He lay there about a fortnight or three weeks, to wait for the Mocca fleet, and sent out his boat three times to make a discovery; the two first times they made no discovery; but the third time they brought information that they were ready to sail.

Baron Hutsell. What was the Mocca fleet?

Brad. They were Moorish ships.

Baron Hutsell. To what end did he wait for them?

Brad. He said he would make a voyage out of them.

Sol. Gen. What happened on that?

Brad. He ordered some men to look out for them on the high lands; and when they saw them coming, they were to give notice, and he was to fetch them off in the boat. This fleet came, and he fell in with them, and fired at them; but they being under convoy, he was forced to quit them: and then going to Carrawar, he met with one Parker's ship; he took this Parker's ship, and took him for a pilot, and the Portuguese for a linguister.

Sol. Gen. How did he use the men there?

Brad. Two of them were brought on board the Adventure-Galley, and they were hoisted up, and drubbed with a naked cutlass.

Sol. Gen. Why did he do that?

Brad. That they might make discovery of their riches.

Sol. Gen. What did they take out of that ship?

Brad. Some coffee, pepper, &c.

Sol. Gen. What did he do with the two men?

Brad. He carried them with him to Carrawar; and when he came there, they were demanded by the English factory there, and he denied them, and said, he had no such men aboard.

Sol. Gen. Where had he put them?

Brad. He confined them aboard in the hold.

Sol. Gen. Where did he go then?

Brad. He put to sea, and the next day he met with a Portuguese man of war, and fought her.

Kidd. He tells nothing but mere lies.

Brad. Then he went to the Malabar islands, and watered and wooded, and caused his men to burn several houses, and plundered several boats, and afterwards burnt them.

Just. Turtan. Did you see them burnt?

Brad. I was not ashore, but I saw the smoke.

Kidd. It is a fine trade that you must take away so many of the king's subjects lives, and know nothing at all of the matter!

Sol. Gen. What did you do with that ship?

Brad. He took her, and disposed of the goods, and carried her to Madagascar.

Sol. Gen. What did he do after that?

Brad. We went to the Malabar islands some time in December, and he took a Moorish ketch.

Kidd. How came you to keep this account; when for five or six months together you were under deck?

Sol. Gen. Go on, Mr. Bradinham, and give an account of your further proceedings.

Kidd. I hope the king's counsel will not put him in the way. It is hard, that a couple of rascals should take away the king's subjects lives: They are a couple of rogues and rascals.

Brad. This ketch was taken by the ship's crew, about December 1697, and one of the boat's crew was wounded at the taking of this ketch.

Sol. Gen. What was there in this ship?

Brad. Some tubs of sugar-candy, tobacco, &c.

Sol. Gen. What did he do with these goods?

Brad. They were carried aboard, and shared into messes, two tubs and a half of sugar candy to a mess.

Sol. Gen. Had the prisoners at the bar any shares?

Brad. Yes; and then he set the ship on fire.

Cl. of Arr. Had capt. Kidd himself any share?—*Brad.* Yes.

Cl. of Arr. How much had he?

Brad. He had forty shares.

Baron Hatsell. You should tell this jury how many shares the whole was divided into,

Brad. It was divided into one hundred and sixty shares, and captain Kidd was to have forty shares, let them be as many as they would, and the rest were to be divided among the men.

Cl. of Arr. Had Robert Lamley any share?

Brad. Yes.

Cl. of Arr. Had William Jenkins a share?

Brad. Yes.

Cl. of Arr. Had Gabriel Loffe any share?

Brad. Yes.

Cl. of Arr. Had Hugh Parrot any share?

Brad. Yes.

Cl. of Arr. Had Richard Barlicorn any share?—*Brad.* Yes.

Cl. of Arr. Had Darby Mullins any share?

Brad. Yes.

Sol. Gen. What was done afterwards?

Brad. After they had done these things, they burnt the ketch.

Mr. Knapp. What did they do then?

Brad. The Moors were driven ashore by the ship's crew.

Kidd. How did you know they were Moors?

Brad. By information of the ship's crew.

Kidd. He was not within five leagues of the place.

Mr. Knapp. What did you meet with afterwards?

Brad. A Portuguese ship. Some time in January, 1697-8, we met with a Portuguese ship on the coast of Malabar, and he took her; and he took out of her some opium, some East

India goods, some powder, and sixty or seventy bags of rice.

Sol. Gen. My lord, this is the other ship for which they are indicted. What was the value of these goods?

Brad. There were some East India goods; opium, powder, and rice.

Kidd. Did you see them brought aboard?

Brad. I am answering the bench.

Sol. Gen. Were there any other goods?

Brad. Yes, there was bees-wax, and thirty jars of butter.

Sol. Gen. What was the value of these goods?

Brad. About four or five hundred pounds.

Kidd. It is a fine trade indeed, that he must be instructed what to say!

Brad. After he had plundered this ship, he was pursued by some Dutch ships; several ships gave him chace, and he was forced to leave this ship.

Sol. Gen. What did they do with the goods?

Brad. He sold the opium on the coast, and the rest he kept for provision.

Sol. Gen. What became of the money?

Brad. Capt. Kidd shared it.

Sol. Gen. Who had their shares give an account of that?

Brad. The prisoners at the bar.

Cl. of Arr. Had capt. Kidd any shares?

Brad. Yes.

Cl. of Arr. Had Robert Lamley any share?

Brad. He had half a share.

Cl. of Arr. Had William Jenkins any share?

Brad. He had half a share.

Cl. of Arr. Had Gabriel Loffe any share?

Brad. He had half a share.

Loffe. How do you know that? Did you see me bring it out?

Brad. I did not see you take it; but you brought it out, and acknowledged it.

Kidd. Before, you swore I paid them first, and now you say they paid me first.

Brad. They had a share as before.

Mr. Knapp. Now proceed in your voyage. What did you do after this?

Brad. After this, we went a-cruizing on that coast, and we met with the Quedagh Merchant, and took her; and afterwards, about 50 leagues from the Cape, we met with a Moorish vessel; and captain Kidd sent his men on board that vessel, and they took out of her ten jars of butter, and a main-sail; and he took out two of the men (that he carried to Madagascar) because he wanted men.

Mr. Knapp. Can you tell of any thing else?

Brad. He took about a dozen Malabar boats, and plundered them, and then let them go.

Mr. Knapp. Go on.

Brad. Then we came to Madagascar.

Mr. Knapp. What happened there?

Brad. There came a canoe off; some of the men in this canoe belonged to the Mocca frigate; they came off to captain Kidd, and they told him, they heard he was come to take them, and hang them.

Mr. Knapp. What were those men?

Brad. They were supposed to be pirates.

Mr. Knapp. Who was the commander of that ship?—*Brad.* Capt. Culliford.

Kidd. How came you to know this? He says any thing.

Mr. Knapp. Go on with this story, and give an account what passed between them.

Brad. This canoo came aboard capt. Kidd, and they told him, they heard he was come to take them, and hang them; but he assured them it was no such thing: and he went aboard the frigate, and swore to be true to them, and that he would aid them in any thing he had: and capt. Culliford came aboard him, and they made presents to one another.

Mr. Knapp. What presents did captain Kidd make Culliford?

Brad. He gave him some shirting-stuff.

Kidd. What! Did I give him shirting-stuff?

Brad. Yes; and he gave him two great guns.

Kidd. Did I go aboard him, you rascal?

Sol. Gen. Mr. Kidd, ask him what questions you will.

Just. Turtou. Capt. Kidd, will you ask this witness any questions?

Kidd. My lord, what signifies it? Were there not 90 of the men that mutinied? I said, let us take this ship; and, did they not all consult and say, where there is one that will fire against the pirate, there are ten that will fire against you. And so they went and took the goods and left me. I ask you, whether this be not true?

Brad. My lord, he never spoke any thing like it, that he would take Culliford; but he swore to be true to them.

Kidd. Did not I propose to my men to take capt. Culliford? Did you never hear any body say so?—*Brad.* No.

Kidd. Did you not say yesterday, that I was come to take them?

Brad. I said, they came and told you they heard so; and you assured them, you intended no such thing.

Kidd. You swore I gave them four guns yesterday, and now you say but two.

Sol. Gen. It was Palmer that said four.

Brad. I said but two, and no more.

Cl. of Arr. Capt. Kidd, have you any thing more to ask him?

Kidd. It signifies nothing to ask him any thing.

Cl. of Arr. Robert Lamley, will you ask this witness any thing?

Lamley. I only ask him, whether I was not an apprentice?

Just. Turtou. Answer that question.

Brad. My lord, he was a servant.

Just. Turtou. To whom?

Brad. To Mr. Owens.

Just. Turtou. Was his master aboard then?

Brad. Yes, my lord.

Cl. of Arr. William Jenkins, will you ask the witness any thing?

Jenkins. I desire him to say, whether I was a servant, or not?

Brad. Yes, my lord, he was servant to the

Just. Turtou. Was his master aboard then?

Brad. He was aboard them.

Cl. of Arr. Gabriel Loffe, will you ask him any questions?—*Loffe.* No, Sir.

Cl. of Arr. Hugh Parrot, will you ask him any thing?—*Parrot.* No.

Cl. of Arr. Richard Barlicorn, will you ask this witness any thing?

Barlicorn. I have nothing to ask him; but desire him to speak the truth, whether I was not the captain's servant.

Brad. He was, my lord.

Cl. of Arr. Darby Mullins, will you ask him any thing?

Mullins. I have nothing to say but what I said before. I submit myself to the king's gracious proclamation.

Kidd. He has perjured himself in many things.

Just. Turtou. In what? Give an instance.

Kidd. In a great many instances: about the guns, that is one thing: and then he says, the ship went from Plymouth the beginning of May, and before he said it was in April, that is another thing: and, my lord, the mariners came and took anchors, and cables, and what they would, and he says I gave them to them, and this is false. And now he says contrary to what he did before; for then he said, we went out in April, and now in the beginning of May.

Just. Turtou. He did not confine himself to a day; he said, about the beginning of May.

Sol. Gen. Call Joseph Palmer. (Who appeared.) Mr. Palmer, pray give my lord and the jury an account of captain Kidd and his crew, where they went, and what they did.

Palmer. We went from Plymouth to New York, in the year 1696, and in the way took a French ship, and carried her to New York, and sold her; and there he put up articles to invite men aboard his ship, and what they took was to be divided into so many shares, whereof captain Kidd was to have 40, the rest to be divided among the men; and in September following we went from thence, and we had then about 160 men: from thence we went to Maderas, from thence to Bonavis, then to St. Jauger, then to Joanna, then to Mahala, then to Joanna again, and then to Meta in the Red-sea, where he watered and wooded his ship, and then to Bab's Key, a small island in the Red-sea; and when he came there, he ordered his men to look out on the high lands for the Mocca fleet, and expected the fleet to come that way; and he sent some men in his boat, with orders either to take a prisoner, or to bring word what ships were there. He sent his boat twice, and they made no discovery; but the third time they went, they came within sight of the ships, and brought word, that there were 14 or 15 sail lying there with Dutch, and English, and Moorish colours, and a great ship with red colours, ready to sail: and then capt. Kidd ordered his men to look out on the other side the high lands, for fear the ships should pass him: and at last the ships came down.

Kidd. There is no great occasion for this.

Palmer. There were Moors and Turks belonging to these ships. And about the 15th of August the fleet came down, and captain Kidd fell in with them: his quarter-master and some of his men were saying, let us go aboard them to-night: no, says he, we will take our choice of them in the morning; and in the morning he went among them, and fired at them, but took none of them; he found they were too strong for him, and went away: and after this, going to Carrawar, he took a ship, called The Maiden: it was between Carrawar and this place; they reckoned they were not far from the island of St. John: he took this ship, and took out of her some pepper, a bale of coffee; and some more bales of coffee came on board, but he retained only one bale, and the pepper, and said, he would not cumber his ship with such stuff: and Parker and a Portuguese he took out, one for a pilot, the other for a linguister; and two of the men he ordered to be hoisted up, and whipped with a naked cutlass.

Kidd. I ask this one thing: did the Mocca fleet fire first at me, or I at them?

Palmer. No, they fired first.

Kidd. And just now the other said, I fired first: is not he perjured?

Just. Turton. Mr. Bradinham, did he fire first, or no?

Brad. He fired at them; I only said, you fired at them; I did not say first or last.

Palmer. After this he went to Carrawar, to an English factory, and wooded and watered his ship, and one Harvey came and demanded these two men; and capt. Kidd denied that he had any such men on board, and kept them in the hold.

Sol. Gen. Is that an English factory?

Palmer. Yes: several of captain Kidd's men left him there, and several more would have left him, if they could have conveniently gone ashore, and the same evening he put to sea, he met a Portuguese ship, and fought her.

Kidd. Who fired there first?

Palmer. The Portuguese fired first.

Kidd. You do not tell that story right.

Palmer. After he left this Portuguese ship, he went to the island of Malabar, and robbed the natives, and set their houses on fire, and took one of the natives, and bound him to a tree, and shot him to death.

Sol. Gen. Did you see the houses on fire?

Palmer. Yes; and afterwards we went to Callicut, and met with a Moorish ship in November, Skipper Mitchel was commander; and there were taken out of her two horses, and cotton, and quilts: and this ship he carried to Madagascar. Some time in December following we came to the coast of Malabar.

Mr. Knapp. Can you tell what year it was?

Palmer. It was in December, 1697.

Mr. Knapp. Where was this?

Palmer. About twelve leagues from Callicut.

Mr. Knapp. What sort of ship was it?

Palmer. A Moorish ketch.

Mr. Knapp. What burthen was she?

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Palmer. About fifty ton.

Mr. Knapp. What did you do there?

Palmer. Capt. Kidd was lying at anchor, and this ketch came between him and the shore; and he sent the boat, and they brought the ketch to the ship, and took out of her thirty bales of sugar-candy, tobacco, sugar, and myrrh.

Mr. Knapp. What did they do with these goods?

Palmer. When they had taken them out, they were shared between the men in messes, seven men to a mess, for their own spending.

Mr. Knapp. Had the prisoners at the bar any share?—*Palmer.* All the men had.

Mr. Knapp. What share had capt. Kidd?

Palmer. I cannot tell whether he had his forty shares of that, or no.

Mr. Knapp. What did they do with the ship?—*Palmer.* They burnt her.

Sol. Gen. Pray now go on. What did they do next?

Palmer. Some time in January they met with a Portuguese ship.

Sol. Gen. Where?

Palmer. Off of Anjingo, an English factory: it was a pretty way off shore.

Sol. Gen. What ship was it?

Palmer. A Portuguese ship.

Kidd. You said, it was just by Callicut yesterday.

Sol. Gen. Whereabouts was it?

Palmer. On the coast of Malabar; it might be about ten or twelve leagues from Callicut.

Sol. Gen. What goods were in the ship when she was taken?

Palmer. There were two chests of Indian goods, two chests of opium, some rice, butter, wax, and iron.

Sol. Gen. What was the value of those goods?

Palmer. Truly I cannot tell the value of them.

Sol. Gen. What did they do with those goods?

Palmer. The wax and iron he put on board the November, and some on board his own ship.

Sol. Gen. Did he sell any of these goods?

Palmer. No; but he sold the opium on the coast.

Sol. Gen. Did he keep the ship?

Palmer. No, but seven or eight days, and then he quitted her; there were some Dutchmen coming, and he sunk that ship. The produce of the ship was shared.

Sol. Gen. Had the prisoners at the bar any share?—*Palmer.* Yes.

Cl. of Arr. Had William Kidd any share?

Palmer. Yes.

Cl. of Arr. Had Robert Lamley any share?

Palmer. Yes.

Cl. of Arr. Had William Jenkins any share?

Palmer. Yes.

Cl. of Arr. Had Gabriel Loffe any share?

Palmer. Yes.

Cl. of Arr. Had Hugh Parrot any share?

Palmer. Yes.

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Cl. of Arr. Had Richard Barlicorn any share?—*Palmer.* Yes.

Cl. of Arr. Had Darby Mullins any share?

Palmer. Yes; these goods were shared, and we bought provision with them.

Kidd. You say, this ship was taken off of Anjingo, and that it was twelve leagues from Callicut, and this Anjingo is fifty leagues from Callicut.

Palmer. It is all upon one coast.

Sol. Gen. Give an account of your coming to Madagascar, and what followed.

Palmer. They found a ship, called The Resolution, captain Culliford was commander; and several of the men came off to capt. Kidd, that were formerly acquainted with him; and they said, We hear you are come to hang us: says he, It is no such thing: and afterwards they went aboard each other, and captain Kidd made protestations to be true to them. There were four guns in the ship, and he presented these guns to Culliford.

Kidd. Did I present him with my guns? Because I would not turn pirate, you rogues, you would make me one!

Baron Hatsell. What did captain Kidd say to Culliford, when they were drinking together?

Palmer. They made a tub of bombo, as they call it, (it is made of water, and limes, and sugar) and there they drank to one another; and, says captain Kidd, before I would do you any damage, I had rather my soul should broil in hell-fire.

Sol. Gen. Was you there then?

Palmer. This was on the quarter-deck of the Mocca frigate.

Sol. Gen. What were those men in that ship? What did you apprehend them to be?

Palmer. They were pirates.

Sol. Gen. Did captain Kidd or his men offer to take them?

Palmer. He did never propose any such thing.

Sol. Gen. Now you may ask him what questions you will.

Kidd. There were twenty of them on board, and left me.

Palmer. Captain Kidd and Culliford were as great friends as could be.

Sol. Gen. Ask him what questions you please.

Kidd. It signifies nothing to ask any questions; a couple of rogues will swear any thing.

Sol. Gen. Will you ask him any questions?

Kidd. No.

Cl. of Arr. Robert Lamley, will you ask him any questions?—*Lamley.* No.

Cl. of Arr. William Jenkins, will you ask him any questions?

Jenkins. No; I have no more to say, but what I said before.

Cl. of Arr. Gabriel Loffe, have you any thing to ask him?—*Loffe.* No.

Cl. of Arr. Hugh Parrot, will you ask the witness any questions?

Parrot. No.

Cl. of Arr. Richard Barlicorn, will you ask him any thing?—*Barlicorn.* No.

Cl. of Arr. Darby Mullins, will you ask him any thing?

Mullins. No; but only I say, I came home upon his majesty's proclamation; I came voluntarily, expecting to have the benefit of it with the evidence.

Just. Turton. That does not fall under the jury's consideration.

Cl. of Arr. You, the prisoners at the bar, will you say any thing for yourselves upon these two indictments?

Kidd. I will not trouble the court any more, for it is a folly.

Cl. of Arr. Robert Lamley, what have you to say for yourself?

Lamley. Nothing, but that I was a servant.

Cl. of Arr. William Jenkins, what have you to say?

Jenkins. I was a servant, my lord.

Cl. of Arr. Gabriel Loffe, have you any thing to say?

Loffe. My lord, I ask him, whether I ever acted any thing in taking these ships, but only under my captain's command?

Palmer. He acted as other men did.

Cl. of Arr. Hugh Parrot, have you any thing to say?

Parrot. I can say no more than I have said.

Cl. of Arr. Richard Barlicorn, have you any thing to say?

Barlicorn. My lord, I am a servant.

Cl. of Arr. Darby Mullins, what have you to say?

Mullins. Did not captain Kidd often say, his commission would bear him out in what he did?

Palmer. Yes; I have heard him often say that.

Just. Turton. But how came you to go aboard Culliford?

Mullins. For want, my lord.

Just. Turton. Gentlemen of the Jury, Here are several persons, viz. William Kidd, Robert Lamley, Wm. Jenkins, Gabriel Loffe, Hugh Parrot, Richard Barlicorn, and Darby Mullins, they all stand indicted for piracy: indeed there are three more indicted with them, viz. Nicholas Churobill, James Howe, and Abel Owens; but they have confessed themselves guilty, and you are now eased of any enquiry concerning them, and are only to consider of the other seven, who are indicted upon two several indictments; one is, for the piratical and felonious taking away a Moorish ketch, to the value of 50*l.* and the goods therein to the value of 100*l.*; this was in December, 1697: and the other is, for piratically seizing and taking away goods to the value of 70*l.* from the Portugal ship, twelve leagues from Callicut, in the East Indies. Now to these two indictments these prisoners at the bar have pleaded, not guilty; and whether they are so or no, you are to determine upon the evidence given you. There have been two witnesses produced for the king, Robert Bradinham, and Joseph Palmer: I will not trouble

you with the repetition of their distinct evidence, because they agree in all things; and if I mention what one has said, it is, in effect, what the other said also.

Gentlemen, It appears, that capt. Kidd, with seventy persons aboard his ship, called the *Adventure-galley*, went from England in the year 1696, having a commission of mart and reprisal, to take the vessels, ships and goods of the French king, or any of his subjects, he then being at war with the king of England; and another commission for seizing pirates. He has not indeed produced these commissions to you now, though he did on another trial. But he went out on a very honest design, and in pursuance of it he took a French ship in his passage to New York, and brought her thither, and had her legally condemned. But while he was there, it appears that he had other thoughts possessed him, and wicked intentions to turn pirate, and not to take them; and that he might be well manned, he makes proclamation amongst the mariners there, that such of them as would come aboard his ship, and assist him in his enterprises, should have their shares of what prizes or booties could be taken; and he proposed, that he would have forty shares for himself, and the rest should be equally distributed amongst the mariners according to agreement, the whole being divided into 160 shares, as I remember: By this means his number was increased from 70 to 150. They set sail from New York, and (after many other places mentioned by the witnesses) they came to a place called *Babs-key*, which it seems is in the Red Sea; and there they staid a considerable time, I think about three weeks, and this was in expectation to meet with the *Mocca fleet*, which he intended to make a prize; and during his stay at *Babs-key*, he sent his boat three several times to get intelligence of this fleet; the two first times there was no account of any thing; but the third time there was notice brought, that they were ready to sail, and that they had English, Dutch, and Moorish colours: And when he had this intelligence, to prevent their escaping him, he sends men ashore, to go on the high lands, to observe when they did actually sail; and when he had notice that they were under sail, he likewise sailed, and went through the fleet, and made some shots at some of the ships; but it appearing that they had a convoy, and that they were too strong for him, he quitted the prize there, of which he had so great expectation. But afterwards he went on, and took his course towards *Carrawar*, and there he takes a Moorish ship; and Parker, an Englishman, the commander of her, and a Portuguese also were taken out of her. From thence they went to *Malabar*, and there he sent some men ashore, and there they burnt some houses; and after that took a Moorish ship, for which they have been tried. Afterwards, in December 1697, (now I come to the first indictment) upon that very coast, some leagues from *Callicut*, they took a Moorish ketch, and

this ketch and the goods aboard it, which were some quantities of sugar-candy, sugar, and tobacco: It seems these goods were shared between them aboard the ship; the witness is not confident what share the captain then had, but what the captain had not was divided amongst them. The witnesses say, they burnt this ketch, because she was not useful to them, and the men that went on board were put ashore. Now this is the matter of the first indictment, the piratically seizing and plundering this ketch, and taking the goods out of her, and dividing them amongst the prisoners; both the witnesses prove there was a distribution of them.

They then come to the next month, and that is January; and this is the matter of the second indictment, for piratically taking several goods, to the value of seventy pounds, from the mariners of the ship called the *Portugal ship*: and these witnesses prove the taking of this ship on the coast of *Callicut*; and there were aboard this ship several sorts of goods, opium, rice, bees-wax, butter, and other sorts of goods, which they judge might be worth four or five hundred pounds. Now after this, there were some Dutch ships that gave chase to the captain, and he was forced to leave the ship; but he took some of the goods into his own ship, and the rest were sold, and the money divided among the men: The captain called them one by one into his cabin, and so they had their several shares, according to the proposals at New York. It is not possible for them to say they saw every man's share paid; but they say, that they were all called by name to receive their shares, and they went into the cabin for that purpose, and they believe they had all their shares according to agreement, because none complained that they had it not.

Gentlemen, There is but one thing more that I will mention to you. When they came to *Madagascar*, there was one *Culliford*, who was a pirate: and he sent some of his crew aboard, to know whether capt. Kidd was not come with a design to seize them, and hang them; and he declared he had no such design: And he and *Culliford* were extremely kind to one another, and made visits and presents to each other; and capt. Kidd gave two guns to *Culliford* as one of the witnesses says; but the other witness says, there were four guns that he gave to *Culliford*, who was engaged in the same design of piracy; and *Culliford* presented other things to *Kidd*.

But now, Gentlemen, the business you are to enquire into is, the piratical taking of these ships: and the witnesses have positively and directly proved not only the taking the ships, but the seizing the goods and selling them, and sharing the money: And if these witnesses say true, as nothing appears to the contrary by the prisoners cross-examining them, or otherwise, they are not at all contradicted, or their credibility made questionable: And they are such as are most likely to know what was done, being with them in the whole voyage, and en-

gaged with them in those enterprizes. And if you can give entire credit to the witnesses, you will probably find these persons guilty of the piracy they are charged with; which I leave to your consideration.

Now indeed there are three of them that are servants, and perhaps you may think their case is different from the rest; Robert Lamley, who was a servant to Owens the cook; William Jenkins, who was servant to the mate; and Richard Barlicorn, who was servant to capt. Kidd. And though the witnesses do prove, that they had their several shares of the goods and money; yet, notwithstanding, that they being servants, their masters might be entitled to their shares: So that if you believe they were servants, and commanded to serve and assist their masters in what they did, I must leave it to you, whether you will think fit to distinguish their case from the rest. I do not find, that the others say any thing material in their own defence, they have called no witnesses at all. The captain lays the blame on the men, and the men seem to lay the blame on him: He went out on a good design, to take pirates, had he pursued it; but instead of that, it appears that he turned pirate himself, and took the ships and goods of friends instead of enemies, which was a notorious breach of trust, as well as a manifest violation of law. The evidence seems strong against them, which I leave to you to consider of.

[Then the Jury withdrew, and after a short space brought in their verdict.]

Cl. of Arr. Gentlemen, answer to your names: Jo. Watson.—*Jo. Watson.* Here, &c.

Cl. of Arr. Are you all agreed of your Verdict?—*Omnes.* Yes.

Cl. of Arr. Who shall speak for you?

Omnes. Foreman.

Cl. of Arr. William Kidd, hold up thy hand. (Which he did.) Look upon the prisoner. How say you? Is William Kidd guilty of the piracy and robbery whereof he stands indicted, in the first indictment, or not guilty?

Foreman. Guilty.

Cl. of Arr. Is Robert Lamley guilty or not guilty?—*Foreman.* Not guilty.

Cl. of Arr. Is William Jenkins guilty, or not guilty?—*Foreman.* Not guilty.

Cl. of Arr. Is Gabriel Loffe guilty, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is Hugh Parrot guilty, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. Is Richard Barlicorn guilty, or not guilty?—*Foreman.* Not guilty.

Cl. of Arr. Is Darby Mullins guilty, or not guilty?—*Foreman.* Guilty.

[The same Verdict was given to all the prisoners upon the other indictments.]

Robert Culliford, Nicholas Churchill, Darby Mullins, and John Eldridge, were arraigned for taking the ship called the Great Mahomet, and seizing the goods to a considerable value; to which they pleaded, Not guilty.

Robert Culliford, Charchill, Howe and Mullins were again indicted for another ship taken piratically by them, to which they pleaded, Not guilty.

Robert Culliford and Robert Hickman were again arraigned for piratically seizing another ship, called the Satisfaction, to which they pleaded, Not guilty.

Robert Culliford and Robert Hickman were again indicted for piracy committed on a Moorish ship; to which they pleaded, Not guilty.

[Then the court proceeding to the trials of the persons aforementioned; Robert Culliford retracted his plea, and pleaded guilty, and argued his couing in upon his majesty's proclamation; and his case being particular, was argued by his counsel, for the benefit of his majesty's pardon: And Churchill, Howe, Mullins and Hickman, likewise pleading guilty, John Eldridge was tried by himself, and found guilty.]

After the trials were over, judgment against Culliford was respited, and he set aside; the other prisoners were called to the bar in order to receive their sentence, as follows:

Cl. of Arr. William Kidd, hold up thy hand. (Which he did.) What canst thou say for thyself? Thou hast been indicted for several piracies, and robberies, and murder, and hereupon hast been convicted: What hast thou to say for thyself, why thou shouldst not die according to law?

Kidd. I have nothing to say, but that I have been sworn against by perjured and wicked people.

Cl. of Arr. Nicholas Churchill, hold up thy hand, What hast thou to say, &c.?

Churchill. I came in upon his majesty's proclamation.

Cl. of Arr. James Howe, What hast thou to say, &c.?

Howe. I came in upon the king's gracious proclamation, and hope I shall receive the benefit thereof.

Cl. of Arr. Gabriel Loffe, What hast thou to say, &c. ?—*Loffe.* Not guilty.

Cl. of Arr. Hugh Parrot, What hast thou to say, &c. ?

Parrot. I came and surrendered myself to my lord Bellamont.

Cl. of Arr. Abel Owens, What hast thou to say?

Owens. I came in upon his majesty's proclamation, and desire the benefit of it.

Cl. of Arr. Darby Mullins, What hast thou to say, &c. ?

Mullins. I came home upon the king's gracious proclamation.

Cl. of Arr. John Eldridge, What hast thou to say, &c. ?

Eldridge. I have but little to say; I am accused but for one thing, and that is all, and I have been falsely accused; I cast myself on your lordships and the honourable bench.

Cl. of Arr. Robert Hickman, What hast thou to say, &c. ?

Hickman. I came in according to the king's proclamation; I came in within the time limited.

[Then proclamation for silence was made, while sentence was pronouncing.]

Dr. Orenden. You the prisoners at the bar, William Kidd, Nicholas Churchill, James Howe, Gabriel Loffe, Hugh Parrot, Abel Owens, Darby Mullins, Robert Hickman, and John Eldridge; you have been severally indicted for several piracies and robberies, and you William Kidd for murder. You have been tried by the laws of the land, and convicted;

and nothing now remains, but that sentence be passed according to the law. And the sentence of the law is this;

' You shall be taken from the place where you are, and be carried to the place from whence you came, and from thence to the place of execution, and there be severally hanged by your necks until you be dead. And the Lord have mercy on your souls.'

Kidd. My lord, it is a very hard sentence. For my part, I am the innocentest person of them all, only I have been sworn against by perjured persons.

Captain Kidd was afterwards executed according to the sentence.

417. Proceedings in Parliament against WILLIAM Earl of PORTLAND, JOHN Lord SOMMERS, EDWARD Earl of ORFORD, and CHARLES Lord HALIFAX, upon an Impeachment for High Crimes and Misdemeanors; as also against JOHN Lord HAVERSHAM, for Words spoken at a Conference between the Lords and Commons: 13 WILLIAM III. A. D. 1701.*

April 1, 1701.

A MESSAGE was brought from the Commons by sir John Levison Gower, and others, who at the bar of the House of Lords, in the name of the House of Commons, and all the Commons of England, impeached William earl of Portland of high crimes and misdemeanors; and acquainted this House, That the House of

* Upon occasion of these Proceedings, Swift composed and published his "Discourse on the Contests and Dissentions between the Nobles and the Commons in Athens and Rome, with the Consequences they had upon both those States," of which Hawksworth says:

"This discourse is a kind of remonstrance in behalf of king William and his friends, against the proceedings of the House of Commons; and was published during the recess of parliament in the summer of 1701, with a view to engage them in milder measures, when they should meet again.

"At this time Lewis 14 was making large strides towards universal monarchy, plots were carrying on at St. Germain's; the Dutch had acknowledged the duke of Anjou as king of Spain; and king William was made extremely uneasy by the violence with which many of his ministers and chief favourites were pursued by the Commons. The king, to appease their resentment, had made several changes in his ministry, and removed some of his most faithful servants from places of the highest trust and dignity: this expedient, however, had proved ineffectual, and the Commons persisted in their opposition. They began by impeaching Wil-

Commons will, in due time, exhibit particular articles against him, and make good the same.

A Committee appointed to inspect the Journals of this House, in relation to the proceedings of this House in cases of Impeachments for misdemeanors, and to report to the House.

A Message was brought from the Commons by Mr. Harcourt and others, who at the bar of this House, in the name of the House of Com-

mons, impeached William Bentinck, earl of Portland, groom of the stole; and proceeded to the impeachment of John Sommers, baron Sommers of Evesham, first lord keeper, afterwards lord chancellor; Edward Russel, earl of Orford, lord treasurer of the navy, and one of the lords commissioners of the Admiralty; and Charles Montague, earl of Halifax, one of the commissioners of the Treasury, and afterward chancellor of the Exchequer. Its general purport is to damp the warmth of the Commons, by shewing that the measures they pursued had a direct tendency to bring on the tyranny which they professed to oppose; and the particular cases of the impeached lords are paralleled in Athenian characters."

In this work, Sommers under the name of Aristides, Orford under that of Themistocles, Halifax under that of Pericles, and Portland under that of Phocion, are described as follows:

"Their next great man was Aristides. Beside the mighty service he had done his country in the wars, he was a person of the strictest justice, and best acquainted with the laws as well as forms of their government, so that he was in a manner chancellor of Athens. This

mons, and all the Commons of England, impeached John lord Sommers of high crimes and misdemeanors; and acquainted this House, That the House of Commons will, in due time,

man, upon a slight and false accusation of favouring arbitrary power; was banished by ostracism; which, rendered into modern English, would signify, that they voted he should be removed from their presence and council for ever. But, however, they had the wit to recal him, and to that action owed the preservation of their state by his future services. For, it must be still confessed in behalf of the Athenian people, that they never conceived themselves perfectly infallible, nor arrived to the heights of modern assemblies, to make obstinacy confirm what sudden heat and temerity began. They thought it not below the dignity of an assembly to endeavour at correcting an ill step; at least to repent, though it often fell out too late.

“Themistocles was at first a commoner himself: it was he, that raised the Athenians to their greatness at sea, which he thought to be the true and constant interest of that commonwealth; and the famous naval victory over the Persians at Salamis was owing to his conduct. It seems the people observed somewhat of haughtiness in his temper and behaviour, and therefore banished him for five years; but finding some slight matter of accusation against him, they sent to seize his person, and he hardly escaped to the Persian court; from whence, if the love of his country had not surmounted its base ingratitude to him, he had many invitations to return at the head of the Persian fleet, and take a terrible revenge, but he rather chose a voluntary death.

“The people of Athens impeached Pericles, for misapplying the public revenues to his own private use. He had been a person of great deservings from the republic, was an admirable speaker, and very popular. His accounts were confused, and he could not then give them up; therefore merely to divert that difficulty, and the consequences of it, he was forced to engage his country in the Peloponnesian war, the longest that ever was known in Greece, and which ended in the utter ruin of Athens.

“In the time of Alexander and his captains, the Athenians were offered an opportunity of recovering their liberty, and being restored to their former state; but the wise turn they thought to give the matter, was by an impeachment and sacrifice of the author, to hinder the success. For, after the destruction of Thebes by Alexander, this prince designing the conquest of Athens was prevented by Phocion the Athenian general, then ambassador from that state; who, by his great wisdom and skill at negotiations, diverted Alexander from his design, and restored the Athenians to his favour. The very same success he had with Antipater after Alexander's death, at which time the government was new regulated by Solon's laws: but Polyperchon, in hatred to Phocion, having

exhibit particular Articles against the said lord, and make good the same.

A Message was brought from the Commons by colonel Bierly and others, who, at the bar

by order of the young king, whose governor he was, restored those whom Phocion had banished, the plot succeeded. Phocion was accused by popular orators, and put to death.”

And in his Dedication to the Tale of a Tub, he thus addresses lord Sommers:

“Your lordship's name on the front in capital letters will at any time get off one edition: neither would I desire any other help to grow an alderman, than a patent for the sole privilege of dedicating to your lordship.

“I should now, in right of a dedicator, give your lordship a list of your own virtues, and at the same time be very unwilling to offend your modesty; but chiefly, I should celebrate your liberality towards men of great parts and small fortunes, and give you broad hints, that I mean myself. And I was just going on, in the usual method, to peruse a hundred or two of dedications, and transcribe an abstract to be applied to your lordship; but I was diverted by a certain accident: for, upon the covers of these papers, I casually observed written in large letters the two following words, ‘Detur Dignissimo;’ which, for aught I knew, might contain some important meaning. But it unluckily fell out, that none of the authors I employ understood Latin (though I have them often in pay to translate out of that language.) I was therefore compelled to have recourse to the curate of our parish, who Englished it thus, ‘Let it be given to the worthiest:’ and his comment was, that the author meant his work should be dedicated to the sublimest genius of the age for wit, learning, judgment, eloquence, and wisdom. I called at a poet's chamber (who works for my shop) in an alley hard by, shewed him the translation, and desired his opinion, who it was that the author could mean: he told me, after some consideration, ‘that vanity was a thing he abhorred; but by the description, he thought himself to be the person aimed at;’ and at the same time, he very kindly offered his own assistance gratis, towards penning a dedication to himself. I desired him however to give a second guess; ‘Why then,’ said he, ‘it must be I, or my lord Sommers.’ From thence I went to several other wits of my acquaintance, with no small hazard and weariness to my person, from a prodigious number of dark, winding stairs; but found them all in the same story, both of your lordship and themselves. Now your lordship is to understand, that this proceeding was not of my own invention; for I have somewhere heard, it is a maxim, that those to whom every body allows the second place, have an undoubted title to the first.

“This infallibly convinced me, that your lordship was the person intended by the author. But being very unacquainted in the style and

of this House, in the name of the House of Commons, and all the Commons of England, impeached Edward earl of Orford of high crimes and misdemeanors; and acquainted this House, That the Commons will, in due

form of dedications, I employed those wits aforesaid, to furnish me with hints and materials, towards a panegyric upon your lordship's virtues.

"In two days, they brought me ten sheets of paper, filled up on every side. They swore to me, that they had ransacked whatever could be found in the characters of Socrates, Aristides, Epaminondas, Cato, Tully, Atticus, and other hard names, which I cannot now recollect. However, I have reason to believe, they imposed upon my ignorance; because, when I came to read over their collections, there was not a syllable there, but what I and every body else knew as well as themselves: therefore I grievously suspect a cheat; and that these authors of mine, stole and transcribed every word, from the universal report of mankind. So that I look upon myself, as fifty shillings out of pocket, to no manner of purpose.

"If, by altering the title, I could make the same materials serve for another dedication (as my betters have done) it would help to make up my loss; but, I have made several persons dip here and there in those papers, and before they read three lines, they have all assured me plainly, that they cannot possibly be applied to any person beside your lordship.

"I expected, indeed, to have heard of your lordship's bravery at the head of an army; of your undaunted courage in mounting a breach, or scaling a wall; or, to have had your pedigree traced in a lineal descent from the house of Austria; or, of your wonderful talent at dreas and dancing; or, your profound knowledge in algebra, metaphysics, and the oriental tongues. But to ply the world with an old beaten story of your wit, and eloquence, and learning, and wisdom, and justice, and politeness, and candour, and evenness of temper in all scenes of life; of that great discernment in discovering, and readiness in favouring deserving men; with forty other common topics; I confess, I have neither conscience, nor countenance to do it. Because there is no virtue, either of a public or private life, which some circumstances of your own have not often produced upon the stage of the world; and those few, which, for want of occasions to exert them, might otherwise have passed unseen, or unobserved, by your friends, your enemies have at length brought to light.

"It is true, I should be very loth, the bright example of your lordship's virtues should be lost to after-ages, both for their sake and your own."

After Swift became a Tory, he expressed himself somewhat differently. In his *History of the Four Last Years of the Queen*, as to which he says, that he shall not "mingle pa-

time, exhibit particular Articles against the said lord, and make good the same.

A Message was brought from the Commons by Mr. Bruges and others, who at the bar of this House, in the name of the House of Com-

negyric or satire with a history intended to inform posterity as well as to instruct those of the present age, who may be ignorant or misled," is the following passage:

"The lord Sommers may very deservedly be reputed the head and oracle of that party: he has raised himself by the concurrence of many circumstances, to the greatest employments of the state, without the least support from birth or fortune: he has constantly, and with great steadiness, cultivated those principles, under which he grew. That accident which first produced him into the world, of pleading for the bishops whom king James had sent to the Tower, might have proved a piece of merit, as honourable as it was fortunate; but the old republican spirit, which the Revolution had restored, began to teach other lessons—That since we had accepted a new king, from a Calvinistical commonwealth, we must also admit new maxims, in religion and government. But since the nobility and gentry would probably adhere to the established church, and to the rights of monarchy, as delivered down from their ancestors; it was the practice of those politicians, to introduce such men, as were perfectly indifferent to any or no religion, and who were not likely to inherit much loyalty, from those, to whom they owed their birth. Of this number was the person I am now describing. I have hardly known any man, with talents more proper to acquire and preserve the favour of a prince; never offending in word or gesture; in the highest degree courteous and complaisant; wherein he set an excellent example to his colleagues, which they did not think fit to follow: but this extreme civility is universal and undistinguished; and in private conversation, where he observes it as inviolably as if he were in the greatest assembly, it is sometimes censured as formal. Two reasons are assigned for this behaviour: first, from the consciousness of his humble original, he keeps all familiarity at the utmost distance, which otherwise might be apt to intrude; the second, that being sensible how subject he is to violent passions, he avoids all incitements to them, by teaching those he converses with, from his own example, to keep a great way within the bounds of decency and respect. And it is indeed true, that no man is more apt to take fire, upon the least appearance of provocation; which temper he strives to subdue, with the utmost violence upon himself: so that his breast has been seen to heave, and his eyes to sparkle with rage, in those very moments when his words, and the cadence of his voice, were in the humblest and softest manner: perhaps that force upon his nature, may cause that insatiable love of revenge, which his detractors lay to his charge, who consequently reckon

mons, and all the Commons of England, impeached Charles lord Halifax of high crimes and misdemeanors; and acquainted this House, that the House of Commons will, in due time, exhibit particular Articles against the said lord, and make good the same.

April 2.

The House being moved, That an Address be made to his majesty, that he will be pleased to pass no censure or punishment upon the Lords impeached, during the dependance of the Impeachment in this House,

After debate, the question was put. That a committee shall be immediately appointed to draw up an Address to his majesty, that his majesty will be pleased not to pass any censure or punishment against the four noble lords, who stand impeached of high crimes and misdemeanors, until the Impeachments depending against them in this House shall be tried? It was resolved in the affirmative, and a committee appointed immediately to draw up the Address.

The House was adjourned during pleasure, and the Lords went to the committee. After some time the House was resumed, and the Lord Steward reported, that the committee had drawn an Address, as ordered; which was read and agreed to, as followeth:

"We your majesty's most loyal and dutiful subjects, the Lords spiritual and temporal in

dissimulation among his chief perfections. Avarice he has none; and his ambition is gratified by being the uncontested head of his party. With an excellent understanding, adorned by all the polite parts of learning, he has very little taste for conversation, to which he prefers the pleasure of reading and thinking; and in the intervals of his time, amuses himself with an illiterate chaplain, an humble companion, or a favourite servant."

In his Conduct of the Allies, &c. he speaks of Halifax as a man who lays heavy burdens upon others, which he would not touch with one of his fingers.

In a Letter to Bolingbroke (dated December 19, 1719,) he says, "that Sommers's timorous nature, joined with the trade of a common lawyer, and the consciousness of a mean extraction, had taught him the regularity of an alderman or a gentleman usher."

In his Remarks on Davis's Characters of the Court of Queen Anne, he says of Sommers, "I allow him to have possessed all excellent qualifications except virtue. He had violent passions, and hardly subdued them by his great prudence." Of Halifax, "His encouragements" [of learning and learned men] "were only good words and good dinners; I never heard him say one good thing, or seem to taste what was said by another." And of Portland, "As great a duce as ever I knew." See also Switt's Journal to Stella, October 2, 1710. Letter to Lady Betty Germaine, June 8, 1735. bel on Dr. Delany and Lord Carteret.

parliament assembled, beg leave to represent to your majesty, that the House of Commons have severally impeached, at the bar of our House, William earl of Portland, John lord Sommers, Edward earl of Orford, and Charles lord Halifax, of high crimes and misdemeanors; and they having acquainted us, that they will, in due time, exhibit particular Articles against the said lords, and make good the same; we do most humbly beseech your majesty, that your majesty will be pleased not to pass any censure upon them, until they are tried upon the same impeachments, and judgment be given according to the usage of parliament, and the laws of the land."

May 5.

A Committee appointed to draw a Message to be sent to the Commons, to put them in mind of the Impeachments brought up by them against the earl of Portland, the earl of Orford, the lord Sommers, and the lord Halifax, and report to the House.

Then the House was adjourned during pleasure. After some time the House was resumed, and the lord steward reported the message; which was read and agreed to, as followeth:

A Message was sent to the Commons by sir Robert Legard and sir Richard Holford, to acquaint them, that they having, on the 1st day of April last, sent up to their lordships an Impeachment against William earl of Portland, of high crimes and misdemeanors; and having also, on the 15th day of the same month, severally impeached John lord Sommers, Edward earl of Orford, and Charles lord Halifax, of high crimes and misdemeanors, their lordships think themselves obliged to put them in mind, that as yet no particular Articles have been exhibited against the said lords; which, after impeachments have been so long depending, is due in justice to the persons concerned, and agreeable to the methods of parliament in such cases.

May 9.

A Message was brought from the Commons by colouel Bierly and others, with the Articles of Impeachment against Edward earl of Orford; and to acquaint this House, That the matter of the Charge was contained in the Articles; and also, That he was commanded to pray and demand, that the earl of Orford do give sufficient security to abide the judgment of the House of Lords.

A Committee appointed to consider of the manner of the Commons delivering Articles of Impeachment, and demanding security to abide the judgment of this House, and report to the House.

The House was adjourned during pleasure, for the Committee to meet presently. After some time the House was resumed, and the earl of Stamford reported, That the committee had met, and inspected the Journals: that they do not find any mention of the Commons read-

ing the Articles at the bar; and as for giving security, they find none.

Then the Articles were read by the clerk, as follows: viz.

ARTICLES exhibited by the Knights, Citizens, and Burgesses, in Parliament assembled, in the name of themselves and of all the Commons of England, against **EDWARD** Earl of **ORFORD**, in maintenance of their Impeachment against him for high Crimes and Misdemeanors.

I. That whereas, for many years past, there hath been a long and expensive war, both by sea and land, carried on by his majesty and his allies, against the French king, for the preserving the balance of Europe, and for preventing the growth of the immoderate power of the said French king; towards the prosecution of which war, great sums of money have been given and levied by authority of parliament, and many debts have been contracted, which remain a very heavy burthen upon the people of England; the said Earl being then of his majesty's most honourable privy council, but always preferring his private interest to the good of the public, and taking advantage of the ready access he had to his majesty's person, during the continuance of the said war, in violation of his duty and trust, hath procured from his majesty one or more grant or grants, of several manors, messuages, lands, tenements, and hereditaments, within the kingdoms of England or Ireland, or elsewhere within his majesty's dominions, of a great yearly value, and also of exorbitant sums of money, to be made to him, or others in trust for him, but to his use, the profits whereof he now enjoys; whereby the standing revenues of the crown of England, which ought to be applied to the service of the public, are greatly diminished, and the people of England thereby burthened with debts, and subjected to grievous taxes.

II. That, in breach of the trust reposed in him, whilst he was commander in chief of the navy royal of England, in or near the Streights of Gibraltar, and within the time aforesaid, he the said Earl did receive great sums of the public money, issued out to him for the service of the navy, which he hath converted to his own private use, and unlawfully and unjustly procured a privy seal or privy seals to discharge him from accounting to the public for the same; and also hath received other great sums of money from his majesty's exchequer, as paymaster or receiver general of the navy, without giving a due and legal account thereof; whereby he hath occasioned great clamours and discontents among the seamen and others belonging to his majesty's navy, who are thereby reduced to great miseries and necessities, for want of their just dues, to the great discouragement and discredit of the public service.

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III. That he the said Earl while he was in several ports belonging to the king of Spain's dominions, did receive, from the said king and others, considerable sums of money, and great quantities of wine, oil, and other provisions for the fleet to a very great value, for all which he ought to have accounted; but the said Earl did convert the same to his own use, and did either embezzle those provisions, or reckoned them as bought with the money allowed for furnishing the navy with fresh provisions; and that, for the advancing his own private interest, and securing himself from rendering any account to the public, he the said Earl, during the said war, procured, enjoyed, and possessed, divers great offices, which were inconsistent, and in their nature improper to be executed by one and the same person, and which ought to be, and by the laws and usages of this realm were and are appointed and designed, as checks one upon the other, in breach of the said laws, to the dishonour of his majesty, and prejudice of his people.

IV. That he the said Earl, within the time aforesaid, hath clandestinely, contrary to the law of nations, sold and disposed of several vessels, with their lading and cargo taken, under pretence of prize, by his majesty's ships of war, without condemnation or judicial proceedings, and converted the money to his own use; well knowing, if they had been condemned, as by law they ought to have been, one tenth (after customs allowed) and one third part of the value thereof, the customs and the said tenth being deducted, are, by act of parliament, appropriated to especial uses; by which proceedings, the public has been greatly endamaged and defrauded, and the debts of the nation increased.

V. And whereas complaints were made to the commissioners for executing the office of lord high admiral of England (where the said earl at that time presided), by the company trading to the East Indies, of divers piracies committed in the South East seas, to the destruction of their trade, desiring they might have letters of marque granted to them, whereby to be empowered (though at their own charge) to suppress such pirates: but the said Earl, preferring his own interest, discouraged and rejected their request and proposal; and in some short time after, jointly with others did procure a commission for one **Wm. Kidd**;* as likewise a grant under the great seal of England, to and for the use of him the said Earl and others, of the ships and goods of certain persons therein named, and also of all goods found on board the said ships: and the said company having intimation of a commission granted to the said Kidd, being apprehensive of the ill consequences of the same, did apply themselves to the said Board of Admiralty, desiring to know what powers and in-

* See the Trial of captain Kidd, p. 129 of this Volume.

structions were given; but such their reasonable request was denied; and Kidd, who was known to be a person of ill fame and reputation, ordered to pursue the intended voyage, in which he did commit divers piracies and depredations on the high seas, being thereto encouraged through the hopes of being protected by the high station and interest of the said Earl, in violation of the law of nations, and the interruption and discouragement of the trade of England.

VI. That the said Earl, within the time aforesaid, when an horrid conspiracy was discovered against his majesty's sacred person, and the kingdom was under an apprehension of an immediate invasion from France, and divers ships of war (particularly the ship *Dutchess*) were armed out, equipped and manned, in defence of the realm, to oppose the intended invasion, did his utmost endeavour to prejudice and weaken the navy royal of England; for that he the said Earl, by colour of his office (being the first commissioner for executing the office of lord high admiral of England), without the privity of the other commissioners, contrary to his oath and duty, and preferring his hopes of gain to himself to the safety of the public, did order capt. Steward, commander of the ship *Dutchess*, to deliver over, and put on board the said Kidd, mentioned in the foregoing article, out of the said ship *Dutchess*, a great number of able seamen, levied and provided at the expence of the public, and then discharging their duty in defence of their country, and against their own consent, to the prejudice of the public security, and to the endangering of the said ship *Dutchess*, if it had been attacked by the enemy.

VII. That the said Earl, during the said war, and at a time of the greatest exigency and necessity, when ships, men, and money were wanting to guard the seas and protect our trade, did by misrepresentations, and contrary to his bounden duty and the trust reposed in him, procure a grant or order for his majesty's ship the *Dolphin*, then fitted out, manned, and equipped for the service of the public, to be employed in a private voyage and undertaking, for the advantage of himself and others concerned with him; in pursuance whereof, and for their private gain, the said ship was, at the public expence, continued in foreign parts for several months, to the destruction and loss of his majesty's subjects aboard the same, to the weakening the navy, by rendering the said ship unserviceable, and the increasing the debts of the public.

VIII. That the said Earl during the time of his commanding the navy royal of England, did, through neglect and in contempt of orders, unnecessarily hazard and expose to imminent danger the said navy; and that, during the time aforesaid, having had many opportunities of taking or destroying the ships belonging to the French king, the said Earl, contrary to

advice, in disobedience to orders, and in neglect of his duty, did suffer and permit the said ships to return safe into their own harbours.

IX. That the said Earl, well knowing our sovereign lord the king to have been engaged in several alliances with the emperor of Germany and other princes and states, particularly in a treaty concluded with his imperial majesty, in the year of our Lord 1689; the end and intention of all which leagues and treaties were, to prevent the growth of the power of the French king, and to secure England, and the ancient allies of England against the same; did notwithstanding, in concert with other false and evil counsellors, advise our said sovereign lord the king, in the year 1698, to enter into one treaty for dividing the monarchy and dominions of Spain; in pursuance whereof, in the year 1699, one other treaty was entered into for the like purpose, by which treaties great injustice was done to the emperor, an ancient ally of our said sovereign lord the king; and a large part of the said Spanish dominions were to be added to the crown of France; both which treaties were prejudicial to the interest of the Protestant religion all over Europe, ruinous to the trade of England, and dishonourable to our sovereign lord the king, and the people of these kingdoms. All which crimes and misdemeanors were committed and done by him the said Earl against our sovereign lord the king, his crown and dignity, the peace and interest of this kingdom, and in breach of the several trusts reposed in him the said Earl.

X. And he the said earl of Orford was one of the lords justices during his majesty's absence beyond the seas, the first commissioner for executing the office of lord high admiral of England, commander in chief of his majesty's navy royal, one of his majesty's privy council, and treasurer of his majesty's navy, or in some or one of the said stations, during the time that all and every the crimes before set forth were done and committed.

That the said Commons, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any other accusation or impeachment against the said Earl; and also of replying to his answers, or to any of them, and of offering proofs to all the said premises, or any of them, or any other impeachment or accusation that shall be exhibited by them, as the case shall according to the course of parliament require; do pray and demand that the said Earl may be put to answer for all and every of the premises; and that such proceedings, examinations, trials, and judgments, may be upon every of them had and used, as is agreeable to law and justice.

After reading in the House the said Articles, his lordship humbly desired to have a copy of the said Articles, and that he would put in his Answer to them in as short a time as the House should think fit: It is thereupon or-

dered, That Edward earl of Orford may have a copy of the said Articles.

A Message was sent to the Commons by sir Richard Holford and Mr. Pitt, to acquaint them, That upon search of the Journals of this House, they do not find any precedent of security given to abide the Judgment of this House by any peer, upon an Impeachment of high crimes and misdemeanors.

May 14.

The Earl of Orford delivered his Answer to the above Articles of Impeachment: which was read, by the clerk, as follows:

The ANSWER of EDWARD Earl of ORFORD, to the ARTICLES exhibited against him by the Knights, Citizens, and Burgesses, in Parliament assembled, in the name of themselves, and of all the Commons of England, in maintenance of their Impeachment against the said Earl, for high crimes and misdemeanors supposed to be committed by him.

The said Earl, saving to himself all advantages of exception to the said Articles, and of not being prejudiced by any words or want of form in this his answer, and saving to him all privileges and rights belonging to him as one of the peers of this realm; for answer to the said Articles, humbly saith,

I. To the first Article, That he having for several years rendered his majesty his utmost service and duty, as a good and loyal subject ought to do; his royal majesty was graciously pleased, upon several occasions, to take notice of the same; and, out of his wonted bounty and of his free will, was pleased to give the said Earl two grants, one whereof was a reversionary grant for years, of some houses, depending upon a then precedent estate for about 29 years; which being a reversionary interest at so great a distance, although the said Earl thankfully received the same from his majesty, as his grace and bounty, yet the same was of no great value: and the other of them was a grant of the remainder of a gross sum, amounting to about 2,000*l.* a year for 5 years; which are the only grants of any manors, messuages, lands, tenements, hereditaments, or sums of money whatsoever, which he, or any in trust for him, hath had from his majesty: and which said two grants his majesty was graciously pleased, after many years service, freely to bestow upon him the said Earl, without any surprize, sinister or indirect means of the said Earl in obtaining the same; and which grants, he humbly conceives, were not unusual in like cases; the accepting whereof he humbly hopes, was not any violation of his duty, or of any trust in him the said Earl reposed.

II. To the second Article, the said Earl answereth, and denieth that he at any time

converted to his own private use any public money, issued to him for the service of the navy; or that he the said Earl ever procured or had any privy seal or privy seals, to discharge him from accounting for the same: but saith, That he the said Earl did make up, and upon oath pass his accompts, for the monies imprest to him for the service in this article mentioned, which accompt was legally declared and passed, upon very strict and great examination, by the lords commissioners of the treasury; and he the said Earl hath his *quietus est* in due course of law upon the same. But the commissioners of the victualling-office making some unusual objections to part of the said accompt, concerning some provisions furnished to the fleet by the said Earl in the king of Spain's dominions, although the same were truly and really had and spent by the seamen in the fleet, and paid for by him the said Earl, and which objections in like cases had not been made, or stood upon, nor could be reasonably expected; his majesty was pleased to direct and order a privy seal, to dispense with the form in that particular; but the said Earl did make no advantage to himself thereby, nor was his majesty or the government in the least defrauded therein; it appearing, upon a very strict examination, that less rates were allowed for the said provisions, than had been allowed before in like cases, or, as the said Earl is informed, hath been since allowed; and to the latter part of the said Article saith, That, for the monies by him received as treasurer or receiver-general of the navy, he hath already delivered in his accompts, and is ready to perfect the same according to the ordinary method, some of them lying ready with the auditors to be declared, and the rest of them being made up, and delivered in to be examined, in order to be passed; and saith, after just allowances had, he does not believe he shall appear to be indebted upon the said accompts; and also denies that any persons are sufferers for want of their dues in respect of the said accompts, or that the public service is or hath been any ways discouraged or discredited thereby, as in the said Article is alleged.

III. To the third Article, the said Earl answereth, and denies that he received any monies whatsoever from the king of Spain, or any other person, as in the Article is alleged; and saith, That what wine, oil, or other provisions, were received from the king of Spain, or any others, for the fleet, were duly delivered and distributed amongst the officers and seamen thereof; and denies he did convert the same to his own use, or did embezzle any of the provisions, or reckoned them, or any part of them, as bought with the money allowed for furnishing the navy with fresh provisions; and does also deny that he the said Earl did enjoy any offices inconsistent in their nature (as he is advised) one with the other, or which were, or ought to be, checks one upon the other: or that he any ways secured or pretended to se-

cure himself from rendering any account to the public, by any office or offices whatsoever, or that he is guilty of the breach of any laws, to his knowledge, by executing any office or offices, or ever executing the same, to the dishonour of his majesty, or to the prejudice of his people, as in the said Article is alleged.

IV. To the fourth Article, the said Earl answereth, and saith, He believes, that the prizes taken in the late war were appropriated as by the act of parliament in that behalf is provided; but denies that he did, at any time, sell or dispose of any vessel or vessels, or their lading or cargo, taken, as or under the pretence of prize, by any of his majesty's ships of war, without condemnation or judicial proceedings, or converted the monies arising by sale of any vessel or vessels, or their lading or cargo, taken, as or under pretence of prize, by any of his majesty's ships of war, to his own use; but, on the contrary, did from time to time, in his station give orders, that the prizes taken should be carefully preserved without embezzlement, and duly proceeded against, and the produce answered as the law directs; and therefore humbly insists, that the public hath been no ways endamaged, or the debts of the nation increased, by any neglect or default of the said Earl.

V. To the fifth Article, the said Earl saith, That the East India Company, about the beginning of March 1696, did apply to the Admiralty-board, of which the said Earl was one, to empower their ships and officers to seize and take all pirates infesting the seas within the limits of their charter, and likewise to erect a court of admiralty in those parts, to try and condemn such pirates as they should take: upon which application, the board of Admiralty did take advice, and were informed they had no authority to grant the same; and denies he the said Earl ever discouraged or rejected the company's request therein, unless it were by telling them that the Admiralty by law could not grant the same; and denies that the company was ever denied letters of marque in common form, to the knowledge of the said Earl: And saith, as to the matter of Kidd in this Article mentioned, he was gone upon his expedition about 12 months before that time; and as to his commission, and the grant in the said Article mentioned, the said Earl humbly conceives, and is advised, the same were not contrary to law; but sure he is, the said expedition was intended for the public good and service; and saith, the said Kidd had no powers or instructions from the board of admiralty, other than the ordinary and common letters of marque, the contents whereof are common, and well known to merchants. And the said Earl doth deny, that he knew the said Kidd to be of ill fame and reputation; but in case the said Kidd hath committed any piracies, he the said Kidd is answerable, and ought to answer for the same, he never being ordered by the said Earl so to do; nor had he ever any

the least encouragement given him by the said Earl, or any other to his knowledge, to expect or hope for any protection therein, or in any illegal action done or committed by him.

VI. To the sixth Article, the said Earl saith, he believes it to be true, that there was a horrid and barbarous plot and conspiracy against his majesty's sacred person, and that there was an apprehension of an immediate invasion; but the said Earl hopes no neglect of duty in his station can be imputed to him to prevent the same: and as for the ship Dutchess, which was, amongst many others, armed and equipped in defence of the realm, the said Earl saith, that the men, in the said Article mentioned to be taken from on board her, were but some of the very persons that were just before taken from on board captain Kidd, and returned by their own consent on board captain Kidd again, not being above 90 in number; and saith, all fears of the invasion were then over and at an end: and denies that the same was intended to weaken, or did weaken, the said ship or the navy royal; or that the said seamen, so returning on board the said Kidd, were levied or provided at the expence of the public; or did return, or were put on board the said Kidd, against their own consent, or to the prejudice of the public security; or that the ship Dutchess was thereby endangered, if she had been attacked, as in the said Article is alleged.

VII. To the seventh Article, the said Earl answereth, and denies that he did, by misrepresentation or otherwise, obtain or procure a grant or order for his majesty's ship Dolphin to be employed in a private voyage or undertaking; but what was done therein was done after the peace concluded, and by his majesty's command, at the instance and request of other persons, and not of the said Earl, but contrary to his opinion; nor was the said Earl any way concerned in interest therein, till after his majesty's orders were given about the said ship; and then, and not before, some of the persons concerned in the said adventure desired the said Earl to take some shares therein (the number whereof he doth not remember), which the said Earl accordingly did; but humbly insists, that his actings therein were not contrary to his duty, or the trust in him reposed, or the debts of the nation thereby increased.

VIII. To the eighth Article, the said Earl answereth, and denies that at any time, while he commanded the navy royal, he did, through neglect or contempt of orders, unnecessarily hazard or expose to danger the said navy; and also denies that, upon any opportunity of taking or destroying the ships of the French king, he did, contrary to advice, or in disobedience to orders, neglect to do the same; and also denies that he did suffer or permit any of the French king's ships to return into their own harbours when he had opportunity to prevent the same; and humbly insists, he is not

guilty of any neglect or omission of his duty herein, nor did expect in this particular to be charged therewith, considering his faithful services rendered against the French fleet.

IX. To the ninth Article, the said Earl saith, he believes it to be true, that his majesty hath been engaged in several alliances with several princes, and particularly with the emperor in the year 1689; and that the end of those alliances was, to prevent the growth and power of France, and to secure this kingdom and its allies; but the said Earl does deny that he did advise his majesty to enter into the Treaty of Partition charged upon the said Earl in this Article; and so far as the said Earl was any ways acquainted therewith, he objected to, and gave his opinion against, the same.

X. To the tenth Article, the said Earl answereth and saith, that true it is, his majesty was pleased to employ and intrust him in the several offices and stations in this article mentioned for several years, as his majesty's occasions required, although not for all the time in the said Article mentioned; and hopes, and humbly insisteth upon it, that he the said Earl did, from time to time, according to his duty and the trusts in him reposed, discharge the said offices and employments with loyalty, faithfulness, and zeal to his majesty and his people.

And having thus laid his case before your lordships; he the said Earl does humbly insist and answer to the said Impeachment, and all and every the Articles aforesaid exhibited against him, that he is not guilty of all or any of them, or of all or any the matters or things by the said Articles charged, in manner and form as the same are therein and thereby alleged against him; and that the matters by him before set forth to be done and transacted, or any of them, were not done or committed by him the said Earl against our sovereign lord the king, his crown or dignity, or the peace or interest of this kingdom, or in breach of the trusts reposed in him the said Earl; and humbly submits himself herein to your lordships' judgment.

ORFORD.

The Committee appointed to consider of the manner in delivering Articles of Impeachments by the Commons being revived, the House was adjourned during pleasure; and the Lords went to the committee. And after some time, the House was resumed, and the earl of Stamford reported, That they had inspected the Journals, and find the first step, after Answers to Impeachments are delivered, is to send a copy thereof to the House of Commons. Whereupon it is ordered, That the Answer of Edward earl of Orford, delivered this day to the Articles of Impeachment depending against him, be copied, in order to be sent to the House of Commons to-morrow morning, by two masters of Chancery.

The earl of Orford having this day delivered in his Answer to the Articles of Impeachment

against him, desired that Mr. Dodd and Mr. Pooley might be assigned counsel for him upon his trial. Ordered, That Mr. Dodd and Mr. Pooley shall be, and they are hereby assigned counsel for the earl of Orford, as desired.

May 15.

A Message was sent to the Commons by sir Richard Holford and Mr. Pitt, to carry down a copy of the earl of Orford's Answer to the Articles of Impeachment against him. Also, to acquaint them, That they having, on the 1st day of April last, sent up to their lordships an Impeachment against William earl of Portland for high crimes and misdemeanors; and having also, on the 15th day of the same month, severally impeached John lord Sommers and Charles lord Halifax of high crimes and misdemeanors, their lordships think themselves obliged to put them in mind, that as yet no particular Articles have been exhibited against the said lords, which, after Impeachments have been so long depending, is due in justice to the persons concerned, and agreeable to the methods of parliament in such cases.

The Messengers sent to the House of Commons return answer, viz. That the Articles against William earl of Portland, John lord Sommers and Charles lord Halifax, are preparing, and in a short time their House will send them up to the House of Lords.

May 19.

A Message was brought from the Commons by Mr. Harcourt and others, with the Articles of Impeachment against John lord Sommers; and to acquaint this House, That the matter of the Charge was contained in the Articles; and also, That he was commanded to pray and demand, that the lord Sommers do give sufficient security to abide the judgment of the House of Lords.

The Articles were read by the clerk, as follows:

ARTICLES exhibited by the Knights, Citizens, and Burgesses in Parliament assembled, in the name of themselves and of all the Commons of England, against JOHN Lord SOMMERS, Baron of Evesham, in maintenance of their Impeachment against him for High Crimes and Misdemeanors.

I. That a treaty and alliance, between Leopold the emperor of Germany and the States General of the United Provinces, was made and concluded, in 1689, upon their consideration of the greatness of the common danger which then threatened all Christendom, from the excessive power of France, and the unconstant faith of the French in the observance of treaties; whereby it was agreed, that there should be, and remain for ever, a constant, perpetual, and inviolable friendship and

good correspondence, between his Imperial majesty and the States General: that each of them should be obliged to promote the other's interest, and, as much as in them lay, prevent all damages and inconveniences to each other. That, during the continuance of the war, there should be, not only a defensive, but also an offensive alliance, between the said parties; by virtue whereof they should both of them act in an hostile manner, with all their forces by sea and land, against the French king, and such of his allies as should refuse to separate themselves from him. That, after the war should be ended, and a peace concluded, there should remain, between his Imperial majesty, his heirs and successors, and the States General, a perpetual defensive alliance, against the crown of France and its adherents. That, if the crown of France should again attack either of the said confederate parties, at what time soever the same should be done, they should faithfully assist each other. That his Imperial majesty and the States General should at all times, by all means, with all their forces, protect and defend all the rights of each other, against the crown of France and its adherents. And other provisions were thereby made for their mutual security, as well during the continuance of the war, as after the conclusion of a peace. That certain separate articles were also at or about that time made, whereby the States General maturely considering that France had openly declared in several courts, that (notwithstanding the most solemn renunciation) they continued their pretensions, by force of arms, to assert for the Dauphin the succession of the Spanish monarchy, in case the king of Spain should die without issue; and also considering what a blow their state would receive, and what a prejudice might happen thereby to the public affairs and quiet, did promise, that in case his said Catholic majesty should die without lawful issue, they would, with all their forces, assist his said Imperial majesty, or his heirs, in taking the succession of the Spanish monarchy, lawfully belonging to that house, together with its kingdoms, provinces, dominions, and rights; and in their obtaining and securing the quiet possession thereof against the French, and their adherents, who should directly or indirectly oppose that succession, and, with force, repel the force which should be brought against them:—That, at the instance of the States General, in pursuance of the said treaty, and separate articles, our most gracious lord and sovereign his most excellent majesty king William the third was invited to enter into the alliance of the aforesaid treaty, and into the agreement of the said separate articles; and thereupon, for restoring and preserving the public peace and quiet, did afterwards, in the said year 1689, enter into, and, under the great seal of England, accept, approve, and ratify, and, in the most solemn manner, engage and promise religiously and inviolably to observe the same, without violating the said treaty, or separate articles, in

any article, or suffering the same, to the utmost of his power to be violated:—That, in 1696, a treaty was projected and contrived in France, to be set on foot between his majesty, the French king, and the States General, for a partition of the Spanish monarchy; whereby many large territories, thereunto belonging, were to be allotted and delivered up to France:—That the tenour and design of the said last-mentioned treaty, whilst the same was in negotiation, was communicated to the said John lord Sommers, then one of the lords justices of England, lord chancellor of England, and one of his majesty's most honourable privy council:—That the said lord Sommers, well knowing the most apparent evil consequences, as well as the injustice of the said partition, did not, according to the trust and duty of his said several offices, dissuade, or endeavour to obstruct, its taking effect; but, on the contrary, having neither regard to his majesty's honour, engaged by the said treaty with the emperor and States-General, as aforesaid, to the trade and known interest of this kingdom, or the peace of Europe, did advise his majesty to enter into the said treaty; and did so far encourage and promote the same, that the said treaty was concluded, and ratified under the great seal of England, then in the custody of the said lord Sommers; and thereby the kingdoms of Naples and Sicily, the places depending on the monarchy of Spain situate on the coast of Tuscany, or the adjacent islands, comprehended under the name of Santo Stephano, Porto Hercole, Orbitello, Telamone, Porto Longone, Piombino, the town and marquise of Final, the province of Guypuscoa, particularly the towns of Fontarabia and St. Sebastian, situate in that province, and especially the port of the Passage, which is therein comprised, with several other parts and things of or belonging to the said kingdom of Spain, were allotted to the dauphin for his share; and the crown of Spain, and the other kingdoms, islands, states, countries, and places, depending thereon, (except such part as aforesaid, which was thereby allotted to the dauphin for his share, and the duchy of Milan, hereinafter mentioned;) was given and assigned to the electoral prince, eldest son to the elector of Bavaria, for his share, to enjoy the same, to him, his heirs, and successors, for ever, never to be molested therein, or on any pretence of rights or claims on the part of the French king, or the dauphin, or his issue, heirs or successors; nor of the part of the emperor, the king of the Romans, the archduke Charles his second son, and other children, or his heirs and successors: and the duchy of Milan was thereby agreed to be given to the said archduke for his share, and in extinction of all pretensions and rights, which the said emperor, the king of the Romans, the said archduke Charles, &c. might have to the said succession of Spain: by which treaty it was also further agreed, that if any prince whatsoever should oppose the taking

possession of the shares thereby agreed on as aforesaid, his majesty, the French king, and the States General should assist one another against such opposition, and hinder the same with all their power.

That, by a secret Article of the said treaty, in like manner ratified under the great seal of England, it was provided, That, if the king of Spain should die without issue, and the electoral prince of Bavaria should afterwards die without issue, his electoral highness of Bavaria, his father, should succeed him in all the kingdoms, islands, states, countries, and places assigned to the electoral prince as aforesaid, and enjoy the same; to him, and his children, successors, and heirs, then born, or to be born, so as neither the emperor, his children, nor any other persons, should or might under any pretext, form the least pretension to that succession; his majesty, the French king, and States General thereby engaging themselves to employ all their power, by land and by sea, for maintaining the order established by the said secret Article, relating to the succession of the monarchy of Spain.

That the said treaty was ratified under the great seal of England (then in the custody of the said lord Sommers), as an agreement between his majesty, the French king, and States General, notwithstanding the said lord Sommers well knew that the same had been concluded between his majesty's commissioners and the French ambassador or the commissioner of the French king only, and that the purport thereof had never been communicated to the States General at the time of the ratification thereof under the great seal of England, notwithstanding the negotiation thereof in Holland.

II. That, for the more effectual carrying on the said treaty, one or more commission or commissions was or were prepared, amended, enlarged or altered, by the said lord Sommers, without any lawful warrant for his so doing; whereunto the said lord Sommers, contrary to the duty of the said several offices, and in violation of the great trusts reposed in him, in or about the month of September, 1698, without communicating the same to the rest of the then lords justices of England, or advising in council with his majesty's privy council thereupon, did presume to affix the great seal of England.—That no certain persons of known honour, fidelity, and experience, were therein nominated commissioners at the time of the affixing the great seal of England thereto; but a blank, or empty space was left in the said commission or commissions, at the time of the sealing thereof, wherein the commissioners names were to be afterwards inserted beyond the seas; notwithstanding which, an unlimited power was thereby granted to the commissioners, whose names were therein afterwards to be inserted as aforesaid, or to either of them, without any written instructions whatsoever, to restrain, guide, or direct them in the exercise

thereof, in his majesty's name, to confer and treat with the commissioner, or deputy, or commissioners or deputies, of the French king, and also with the commissioners or deputies of the States General, for preserving the public peace, and touching the succession to the crown of Spain, and his majesty did thereby engage himself to approve, ratify, and confirm whatsoever should be thereupon concluded by them or either of them.

III. That the said lord Sommers contrary to the duty of his said office of lord chancellor, did affix the great seal of England to the said commission or commissions, not having first received any lawful warrant for that purpose: in hopes of concealing which evil and most dangerous practice, the said lord Sommers after he had sealed the said commission or commissions, used his endeavours to procure a warrant to be transmitted to him for affixing the great seal to the said commission or commissions, and that it might not be known but that he had it in due time.

IV. That the said lord Sommers contrary to the duty of his said several offices, affixed the great seal of England to the ratification of the said treaty made in the year of our Lord 1698, not having first communicated the same to the rest of the then lords justices of England, or advised in council with his majesty's privy council thereupon; and, at the time of his affixing the great seal thereto, one entire blank sheet and many other blanks were left in the said ratification with an intent to be afterwards filled up by other persons beyond the seas, as should be thought fit.

V. That, in 1699, another treaty was entered into, in pursuance of the said treaty made in 1698, and concluded by and between his majesty, the French king, and the States General, and also ratified under the great seal of England, then in the custody of the said lord Sommers, whereby the kingdom of Spain (in case his Catholic majesty should die without issue) was agreed to be divided, and many large territories thereof were allotted to the dauphin for his share; which treaties were evidently destructive of the trade of this realm, dishonourable to his majesty, highly injurious to the interest of the Protestant religion, and manifestly tended to disturb the general peace of Europe, by altering the balance of power therein, and strengthening France against the good friends and ancient allies of our sovereign lord the king.

VI. That whereas, by the laws and usages of this realm, all commissions under the great seal of England, for the making any treaties or alliances with any foreign princes, states, or potentates, and all ratifications under the great seal of all such treaties or alliances, ought to be enrolled and entered of record in the court of Chancery, with or by the prothonotary of the said court, for a perpetual memorial thereof; and that the merchants and other who were

of England, having commerce or correspondence in foreign parts, may not, through ignorance of the same, incur the pains and penalties by the law due to those who shall any ways infringe, break, or act contrary to such treaties; he the said lord Sommers, not minding the duty of his office, did not in any manner enrol or enter of record, or cause to be enrolled or entered of record, any of the said commissions or ratifications, in the foregoing articles mentioned, as by the duty of his place he should and ought to have done; but so to do did totally neglect and omit, in breach of his duty, and in violation of the laws of this realm.

VII. That the said lord Sommers, when the custody of the great seal of England was committed to him, did swear, well and truly to serve our sovereign lord the king, and his people, poor and rich, after the laws and usages of this realm, and truly to counsel the king, and his counsel to keep, and not to know nor suffer the hurt or disinheriting of the king, or that the rights of the crown should be decreased, as far forth as he might let it; and if he could not let it, that he would make it clearly and expressly to be known unto the king, with his true advice and counsel; and that he should do and purchase the king's profit in all he reasonably might; or to that effect: and the said lord Sommers afterwards took the said oath, as lord chancellor of England.—That the said lord Sommers being lord keeper of the great seal, or lord chancellor of England, and one of his majesty's most honourable privy council, whilst this nation was engaged in a tedious and most expensive war against the French king, for preserving the balance and liberties of Europe, and almost exhausted with supplies and taxes for carrying on the same, and under such heavy debts, as, without the utmost frugality, or laying insupportable taxes on the Commons of England, were impossible to be satisfied, contrary to his said oath, did pass many great, unreasonable, and exorbitant grants, under the great seal of England, of divers manors, lordships, lands, tenements, hereditaments, revenues and interests, belonging to the crown of England, amounting to a most prodigious and excessive value; and did advise, promote, and procure, divers great, unreasonable, and exorbitant grants to be made, of several of the late forfeited estates in Ireland, in contempt of the advice of his majesty's most dutiful and loyal subjects the Commons of England in parliament assembled, and without any regard to his majesty's most gracious assurance thereupon to both his Houses of Parliament; and engaged to procure, and accordingly did procure, divers acts prepared for confirming the said grants in parliament in Ireland, to be approved in council in England; and afterwards remitted the same, under the great seal of England, to be passed into laws in Ireland.

VIII. That the said lord Sommers, during the time of his being lord keeper of the great seal and lord chancellor of England, did not

only receive and enjoy the fees, profits, and perquisites, of or belonging to the great seal, established by law as a sufficient and ample recompense and reward for the faithful discharge of that high station; but also, as a further encouragement, through his majesty's most abundant grace and bounty, received an annual pension or allowance from the crown of 4,000*l.* and many other profits and advantages; notwithstanding which, the said lord Sommers not being contented therewith, contrary to his said oath, begged and procured for his own benefit many great, unreasonable, and exorbitant grants of several manors, lands, tenements, rents, hereditaments, and revenues, belonging to the crown of England:—That, in or about the month of April, 1697, the said lord Sommers, being then lord chancellor of England, and of his majesty's most honourable privy-council, contrary to his said oath, did procure and pass a grant under the great seal of England, without any real consideration whatsoever, to Joseph Jekyll, esq. and his heirs for ever, of the manor or manors of Rygate and Howligh, with all and singular their rights, members, and appurtenances, situate and being in the parish of Rygate, or elsewhere, in the county of Surry, and of all quit-rents, rents of assize, free rents, conventional rents, copyhold and customary rents, and all other rents whatsoever, to the said manor or manors belonging or appertaining, with the site of the ruined castle, and of all other demesne lands of the said manor or manors, with the rents reserved on any leases then in being, of any parts thereof, and of all other lands, meadows, feedings, pastures, messuages, houses, edifices, buildings, barns, stables, dove-houses, tolls of market or fairs, with the market-house there; and also of all warrens, chaces, parks, commons, woods, underwoods, woodlands, waste grounds, courts-leet, courts-laron, and other courts, services, franchises, heriots, fines, issues, amerciaments, and all other profits and perquisites of the said courts, rights, royalties, and jurisdictions, and of divers other matters, hereditaments, and appurtenances, to the said manor or manors, or either of them, or to the royalties thereof, belonging, or in any wise appertaining: which premises were parts of the demesnes and revenues of the crown, and of the value of 12,000*l.* and upwards:—That, under pretence of purchasing divers fee-farm rents, and other rents, vented in trustees for sale thereof, in pursuance of several acts of parliament, made in the reign of his late majesty King Charles 2; the said lord Sommers, in 1697, procured a warrant from his majesty, under his sign manual, to the commissioners of the treasury then being, to contract, or give warrant to the trustees for sale of fee-farm rents to contract, with Humphrey Hetherington, esquire, or such as he should nominate, for as many fee-farm and other rents, then remaining unsold, except such rents as were set apart for payment of pensions in the pension deed, as should amount unto 300*l.* per annum, at the rate of 16 years

purchase; and that, upon such contract, the said commissioners of the treasury should give warrant for conveying the said rents to the said Humphrey Hetherington, or such as he should appoint, and his heirs:—That, under the like pretence, and at or about the same time, the said lord Sommers procured another warrant from his majesty, under his sign manual, to the said commissioners of the treasury, to contract, or give warrant to the said trustees to contract, with Richard Adny, esq. or such as he should nominate, for as many fee-farm and other rents, then remaining unsold, except as aforesaid, as should amount to 700*l.* per annum, at the rate of 16 years purchase; and that, upon the said contract, the said commissioners should give warrant for conveying the said rents unto the said Richard Adny, or such as he should nominate, and his heirs:—That, under the like pretence, and at or about the same time, the said lord Sommers procured another warrant from his majesty, under his sign manual, to the said commissioners of the treasury, to contract, or give warrant to the said trustees to contract, with Samuel Newton, esq. or such as he should nominate, for as many fee-farm and other rents, then remaining unsold, except as aforesaid, as should amount unto 600*l.* per annum, at the rate of 16 years purchase; and that, upon such contract, the said commissioners should give warrant for conveying the said rents unto the said Samuel Newton, or such as he should nominate, and his heirs:—That, in pursuance of warrants of the said commissioners of the treasury thereupon, certain contracts were made, or pretended to be made, with the said Humphrey Hetherington, Richard Adny, and Samuel Newton, for the real sale of divers fee-farm rents, and other rents, of the several and respective yearly values aforesaid; by virtue whereof, the said Humphrey Hetherington, Richard Adny, and Samuel Newton, became obliged to pay into the receipt of his majesty's Exchequer at Westminster, for the purchase of the several and respective rents to them respectively to be conveyed, as aforesaid, the sums hereinafter mentioned; that is to say, The said Humphrey Hetherington 12,800*l.* the said Richard Adny 11,200*l.* and the said Samuel Newton 9,600*l.*:—That, in pursuance of such contracts, or pretended contracts, through the power of the said lord Sommers, and by his means and procurement, divers fee-farm rents, and other rents, were, by certain indentures tripartite of bargain and sale, bearing date on or about the 6th of January, 1697, in consideration of 3,200*l.* therein mentioned to have been paid by the said Humphrey Hetherington, unto his majesty, at the receipt of his Exchequer at Westminster, or by other assurance in the law, granted and conveyed by the said trustees, by the appointment of the said Humphrey Hetherington, to Leonard Hancock, of Cheshunt, in the county of Hertford, esquire, and John Warner, of the parish of St. Clements Danes, in the county of Middlesex, goldsmith, and their heirs:—And,

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by other indentures of bargain and sale, of the same date, or other assurance in the law, divers other fee-farm rents, and other rents therein mentioned, in consideration of 9,600*l.* therein mentioned to have been paid by the said Humphrey Hetherington to his majesty, at the receipt of his Exchequer at Westminster, being the residue of the said sum of 12,800*l.* were, by the said trustees, granted and conveyed to the said Humphrey Hetherington, and his heirs; which fee-farm and other rents, so conveyed unto, or by the appointment of, the said Humphrey Hetherington, amount to the full yearly value of 800*l.*—And, by other indentures of bargain and sale, of the same date, or other assurance in the law, and in consideration of 2,400*l.* therein mentioned to have been paid by the said Richard Adny unto his majesty, at the receipt of his Exchequer at Westminster, other fee-farm rents, and other rents, were, by the appointment of the said Richard Adny, granted and conveyed, by the said trustees, to the said Leonard Hancock and John Warner, and their heirs.—And, by other indentures of bargain and sale, of the same date, or other assurance in the law, in consideration of 8,800*l.* in the same indentures mentioned to have been paid by the said Richard Adny to his majesty, at the receipt of his Exchequer at Westminster, (being the residue of the said sum of 11,200*l.*) divers other fee-farm rents, and other rents therein mentioned, were granted and conveyed, by the said trustees, to the said Richard Adny and his heirs; which fee-farm and other rents, so conveyed to or by the appointment of the said R. Adny, amount to the full yearly value of 700*l.* per annum.—And, by other indentures of bargain and sale, bearing date on or about the 25th of April, 1698, or other assurance in the law, in consideration of 2,400*l.* therein mentioned to have been paid by the said Samuel Newton to his majesty, at the receipt of his Exchequer at Westminster, other fee-farm rents, and other rents therein mentioned, were, by the appointment of the said Samuel Newton, granted and conveyed, by the said trustees, to the said Leonard Hancock and John Warner, and their heirs.—And, by other indentures of bargain and sale, of the same date, or other assurance in law, in consideration of 7,200*l.* therein mentioned to have been paid by the said Samuel Newton to his majesty, at the receipt of his Exchequer at Westminster (being the residue of the said sum of 9,600*l.*) divers other fee-farm rents, and other rents therein mentioned, were granted and conveyed, by the said trustees, to the said Samuel Newton and his heirs; which said several rents, so conveyed unto or by the appointment of the said Samuel Newton, amount to the yearly value of 600*l.* That the said several manors and rents aforesaid were granted to the said Joseph Jekyll, Humphry Hetherington, Rd. Adny, and Samuel Newton, and their heirs respectively, as aforesaid, in trust only for the said lord Sommers and his heirs.

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IX. That the said lord Sommers in order to procure a grant of the said fee-farm rents for his own benefit, whilst he was lord chancellor of England, and one of his majesty's most honourable privy council, whilst his majesty was engaged in the said war, and the nation under such heavy debts as aforesaid, did enter into several treaties, and had many communications with divers persons intrusted with the care and management of the said fee-farm rents: and particularly with Reginald Marriot, of the parish of St. Clement Danes in the county of Middlesex, auditor of the rates, or acting as auditor; and with John Digby, of the parish of St. Bride's, London, clerk of the trustees for sale of the said fee-farm rents, and other evil disposed persons; and for encouraging the said Marriot, Digby, and others, to discover to him such particular fee-farm and other rents as then remained undisposed of, to the intent the said lord Sommers might beg the same, he the said lord Sommers contracted and agreed with the said Marriot, to give the said Marriot, for himself and his accomplices, as a reward for the said discovery, one full fourth part of all such rents so discovered, whereof the said lord Sommers should procure a grant from the crown; and accordingly the said several grants from the said trustees to the said Hancock and Warner, being together of the yearly value of 500*l.* per annum and upwards, were so made by the direction of the said lord Sommers, in trust for the said Marriot, Digby, or others.

X. That, notwithstanding the said pretended contracts and payments, there was not any sum of money whatsoever really and bona fide paid, as the consideration of the conveyances of the said rents, from the said trustees; but such contracts and payments of the said several considerations, amounting in the whole to 33,600*l.* were colourably and fraudulently contrived and made by the direction of the said lord Sommers, contrary to his said oath, in deceit of his majesty, and elusion of the said acts of parliament.

XI. That many quit rents and copyhold rents, standing in charge as parcel of, or belonging to several manors, or reputed manors, rents reserved upon leases or estates, the reversion whereof was in his said majesty king Charles 2nd at the making the said acts, rents conveyed before in lease, or granted to other persons, rents appropriated by, or in pursuance of, act or acts of parliament for payment of pensions, stipends, salaries, annuities, alms, and allowances for the maintenance of grammar schools or scholars, or for or towards the reparation of churches, chapels, highways, causeys, bridges, schools, alms-houses, castles or other uses, and many quit rents of manors, and other rents, by act of parliament united and annexed to the castle of Windsor, with intent to support and maintain the yearly reparations and charges of the said castle, and discharge and pay the fees and wages of the officers, ser-

vants, and attendants in the same castle, and the forests, chases, and parks to the same belonging, and for many years applied according to the intention of the said act, and also many quit rents of or belonging to divers ancient manors, heretofore and yet parcel of the demesnes possessions of the crown, as if the same had been entire fee-farm rents, issuing out of those manors, were by the aforesaid several indentures of bargain and sale, through the direction and power of the said lord Sommers conveyed, by the said trustees for sale of fee-farm rents, to the said Humphry Hetherington, Rd. Adny, and Samuel Newton, and to the said Hancock and Warner, and their heirs, or unto some of them, contrary to the true intent and meaning of the said acts of parliament, to the great vexation and oppression of many of his majesty's good subjects, and creating many new and unreasonable charges on other revenues of the crown.

XII. That by the direction of the said lord Sommers, the said Humphry Hetherington, Rd. Adny, Samuel Newton, Leonard Hancock and John Warner, surrendered several of the said rents to them granted as aforesaid, amounting to the yearly value of 347*l.* 11*s.* 5½*d.* on suggestion that the same were either conveyed before in lease, set apart for payment of pensions, old super, bad or illeivable, or part thereof bad or illeivable, or wrong conveyed: and the said lord Sommers in 1699, being then lord chancellor of England, and one of his majesty's most honourable privy-council, in breach of his duty, and contrary to the laws and statutes of this realm, procured other rents, of the yearly value of 391*l.* 0*s.* 3½*d.* to be allowed by way of reprice, and to be conveyed to Rd. Adny, and his heirs, in trust for the said lord Sommers and his heirs, as if the said yearly rents of 347*l.* 11*s.* 5½*d.* so surrendered, had been really and bona fide purchased, in pursuance of the said acts for sale of fee-farm rents.

XIII. That, in 1695, the said lord Sommers being then lord keeper of the great seal of England, and also one of his majesty's most honourable privy council, together with Edward earl of Orford, then first commissioner for executing the office of lord high admiral of England, and commander in chief of his majesty's navy royal, and one of his majesty's most honourable privy council, Richard earl of Bellamont in the kingdom of Ireland, governor of New-York and New England, and others, then in high stations, and in great power and authority, procured a commission to be granted unto one Wm. Kidd, a person of evil fame and reputation, and since that time convicted of piracy, to apprehend, and take into his custody, divers persons therein named, and all such pirates as the said Kidd should meet with upon the coasts or seas of America, or in any other seas or parts, with their ships and vessels, and also such merchandizes, goods, and wares, as should be found on board, or with them: And afterwards the said lord S. in 1697, with the

assistance of the said earl of Orford, and other persons aforesaid, procured a grant from his majesty : and the said lord Sommers passed the same under the great seal of England ; whereby all and whatsoever ships, vessels, goods, merchandizes, treasure, and other things whatsoever, which, since the 30th day of April, 1696, had been taken or seized upon or with, or did belong to, or which should be taken or seized upon or with, or did or should belong to, Thomas Soo, John Irelands, Thomas Wake, and William Maze, in the said letters patents mentioned to have been complained of, and informed against, for committing many robberies, piracies, and depredations, upon the seas in the parts of America, and other places; but never convicted or attainted for the same; or which, since the said 30th day of April, 1696, had been taken or seized upon; or which did or should belong to any of the adherents of the said Thomas Soo, John Ireland, Thomas Wake, and William Maze, or any other pirates, freebooters, and sea-rovers, by the said William Kidd, or other commander of the Adventure-galley; or which by, or by means of the said ship or galley, should be taken, or forced on shore, in any of his majesty's plantations of America; were granted unto the said Richard earl of Bellamont, and unto Edmund Harrison merchant, Samuel Newton, gent. William Rowley, gent. George Watson, gent. and Thomas Reynolds, of St. Martin's, their executors, administrators, and assigns, to their own sole use and benefit, and as their own proper goods and chattels, without any account thereof or therefore to be made; in which grant, the name of the said Samuel Newton was used in trust, and for the only benefit and advantage of the said lord Sommers: Which said grant, under the great seal of England, manifestly tended to the destruction and discouragement of trade and navigation, the great loss and prejudice of merchants and others, being his majesty's subjects, or subjects of the friends and allies of his majesty, and the dishonour of the king and kingdom; and the said lord Sommers was, by procuring and passing the said grant, guilty of a notorious breach of his duty.

XIV. That the said John lord Sommers, to the great oppression of the subject, and contrary to Magna Charta, and gives good statutes of this realm, and in manifest breach and violation of his oath as lord high chancellor of England, hath, in several causes depending before him, by many extraordinary methods, and unwarrantable practices, for several years, delayed proceedings in the said causes; and, by colour of his office, hath made divers arbitrary and illegal orders, in subversion of the laws and statutes of this realm; and hath, of his own authority, reversed judgments given in the court of Exchequer, and without calling before him the barons of the Exchequer to hear their informations, and the causes of their judgments, as the statute, in those cases, expressly directs; assuming thereby to himself an arbitrary and

illegal power: and hath declared and affirmed, in public places of judicature, that particular subjects might have rights and interests, without any remedy for recovery of the same, unless by petition to the person of the king only; or to that effect: which position was highly dangerous to the legal constitution of this kingdom, and absolutely destructive to the property of the subject.*

And the said knights, citizens, and burgesses, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusation or impeachment, against the said lord Sommers; and also of replying to his Answers, which he shall make unto the said Articles, or any of them; and of offering proofs to all and every the aforesaid Articles, and to all and every other articles, impeachment, or accusation, which shall be exhibited by them, as the cause shall, according to the course of parliament, require; do pray, that the said John lord Sommers may be put to answer the said crimes and misdemeanors; and that such proceedings, examinations, trials, and judgments, may be thereupon had and given, as is agreeable to law and justice.

After reading the said Articles of Impeachment, and hearing his lordship thereupon, who desired a copy of the said Articles, and said, he would put in his Answer so soon as possible he could; it is ordered accordingly.

May 20.

The earl of Orford desiring that a day may be appointed for his Trial, the House thereupon ordered, That the committee appointed to consider of the manner in delivering Articles of Impeachments by the Commons be revived, to inspect the books, and meet immediately.

Then the House was adjourned during pleasure, and the Lords went to the committee.

After some time the House was resumed, and the earl of Stamford reported the precedents following; viz.

' 21 Dec. 1680. That Mr. Seymour was impeached, and articles delivered.

' 23 Decem. 1680. He delivered in his answer.

' 3 Jan. That he petitioned for a trial; whereupon the same day a message was sent to the Commons, that the House finding no issue joined by replication from the Commons, thought fit to give them notice thereof.

' Then counsel were assigned him.

' 8 Jan. Saturday the 15th was appointed for his trial.

' 27 Apr. 1695, the duke of Leeds was impeached.

' 29 Apr. the Articles were brought up.

* The learned author of Eunoios thinks it not improbable that some part of lord Sommers's doctrine in the Bankers' Case might be the ground of this Charge. See Dialogue 2, p. 198, and the Note to it.

' 30 Apr. the duke of Leeds put in his Answer, and a Copy thereof was sent to the Commons.

' 1 May, the Lords sent to the Commons, to know when they should be ready to make good the same.

' 3 May, the Commons desired a conference on the Lords message; and at the conference acquainted the Lords, that Mr. Robart, a material witness, was withdrawn. The Lords moved the king, that a proclamation might be issued for his apprehension. The same day the parliament was prorogued.'

A Message was sent to the Commons by sir Robert Legard and Mr. Gery, to acquaint them, That the House having been desired by the earl of Orford, that a day may be appointed for his speedy trial, their lordships finding no issue joined by replication of the House of Commons, think fit to give them notice thereof.

A Message was also sent to the Commons by sir Robert Legard and Mr. Gery, to acquaint them, ' That they having, on the 1st of April last, sent up to their lordships an Impeachment against William earl of Portland for high crimes and misdemeanors; and having also, on the 15th day of the same month, impeached Charles lord Halifax, for high crimes and misdemeanors; and there being as yet no particular Articles exhibited against the said lords, their lordships think themselves obliged to put them in mind thereof; which, after impeachments have so long depended, is a hardship to the persons concerned, and not agreeable to the usual methods and proceedings of parliament in such cases.

May 24.

The lord Sommers delivered his Answer to the Articles of Impeachment of the House of Commons against him. Which was read, by the clerk, as follows:

The ANSWER of JOHN Lord SOMMERS, Baron of Evesham, to the Articles exhibited, by the Knights, Citizens, and Burgesses, in Parliament assembled, in the name of themselves and of all the Commons of England, in Maintenance of their Impeachment against him, for High Crimes and Misdemeanors supposed to be by him committed.

The said lord Sommers, saving to himself all advantages of exception to the said Articles, and of not being prejudiced by any words or want of form in this his Answer; and also saving to himself all rights and privileges belonging to him as one of the peers of this realm; for Answer to the said Articles, humbly saith:

I. To the first Article, That he believes the now emperor of Germany and the States General of the United Provinces being, in the year 1689, engaged in a war with France, a treaty

and alliance was concluded between them, and a separate article then made, to the effect in this Article mentioned; and that his sacred majesty did afterwards enter into, ratify, and approve the same; to which treaty, separate articles, and ratification, (for more certainty thereof) he referreth himself. And further saith, That, in the year 1698, his majesty, before he left England, was pleased to tell him, "That some intimation had been given to the earl of Portland, when in France, that the French king inclined to come to an agreement with his majesty concerning the succession to the crown of Spain:" And afterwards, in August, 1698, (his majesty being then in Holland, and the said lord Sommers at Tunbridge Wells, by his majesty's permission, for recovery of his health), Mr. Secretary Vernon communicated to him a letter he had then received, written by the earl of Portland, by his majesty's order, wherein it was mentioned, "That count Tallard (who was then ambassador from the French king to his majesty) had declared an accommodation might be found out, in relation to the succession of Spain, in case of that king's death; and that his majesty had sounded France, upon what terms an agreement might be made; and the conditions were near of this nature, (videlicet,) That the electoral prince of Bavaria should have the kingdoms of Spain, the Indies, the Low Countries, and all that depends upon the Spanish dominions (except the kingdom of Naples and Sicily, Sardinia, the province of Guipuscoa on this side of the Pyreneans, Fontarabia, and St. Sebastian, Finall, and the places in Tuscany of which Spain then stood possessed); in consideration of which, France was absolutely to renounce the right it pretended to the succession of Spain, and Milan was to be given to the archduke, second son to the emperor;" and that his majesty commanded the said Mr. Secretary to speak to him the said lord Sommers touching that matter; and that his lordship should discourse it with those he thought he might trust with that secret; which to keep with the utmost care, was, by the said letter, mentioned to be of the highest importance. And, at the same time, the said lord Sommers received a letter from his majesty, signed by himself, intimating that count Tallard had made some propositions, touching an agreement with his majesty, concerning the succession of the kingdom of Spain; the which the said earl of Portland would write to Mr. Secretary Vernon, to the end his majesty might have some opinions upon that affair, which required the greatest secrecy, and in which no time was to be lost if that negotiation were to be carried on; and for that end, his majesty thereby commanded the said lord Sommers to send full powers to him, under the great seal of England, with blanks for the names of commissioners to treat with count Tallard, which his majesty, by his said letter, was pleased to say, "He believed might be done secretly; that none but the lord Sommers and Mr. Secretary

Vernon, and those to whom the said lord Sommers and Mr. Secretary should communicate it, might have knowledge thereof; and that the clerks who were to write the full powers might not know what they were," or to the like effect. And the said lord Sommers did immediately return the earl of Portland's said letter to Mr. Secretary Vernon, and desired him to communicate the contents thereof to the earl of Orford and the now lord Halifax (two of the then lords justices, who, as he was assured, were then in town,) and also to such others as they and Mr. Secretary Vernon should think fit; who, in regard of the king's command to have that affair kept a secret, thought fit to impart it to the duke of Shrewsbury only (as the said Mr. Secretary afterwards acquainted the said lord Sommers;) and some time afterwards the said lord Halifax came down to the said Wells, and Mr. Secretary Vernon coming thither also about the same time, they and the said lord Sommers had discourse together, concerning the said proposal. And the said lord Sommers, by letter dated 28th August, 1698, did (as his own thoughts, and as what he apprehended to be the result of their consideration) humbly represent to his majesty, 1st, That the entertaining of such a proposal as was mentioned by count Tallard seemed to be attended with very many ill consequences, if the French did not act a sincere part; but that they were soon at ease as to any apprehension of that sort, being fully assured, his majesty would not act but with the utmost niceness, in an affair wherein his glory and the safety of Europe was so highly concerned: That the 2nd thing they considered, was the very ill prospect of what was like to happen upon the death of the king of Spain, in case nothing was done previously towards the providing against that accident, which seemed probably to be very near, the king of France then having so great a force in such a readiness, that he was in a condition to take possession of Spain before any other prince could be ready to make a stand: That his majesty was the best judge whether that was the case, who was so perfectly informed of the circumstances of all parts abroad; but so far as related to England, it would be want of duty, not to give his majesty this clear account, That there was a deadness and want of spirit in the nation universally, so as not at all to be disposed to the thoughts of entering into a new war; and that they seemed to be tired out with taxes, to a degree beyond what was discerned, until it appeared upon the occasion of the then late elections: That that was the truth of the fact, upon which his majesty would determine what resolutions were proper to be taken. The remaining consideration was, what would be the condition of Europe if the proposal took place? But of that they thought themselves little capable of judging; but it seemed, that, if Sicily was in the French hands, they would be entirely masters of the Levant trade; that, if they were possessed of Finall, and those other

sea ports on that side (whereby Milan were intirely shut out from relief by sea or any merce,) that duchy would be of little station in the hands of any prince; and that the king of France had possession of the island of Gypuscoa which is mentioned in the proposal, besides the ports he would have in the ocean, it did seem he would have as easy a way of invading Spain on that side as he had on the side of Catalonia: but it was to be hoped that France should quit its pretensions to so great a succession, without considerable advantages; and they were assured his majesty would reduce the terms as it could be done, and make them, as far as possible in the then present circumstances, such as might be some foundation for future quiet of Christendom, which all his majesty's subjects could not but be convinced was his true aim; and, if it could be brought to pass, that England might be some way a gainer by that transaction, whether it was by the exclusion of Bavaria, who was the gainer by his majesty's interposition in that treaty, his coming to an agreement to let the English into a free trade to the Spanish plantations, or in any other manner, it would wonderfully endear his majesty to his English subjects.—That it did not appear, in case the negotiation should succeed, what was to be done on his majesty's part, in order to make it take place; whether any more was required, than that the English and Dutch should sit still, and France it was to see it executed; and, if that were not done, what security ought to be expected; that by their being neutrals, the French should be successful, they would confine themselves to the terms of the treaty, and not attempt to make further advantages of their success? A third thing the said lord Sommers saith, That after the writing of his said letter, he had no account whatsoever, nor heard any thing, of the said treaty, or knew or heard, whether the same was proceeded upon, or not, until towards the latter end of September following, when he was acquainted by Mr. Secretary Vernon, that he had received an account, that a treaty relating to the succession of the crown of Spain had been adjusted, concluded, and signed, by the commissioners named by his majesty for that purpose, and the ambassador and plenipotentiary of the French king: and the said lord Sommers doth deny, that the said treaty of partition, or any proposition for such treaty, or the transaction thereof, was communicated to him the said lord Sommers; nor was he acquainted with the same, or the design thereof, or any other matter relating thereto, at any other time, or in any other manner, before he was told of the concluding and signing thereof, as aforesaid, than as is herein before-mentioned to be done by his majesty, as aforesaid, and by his and the said earl of Portland's letter herein before-mentioned: and the said lord Sommers doth deny he did, at any time whatsoever, advise his majesty to enter into the said treaty, or any way encourage or promote

same; but, having made the objections before-mentioned, in his said letter to his majesty against the propositions so communicated him as aforesaid, and clearly laid open such doubts and observations as occurred to him on the said matter, he did thereby, as he received, fully and faithfully discharge his duty, and the duty incumbent on him: and the said lord Sommers further saith, That afterwards Mr. Secretary Vernon did acquaint him, that he had received, by his majesty's command, a copy of the treaty relating to the cession of the crown of Spain, and of two secret articles relating to the matter of that treaty; and that he had likewise his majesty's command to prepare the instruments for the ratification of the same, and to leave blanks therein for the names of the commissioners of the States General; and accordingly the said Mr. Secretary did prepare the said several instruments, and did bring the same, so prepared, to the said lord Sommers, to pass the same under the great seal; which was done accordingly, the said lord Sommers having a good and lawful warrant so to do; and the said ratification was transmitted to his majesty, to have the same perfected in his presence: which treaty, and secret articles, were to such effect as in this article is set forth; but, for more certainty, he refers himself to the said treaty and articles.—And the said lord Sommers, not being privy, in any other manner than as aforesaid, to the said treaty, or the ratification thereof, doth not know when, or in what manner, the same was communicated to the States General.

II. and III. To the 2nd and 3rd Articles, the said lord Sommers saith, That he having received his majesty's express commands, by his letter mentioned in his answer to the 1st Article, to send to his majesty full powers, under the great seal of England, for negotiating the said treaty, with blanks for his majesty's commissioners' names; which he humbly conceives, and is advised, was a sufficient warrant for him to pass a commission under the great seal for that purpose; and the same being prepared in usual form of commissions of full powers, with blanks for commissioners' names, according to his majesty's direction, he did affix the great seal to the same; and the said commission was sent to his majesty, then in Holland, to be perfected in his presence, by inserting the names of such persons as his majesty should think fit to commissionate therein, as he conceives, might legally be done; which commissioners were to receive their instructions from his majesty for the execution of their said power, together with the said commission, in usual manner: but what instructions, or whether any instructions, in writing, were given to the commissioners, in relation to the executing the said power, the same noways concerning the lord Sommers, he knows not: and the said lord Sommers saith, He did desire his majesty, that a particular warrant for the

said commission, which had been before sent by Mr. Secretary Vernon to his majesty, as he informed the said lord Sommers, for his signing, might be signed, and returned; not that he doubted his majesty's said letter to be a sufficient warrant, but for that such warrant might be more proper to be produced, if occasion should require, than his majesty's said letter; which, by reason of other matters therein contained, ought not to be produced without his majesty's permission, and which is now made use of by his majesty's gracious leave: and the said lord Sommers further saith, That his majesty having, by his own and the earl of Portland's letter before mentioned, directed, that his majesty's said commands should be kept secret, he did not communicate the making of the said commission, otherwise than to the persons mentioned in his answer to the said 1st Article.

IV. To the 4th Article, he saith, That Mr. Secretary Vernon having prepared, by his majesty's command, the instruments for ratification of the said treaty, with blanks therein, as is before set forth, he did affix the great seal to the said ratification with such blanks; which, he conceives, and is advised, he might lawfully do: and, having also his majesty's command, that the said treaty should be kept secret, he did not communicate the same to the rest of the then lords' justices, or his majesty's privy council, which besides, he conceived, was unnecessary to be done, in regard his majesty had then, by his commissioners, perfected the said treaty; so that the same could not be altered.

V. To the 5th Article, the said lord Sommers saith, he believes, that, in the year 1699, another treaty was entered into and concluded, between his majesty, the States General, and the French king, to such or such-like effect as in this Article is mentioned, to which treaty, for more certainty thereof, he referreth himself: and denieth, that he had any knowledge of such treaty, or any transaction in order thereunto; save only that a draught of the said treaty was read over in the presence of divers of the lords of his majesty's privy-council, whereof the said lord Sommers, as well as others then present, did make several objections; but they were informed by his majesty's plenipotentiaries for transacting the said treaty, who were then also present, that the said treaty was so far perfected, that nothing could then be altered therein; and his majesty afterwards, by his warrant, requiring the ratifying of the said treaty under the great seal, he did affix the great seal to such ratification, being, as he conceives, obliged so to do.

VI. To the 6th Article, he saith, He conceives it was not incumbent upon him, as lord chancellor, to see the commissions or ratifications, in this Article mentioned, inrolled; the same being prepared, and brought to the great seal, by the secretaries of state, ready ingross-

ed; and, when sealed, taken away by them, and the original treaties remaining in their custody; but the care of inrolling the same, if necessary, doth, as he conceives, belong to the prothonotary of the court of Chancery.

VII. To the 7th Article, he saith, That, when the great seal was committed to his custody, he took the oath of office to the effect in that Article set forth; and, during the time he had the custody thereof, he did carefully, diligently, and honestly, endeavour to keep the said oath; and hopes and believes he hath duly observed the same; and doth acknowledge, That, during the time he was lord keeper and lord chancellor, he did pass several grants to divers persons of several lands, tenements, and hereditaments, belonging to his majesty in right of his crown of England; but saith, that before any of them came to the great seal, the same were regularly passed through the proper offices, and brought, with sufficient warrants, for the great seal; and believes more considerable grants have passed, in the like number of years, in most of his predecessors times; and conceives, and is advised, that, being required by his majesty, by proper warrants, to pass the same, he ought so to do: and denies, that he did ever advise, promote, or procure, any grant to be made to any person whatsoever, of any forfeited estate in Ireland, or did procure any act or bill prepared for confirming any such grant in the parliament in Ireland, to be approved in the privy council in England: and saith, that, what Lills of this nature were remitted under the great seal of England, to be passed into laws in Ireland, the same were first approved, and passed, in the privy council in England, according to the usual form in such cases; and, being so approved were by order of council, sent to the said lord Sommers; who was, by the said order, required to affix the great seal thereto.

VIII. To the 8th, he saith, He did, during the time he had the custody of the great seal, receive the profits and perquisites thereto belonging, which before his time, were become very inconsiderable; and did also receive an annual pension or allowance from his majesty of 4,000*l.* being the like pension that had been allowed to several of his predecessors: but denies, that he did ever beg, or use any means to procure, any grant whatsoever from his majesty, for his own benefit: but saith, that what his majesty was pleased to give him proceeded from his majesty's own motion, and of his mere bounty, and as his majesty was pleased to declare upon that occasion, as an evidence of his gracious acceptance of the said lord Sommers's zealous endeavours for his service; and the same was done without any previous solicitation by him the said lord Sommers, or any other to his knowledge or belief; and that, in the year 1697, his majesty, of his own motion, did grant for the benefit of the said lord Sommers, the manor or manors of Hygate and Howley, as in the said Article is mentioned; but the

same was, and is, far short of the value thereby suggested: and the said lord Sommers further saith, he never pretended to purchase, in his own name, or in the name or names of any other person or persons in trust for him, any of the fee-farm rents, or other rents, vested in trustees for sale; but his majesty taking notice, that several of the said fee-farm rents, and other rents, so vested in trustees, were unsold; and the said trustees being, by the acts of parliament vesting in them the said rents, declared to hold the same for the benefit of his majesty, his heirs and successors; his majesty did, in the year 1697, of his own motion, without any solicitation, procurement, or means, used by the said lord Sommers, acquaint the then lords commissioners of the treasury, or some or one of them, that it was his majesty's pleasure, that 2,100*l.* per annum of those rents should be granted to, or for the benefit of, the said lord Sommers, and his heirs; and that all proper methods should be used for vesting the same for his benefit, as of his majesty's free gift; and the said acts of parliament having directed, that the said trustees on sales should convey the said rents pursuant to contracts to be signed by the lord treasurer, or lords commissioners of the Treasury, for the time being, or any two of them, for the satisfaction of the said trustees only; and according to the method that had been used, from the time of making the said acts, in passing grants of any of the said rents, even such as were merely of the bounty of his majesty's predecessors, and of his majesty: such warrants were made by his majesty to the lords commissioners of the treasury to contract, or give warrants to the trustees to contract, for the said rents; and such contracts were pursuant therunto made; and such grants of the said rents were passed, as in the said Article is mentioned; and the money, mentioned in such contracts, was, for the perfecting of his majesty's said intended free gift, discharged by tallies struck for that purpose: and the said lord Sommers saith, the said contracts were not intended or designed to make the grantees of the said rents appear to be purchasers; but the said lord Sommers always acknowledged he received the said grants of his majesty's bounty; and, he humbly conceives, it was lawful for him so to accept the same.

IX & X. To the ninth and tenth Articles the said lord Sommers saith, That, after his majesty had given such direction to the lords of the Treasury for granting fee-farm rents, and other rents, to the yearly value aforesaid, for the benefit of the said lord Sommers, and his heirs, and after warrants were signed by the lords of the Treasury to the said trustees, for making contracts for conveying tents of the said yearly value, for the benefit of the said lord Sommers, it did appear, that the said intended contracts and grants could not be perfected; for that neither the lords of the Treasury, nor the said trustees, were sufficiently in-

formed what fee-farm rents, or other rents, remained undisposed of; so that the whole benefit of his majesty's intended bounty would have been lost, without information could be granted of such particular rents: and the said lord Sommers being informed, that Reginald Marriott, and John Digby, in this Article named, were the most likely, if not the only, persons capable to give information therein, application was made to them for that purpose; and the said Marriott and Digby, being so applied to after the said warrants of his majesty, and the said lords of the Treasury, were executed, as aforesaid, did refuse to give any account of such rents, unless they might have, as a reward for their so doing, rents amounting to near a fourth part of such rents, whereof they should give such account, conveyed in trust for them, in such manner as in the said Article is mentioned; which the said lord Sommers did, as, he conceives, he lawfully might, it being only to his own loss and prejudice, comply with; not in order to any such end as is suggested in the said Article, but that he might perfect the grant before designed and appointed to be made to him by his majesty of his own free will, and not at the said lord Sommers's solicitation; the discovery of any of the said rents not being made by the said Marriot and Digby, or any other person, till after the said warrants of his majesty, and the lords of the Treasury, as aforesaid; and accordingly the several grants, in this Article mentioned, were made to Huncock and Warner, in trust for the said Marriott and Digby, as was affirmed to the said lord Sommers: and the said lord Sommers saith, there was not any sum of money paid as the consideration of the grants of the said rents; but the contracts were made, and the payment of the several considerations thereof were discharged, in the manner and for the reasons, herein before set forth; and were not colourably or fraudulently contrived, in deceit of his majesty, or elusion of the said acts of parliament.

XI. To the eleventh Article the said lord Sommers saith, He believeth, that several of the rents, mentioned to be granted in trust for him, as aforesaid, had been before granted to other persons by the said trustees; and that others of them were not in the power of the said trustees to grant; which was, and is, very much to his prejudice: and believes the same were inserted by mistaken informations given touching the same, and not out of any design; and the like mistakes have frequently happened in other grants of other of the said rents: and denies, that to his knowledge or belief, any of the said rents, so granted for his benefit, were ever united or annexed to the castle of Windsor for any purpose whatsoever, or that any oppression or vexation hath happened to any of his majesty's subjects, by reason of the granting of any of the said rents, and as he believes, little or no new charge to the crown.

XII. To the twelfth Article the said lord Sommers saith, That, his majesty having de-

signed, of his bounty to him the said lord Sommers, and his heirs, fee-farm and other rents, to the annual value in the said grants mentioned; and the said trustees having covenanted, as was usual for them to do, that they had not made any former, or other grant or conveyance of the said rents, or any of them; and 347*l.* 11*s.* 3*d.* per annum of the said rents, so granted as aforesaid, having appeared to be granted before, or not to be grantable, by the said trustees, or not leviable on surrender of such rents; the said trustees, by warrant of the lords commissioners of his majesty's Treasury, who were thereunto sufficiently authorized, in lieu and satisfaction of the said rents, and arrears thereof, and in discharge of the covenants of the said trustees, did, the 21st day of October 1699, grant divers other rents, amounting to the yearly value of 391*l.* 0*s.* 3*d.* to Richard Adney, and his heirs, as in the said Article is mentioned, which were not so granted, as if the said yearly rents of 347*l.* 11*s.* 3*d.* had been, *bonâ fide*, purchased, but was in lieu and reprice for the same as granted of his majesty's bounty, for the benefit of the said lord Sommers, and his heirs, as aforesaid; which he conceives, might be, and was, lawfully done.

XIII. To the thirteenth Article the said lord Sommers saith, He doth admit, that, in the year 1695, he then being lord keeper of the great seal of England, his majesty being informed, as the truth was, that Thomas Too, John Ireland, Thomas Wake, and William Maze, and several other of his majesty's subjects in his plantations of America, had associated themselves and did frequently commit great piracies, robberies, and depredations, on the seas in the parts of America, and other parts, to the hindrance and discouragement of trade and navigation, for preventing the said mischiefs, did grant a commission, as in this Article is mentioned, unto William Kidd in this Article named, (who was the commander of the ship, called the Adventure-galley, and was not then to the knowledge or belief of the said lord Sommers, esteemed a person of ill fame or reputation), to apprehend, seize, and take into his custody, the said Thomas Too, John Ireland, Thomas Wake and William Maze, and all such other pirates as he should meet with, in the seas of America, or any other seas, with their ships and vessels, and such merchandizes, monies, and wares, as should be found on board or with them, and to cause such pirates to be brought to a legal trial; the granting of which commission was then apprehended to be necessary for the preservation of trade and navigation: And the said lord Sommers doth also admit, that a grant, dated the 27th of May, 1697, did pass under the great seal of England, as in this article is mentioned; whereby, reciting the said commission so granted to the said William Kidd, and that the said Adventure-galley was, with his majesty's knowledge and royal encouragement, bought and fitted out to sea for the execution of the said commission,

at the charge of the earl of Bellamont, Edmund Harrison, Samuel Newton, William Rowley, George Watson, and Thomas Reynolds in this article named, his majesty for encouraging and rewarding the said undertaking, did grant unto the said earl of Bellamont, Edmund Harrison, William Rowley, George Watson, Tho. Reynolds, and Samuel Newton (who was named by and in trust for the said lord Sommers), their executors and administrators, all and whatsoever ships, vessels, goods, merchandizes, treasure, and other things whatsoever, which since the 30th of April 1696, had been taken or seized upon or with, or did belong to, or should happen to be taken or seized upon or with, or which did or should belong to, the said Tho. Too, John Ireland, Tho. Wake, and W. Maze, or their adherents, or any other pirates, by the said W. Kidd, or other commanders of the said Adventure-galley, or which by or by means of the said ship or galley should be taken, or forced on shore, on any of his majesty's plantations in America, so far as the said premises, or any of them, did, should, or might, belong to his majesty, or could or might be granted or grantable by him, or was or were in his power to dispose of: Which grant was not intended to be without an account; for the said lord Sommers saith, That, by indenture, bearing date the 22d of May 1697, made (after the warrant for the said grant was signed, and before it was past) between his majesty of the one part, and the said earl of Bellamont, Edm. Harrison, W. Rowley, George Watson, Tho. Reynolds, and Samuel Newton, of the other part; they the said earl of Bellamont, &c. did covenant, promise and agree, with his majesty, his heirs and successors, well and truly to account for, and deliver upon oath, to the use of his majesty, his heirs and successors, or the commissioners of his or their treasury, or his or their high treasurer, a clear tenth part, the whole in ten equal parts to be divided of all and every such ships, vessels, goods, merchandizes, and other things whatsoever, which in and by the said grant should be given, or which should from time to time be taken, or seized, or secured, by them, or any of them, their or any of their executors or administrators, officers, agents, servants, or assigns, by virtue or colour thereof; to which grant and indenture the said lord Sommers for more certainty referreth himself. And further saith, He conceives, and is advised that the said grant did not any way tend to the obstruction or discouragement of trade or navigation, or to the loss or prejudice of merchants, or others his majesty's subjects, or the subjects of his friends or allies, nor to the dishonour of his majesty or the kingdom; nor was the passing of the same any breach of the duty of the said lord Sommers: but the said grant was formed as a recompence to the said grantees, who, at their own charge, had provided and fitted out the said ship, to enable the said Wm. Kidd to execute the powers in the said commission mentioned, whereby the public might have received

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great benefit, had the said Wm. Kidd faithfully discharged the trust in him reposed by his majesty and the said grantees; which he failing to do, the owners of the said ship have lost their expences, and have not received any benefit of his majesty's said grant.

XIV. To the fourteenth Article; the said lord Sommers saith, He did not delay any proceedings, in any cause or causes depending before him as chancellor of England, longer or otherwise than as the circumstances and justice of each cause required; but did, to the very manifest impairing of his health, constantly apply himself to the dispatch of the causes depending before him; and denies that he did ever make by colour of his office, any arbitrary or illegal order, to the subversion of any law or statute of this realm; or did ever assume to himself any arbitrary or illegal power, or ever reverse any judgment given in the court of Exchequer, otherwise than as is warranted and allowed by the law, and in the presence of the barons of the court of Exchequer, who were always present in the court of Exchequer chamber when their judgments were examined, as the statute in such cases directs; nor did ever deliver, in any court of judicature, or other place whatsoever, any position whatsoever dangerous to the legal constitution of the kingdom, or destructive to the property of the subject, as is charged by the said Article.

And as to all other matters and things in the said Articles contained, and not herein before particularly answered unto: the said lord Sommers saith, he is not guilty of them, or any of them, in manner and form as the same are charged upon him in and by the said Articles; and humbly submitteth himself to your lordships' judgment.

SOMMERS.

May 30.

It is ordered by the Lords spiritual and temporal in parliament assembled, That Monday the 9th day of June next shall be, and is hereby appointed for the trial of Edward earl of Orford, in Westminster-hall, upon the Articles brought up against him by the House of Commons, whereby he stands charged with several high crimes and misdemeanors.

A message was sent to the Commons by sir Robert Legard and sir John Hoskins, to let them know, That this House hath appointed Monday the 9th day of June next, for the Trial of Edward earl of Orford, in Westminster-hall, upon the Articles sent up against him, and that the Commons may reply, if they think fit.

A message was sent to the Commons by sir Robert Legard and sir John Hoskins, to acquaint them, That they having on the 1st day of April last, sent up to their lordships an impeachment against William earl of Portland, for high crimes and misdemeanors; and having also, on the fifteenth day of the same month, impeached Charles lord Halifax for high crimes and misdemeanors; and there being as yet no particular Articles exhibited against the said

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lords, their lordships think themselves obliged to put them in mind thereof; which, after impeachments have so long depended, is a hardship to the persons concerned, and not agreeable to the usual methods and proceedings of parliament in such cases.

May 31.

A message was brought from the Commons by Mr. Bromley and others to acquaint this House, "That in answer to the message of the 31st instant, the Commons have prepared a replication to the earl of Orford's Answer to the Articles of impeachment of high crimes and misdemeanors exhibited against him, and at present defer bringing it up to your lordships, because in the trials of the several impeachments now depending, the Commons think it must proper, from the nature of the evidence that will be given at the said trials, to begin with the trial of the impeachment of John lord Sommers of high crimes and misdemeanors. And as to your lordships' other Message, the Commons take it to be without precedent, and unparliamentary; they, as prosecutors, having a liberty to exhibit their Articles of impeachment in due time; of which they who are to prepare them are the proper judges: and therefore, for your lordships to assert, That having not yet exhibited particular Articles against William earl of Portland and Charles lord Halifax, is a hardship to them, and not agreeable to the usual methods and proceedings in parliament in such cases; does, as they conceive, tend to the breach of that good correspondence betwixt the two Houses, which ought mutually to be preserved."

June 2.

Ordered, That the Committee appointed to consider of the manner in delivering articles of Impeachments by the Commons, be revived, to meet on Monday next, to draw an answer to be sent to the House of Commons to their Message received the 31st instant.

The House was adjourned during pleasure. After some time, the House was resumed, and the earl of Stamford reported from the lords committee, appointed to consider of the manner in delivering Articles of Impeachments by the Commons, the Precedents following; viz.

' 7 Feb. 25 H. 8. The bishop of London impeached by the Commons, for imprisoning Tho. Phillips on suspicion of heresy.

' 9 Feb. The Articles were read.

' 20 March, 1620. The Commons, at a conference, accused the lord chancellor St. Alban and the bishop of Landaff of bribery and corruption.

' 16 April, 1624. The Commons, at a conference, accuse the earl of Middlesex, lord-treasurer, of bribery.

' 19 May, 1624. The Commons accuse the bishop of Norwich of several matters by them then particularly mentioned at a conference.

' 29 Decemb. 1640. The Commons accuse sir George Radcliffe of Radcliffe of high-treason.

' 31 Decemb. They delivered the Articles at a conference.

' 22 Decemb. 1640. The lord-keeper Finch was impeached.

' 29 Jan. 1640. Report of what he was accused of at a conference.

' 18 Decemb. 1641. Daniel O-Neal impeached.

' 30 August, 1641. The earl of Bridgewater impeached, and Articles read, but not entered.

' 6 Decemb. 1660. William Drake impeached, and Articles brought up.

' 24 April, 1668. Sir William Pen was impeached, and the Articles delivered at a conference the same day.

' 29 Decemb. 1666. The Commons, at a conference, impeached the lord viscount Mordaunt.

' 3 Jan. The conference was reported, and the Articles read.

' 23 Decemb. 1678. The earl of Danby was impeached, and Articles brought up against him at the same time.

' 5 Decemb. 1678. The earl of Powis, lord A. Wardour, lord Bellasyse, lord Petre, and lord viscount Stafford, were impeached.

' 30 Decemb. The parliament was prorogued to the 4th of February, and was dissolved the 24th of January.

' 6 March. A new parliament met.

' 7 April, 1679. Articles were brought up against them.

' 21 Decemb. 1680. Mr. Edward Seymour was impeached, and Articles brought up at the same time.

' 7 Jan. 1680. Sir William Scroggs was impeached, and Articles brought up at the same time.

' 7 Jan. 1680. The earl of Tyrone was impeached, but no Articles brought up.

' 10 Jan. The parliament was prorogued to the 20th. Dissolved the 18th.

' 26 March, 1681. Mr. Fitz Harris was impeached: no Articles brought up.

' 28 March. The parliament was dissolved.

' 26 June, 1689. Blaire, Vaughan, Noel, Elliot, and Grey were impeached and Articles brought up.

' 26 Octob. The earl of Salisbury and earl of Peterborough were impeached. Special matter assigned the same day.

' 27 April, 1695. The duke of Leeds was impeached.

' 29 April. Articles were brought up.

' 10 May, 1698. Goudet and others were impeached.

' 17 May. Articles brought up.

' 23 May, 1698. John Auriol and John Dumastre were impeached.

' 8 June. Articles were brought up against them.

Ordered, That the Committee, appointed on Saturday last, do meet presently, to draw an Answer to be sent to the House of Commons, to their Message received the 31st of May last.

Then the House was adjourned during pleasure.

After some time the House was resumed, and the earl of Stamford reported the Answer drawn by the Committee, to be sent to the House of Commons, to their Message received the 31st of May last, which was read as follows, viz.

“The Lords do think fit, upon occasion of the Message of the Commons of the 31st of May, to acquaint that House, That having been desired by the lord Sommers, that a day may be appointed for his speedy trial, and their lordships finding no issue joined by replication of the House of Commons, judge it proper to give them notice thereof, that the Commons may reply, if they think fit; and at the same time their lordships let the Commons know, that they will proceed to the trial of any of the impeached lords, whom the Commons shall be first ready to begin with, so as there may be no occasion taken from thence for any unreasonable delay in the prosecution of any of them: and further to acquaint them, That having searched their own Journals, they do not find, that after a general impeachment, there has ever been so long a delay of bringing up the particular articles of impeachment, sitting the parliament: and therefore the Lords do think they had reason to assert, That it was a hardship to the two lords concerned, (especially after this House had put the House of Commons in mind of exhibiting such articles) and not agreeable to the usual proceedings in parliament. And as the Lords do not controvert what right the Commons may have of impeaching in general terms, if they please; so the Lords, in whom the judicature does entirely reside, think themselves obliged to assert, That the right of limiting a convenient time for bringing the particular charge before them, for avoiding of delay in justice, is lodged in them.—The Lords hope the Commons, on their part, will be as careful not to do any thing that may tend to the interruption of the good correspondence between the Houses, as the Lords shall ever be on their part: and the best way to preserve that, is for neither of the two Houses to exceed those limits which the law and custom of parliament hath already established.”

The House went into consideration of this Report; and after debate, it was ordered, That the further consideration thereof, and debate thereupon, be adjourned till to-morrow twelve o'clock.

June 3.

The House resumed the adjourned debate yesterday, in relation to the report of the Answer drawn by the Committee to be sent to the House of Commons, to their Message received the 31st of May last. The report was read by paragraphs, and agreed to, and sent to the House of Commons by sir Richard Holford and Mr. Pitt.

June 5.

A Message was brought from the Commons by Mr. Harcourt and others, to acquaint this

House, “That the Commons, on consideration of your lordships’ Message to them of the 31st of May, concerning the earl of Orford, think it their undoubted right, when several persons stand impeached before your lordships, to bring to trial such of them, in the first place, as the Commons apprehend, from the nature of the evidence, ought first to be proceeded against; to the intent all such offenders may, in due time, be brought to justice: and, that no day ought to be appointed by your lordships for the trial of any impeachment by the Commons, without some previous signification to your lordships from the Commons, of their being ready to proceed thereon.

“The Commons could not receive this Message from your lordships without the greatest surprise; your lordships’ proceedings in this case being neither warranted by precedents, nor (as the Commons conceive) consistent with the methods of justice, or with reason: wherefore the Commons cannot agree to the day appointed by your lordships for the trial of the earl of Orford.

“As to your lordships’ Message, at the same time, relating to the earl of Portland, and Charles lord Halifax, the Commons take the same to be without precedent, and unparliamentary; and conceive your lordships’ frequent repetition thereof, in so short a time, after the Commons had transmitted to your lordships their articles against two of the impeached lords, and were daily preparing their articles against the others, manifestly tends to the delay of justice, in obstructing the trials of the impeached lords, by introducing disputes, in breach of that good correspondence between the two Houses, which ought inviolably to be preserved.”

Upon receiving a Message from the Commons, in answer to a Message sent to them by this House the 31st of May last, it is ordered, That the Lords Committees appointed to consider of the manner of proceedings on impeachments, do meet to-morrow at nine of the clock in the forenoon, to consider the said Message, inspect the Journals, and report to the House what they shall think proper in this case.

June 6.

A Message was brought from the Commons by Mr. St. John, and others, to desire a conference with this House, upon the subject matter of the Message of this House of the 4th instant.

It being proposed to return answer, That this House will send an answer by messengers of their own, and debate thereupon: The House agreed to a present conference. Then the Commons being called in, were told, That the Lords agreed to a conference as desired, and appoint it presently in the Painted Chamber. Lords were named managers of the conference.

The Commons being come to the conference, the House was adjourned during pleasure, and

the Lords went to the conference; which being ended, the House was resumed, and the lord steward reported, That the Lords had attended the conference, and that Mr. Harcourt delivered himself in the following manner:

“The Commons have desired this conference upon your lordships’ Message of the 4th of June, in order to preserve a good correspondence with your lordships; which will always be the endeavour of the Commons, and is at this time particularly necessary, in order to bring the impeached lords to a speedy trial. And because the messages which your lordships have thought fit to send to the Commons, and the answers thereunto, seem not to tend towards expediting the trials, which the Commons so much desire, but may rather furnish matter of dispute between the two Houses; the Commons, therefore, chuse to follow the methods formerly used with good success upon the like occasions: and for the more speedy and easy adjusting and preventing any differences which have already happened, or may arise, previous to, or upon these trials, the Commons do propose to your lordships, That a Committee of both Houses be nominated, to consider of the most proper ways and methods of proceeding on impeachment, according to the usage of parliament.”

Ordered, That the Lords Committees appointed to consider of the manner of the proceedings on impeachments, do meet to-morrow upon the report of this conference, and inspect the Journals, and report to the House.

June 7.

The earl of Stamford reported from the Lords Committees appointed to consider of the manner of proceedings on impeachments, That they have inspected the Journals, and ordered him to report the precedents following, viz.

‘16 April, 1624. Report is made of the Commons’ complaint and charge at a conference against the earl of Middlesex, lord treasurer.

‘24 April, 1624. Ordered, That the lord treasurer shall appear on Tuesday next at nine o’clock, to answer his charge at the bar; and that if he hath any witnesses to be examined, they may in the mean time be sworn and examined.

‘27 April. The lord treasurer petitioned, That his witnesses might not be examined, till he hath answered; but the House did not think fit to alter the day.

‘28 April. The lord treasurer desires the interrogatories to his witnesses may be respited till he hath answered; and that he may have copies of the depositions taken on both sides.

‘His lordship was answered, That his desire is so unfit, as the Lords think him ill advised to make such a request; and according to the former order, expect his appearance to-morrow, and to hear such answer as he shall make.

‘29 April. The lord treasurer petitioned, That in regard of his being indisposed, he may have a further day for presenting his answer. The House, in respect of his indisposition, is pleased to respite his appearance this day; but enjoin, that Saturday next he brings in his answer, according to former orders; and the Lords do peremptorily assign Friday, the 7th of May, for his appearance in person, and for the final hearing and determining of the cause.

‘7 May. The lord treasurer was accordingly brought to the bar, and the trial proceeded.

‘30 Aug. 1641. The earl of Bridgewater was impeached by the Commons.

‘6 Sept. 1641. Ordered, To answer the second Tuesday in November.

‘17 Oct. 1641. Ordered, To be heard on the 9th of December.

‘2 Nov. 1641. Ordered, That the earl of Bridgewater may answer on the 9th of November.

‘31 March, 1642. At a conference desired, by the Commons, they desired articles of impeachment against George Benyon. Benyon was ordered to answer in four days, and to have liberty, with his keeper, to go any where, and counsel assigned.

‘4 April, 1642. Benyon put in his answer: then it was ordered, That this cause against George Benyon, upon the impeachment of the House of Commons, shall be proceeded in on Wednesday next at this bar.

‘5 April, 1642. A Message was sent to the House of Commons, to acquaint them, That the Lords have appointed to proceed in the cause against Benyon to-morrow.

The House of Commons return answer, That they will send a Committee of their House, to manage their evidence against Benyon to-morrow.

‘6 April, 1642. The Committee of the House of Commons being come to manage their evidence against him, had the articles read, &c. and the trial proceeded.

‘5 July, 1642. Sir Robert Gurney, lord mayor, was impeached at a conference, and brought to the bar, and heard the articles read, had counsel allowed him, and was ordered to answer on Friday next.

‘8 July. He delivered in his answer, which was read, and the cause was ordered to be heard on Monday next, and the Commons were acquainted therewith by message.

‘11 July. The Commons at a conference deliver in a further impeachment against him, and the articles were read to him at the bar, and he desired counsel, which was allowed, and he had time given him to answer till to-morrow seven-night.

‘19 July. Sir Richard Gurney put in his Answer; and the same day it was ordered, That this House will proceed against him on Friday next, on both the impeachments; and the House of Commons are then to produce all their proofs to prove the said impeach-

'ments: And a Message was sent to the Commons to acquaint them with the said order.

' 22 July. The committee of Commons being come to manage the evidence, the trial was proceeded in.

' 17 July, 1645. The earl of Stamford desiring time to put in his Answer to the Impeachment of the House of Commons against him, it was ordered he put in his Answer on Monday next.

' 21 July. The earl of Stamford delivered in his Answer; which was read, and ordered to be heard at the bar on Friday next; and the commons were acquainted therewith by message.

' 25 July. A Message from the Commons to desire another day for hearing of the cause of the earl of Stamford's impeachment, because they cannot be ready this day.

' Eodem Die, A Message to the Commons, That they have appointed Monday next: and in regard it concerns his lordship so much, their lordships have appointed so short a day.

' 26 July, 1645. A Message from the Commons, to desire a further day, in regard their witnesses cannot be ready.

' 28 July, 1645. Ordered, That the earl of Stamford's business shall be heard the first Tuesday after Michaelmas.

' 30 Septemb. The cause of the earl of Stamford, upon the impeachment of the House of Commons, was heard, a committee of the Commons managing the evidence against him.

' 21 Decemb. 1680. Edward Seymour, esq. was impeached of high crimes, &c. the Articles were brought up against him; he had the Articles read to him, and ordered to answer.

' 23 Decemb. He delivered in his Answer.

' 3 January. Mr. Seymour petitions for a speedy trial.

' Whereupon a Message was sent to the House of Commons, that the House, finding no issue joined by replication from the House of Commons, thought fit to give them notice thereof.

' 8 January. Ordered, That Saturday the fifteenth is appointed for the trial of Mr. Seymour.'

Upon consideration of the precedents above-mentioned: It is ordered, That the Lords Committees appointed to consider of the manner of proceedings on impeachments do meet on Monday next, to draw an Answer to be sent to the Commons, to their Message received the 5th instant.

June 9. The earl of Stamford reported from the Lord Committees appointed to consider of the manner of proceedings on impeachment, what was drawn by them, to be sent to the Commons, in answer to their Message of the 5th instant; which was read, amended, and agreed to, as follows:

A Message was sent to the Commons by sir Richard Holford and Mr. Gery, to acquaint them, " That in Answer to the Message of the

House of Commons, of the 4th instant, the Lords say, by their message sent on the 3rd, wherein they declare themselves ready to proceed to the trial of any of the impeached lords whom the Commons should be first ready to begin with, they have given a full proof of their willingness to comply with the Commons in any thing which may appear reasonable, in order to the speedy determining of the impeachments now depending: and therefore, as the Lords conceive the Commons had no occasion to begin any disputes on that head, so their lordships are careful to decline entering into a controversy, which seem to them to be of no use at present.

" The Lords think themselves obliged to assert their undoubted right to appoint a day for the trial of any impeachment depending before them, if they see good cause for it, without any previous signification from the Commons of their being ready to proceed; which right is warranted by many precedents, as well as consonant to justice and reason; and their lordships, according to the example of their ancestors, will always use that right with a regard to the equal and impartial administration of justice, and with a due care to prevent unreasonable delays.

" This being the case, the Lords cannot but wonder, that the Commons, without any foundation for it, should make use of expressions which, as their lordships conceive, have never been used before by one House of Parliament to another, and which, if the like were returned, must necessarily destroy all good correspondence between the two Houses.

" The last part of the Commons' message being in effect a repetition only of their former, of the 31st of May, to which the Lords have already returned a full answer, their lordships think it not requisite to say more, than that they cannot apprehend with what colour their calling upon the House of Commons to send up articles against two lords, whom the Commons have so long since impeached in general terms, can be said to tend to the delay of justice: and therefore, as the Lords think the Commons ought to have forbore that reflection, so their lordships, in saying no more upon the occasion of this message of the Commons, think they have given a convincing proof of their moderation, and of their sincere desire of preserving a good correspondence between the two Houses, which is so necessary for the public security, as well as doing right upon the impeachments."

The earl of Stamford also reported from the Lords Committees appointed to consider of the manner of proceedings on impeachments, what precedents they have found in pursuance of the order of the 7th inst.; which are as follow; viz.

' 21 May, 1614. A Message from the Commons, to desire a conference upon the point of impositions.

' 24 May. The question being proposed, Whether this House shall meet with the lower

‘ House, and give them bearing, touching the point of impositions? The greater number of the Lords answered, Not Content.

‘ 26 May. A Message to the Commons, That the Lords are, and always will be, ready and willing to hold loving and mutual correspondence with them; but their lordships having entered into a grave and serious consideration, as well of the matter itself, as of divers incident and necessary circumstances, do not think it convenient to enter into any conference of this cause, concerning the point of impositions, at this time.

‘ 1 Feb. 1666. A Message from the Commons, to desire a conference touching the manner of proceedings upon the impeachment against the lord viscount Mordaunt.

‘ The Lords answer, That they will send answer by messengers of their own.

‘ Then a committee was appointed to consider, whether ever the Commons desired any conferences concerning the manner of proceedings upon judicature before their lordships?

‘ 4 Feb. 1666. After report of the conference so had, the Lords resolved to let the Commons know at a conference, That they are resolved, that their former answer given them the 28th of January, and confirmed the 31st of the same month, shall stand.

‘ 31 Jan. Which answer was, That they judge it a right inherent in every court, to order and direct such circumstances and matters of form, that can have no influence to the prejudice of justice, in such way as they shall judge fit, where the same are not settled otherwise by any positive rule.

‘ 4 Feb. P. M. A conference was accordingly had at the desire of the Lords.

‘ 5 Feb. A Message from the Commons to desire a free conference upon the subject-matter of the last conference.

‘ The answer returned was, That the Lords have already stated the manner of proceedings in the impeachment of the lord Mordaunt, and have declared it in their last conference; and in that conference gave the House of Commons notice, that they were ready to proceed this morning in that business.

‘ They adhere to their former resolution, and are ready to proceed in the trial.

‘ 6 Feb. A Message from the Commons to desire a conference upon the last-mentioned answer.

‘ 7 Feb. The Lords gave the conference desired; whereat the Commons acquainted their lordships, That conferences and free conferences, when desired, are essential to the proceedings of parliament, the only means to preserve the good correspondence between the two Houses; and the denial thereof, destructive to the proceedings of parliament, and unprecedented.

‘ Eodem Die. A free conference was had at the desire of the Lords, concerning the subject-matter of the last conference; whereat the managers were to let the Commons know,

‘ that their lordships desire not this conference in reference to the free conference lately desired by them, but in relation to the assertion of the Commons in their last conference, which their lordships can no way allow; and therefore commanded the Lords that are to manage this free conference, as to justify the proceedings of their lordships, so to make it appear to the Commons, that what they have done is neither destructive to the proceedings of parliament, nor unprecedented.

‘ 27 May, 1694. The Lords did not agree to a conference desired by the Commons on the 21st, because it was desired upon the answer sent by the Lords of the 17th instant, wherein the whole matter concerns the judicature of the Lords, on which they can admit no debate, nor grant any conference: but the Lords agree to a conference desired concerning the privileges of the Commons, always provided nothing be offered thereat that may concern their lordships’ judicature.

‘ 6 May, 1679. A Message to the Commons, to acquaint them, that the Lords have appointed to try the Five Lords on the 13th instant.

‘ 8 May, P. M. A Message from the Commons, to desire a conference concerning the matter of their lordships’ message concerning the trial of the Lords in the Tower; and a conference was had thereupon.

‘ At the conference, the Commons proposed to have a committee of both Houses nominated, to consider the proper ways of proceedings upon impeachment; and upon the question, it was carried, ‘Not to agree with the Commons in this proposal.’

‘ 9 May. A Message to the Commons for a free conference of the subject-matter of the last conference, which was had; and at the conference the Lords told the Commons, that they did not agree to the nominating a Committee of both Houses, because they do not think it conformable to the rules and orders of proceedings of this court, which is, and must be, tender in matters relating to judicature.

‘ 10 May. A Message from the Commons for a conference, &c. which was had; and the Commons told the Lords, That things standing thus, they cannot proceed to the trials of the lords, before the method of proceedings be adjusted between the two Houses.

‘ 11 May. A Message to the Commons for a conference, &c. which was had; and the Lords also asked the Commons, What were the methods of proceedings they would confer about? The Commons answer, They had no directions from their House concerning the same.

‘ Message from the Commons for a free conference, which was had; and upon the report of it, the Lords appointed a Committee to meet with a Committee of the House of Commons, to consider of propositions and circumstances, in reference to the trials of the five lords in the Tower: and a

Message sent to the Commons to let them know it.

12 May. A Report from the Committee of both Houses, That (*inter alia*) the Commons propose a longer day for the trial of the lords; whereupon the Lords ordered their trials to be put off till further order.

16 May. The Lords appointed a day for the trial of the five lords.

19 May. The Commons tell the Lords, that when the methods of proceedings are adjusted, their House will be ready to proceed upon the trial of the earl of Danby, against whom they already demanded judgment, and afterwards to the trial of the five lords; and proposed several difficulties, in respect of the bishops being present at the trial of the earl of Danby. They say further, That the Lords seem to lay the stop at the Commons' door, by naming a day; which they conceive ought not to have been appointed before the methods be considered; that the Lords may as well make the judges part of their court, as the bishops, in this point. The Commons will give no disturbance to the ancient judicature, and they conceive they have a right to know before what court they shall appear.

20 May. Upon debate of the Report from the Committee of both Houses, the Lords appointed a day for the trial of the five lords.

22 May. The Lords sent a Message to the House of Commons to acquaint them, that the Lords have appointed a day for the trial of the five lords.

Then it being moved to have a Conference with the Commons, to let them know, that the Lords do not agree to a Committee of both Houses, in relation to the trials of the impeached lords, and debate thereupon: The question was put, Whether a Committee of this House shall be appointed to meet with a Committee of the House of Commons, in relation to the proceedings upon the impeachments? It was resolved in the negative.

Ordered, That the Lords Committees appointed to consider of the manner of proceedings on impeachments, do meet to-morrow at ten of the clock in the forenoon, and draw Reasons to be given at a Conference with the House of Commons, Why their lordships cannot agree, that a committee of both Houses be nominated to consider of the methods of proceedings on impeachments?

Ordered, That Friday the 13th day of this instant June, is hereby appointed for the Trial of John lord Sommers, in Westminster-hall, upon the Articles brought up against him by the House of Commons, whereby he stands charged with several high crimes and misdemeanors.

A Message was sent to the House of Commons by sir Richard Holford and Mr. Gery, to let the Commons know, That the Lords have appointed Friday next for the trial of John lord Sommers, upon the impeachment against him.

June 10.

The earl of Stamford reported from the Lords Committees (appointed to consider of the manner of Proceedings on Impeachments) the reasons drawn by them, to be given to the House of Commons, at a conference upon the subject-matter of the last conference: Which Report was read, and agreed to, as follows; viz.

"The Lords have desired this conference, upon occasion of the last conference, in order to preserve a good correspondence with the House of Commons, which they shall always endeavour. As to the late messages between the two Houses, their lordships are well assured, that on their part, nothing has passed, but what was agreeable to the methods of parliament, and proper to preserve that good understanding between both Houses, which is necessary for the carrying on of the public business.

"As to the proposal of the Commons, That a Committee of both Houses should be appointed, to consider of the ways and methods of proceeding on impeachments, their lordships cannot agree to it:

1. Because they do not find that ever such a Committee was appointed, on occasion of impeachments for misdemeanors; and their lordships think themselves obliged to be extremely cautious in admitting any thing new, in matters relating to judicature.

2. "That although a Committee of this nature was agreed to, upon the impeachments of the earl of Danby, and the five Popish lords, for high-treason, yet it was upon occasion of several considerable questions and difficulties which did then arise; and their lordships do not find, that the success in that instance was such as should encourage the pursuing the same methods again, though in the like case; the Lords observing, that after much time spent at that Committee, the disputes were so far from being there adjusted, that they occasioned the abrupt conclusion of a session of parliament.

3. "Their lordships are of opinion, that the methods of proceedings on impeachments for misdemeanors, are so well settled by the usage of parliament, that they do not foresee any difficulties likely to happen, at least none have been yet stated to them: and all the preliminaries in the case of Stephen Goudet, and others (which was the last instance of impeachments for misdemeanors), were easily settled and agreed to, without any such committee.

4. "The Lords cannot but observe, that this proposal of the Commons comes so very late, that their lordships can expect no other fruit of such a Committee, but the preventing of the trials during this session.

"The Lords assure the Commons, that in case any difficulties shall arise in the progress of these trials (which their lordships do not foresee), they will be ready to comply with the Commons in removing them, as far as justice and the usage of parliament will admit."

A Message was sent to the Commons by sir Richard Holford and Mr. Gery, to desire a present conference in the Painted Chamber, upon the subject-matter of the last conference.

A Message was brought from the House of Commons by Mr. Harcourt, and others, to acquaint this House, "That the Commons, in hopes of avoiding all interruptions and delays in proceeding against the impeached lords, and the many inconveniencies which might arise thereby, having proposed to your lordships, at a conference, that a Committee of both Houses might be nominated, to consider of the most proper ways and methods of proceedings on impeachments, think they might have justly expected your lordships' compliance with their said proposition, instead of your lordships' answer to their Message of the 4th instant, which they yesterday received: in which answer of your lordships, though many matters of great exception are contained, a suitable reply whereunto would inevitably destroy all good correspondence between the two Houses; yet the Commons, from an earnest desire inviolably to preserve the same, as well as give the most convincing proof of their moderation, and to shew their readiness to bring the impeached lords to speedy justice, at present insist only on their propositions, for a Committee of both Houses to settle and adjust the necessary preliminaries to the trials; particularly, whether the impeached lords shall appear on their trials at your lordships' bar as criminals? Whether, being under accusations of the same crimes, they are to sit as judges on each other's trial for those crimes; or can vote in their own cases, as we find, from your lordships' journals since their being impeached, they have been admitted so to do? Which matters, and some others, being necessary to be adjusted, the Commons cannot but insist on a Committee of both Houses to be appointed for that purpose; their departing from which would be giving up the rights of the Commons of England, known by unquestionable precedents, and the usages of parliaments, and making all impeachments, the greatest bulwark of the laws and liberties of England, impracticable for the future."

Ordered, That the Message received this day from the Commons, shall be considered to-morrow at twelve a-clock.

The messengers sent to the House of Commons return answer, That the Commons will give a conference as desired.

Then the Commons being come to the conference, the managers names of the last conference were read, and the House adjourned during pleasure, and the Lords went to the conference; which being ended, the House was resumed, and the lord steward reported, that the Lords had been at the conference, and delivered their reasons as ordered.

June 11.

The Message received yesterday from the Commons was read; and after debate of the

several particulars contained in it, this question was proposed: That no lord of parliament impeached of high crimes and misdemeanors, and coming to his trial, shall, upon his trial, be without the bar?

Then the previous question was put, Whether this question shall be now put? It was resolved in the affirmative. Then the main question was put, That no lord of parliament, impeached of high crimes and misdemeanors, and coming to his trial, shall, upon his trial, be without the bar; It was resolved in the affirmative, *nem. con.*

'Resolved, by the Lords spiritual and temporal in parliament assembled, *nem. con.*
'That no lord of parliament, impeached of high crimes and misdemeanors, and coming to his trial, shall, upon his trial, be without the bar.'

Then after further debate, this question was proposed, That no lord of parliament, impeached of high crimes and misdemeanors, can be precluded from voting, on any occasion, except in his own trial? Then the previous question was put, Whether this question shall be now put? It was resolved in the affirmative. Then the main question was put, That no lord of parliament, impeached of high crimes and misdemeanors, can be precluded from voting, on any occasion, except in his own trial? It was resolved in the affirmative.

'Resolved by the Lords spiritual and temporal in parliament assembled, that no lord of parliament, impeached of high crimes and misdemeanors, can be precluded from voting, on any occasion, except in his own trial.'

Ordered, That the Committee appointed to consider of the method of proceedings on impeachments, do meet to-morrow at 10 o'clock in the forenoon, and do draw an Answer to the Message received yesterday from the Commons upon the Resolutions of the House this day; and that the Committee do assert in their Answer, That by the Journals of this House, it doth not appear the lords impeached have voted, as is inserted in the Commons' Message.

A Message was brought from the Commons, by Mr. Harcourt and others, to acquaint this House, "That the Commons on Monday last received a Message from your lordships, that your lordships had appointed the trial of John lord Sommers upon Friday next, upon their impeachment against him: in which they observe, your lordships have not nominated any place for his trial, though your lordships thought fit to make that matter, on the last impeachment for misdemeanors, the subject of a long debate.

"And they cannot but take notice, that your lordships have taken as long a time to give your answer to the common desire of a Committee of both Houses delivered at a conference on Friday last, as you are pleased to allow the Commons to have of a day appointed by your lordships for the said trial.

"Your lordships appointing so short a day, especially whilst the proposition made to your

lordships for a Committee of both Houses was undetermined, the Commons take to be such a hardship to them, and such an indulgence to the person accused, as is not to be paralleled in any parliamentary proceeding.

“The Commons must likewise acquaint your lordships, that their experience of the interruption of a former trial on an impeachment for misdemeanor, for want of settling the preliminaries between the two Houses, obliges them to insist on a Committee of both Houses, for preventing the like interruption.

“And they conceive, it would be very posterous for them to enter upon the trials of any of those lords, till your lordships discover some inclination to make the proceeding thereupon practicable; and therefore they think they have reason to insist upon another day to be appointed for the trial of the lord Sommers. And the Commons doubt not but to satisfy your lordships, at a free conference, of the necessity of having a Committee of both Houses, before they can proceed upon the said trial.”

Ordered, That the debate which hath arose upon the Commons' Message received this day, be adjourned to to-morrow 11 o'clock, and no other business to intervene; and all the Lords summoned to attend.

June 12.

The earl of Stamford reported from the Lords Committees appointed to consider of the manner of proceedings on impeachments, what was drawn by them in Answer to a Message from the House of Commons of the 10th instant; which was read and agreed unto as follows:

A Message was sent to the House of Commons by Dr. Newton and Mr. Gery, to acquaint them, “That in Answer to the Message from the Commons of the 10th instant, the Lords say, That although they take it to be unparliamentary in many particulars, yet to shew their real desire of avoiding disputes, and removing all pretence of delaying the trials of the impeached lords, they will only take notice of that part of their Message, wherein the Commons propose some things as difficulties, in respect of the trials; which matters relating wholly to their judicature, and to their rights and privileges as peers, they think fit to acquaint the Commons with the following Resolutions of the House of Lords:

“1. That no lord of parliament, impeached of high crimes and misdemeanors, and coming to his trial, shall, upon his trial, be without the bar.

“2. That no lord of parliament, impeached of high crimes and misdemeanors, can be precluded from voting on any occasion, except in his own trial.”

“Their lordships further take notice of a mistake in point of fact alledged in the Message of the Commons; it no way appearing upon their Journals, that the lords impeached have voted in their case.

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“The Lords being well assured, that all the steps that have been taken by them, in relation to these impeachments, are warranted by the practice of their ancestors, and the usage of parliament, have reason to expect the trials should proceed without delay.”

A Message was brought from the Commons by Mr. Granvill and others, to desire a free conference with this House, upon the subject-matter of the last conference. The Commons were called in, and told, That the Lords will return an Answer by messengers of their own.

Ordered, That John lord Sommers shall be tried in Westminster-hall, upon the Articles of Impeachment against him, on Tuesday the 17th day of this instant June, at 10 o'clock in the forenoon.

Ordered, That the Committee appointed to consider of the manner of proceeding upon impeachments, do meet presently, and draw an Answer to the Message received yesterday from the Commons.

The earl of Stamford reported from the Lords Committees, appointed to consider of the manner of proceedings on impeachments, what is drawn by them to be sent to the Commons, in Answer to their Message of the 11th instant; which was read and agreed to, as follows:

A Message was sent to the Commons by Dr. Newton and Mr. Gery, to acquaint them, “That in Answer to the Message of the Commons yesterday, the Lords say, That they cannot give a greater evidence of their sincere and hearty desires of avoiding all differences with the House of Commons, and proceeding on the trials of the impeachments, than by not taking notice of the several just exceptions to which that Message is liable, both as to the matter and expressions.

“The Lords have nothing further from their thoughts, than the going about to do any thing which might have the least appearance of hardship in relation to the Commons.

“But the Answer of the lord Sommers to the Articles exhibited against him, having been sent down to the Commons on the 24th of May last; and they having by their Message of the 31st of May, signified to their lordships their intention of beginning with the trial of his impeachment in the first place:

“The Lords considering how far the session is advanced, thought it reasonable to appoint the 30th instant for the said trials; their lordships finding several precedents of appointing trials on impeachments within a shorter time.

“The Lords also think it incumbent upon them to endeavour to dispatch the trials of all the impeached lords before the rising of the parliament. This is what justice requires, and cannot be looked upon as a matter of indulgence. Nevertheless, that the Commons may see how desirous their lordships are to comply with them in any thing which may be consistent with justice, they have appointed the trial of impeachment against John lord Sommers,

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on Tuesday the 17th day of this instant June, at 10 o'clock in the forenoon in the House of Lords, which will be then sitting in Westminster-hall."

A Message was sent to the Commons by Dr. Newton and Mr. Gery, to acquaint them, That the Lords agree to a free conference, as desired, and appoint the same to be to-morrow at one o'clock in the Painted Chamber.

June 13.

A Message was brought from the Commons by Mr. St. John and others, to acquaint this House, "That the House of Commons find great reasons to insist upon their proposal of a committee of both Houses, from the two Messages received yesterday from your lordships; for their ambiguity and uncertainty do shew the methods of former parliaments to be the most proper way for dispatch of business.

"The Commons have been obliged to employ that time in considering and answering your lordships' Messages, which otherwise would have been spent in preparing for the lord Sommers's trial; so that the delay must be charged where the occasion ariseth. And the Commons having desired a committee of both Houses, to adjust the preliminaries of the trials, cannot but think it strange your lordships should come to resolutions upon two of those points, while the proposal of the House of Commons is under debate at conferences between the two Houses; the Commons having other difficulties to propose, which concern them as prosecutors, and all future impeachments.

"And though the Commons leave the subject of your lordships' resolutions, with other things, to be debated at a committee of both Houses; yet they cannot but observe, that your lordships' second resolution is no direct answer to the Commons' proposal, which was, Whether peers impeached of the same crimes, shall vote for each other upon their trial for the same crimes? And the Commons cannot believe that any such rule can be laid down in plain words where there is a due regard to justice.

"And as to what your lordships observe, That there is a mistake in point of fact alleged by the Commons, this House may take notice of the caution used by your lordships, in wording that part of your Message; for they know your lordships are too well acquainted with the truth of the fact, to affirm, that the impeached lords did not vote in their own cases: And though the appearing or not appearing upon your lordships' Journal, does not make it more or less agreeable to the rules of justice; yet the Commons cannot but add this further observation from your lordships' Journal, That the impeached lords presence is not only recorded when those votes passed, but they also find some of them appointed of committees for preparing and drawing up the Messages and Answers to the House of Commons; which they

do not think has been the best expedient for preserving a good correspondence between the two Houses, or adjusting what will be necessary upon these trials: and therefore the Commons cannot think it agreeable to the rules of parliament for them to appear at a trial, till all necessary preliminaries are first settled with your lordships."

The Commons being come to the free conference, the managers names were read; then the House was adjourned during pleasure, and the Lords went to a free conference: which being ended, the House was resumed, and the Lord Steward reported, "That the Lords had attended the free conference, as commanded; and that Mr. Harcourt opened the free conference, and argued against the reasons given by this House, Why they could not agree to a committee of both Houses; and that the lord Haversham, in answer to some part of the arguments of Mr. Harcourt and sir Bartholomew Shower, used some expressions, at which the Commons taking exceptions, abruptly broke up the conference."

After debate thereupon, a Message was sent to the Commons by Dr. Newton and Mr. Gery, to acquaint them, That the Lords having been informed by their managers, that some interruption happened at the free conference, which their lordships are concerned at, because they wish that nothing should interrupt the public affairs, do desire the Commons would come again presently to the said free conference, which they do not doubt will prove the best expedient to prevent the inconvenience of a misunderstanding upon what has passed.

The messengers sent to the Commons return Answer, that they have delivered their Message to the Commons, as ordered; and that the Commons say, they will return answer by messengers of their own.

A Message was brought from the Commons by sir Christopher Musgrave and others, to acquaint this House,

"That the Commons desiring to keep up a good correspondence with your lordships, do think it necessary to acquaint your lordships with what has happened at the free conference.

"One thing there is, though I cannot speak to it, because I am bound up by the orders of the House; yet it must have some answer: That is, as to the Lords voting in their own case, it requires an Answer, though I cannot go into the debate of it. The Commons themselves have made this precedent; for in these impeachments they have allowed men guilty of the same crimes to vote in their own House; and therefore we have not made any distinction in our House, that some should vote, and some not. The Lords have so high an opinion of the justice of the House of Commons, that they hope justice shall never be made use of as a mask for any design: And therefore give me leave to say, (though I am not to argue it) it is a plain demonstration, that

‘ the Commons think these lords innocent :
 ‘ And I think the proposition is undeniable ;
 ‘ for there are several lords in the same crimes,
 ‘ in the same facts, there is no distinction ; and
 ‘ the Commons leave some of these men at the
 ‘ head of affairs, near the king’s person, to do
 ‘ any mischief, if their persons were inclined to
 ‘ it, and impeach others, when they are both
 ‘ alike guilty, and concerned in the same facts.
 ‘ This was a thing I was in hopes I should
 ‘ never have heard asserted, when the beginning
 ‘ of it was from the House of Commons.’

“ These were the Words spoken by John lord Haversham ; and the Commons have ordered me to communicate this Resolution to your lordships.

Resolved, That John lord Haversham be charged before the Lords, for the Words spoken by the said lord this day at the free conference ; and that the Lords be desired to proceed in justice against the said lord Haversham, and to inflict such punishment upon the said lord, as so high an offence against the House of Commons doth deserve.’ ”

Ordered, That the Lords, who were at the free conference, do meet presently at a committee, and draw up what was offered at the free conference, and report to the House to-morrow at eleven o’clock.

June 14.

A Message was brought from the Commons by Mr. Bruges and others, with the Articles of Impeachment against Charles lord Halifax, and to acquaint this House, That the matter of the charge was contained in the Articles ; and also, that he was commanded to pray and demand, That Charles lord Halifax, do give sufficient security to abide the judgment of the House of Lords.

The Articles were read by the clerk, as follow :

ARTICLES exhibited by the Knights, Citizens, and Burgesses, in parliament assembled, in maintenance of their Impeachment against CHARLES lord HALIFAX of High Crimes and Misdemeanors.

Whereas several persons contrary to their duty and allegiance to his majesty and his late royal consort of ever-blessed memory, traitorously adhering to their majesties enemies, did levy and maintain, within their majesties realm of Ireland, a desperate and bloody war and rebellion against their majesties ; and were, by his majesty’s conduct and courage, at the great expence of his English subjects, reduced to their due obedience to the crown of England ; —And whereas, upon the 4th day of April 1690, it was resolved, by the Commons of England in parliament assembled, that a bill should be brought in to attain all persons guilty of rebellion in Ireland, or elsewhere, against their majesties king William and queen Mary, and to enact and declare their estates to

be forfeited, and to be sold for the reducing of that kingdom : and whereas his majesty, in his gracious speech to both houses of parliament, did, upon the 5th of January, 1690, assure them, That he would not make any grant of the forfeited lands in Ireland, till there should be another opportunity of settling that matter in parliament, in such manner as should be thought most expedient : and whereas the Commons of England, in parliament assembled, by their humble Address to his majesty, upon the 4th of March 1692, did humbly beseech his majesty, that, according to the assurance his majesty had been pleased to give them, no grant might be made of the forfeited estates in Ireland, till there should be an opportunity of settling that matter in parliament, in such manner as should be thought most expedient ; to which his majesty was pleased to give a most gracious answer ; whereby, and by many other occasions of the Commons in the following sessions of parliaments, it appears that what has since been declared by act of parliament, was the continued sense of the Commons of England, that it was highly reasonable, that the forfeited estates of rebels and traitors in Ireland should be applied in ease of his majesty’s faithful subjects of the kingdom of England : —And whereas it was the apparent duty of every officer or minister of state, to have had so much regard to the Resolutions and Address of the House of Commons, to the public good, and his majesty’s honour, as to have dissuaded and prevented, as much as in them lay, the procuring or passing any grant or grants of the said forfeited estates in Ireland ; yet Charles, now lord Halifax, then the honourable Charles Montagu, esq. being a member of the honourable House of Commons, one of the lords of the Treasury, chancellor of the Exchequer, and one of his majesty’s most honourable privy council, hath, since the aforesaid 4th of March 1692, presumed to advise, pass, or direct the passing, a grant to Thomas Raiton, esquire, in trust for himself, of several debts, interest, sum and sums of money, amounting in the whole to the sum of 13,000*l.* or thereabouts, due, owing, and which ought to have accrued to his majesty, by reason of the attainders, outlawries, or other forfeitures of the respective persons for whom the same were entered on record, whereby he hath much contributed to the contracting great debts upon the nation, the laying heavy taxes upon the people, hath highly reflected on his majesty’s honour, and failed in the performance of his trust and duty.

II. Whereas, by an act of parliament, made in the 11th and 12th years of his majesty’s reign, intituled, “ An Act for granting an aid to his majesty, by sale of the forfeited and other estates and interests in Ireland, and by a land tax in England, for the several purposes therein mentioned ;” it is, amongst other things, enacted, That all and every person or persons whatsoever, who had, by virtue of any grant or disposition from his majesty, or from hi

majesty and the late queen, received, for his or their own use or benefit, any debt or debts, or sum or sums whatsoever, due from any debt or debts of any forfeiting person, mentioned or described in the said act, or from any person or persons subject or liable to the payment of any sum or sums of money whatsoever to any of the said forfeiting persons, should be, and they are hereby declared to be respectively liable, and are required to repay every such debt or debts, sum or sums of money whatsoever, so by him, her, or them, respectively received, into the receipt of his majesty's Exchequer in Ireland, on or before the 24th of August, 1700; and whereas the said Charles lord Halifax had before the making of the aforesaid act, procured for Thomas Raiton, esq in trust for himself, a grant of several debts, by judgments and otherwise, to several of the said forfeiting persons, amounting to the sum of 13,000*l.* or thereabouts, forfeited to his majesty, by the attainder, outlawries, or other forfeitures, of the respective persons to whom such debts were originally due; and, by virtue of the said grant, the said lord Halifax actually received to his own use the sum of 1,000*l.* part of the before-mentioned sum of 13,000*l.* which said sum of 1,000*l.* he the said Charles lord Halifax ought to have repaid, before the said 24th of Aug. 1700, into the receipt of his majesty's Exchequer in Ireland, as by the said act he was required to have done; yet the said Charles lord Halifax did not repay the said sum of 1,000*l.* as by the said act he was required to do; but has hitherto, in contempt of the act, refused or neglected to repay the same; which neglect or refusal of him the said Charles lord Halifax, to repay the said sum of 1,000*l.* is a manifest wrong to his majesty and the public, and a misapplication of that sum to other uses and purposes than by the act it is appropriated and ought to have been applied.

III. That the said Charles lord Halifax being a member of the honourable House of Commons, one of the commissioners for executing the office of lord treasurer of England, chancellor of the Exchequer, and one of his majesty's most honourable privy council, not contented with the many employments and places of honour bestowed upon him by his majesty, nor with the large and excessive gains by him made by the incomes and profits arising from such offices and preferments; did, (in opposition to what he well knew to be the true interest of England, and contrary to his oath as a privy counsellor, and his duty as a public minister, at a time when the nation was engaged in a tedious and expensive war against France for preserving the balance and liberties of Europe, and under such heavy debts as, without laying unsupportable taxes on the people, were impossible to be satisfied) advise, procure, and assent, not only to the passing of divers grants to others in England and Ireland, but did obtain and accept of several beneficial ones to or in trust for himself; which said

practices of him the said lord Halifax were a most notorious abuse of his majesty's goodness, a great breach of his trust, and a very high vexation and oppression of his majesty's other subjects.

IV. Whereas, by the common law and by many statutes and ordinances of this realm, it appears to have been the great care of our ancestors, that the king's forests should be preserved, and in particular the timber therein growing, for the building and repairing the navy royal, which has ever been accounted (as it undoubtedly is) the great security of this realm; and whereas Charles lord Halifax was, in the year of our Lord 1697, one of the commissioners of the Treasury, chancellor of the Exchequer, and one of his majesty's privy council; and obliged, as well by repeated oaths, as by the duty he owed to his majesty and his country, to have advised, consulted, and promoted, such matters and things, as should or at least were most likely to redound to his majesty's honour, and the nation's safety; yet the said Charles lord Halifax not regarding the laws and ordinances of this realm, nor his said duty to his majesty and the public, but pursuing his private interest, did, by letters of privy seal, bearing date on or about the 6th of May, which was in the year of our Lord 1697, (the kingdom being then engaged in an expensive war, and the debts of the nation requiring the best and most frugal management) procure from his majesty a grant to Henry Segar, gentleman, in trust for himself, of the sum of 14,000*l.* of so much scrubbed beech, birch, holly, hazle, thorns, and orle, as should by sale raise the said sum of 14,000*l.* to be fallen in his majesty's forest of Dean, in the county of Gloucester, within the space of seven years time, from the 25th of December, 1697: under colour of which grant, beech of a much greater value, great number of sapling oaks, which might and would have been serviceable to the realm, and also many tons of well-grown timber, fit for the present use of the navy, have been cut and fallen, and sold and disposed of for the benefit of the said lord Halifax.

V. Whereas there is not any thing, that so much conduceth to his majesty's and the nation's honour and safety, as the due ordering and management of the king's treasure and the public revenues; for the receiving and issuing forth of which, the wisdom and policy of this nation has provided and appointed several and distinct officers, with beneficial salaries, in order that they may be a check to each other, and that no loss may accrue to his majesty or the public, by the corruption, unskillfulness, or negligence of any particular officer; yet he the said Charles lord Halifax being one of the lords of the Treasury, when, by the death of the hon. sir Robert Howard, the office of the auditor of the receipts and writer of the tallies became vacant, not regarding the ancient constitution and approved methods in ordering his majesty's Treasury and the public revenues,

did grant, or procure to be granted, to Christopher Montagu, esquire, the brother of him the said Charles lord Halifax, and then one of the commissioners of the excise, the said place and office of auditor of the receipts and writer of the tallies; which said grant was so made and procured by the said lord Halifax in trust, as to the profits thereof, for himself, so that, from and after the passing of the said grant, he the said lord Halifax was in effect at the same time one of the commissioners of the Treasury, chancellor of the Exchequer, and auditor of the receipts, and writer of the tallies, and enjoyed the profits of the said several offices, which, by the constitution of the Treasury, are manifestly inconsistent, and never were or ought to be trusted in the same person; the making and procuring of which said grant, by him the said Charles lord Halifax as aforesaid, was a manifest violation of the established course and constitution of the Exchequer, a breach of his trust, of evil example, and tended very much to the great loss and prejudice of his majesty and the public, by opening a way to all manner of corrupt practices in the future management of the revenues.

VI. Whereas a treaty and alliance, between Leopold the emperor of Germany and the States General of the United Provinces, was made and concluded, in the year of our Lord 1689, upon the consideration of the greatness of the common danger which then threatened all Christendom, from the excessive power of France, and the unconstant faith of the French in the observance of treaties; whereby it was agreed, that there should be and remain for ever a constant, perpetual, and inviolable friendship and good correspondence between his imperial majesty and the States General; that each of them should be obliged to promote the other's interest, and, as much as in them lay, prevent all damages and inconveniences to each other.—And whereas certain separate articles were also at or about that time made, and annexed to the aforesaid treaty, whereby the States General, maturely considering that France had openly declared in several courts that, (notwithstanding the most solemn renunciation) they continued their pretension, by force of arms, to assert for the dauphin the succession of the Spanish monarchy, in case the king of Spain should die without issue; and also considering what a blow their state would receive, and what prejudice might happen thereby to the public affairs and quiet; did promise, that, in case his said Catholic majesty should die without issue, they would, with all their force, assist his said imperial majesty, or his heirs, in taking the succession of the Spanish monarchy, lawfully belonging to that house, together with its kingdoms, dominions, and rights, and in their obtaining and securing the quiet possession thereof, against the French and their adherents, who should directly or indirectly oppose that succession, and with force repel the force which should be brought against

them.—That, at the instance of the States General, in pursuance of the said treaty and separate articles, our most gracious lord and sovereign his most excellent majesty king William 3, was invited to enter into the alliance of the aforesaid treaty, and into the agreement of the said separate articles; and thereupon, for restoring and preserving the public peace and quiet, did afterwards, in the said year of our Lord 1689, enter into, and, under the great seal of England, accept, approve, and ratify, and in the most solemn manner engage and promise religiously and inviolably to observe the same, without violating the said treaty, or separate articles in any article, or suffering the same, to the utmost of his power, to be violated.—That, in 1698, a treaty was projected, and contrived in France to be set on foot, between his majesty, the French king, and the States General, for a partition of the Spanish monarchy; whereby many large territories thereunto belonging, in case of the decease of the king of Spain without issue, were to be allotted and delivered up to France.—The tenor and design of which last mentioned treaty, whilst the same was in negotiation, was communicated to the said Charles lord Halifax, then one of the commissioners for executing the office of lord treasurer, chancellor of the Exchequer, and one of his majesty's most hon. privy council; That the said Charles lord Halifax well knowing the most apparent and evil consequences, as well as the injustice of the said partition, did not according to the trust and duty of his said several offices, dissuade or endeavour to obstruct its taking effect; but, on the contrary, having neither regard to his majesty's honour, engaged by the above-mentioned treaty with the emperor and the States General, to the trade and known interest of these kingdoms, or the peace of Europe, did advise his majesty to enter into the said treaty; and did so far encourage and promote the same, that the said treaty was concluded and ratified under the great seal of England; which said treaty was evidently destructive of the trade of this realm, a breach of the former treaty made with the emperor in 1689, dishonourable to his majesty, highly injurious to the interest of the Protestant religion, and manifestly tended to disturb the general peace of Europe, by altering the balance of power therein, and strengthening France against the good friends and ancient allies of our sovereign lord the king.

And the said knights, citizens, and burgeses, by protestation saving to themselves the liberty of exhibiting, at any time hereafter, any further Articles, or other Accusation or Impeachment, against the said lord Halifax, and also of replying to his Answers which he shall make unto the said Articles or any of them, and of offering proofs to all and every the aforesaid Articles, and to all and every other Articles, Impeachment, or Accusation, which shall be exhibited by them, as the case shall, according to the course of parliament,

require; do pray, that the said Charles lord Halifax may be put to answer the said crimes and misdemeanors; and that such proceedings, examinations, trials, and judgments, may be thereupon had and given, as is agreeable to law and justice."

June 16.

The lord Halifax delivered his Answer to the Articles of Impeachment of the House of Commons against him: viz.

The ANSWER of CHARLES lord HALIFAX to the Articles exhibited against him, by the Knights, Citizens, and Burgesses in Parliament assembled, in Maintenance of their Impeachment against the said Lord Halifax, for High Crimes and Misdemeanors supposed to be committed by him.

The said lord Halifax, saving to himself all advantages of exceptions to the said Articles, and of not being prejudiced by any words or want of form; and saving to himself all privileges and rights belonging to him as one of the peers of this realm; for answer to the said Articles humbly saith,

I. To the first Article; he saith, True it is, that several persons did levy and maintain a desperate and bloody war and rebellion in Ireland against their majesties, and were, by his majesty's courage and conduct, at the great expence of his English subjects, suppressed and reduced to their obedience, as in this Article is alleged: and he further answereth and saith, He believes it to be true, that on the 4th of April 1690, such vote or resolve was made by the then House of Commons for that purpose, and such assurance was given by his majesty, and such addresses were made by the House of Commons in the year 1690 and 1692, that no grants should be made of the forfeited lands in Ireland, till there should be another opportunity of settling that matter in parliament, in such manner as should be thought most expedient; and such answers were given thereunto as in this article is and are set forth, as by the said several votes, resolves, speeches, addresses, and answers, to which the said lord craves leave, for more certainty, to refer himself, may appear. That, in 1693, 1694, and 1695, the parliament of England did meet; and no act was passed touching the forfeited estates, though by other ways great sums were raised for the carrying on and defraying the charges of the war in those years; and his majesty did after, as rewards to several persons who had served him in Ireland and elsewhere, grant to them some of the forfeited estates in Ireland; and the grantees did enjoy the same. And the said lord Halifax further saith, That his majesty did never grant to him, or any in trust for him, or to his use, any of the said forfeited lands, but of his grace and favour; and,

as a reward for his faithful services (which his majesty was pleased to accept) did, by letters patents under the great seal of Ireland, bearing date on or about the 11th May 1697, grant to Thomas Railton, esq. in trust for the said lord Halifax (who was then one of the commissioners of the Treasury, chancellor of the Exchequer, and one of the members of the House of Commons, as in this Article is set forth), several debts, interests, sum or sums of money, amounting in the whole to the sum of 11,546*l.* 17*s.* 8*d.* or thereabouts: which grant, he conceives and is advised, his majesty might then lawfully make; and was lawful for him to accept, without breach of his duty or the trust reposed in him; and denies that he did ask for or procure the said grant; but confesseth he accepted the same as a mark of his majesty's grace and favour: and saith, the said grant hath since been taken away by act of parliament; and saith, that the said grant made to Thomas Railton is the same which is mentioned or intended by the said Article of Impeachment: and although the said debts therein mentioned to be granted did amount to 11,546*l.* 17*s.* 8*d.* and no more; yet the said grant itself, at the time of making thereof, or at any time afterwards, could not be valued at near the said sums, because a great part of the said debts were not recoverable; and he hath not made clear thereof, as yet, above 400*l.* and humbly hopes, the said grant hath very little, if at all, contributed to the contracting any debts upon the nation, or laying heavy taxes upon the people, or any ways reflected upon his majesty's honour, or that he hath failed in the performance of his trust or duty, as in the Article is suggested.

II. The second Article; the said lord Halifax saith, that he believes it to be true, that such act was made, and such clause therein, as in this Article is mentioned; and also in the said act there is a further clause, that the grantees from the king of any of the forfeited estates thereby resumed, should not be accountable for the rents, issues, and profits of the same, by them received before the 2nd of Nov. 1699; but might retain the same to their own uses. And the said lord Halifax doth acknowledge, that, after the making the said grant before mentioned to the said Thomas Railton, the agents of the said lord Halifax did receive some monies, not exceeding 1,000*l.* (as he is informed), out of the rents and profits of the forfeited estate of the earl of Clancarty, of which no more than the abovesaid sum did come clear to him the said lord Halifax; and no more, to his knowledge or belief, hath been received or recovered upon the aforesaid grant: that the said lord Halifax gave directions, after the said act passed, to his agents in Ireland, to do, in relation to the money received, as should be advised by counsel, there; by whom his agents were advised (as they informed the said lord, and which he believes to be true) that the said monies, being received out of the mean profits

which were remitted by that act, were not within the first mentioned clause in the said act; and therefore the said lord does believe and admit the same were not paid into the receipt of his majesty's Exchequer in Ireland, nor ought to have been paid into the Exchequer, as he humbly insists and is advised; and he doth deny that the non-payment of the said money into the said receipt is any wrong to his majesty or the public, or any misapplication; and in case the said money ought to have been paid into the said receipt, there are proper methods and remedies in the said act prescribed, to compel the payment of the same.

III. To the third Article; he saith, He was a member of the House of Commons, one of the commissioners of his majesty's Treasury, chancellor of the Exchequer, and privy councillor, as in the Article is set forth; and served his majesty faithfully, as he hopes and believes, in those stations; and was contented with the employments and places of honour bestowed upon him, and with the incomes and gains by him made by the just and lawful fees and profits of the same; and his majesty graciously accepted of such his services, and as a mark of his royal favour to him, did make for his benefit the grant in the answer to the precedent Article, and the grant in the answer to the subsequent Article mentioned; which were all the profitable grants he, or any in trust for him, ever had from his majesty: and the said lord Halifax says, He conceives, and is advised, that his accepting such grants were not any abuse of his majesty's goodness, nor breach of the trust reposed in him, nor were any of his majesty's subjects thereby oppressed; and denies that he ever did, in opposition to what he knew to be the true interest of England, or contrary to his oath or duty, at any time advise, procure, or assent to, the passing of any grant or grants to himself, or to any person in trust for him, or to any other person or persons whatsoever; but, saith, He, as one of the commissioners of the Treasury, in conjunction with the other commissioners, did sign several warrants and dockets for such grants as his majesty was pleased to direct to be passed by them, and which, he humbly conceives, and is advised, he was, by the duty of his place, obliged to do.

IV. To the fourth Article; he saith, He believes it to be true, that our ancestors did take great care to preserve the king's forests, and the timber therein growing for the building and repairing the navy royal; which, the said lord doth own, has ever been accounted (and as he believes very rightly) the great security of the realm; and saith, true it is, he was, in the year 1697, one of the commissioners of the Treasury, chancellor of the Exchequer, and one of his majesty's privy council, and did from time to time advise and promote such matters and things as were most likely to redound to his majesty's honour and the nation's safety; and denies that he at any time preferred his private interest to that of the public; but doth

confess and admit, that his majesty, by his letters of privy seal, dated the 6th of May 1697, did, out of his grace and favour designed to the said lord Halifax, grant unto Henry Seager, in the Article mentioned (and which was in trust for the said lord) the sum of 2,000*l.* per annum, to be raised by the fall of scrubbed beech, birch, holly, hazle, thorns, and orle, in the forest of Deane, in the county of Gloucester, for the space of seven years, from the 25th of Dec. 1697, as by the said letters of privy seal, to which the said lord for more certainty referreth himself, may appear; which grant was not, nor could be, prejudicial to any timber growing in the said forest; and believes no sapling oaks, or timber, or trees likely to be timber, were cut down by colour of the said grant; and if any abuse were in cutting wood, he conceives he is not answerable for the same, such cutting not having been by his directions, nor by any ways concerning himself therein; the setting out and cutting whereof did belong to his majesty's surveyor general, and other his majesty's officers; who (as the said lord hath been informed and believes) faithfully discharged their trust in the execution thereof, and took particular care to preserve the timber there.

V. To the fifth Article; the said lord Halifax answereth and saith, he believes it to be true, that the due ordering and management of the king's treasure and public revenues conduceth very much to the honour and safety of his majesty and the nation; and that there are several distinct officers, with salaries, for the better receiving and issuing forth of the same, and that are cheques upon each other, to prevent any loss to his majesty or the public. And the said lord saith, true it is, he was one of the commissioners of the Treasury, when, by the death of sir Robert Howard, his office of writer of the tallies and counter tallies, commonly called auditor of the receipt of Exchequer, became vacant; and thereupon the then commissioners of the Treasury did grant the said office to Christ. Montagu, then one of the commissioners of excise, and brother to the said lord, which, the said lord does own and admit, was done at his desire and request; but humbly insisteth, the same was not granted contrary to the ancient constitution or approved methods in ordering his majesty's Treasury or public revenue; and saith, he the said lord did procure the said office to be granted to his brother, intending, in a short time after, by his majesty's permission, when his majesty's affairs would permit thereof, to leave his the said lord's employments and places in the Treasury, and to obtain a surrender from his said brother of the said office, and procure a grant thereof to himself; which, he hopes and humbly insists, was lawful for him to do; and saith, his said brother duly executed the said office till after the said lord had left, or laid down, by his majesty's leave, his places in the Treasury; and then and not before, his said brother surrendered the said office, and the said lord obtained a grant of the

same, as he conceives was lawful for him to do. In all which proceedings, nothing was done by him the said lord, as he is advised, in violation of the established course and constitution of the Exchequer, or to the loss or prejudice of his majesty or the public; and saith, he does not know or believe, that the said several offices, as they were executed, were in their nature, inconsistent with one another; and is very sure his majesty or the public were no ways prejudiced by the execution of the same.

VI. To the sixth Article; the said lord Halifax saith, That he believes, that in the year of our Lord 1689, such treaty and alliance and separate article were made, between the emperor of Germany and the States General of the United Provinces (into which his majesty and the late queen entered), and such ratifications thereof were made, as in this Article is mentioned; and also saith, he hath heard, and believes, that, in the year of our Lord 1698, a treaty was made, to such effect as in this Article is mentioned; and saith, he never saw the said treaty, or heard the same read, or does as yet know the articles or agreement it contains; and denies that he ever advised his majesty to enter into or make the said treaty, or was ever consulted upon any clause or article thereof, or ever encouraged or promoted the same: and the said lord saith, That, as he remembers, Mr. secretary Vernon did at one time send for him, and discourse with him and others, upon an intimation that was given by a letter from the earl of Portland, as he remembers, "That the French king was disposed to commence a negotiation, upon some general terms that were then mentioned, to prevent a war, in case of the king of Spain's death, who was then reported to be very ill;" and afterwards the said matter was discoursed between the secretary, the then lord chancellor, and the said lord Halifax, at Tunbridge Wells, when and wherethe said lord Halifax made several objections to the same; and denies that he gave any opinion to encourage or promote the said treaty, or ever afterwards was informed of any one particular relating to it, or was ever consulted or advised upon any clause or article of it, or was ever after told or informed that the said negotiation or treaty did go on or proceed; and saith, that, not being advised with, or any ways knowing of the said treaty or negotiation (except as aforesaid), he could not dissuade or obstruct its taking effect; and saith, as he cannot tell what the effects of the treaty might have been, if the said treaty had been observed, so he conceives, and insisteth, that he is not, nor ought to be, answerable for the same.

And having thus laid his case before your lordships; he humbly saith, and insisteth upon it, that he is not guilty of all or any the matters by the said Articles charged, or in them specified, in manner and form as the same are therein and thereby charged against him.

HALIFAX.

June 14.

Ordered, That the Lords Committees (appointed to draw what was offered at the free conference) do inspect the Journals as to what hath happened upon any occasion, in relation to what passed at a free conference yesterday, and what hath been done thereupon, and report to the House.

A Message was sent to the Commons by sir John Hoskins and Dr. Newton, to acquaint them, "That upon the occasion of their last Message yesterday, in order to continue a good correspondence between the two Houses, their lordships did immediately appoint a Committee to state the matters of the free conference, and also to inspect precedents of what has happened of the like nature: And that the public business may receive no interruption, the time desired by their lordships for renewing the free conference being elapsed, their lordships desire a present free conference in the Painted-chamber, upon the subject matter of the last free conference."

A Message was brought from the Commons by my lord Cheney and others, to acquaint this House, viz. "That the Commons are extremely desirous to preserve a good correspondence between the two Houses, and to expedite the trials of the impeached lords; but conceive it is not consistent with the honour of the House of Commons to renew the free conference, until they have received reparation, by your lordships doing justice upon John lord Haversham, for the indignity he yesterday offered to the House of Commons."

The Lord Steward reported from the Committee appointed to draw up what was offered at the free conference, viz. That Mr. Harcourt opened the conference, and argued first against the reasons given by this House, why they could not agree to a committee of both Houses, but afterwards entered into a debate against the two Resolutions of this House, relating to impeachments depending, viz.

Resolved, *scm. con.* 'That no lord of parliament, impeached of high crimes and misdemeanors, and coming to his trial, shall, upon his trial, be without the bar.

Resolved, 'That no lord of parliament, impeached of high crimes and misdemeanors, can be precluded from voting on any occasion, except in his own trial.

And in his arguments he used this expression, 'That he wished their lordships had sent their reasons, as well as their Resolutions.'

Sir Bartholomew Shower spoke next, in pursuance of the argument begun by Mr. Harcourt, against the abovesaid resolutions; and in giving reasons against the latter of the said resolutions, amongst other things did affirm, 'That such a proceeding would be abhorrent from justice.'

In answer to those gentlemen, the lord Haversham used some arguments and expres-

mons, which the managers for the House of Commons took exceptions at; but what those were, the committee cannot so charge their memories as to give the House a particular account of them: And the lord Haversham being desired by the committee to recollect what he had said, did inform their lordships, that observing in the free conference several things said by Mr. Harcourt and sir Bartholomew Shower, that reflected on the honour and justice of this House, as he apprehended, and that he took to be foreign to the subject-matter of the free conference, he thought it his duty to take notice thereof; but in what expressions, he hoped their lordships would excuse him from giving a particular account; but denies that he said several things contained in the paper sent up by the House of Commons: but says, That he desired to be heard out, and that the words he had spoken might be writ down; but the managers for the Commons broke up abruptly.

The lord Haversham this day moved, That he may have a copy of the Commons' Charge against him, and time to answer. It is ordered, That the lord Haversham shall have a copy of the charge against him, and do answer therunto; and that he shall have counsel allowed him, in order to answer the charge against him.

The House being moved, To insist not to have a Committee of both Houses, touching the Trial of the impeached lords; and debate thereupon: The question was put, Whether this House shall insist upon their resolutions, of not allowing a committee of both Houses? It was resolved in the affirmative.

A Message was sent to the Commons by sir Robert Legard and Dr. Newton, to acquaint them, "That the lord Sommers having informed this House, that sir Stephen Fox, John Smith, esq. William Lowndes, esq. Stephen Harvey, esq. and William Gulston, esq. members of their House, may be material witnesses for him at his trial on Tuesday next in Westminster-hall, this House desires, that they may have leave to attend, and give their testimonies at the said trial, and that a letter which his majesty was pleased to write to him in 1698, being now in their House, will be necessary for his defence at his trial; this House desires that the said letter may be produced at the said trial."

Ordered, That an humble Address be made to his majesty from this House, That he will be pleased to give order, that the Original Treaties of Partition, of 1698 and 1699, and the earl of Portland's and Mr. Secretary Vernon's Letters relating therunto, or authentic copies of them, may be laid before this House on Monday next.

June 16.

The Messengers sent on Saturday last to the Commons, to desire some of their members may give evidence for the lord Sommers at his trial in Westminster-hall, return answer,

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That they will send an answer by messengers of their own.

Ordered, That the Lords with white staves do humbly attend his majesty from this House, to desire, That the lord Haversham may have liberty to inspect the Treasury-books, in relation to several commissions from time to time renewed, and grants of the forfeited estates in Ireland, which are necessary for him towards his defence.

June 17.

A Message was brought from the Commons by the earl of Dysart and others, to acquaint this House, "That the Commons, in this whole proceeding against the impeached lords, have acted with all imaginable zeal to bring them to a speedy trial; and they doubt not but it will appear, by comparing their proceedings with all others upon the like occasion, that the House of Commons have nothing to blame themselves for, but that they have not expressed the resentment their ancestors have justly shewed, upon much less attempts which have been made upon their power of impeachments.

"The Commons, on the 31st of May, acquainted your lordships, that they thought it proper, from the nature of the evidence, to proceed in the first place upon the trial of the lord Sommers. Upon the first intimation from your lordships, some days afterwards, that you would proceed to the trial of any of the impeached lords whom the Commons should be first ready to begin with, notwithstanding your lordships had before thought fit to appoint which impeachment should be first tried, and affix a day for such a trial, without consulting the Commons, who are the prosecutors.

"The Commons determining to expedite the trials to the utmost of their power, in hopes of attaining that end, and for the more speedy and easy adjusting and preventing any differences which had happened, or might arise, previous to or upon these trials, proposed to your lordships, at a conference, the most parliamentary and effectual method for that purpose, and that which in no manner intrenched upon your lordships' judicature; that a conference of both Houses should be appointed, to consider of the most proper ways and methods of proceedings upon impeachments, according to the usage of parliament.

"In the next message to the Commons, upon Monday the 9th of June, your lordships thought fit, without taking the least notice of this proposition, to appoint the Friday then following for the trial of the said lord Sommers; whereunto, as well as to many other messages and proceedings of your lordships upon this occasion, the House of Commons might have justly taken very great exceptions; yet, as an evidence of their moderation, and to shew their readiness to bring the impeached lords to speedy justice, the Commons insisted only on their proposition for a committee of both Houses, to settle and adjust the necessary preliminaries to the trial; particularly, Whether

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the impeached lords should appear on their trial at your lordships' bar as criminals? Whether being under accusations of the same crimes, they should sit as judges on each other's trial for those crimes; or should vote in their own cases, as it is notorious they have been permitted by your lordships to do in many instances which might be given? To which particulars your lordships have not yet given a direct answer, though put in mind thereof by the Commons.

"Your lordships, at a conference, having offered some reasons why you could not agree to a committee of both Houses, to adjust the necessary preliminaries, the Commons thereupon desired a free conference, and your lordships agreed thereunto; at which it is well known to many of your lordships, who were then present, what most scandalous reproaches and false expressions, highly reflecting upon the honour and justice of the House of Commons, were uttered by John lord Haversham; whereby the Commons were under a necessity of withdrawing from the said free conference: for which offence the Commons have, with all due regard to your lordships, prayed your lordships' justice against the lord Haversham; but have as yet received no manner of satisfaction.

"The Commons restrain themselves from enumerating your lordships' very many irregular and unparliamentary proceedings upon this occasion, but think it is what they owe to public justice and all the Commons of England, whom they represent, to declare some few of those reasons, why they peremptorily refuse to proceed to the trial of the lord Sommers on the 17th of June.

"First, Because your lordships have not yet agreed, That a committee of both Houses should be appointed for settling the necessary preliminaries; a method never, until this time, denied by the House of Lords, whensoever the Commons have thought it necessary to desire the same.

"Secondly, Should the Commons (which they never will do) be contented to give up those rights which have been transmitted to them from their ancestors, and are of absolute necessity to their proceedings on impeachments; yet, whilst they have any regard to public justice, they never can appear as prosecutors before your lordships, till your lordships have first given them satisfaction, that lords impeached of the same crimes shall not sit as judges on each other's trials for those crimes.

"Thirdly, Because the Commons have, as yet, received no reparation for the great indignity offered to them at the free conference by the lord Haversham; the Commons are far from any inclination, and cannot be supposed to be under any necessity of delaying the trial of the lord Sommers: there is not any article exhibited by them in maintenance of their impeachment against the lord Sommers; for the proof whereof they have got full and undeniable evidence, which they will be ready to produce

as soon as your lordships shall have done justice upon the lord Haversham; and the necessary preliminaries, in order to the said trial, shall be settled by a committee of both Houses.

"The Commons think it unnecessary to observe to your lordships, That most of the Articles whereof the lord Sommers stands impeached, will appear to your lordships to be undoubtedly true, from matters of record, as well as by the confession of the said lord Sommers, in his Answer to the said Articles, to which the Commons doubt not but your lordships will have a due regard, when his trial shall regularly proceed."

The House being moved, to go into Westminster-hall, in order to the Trial of the lord Sommers:

After debate, this question was put, Whether this House shall go this day into the court in Westminster-hall, in order to proceed upon the trial of the lord Sommers, according to the order of the day? It was resolved in the affirmative, although several lords protested against it.*

A Message was sent to the Commons by Mr. Baron Tracey and Mr. Baron Berry, to acquaint them, that the Lords intend presently to proceed to the Trial of John lord Sommers in Westminster-hall.

The Messengers being returned, acquainted the House, That the Commons were adjourned.

Then this question was proposed, Whether the earl of Orford and lord Halifax may withdraw at the trial of lord Sommers?

Then this previous question was put, Whether this question shall be now put? It was resolved in the affirmative.

Then the main question was put, Whether the earl of Orford and lord Halifax shall have leave to withdraw at the trial of the lord Sommers? It was resolved in the affirmative.

* This Protest was thought so injurious to the House, that it was ordered to be expunged; but it was as follows: "We do conceive it very improper to proceed to this trial, before the preliminaries are adjusted, especially since some of those preliminaries are such, as in our opinion are essentially necessary to the administration of justice. And after such a protestation of the Commons as they have sent to us against the proceedings to a trial, and which we conceive is founded upon justice, and the reasonable method of parliament, we apprehend our proceeding now to this trial may tend to the disappointment of all future trials on impeachments. Somerset, H. London, Normanby, Rochester, Carnarvon, Marlborough, La Warr, Oxford, Dartmouth, Weymouth, Jonath. Exon, Scarsdale, Nottingham, Feversham, Plymouth, Abingdon, Denbigh, Warrington, Tho. Roffens, Hunsdon, Weston, Godolphin, Jefferies, Northumberland, T. Jermya, Derby, Thonet, Peterborough, Lexington, Howard, Cholmondeley, Guildford."

Then the Lord Keeper desired, That some further directions be given to him, in order to the Trial in the Hall; and thereupon it was proposed, that this Proclamation be made in the Hall, viz.

‘Whereas a charge of High Crimes and Misdemeanors has been exhibited by the House of Commons, in the name of themselves and all the Commons of England, against John lord Sommers, all persons concerned are to take notice, that he now stands upon his trial, and they may now come forth, in order to make good the said Charge.’

After Debate, the question was put whether this proclamation shall be made? It was resolved in the affirmative.

Ordered, That the said proclamation be made in the Hall before the reading the Articles of Impeachment, and the lord Sommers's Answer, and also after they are read.

Ordered, That the court in Westminster-hall be cleared for the lords.

Then the House adjourned to Westminster-hall, and the lords were called by the herald, and went as ordered; and being seated in the Hall, the House was resumed.

Then proclamation was made for silence, as follows:

‘Our sovereign lord the king strictly charges and commands all manner of persons to keep silence upon pain of imprisonment.’

Then the Lord Keeper asked leave for the Judges to be covered: Which was agreed to.

Then proclamation, as ordered, was made.

After which, the Articles against John lord Sommers were read, and also his lordship's Answer to them.

After which the same proclamation was again made.

Then the Lord Keeper declared, the House was ready to hear the evidence against John lord Sommers, and therefore desired the Lords to give attention.

The lord Sommers moved to have his counsel heard.

Whereupon the House adjourned to the House above, and went back in the same manner as they came down; and, being there, the House was resumed.

The House being moved, to acquit the lord Sommers; and, after long debate, and hearing the Judges to several questions asked them by the lords, this question was proposed: That John lord Sommers be acquitted of the Articles of Impeachment against him exhibited by the House of Commons, and all things therein contained; and that the said impeachment be dismissed.

Then this question was put, Whether the question now stated shall be put in the court below? It was resolved in the affirmative.

Then it was agreed and ordered, That in Westminster-hall the Lord Keeper shall read the question, and then call the junior baron present first, and ask every lord, Whether Con-

tent? or Not Content? and, that every lord stand up when called to, and give his vote Content, or Not Content; and that the Lord Keeper, having taken their votes, declare the majority; and if the majority be for acquitting the lord Sommers, the Lord Keeper is to declare it so, and particularly to the lord Sommers.

Then the House adjourned again to Westminster-hall, and the Lords went in the same manner as before: and being come there, the House was resumed, and proclamation was made for silence.

The Lord Keeper put the question as follows: That John lord Sommers be acquitted of the Articles of Impeachment against him exhibited by the House of Commons, and all things therein contained, and that the said Impeachment be dismissed.

Then the Lord Keeper asked every lord, Whether Content, or Not?

Lord Haversham, C.	Lord Colepepper, C.
Lord Herbert, C.	Lord Byron, C.
Lord Jeffreys, N. C.	Lord Jermyn, N. C.
Lord Godolphin, N. C.	Lord Mohun, C.
Lord Guilford, N. C.	Lord Howard Escrick,
Lord Dartmouth, N. C.	N. C.
Lord Ossulston, C.	Lord Lovelace, C.
Lord Osborne, C.	Lord Hunston, N. C.
Lord Cornwallis, C.	Lord North, C.
Lord Grauville, C.	Lord Wharton, C.
Lord Berkely, C.	Lord Bure, C.
Lord Lexington, N. C.	Lord Fitzwalter, C.
Lord Rockingham, C.	Lord Lawarr, N. C.
Lord Lucas, C.	Lord Bergavenny, C.
Bishop of Chichester (John Williams), C.	
Bishop of Lincoln (James Gardner), C.	
Bishop of St. Asaph (Edw. Jones), C.	
Bishop of Bristol (Joseph Hall), C.	
Bishop of Gloucester (Edw. Fowler), C.	
Bishop of Peterborough (R. Cumberland), C.	
Bishop of Norwich (John Moore), C.	
Bishop of Coventry and Litchfield (John Hough), C.	
Bishop of Ely (Simon Patrick), C.	
Bishop of Bangor (H. Humphreys), C.	
Bishop of Sarum (Gilbert Burnet), C.	
Bishop of Exeter (Sir Jonathan Trelawney), N. C.	
Bishop of Rochester (Tho. Sprat), N. C.	
Bishop of London (Henry Compton), N. C.	
Lord Viscount Weymouth, N. C.	E. of Rochester, N. C.
Lord Viscount Say and Seale, C.	Earl of Nottingham, N. C.
Earl of Rochford, C.	E. of Berkeley, C.
E. of Romney, C.	E. of Radnor, C.
Earl of Warrington, N. C.	E. of Macclesfield, C.
E. of Scarborough, C.	Earl of Feversham, N. C.
Earl of Marlborough, N. C.	E. of Shaftsbury, C.
E. of Montagu, C.	E. of Burlington, C.
E. of Portland, C.	E. of Bath, C.
E. of Plymouth, N. C.	E. of Essex, C.
E. of Abingdon, N. C.	E. of Scarsdale, N. C.
	E. of Thanet, N. C.
	E. of Carnarvon, N. C.

E. of Kingston, C.	lain, N. C.
E. of Stamford, C.	Marquis of Norman-
Earl of Peterborough,	by, N. C.
N. C.	Duke of Newcastle, C.
E. Rivers, C.	D. of Schomberg, C.
E. of Denbigh, N. C.	D. of Bolton, C.
E. of Dorset, C.	D. of St. Albans, C.
E. of Suffolk, C.	Duke of Northumber-
E. of Huntingdon, C.	land, N. C.
E. of Derby, N. C.	D. of Somerset, N. C.
E. of Oxford, N. C.	Lord Steward, C.
Lord Chamberlain, N.	Lord Privy Seal, C.
C.	Lord Archbishop of
Earl Marshal, C.	Canterbury (Tho.
Lord Great Chamber-	Tennison), C.
Content, 56.	Not Content, 32.

The Lord Keeper declared, the majority was for acquitting; and then declared, That John lord Sommers was acquitted of the Articles of Impeachment against him exhibited by the House of Commons, and all things therein contained; and, That the said impeachment was dismissed.

And also declared to the lord Sommers, That he was acquitted.

Then the House adjourned to the House above; and being come thither, the House was resumed, and the following order made:

It is considered, ordered, and adjudged by the Lords spiritual and temporal in parliament assembled, That John lord Sommers shall be, and he is hereby acquitted of the Articles of Impeachment against him exhibited by the House of Commons, and all things therein contained; and, That the said impeachment shall be, and is hereby dismissed.

Ordered, That the proceedings in this House upon the impeachments be printed; and, that the Lords' Committees appointed to consider of the manner of proceeding on impeachments, do meet to-morrow at ten o'clock, and inspect the Journals, and draw up the matter relating thereunto, in order to be printed, and report to the House.

June 18.

A Message was sent to the Commons by sir John Francklyn and Dr. Edisbury, to acquaint them, That this House hath appointed Monday, the 23rd day of this instant June, for the trial of Edward earl of Orford, in Westminster-hall, at ten o'clock.

A Message was sent to the House of Commons by sir John Francklyn and sir Richard Holford, to acquaint them, "That the Lords, in order to keep a good correspondence between the two Houses, and to put the Charge against John lord Haversham in a course of justice, have ordered (at his lordship's motion) his lordship a copy of the Charge against him, and that he do put in his Answer thereunto, in order to bring that matter to a speedy judgment."

June 19.

A Message was sent to the Commons by sir John Francklyn and sir Lacon-Wilkinson Child,

to acquaint them, "That the Lords in answer to the Message of the Commons of the 17th instant, say, The only true way of determining which of the two Houses has acted with the greatest sincerity, in order to bring the impeached lords to their trials, is to look back upon the respective proceedings.

"The Lords do not well understand what the Commons mean by that resentment which they speak of in their Message. Their lordships own, that the House of Commons have a right of impeaching: and the Lords have the undoubted power of doing justice upon those impeachments, by bringing them to trial, and condemning or acquitting the parties in a reasonable time. This power is derived to them from their ancestors, which they will not suffer to be wrested from them by any pretences whatsoever.

"Their lordships cannot but wonder, that the Commons should not have proposed a Committee of both Houses much sooner, if they thought it necessary for the beginning on the trials; no mention being made of such a Committee, from the 1st of April to the 6th of June, although, during that interval, their delays were frequently complained of by the House of Lords.

"The manner in which the Commons demand this Committee, the Lords look upon as a direct invading of their judicature; and therefore, as there never was a Committee of both Houses yielded to by the Lords, in case of any impeachment for high crimes and misdemeanors; so their lordships do insist, that they will make no new precedent upon this occasion. Many impeachments for misdemeanors have in all times been determined without such a Committee: and if now the Commons think fit, by an unprecedented demand to form an excuse for not prosecuting their impeachments, it is demonstrable where the obstruction lies.

"As to the preliminaries, which the Commons mention in particular, as proper to be settled at such a Committee, they have received the resolutions of the House of Lords therein by their message of the 12th instant; from which (being matters relating entirely to their judicature) their lordships cannot depart.

"As to the last pretence the Commons would make to shelter the delaying the trials, from some expressions which fell from the lord Haversham at the free conference, at which offence was taken; their lordships will only observe,

"First, That they have omitted nothing which might give the Commons all reasonable satisfaction of their purpose to do them justice in that matter, so far as is consistent with doing justice to that lord; and also to preserve all good correspondence with them, as appears by the several steps they have taken.

"Secondly, That this business has no relation to the trials of the impeached lords: and therefore their lordships cannot imagine why the Commons should make satisfaction and reparation against the lord Haversham's words.

any condition for the going on with the trials, and at the same time find no difficulty in proceeding on other business."

This day, John lord Haversham delivered his Answer to the Charge of the House of Commons exhibited against him the 13th instant; which was read by the clerk, as follows:

The ANSWER of JOHN lord HAVERSHAM, to the Charge exhibited against him by the Commons, for Words spoken at a Free Conference on the 13th day of this instant June 1701.

The said lord Haversham saving to himself all advantages of exception to the said Charge, and of not being prejudiced by any want of form in this his Answer; and also saving to himself all rights and privileges belonging to him as one of the peers of this realm; for answer to the said Charge, saith, That on the 6th day of June, 1701, the Commons, by a Message sent to the Lords, desired a conference upon their Message to the Commons of the 4th of June; in which conference they proposed to the Lords, That a Committee of both Houses should be nominated, to consider of the most proper ways and methods of proceeding on the impeachments of the Lords, according to the usage of parliament. That on the 10th of June the Lords desired another conference with the Commons; in which they delivered them their reasons why they could not agree to the appointing such Committee, viz. First, That they could not find that ever such a Committee was appointed on occasion of impeachments for misdemeanors; and their obligation to be cautious in admitting any thing new in matters relating to judicature. Secondly, That although a Committee of this nature was agreed to, upon the impeachments of the earl of Danby and the five Popish lords for high-treason; yet the success, in that instance, was not as should encourage the pursuing the same method, though in the like case: and, that after much time spent in that instance, the disputes were so far from being adjusted, that they occasioned the abrupt conclusion of a session of parliament. Thirdly, That the method of proceedings on impeachments for misdemeanors are so well settled by the usage of parliament, that no difficulties were likely to happen, nor none had been stated to them: and that all the preliminaries in the case of Stephen Goudett and others, (which was the last instance of impeachments for misdemeanors) were easily settled and agreed to without any such Committee. Fourthly, That the proposal of the Commons came so very late, that no other fruit could be expected of such a Committee, but the preventing of the trials during this session. Whereupon the Commons on the 13th of June, desired of the Lords a Free Conference on the subject-matter of the last conference. That the lords, on the said 13th of June, came to two Resolutions in relation to the lords impeached: First,

"That no lord of parliament, impeached of high crimes and misdemeanors, and coming to his trial, shall upon his trial be without the bar. Secondly, That no lord of parliament, impeached of high crimes and misdemeanors, can be precluded from voting on any occasion, except in his own trial." And by messengers of their own the Lords acquainted the Commons with the said two Resolutions, and also that they agreed to a Free Conference with the Commons, and appointed the next day. That upon the 13th of June Mr. Harcourt, one of the managers, began the Free Conference on the part of the Commons, and argued upon the four reasons given by the Lords, why they could not agree to the appointing a Committee of both Houses; and principally relied upon the instance in the case of the Popish lords; and insisted upon the delay that the not agreeing to the nomination of such a Committee would necessarily occasion, whereby the lords' trials, and the justice due to the nation would be retarded. And departing from the subject-matter of the said conference, (which was, Whether it was requisite to appoint or not appoint such a Committee?) the said manager discoursed upon the latter of the two Resolutions of the Lords communicated to the Commons, and said, 'That he wished the Lords had sent down their reasons, as well as their resolutions:' Which words seemed to the lord Haversham to carry therein an implication, as if the said resolution could have no reason to justify it. That sir Bartholomew Shower, another manager for the Commons, observed the same method of discourse: and having argued upon the Lords' reasons, departed from the subject-matter of the Free Conference; and inveighing against the manner of the Lords' judicature, asserted by their resolutions, said 'That it was abhorrent to justice.' Which expression being foreign (as the said lord Haversham apprehended) to the subject-matter of the said free conference, which was, Whether such Committee of both Houses should be appointed or not; the said lord, being appointed by the Lords for one of the managers of the said free conference on their behalf, in vindication of the honour and justice of the House of Peers, and their judicature and resolutions, in answer to what had been said by the managers for the Commons, he spoke to the effect following:

"Gentlemen, I shall begin what I have to say, as that worthy member who opened this conference, that there is nothing the Lords more desire than to keep a good correspondence, which is so necessary to the safety of the nation, and the dispatch of public business; and nothing they have more carefully avoided, than what might create a misunderstanding between the two Houses. A greater instance of which could not be given, than the messages my lords returned to some the Commons had sent them up; in which they took care to express themselves so cautiously, that no heat might arise from any expression of theirs. And as to what the worthy members mention-

ed, in relation to delay ; the repeated remembrances sent the Commons, with relation to the sending up the articles against the impeached lords, are a sufficient instance how desirous they are that these matters should proceed. And the Lords have this satisfaction, that it is not on their part that the trials are not in a greater forwardness ; they cannot but look on it as a great hardship ; that they should lie under long delays on impeachments. Persons may be incapable ; facts may be forgotten ; evidences may be laid out of the way ; witnesses may die ; and many other like accidents may happen. The instance the worthy members give of the Popish lords, as it is a crime of another nature, and not fully to the point, so it seems to make against what it was brought for : for the worthy members say, there was but one of the lords brought to justice, though four more (as I take it) were accused. And can any man believe, that the Commons have a mind to bring only one of these lords to trial ? It is inconsistent with the opinion that every body must have of their justice. And as to the point of judicature, it were very hard upon the Lords, that no person should be brought to trial, till the judicature of the House be so first. The judicature of the Lords is their peculiar, and hath in former ages been sacred with the Commons themselves. And this House, perhaps, hath as much reason to be jealous, and careful of it, as any other House ever had ; especially when one single precedent is so urged and insisted upon. One thing there is which a worthy member mentioned, though I cannot speak to it at large, because I think myself bound up by the resolutions of the House ; yet it must have some answer ; that is, as to the Lords voting in their own case ; it requires an answer, though I cannot enter into the debate of it. The Commons themselves have made this precedent ; for in these impeachments they have allowed men, equally concerned in the same facts, to vote in their own House ; and we have not made the distinction in ours, that some should vote and some not. The Lords have so high an opinion of the House of Commons, that they believe justice shall never be made use of as a mask for any design. And therefore give me leave to say, though I am not to argue it, it is to me a plain demonstration, that the Commons think those lords innocent ; and I think the proposition is undeniable : for when there are several lords in the same circumstances, in the same facts, there is no distinction ; and the Commons leave some of these men at the head of affairs, near the king's person, to do any mischief if they were inclined to it ; it looks as if they thought them all innocent. This was a thing I was in hopes I should never have heard asserted, when the beginning of it was from the House of Commons."

The said lord being here interrupted, he desired to be heard out, and that his words might be taken down in writing. But the managers for the Commons broke up, and departed, re-

fusing to hear any explanation. Now the said lord, as to any implicit charge of a design to reflect on, or dishonour the House of Commons, denies any such design or intention ; having for many years had the honour to sit in the House of Commons, and having ever had an honourable and respectful sense thereof : but the said lord was led to express himself in the manner aforesaid, for the reasons aforesaid, and takes himself to be justified therein, by the facts and reasons following :— That the nature of that conference was, that it should be free ; the occasion of it, because either House apprehended the other to be in an error, and the end of it, that each side might urge such facts as are true, and such reasons as are forcible to convince. That one article of the impeachment against John lord Sommers, was, That the treaty of partition 1699, was ratified under the great seal, which then was in the custody of the same lord, then lord chancellor of England ; that the Commons on the 1st of April, 1701, resolved, That the earl of Portland by negotiating and concluding the treaty of partition, was guilty of a high crime and misdemeanor ; and pursuant thereto, lodged an impeachment against him in the House of Peers ; which vote and impeachment could not have reference to any treaty, other than the treaty of partition of 1699, the treaty of 1698 not being before the House of Commons, till after the time of that vote and impeachment : and yet the earl of Jersey, who then was secretary of state and a privy counsellor, and actually signed the said treaty of 1699, as a plenipotentiary with the lord Portland, stands unimpeached, and continues at the head of affairs, being lord chamberlain, near his majesty's person, and his presence and councils, (without complaint :) that the earl of Orford, and the lords Sommers and Halifax, are severally impeached for advising the treaty of partition of 1698, and yet Mr. Secretary Vernon, who then was secretary of state, and a privy counsellor, and acted in the promoting of the treaty of partition of 1698, stands unimpeached, and still continues one of the principal secretaries of state ; and sir Joseph Williamson, who then was a privy counsellor, and transacted and signed the treaty of partition of 1698, as a plenipotentiary, stands unimpeached. That the lord Halifax is impeached, for that he, being a commissioner of the Treasury, assented to the passing of divers grants from the crown to several persons, of lands in Ireland ; and yet sir Edward Seymour, sir Stephen Fox, and Mr. Pelham, who being severally lords commissioners of the Treasury, did severally assent to the passing of divers like grants from his majesty, of lands in Ireland, stand unimpeached. That in the impeachments against the earl of Orford and lord Sommers, one of the articles against them is for procuring a commission to captain Kidd, and likewise a grant under the great seal of the ships and goods of certain persons therein named, to certain persons in trust for them ; and yet other lords, equally

concerned in procuring the said commission and grant, stand unimpeached. That the said Mr. Secretary Vernon, sir Edward Seymour, sir Stephen Fox, and Mr. Pelham, notwithstanding their being parties in the same facts, charged in the said respective impeachments, have been permitted to sit and vote in the House of Commons, touching the impeachments and the matters thereof: That these facts being true and publicly known, the consequences resulting therefrom (as the said lord Haversham apprehended) are undeniable, viz. That the doing of the same thing by two persons in equal circumstances, cannot be a crime in one, and not in another. That the Commons had no reason to insist, that the Lords should not permit that in their members, which the Commons had first permitted, and continued to permit, and so begun the first precedent, in their own members. That it must be thought, that the impeached lords (notwithstanding the facts alledged in the impeachment) are innocent of danger to the king, when the lord Jersey and Mr. Secretary Vernon, who were respectively concerned in the partition treaty, are permitted without complaint, to be at the head of affairs, and in the king's presence, and of his councils, as not dangerous: That the word 'innocent,' used in the words spoken by the said lord Haversham, can extend no further than to such matters as were done by the impeached lords, of the same nature with what was done by those unimpeached. All which facts being true, and the consequences obvious, the said lord being ready to prove the same, he insists that the words, spoken by him at the said free conference, were not scandalous or reproachful, nor false, nor reflecting on the honour or justice of the House of Commons; but were spoken upon a just occasion, given in answer to several expressions that fell from the managers for the Commons, remote, as he conceives, from the matter in question, and reflecting on the honour and justice of the House of Peers; and in maintenance and defence of the Lords' resolution and judicature, and conformable to the duty he owes to the said House. And the said lord humbly demands the judgment of this honourable House therein. And the said lord Haversham denies that he spoke the words specified in the said charge, in such manner and form, as the same are therein set down.

"And having thus given a true account of this matter, and it being true and indisputable, that some Lords in this House, equally concerned in facts, for which other lords are impeached by the House of Commons, are still near the king's person, in the greatest places of trust and honour, and unimpeached; and also, that several members of the House of Commons equally concerned in the same facts, for which some of the Lords are impeached, do however remain unimpeached; the said lord thinks, such a truth could never have been more properly spoken, in the maintenance and defence of your lordships' judicature and resolutions; and in-

sisteth, that what he said at the free conference, was not any scandalous reproach, or false expression, or any ways tending to make a breach in the good correspondence between the Lords and Commons, or to the interrupting the public justice of the nation, by delaying the proceedings on the impeachments, as in the said Charge alledged; but agreeable to truth, in discharge of his duty, and in the defence of the undoubted right and judicature of this House.

HAVERSHAM.

Ordered, That a copy of the Lord Haversham's Answer be sent to the Commons.

June 20.

A Message from the Commons by the lord Morlaunt and others to acquaint this House, "That in Answer to the Message of the Lords, appointing Monday next for the trial of the earl of Orford; that the Lords have been acquainted, that the Commons would proceed, in the first place, against the lord Sommers; and they are ready to go to that lord's trial, as soon as ever the Commons have received satisfaction for the affront offered to the House of Commons, by the lord Haversham at the free conference, and that the necessary preliminaries are adjusted by a committee of both Houses."

Ordered, That the Committee appointed to consider of the manner of proceedings on Impeachments do meet presently, and draw an Answer to this Message.

The earl of Stamford reported from the Lords Committees, appointed to consider of the manner of proceedings on Impeachments, the Answer drawn by them, in Answer to the Commons' Message this day: Which was read, and agreed to, as follows:

A Message was sent to the House of Commons by Mr. Gery and Dr. Newton, to acquaint them, "That in Answer to the Message of the House of Commons this day, the Lords do acquaint the Commons, That they might have known, by the records of the House of Lords, that the Lords have proceeded to the trial of the lord Sommers, on Tuesday last, being the day appointed; and the Commons not appearing to maintain their Articles against the said lord, the Lords have, by judgment of their House, acquitted him of the Articles of Impeachment against him exhibited by the House of Commons, and all things therein contained, and have dismissed the said impeachment."

"And the Lords have appointed Monday next for the trial of the earl of Orford; on which day they will proceed on the said trial."

"The Commons still pressing for a committee of both Houses (which the Lords never can consent to, for the reasons already given), their lordships can infer nothing from their persisting in that demand, than that they never designed to bring any of their Impeachments to a trial."

"As to the lord Haversham, his Answer is now before the House of Commons, and the Lords resolve to do justice in the matter."

June 21.

The House being moved to consider what is fit to be done in relation to the Charge of the House of Commons against John lord Haversham; and after due consideration thereof, and the lord Haversham desiring to be prosecuted, it was proposed as follows:

"That the Answer of John lord Haversham, to the Charge sent up against him by the House of Commons, having been sent down to that House; it is resolved, by the Lords Spiritual and Temporal in Parliament assembled, That unless the said Charge shall be prosecuted against the said lord Haversham, with effect, by the Commons, before the end of this session of parliament, the Lords will declare and adjudge him wholly innocent of the said Charge."

Then this question was put, "Whether this resolution shall be agreed to?" It was resolved in the affirmative.

"Dissentient.

"1. Because, the justice of our judgment of acquitting the lord Sommers depending on our right to name a peremptory day, I do conceive that, by this vote, that right is violated; the Commons being by it allowed to declare when they are ready to prosecute, before any day is by us named.

"2. Because, having thought fit to name a day for the impeachment of the lord Sommers; to be consistent to ourselves, we ought to pursue the same methods: Nor does this being a Charge only alter the case; for what is done in matters of greater moment, may safely be pursued in cases of less concern.

"3. Because to me there does not seem any need of farther prosecution on the Commons' part in this matter; the fact and the nature of it being both fully before us. NORTH & GREY."

Ordered, That sir David Mitchel, sir Edmund Harrison, George Dorrington, esq. Joseph Burchet, esq. captain George Bynns, Brooke Bridges, esq. George Cornwal, esq. captain — Griffith, — Holmes, Edward Hayman, and — Traverse, esq. his majesty's Surveyor General, do and they are hereby required to attend this House on Monday next, as witnesses on the behalf of Edward earl of Orford.

A Complaint being made of certain printed Votes of the House of Commons, dated the 20th instant, wherein there are several things highly reflecting on the House of Peers; it is ordered, That the consideration thereof shall be adjourned to Monday next, and all the Lords summoned to attend with special notice of this Order.

June 23.

The Earl of Stamford acquainted the House, from the Lords Committees appointed to draw or extract out of the books, what is to be printed in relation to the Lords impeached, and the proceedings thereupon, what was transcribed in order thereunto; and that there was more to be extracted which as yet was not transcribed;

Whereupon it was ordered, That any three of the lords of the said Committees do meet when they please, after the House is up, and give order to, the clerk for what shall be further transcribed out of the Journals, in order to the printing thereof.

The House resumed the adjourned debate upon the printed Votes of the House of Commons, of the 20th instant. After debate it was proposed to declare, "That the Resolutions of the House of Commons, in their Votes of the 20th instant, contain most unjust reflections on the honour and justice of the House of Peers, and are contrived to cover their affected and unreasonable delays in prosecuting the impeached lords."

The question was put, Whether this shall be the Resolution of the House? It was resolved in the affirmative.

1. "It is resolved by the Lords Spiritual and Temporal in parliament assembled, That the Resolutions of the House of Commons, in their votes of the 20th instant, contain most unjust reflections on the honour and justice of the House of Peers, and are contrived to cover their affected and unreasonable delays in prosecuting the impeached lords."

It being also proposed to declare, "That the said Resolutions do manifestly tend to the destruction of the judicature of the Lords, to the rendering Trials on Impeachments impracticable for the future, and to the subverting the constitution of the English government."—The question was put, Whether this shall be the resolution of the House? It was resolved in the affirmative.

2. "It is resolved, That the said Resolutions do manifestly tend to the destruction of the judicature of the Lords, to the rendering trials on impeachments impracticable for the future, and to the subverting the constitution of the English government."

It being also proposed to declare, "That whatever ill consequences may arise from the so long deferring the supplies for this year's service, are to be attributed to the fatal counsel of putting off the meeting of a parliament so long, and to the unnecessary delays of the House of Commons." After debate, the question was put, Whether the last words shall stand part of the resolution? It was resolved in the affirmative.

Then the whole resolution was read, and the question was put, Whether these words shall be the resolution of the House? It was resolved in the affirmative.

3. "It is resolved, That whatever ill consequences may arise from the so long deferring the Supplies for this year's service, are to be attributed to the fatal counsel of putting off the meeting of a parliament so long, and to the unnecessary delays of the House of Commons."

"Dissentient.

"Because, though I humbly conceive it is evident to all Englishmen, that nothing could be more fatal to the interest of Europe, to the

interest of the Protestant religion, and the safety of England, than the so long delay of the meeting of a parliament, after the death of the king of Spain; yet I cannot agree to the latter part of this vote, which lays imputations of unnecessary delays to this House of Commons.

“PETERBOROUGH.”

Ordered, That the several Resolutions made this day be printed, with what was formerly ordered to be printed out of the Journals relating to the lords that were impeached.

Then the House was adjourned during pleasure to robe. Then the House was resumed. The House was called over by the clerk, and the names of the lords present set down by the heralds. Then the House was adjourned to Westminster-hall, and the lords went in the same order as they did to the lord Sommers's trial: and being come to the hall, and seated, the House was resumed. Leave was given to the Judges to be covered.

Proclamation being made for silence, the following proclamation was made for prosecution; viz.

‘Whereas a Charge of high crimes and misdemeanors has been exhibited by the House of Commons, in the name of themselves and all the Commons of England, against Edward earl of Orford: all persons concerned are to take notice, that he now stands upon his trial, and that they may now come forth in order to make good the said Charge.’

Then the Articles of Impeachment against Edward earl of Orford were read, and also his lordship's Answer to the said Articles.

Then the same proclamation as before was made for prosecution; and the Lord Keeper declared, That the court is now ready to proceed upon the trial of Edward earl of Orford, and therefore their lordships are to give attention.

The Earl of Orford said, His counsel were ready to be heard, if the House pleased.

Then the House was moved, and did adjourn to the House above, and returned in the same manner as they went down.

Then the House was resumed, and ordered, That the same method be observed, in giving judgment in the Hall, as was at the lord Sommers's trial, and the like question put in the Hall.

The House being called over, and the name of every lord present writ down for the Lord Keeper. The House was again adjourned to Westminster-hall, where the House was resumed, and proclamation made for silence.

Then the Lord Keeper put this question, “That Edward earl of Orford be acquitted of the Articles of Impeachment exhibited against him by the House of Commons, and all things therein contained; and that the said Impeachment be dismissed?”

The Lord Keeper asked every lord present, Whether Content, or Not Content, beginning at the lowest baron. Lords Haversham, Her-

bert, Ossulston, Cornwallis, Berkeley, Rockingham, Lucas, Colepeper, Mohun, Lovelace, North, Wharton, Eure, Fitzwalter, Bergavenny; bishops of Chichester, Peterborough, Lincoln, Norwich, Coventry and Lichfield, Ely, Sarum; viscount Say and Seale; earls of Rochford, Scarborough, Montagu, Portland, Berkeley, Radnor, Macclesfield, Shaftsbury, Burlington, Essex, Kingston, Stamford, Rivers, Huntingdon; earl Marshal, dukes of Newcastle, Schomberg, Bolton; lord Steward; lord archbishop of Canterbury, Contant. After which the Lord Keeper declared, That the votes were unanimous in the affirmative.

Then the Lord Keeper declared, That Edward earl of Orford was acquitted of the Articles of Impeachment against him, exhibited by the House of Commons, and all things therein contained; and that the said Impeachment be dismissed. And his lordship also declared to the earl of Orford, that he was acquitted.

Then the House adjourned to the House above; and being resumed, It is considered, ordered, and adjudged, by the Lords spiritual and temporal in parliament assembled, That Edward earl of Orford shall be, and is hereby acquitted of the Articles of Impeachment against him exhibited by the House of Commons, and all things therein contained; and, that the said Impeachment be dismissed.

June 24.

Ordered, That all the Articles of Impeachments, and Answers to them; the lord Haversham's Charge and Answer; the lord Sommers, and the earl of Orford's Trial, and all other things relating thereunto, and the Resolutions of Monday last, be transcribed and printed; and, that the duke of Bolton, the earl of Stamford, the lord Wharton, the lord North, lord Haversham, and lord Sommers, or any three of them, do inspect the Journals, and take care that what is or shall be transcribed, in order for printing, be perfect; and give order to the clerk for printing thereof.

Then the House taking into consideration, that there were several lords charged and impeached by the Commons, and no prosecution against them; ordered as follows; viz.

The House of Commons not having prosecuted their Charge, which they brought up against John lord Haversham, for Words spoken by him at a Free Conference the 13th inst.; it is this day ordered, by the Lords spiritual and temporal in parliament assembled, That the said Charge against John lord Haversham shall be, and is hereby dismissed.

The earl of Portland, being impeached by the House of Commons of High Crimes and Misdemeanors, the 1st day of April last; it is ordered, That the Impeachment against William earl of Portland shall be, and is hereby dismissed, there being no Articles exhibited against him.

The House of Commons having impeached

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Charles lord Halifax of High Crimes and Misdemeanors, on the 15th day of April last, and on the 14th day of this instant June exhibited Articles against him; to which he having answered, and no further prosecution thereupon; it is ordered, That the said Impeachment, and the Articles exhibited against him, shall be, and they are hereby dismissed.

The House of Commons having impeached Thomas duke of Leeds* of High Crimes and Misdemeanors, on the 27th of April, 1695, and on the 29th of the said April exhibited Articles against him, to which he answered; but the Commons not prosecuting, it is ordered, That the said Impeachment, and the Articles exhibited against him, shall be, and they are hereby dismissed.

A STATE OF THE PROCEEDINGS IN THE HOUSE OF COMMONS, WITH RELATION TO THE IMPEACHED LORDS: AND WHAT HAPPENED THEREUPON BETWEEN THE TWO HOUSES.†

Feb. 15, 1701.

Resolved; That an humble Address be presented to his majesty, that he will be pleased to order all the Treaties that have been made between his majesty and any other prince or state since the late war, to be laid before this House.

February 18.

Mr. Secretary Vernon acquainted the House, That their Address having been presented to his majesty, his majesty had been pleased to give

* See vol. 13, p. 1263.

† *Martia*, 24 die Junii, 1701. "Ordered, That all the proceedings with relation to the Impeachments, and what happened between the House of Lords and House of Commons, be examined by the Journals, and printed. Paul Jodrell, Cler. Dom. Com."

"In the preceding are inserted, 'Proceedings in parliament against William earl of Portland, John lord Sommers, Edward earl of Orford, and Charles lord Halifax, upon an Impeachment for High Crimes and Misdemeanors; as also against John lord Haversham, for words spoken at a conference between the Lords and Commons, 1701, 13 Will. 3.' But it is observable, that those are the Proceedings as published by the order of the House of Lords only: these here inserted are what were published by order of the House of Commons; which are omitted in the preceding, but for what reason no one can tell, unless partiality: for as the Commons were the prosecutors, sure their evidence, and the grounds they went upon, ought not to have been omitted." Former Editions.

order, that they should be copied, and that then either the originals or copies, as the House pleased, should be laid before them.

March 4.

Mr. Secretary Vernon presented to the House copies of several Treaties, and translations thereof. Ordered, That the said copies do lie upon the table, to be perused by the members.

March 6.

Mr. Secretary Hedges presented to the House, according to order, copies of several Treaties. Ordered, That the said copies do lie upon the table, to be perused by the members.

March 17.

A Message from the Lords, That the Lords do desire, that this House will give leave to Mr. Secretary Vernon, a member of this House, to come to a committee of the Lords now sitting in the Prince's lodgings, to give an account of some matters relating to the Treaty of Partition which their lordships have now under consideration.

Ordered, That Mr. Secretary Vernon have leave to go to the Lords as desired, if he think fit.

March 19.

Resolved, That this House will, on Saturday come se'night, resolve itself into a committee of the whole House, to consider of the State of the Nation.

March 21.

Resolved, That the Treaty of Partition be read. (And the same was read accordingly.)

Resolved, That an humble Address be presented to his majesty, to return the thanks of this House for his gracious Message, wherein he is pleased to communicate his royal intentions to acquaint this House, from time to time, with the state and progress of those negotiations into which his majesty has entered, pursuant to the Address of this House: and also to lay before his majesty the ill consequences of the Treaty of Partition (passed under the great seal of England during the sitting of parliament, and without the advice of the same) to this kingdom, and the peace of Europe, whereby such large territories of the king of Spain's dominions were to be delivered up to the French king.

March 24.

Sir Edward Seymour reported from the committee, to whom it was referred to draw up an humble Address to be presented to his majesty, that they had drawn up an Address accordingly, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the clerk's table; where the same was read, and with an amendment agreed unto by the House, and is as followeth; viz.

"Most gracious Sovereign;
"Whereas nothing can more conduce to the safety and honour of your majesty and this na-

tion, than taking the advice of your English councils, we your majesty's most dutiful and loyal subjects, the Commons in this parliament assembled, do, with all humility, return your majesty our hearty thanks for your gracious message, wherein you are pleased to communicate your royal intentions to acquaint this House with the state and progress of those negotiations into which your majesty was entered, pursuant to the Address of this House; which method had your majesty been advised to take before the Treaty of Partition was perfected (which was passed under the great seal of England, during the sitting of parliament, and without the advice of the same), we had been prevented from laying before your majesty what we are now bound in duty (though with grief) to do, the ill consequences of that treaty to this kingdom, and the peace of Europe, which so directly tended to increase the power and greatness of France, by delivering up to the French king such large territories of the king of Spain's dominions, and to the destruction of the trade of this kingdom; to which treaty may justly be ascribed the dangers which now threaten both this kingdom and the peace of Europe."

Resolved, That the said Address be presented to his majesty by the whole House.

Ordered, That it be an instruction to the committee of the whole House, who are upon Saturday next to take into consideration the State of the Nation, that they do take into further consideration the Treaty of Partition.

Ordered, That a committee be appointed to search the Journals of the House of Lords, what proceedings are therein, with relation to the Treaty of Partition, and report the same to the House.

March 26.

Sir Edward Seymour reported from the said committee, That they had searched the Journals of the House of Lords accordingly, and taken copies thereof; which he read in his place, and afterwards delivered in at the clerk's table; where the same were read, and are as followeth; viz.

(A Copy of the Lords' Journal.)

March 10.

The House being moved, That a day may be appointed for taking into consideration the Treaties now lying before this House, it is ordered by the Lords spiritual and temporal in parliament assembled, that the said treaties shall be taken into consideration on Wednesday next.

March 12.

The order being read for taking into consideration the treaties now lying before this House, the several translations of treaties were read. After which the House came to this agreement, That the lord chamberlain do humbly move his majesty, that all matters or pa-

pers any way relating to the negotiations of the treaties be laid before this House.

March 14.

The order being read for taking into further consideration the Treaties; the House was acquainted, That Mr. Yard attended with the papers as agreed on yesterday; he was called in, and delivered the Papers at the table.

(These papers were all read by the clerk.)

Lords committees appointed to draw up and state the fact as to the treaty now in debate, and all things and circumstances relating thereunto, and to draw an Address to be presented to his majesty thereupon, and report to the House.

March 15.

The earl of Nottingham reported from the Lords Committees appointed to draw up, and state the facts, as to the Treaty now in debate, That the Committee had met, and thought it proper to set down such facts as appeared to them, viz. 1. That by the Treaty of Partition, Naples, Sicily, &c. were to be given to the Dauphin. 2. That the emperor was not a party to this treaty, though principally concerned. 3. That no minister of the States-General met with the plenipotentiaries of England and France, as were required by the powers, at the making the treaty in London. 4. That there were no instructions in writing to our plenipotentiaries, though the powers were unlimited, and that if there were verbal orders given, yet it appears not to us they were considered in any council. 5. That the treaty when perfected, was not considered in any council before it was ratified. 6. That it appears, That the warrant for ratification was countersigned by one of the plenipotentiaries. 7. That the treaty was transacted and signed, and the great seal affixed to it during the sitting of a parliament.

Then the House, upon consideration of the first head in the said report, agreed to the same, with the alterations following, viz.

Instead of *given to* 'put into the hands of.' Then the second head was read. After debate thereupon, the question was put, Whether this paragraph shall stand? It was resolved in the negative,

"Dissentient,

"1. Because it is manifest by the treaty itself, that the matter of fact is true. 2. Because the emperor, as we conceive, had been the most proper to have been treated with on this occasion; for it was more prudent and safe to have treated with the emperor to have restrained the pretensions of France, than with France to lessen the dominions of the House of Austria, which in its full strength, and in conjunction with the most considerable powers in Europe, and with the expence of more than sixty millions sterling to our share, was scarce able to withstand the arms of France. 3. But admitting that the emperor was not the most proper to be treated with; yet to prevent the

umbrage which might be taken by uniting too many dominions under one prince, especially such a prince as without any additions was formidable to all Europe, of all others the emperor was the most improper to be left out of such a treaty, for he was most concerned in it; and our ministers could not, or at least did not, sufficiently support his interests, or the just balance of Europe: but, on the contrary, as we are informed by one lord who signed this treaty, it was concluded against the express desire of the emperor.—(Signed,) De Longueville, Granville, Abington, Jeffreys, Guilford, Tho. Roffen, Normanby, Thanet, Hereford, Weymouth, Poulett, Leeds, Nottingham, Howard, Scarsdale, Craven.”

Third Head. That no minister of the States-General met with the plenipotentiaries of England and France, as were required by the powers, at the making the treaty in London.

After the debate, the question was put, Whether this paragraph shall stand? It was resolved in the negative.

“Dissentient.

1. Because the truth of this proposition is reason enough for asserting it; and it must certainly be of fatal consequence, if ministers, without any directions by instructions in writing shall presume to act contrary to the very commission that empowers them: and, in this case, the assistance of the Dutch ministers was the more necessary, because the emperor was no party to this treaty, and the States-General are more immediately concerned than we are to promote his interests. 2. But if this treaty was concerted with the Dutch ministers in 1699, before his majesty's return into England, as was asserted by one of the lords who signed it afterwards in London; (1.) This treaty was made by those who had no authority to transact it; for the power was not granted by his majesty till the 2nd of January following. (2.) As they acted without power, so without instructions too in writing; which never was practised in any former transaction abroad. Lastly, We conceive, that neither of the foregoing facts ought in reason, or according to the method of parliament, to be ordered to be omitted; because, till the Committee had formed the address pursuant to the order, it was impossible to know what use would be made of those facts; for as they might have been improperly applied, and then would have been justly rejected, so there might have been so great use made of them, and so opposite to the design of the House in the intended address, that it will be improper to omit them.—(Signed,) Leeds, Howard, Weymouth, Abington, Thanet, Craven, Nottingham, Hereford, Granville, Normanby, Jefferys, De Longueville, Tho. Roffen.”

After consideration of the Report made from the Lords Committees, appointed to state matters of fact upon the Treaty in debate,

and to draw an Address thereupon, it is ordered by the Lords spiritual and temporal in parliament assembled, that the debate in the fourth paragraph in the report, shall be, and is hereby adjourned till Monday next, at eleven o'clock, and all the lords summoned.

March 17.

The order being read for resuming the adjourned debate, upon the fourth paragraph in the Report from the Committee appointed to state matters of fact, and draw an address to his majesty upon the Partition-treaty; some lords of the council, having his majesty's leave, were heard relating to the treaty: and Mr. Secretary Vernon being mentioned, a message was sent to the House of Commons by sir John Franklin, and sir Lacou William Child, to desire, that they will give leave to Mr. Secretary Vernon, a member of their House, to come to a Committee of the Lords now sitting in the Prince's lodgings, to give an account of some matters relating to the treaty of partition, which their lordships have now under their consideration.

Ordered, That it be the same committee as stated the matters of fact.

After some time, the messengers sent to the House of Commons returned this answer: That the Commons have given leave to Mr. Secretary Vernon to attend the committee as desired, if he thinks fit.

Hereupon the House was adjourned during pleasure, and the lords went to the committee, which being ended, the House was resumed, and the earl of Nottingham gave the House an account, that the lords had been at the committee, and heard Mr. Secretary Vernon to the treaty of partition. Then after reading the fourth paragraph, or matter of fact reported from the committee, and debate thereupon, the House agreed as follows: Whatever verbal orders or instructions were given, yet it appears not to us, that the draught of the treaty, when perfected, was considered at any council when the king was present, or that it was advised or approved by any council, or committee of council.

Ordered, That the further consideration of matters of fact in the transacting the Partition-Treaty, shall be adjourned till to-morrow.

March 18.

The House went into debate, pursuant to the order yesterday, concerning the treaty of partition; and it being proposed, That it appears that there were powers dated the 1st of July to treat with the emperor, the Dutch and French ministers, for securing the mutual friendship, upon terms most suitable to the circumstances at that time; and we are informed, that accordingly there was some progress made in that negotiation: But afterwards there were new powers granted the 1st of January, to treat with the French and Dutch ministers only, and the treaty for the partition of the

Spanish monarchy was concluded without the emperor.

And after debate thereupon, This question was put, Whether the said proposal shall go to the committee to be one of the heads for the address? It was resolved in the negative.

Then it was farther proposed, That it appears, That the French king's acceptance of the will of the king of Spain, is a manifest violation of the treaty; and humbly to advise the king, that in all future treaties with the French king, his majesty do proceed with such caution as may carry along with it a real security.

After debate thereupon, This question was put, Whether the said proposal should go to the committee to be one of the heads for the address? It was resolved in the affirmative.

“Dissentient.

“1. Because it may be construed to be an approbation of the treaty; which, as we conceive, was not intended by the House. 2. Because it is impossible to know the full meaning and extent of real security.—(Signed,) Normauby, Abingdon, Guilford, Nottingham, Granville, Godolphin, Rochester, Weymouth.”

The Lord Chamberlain acquainted the House, That he had a Message from his majesty in writing, which was read by the Lord Keeper, as followeth:

“WILLIAM R.

“His majesty having directed Mr. Stanhope, his envoy extraordinary, and plenipotentiary at the Hague, to enter into negotiations in concert with the States General of the United Provinces, and other potentates, for the mutual security of England and Holland, and the preservation of the peace of Europe: And the said Mr. Stanhope having transmitted to his majesty copies of his demands, made by himself and the deputies of the States, upon that subject to the French ambassador there, his majesty has thought fit to communicate the same to the House of Lords, it being his majesty's gracious intention to acquaint them, from time to time, with the state and progress of those negotiations.—*Kensington, March 17, 1700-1.*”

1. The proposals made to the French ambassador by Mr. Stanhope were read.

2. Translation of the Resolution of the States General for treating with Monsieur D'Avaux, the 22nd of March, 1700.

March 20.

The earl of Nottingham reported from the Lords Committees, appointed to state matter of fact upon the Treaty of Partition, and to draw an Address thereupon, That the committee had accordingly drawn an address to be presented to his majesty; which was read, and with one amendment, agreed to as follows, viz.

“We your majesty's most dutiful and loyal subjects, the Lords spiritual and temporal in parliament assembled, having read and consi-

dered the treaty, 21 Feb. 3 Martii, 1700, made with the French king, together with the separate and secret articles which your majesty has been pleased to communicate to us, do with all humility represent to your majesty, that to our great sorrow we find the matters thereof to have been of very ill consequence to the peace and safety of Europe; for besides the occasion it may have given to the late king of Spain to have made his will in favour of the duke of Anjou, if this treaty had taken effect, the prejudice to your majesty and your subjects, and indeed to all Europe, by the addition of Sicily, Naples, several ports in the Mediterranean, the province of Guipuscoa, and the duchy of Lorraine, had been not only very great, but contrary to the pretence of the treaty itself, which was, to prevent any umbrage which might be taken by uniting too many states and dominions under one head.

“And by all the informations we have yet had of the progress of this fatal treaty, we cannot find, that the verbal orders and instructions, if any were given to your majesty's plenipotentiaries, were ever considered in any of your majesty's councils, or that the draught of this treaty was ever laid before your majesty at any meeting of your council, much less that it was advised or approved by any council, or committee of council: we therefore think ourselves obliged in duty to your majesty, and justice to our country, most humbly to beseech your majesty, that for the future your majesty will be pleased to require and admit, in all matters of importance, the advice of your natural-born subjects, whose known probity and fortunes may give your majesty and your people a just assurance of their fidelity in your service; and in order hereunto, to constitute a council of such persons, to whom your majesty may be pleased to impart all affairs both at home and abroad, which may any way concern your majesty and your dominions; for as interest and natural affection to their country, will incline them to wish the welfare and prosperity of it much more than others who have not such ties upon them; and as their experience and knowledge of their country will also render them more capable than strangers of advising your majesty in the true interests of it; so we are very confident, that after such large and repeated demonstrations of your subjects' duty and affections, your majesty cannot doubt of their zeal in your service, nor want the knowledge of persons fit to be employed in all your most secret and arduous affairs.

“And since it appears, that the French king's accepting of the king of Spain's will is a manifest violation of this treaty, we humbly advise your majesty, in future treaties with the French king, to proceed with such caution, as may carry along with it a real security.”

It being proposed to send to the House of Commons for their concurrence to the said address, and debate thereupon; the question was put, Whether this address shall be communi-

ated to the House of Commons for their concurrence? It was resolved in the negative.

“Dissentient,
Rochester, W. Oxon, Devonshire.

1. “Because we conceive, that the last clause in the address does necessarily imply a war, and that a very long one, by reason of the extent unintelligible (at least to us, of a real security, and the great improbability of obtaining any terms of that kind; and since this necessarily implies great supplies, which cannot be granted without the House of Commons, we think their concurrence in this address absolutely necessary; and that it is very improper for us to desire that of the king, which, for want of such concurrence of the Commons, we conceive his majesty will not think fit or prudent for him to grant.

2. “We conceive all the other parts of the address very fit to be communicated to the House of Commons; for upon the success of it depends the future happiness of this nation, and as we cannot doubt of the readiness of the Commons to join in any proper measures towards it, so we think their concurrence in it would highly contribute towards the obtaining a gracious answer from his majesty; and we cannot but think it reasonable, that the advice of the whole nation assembled in parliament, should be made known to his majesty upon this occasion.

3. “Having desired the House of Commons to permit Mr. Secretary Vernon, a member of their House, to come to the Committee of Lords, to inform them of some matters relating to this treaty, we apprehend that the House of Commons may think it extraordinary, and not suitable to the good correspondence which is highly necessary between the two Houses, not to acquaint them with the things which have come to our knowledge, partly by the information of their own member.

4. “And having been otherwise informed of some transactions relating to this treaty, between the earl of Portland, and Mr. Secretary Vernon, by letters, of which we have not had a full account, we think it may be very useful to the public to communicate this address to the Commons, who have better opportunity than we have had of enquiring into this matter, which seems to be yet in the dark, and which their own member may help to explain to them.

(Signed) Leeds, Normanby, De Longueville, Nottingham, Granville, Craven, Thanet, Kent, H. London., Bath, Abingdon, Guilford, Willoughby, Scarsdale, Carnarvon, Weymouth, Jeffreys, Hunsdon, N. Duresme, Tho. Roffen., Poulett.”

Ordered, That the whole House do attend his majesty with the Address.

March 25.

The Lord Keeper reported his majesty's answer to the said Address:

“My lords; this Address contains matters

of very great moment: I will always take care, that all treaties I make shall be for the honour and safety of England.”

Ordered, That the foregoing Report of the Lords' Journal do lie upon the table to be perused by the members.

March 29, 1701.

The order of the day being read for the House of Commons to resolve itself into a Committee of the whole House, to consider of the State of the Nation, and of the Treaty of Partition; Ordered, That the Treaty of Partition, and the Report from the Committee appointed to inspect the Journals of the House of Lords what proceedings were therein relating to the Treaty of Partition, be referred to the consideration of the said Committee.

Then the House resolved itself into the said Committee, and after some time spent therein, Mr. Speaker resumed the chair; col. Granville reported from the said Committee, That they had come to a Resolution, which they had directed him to report when the House will please to receive the same.

Ordered, That the Report be made upon Tuesday morning next.

April 1.

Col. Granville, according to order, reported from the said Committee, the Resolution which they had directed him to report to the House, which he read in his place, and afterwards delivered in at the clerk's table, where the same was read, and agreed unto by the House, and is as followeth, viz.

Resolved, 1. That William earl of Portland, by negotiating and concluding the Treaty of Partition (which was destructive to the trade of this kingdom, and dangerous to the peace of Europe) is guilty of an high crime and misdemeanor. 2. That William earl of Portland be impeached of high crimes and misdemeanors.

Ordered, That sir John Leveson Gower do go up to the Lords, and at their bar, in the name of the House of Commons, and of all the Commons of England, impeach William earl of Portland of high crimes and misdemeanors, and acquaint them, That this House will, in due time, exhibit particular Articles against him, and make good the same.

Ordered, That a Committee be appointed to draw up Articles of impeachment against William earl of Portland. (And a committee was accordingly appointed.)

And sir John Leveson Gower went up to the Lords with the said impeachment.

Sir John Leveson Gower reported, That he had been at the Lords (according to order) and at their bar had impeached William earl of Portland of high crimes and misdemeanors, and acquainted them, That this House will, in due time, exhibit particular Articles against him, and make good the same.

Resolved, That a conference be desired with

the Lords, upon matters relating to the Treaty of Partition.

Ordered, That Mr. St. John do go to the Lords, and desire the said conference.

Mr. St. John reported, That he having according to order been at the Lords to desire a conference, the Lords do agree to a conference accordingly, to-morrow at one o'clock, in the Painted Chamber.

Ordered, That the Committee who are appointed to draw up the Articles of Impeachment, do manage the said conference.

April 9.

Ordered, That the managers appointed for the conference with the Lords, do withdraw into the Speaker's chamber, and draw up what is to be offered at the said conference.

Colonel Granville reported, That the managers appointed to withdraw into the Speaker's chamber, and draw up what is to be offered at the conference with the Lords, had drawn up the same accordingly, and directed him to report the same to the House, which he read in his place, and afterwards delivered in at the clerk's table, where the same was read, and agreed unto by the House, and is as followeth:

"It appearing by your lordships' Journal, that your lordships have received information of some transactions between the earl of Portland and Mr. Secretary Vernon, relating to the partition of the Spanish monarchy, the Commons having the said matter under their consideration, desire your lordships will be pleased to communicate to the Commons what informations your lordships have had of any transactions relating to any negociations or treaties of partition of the Spanish monarchy, by letters, or otherwise: And the Commons are fully assured, that your lordships will readily concur in assisting them in this inquiry, which they conceive absolutely necessary for the safety and honour of this kingdom, and the preservation of the peace of Europe."

Then the managers went to the conference, and being returned, colonel Granville reported, That they had attended the conference, and offered what the House had directed.

April 8.

Resolved, That an humble Address be presented to his Majesty, 1. That he will please to give order, that the Grand Alliance of 1689, with the two Secret Articles, may be laid before this House. 2. That the treaty made in the year 1698, with relation to the electoral prince of Bavaria's having part of the territories of the crown of Spain, may be laid before this House. 3. That the Powers and Instructions for making the late Treaties may be laid before this House.

April 9.

Mr. Secretary Vernon acquainted the House, that their Address having been presented to his majesty, his majesty had been pleased to give order for the Treaties and Powers to be laid

before this House, but that there were no instructions for either of those treaties in writing.

A Message from the Lords by sir Richard Holford, and Mr. Pitt.

"Mr. Speaker; The Lords do desire a conference with this House to-morrow at one o'clock in the Painted Chamber, upon the subject-matter of the last conference."

To which the House agreed: and the messengers were called in, and Mr. Speaker acquainted them therewith.

April 10.

Ordered, That the members who managed the last conference with the Lords, do manage the conference this day.

And the managers went to the conference, and being returned, Colonel Granville reported, That the managers appointed had attended the conference; that, on the part of the Lords, the lord marquis of Normanby managed the conference, and acquainted them, That the Lords had ordered to be laid before this House Two Powers, and also a Paper, which (although not signed by the earl of Portland) yet was laid before the Lords by him, and that there being some questions asked him by the Lords, there were his Answers also; which Powers and Paper colonel Granville read in his place, and afterwards delivered in at the clerk's table, where the same were read, and are as follow, viz.

GULIELMUS R.
Gulielmus Tertius Dei Gratia Magnae Britanniae, Franciae, et Hiberniae Rex, Fidei Defensor, &c. Omnibus ad quos praesentes Literae pervenerint Salutem. Quum ad conservandam universae Europae Quietum plurimum conducere arbitramur, ut de efficacissimis Mediis quibus redintegratae Pacis Beneficia confirmari ac conservari possint sedulo et opportunè provideatur, neq; ullum Publicae Tranquillitati immutandae periculum evidenter imminere, quam si eveniat ut Rex Catholicus, nullam Sobolem superstitem relinquens, moriatur, (illum vero Regem diu superesse exoptamus) ac proinde principes, illam successionem non tam jure quam viribus vindicantes, crudelissimum Bellum per tot florentia Regna, Provincias, Ditionesq; excitent; quòmq; Nobis spes maxima elucescat, haec Bella averti posse, atq; omnia amicè et feliciter componi, si de cujusq; Rationibus et Commodis in medium providè consuleretur: Quòd Nobis deniq; innoscat, Serenissimum Principem et Dominum Dominum Ludovicum Decimum Quartum, Regem Christianissimum, ac Praepotentes Dominos Dominos Ordines Generales Foederatarum Belgii Provinciarum, in eodem foris Animo esse. Sciatis igitur, Quod Nos fide prudentià ac in Rebus gerendis una perfidelis et perquam dilecti Consanguinei et Consilarii nostri Gulielmi Comitis Portlandiae, Vicecomitis de Cirencester, Baronis de Woodstock, Ordinis Nostri Pericelidii Equitis; necnon perfidelis et perquam dilecti

‘ Consanguinei et Consilarii Nostri Edwardi
 ‘ Comitis Jersey, unius Primariorum Secreta-
 ‘ riorum Nostrorum Status; plurimum confisi,
 ‘ eodem fecimus, ordinavimus et deputavimus,
 ‘ ac per præsentem facimus, ordinamus et depu-
 ‘ tamus veros et indubitatos Commissarios et
 ‘ Plenipotentiarios Nostros, dantes et conce-
 ‘ dentes iisdem aut eorum alteri plenam et
 ‘ omnimodam Potestatem atq; Autoritatem,
 ‘ pariter et Mandatum generale et speciale, ut
 ‘ pro Nobis et Nostro Nomine, cum præfatorum
 ‘ Serenissimi Regis Christianissimi, ac Domi-
 ‘ norum Ordinum Generalium Fœderatarum
 ‘ Belgii Provinciarum Commissario ac Pleni-
 ‘ potentiario, sive Commissariis ac Pleni-
 ‘ potentiariis de et super Præmissis conveniant,
 ‘ colloquantur et tractent, eaq; omnia perfici-
 ‘ ant et concludant, quæ ad Bella de Succes-
 ‘ sione Hispanica avertenda, stabilendamq;
 ‘ Europæ Pacem omni meliori modo faciant et
 ‘ conducant; Promittentes bona fide et in
 ‘ Verbo Regio, Nos omnia et singula quæ à
 ‘ dictis Commissariis ac Plenipotentiariis Nos-
 ‘ tris, vel eorum altero, vi Præsentium conclusa
 ‘ fuerint, grata, rata et firma habituros, nec
 ‘ contra eorum aliquid contraveniuros, sed
 ‘ eadem sancte et inviolabiliter observaturos.
 ‘ In quorum omnium majorem Fidem ac
 ‘ Robur, hæc Literas Manu Nostrâ Regia
 ‘ signatas, Magno Nostro Angliæ Sigillo
 ‘ muniti fecimus: Quæ dabantur in Palatio
 ‘ Nostro apud Kensington Die Secundo Men-
 ‘ sis Januarii, Anno Domini 1699-1700 Regniq;
 ‘ Nostri Undecimo.

‘ GULIELMUS R.

‘ Gulielmus Tertius Dei Gratia Magnæ Britan-
 ‘ niæ, Franciæ et Hiberniæ Rex, Fidei De-
 ‘ fensor, &c. Omnibus et singulis ad quos præ-
 ‘ sentes Literas pervenerint Salutem. Quùm ad
 ‘ conservandam Quietem Publicam plurimum
 ‘ conducere arbitramur, ut de efficacissimis
 ‘ Mediis quibus redintegratæ Pacis Beneficia
 ‘ confirmari et augeri possint sedulo et op-
 ‘ portunè provideatur: Quòm; Nobis inno-
 ‘ tescat Serenissimum Principem et Dominum
 ‘ Dominum Leopoldum Romanorum Impe-
 ‘ ratorem, tum Serenissimum Principem et
 ‘ Dominum Dominum Ludovicum Decimum
 ‘ quartum Regem Christianissimum, ac Præ-
 ‘ sentes Dominos Dominos Ordines Ge-
 ‘ nerales Fœderatarum Belgii Provinciarum,
 ‘ in eo Animo esse, ut Consilia sua No-
 ‘ biscum invicem communicare, et de iis quæ
 ‘ ad mutuam Amicitiam firmiter astringendam,
 ‘ quæq; presentis temporis Rationibus max-
 ‘ imè accommodata sint in commune consulere
 ‘ velint. Sciatis igitur, Quod Nos fide pru-
 ‘ dentia et in Rebus gerendis usu per dilecti et
 ‘ perquam fidelis Consanguinei et Consilarii
 ‘ Nostri Gulielmi Comitis de Portland, Ordinis
 ‘ Nostri Periscelidis Equitis; ac Consilarii
 ‘ Nostri Edwardi Comitis de Jersey, unius pri-
 ‘ mariorum Secretariorum Nostrorum Status,
 ‘ plurimum confisi, eodem fecimus, ordina-
 ‘ vimus ac deputavimus, sicut per Præsentem
 ‘ facimus, ordinamus et deputamus, veros et

‘ indubitatos Commissarios et Deputatos Nos-
 ‘ tros, dantes et concedentes iisdem Com-
 ‘ missariis et Deputatis Nostris, aut eorum
 ‘ alteri, plenam et omnimodam potestatem
 ‘ atq; Autoritatem, pariter et Mandatum ge-
 ‘ nerale ac speciale, ut pro Nobis et Nostro
 ‘ Nomine, cum præfatorum serenissimi, Ro-
 ‘ manorum Imperatoris, Serenissimi Regis
 ‘ Christianissimi, ac Dominorum Ordinum Ge-
 ‘ neralium Fœderatarum Belgii Provinciarum
 ‘ Commissariis ac Deputatis, plena etiam Po-
 ‘ testate munitis, de et super Præmissis con-
 ‘ veniant, colloquantur et tractent, eaq; omnia
 ‘ perficiant et concludant quæ ad prædictum
 ‘ finem omni meliori modo faciant et conducant.
 ‘ Promittentes bonâ fide et in Verbo Regio,
 ‘ Nos omnia et singula quæ à dictis Commis-
 ‘ sariis Nostris, aut ab eorum altero, vi Præ-
 ‘ sentium conclusa fuerint, grata, rata et firma
 ‘ habituros, nec contra eorum aliquid contra-
 ‘ venturos aut contraveniri passuros. In quo-
 ‘ rum omnium majorem Fidem ac Robur,
 ‘ hæc Literas Manu Nostrâ Regia signatas,
 ‘ Magno Nostro Angliæ Sigillo muniti fecimus:
 ‘ Quæ dabantur in Palatio Nostro apud Loo,
 ‘ Primo Die Mensis Julii Anno Domini Mille-
 ‘ simo sexcentesimo nonagesimo nono, Regniq;
 ‘ Nostri Undecimo.’

The lord Portland’s Paper is as follows: viz.

‘ At the beginning of the summer of the year
 ‘ 1699, when I was in Holland at my country
 ‘ house, and when the king would have me be
 ‘ concerned in the negotiating of this treaty
 ‘ with the emperor, the French king, and the
 ‘ States; being very unwilling to meddle with
 ‘ business again, from which I was retired; be-
 ‘ fore I would engage myself, I advised with my
 ‘ friends in Holland, and writ into England to
 ‘ Mr. Secretary Vernon, as my particular friend,
 ‘ Whether it was advisable for me to engage
 ‘ in any business again? To which Mr. Vernon
 ‘ answered in substance, That this would not
 ‘ engage me but for a little while; that I being
 ‘ upon the place, and generally acquainted
 ‘ with the foreign ministers, it would be easier
 ‘ for the king and properer for me to be em-
 ‘ ployed in it than any body else, that must be
 ‘ otherwise sent for on purpose.’

The earl of Portland being desired by the
 lord Sommers, with the leave of the House,
 to declare if he pleased, Whether the lord
 Sommers’s name was mentioned in the letter
 he received from Mr. Secretary Vernon;

The earl of Portland declared, That if he had
 remembered any such thing in the letter, and
 had not inserted it in the paper which he had
 delivered to the House, he should have thought
 he had deceived the House.

Ordered, That the consideration of the said
 Report be adjourned till to-morrow morning.

April 11.

Mr. Secretary Vernon presented to the
 House (pursuant to their Address to his ma-
 jesty) several Treaties and Translations of them,

and of the powers for them, and a schedule of them; and the schedule was read.

Mr. Secretary Hedges presented to the House (pursuant to their address to his majesty) the translation of the Treaty between the emperor and the States General, called the Grand Alliance, with the Separate Articles, dated May 12, 1689, and acquainted the House, That he had the original in his custody for the service of the House. The title of the said treaty was read. Then the Report of the Conference with the Lords yesterday was read.

Ordered, That Mr. Secretary Verron do lay before this House all the Letters and copies of letters which have passed between himself and the earl of Portland in the years 1698, 1699, or at any other time, with relation to any treaty concerning the partition of the Spanish dominions.

Ordered, That the said letters and copies of letters be laid before this House to-morrow morning.

April 12.

Mr. Secretary Vernon, according to order, presented to the House the Letters and Copies of letters between him and the earl of Portland, relating to the treaty of partition, with a list of them; and the list was read.

Ordered, That a committee be appointed to translate the said letters, and report the same to the House; and a committee was appointed accordingly, and they are to sit 'de die in diem.'

April 14.

Sir Godfrey Copley reported from the Committee appointed to translate the said letters, that they had translated them accordingly, and he delivered them in at the clerk's table, where the same, and the copies of the letters sent by Mr. Secretary Vernon to the earl of Portland, were read (all of them dated in the year 1698). And the treaty in the year 1698, with the secret and separate articles: and also, the treaty called the Grand Alliance, with the separate articles, dated May 12, 1689, were read.

Ordered, That the Serjeant do go with the mace into Westminster-hall, and the Court of Requests, and places adjacent, and summon the members there to attend the service of the House immediately. And he went accordingly; and being returned; and a debate being in the House touching the lord Sommers, the House was informed, That the lord Sommers had heard, that the House was upon a debate concerning him, and that he desired he might be admitted in, and heard.

Resolved, That the lord Sommers be admitted in, and heard.

Ordered, That candles be brought in; (and candles were brought in accordingly).

Then a chair was set by the serjeant, a little within the bar on the left hand coming in; and the serjeant had directions to acquaint the lord Sommers, That he might come in; and the door being opened, his lordship came in, and Mr. Speaker acquainted his lordship, That he

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might repose himself in a chair provided for him; and his lordship was heard what he had to offer to the House: and after his lordship withdrew, the House came to this resolution;

Resolved, 1. That John lord Sommers, by advising his majesty in the year 1698, to the Treaty for Partition of the Spanish monarchy, whereby large territories of the king of Spain's dominions were to be delivered up to France, is guilty of a high crime and misdemeanor. 2. That John lord Sommers be impeached of high crimes and misdemeanors.

Ordered, That Mr. Harcourt do go up to the Lords, and at their bar, in the name of the House of Commons, and of all the Commons of England, impeach John lord Sommers of high crimes and misdemeanors; and acquaint them, That this House will, in due time, exhibit particular Articles against him, and make good the same.

Resolved, 1. That Edward earl of Orford, by advising his majesty in the year 1698, to the Treaty of Partition of the Spanish monarchy, whereby large territories of the king of Spain's dominions were to be delivered up to France, is guilty of a high crime and misdemeanor. 2. That Edward earl of Orford be impeached of high crimes and misdemeanors.

Ordered, That col. Byerly do go up to the Lords, and at their bar, in the name of the House of Commons, and of all the Commons of England, impeach Edward earl of Orford of high crimes and misdemeanors; and acquaint them, That this House will, in due time, exhibit particular Articles against him, and make good the same.

Resolved, 1. That Charles lord Halifax, by advising his majesty in the year 1698, to the Treaty of Partition of the Spanish monarchy, whereby large territories of the king of Spain's dominions were to be delivered up to France, is guilty of a high crime and misdemeanor. 2. That Charles lord Halifax be impeached of high crimes and misdemeanors.

Ordered, That Mr. Bruges do go to the Lords, and at their bar, in the name of the House of Commons, and of all the Commons of England, impeach Charles lord Halifax of high crimes and misdemeanors; and acquaint them, That this House will, in due time, exhibit particular Articles against him, and make good the same.

April 15.

Resolved, That an humble Address be presented to his majesty, that he will be pleased to remove John lord Sommers, Edward earl of Orford, Charles lord Halifax, and William earl of Portland from his council and presence for ever.

Resolved, That an Address be drawn up upon the said Resolutions, and upon the debate of the House, to be presented to his majesty.

Ordered, That it be referred to the Committee (who are to draw up the Articles of Impeachment) to draw up the said Address.

Z

Resolved, That the said Address be presented to his majesty by the whole House.

April 16.

Mr. Bromley reported from the Committee, to whom it was referred to draw up an Address upon the Resolutions yesterday, and upon the debate of the House to be presented to his majesty, That they had drawn up an Address accordingly, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the clerk's table, where the same was read, and (with an amendment) agreed unto by the said House, and is as follows, viz.

The Humble ADDRESS of the House of Commons to the King.

"Most gracious Sovereign,

"We your majesty's most dutiful and loyal subjects, the Commons in parliament assembled, do humbly crave leave to represent to your majesty the great satisfaction we have from our late enquiry concerning the Treaty of Partition made in the year 1698 (on which the treaty in 1699 was founded), to see your majesty's great care of your people and this nation, in not entering into that negotiation without the advice of your English counsellors: and finding that John lord Sommers (on whose judgment your majesty did chiefly rely in that so important affair) did, in concert with Edward earl of Orford, and Charles lord Halifax, advise your majesty to enter into that treaty of so dangerous consequence to the trade and welfare of this nation; and who, to avoid the censure which might justly be apprehended to fall on those who advised the same, endeavoured to insinuate, that your majesty, without the advice of your council, entered into that treaty, and under your sacred name to seek protection for what themselves had so advised; of which treatment of your majesty we cannot but have a just resentment. And that they may be no longer able to deceive your majesty, and abuse your people, we do humbly beseech your majesty, that you will be pleased to remove John lord Sommers, Edward earl of Orford, and Charles lord Halifax, from your council and presence for ever; as also William earl of Portland, who transacted those treaties, so unjust in their own nature, and so fatal in their consequences to this nation, and the peace of Europe. And we humbly crave leave, upon this occasion, to repeat our assurances to your majesty, that we will always stand by and support your majesty to the utmost of our power, against all your enemies both at home and abroad."

April 21.

Mr. Speaker reported, That he with the House did yesterday present to his majesty their humble Address; and that his majesty was pleased to give a most gracious Answer thereunto as follows: viz.

"Gentlemen,

"I am willing to take all occasions of thank-

ing you very heartily for the assurances you have frequently given me, and now repeat, of standing by and supporting me against all our enemies, both at home and abroad; towards which nothing, in my opinion, can contribute so much, as a good correspondence between me and my people; and therefore you may depend upon it, that I will employ none in my service, but such as shall be thought most likely to improve that mutual trust and confidence between us, which is so necessary in this conjuncture, both for our own security, and the defence and preservation of our allies."

May 5.

A Message from the Lords by sir Robert Legard and sir Richard Holford. [See p. 240.]

Resolved, That an Answer be returned to the Lords, That the Articles against the Lords impeached are preparing, and in a short time this House will send them up to the House of Lords.

May 8.

Sir Bartholomew Shower, according to order, reported, from the committee to whom it was referred to draw up Articles of Impeachment against the Lords impeached, the Articles of Impeachment against Edward earl of Orford, which he read in his place, and afterwards delivered in at the clerk's table, where the same were once read.

Resolved, That the said Articles be read a second time, article by article: and the same were severally read a second time; and upon the question severally put thereupon, agreed unto by the House to be the Articles of Impeachment against the earl of Orford: and are as follow: [See p. 241.]

Resolved, That such witnesses as are necessary to be made use of in relation to the said Impeachment, have the protection of this House during their attendance upon that service.

May 13.

Resolved, That a further humble Address be presented to his majesty, That he will be graciously pleased effectually to answer the Address of this House, for removing John lord Sommers, Edward earl of Orford, Charles lord Halifax, and William earl of Portland, from his council and presence for ever.

May 16.

The Answer of Edward earl of Orford to the Articles of Impeachment against him was, according to order, read, and is as follows: [See p. 245.]

Ordered, That the said Answer be referred to the committee appointed to draw up the Articles of Impeachment. That the said committee do prepare a Replication to the said Answer.

Mr. Harcourt reported from the committee appointed to draw up Articles of Impeachment, That they had drawn up Articles accordingly

against John lord Sommers, baron of Evesham, in maintenance of the impeachment against him for high crimes and misdemeanors: and he read the same in his place, and afterwards delivered them in at the clerk's table, where they were read, article by article; and upon the question severally put thereupon, agreed unto by the House to be Articles of Impeachment of high crimes and misdemeanors against the said lord Sommers; and are as follow: [See p. 250.]

May 23.

Sir B. Shower reported from the committee appointed to draw up the Articles of Impeachment, That they had considered of the Answer of Edward earl of Orford, and had drawn up a Replication thereunto, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the clerk's table; where the same was read, and, with an amendment, agreed unto by the House: and is as followeth; viz.

"The Commons have considered the Answer of Edward earl of Orford, to the Articles of Impeachment exhibited against him by the knights, citizens, and burgeses assembled in parliament; and do aver their charge of high crimes and misdemeanors against him to be true, and that the said earl is guilty in such manner as he stands accused and impeached; and that the Commons will be ready to prove their charge against him, at such convenient time as shall be appointed for that purpose."

May 27.

The Answer of the lord Sommers to the Articles of Impeachment exhibited against him was, according to order, read, and is as follows: [See p. 263.]

May 31.

Mr. Bromley reported from the committee to whom it was referred to draw up the Articles of Impeachment, and who were to consider of the messages from the Lords relating to the Impeachments, and inspect the precedents of messages in relation to former impeachments, and report the same to the House, that they had considered the said messages, and inspected the precedents; and that they had drawn up an Answer to the Message from the Lords the 21st instant, and had directed him to report the same to the House; which he read in his place, and afterwards delivered in at the table; where the same was read, and is as followeth: [See p. 275.]

Sir Bartholomew Shower also reported from the said Committee, That they had drawn up a Replication to the Answer of the lord Sommers to the Articles of Impeachment exhibited against him, which they had directed him to report to the House; which he read in his place and afterwards delivered in at the clerk's table, where the same was read and agreed unto by the House: and is as follows: viz.

"The Commons have considered the Answer

of John lord Sommers to the Articles of impeachment exhibited against him by the knights, citizens, and burgeses assembled in parliament, for high crimes and misdemeanors. The said Commons do aver their charge against the said lord Sommers to be true; and do say, that he is guilty in the manner as he stands accused and impeached; and the said Commons will be ready to prove the same at such convenient time as shall be appointed for that purpose."

June 4.

A Message from the Lords by sir Richard Holford and Mr. Pitt. [See p. 279.]

Mr. Harcourt, according to order, reported from the Committee, who were appointed to consider of the Message from the Lords of Saturday last, and search precedents in relation thereunto, and prepare an answer to the said message, That they had considered the said message, and searched precedents, and had drawn up an Answer accordingly, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the clerk's table; where the same was read, and, with some amendments, agreed unto by the House, and is as followeth: [See p. 280.]

A motion being made, and the question being put, That the engrossed Replication to the Answer of the lord Sommers to the Articles of impeachment exhibited against him, be now read; it passed in the negative.

June 6.

Mr. Harcourt reported from the Committee appointed to draw up Articles of impeachment, and who were to consider of the message from the Lords the fourth of June instant, and to draw up what shall be offered at a conference with the Lords upon the subject-matter of the said message, that they had drawn up the same accordingly, and had directed him to report the same to the House; which he read in his place, and afterwards delivered in at the clerk's table; where the same was read, and agreed unto by the House, and is as followeth: [See p. 281.]

June 9.

Mr. Bruges reported from the Committee, to whom it was referred to draw up Articles of impeachment, that they had drawn up Articles accordingly against Charles lord Halifax, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the clerk's table; where the same was read, and agreed unto by the House, and are as follow: [See p. 293.]

June 10.

Mr. Harcourt reported from the Committee, to whom it was referred to draw up Articles of impeachment, that they had (according to order) drawn up an Answer to the message from the Lords yesterday, which they had directed

him to report to the House; which he read in his place, and afterwards delivered in at the clerk's table; where the same was read, and with an amendment agreed unto by the House, and is as followeth: [See p. 287.]

The House proceeded to take into consideration the message from the Lords yesterday, whereby they acquainted this House, That they have appointed the Trial of John lord Sommers on Friday next, on the impeachment against him; and the same was read.

Ordered, That the said Message be referred to the Committee appointed to draw up Articles of Impeachment, to prepare an Answer to the said Message.

A Message from the Lords, by sir Richard Holford and Mr. Gery. "Mr. Speaker, The Lords do desire a present conference with this House in the Painted Chamber, upon the subject-matter of the last conference."

To which the House agreed; and the messengers were called in again, and Mr. Speaker acquainted them therewith.

Ordered, That the Committee that managed the last conference, do manage this conference.

And the managers went to the conference, and being returned,

Mr. Harcourt reported, That he had (according to order) carried the said Answer to the Lords.

Mr. Harcourt also reported, The managers appointed had met the Lords at the conference; and that the conference, on the part of the Lords, was managed by the duke of Devonshire, who acquainted them, &c. [See p. 287.]

June 11.

The House took into consideration the Report of the conference with the Lords yesterday. Ordered, That a free conference be desired with the Lords upon the subject-matter of the last conference.

Mr. Harcourt reported from the committee appointed to draw up Articles of Impeachment, That they had, according to order, drawn up an Answer to the Message from the Lords on Monday last, for appointing the trial of the lord Sommers upon Friday next, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the clerk's table; where the same was read, and agreed unto by the House, and is as followeth; [See p. 288.]

June 12.

Col. Granville reported, That he having (according to order) been at the Lords to desire a free conference with their lordships upon the subject-matter of the last conference, the Lords answered, That they will send an answer by messengers of their own.

The engrossed Articles of Impeachment against Charles lord Halifax were read.

Ordered, That the Articles be carried to the Lords. That Mr. Bruges do carry the said Articles to the Lords. That he do also pray and demand, That Charles lord Halifax do give

sufficient security to abide the judgment of the House of Lords.

A Message from the Lords by Dr. Newton and Mr. Gery:

"Mr. Speaker, we are commanded by the Lords to acquaint this House, that," &c. [See p. 289.]

June 13.

Mr. St. John reported from the Committee to whom it was referred to draw up the Articles of Impeachment, and to whom the messages from the Lords yesterday were referred, That they had drawn up an Answer to the said messages, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the clerk's table; where the same was read and agreed unto by the House, and is as followeth; [See p. 291.]

Ordered, That the said Answer be sent to the Lords. That Mr. St. John do carry the said Answer. That the Committee who managed the last conference, do manage the free conference.

And the managers went to the conference; and being returned,

Mr. Harcourt reported what had happened at the conference in a speech of the lord Haversham, upon which the managers thought fit to withdraw from the conference, to the end they might acquaint the House therewith.

Ordered, That the managers do withdraw into the Speaker's chamber, and collect the matter of the conference, and what was said by the lord Haversham, and report the same to the House. And the Committee withdrew; and the House adjourned till the return of the Committee.

The Committee being returned,

Mr. Harcourt reported the matter of the free conference, and the words which the lord Haversham had spoke thereat, which he read in his place, and afterwards delivered in at the clerk's table; where the same was read, and is as followeth; [See p. 292.]

Resolved, 1. That John lord Haversham hath, at the free conference this day, uttered most scandalous reproaches and false expressions, highly reflecting upon the honour and justice of the House of Commons, and tending to the making a breach in the good correspondence between the Lords and Commons, and to the interrupting the public justice of the nation, by delaying the proceedings on the impeachments. 2. That John lord Haversham be charged before the Lords for the words spoken by the said lord this day at the free conference: and that the Lords be desired to proceed in justice against the said lord Haversham, and to inflict such punishment upon the said lord, as so high an offence against the House of Commons does deserve.

Ordered, That sir Christopher Musgrave do carry the said Charge and Resolution to the Lords.

A Message from the Lords by Dr. Newton

and Mr. Gery: "Mr. Speaker, the Lords having been informed by their managers, that some interruption happened at the free conference, which their lordships are concerned at, because they wish that nothing should interrupt the public business, do desire the Commons would come again presently to the said free conference, which they do not doubt will prove the best expedient to prevent the inconvenience of a misunderstanding upon what has past."

Resolved, That this House will send an answer by messengers of their own.

And the messengers were called in again, and Mr. Speaker acquainted them therewith.

Sir Christopher Musgrave reported, That he had been at the Lords, and (according to order) delivered the Charge and Resolution of the House, relating to the lord Haversham.

June 14.

A Message from the Lords by sir John Hoskins and Dr. Newton: "Mr. Speaker, the Lords have commanded us to acquaint this House, that upon the occasion of their last Message yesterday, in order to continue a good correspondence between the two Houses, their lordships did immediately appoint a Committee to state the matter of the free conference, and also to inspect precedents of what has happened of the like nature; and that the public business may receive no interruption, the time desired by their lordships for renewing the free conference being elapsed, their lordships desire a present free conference in the Painted-chamber, upon the subject-matter of the last free conference."

Resolved, That this House will send an answer by messengers of their own.

And the messengers were called in again, and Mr. Speaker acquainted them therewith.

Resolved, That an answer be returned to the Lords, That the Commons are extremely desirous to preserve a good correspondence between the two Houses, and to expedite the trials of the impeached lords; but do conceive it is not consistent with the honour of the Commons to renew the free conference, until they have received reparation by their lordships doing justice upon John lord Haversham, for the indignity he yesterday offered to the House of Commons.

Ordered, That the lord Cheine do carry the said Answer to the Lords.

Mr. Bruges reported, That he had carried the Articles of Impeachment against Charles lord Halifax to the Lords, and had demanded, That the said lord Halifax do give security to abide the judgment of the House of Lords.

The lord Cheine reported, That he had, according to order, been at the Lords, and delivered the Answer to their lordships' Message.

June 16.

A Message from the Lords by sir Richard Holford and Dr. Newton: "Mr. Speaker, we are commanded by the Lords to acquaint this

House, that the lord Sommers having informed the Lords, that sir Stephen Fox, John Smith, esquire, William Lownds, esquire, Stephen Harvey, esquire, and William Gulston, esquire, members of this House, may be material witnesses for him, at his trial on Tuesday next in Westminster-hall, the Lords desire that they may have leave to attend and give their testimonies at the said trial. And that a letter which his majesty was pleased to write to him in 1698, being now in this House, will be necessary for his defence at his trial, they desire that the said letter may be produced at the said trial.

Resolved, That this House will send an Answer to the said Message, by messengers of their own.

And the messengers were called in again, and Mr. Speaker acquainted them therewith.

Ordered, That the Committee who were appointed to draw up the Articles of Impeachment, do consider of the reasons why this House cannot proceed to the trial of the lord Sommers to-morrow morning, and report the same to the House.

Ordered, That the said Message be referred to the said Committee.

June 16.

A Message from the Lords by sir John Francklyn and sir Richard Holford.

"Mr. Speaker, The Lords have commanded us to acquaint this House, that the lord Halifax hath put in his Answer to the Articles exhibited against him by this House, and to deliver a copy thereof to this House.

"Also the Lords have commanded us to acquaint this House, that this House having, the first day of April, sent up to their lordships an impeachment against William earl of Portland, for high crimes and misdemeanors, and there being as yet no particular Articles exhibited against him, their lordships think themselves obliged to put this House in mind thereof."

A Message from the Lords by sir John Francklyn and sir Richard Holford.

"Mr. Speaker, We are commanded by the Lords to acquaint this House, that for the keeping a good correspondence between the two Houses, and to put the charge against John lord Haversham in a course of justice, at his lordship's motion, they have ordered his lordship a copy of the charge against him, and that he do put in his Answer thereunto, in order to bring that matter to a speedy judgment."

June 17.

Ordered, That no member of this House do presume to go into the place appointed by the Lords for the trial of the lord Sommers, without leave of this House.

Ordered, That the serjeant at arms attending this House, do go with the mace, and summon all the members of this House that are in, or about Westminster-hall, immediately to attend the service of the House.

And he went accordingly; and being returned,

Mr. Harcourt reported from the Committee appointed to draw up Articles of Impeachment, and to whom the messages from the Lords yesterday were referred, to draw up Reasons why they cannot proceed to the trial of the lord Sommers this day, that they had drawn up Reasons, which they had directed him to report to the House accordingly, which he read in his place, and afterwards delivered in at the clerk's table, where the same were read and agreed unto by the House, and are as follow: [See p. 306.]

Resolved, That the said Reasons be sent by a message to the Lords.

Ordered, That the earl of Dysert do carry the said message.

The earl of Dysert reported to the House, that he had, according to their order, carried up their message to the Lords.

Ordered, That no member of this House do presume to appear at the place erected for the pretended trial of the impeachment of the lord Sommers, under the penalty of incurring the utmost displeasure of this House.

June 18.

Ordered, That a Committee do inspect the Lords' Journals, with relation to the proceedings against the impeached Lords, and report what they find therein. That the Committee who were appointed to draw up the Articles of Impeachment, be the said Committee. That no member of this House do presume to go out of town. That all members of this House do attend the service of the House on Friday morning next.

June 20.

A Message from the Lords by sir John Francklyn and sir Lacon William Child. "Mr. Speaker, We are commanded by the Lords to acquaint this House, that the Lords have appointed Monday the 23rd day of this instant June, at ten o'clock in the forenoon, for the trial of Edward earl of Orford, in Westminster-hall. Also, that they are commanded by the Lords to deliver to this House a copy of the lord Haversham's Answer to the charge against him. Also, that the Lords, in Answer to the Message of the Commons of the 17th instant, say, &c." [See p. 318.]

Resolved, In answer to the message of the Lords, appointing Monday next for the trial of the earl of Orford, That the Lords have been acquainted, that the Commons would proceed in the first place against the lord Sommers; and they are ready to go to that lord's trial as soon as the Commons have received satisfaction for the affront offered to the House of Commons by the lord Haversham at the free conference; and that the necessary preliminaries are adjusted by a committee of both Houses.

Ordered, That the lord Mordant do carry the said Answer to the Lords.

The lord Mordant reported to the House,

That he had, according to order, carried their Answer to the Lords.

Mr. Bruges reported from the Committee appointed to inspect the Lords' Journals, with relation to the proceedings against the impeached Lords, and report the same to the House, that they had inspected the same accordingly, and had directed him to report what they find therein; which he read in his place, and afterwards delivered in at the clerk's table, where the same was read, and is as followeth, viz. [See p. 309.] After which Report read,

Ordered, That the serjeant do go with the mace into Westminster-hall, and courts there, and Court of Request, and places adjacent, and summon the members there to attend the service of the House immediately.

And he went accordingly; and being returned,

Resolved, That the Lords have refused justice to the Commons upon the impeachment against the lord Sommers, by denying them a committee of both Houses, which was desired by the Commons, as the proper and only method of settling the necessary preliminaries, in order to the proceeding to the trial of the said lord Sommers with effect: and afterwards, by proceeding to a pretended trial of the said lord, which could tend only to protect him from justice, by colour of an illegal acquittal; against which proceedings of the Lords, the Commons do solemnly protest, as being repugnant to the rules of justice, and therefore null and void.

Resolved, That the House of Lords, by the pretended trial of John lord Sommers, have endeavoured to overturn the right of impeachments lodged in the House of Commons by the ancient constitution of this kingdom, for the safety and protection of the Commons against the power of great men; and have made an invasion upon the liberties of the subject, by laying a foundation of impunity for the greatest offenders.

Resolved, That all the ill consequences which may at this time attend the delay of the supplies given by the Commons for preserving the public peace, and maintaining the balance of Europe, by supporting our allies against the power of France, are to be imputed to those who, to procure an indemnity for their own enormous crimes, have used their utmost endeavours to make a breach between the two Houses.

Ordered, That the Message this day from the Lords be referred to the Committee who are appointed to draw up the Articles of Impeachment.

Ordered, That the said Committee do consider of the proceedings between the two Houses relating to the impeached Lords, and state to this House the matter of fact, in order to the justification of this House in their proceedings.

A Message from the Lords by Dr. Newton and Mr. Gery. "Mr. Speaker, In answer to the Message of the House of Commons this day, the Lords do acquaint the Commons, that

they might have known by the Records of the House of Lords, that the Lords have proceeded to the trial of the lord Sommers on Tuesday last, being the day appointed; and the Commons not appearing to maintain their Articles against the said lord, the Lords have, by judgment of their House, acquitted him of the Articles of Impeachment against him exhibited by the House of Commons, and all things therein contained; and have dismissed the said impeachment.

“And the Lords have appointed Monday next for the trial of the earl of Orford; on which day they will proceed on the said trial.

“The Commons still pressing for a committee of both Houses (which the Lords never can consent to) for the reasons already given, their lordships can infer nothing from their persisting

in that demand, than that they never designed to bring any of their impeachments to trial.

“As to the lord Haversham, his Answer is now before the House of Commons; and the Lords resolve to do justice in that matter.”

Ordered, That no member of this House do presume to appear on Monday next at the pretended trial of the earl of Orford, upon pain of incurring the utmost displeasure of this House.

For the copy of the Answer of Charles lord Halifax, sent down from the Lords, to the Articles of Impeachment exhibited against him, and the Paper sent down from the Lords, entitled, ‘The Answer of John lord Haversham, to the Charge exhibited against him,’ being never read in the House of Commons, see p. 399.

418. Proceedings against THOMAS FRASER, of Beawfort, Captain SIMON FRASER, and others, for Treason and other Crimes; 10 WILLIAM III. A. D. 1698.* [Now first printed from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in Prætorio Burgi de Edinburgh, vicesimo septimo die mensis Junii, millesimo sexcentesimo nonagesimo octavo, per honorabiles viros Dominos Colinum Campbell de Abercubill, Davidem Hume de Crocerig, Joannem Lauder de Fountainhall, Archibaldum Hope de Rankellor, et Jacobum Falconar de Phesdoe, Commissionarios Justiciarii dicti. S. D. N. Regis.

Curia legitime affirmata.

THE said day anent the criminal letters of treason raised, intended and pursued, at the instance of sir James Stewart, of Goodtrees, his majesties advocat for his highness interest, and as having warrant and commissione from the lords of privie councill, against Thomas Fraser, of Beawfort; captain Simeon† Fraser his sone;‡ William Fraser, of Foyre; Hugh Fraser, of Kinmonavie; William Fraser, of Dalcraig; William Fraser, of Erchitt; Alexander Fraser, of Calduthill; Hugh Fraser alias Houstoun Oig, in Leadchin; Alexander Fraser, of Riven; John Fraser his brother; Alexander Fraser,

sone to Faraline; Alexander Fraser, sone to Migavie; Tawes Fraser, brother to Garthbeg; Thomas Houstoun, sone to the minister of Stratharrick; Thomas Fraser M^cWilliam, J^c Jan—servant to Foyre; Aeneas M^cBayne, brother to Drummond, in Doirs; William Fraser, of Ghusachan; John Fraser, sone to Teynakeill; Hugh Fraser sone to Strowyie; Donald Baine M^cEwan J^c Alaster, pyper to the laird of Glenmoristoun; Donald Gromach, buman to William Fraser sone to Teynakeill; Donald Mantach M^cEan in Lagbuy; Hugh Fraser, younger, of Bochruben; John Fraser, brother to Culduthell, elder: Thomas Fraser, elder, of Strowie; Hugh Fraser, brother to Erchitt; Alexander Fraser, sone to Mr. James Fraser, minister at Kirkhill, and master Robert Monroe minister at Abertarffe: Making mention, That where be the lawes of this and all other well governed realmes the crymes of treasons and rebellions, as lykeways of unlawfull leagues and combinations, and the convocating or convening of subjects in armes without the warrant of authority; and the occupying, possessing, stuffing and fortifying of houses and forts, with armed men and other provisiones; as also the waylaying, seizing, apprehending, and making free subjects prisoners, and detaining them in privato carcere, or in bondage and captivity, and treating them with insolence and cruelty; as lykeways the ravishing, or offering to ravish women by force and violence, and without respect to the quality or conditione of the persons injured or even to common humanity; and the persisting in the said violence, rapt and ravishing, by carrying the ravished about from place to place, at the pleasure of the ravishers, are punishable

* Of some of the Depositions in this case, an imperfect account was printed in the year 1704, in the “Collection of Original Papers about the Scots Plot,” and is inserted in the Sommers’ Tracts.

† So in the Record, of which the spelling is retained.

‡ The notorious Simon lord Lovat. See more of him in the proceedings relative to the Scots Plot, A. D. 1704. See also his trial, A. D. 1746-7.

with the confiscation of lyfe, lands and goods ; Lykeas by the act of parliament, James 1st, parliament 1st, capt. 3, it is statute, that noe man openly rebell against his majestie under the paines of forfaiture of lyfe and goods ; and by the act of parliament James 2nd, parliament 6, cap. 24, it is statute, that who committs treason against the king's persone and majestie, rises in fear of warr against his majestie, receipts and supplies such as have committed treason or stuffs their houses, and holds them against the king, or stuffs houses of their own in furtherance of rebells, shall be punished as traytors. And by the act of parl. qu. Mary parl. 9, cap. 75, it is statute, that none attempt to doe or raise any bands of men of weir on horse or foot, with culverings, pistolls, picks, or other munitione bellicall without special licence, in wryte of our soveraigne lady and her successors, under the paine of death, to be execute upon the raisers of the saids bands, as also upon them that ryse and conveans in bands : and by the act James 6th, parl. 8, chap. 131, it is statute, that none of the subjects presume to convocat, conveen or assemble, for holding of counccills to treat, consult, and determine in any matters of state civill or ecclesiastick, except in the ordinar judgments, without his majesties speciall command or express licence, under the paines made against such as unlawfully convocats the leidges ; and by another act James 6th, parliament 10th, chapter 12th, It is statute, that noe leagues or bands be made amongst the subjects of any degree without the king's privity and consent, under the pain to be holden and execute as movers of seditioun to the breach of peace, which two last acts are ratified Charles the 2nd, parliament 1st chap. 4th ; and by the act Charles 2nd, parliament first, chap. 5th, it is declared, that it is and shall be high treason to the subjects of this kingdome, or any number of them, more or lesse, upon any ground or pretext whatsoever, to ryse and continue in arms, to maintaine any forts, strengths, or garrisones, or to make any treaties or leagues with forrainers, or amongst themselves, without his majestie's speciall authority and approbatione first had and obtained thereto ; and by the act Charles the 2nd, parliament first, session 2nd, chapter 2nd, it is statute and declared, that to plott, contryve, or intend to levie warr, or to take up armes against the king, or any commissionat by him, is punishable as high treason ; Lykeas by the act Charles the 2nd, parliament 2nd, chapter 11th, it is statute, that in tyme coming, in all cases of treasonable rising in armes and open and manifest rebellione against his majestie and his authority, his majestie's advocat for the tyme may and ought to insist against and prosecute such persones as he shall be ordered by the king or his privy council to pursue, and if they be cited and doe not appear, the justice, notwithstanding of their absence, may and ought to proceed to consider and give interloquitor upon the lybell, and if it be found relevant admitt the same to the knowledge of

ane assyse, and upon their verdict finding the same to be proven, the Doome and Sentence of forfaiture ought to proceed and be given in the same manner as if the persones accused had compeired and were present, which raising convocating and conveening in armes, without or against his majestie's authoritie, with the other crymes forsaid, are highly agravat, and the treason and rebellione becomes yet more open and manifest when the persones guilty to presume persist and continue therein, after having bein charged in his majestie's name and his officers, or by a herald therto warranted to lay down their armes and render their persones to abide the law under the paine of rebellione ; as also by the 34th act, parliament 1st, sessione 1st, Charles the 2nd, it is statute, that the celebrator of clandestine marriages be banished the kingdome never to returne under the paine of death : Nevertheless it is of verity, that Thomas Fraser, of Beaufort ; captain Simeon Fraser, his sone ; William Fraser, of Foyre ; Hew Fraser, of Kinmornavie ; William Fraser, of Dalraig ; William Fraser, of Erchitt ; Alexander Fraser, of Culduthell ; Houstoun Oig, in Leadclune ; Alexander Fraser, in Riven ; John Fraser, his brother ; Alexander Fraser, sone to Farraline ; Alexander Fraser, sone to Migavie ; Taws Fraser, brother to Garthbeg ; Thomas Houstoun, sone to the minister of Stratharrick ; Thomas Fraser, M^rWilliam J^c Jan, Aencas M^rBayne, broyr to Drummond in Doirs ; Hugh Fraser, of Ghusachane ; John Fraser, sone to Tynakeill ; Hugh Fraser, sone to Strowie ; Donald Baine M^rEvan Ic Alistair, pyper to the laird of Glenmoristoun ; Donald Gromach, buman to William Fraser sone to Tynakeill ; Donald Mantach M^rEvan Laghuy, and the other persones above named, and Mr. Robert Monroe, minister at Abertarffe, shaking of all fear of God and regard to his majesties lawes and authority, are guilty airt and part of the crymes above and under mentioned ; in so far as the said captain Simeon Fraser, haveing on aue or other of the dayes of the moneths of September last, sent to the forsaid persones to come and meet him at Moniak a house belonging to ——— Fraser, of Streichen ; they agreed and came to the forsaid house pertaining to Streichen, and there ther being severall other gentlemen of the name of Fraser and others, they unlawfully leagued and combined together for to ryse in armes and prosecute their mischeviuous practices ; lykeas for their better effectuating thereof, intimatione having bein made by one or other of the persones above mentioned to the men of Stratharrick, which is a part of the lord Lovates estate and interest, they within three or four dayes after the meeting at Streichen's house, did rendezvous about 200 men in armes at Essock, and when the men of Stratharrick did come to the said rendezvous at Essock, about 200 men in armes as s^d is, the saids Thomas and Simeon Frasers of Beaufort and the other persones above named, did conveen and were present with them, and the

persons above complained upon, did encourage these men unlawfully convened in armes as s'd is, and by swearing and causing them swear to joyne and concur for maintaining the saids Thomas and Simeon Frasers' pretences to the estate of Lovat, against all opposers; lyke as after the rendezvouze, the saids Thomas and Simeon Frasers and others above complained upon, that had bein at the rendezvouze, went in to a change house near by, and there contrived and drew up the letter subscribed by them and directed to the lord Fraser, and of which letter a copy is hereto subjoynd (the principall being put in the Clerk of Justiciary's hands) and doeth manifestly containe ane unlafulfull league and combinatione for mutuall adherence in their wicked designs, which leagues and combinatione is the rather aggravate than palliat by any exceptione therein of the king and government, as being 'protestatio contra-ria facto.' Lyke as the said letter of associatione doth also containe bold and wicked threatenings against the lord Saltoune, and false and undue reflectiones and insinuationes against the marquess of Atholl and his family; and this letter being framed and agreed to, as said is, to be sent to the lord Fraser after his parting from the banders and leaguers, doth farther declare their purpose to continue in the said unlafulfull associatione, and to have the same recorded 'ad futuram rei memoriam,' and the said letter was accordingly sent to the lord Fraser to his house of _____, the lord Saltoune having gone north the next day to visit the lady dowager of Levat at her house of Castledoune, after he had stayed there a few dayes, and he was returning homeward with the lord Mungo Murray, sone to the marquess of Atholle, and some other gentlemen by the way throw the wood of Bonthrew, about four myles from Castledoune, the said lord Saltoune, lord Mungo Murray and their company, were upon the sixth or ane or other of the dayes of October last, surprisid by the said captaine Simeon Fraser and his father, who having convocated a great many men in armes, above fourscore or a hundreth, did place themselves in ambush for waylaying and seizing the said lord Saltoune, lord Mungo Murray, and their companie, whom they accordingly seized with great violence and barbarity, disarming, dismounting, throwing them down and beating them, with many threatenings to murder them outright, and the saids Thomas and Simeon Frasers, having with their forsaid company, whereof severalls were subscriyvers of the forsaid letter of associatione, taken prisoners the said lord Saltoune, lord Mungo Murray, and their company, unable to resist soe great a force, they caused them again to mount upon litle pityfull beasts in stead of their own horses, whereof they had robbed them, as also of their armes and other things about them, and thus carried them away captives under their guards of men and armes, to the house of Finallen, where they made them close prisoners every one in a rouble be himselfe, for the space of six or seven

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dayes, having in the meantyme fortified and stuffed the house with armed men, and other provisiones; and farther in prosecutione of their wicked band and league to rise in armes, the saids Thomas and Simeon Frasers and their complices, sent the Fiery Cross* through the cuntry to raise their men and people in armes, whereby they convened to the number of 200 more in armes to assist and joyne with the saids Frasers and others above named, in their forsaid open and manifest insurrectione and rebellion; in surder prosecution whereof the saids Thomas and Simeon Frasers and their complices above named, did the same day that they had made the lord Saltoune and lord Mungo Murray and others their prisoners, march with a company of about 100 armed

* "This mode, by which the highland chieftains convoked their clans to arms, is, I apprehend, of greater antiquity than their conversion to Christianity; with the difference only of change of symbol. Anciently, when the chief desired to assemble his clan, he killed a goat with his own sword, and dipped a half burned stick in the blood. This he gave to one of his vassals, who bore it with all dispatch to the next village, where the first person he met was obliged, by the feudal customs, to relieve him, and carry forward this summons to arms; and thus it was carried from village to village through the chieftain's domains.—Upon their conversion to Christianity, the priests would no doubt discover in the killing of a goat a species of heathen sacrifice. It was proper that a symbol should be adopted more analogous to their new religion; and what so suitable as the cross, which, under the splendid name of the 'Labarum,' blazed in the heavens, conducting the Christian emperor to victory and glory. A slight pole, with a bit of stick infixed in the figure of a cross, burned at the ends, was substituted in the place of that dipped in goat's blood: and this ceremony was performed even in the late rebellion." Arnot.

"Time rolls his ceaseless course. The race of yore,
Who danced our infancy upon their knee,
And told our marvelling boy-hood legends store,
Of their strange ventures happ'd by land or sea,
How they are blotted from the things that be!
How few, all weak and wither'd of their force,
Wait, on the verge of dark eternity,
Like stranded wrecks, the tide returning hoarse,
To sweep them from our sight! Time rolls his cease-
less course.

"Yet live there still who can remember well,
How, when a mountain chief his bugle blew,
Both field and forest, dingle, cliff, and dell,
And solitary heath, the signal knew;
And fast the faithful clan around him drew,
What time the warning note was keenly wound,
What time aloft their kindred banner flew,
While clamorous war-pipes yelled the gathering
sound,
And while the Fiery Cross glanc'd, like a meteor,
round."

Lady of the Lake, Introduction to Canto 3 :

In which the poet has, in delightful spirit-stirring numbers, finely pourtrayed the consecration, progress and power of this Highland Ensign for summoning a clan to war.

2 A

men, to the lady Lovat's house of Castledounie, and there wickedly and violently seized upon the widow lady and her servants, and made them prisoners, and robbed and spoiled the goods in and about the house at their pleasure, and thus the said Thomas and Simeon Frasers and their complices above complained upon, having broke out into open rebellious in armes, and seized the forsaid two housses with the prisoners therein, they garrisoned the same, and appointed captains and other officers over their troops and garrisons, and adding yet more barbarity to all their violence, they sett up a gallows before the house of Ffinalen, and in the view of the windows where the prisoners were, threatening to hang them thereon: and by sending the said Fierie Cross, as said is, they convocat and convened yet more men in armes, and after they had kept the saids prisoners some six or seven dayes in the forsaid captivity and terrour, they carryed them from Ffinalen by armed guards to the isle of Algies, where they kept them prisoners in a creell house for all their lodging, and did treate them in a most miserable manner, soe that the lord Saltoun fell soe sick, that they were faine to dismiss him, but still keeping the lord Mungo Murray prisoner for some dayes thereafter, and about the same tyme they have the lady dowager of Lovat still their prisoner in Castledouny, and during their imprisonment the saids Thomas and Simeon Frasers and their complices above complained upon, propone conditiones, extort articles and agreements, and whatever they pleased to demand, there being noe resisting such a wicked and barbarous force, which continually proceeded to greater violence and barbarity, for not only the saids Thomas and Simeon Frasers and their saids complices refused to lay down armes and desist from their violence, when commanded and charged be the sheriff of Inverness, but going on in their villanous barbarities, they kept the said lady dowager in most miserable captivity, and when nothing that she could propose or promise would satisfie them, the said captain Simeon Fraser takes up the most madd and villanous resolutione that ever was heard off, for all in a sudden he and his saids complices makes the lady close prisoner in her chamber, under his armed guards, and then comes upon her with the said Mr. Robert Monroe, minister at Abertarffe, and three or four ruffians in the night tyme, about two or three in the morning of the moneth of October last, or one or other of the dayes of the said moneth of October last, and having dragged out her maids Agnes M'Brayr, and ——— Fraser, he proposes to the lady that she should marry him, and when she fell in lamenting and crying, the great pype was blown up to drowne her cries, and the wicked villains order the minister to proceed, and tho she protested with teares and cries and also offered all promises of any thing else, and declared she would sacrifice her life sooner than consent to their proposall, nevertheless the said minister proceeds and declaires

them married perones, and Hugh Fraser of Kinmonavie and the said Hutcheon Oig, both of them theives and murderers, are appointed for her waiting maids, and though she often swarred and again cryed out most grievously, yet noe relenting, but the bage pype is blown up as formerly, and the forsaid ruffians rent off her cloathes, cutting her staves with their durks, and soe thrust her into her bed; after this most horrid violent rapt, when the lady's friends offered to make some attempt for her rescue out of captain Simeon's hands, the said captain Simeon and his saids complices cary'd her away to the hills, and raising the countrey to the number of ffour or fyve hundred men in armes of their own name and dependers, did detaine still the afflicted lady, and did stand to their own defence; and farther, when the lords of his majesties privy councill having intelligence of this violence and insurrectione in armes, and of the forsaid wicked practices and rebellions of the saids Frasers and others above complained upon, did order one herald to charge the saids traitours and rebels to lay down their armes and sett the lady at liberty, and render themselves prisoners to abyde the law, and did also order the sheriff of the shyre with the *pose comitatus*, as lykewayes his maj't's troups and forces to march against them and subdue them, yet the forsaid Thomas and Simeon Frasers and their saids accomplices, disobeyed the said charge, and in manifest contempt therof, continued in armes and rebellions for a considerable tyme after they were soe charged, and detained the said lady prisoner for severall dayes thereafter; by all which it is evident, that the haill foresaid perones and each of them respective, are guilty as actors, at least as airt and part of the crymes of treason and open rebellions, convocations and convening in armes, unlawfull banding and leaguering, robbrie, ravishment and the other violences and crymes above mentioned, or of one or other of them, and also the said master Robert Monroe, minister, is guiltie of celebrating a clandestine marriage, which being found by the knowledge of one inqueist, they ought to be punished by forfaiture of lyfe, lands, honour and goods, and other paines of the law, to the example and terrour of others to commit the lyke in tyme coming.

Follows the Copy of the Bond of Association, or Letter directed to the Lord Fraser:

STRATHERICK, Sept. 22, 1697.

" My Lord; The near interest I have in you ingadged me and my friends under subscriyving to put your lordship to the trouble to accost my lord Saltoun, and as you wish the name of Fraser weell, to be as serious with him as possible in pressing home the subsequent affair, with what else the bearer will inform you not repugnant thereto, viz. You may shew my lord Saltoun that the sad and lamentable circumstances, which the late Lovat's death has cast me and the cadents of my family in, and

the old relations and friendship betwixt us, but especially the designes he hath upon us hee given occasione to this lyne, by which wee not only expostulat with him, but also crave his advyce, in the present criticall juncture of affaires. Our condition is such, that the name of Fraser was never (and perhaps shall never be) nearer ane utter extinctions, if we ourselves, by the advyce of the many good and great friends wee have, in all the places of the kingdome, practising a part of that courage and magnanimity, which was natural to our ancestores, and by the blessing of God, which we shall alwayes implore to accompany our lawfull endeavours, doe not prevent our finall ruine. We have putt on a full resolution to defend our lands, possessiones, goods, lives, wyves, children, liberties, and priviledges of free subjects, which lye at the stake, against all invading and insulting avarice, ambitione and oppressione 'pro aris et focis, contra omnes mortales,' the king's majestie, his authority and lawes only excepted. It is reported, that my lord Saltoune hath bein endeavouring to gett Lovat's eldest daughter to his sone, which the pretended tutors take advantage of, to insnare us, by giving it out that a Fraser will be the man, whyle ther is noe such thing intended, by which they think to facilitate their other misstrous designes, and to befool both him and us. For how is it possible, that a family who still had a voracious desyre after greatness and took all occasiones of raising themselves, and expressing their ambition, will now prefer any other people to themselves. This is simply impossible; therefore tell him as he wishes his own weell and our standing, that he lay noe stress upon any promises or assurances, except he gett the child in his custody, which if they refuse, it is ane evident prooffe that their whole pretences will turne to a shamme. And when he hath gott the child wee advyse, that nothing be done without the unanimous consent of the friends here, otherwayes wee assure my lord Saltoune by these, that it will occasione a rupture, that neither this, nor the next (and perhaps no succeeding) age will sement, and therefore, wee expect that he will not move a step in this bussiness, nor intrude upon us, or our affaires, particularly that he come not to this countrey without our free and frank consent and call. It would requyre a tractat to give a full account of the bad useage wee mett with, and how much justice wee have upon our side, the two or three miscreants who shooke off all principles, naturall, divine and humane, and who did all they could to eradicat us and themselves, have been so flouted and hissit at by all people, that ther taking a remorse of conscience, and making recantations for fear of being diverted by the women of the country. My lord, these few lynes flowing from a deep sence of our deplorable conditione, we expect you'll concurr with my lord Saltoune, in giving us your best advyce. Wee have sent ane honest gentleman with these, to whom you may communicate what you think not fit to commit to

paper. Soe expecting that my lord Saltoune will preserve the old friendship built upon the principles of naturall affectione, as inviolable with us, as wee'l doe with him, and as our predecessors have done for severall centuries, we waite both your returnes and subscriyve ourselves, My lord, Your lordship's most affectionat uncle, consings and servants. *Sic Subscribitur*, Lovatt, W. Fraser, of Foyer; Fraser of Borland, W. Fraser of Knoncrean, John Fraser of Miklegarth, Jo. Fraser of Munthegair, Hugh Fraser of Kintrelye, Jo. Fraser of Erigik, W. Fraser of Dalraig, H. F. of Leadoloin, Hugh Fraser of Strowie, Alexander Fraser of Faraline, T. Fraser of Gortuleg, H. F. of Duncien, Jo. Fraser, of Abershie; Alexander Fraser, of Ruthven; Jo. Fraser, of Littlegarth; J. Fraser, younger, of Belname; T. Fraser, of Drumund; J. Fraser, of Bachruben; A. F. of Mikleglendo. Follows the Postscript. My humble duty to my lady Fraser. After communicating of this lyne to my lord Saltoune, lay the same up and preserve it, that it may not only be a prooffe of our fair advertisement to my lord Saltoune, but alsoe a monument of the friendly correspondence wee keep with your family; therefore we expect that your lo'p will trust none with it, and I and my friends have kept severall doubles of it, in *futuram rei memoriam*."

The Lords Commissioners of Justiciary, for severall good causes moving them, continue the dyet against Thomas Fraser, of Beawfort; captain Simeon Fraser, his sone, and severalls mentioned in the criminall letters for the crymes of rapt, ryseing in armes, garisoning of houses, till the 11th day of July.

July 12, 1698.

The said day, anent our sovereign lord's other criminall letters of treason, raised at the instance of sir James Stewart, of Goodtrees, his majestie's advocate for his highness interest, against Thomas Fraser, of Beawfort; captain Simeon Fraser, his sone; William Fraser, of Foyer; Hugh Fraser, of Kinmonavie; Wm. Fraser, of Dalraig; Hugh Fraser, of Bolleskine; John Fraser, younger, of Migavie; Alexander Fraser Roy, his brother; Tawes Fraser, brother to Littlegarth; Wm. Fraser, brother of Erchitts; Hugh Fraser, sone to Bochruben; Alexander Fraser, uncle to Faraline; Alexander Fraser, of Riven; and John Fraser, his brother, in Riven; Hutcheon Oig Fraser, in Leadchine; Alexander Fraser, sone to Balmaine; James Fraser, brother to Gortleg; Alexander Fraser, aneother brother of Gortlegs; Allan M'Donald, brother to Achadoack; Duncan M'Taws, officer to Strechin; John M'Alaster, vig and his brother; — M'Vuller, miller to Streichen; Alexander Fraser, sometime in Bochruben; John Fraser, in Abershie; Donald Dow M'Allan, at Drummon; John Fraser, younger, of Drummon; William Fraser, his natural brother, there; Martine Cameron, in Glendobeg; Johu Fraser, in Horeland, commonly called the major; Hugh Fra-

ser, sone to Culduthell; James and John Frasers, sons to Culduthell; James Fraser, in Ardachie, in Abertarfe; Angus M'Donald, brother to Kepoch Alaster; Mor M'Donald, in —; Hugh Fraser, younger, of Strowie; Alexander Fraser, younger, of Culduthell; Hugh Fraser, sone to Menchigavy; Hugh Fraser, brother to Menchigavy; William Fraser, in Knockie, tenent to Streichen; Alexander M'Huistonier, in Belocharnoch; Thomas M'Alaster Cheill, there; Alexander M'Donald, there; Thomas Houstoun, sone to the minister of Stratharick; Thomas Fraser M'William, vic Jane, servant to Foyer; Aeneas M'Bayne, brother to Drummond, in Dores; William Fraser, of Gulsuchan; John Fraser, sone to Teynakeill; Donald Bayne M'Evan vic Alaster, pyper to the laird of Glenmoristoun; Donald Gronach, bowman to William Fraser, sone to Teynakeill; Donald Mantach M'Jan, in Lagbuy; maater Robert Monroe, minister at Abertarfe; Thomas Fraser, elder, of Strowie; Alexander Fraser, sone to Mr. James Fraser, at Kirkhall; that where by the lawes of this and all other weell governed realmes, the crymes of treason and rebellione, and open insurrectione, in armes, as lykewayes of unlawfull leagues and combinations, and the convocating and conveying of the subjects in armes, without the command of his majestie's authority, and the occupying, possessing, stuffing, and fortifying of houses and forts, with armed men, and other provisions; as alsoe the waylaying, seasing, apprehending, and making free subjects prisoners, and detaining them by violence in bondage and captivity, and treating them with all hardships, are punishable with confiscatione of life, lands, and goods; lykewayes be the act of parliament James the 1st, parliament first, cap. 3d, it is statute, that noe man openly rebell against his majestie, under the paine of forfeiture of life and goods; and by the act of parliament James the 2nd, parl. 6th, cap. 23th, it is statute, that who commits treason against his majestie's persone and majestie, rises in fear of weir against the king, resettts and supplies such as have committed treason, or stuffs their houses, and holds them against his majestie, or stuffs of their own in furtherance of rebels, shall be punished as traytours; and be the act of parliament queen Mary, parliament 9th, cap. 75th, it is statute, that none attempt to doe or raise any band of men of weir, on horse or foot, with culverings, pistolls, pikes, spears, or other munitione bellicall, without special licence in wryte of her majestie and her successors, under the paine of death, to be execute upon the raisers of the saids bands, as also upon them that raises and conveys in bands; and by the act James 6th, parliament 8th, cap. 131st, it is statute, that none of his majestie's subjects presume to convocat, convene, or assemble, for holding of councils, to treat, consult, and determine, in any matter of state, civill or ecclesiastick, except in the ordinary judgements, without the king's special command or express licence, under the paines

made against such as unlawfully convocats the leidges; and be another act James 6th, parliament 10th, cap. 12th, it is statute, that noe leagues or bands be made amongst the king's subjects of any degree, without his privy and consent, under the paines to be holden and repnte as movers of seditiōne to the breach of the peace, which two last acts are ratified; Charles 2nd, parliament 1st, caput 4th, and by the act Charles 2nd, parliament 1st, cap. 5th, it is declared, that it is and shall be high treason to the subjects of this kingdome, or any number of them, more or lease, upon any ground or pretext whatsoever, to rise and continue in armes, to maintaine any forts, strenshts, or garrisones, or to make any treaties or leagues with forraigners, or amongst themselves, without his majestie's special authority and approbatione, first had and obtained thereto; and by the act Charles 2nd, parliament 1st, session 2nd, cap. 2nd, it is statute and declared, that to plott, contrive, or intend to levie warr, or to take up armes against his majestie, or any commissionat by him, is punishable as high treason; lykeas by the act Charles 2nd, parliament 2nd, cap. 11th, it is statute, that in tyme coming in all causes of treasonable rising in armes, and open and manifest rebellione against the king and his authority, his advocat for the tyme may and ought to insist against, and proccute such persones as he shall be ordered by his majestie or his privy councill to pursue; and if they be cited and doe not appear, the justice, notwithstanding of their absence, may and ought to proceed to consider and give interloquitōr upon the lybell; and if it be found relevant, admitt the same to the knowledge of anc assyse, and upon their verdict finding the same to be proven, the doome and sentence of forfeiture ought to proceed and be given in the same manner as if the persones accused had compeired and were present, which raising, convocating and conveying in armes without or against his majestie's authority, with the other crymes forsaid, are highly aggravat, and the treason and rebellion becomes yet more wicked and atrocious, when they are perpetrat by persones under proces for former treasons, and other capitall and wicked crymes, and after having bein charged in the king's name by his officers or by a herald thereto warranted, to lay down their armes and render their persones to abyde the law, under the paine of rebellione. Lykeas to attempt to seise and actually to seise and keep back by force and violence, persones cited or under baill to appear befor the Court of Justiciary, or any other court or judicatory, to bear witnes and give evidence, or for any other cause or effect, as also to extort by force and violence, bands, declarations, or any other wryte or paper from any of the free subjects or leidges, are lykewayes crymes of a high nature, and ought to be severely punished; Neverthelesse, it is of verity, that the saids Thomas and captain Simeon Frasers, and the haill other persones above named, shakeing off all

fear of God, and regard to his majestie's laws and authority, are guilty airt and pairt of the crymes above and after mentioned, in so far as the said captain Simeon Fraser and his complices above named, being either already under process of treason, or designing to frustrat the said proces raised against others of their accomplices, did upon the occasions that certain persones witnesses were to come or be brought from Stratherick, and the bounds adjacent thereto, within the shyre of Inverness, for to give evidence in the said proces anent the crymes of treason and others therein lybelled, wickedly add to all their former rebelliones and other horrid crymes, their convocating and conveneing in armes of new to the number of 2 or 300 men less or more, who appearing in ane open insurrectione and manifest rebellione in armes, did, upon the 15th, 16th, 17th, 18th, or ane or other of the dayes of the moneth of June last bypast, march in fear of weir and open hostility against certain of his majestie's loyall subjects, convened by his authority and for furthering of justice, within the forsaid bounds of Stratharick and others within the shyre of Inverness, and there invading, encompassing, threatening and overmastering them, did seise upon their persones and make them prisoners, and violently keep back such as were either cited, or were under baill to have come, and given evidence and witness in the process above mentioned. As also they extorted from the said free leidges certain bonds, declarations and other wrytes, according to their own wicked imaginations and purposes. Lykeas, that they might raise and promote their forsaid manifest insurrectione and rebellione, they sent the Fierie Cross through the countrey, a signe and symbol used amongst them to gather their complices in armes, for making insurrectiones and rebelliones and other unlawful convocations; as also they did place a garrison in John Fraser's house of Meiklegarth in Stratharick, and in a word have committed most manifest treason and rebellione, by open rising in armes against his majestie's lawes and authority, and using hostilities and violence upon his good subjects; by all which it is manifest, that the forsaid persones complained upon, or ane or other of them, are guilty of the crimes of open and manifest rebellione in armes, treason, unlawfull convocations, violent imprisonments, and the haill other crymes above lybelled, which being found by the knowledge of ane inquest, they ought to be condignely punished by the forfaiture of life, lands, honour and goods, to the example and terror of others to committ the lyke in tyme comeing.

His Majesty's Advocat humbly craved, That seing Thomas Fraser of Beaufort, captain Simeon Ffraser his sone, and a great many more persones, their friends and dependents, are now in armes and open rebellione, as appears by severall letters produced, and that there is nqt 'tutus accessus' to cite them, that y'r lo'p's would be pleased to grant warrand to cite them

at the mercat crosses of the head burghs of the next shyre in the lowe lands, conforme to the 66th act, 11th parliament, king James 6th, appointing that all executions and wairnings in the king's causes against iseland men, highlandmen, or borderers, in brocken countreys, 'ubi non patet tutus accessus,' be made at the mercat crosses of the head burghs of the next shyre in the lowe lands, and which is ordinarily in use to be granted in such cases where there is noe 'tutus accessus.'—The Lords Commissioners of Justiciary having considered the above wryten representatione, they grant warrand for the edictall citatione craved against the haill persones contained in the list given in.

September 5, 1698.

His Majesty's Advocat produced criminall letters of treason duely execute against captain Simeon Fraser younger of Beaufort, Thomas Fraser elder of Beaufort, his father, and others, and the pursevant executor thereof, and his witnesses to the executing of the same, being solemnly sworne, made faith upon the truth and verity of the executions in all poynts, and his majestie's Advocat declaired, he insisted against the persones after named, in order to forfaiture in absence, viz. against captain Simeon Fraser, eldest lawfull sone to Thomas Fraser of Beaufort, William Ffraser of Ffoyer, Hugh Fraser in Kinmonavie, William Fraser in Dalcraige, William Fraser of Erchitt, Alexander Ffraser of Culduthell younger, Hugh Fraser alias Houston Oig in Leanclune, Alexander Ffraser in Riven, John Fraser his brother, Alexander Fraser sone to Ffaraline, Alexander Fraser sone to Migavie, Tawes Fraser brother to Littlegarth, Thomas Houstoune sone to the minister of Stratherrick, Aneas M'Bayne brother to Drummond M'Bayne, Hugh Fraser sone to Strowie, Hugh Fraser younger in Bochruben, John Fraser brother to Culduthell elder, major Thomas Fraser elder of Strowie, Hugh Fraser brother to Erchitt, John Ffraser younger of Migavie.

And produced warrands of council for prosecuting them, whereof the tenors followes:

EDINBURGH, Nov. 1, 1697.

The lords of his majestie's privy councill doe heirby recommend to sir James Stewart, his majestie's advocat, to raise and follow furth a process of high treason against Thomas and Simeon Frasers of Beaufort, and their accomplices, befor the lord justice generall, justice clerk, and comissioners of his majestie's justiciary, according as his lo'p hes or shall receive information of their misdemanners, irregularities and barbarities. Ext. by me,

Sic Subscribitur, GILB. ELLIOT.

EDINBURGH, June 23, 1698.

The lords of his majestie's privy councill doe heirby recomend to sir James Stewart, his majestie's advocat, to intent and follow furth ane additionall process of treason at his instance

before the lords commissioners of his majestie's justiciary, against captain Simeon Fraser and his associates, for convocating the leidges, and ryseing in armes and setting up the Fiery Cross, contrary to law. Extracted by me,
Sic Subscritur, GILB. ELLIOT.

The lords justice generall, justice clerk, and commissioners of justiciary, with consent of his majestie's advocat, deserts the dyet as to Hugh Fraser of Bolleskine, Thomas Fraser in Shougly brother to William Fraser of Erchitt, John Fraser in Aberbie, Hugh Fraser sone to Culduthell elder, James Ffraser sone to the said Culduthell, John Fraser also sone to the said Culduthell, John Ffraser sone to Teynakeill, and John M'Donald brother to Archadieach; his majestie's advocat restricts the lybells against captain Simeon Fraser and the other persones insisted against, to their treasonable ryseing in armes and open rebellione against his majestie, in the termes of the acts of parliament, with all the aggravations lybelled for aggravating the said treasone and rebellione.

The lords justice generall, justice clerk and commissioners of justiciary having considered the lybells pursued at the instance of his majestie's advocat against captaine Simeon Fraser and the other persones insisted against as restricted by my lord advocate for their treasonable ryseing in armes and open rebellione against his majestie in the termes of the act of parliament, with the aggravationes lybelled for aggravating the said treasone and rebellione, they find the lybell soe restricted, relivant to inferr the paines of treasone lybelled, and remits the same to the knowledge of the assyse.

Sic Subscritur, LOTHIAN, I. P. D.

ASSISA.

Sir John Clerk, of Pennyuck.
Archibald Primerose, of Dalmeny.
Sir William Hope, of Kirklistoune.
Archibald Murray, of Spott.
Sir George Hamiltoun, of Barntoun.
Sir John Shaw, of Greenock.
Sir James Dick, of Prestfield.
Andrew Patersone, of Kirktoun.
Mr. Robert Blackwood, merchant.
James Livingstone, merchant.
George Clerk, late baillie of Edinburgh;
James Marjoribanks, merchant, there.
James Bowden, merchant, there.
Patrick Crawford, merchant, there.
John Lindsay, merchant, there.

The Assyse lawfully sworne, noe objectione of the law in the contraire: His majesty's advocat for probatione adduced the criminal letters of treasone raised against captain Simeon Fraser, and his accomplices, with the executione thereof; and James Guthrie pursevant and the witnesses to the executing therof being solemnly sworne, made faith upon the truth and verity of the samen in all poynts. And for furdre probatione adduced the witnesses after deponing, who were all purged of

malice, prejudice, ill-will and partial councill, and solemnly sworne, viz.

Alexander Fraser, younger, of Balmain, aged 21 yeeres, unmarried, purged, and sworne; depones that the tyme lybelled he saw captain Simeon Fraser, of Beaufort; William Fraser, of Ffoyer; Hugh Fraser, of Kinmonavie; William Fraser, in Dalraig; William Fraser, of Erchitt; Alexander Ffraser, of Culduthill, younger; Hugh Fraser, alias Houston Oig, in Lealclue; Alexander Ffraser, in Riven; John Fraser, his brother; Alexander Fraser, son to Ffaraline; Alexander Fraser sone to Migaivie; Tawes Fraser, brother to Littlegarth; Thomas Houstoune, sone to the minister of Stratherrick; *Aneas M'Bayne*, brother to Drummond M'Bayne; Hugh Fraser, sone to Strowie; Hugh Fraser, younger, in Bochruben; John Ffraser, brother to Culduthell, elder; major Thomas Fraser, elder of Strowie; Hugh Fraser, brother to Erchitt; and John Fraser, younger, of Migavie, in armes at Ffanellan, and the most of them at Essock; to the number of fifty or threescore, and having heard a paper read in court which is mentioned in the lybell, ownes that it is of the same straine with a paper that he saw Kinmonavie signe, and saw delyvered to my lord Ffraser; depones that he wes present att Ffanellan, when he saw the lord Saltoune, and lord Mungo Murray,* brought prisoners there, and made close prisoners in severall roumes with centries putt on them, and that they were brought there prisoners by captain Simeon Fraser, and the other persones above mentioned; depones that when they came to Ffanellan, a house belonging to the Laird of Kinaires, the doors were shutt close and they forced them up and putt in a garrisone of armed men in the house; depones that the tyme lybelled in the second lybell, he heard captain Simeon Fraser order the coronoch to be sent throw the cuntrye of Stratherrick, to convey the cuntrye in armes, and he saw them meet in armes about ayne score or two hundreth, and he mustered and drew them up in armes, depones that he saw at Ffanellan, about two or three dayes after my lord Saltoune was brought prisoner, about two or three hundreth men in armes under the command of captain Simeon Fraser, and he saw him muster them there, and that William Ffraser of Ffoyer; Ffraser of Strowie; and John Ffraser, brother to Culduthell elder, were commanders of these men conveyed there in armes, and that they all of them had armes, such as guns, swords, pistols, targes. Depones that about seven or eight dayes after lord Saltoune was made prisoner, he was at Castle Downie, where he did see the lady Lovat, and that he sawe a number of armed

* "Son to John first marquis of Athole by lady Amelia Stanley, daughter of James earl of Derby, and brother to the lady dowager Lovat mentioned in this Trial." Arnot.

men within the house and centries standing at the gate, and that they were commanded by William Ffraser, in Dalcraig; and that he saw captain Simeon Ffraser about the same tyme there. Depones he saw centries sitting upon the threshold of my lady's chamber door, and that they continued there for a night, after which tyme the deponent went away. Depones he saw pairties sent from Ffanellan to Castledownie, too and frae severall tymes, depones that after lord Saltoun and lord Mungo Murray were brought prisoners to Ffanellan, he saw a gallows standing before the windows where the saids two lords were kept close prisoners, which was not there the day they were brought prisoners; depones that about nyne or ten dayes after lord Saltoun and lord Mungo were taken prisoners, he did see one night at Castledownie captain Simeon Ffraser and Mr. Robert Monroe, minister at Abertaffe, att Castledownie; and being deysred by Mr. Leonard Robertsone of Strathloch, to gett him notice of my lady's conditione, he went to my lady's chamber door and heard her sighing and moaning, and it was then about the creek of day, and that he heard the pypes playing in the dyneing roume next roume to my lady's chamber. The same night he saw my lady's two women in another roume, with centries set upon them, and the two women weeping, and this was about the midnight that he saw them. Depones that about the twentieth of November last he would have seen captain Simeon Ffraser, and the other persons above mentioned in armes to the number of threitie, fourtie, and sometymes fiftie, and the night before my lady left them they would have been the number of seven or eight score all in armes, which was about the twentie day of November as said is. Depones that in June last, he did see captain Simeon Ffraser, with the above named persons to the number of about two hundred men in armes, march up towards lord James Murray after he had left a certaine pairtie in a certain place, endeavouring to gett the wind of lord James and to surround him. *Causa patet*, and this is the truth as he shall answer to God.

Sic Subscritur, A. FRASER.

LOTRIAN, I. P. D.

Thomas Fraser, of Gartlobeg, aged 30 years, married, purged, and sworn; depones that in September last the deponent saw about sixty or seventy Stratherrick men meet in armes at Essecks, and that captain Simeon Ffraser was with them there, and William Fraser of Ffoyer, Hugh Ffraser of Kinmonavie, William Fraser in Dalcraig, William Fraser of Erchitt, Alexander Ffraser of Culduthell younger, Hugh Ffraser alias Hutcheon Oig in Leadchune, Alexander Ffraser in Ruthven, John Fraser his brother, Alexander Ffraser, sone to Ffaraline, Taws Fraser, brother to Littlegarth, and John Fraser brother to Culduthell elder, Hugh Ffraser, brother to Erchitt, John Fraser younger of Migavie; all in armes, and that they

had swords, gumms, and pistolls, and some of them targes; Depones that after they had mett, captain Simeon Ffraser gave them thanks for their meeting soe readily, and deysred them to be ready against the next call he should give them, and some of them were on horse and some on foot, and att their parting the footmen gave a volie of fyre. Depones that sometymes thereafter, about the beginning of October, that captain Simeon Ffraser and the deponent coming from Inverness; and the lord Saltoun, and lord Mungo Murray, from Castledownie; there having mett them in the wood of Bochruben some armed men, when they were mett together they did make up thirty, or forty foot besydes horses, all in armes, where the lord Saltoun, and lord Mungo, being ryding peaceably, captain Simeon Ffraser gave orders to his company to take my lord Saltoun, either dead or alive, and accordingly came up close to the lord Saltoun, and lord Mungo, and assaulted them with bended pistolls, and commanded them to render themselves prisoners; my lord Saltoun asking for what cause, he answered because it was his pleasure; Depones ther was present with captain Simeon Ffraser at that tyme in armes, William Fraser, of Foyar; William Ffraser, of Erchitt; Alexander Ffraser, of Culduthell, younger; Hugh Ffraser, alias Houstoun Oig, Alexander Ffraser, in Riven; Tawes Fraser, brother to Littlegarth; Thomas Houston, sone to the minister of Stratherrick; and the deponent did see captain Simeon and his pairtie dismounting and disarming lord Saltoun and lord Mungo, and all that were with them, and threatening them, the footmen having guns presented and durks drawn, and the horsemen pistolls cocked, and thereafter they were set upon cuntry horses instead of their own, with guards in armes surrounding them, and carried them in that posture to Finellan, where they were made close prisoners in severall-roumes, and centries put upon the roumes, and a guard kept in the house where they stayed for four or fyve nights. Depones that immediately thereafter the deponent heard the fiery cross was sent throw the cuntry to convey the men, and accordingly the nixt night there convened at Ffanellan about three or four hundred men, with guns, swords, and pistolls, and pypers, and depones that they were all commanded by captain Simeon, and under him by their severall under leaders, and that the haill persons insisted against, and contained in the preceding depositions, were all there in armes; depones that ther was a considerable pairtie sent from Ffanellan to my lady Lovat's house at Castledownie, and that pairties were from tyme to tyme releived, and that there were centries put upon severall roumes of the house and particularly upon my lady's chamber, and that they continued these centries for seven or eight dayes att least, and that he saw captain Simeon Ffraser there, and that he was the persone that gave the orders; depones he saw lord Sal-

towne and lord Mungo carried prisoners to the Isle of Eagles, where they were kept prisoners with a guard of fifty or sixty men in armes. Depones that in June last the fiery cross and coronoch* was sent thro the countrie of Stratherrick to conveen the countrey, and that captain Simeon Fraser was then there with twenty men in armes, and took the deponent prisoner, alleading that he was an unkynd kinsman; depons that at Belalyne in the moneth of August 1697 he heard captain Simeon Fraser demanding oaths of fedelity of such of the gentlemen of his name, as he suspected; and such as he did not suspect, he only took their promises, and some of them did swear and some promise, and ther was twenty four of them present at that time. *Causa patet*, and this is the truth as he shall answer to God.

Sic Subscribitur,

T. FRASER.

LOTHIAN, I. P. D.

William Fraser of Kilbockie, aged forty yeares, married, purged, and sworne; depones, that in October last the deponent came to the house of Finellan, where captain Simeon Fraser was, with two or three hundreth men all armed, who had conveened there, in obedience to an fiery croce, which was sent by captain Simeon's order thro the country, and it was the third day after the lord Saltoun and lord Mungo were taken prisoners, and the deponent saw them there, and guards, and centinels upon them as prisoners, and lykeways saw a gallows erected over against the windows of their chambers, and the deponent having asked at captain Simeon what that meant, he answered, that it was to terrifie the lord Saltoun and lord Mungo, and the deponent having told captain Simeon that it was not well done, he gave orders to take down the gallowes. And depones, that notwithstanding the deponent saw the gallowes put up a second time, within a few days thereafter. Depones that he was present when the saids lords were carried prisoners from Finellan to the isle of Eagles, where they were detained prisoners, all by the said captain Simeon's command, and that the deponent stayed one night there. Depons, that before the deponent went first to Finellan he was at Castledounie, my lady Lovat's dwelling, where there was a partie of upwards of three or fourscore of armed men, and saw them keeping guard at the gates, and captain Simeon was there, and gave them

* "There were two sorts of *Coronoch*; that properly so called was the dirge which accompanied the deceased to their grave; the other, which is here alluded to, was a sort of war song, or dismal howl, which the women set up on seeing the *Fiery-cross*, from the anxiety they entertained about the safety of their husbands and friends in the approaching hour of battle." Arnot. As to the *Coronoch*, see also in the case of lord Lovat, A. D. 1746-7, a Note to lord Lovat's letter to lord president Forbes, dated October 29, 1745.

orders, as commander. Depones that the deponent did see captain Simeon Fraser, upon the head of nyne score armed men the day that my lady Lovat left him, and came away with my lord Forbes, and lykeways in December last the deponent saw him severall tymes at severall places of the country, sometymes with fiftie, sixtie, and sometymes with more men all in armes, particularly at Culgaran and Strowie, and when my lady left him with the nynescore of men, he was at Arckles. Depones, he saw the hail persones insisted against, and contained in the first depositione in armes with captain Simeon Fraser, the tymes and places lybelled. Depones, that the armed men that were at Finellan were dividyd in companies, and had two pair of collours and pypers, and depones that they were under commanders, and were sworne to their collours. Depones that captain Simeon gave them orders, to gather together, whenever he should advertise them by the fiery croce and coronoch, and to conveen in their armes, and this is the truth as he shall answer to God.

Sic Subscribitur,

W. FRASER.

LOTHIAN, I. P. D.

Robert Spence in Suddie, aged 24 yeares, married, purged, and sworne, depones that he came to captain Simeon Fraser and his company, that were in armes after he came from the wood of Benchrew, and they were then in number about forty foot, and twelve horses, and they increased very much that night. Depones that when he mett with them there were with them prisoners, the lord Saltoun, lord Mungo Murray and others; and the deponent marched with them to Finellan, where they putt the prisoners in severall roumes and centinels upon them; depones that the prisoners were kept at Finellan about a week, and thereafter lord Saltoun was carried down to Castledounie, and at that tyme the men that were conveened with captaine Simeon Fraser were about the number of 500 men, all armed with swords and gunns, that captain Simeon commanded in chiefe, and he had commanders under him; and depones, that the day that lord Mungo was carryed to Castledownie from Eagles, he saw them have two pair of collours; depones that they sent parties from tyme to tyme from Finellan to Castledownie, and relieved their guards, and that they kept the lady Lovat prisoner there, and saw centries at the doors of the house; depones he saw the hail persones insisted against and contained in the first depositione all in armes with captain Simeon Fraser the tymes lybelled; depones that captain Simeon having carryed my lady Lovat alongst with him from Kirkhill, and having heard that there was a partie of redcoats with lord James Murray, and some gentlemen coming to rescue my lady, captain Simeon did on the Saturday send word through the country to cause the fiery croce goe to wairne the country to come for their defence; depones that when my lady left captaine Simeon, ther

would have bein about two or three hundred men in armes with him; depones that captain Simeon and his pairtie continued in armes till about Christmass, and that they were then about the number of fourtie or fiftie, and that some dayes after my lady left him, he saw and heard the men that were with captain Simeon swear over their durks to be faithfull to him. And that the hail persones insisted against, except Foyar, were sometyne or other with captain Simeon Fraser in armes, betwixt Martimes and Christmass, and that their heart was about Strowie and Culgaran, where he has sein them; depones that these who were commanders under captaine Simeon Fraser swore the men upon their durks in sex's and awens, and more, to be faithfull to captain Simeon, and were not to desert him but to stand by him, 'causa scientiæ patet,' and this is the truth as he shall answer to God.

Sic Subscibitur, ROBERT SPENCE,
AD. COCKBURNE, I. P. D.

My Lord Justice Generall having removed from court, my Lord Justice Clerk did proceed till his lordship returned.

Alexander M^r Hemish, mulier in Groom, aged twenty eight yeares, married, purged and sworne, and being examined upon oath by lord Aberuchill, and John Bayne of Tulloch, who was sworne to be interpreter, in respect the deponent speakes and understands only the Irish tongue, depones that the deponent was with captaine Simeon Ffraser when my lady Lovat went away with my lord Forbes about Martimes last, at which tyme captain Simeon Ffraser had about 400 men in armes, and thereafter continued to have smaller pairties, somtymes fiftie, somtymes sixty armed men with him, and the deponent was with him at severall tymes and places, viz. at Strowie, Culgaran, and Glen Strafarran; depones that being at Strowie, there were ten men pitched upon out of each paroch, of three paroches, and about ten men more, who being commaunded each ten by under commanders of captain Simeon's, did swear on the poynt of a sword that they should be faithfull and adhere to the said captain Simeon Ffraser, and should not take gold, silver, horses, or other good deed to discover or betray him; depones that the hail persones insisted against and mentioned in the first depositione, except John Ffraser of Migavie, whom he knowes not, continued in armes with captain Simeon Ffraser, from Martimes till within two nights of Christmass, at which tyme he left them with him; depones the picking out the men, and swearing on the poynt of the sword, was four dayes after the lady Lovat went off; depones he cannot wryte, and this is the truth as he shall answer to God.

Sic Subscibitur, JO. BAYNE, interpret.
AD. COCKBURNE, I. P. D.

Mr. Leonard Robertsons, of Straloch, aged 40 yeares, &c. (correct in the printed copy.)

Amelia Reoch, late servitrix to my lady Lovat.
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vat, (this deposition in the printed copy, is in substance the same as the Record, altho differently expressed.)

Jannet Fraser, daughter to Dumballoch, (correct in printed copy.)

Christian M^r Leun, late servitrix to James Ffraser of Relict, (correct in printed copy.)

Mr. *George Ffraser*, sub-principal of the colledge of Aberdeen, (this deposition is so far correct in the print, but stops where this begins:) depones he saw in armes at Ffinalan with captain Simeon Ffraser, William Fraser of Foyar, Fraser of Kinmonavie, William Fraser of Erchitt, Alexander Ffraser of Culduthell yo'r, Hugh Fraser alias Houston Oig, Alexander Ffraser sone to Migavie, Taws Ffraser brother to Littlegarth, Thomas Housone sone to the minister of Stratherrick, Hugh Ffraser sone to Strowie, John Ffraser brother to Culduthell elder, major John Ffraser of Migavie younger, and Thomas Ffraser elder of Strowie, *causa patet*, and this is the truth as he shall answer to God.

Sic Subscibitur, GEO. FFRASER.
LOTHIAN, I. P. D.

John Monro, lately footman to captain Simeon Fraser, aged 20 yeares, unmarried, purged and sworne, and examined by lord Aberuchill, and Mr. Thomas Fraser sworne interpreter; depones he heard the coronoch the night the lady Lovat was carryed from Castle-dounie; depones he saw the hail persones insisted against in armes with captain Simeon Ffraser, and under his command, and 300 more or thereby at Ffinalan, the night my lord Saltoun was taken, with collours displayed and pypers, and saw them sworne to the collours and drawn round them; and depones that he saw guards and centries sett, and a gallops twyce sett up against the windows where lord Saltoun and lord Mungo were keeped prisoners; depones that about Martimes the herald left his charges in a cloven stick at the river syde, opposite to the isle of Eagles, and that after that the persones insisted against, continued in armes, till from Wednesday that my lady left them after the charge, till Saturday thereafter that he left them; and depones, that after my lady left them, he saw sixtie of them or therby sworne upon the poyntes of their durks at Strowie, to adhere to captaine Ffraser: and this is the truth as he shall answer to God; and depones he cannot wryte.

Sic Subscibitur, THO. FRASER,
LOTHIAN, I. P. D.

Alexander Stewart, brother to Urard, aged 24 yeares, unmarried, purged and sworne; depones that in May or June last, he saw captain Simeon Fraser in armes, with about 2 or 300 men lykways in armes, and did see them surround lord James Murray; but depones, the deponent doeth not know any of the other defenders mentioned in the list except Foyar, Dalraig, and Erchitt, and knowes not whither

they were there or not, and did not see them there; and this is the truth as he shall answer to God. *Sic Subscritur*, A. STEWART.

LOTHIAN, I. P. D.

Peter Fraser, servitor to Balnean, aged 30 yeares, married, purged and sworne, and examined by lord Aberuehill, and Mr. Thomas Fraser sworne interpreter; depones that in June last, he saw the fyrie croce, and heard the coronoch goe throw the country, by order of captain Simeon Fraser, and accordingly the hail persones insisted against and contained in the first depositione, and others, to the number of seven or eight-score more, did convene at Oldmoir in Stratherrick, all in armes, under commanders, and sawe them march towards lord James Murray and surround him and his partie; and this is the truth as he shall answer to God; and depones that they were all commanded by captain Simeon; and he cannot wryte.

Sic Subscritur,

THO. FRASER.

LOTHIAN, I. P. D.

William Oige Fraser, tennent to Balnean, aged 40 yeares, married, purged and sworne, and examined by lord Aberuehill, and Mr. Thomas Fraser sworne interpreter; depones *conformis precedenti in omnibus*, except that he did not see Thomas Houston and young Culduthell and Ffaraline's brother, at the meeting in armes with captain Simeon in June last, in Stratherrick; and this is the truth as he shall answer to God; and depones he cannot wryte.

Sic Subscritur,

THO. FRASER.

LOTHIAN, I. P. D.

The lords ordaines the Assyse to inclose and returne their verdict to-morrow, at twelve o'clock.

The said day, Thomas Ffraser of Beawfort, Alexander Fraser sone to Mr. James Fraser minister at Kirkhill, Mr. Robert Monroe minister at Abertarffe, James and Alexander Ffrasers brothers to Gartlobeg, Duncan Taws officer to Strechin, John M'Alister vag ——— M'Alister vig his brother, ——— M'Vuller milner to Streichen, Alexander Ffraser somtyme in Bochruben, Donald Dowe M'Allan in Drummond, John Ffraser younger of Drummond, William Ffraser his naturall brother there, Martine Cameron in Glendobeg, Angus M'Donald brother to Keppoch, Allaster Moir M'Donald in ———, Hugh Ffraser sone to Monchigavie, Hugh Ffraser brother to Monchigavie, William Ffraser in Knockie tennent to Streichen, Alexander M'Huiston iter in Belocharenoch, Thomas M'Alister Cheill there, Alexander M'Donald there, Thomas Fraser M'William vic Jan servant to Ffoyar, Donald Mantach M'Jan in Lagbuy, Donald Bayne M'Ean vic Alister pyper to Glenmoristoune, and Donald Gronoch buman to William Ffraser sone to Teynakeill, being oftymes called to have compeared before the saids lords this day and place, in the hour of cause, there to have underlyen the law for their treasonable rycing

in armes with and under the command of captain Simeon Ffraser of Beawfort, and a great many more their accomplices, and entering in treasonable bonds and combinations in the moneths of September and October last, and taking and apprehending the lord Saltoune and lord Mungo Murray, prisoners, in the wood of Benachren, and caryng them captives to the house of Finallas, and thereafter to Castledounie and the isle of Eagies, threatening to bereave them of their lives, and for that effect, erecting a gallows at the window of their chamber, keeping close centries upon them, and upon the lady dowager of Lovat, whom they also had treasonably apprehended and carryed prisoner from place to place, and treated with barbarous inhumanity, threatneing her to mary the said captain Simeon, and continueing thus in armes with a great body of rebels, somtymes 3, somtymes 4, and somtymes 500 men with collours and hagg pypes, whom they did thus convocat by messages and fiery croces sent throw the country, and being and continueing together in armes betwixt Martines and Christmas last, at severall places in Stratherrick, in Inverness-shyre, and for marching against and surrounding lord James Murray, and a party with him near Old Marr, in the month of June last, and other treasonable crymes mentioned in the criminall letters of treason raised at the instance of sir James Stewart, his majestie's advocat, by warrand of councill against them, and others therenant, as they who were lawfully cited by James Guthrie, Dingwall pursuivant, by sound of armes, with his majestie's coat of armes displayed, and useing other solemnities necessar, to have come and found sufficient cautione acted in the books of adjournal, for their appearance before the said lords to have underlyen the law for the crymes forsaid, lawfull tyme of day bidden, and they nor none of them compeirand, the lords justice generall, justice clerk and commissioners of justiciary, therfor be the mouth of James Guthrie, macer of court, decreued and adjudged the hail forenamed persones to be denounced our sovereign lord's rebels, and ordained them to be putt to the horne, and all their moveable goods and gear to be escheat and inbrought to his majestie's use, as outlaves and fugitives frae the laws, for the crymes forsaid, which was pronounced for doom.

September 6, 1698.

The said day, the persons who past upon the Assyse of captain Simeon Ffraser and others, returned their verdict in presence of the saids lords, whereof the tenor followes: The Assyse having elected and chosen sir John Schaw of Greenock, their chancellor, they having read and considered the lybell and the lords' interloquitor, with the wholle depositions of the witnesses adduced for proving of the lybells, with the aggravations thereof, as the samyne is restricted by the lords their interloquitor, clearly proven against captain Simeon Ffraser lawfull sone to Thomas Fraser of Beawfort, William

Fraser of Pfyar, Hugh Fraser of Kinmonavie, William Fraser in Dalcraige, William Fraser of Erchitt, Alexander Fraser of Culduthell younger, Hugh Fraser alias Hutcheon Oig in Leadchune, Alexander Fraser in Riven, John Fraser his brother, Alexander Fraser sone to Faraline, Alexander Fraser sone to Migavie, Tawis Fraser brother to Litlegarth, Thomas Houstoune sone to the minister of Stratherick, Eneas M'Bayne brother to Drummond M'Bayne, Hugh Fraser sone to Strowie, Hugh Fraser younger in Bochruben, John Fraser brother to Culduthell elder, major Thomas Fraser elder of Strowie, Hugh Fraser brother to Erchitt, and John Fraser younger of Migavie; in witness whereof their presents are subscribed by their said chancellor and clerk att Edinburgh, the 6th day of September, 1698.

Sic Subscribitur, JOHN SHAWE, Chancellor.
JA. LIVINGSTONE, Clerk.

Efter opening and reading of the which Verdict of Assyse, the lords justice generall, justice clerk, and commissioners of justiciary, in respect thereof by the mouth of John Ritchie, dempster of court, decerne and adjudge the said captain Simeon Fraser and the hault persons contained in the above written Verdict, to be execute to the death, demained as traytors, and to undergoe the paines of treason and utter punishment appoynted by the laws of this realme, at such tymes and places and in such manner as the saids lords shall appoynt; and ordaines their name, fame, memory and honours to be extinct, and their armes to be riven furth and delate out of the books of armes, swae that their posterity may never have place nor be able hereafter to bruike or joye any honours, offices, titles or dignities within this realme, in tyme coming; and to have forfaitured, amitted, and tint all and sundry their lands, herotages, tacks, steedings, rounes, possessions, goods and gear whatsoever pertaining to them to our soveraigne lord, to remaine perpetually with his majestie in property, which is pronounced for doom.

Sic Subscribitur, LOTHIAN.
AD. COCKBURN.
C. CAMPBELL.
DAVID HOME.
J. FALCONAR.

Arnot has reported this Case, p. 79, 4to edition of 1785, and has accompanied his report with the following observations:

"This is the only case I know of since the Revolution in which a person was tried in absence before the Court of Justiciary; * a proof led, a jury inclosed, a verdict returned, and

* As to trials in absence or after death, see vol. 11, p. 1030. See, also, the Cases of lord Gowrie and others, vol. 1, p. 1359; and of Robert Logan, vol. 2, p. 707.

sentence pronounced, forfeiting life and estate, honours, fame and posterity. The first instance of this tyrannical mode of proceeding was the illegal sentence upon the rebel covenanters after the battle of Pentland, which was afterwards rescinded by act of parliament. The rebels of Bothwellbridge met with the same treatment; and the like was repeated after the defeat of Monmouth.

"The following is one of the most singular prosecutions in our criminal record: whether we respect the stretch of law that was made to convict the absentee, or the savageness of his conduct, or the absolute dominion that he possessed over his followers, and directed to purposes the most shocking to human nature.

"By the law of Scotland, outlawry, even for treason, inferred the forfeiture only of personal estate. It was sanctioned by statute, that trials for treason could not be taken in absence; but that the whole accusation, [Bankton's Inst. vol. 2, p. 251; Erskine's Fol. Inst. p. 733; James 6th, parl. 11th, c. 90; Mackenzie's Crim. tit. Treason, § 22, 23], argument, and evidence, should be led in presence of the accused, and no otherwise. So anxiously did the professional lawyers adhere to this form, that, as our jurisprudence admitted, under certain limitations, of trial after death, for this heinous offence, on such occasions, the bones of the deceased were dug out of the grave and formally presented in court.

"When the covenanters were defeated in the battle of Pentland, a desire to arm insulted majesty with additional terrors, or to enrich the servants of the crown with unlawful spoil, induced the ministers of Charles to attempt, in absence of the accused, the trial of those rebels, and the forfeiture of their estates. And, although the complaisant disposition of parliament gave every reason to conclude that they would not have hesitated to pass a law to this effect; yet it suited better the views of a tyrannical administration to operate this innovation in law, by the decree of judges who were appointed, and might be removed at pleasure, than by the authority of the great council of the nation.

"[Mackenzie's Criminals, p. 30. Wodrow's History of the sufferings of the Church, vol. 1, p. 267; Appendix, N^o 14, 15, 16, 18. vol. 2, p. 115, 586; Charles 2nd, parliament 2, c. 11.] Before the court of Justiciary proceeded to such an important innovation, so little idea was then entertained of its supremacy and infallibility, [It is now alledged, that no appeal lies from the Court of Justiciary to the House of Lords; and a judgment, indeed, to that effect, has been pronounced. As no man can command his faith or his judgment, I have never been able to discover either the legality or propriety of this decree],* that the Court of Session was consulted upon the occasion. After tampering with the judges, a memorial and

* As to this, see the Case of Nairne and Ogilvy, A. D. 1765.

queries were laid before them by sir John Nisbet, king's advocate, and lord Bellenden treasurer-depute, stating a variety of arguments, by inference and analogy, to show, that, if the parliament could proceed to forfeit after death, why not the Court of Justiciary; and, if either could try after death, why not also in absence, since 'what is just before parliament, is just and warrantable before other judicatories.' Upon this and the like notable arguments, the lords of session delivered an opinion, declaring, that, upon sufficient proof being taken before the judges and assize, they might proceed in absence to sentence, and to forfeit persons guilty of high treason. Thus fortified, his majesty's advocate prosecuted, in absence, colonel Wallace, William Muir of Caldwell, and some other gentlemen; and a verdict being found against them by the jury, the court sentenced them to be put to death as traitors, when they should be apprehended, and their whole estates, real and personal, [Muir of Caldwell's estate was gifted to general Dalziel, commander of the forces at the battle of Pentland], to be forfeited. From a consciousness of the illegality of the sentence, it was solemnly ratified in parliament; trial in absence was adopted as a part of our law; and, in consequence, two of the most distinguished personages in the nation, the duke of Monmouth, and Fletcher of Saltoun, were condemned and forfeited, the former when dead, the latter, when out of the kingdom.*

"Had the torrent which overwhelmed the lineal succession of our sovereigns issued pure from the fountain of liberty, and in its wide and rapid course been contaminated by no foul stream, 'trial in absence' would have been enumerated in the list of those illegal and grievous assumptions of power upon which the estates of Scotland declared king James to have forfeited his right to the crown. And the opinion of the Lords of Session on this head, as well as on the two other cases stated in 'the Claim of Right,' would have been declared to be contrary to law. But it was deemed prudent to preserve this statute as a security for the good behaviour of the numerous exiles who followed their prince to the court of St. Germans. A law was accordingly passed, [William and Mary, parl. 1, ses. 2, c. 31. The most approved commentator on the Scottish law, has so far misunderstood this act, as to say, that the act 1669 was repealed by it. Erskine's fol. Inst. p. 733], rescinding the act

* See the Case, vol. 11, p. 1023. I have there mentioned (p. 1050) that after the Revolution, Fletcher of Saltoun's forfeiture was rescinded by act of parliament. It should be added, that by the 18th act (as to which, see vol. 12, p. 1011) of the second session of king William and queen Mary's first parliament, among a great number of persons of whom by name the decrees and dooms of forfeiture are rescinded, is mentioned James sometime duke of Buccleuch and Monmouth.

1669, c. 11, in so far as it ratified the forfeiture of the covenanters; but not repealing the act itself, which might now be turned as an engine of oppression upon the party which contrived it. It must be acknowledged, however, that king William's ministers made no rigorous exercise of this law. The earls of Melfort, Middleton, and Lauderdale, and ninety gentlemen, were summoned before the Court of Justiciary, in one day, to stand trial for various points of treason; in particular, for entering into the French service when that state was at war with his majesty, and for rising in arms against the king. They failed to appear, and sentence of outlawry only was pronounced against them.

"Tyranical as this statute was, captain Fraser could not have been convicted upon it but by an obvious wresting of the law; for it authorised trial in absence, only in 'cases of treasonable rising in arms, and open and manifest rebellion.' Now, it is altogether absurd, to construe the collecting of an armed force for the purpose of private rapine, into 'treasonable rising in arms, and open and manifest rebellion.'

"It will be proper to state the motives which induced captain Fraser to perpetrate the barbarity and villainy which gave occasion to this trial. On the death of Hugh, tenth lord Lovat, the titles and estate of Lovat were disputed between his lordship's daughter, heir of line, and Thomas Fraser of Beaufort, the captain's father, heir-male. The captain wisely proposed to do away the contest, by uniting their persons and pretensions, and there was not a disparity of years to render such marriage anyways absurd. With this view, he privately paid his addresses to the young lady, and one Fraser of Tenecheil was made the confident of the amour. The captain obtained her consent, and she actually eloped from her mother's house of Castle Downie, under the conduct of the mutual confident; but the person whose finesse was employed to accomplish the intrigue, from whatever motive of fear or of venality, of caprice or of remorse, blasted it at the moment when it was sure of success. He forced the lady to return to her mother, to whom he disclosed the intrigue.

"It was no longer thought safe for the lady to remain at Castle Downie, as this seat was in the domains of the clan Fraser, over whom the captain possessed great influence. She was therefore conducted under a proper escort to Dunkeld, a house of her uncle's, the marquis of Athole, and this lord prevailed on his niece to accept as a husband the Master of Saltoun. The intended bridegroom set out for Dunkeld to celebrate the espousals, accompanied by lord Mungo Murray. As the captain foresaw in this match the ruin of his hopes, he embraced the resolution of preventing the marriage, by force; and (if he could not possess himself of the heiress) of compelling a marriage with the Dowager, who, in virtue of her jointure, was in possession of a considerable part of the

estate of Lovat: and this wild enterprise was to be accomplished by such deeds, that the stern contrivance of the principal actor is less shocking than the abject submission of his accomplices.

“The sentence, which was severer even than that commonly pronounced on traitors, seems to be copied from the sentence pronounced by parliament, after death, on Logan of Restalrig, and the earl of Gowry. As captain Fraser, in the rebellion 1715, although supposed to be a keen Jacobite, supported the House of Hanover, king George 1st granted him a pardon and remission of this sentence. [Paper Register of Chancery, B. 16, N^o 134. Remissio et rehabilitatio Simonis Fraser de Beaufort, Domini Lovat, de crimine perduellionis aliisque infrascript. St. James's, 10th

March, 1716.] And he claimed and obtained the contested title and estate of Lovat. He joined the next rebellion against the family that pardoned and restored him; and his house of Castle Downie, which had witnessed his foul crimes, was burned by the royal army before his eyes, and those of 300 of his clan, a few days after the battle of Culloden. How he lost his titles and estate, and his life also, is known to every one; so perhaps he is the only person upon record who was twice condemned, twice forfeited, and whose estate was twice restored.

“Captain Fraser was also prosecuted for a rape by the party injured, lady dowager Lovat, before the Court of Justiciary, and was outlawed for not appearing to take his trial.” See the Records of Justiciary, February 17, 1701, as cited by Arnot.

419. The Trial of PATRICK HURLY, of Moughna, in the County of Clare, Gentleman, at the King's-Bench in Ireland, upon two (several) Indictments, the one for Perjury, and the other for conspiring with Daniel Hicky, &c. to cheat the Popish Inhabitants of the County of Clare, &c.: 13 WILLIAM III. A. D. 1701.

May 31, 1701.

THE Prisoner being brought from the Marshalsea to the bar, and a full jury appearing, the clerk of the crown bid him look to his challenges: and after some challenged by him, the jury sworn were, Edmund Perry, James Mac Donnel, John Brady, Dennis Mac Mahone, Richard Hen, Thomas Brown, John Drew, Hugh Brady, Edward Mealing, Austin Bennis, Joseph Cecul, Patrick Counsel.

Cl. of the Crown. Gentlemen of the jury, you are to understand, “That Patrick Hurly stands indicted of perjury, for swearing before Neptune Blood, dean of Kilfenora, one of his majesty's justices of the peace for the county of Clare, that he was robbed of 300 pistoles in gold, and several other things, by four persons altogether unknown to him, but whom, by the tone of their voice, he believed to be Irishmen and Papists; whereas, in truth and fact, he well knew them by their names and persons, being set on by himself, and did not take any thing at all from him.”

Att. Gen. Clerk of the crown, you have another indictment against the prisoner at the bar; pray charge him with it.

Cl. of the Cr. Gentlemen of the jury, you shall likewise understand, “That the same Patrick Hurly stands here indicted, for that he did falsely and deceitfully conspire with one Daniel Hicky and several other malefactors, unjustly to oppress the Popish inhabitants of the county of Clare, and cheat them of a great

sum of money, by colour of the Rapparee Act.”

Att. Gen. May it please your lordships, and you gentlemen of the jury, the prisoner at the bar, Patrick Hurly, is here indicted for perjury; and the perjury is this, that the 6th of March, 1699, he came before dean Neptune Blood, one of his majesty's justices of the peace for the county of Clare, and made oath before him, pursuant to the late statute for suppressing tories, robbers and rapparees, That being at his father's house in the aforesaid county of Clare, several persons, with their faces masked, came unto the said house in the night-time, and forced into his chamber, made a shot at him, and tied him and another man with cords fast to a bedstead; that by the tone of their speech they seemed to be Irishmen, and that he believed them to be Papists; that he knew not one of them either by their names or persons; that immediately they broke open several trunks, and took out of one of them a bag, wherein were 374 guineas, and 345 pistoles; a gold cross set with diamonds, and several other diamonds to a great value, and a great number of Holland sheets and Holland shirts, all to the value of about 1,300*l.*; all which he swore they took away from him; and this he swore, in order that he might (according to the late act, called the Rapparee Act) make the country re-imburse this 1,300*l.* to him. Gentlemen, this was all false, and nothing at all in it but a mock robbery, acted by persons employed and set on by himself, whom

he very well knew, and who took nothing at all from him, but it was only designed to cheat the country; and in truth he was not robbed at all, not of the value of a farthing. The second indictment is for a cheat, in conspiring with the malefactors to wrong the said country, and deceitfully and unjustly to raise money upon the country, under colour of the act of parliament.

Sol. Gen. May it please your lordship, and you gentlemen of the jury, Mr. Attorney General has given you an account of the indictments: the second is the consequence of the first. If Mr. Hurly was really and truly robbed, then he did not design to cheat the country: but if he was not really and truly robbed, but that his examinations be all false, then he was not only perjured, but did likewise conspire to cheat the country. We will begin with our evidence of the perjury, and the force of our evidence is this: Mr. Hurly pretends to be robbed of about 1,300*l.* in March, 1699. We will shew you, that Mr. Hurly, instead of being a man of so much cash at that time, was the contrary, to an extreme degree: that to prevent arrests, he had several protections; and he told a gentleman, there could not be a readier way to get money, than by the act of parliament; if he could fix a robbery on the country, he could tax what sum he pleased. We shall shew you with whom he concerted this pretended robbery, and by whom it was acted, and that Mr. Hurly himself contrived the whole matter; and the several goods that he pretended to lose, he had back again, and they were sent another way afterwards by Mr. Hurly; and that the gold he pretended to lose, was but counters. We will trace you the whole drift and contrivance of the matter. My lord, we shall first produce the information of Mr. Hurly, sworn before dean Blood.

Dean Neptune Blood sworn.

Court. Look on that paper: was that examination sworn before you, Sir?

Dean Blood. Please your lordship to give me leave to read it.

Court. Do so, Sir; take your own time. You have read that paper?—*Dean Blood.* Yes.

Court. Was that examination taken before you upon oath?—*Dean Blood.* Yes, my lord.

Court. Who was the person that swore it?

Dean Blood. Patrick Hurly.

Court. Is that the man that stands there?

Dean Blood. Yes, that is he.

Clerk reads the Examination:

Com. Clare. The INFORMATION OF PATRICK HURLY, of Moughna, in the said county, gent. taken before Neptune Blood, Dean of Kilsenora, one of his Majesty's Justices of the Peace for the said county.

The said informant being duly sworn on the holy evangelists, and examined, saith, That on Sunday the 3rd of March, 1699, about 11 o'clock at night, being then at his father's house at Moughna aforesaid, and in his cham-

ber, he saw three men armed burst in an out-door of the said house, which opened into a garden, threw down Mr. Ronane, who was near the said door, in a rude manner, with swords and pistols in their hands, entered into the said chamber, dragging the said Mr. Ronane with them: instantly there appeared a fourth person armed, and with their faces masked; and making a shot at the informant, they immediately tied him and the said Mr. Ronane with cords fast to a bedstead, calling the informant rogue, rascal, son of a whore, treacherous villain to his country, and many absurd words to that effect. The said informant further saith, that the said persons, by the tone of their speech, seemed to be Irishmen, and believes them to be Papists, but knows not any one of them by their names or persons. That immediately they broke open three large trunks, and took out of one of the said trunks a bag, wherein were 374 guineas, and 345 pistoles, amounting in all to the sum of 848*l.* 9*s.* or thereabouts, together with a gold cross set with diamonds, and several other diamonds, to the value of 225*l.* sterling; and also the number of 24 large Holland sheets; each of them containing ten yards, or thereabouts, price 72*l.* sterling; and 35 Holland shirts, amounting to the value of 157*l.* 10*s.* sterling. The said informant further saith, he heard a great bustle and noise, and shots made in the other parts of the said house at the same time, which he understands was done by others of the said robbers. And further saith, that the said robbers took away all the aforesaid gold, diamonds, sheets and shirts, and left the said informant and Mr. Ronane tied as aforesaid, and locked the said door on the outside. He further saith, that he never got any of the said gold or goods since the said robbery. And further saith, that when he perceived the said robbers were gone away, he, this informant, sent some of his servants out through a window about 4 o'clock next morning, to make a hue and cry, and to raise the country, to pursue after the robbers. The said informant being asked, whether the said robbery was committed by any contrivance of his own, or any friend of his, with expectation to get money raised on the country, or for any other self-end? declares, that it was not, nor does know of any such contrivance or design by any person whatsoever, either directly or indirectly. The said informant further saith, that two of the said robbers, which came into his chamber, had red cloaths, and understands that there were in and about the said house the number of seven more of the said robbers, besides the aforesaid four that entered into the said chamber. He further saith, that he cannot give any description of any of the said persons, more than is herein set forth. And being examined, whether any of his servants or family were from home at the same time when the said robbery was committed? he said, that he sent one Calaghan Certy, a servant of his, that same day to Mr. John Forster, at Rathorpa in the county of Galway, for

a suit of mourning cloaths, which the said Mr. Forster brought from Dublin for the said informant; and the said Calaghan returned the next day, being Monday the 4th of March instant, with a letter from the said Mr. Forster; and that the said informer's wife and her brother, Mr. Edmond Tirrey, and Mr. Ulick Bourk, who is married to her sister, were the same night when the said robbery was committed at captain Christopher O'Brien's house at Imish-timan, in the said county of Clare. The said informant further saith, that Moughna aforesaid, where the said robbery was committed, is in the barony of Corcumoroe, and county aforesaid. He further saith, that he had about 400*l.* of the aforesaid gold from alderman Walton in Dublin, and had the rest some time before from Mr. Christopher Fitz-Symonds, merchant in Dublin. The said informant further saith, that he knows not who any of the aforesaid seven persons were, that were in and about the said house, nor yet any of the four persons as aforesaid, nor from whence any of them came, nor whether they went, and further saith not.—*Jurat. coram me, 6 Martii, 1699.*

(Vera Copia.)
GUL. TISDAL.

N^oP. BLOOD.

Court. Mr. Dean Blood, is this the very examination that Mr. Hurly gave in upon his oath before you?—*D. Blood.* Yes, Sir.

K. Counsel. Did he swear it all?

D. Blood. Yes, he swore all the contents of this examination to be true.

Sol. Gen. My lord, and you gentlemen of the jury, the scope of the evidence against the gentleman at the bar is thus: we will shew you the great necessity he was under, and the pressing occasions he had for money; and that being in great straits, he was contriving how to stave off his creditors, and save his reputation. We will produce the persons that he had discourse with about the probable way of getting money; and some of the very persons that were to act in order to it; and that when Mr. Ronane was in the house, these actors were to rush in; and to tie him and Mr. Patrick Hurly together; and then to look in such a trunk, and there they should find something like gold. That the actors did lurk in and about the house by Mr. Hurly's appointment: and came into the dwelling-house as was contrived between them, rushing in with the said Mr. Ronane, who went out into the garden after supper, as was contrived beforehand. When Mr. Hurly was giving in his information, Mr. Blood asked him, what witnesses he had besides himself? He said, a servant of his, one Calaghan Carty. We will produce that same Calaghan Carty, who will give a full relation of the matter.

Calaghan Carty called.

Mr. Bernard. My lord, one word for the traverser. My lord, this Calaghan Carty and others were the persons taken up for this robbery, and actually in gaol for it; they were the persons that did actually rob us. My lord,

they were put into irons, and threatened to be hanged unless they would swear it was a sham robbery; and thereupon were discharged; and after came to this town, and went before my lord-chief-justice Pyne, and they swore, that their examination was forced from them. It is here in court.

Calaghan Carty sworn.

Court. Do you know Patrick Hurly?

Carty. Yes, my lord.

Court. How long have you been acquainted with him?

Carty. Since he came into this kingdom from England.

Court. How long was he come before he was prosecuted?—*Carty.* It was about two years.

K. Counsel. Will you give the court and the jury an account what you know concerning this robbery? Tell the whole truth, and nothing but the truth.

Carty. My lord, I was one of his servants. He came to me, and called me out to his stable, and drew out a purse of gold, and shewed it me, and told me, he was to pay one Mr. Arthur some money, who was to come such a day to compound with him for the money; and if he did give him that money, he would be ruined for ever; but that if I would do as the rest would, I would do him a kindness: and says, that when Mr. Arthur should hear the money was robbed, he would compound with him: and he told me where the money was to be, and the trunk he would put it into.

Court. Did you, according to his desire, take away the gold and the linnen?

Carty. Yes, my lord.

Court. Was there any others to do it, besides yourself?

Carty. Yes, four more, Donagh O-brian Andrews, Daniel Hicky, Daniel Carty, and Teigus Carty.

Court. What did you do with the linnen?

Carty. It was Daniel Hicky took it out, and, he said, he gave it all back again to his master.

Court. Were you disguised?

Carty. Yes; we had some of us blue coats, and some of us red coats and vizards.

Court. Where had you the coats?

Carty. Mr. Hurly's man threw them into the barn to us.

Court. Had you any arms?

Carty. Yes, my lord, we had swords.

Court. Who gave the arms to you?—*Carty.* Daniel Maccay, Mr. Hurly's footman.

Court. Whose were the swords?

Carty. I was told they were brought from Dublin by Mr. Hurly.

Court. Was there any fire-arms?

Carty. Yes, there was fire-arms left on a table by the door, and charged with powder.

Court. Had you any directions about them?

Carty. Yes, my lord; they were laid there on purpose for the men.

Court. Who gave those directions about the fire-arms?—*Carty.* It was Daniel Maccay.

Court. Were they charged?
Carty. Yes, with powder only.
Court. Was any of them fired off then?
Carty. Yes, there was.
Sol. Gen. My lord, though they were fired off, there was no ball in them: It was not to do harm, but only to fright those who were not in the secret.
Court. Did you take the gold in the purse, or whatever it was?
Car. My lord, we were directed by Mr. Hurly to pour it on the table, that Mr. Ronane might see it.
Court. How long had Mr. Ronane been there?—*Car.* Two nights.
Sir J. Mead. Was there any particular time appointed when you was to do this fact?
Car. There was, my lord; when Mr. Ronane should come out of the back-door.
Court. Had you any directions in particular what to do with the servants?
Car. Yes; we had directions to tie Mr. Hurly and Ronane together, and there was a bed-cord laid in the room ready for the purpose.
Recorder. Who gave you the directions to tie them?—*Car.* Mr. Hurly.
Sol. Gen. Do you know one Walter Neylan?
Car. Yes.
Sol. Gen. Where was he?
Car. He was in gaol at Ennis, for Mr. Hurly's debt.
Sol. Gen. You were Mr. Hurly's servant.—Pray, did he appear publicly about that time? or, was he on his keeping?
Car. He was on his keeping.
Court. Explain yourself. What was the keeping?
Car. My lord, he was on his keeping, for fear of being taken upon writs and executions: he had servants in his house, and he kept one watching constantly, for fear of being taken.
Court. At whose suit?
Car. At Mr. Arthur's suit.
Att. Gen. My lord, I am told his house was a sort of garrison, and there were regular works about it.
Court. You say there were scouts abroad, and some wall: pray, give an account what works there were about the house.
Car. Yes; there was a brick wall about one side of the house.
Court. Do you imagine it was to prevent his being arrested that he built that wall?
Car. Yes, it was, my lord.
Recorder. What sort of money was there when you opened the bag? What did it appear to be?
Car. It was yellow pieces; and Mr. Hurly gave his seal, to seal the bag up again.
Court. Was Mr. Ronane there at that time?
Car. The seal was given before, my lord.
Sol. Gen. He says, it was not he that poured the money out. Did you judge the money to be gold, or counters?
Car. That, my lord, I did not know.
Sol. Gen. My lord, Mr. Hurly pretends that this man gave an examination contrary to this.

Now we will shew you, that that was done by another person employed by Mr. Hurly to personate this man. But before that, please to ask him as to the linen that was carried away, what became of it, and who disposed of it?
Court. You say, there was linen taken away—What linen?
Car. There was Holland sheets, and they were put into a chest in the barn; and we brought them in again.
Court. Who brought them in?
Car. Daniel Hicky, and I myself.
Court. Who did you deliver them to?
Car. To Mr. Hurly's wife.
Court. Was he privy to it?
Car. Yes, he was.
Court. Did you ever make Mr. Hurly acquainted, that you had restored the linen?
Car. Yes, my lord.
Recorder. Pray, was there any jewels or diamonds taken away?
Car. My lord, he said there was some in a little bag, some jewels and diamonds; and he bid us not open it; and we did not.
Court. Was that bag in the same drawer with the other money?
Car. Yes, my lord, it was.
Sir J. Mead. Pray, my lord, I desire to know, whether he was ever tampered with by any body; and who it was?
Court. Was you ever tampered with, to take off your evidence?
Car. Yes, my lord, I was—by Daniel Carty, and I refused it.
Court. Was you by Mr. Hurly?
Car. No; but he sent his brother to me.
Mr. Forster. Pray, my lord, let us see that examination: he, after that examination, gave evidence contrary to what he has now given.
Court. Do you admit that there was an examination?
Sol. Gen. That there was an examination sworn before my lord chief justice—But that this was not the man.
Recorder. Was you sworn before my lord chief justice Pyne?—*Car.* Never in my life.
Court. Look on it; is that your hand?
Car. It is none of my hand.
Recorder. Pray, look upon it.
Car. It is none of my hand.
Mr. Forster. (Produces another paper.)—Pray, look on that paper, and see if that be your hand or not.
Car. I do not know whether it be or no; I believe it may.
Sol. Gen. Pray, mind which he owns to be his hand, and which not.
Recorder. We have to deal with a nimble person.
Court. What will you have next?
Mr. Bernard. The next thing is, What time of the day or night the robbery was committed?
Car. My lord, it was about ten o'clock at night, before the people went to bed.
Court. What month?
Car. The month of March.
Court. What day of the month?

Car. As I understand, the 3rd of March.

Court. What day of the week?

Car. Sunday.

Mr. Bernard. Where was you on Monday morning?—*Car.* I was at Corrofin.

Mr. Bernard. How far is that from Mr. Hurly's?—*Car.* It is five miles.

Court. How long did you stay at Corrofin?

Car. I staid there till news came, that the robbery was committed; I staid till night.

Mr. Bernard. Pray, was Mr. Ronane privy at all to this robbery?

Car. I do not know; I believe he may, for I know no other business he had there, nor I saw no other business he did there.

Court. Mr. Bernard, he says this—As Mr. Ronane was to go out of the back door, then at that very time they came through the garden.

Car. Yes, my lord; Mr. Hurly's man came to give us a call.

Court. He says, Hurly's man did give them notice when Mr. Ronane did go abroad.

Mr. Bernard. Do you believe that Mr. Ronane went abroad?

Court. He says, It was usual for Mr. Ronane to go abroad.

Att. Gen. My lord, the next witness we shall produce is another servant, that was in the house with Mr. Hurly the same time.

Margaret Connene.

Sol. Gen. This lady goes in the family by the name of Peggy Rabbet; Margaret is Peggy, and Connene, Rabbet.

[An interpreter sworn, because she could not speak English. Then she was sworn.]

Sol. Gen. Pray, ask her, Whether she knew Patrick Hurly, and let her point at him.

Con. There he is.

Sol. Gen. What does she know of this robbery, this pretended robbery?

Court. Pray ask her how long she has been acquainted with Mr. Hurly?

Interp. This year and a half.

Court. Was she a servant or no?

Interp. Yes, a servant in the house for a year and a half.

Court. Does she know of any robbery, or pretended robbery committed on Mr. Hurly?

Interp. She knows there was a robbery.

Court. Was she a servant in his house at that time?—*Interp.* Yes, my lord, she was.

Court. Let her tell what she knows of it from the beginning to the end.

Recorder. The whole story, the whole intrigue.

Interp. She says, one Hicky, and Calaghan Carty, Donogh O'Brien Andrews, came into the house at night, and Teigue Carty and Daniel Carty.

Court. Were they disfigured?

Interp. Yes, she says, they were.

Court. How did she know them?

Interp. As Calaghan Carty told her.

Court. When was that?

Interp. After he came out of gaol.

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Court. Did she know any of them when their disguise was on?

Interp. No, she did not.

Court. Did she know of any contrivance of a robbery?

Interp. No, she did not.

Court. What time of the day or night was this robbery committed?

Interp. She says, my lord, about ten of the clock at night.

Court. What month? or, What time of the month?

Interp. She does not know; but it was about ten of the clock at night, as she believes.

Court. Pray, in what manner was it that they came into the house?

Interp. She says, my lord, that about that hour of the night she came in before Mr. Ronane went out at the back-door; and that these five persons came in at that time into the house.

Court. What part of the house was she in then, when these five persons came in?

Interp. She was in the kitchen.

Court. Ask her, how could she see these persons, when they came into the house, from the kitchen?

Interp. She says, she could not.

Court. How soon after they got in had she notice the robbers were got into the house?

Interp. She says, that as soon as they came in, one Mac Caie cried murder, and said, his master was killed.

Court. Where were the robbers then?

Interp. In the parlour, near her master's chamber.

Court. What arms had they that time there?

Interp. She says, that they had fire arms and a sword; and that they shot at them.

Court. Which of them had arms?

Interp. She says, all that she saw had arms.

Court. Was there any body wounded; or, Was there any opposition given by any servants, that occasioned them to fire?

Interp. There was nobody to oppose them.

Court. What made them fire off the gun then?

Interp. She does not know, unless it was to keep them in, and frighten them.

Court. How far was this house where Mr. Hurly lived from any neighbours?

Interp. She believes there were some neighbours half a mile off.

Court. Was she in the parlour? or, did she see any arms in the house before the robbers came in? or, Did they bring the arms with them?

Interp. She says, there were arms in the parlour when they came in.

Court. Were these arms she saw with them the same that she saw in the parlour, before they came in?

Interp. They were the same arms.

Court. Did she see those arms? How long did she see them there before the robbers came in?

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Interp. She says, that the arms lay there all the evening before.

Court. Was it usual for the arms to lie there before?—*Interp.* It was so sometimes.

Sol. Gen. What was Mr. Hurly's motive for keeping arms always ready at the door? What occasion had he for them?

Interp. She does not know any other, than that her master was in debt, and apprehensive of trouble; and that he kept those arms for his defence.

Court. Pray, does she know what was taken away from her master at that time?

Interp. She knows that they took twelve pair of Holland sheets.

Court. Did she ever see any of the linen that was taken away from her master with him afterwards?

Interp. There were sheets in the house after the robbery, and she believes they were the same sheets.

Mr. Butler. The sheets in the robbery were large, double Holland sheets. Pray, what sheets were they she saw afterwards in the house?—*Interp.* Large Holland sheets.

Sol. Gen. How many pair of Holland sheets did she see in the house after the robbery?

Interp. She saw four or five pair of Holland sheets in the house after the robbery.

Sol. Gen. Pray, how soon after the robbery did she see those sheets in the house?

Interp. After the assizes.

Att. Gen. Pray, ask her, Whether any goods were sent out to any neighbour's house, and what neighbour's, and what goods?

Interp. She believes it was usual, when W. Malway came to the house, that was a person who prosecuted Mr. Hurly for debt, to send away the goods, to secure them.

Att. Gen. As I understand this woman, when these robbers had come into the parlour, Daniel Mac-Caie ran into the kitchen, and cried, murder! murder! I would fain know, since Daniel Mac-Caie was not tied, and that the robbers did not tie her, why they did not go out to make hue and cry, and raise the country.

Interp. She says, my lord, that there was none of them tied; but they did not go out.

Court. Pray, how came it about, that after the shots went off, no neighbours came in?

Interp. She says she believes they could not hear.

Att. Gen. Pray, when they fired off the fire-arms, did they present them at her, or at Daniel Mac-Caie? or, did they find any holes the shots had made in the ceiling, or marks of the bullets in the wall, or in any other place?

Interp. She says, they hurt nobody, and they saw no holes or marks of shot or bullets.

Att. Gen. Ask her, whether the arms that were in the parlour did not usually hang on racks or hooks; and where were they a little before the robbers came into the parlour?

Interp. They were upon the table, my lord, near the door.

Court. Where did these arms use to be at other times?

Interp. She says, at the same place, near the door.

Mr. Forster. What number of arms did Mr. Hurly use to have in the house? and, of what sort?

Interp. A couple of fuzes, a blunderbuss, a couple of carbines, and pistols.

Mr. Bernard. Pray, how many swords were there usually?

Interp. She did not know of any but her master's sword; she saw but two.

Mr. Bernard. How does she know the shots were made out of these arms that were Mr. Hurly's?

Interp. She says, that she was shot at twice.

Mr. Bernard. And was it out of these arms that used to be in the parlour?

Interp. She was shot at with a pistol.

Mr. Bernard. Was it with Mr. Hurly's pistol?—*Interp.* She believes it was.

Court. Whether these arms, that were fired off, were the arms that lay on the table?

Interp. She was told afterwards, by the person that did it, that they were her master's arms.

Court. Who told her of it?

Interp. Calaghan Carty.

Mr. Bernard. She has no other knowledge of this but as Calaghan Carty told her. When was it he told you this?

Interp. After he came out of gaol.

Mr. Bernard. How long was that after the robbery?

Interp. They were long in gaol—she does not know.

Mr. Bernard. Though she was our servant then, we shall shew whose servant she is now, and how she has been promised to be portinaced and potticoated. Does she know Teigue Carty?

Interp. Yes, she does.

Mr. Bernard. Does she know Daniel Hinky?

Interp. Yes, my lord.

Mr. Bernard. Does she know Donogh O'Brien?—*Interp.* Yes, she does.

Mr. Bernard. Had she this account from any of those persons?

Interp. She did not ask them.

Sir John Mead. Whether the arms Mr. Hurly had, were carried away by these persons, or left there?

Interp. She says, they took them out, and locked the door, and left them without the house.

Sol. Gen. Upon my word, a man that had robbed 1,300*l.* would hardly have parted with his arms till he was safe lodged. What became of the arms? who had them afterwards?

Interp. She saw the arms in the house again.

Court. Were the arms abused any ways?

Interp. She heard they were stuffed with gravel; but she does not know whether it was so or no.

Court. Who did she hear say so?

Interp. She heard the family say so.

Mr. Bernard. Pray, when did she see that Calaghan Carty? How long was it from the

time of the robbery to the time he told her this?

Interp. Next day in the evening she saw him after the robbery.

Mr. Bernard. About what time?

Interp. She does not know certainly what time of the day. It was afternoon, pretty late, after the cows were milked.

Mr. Hurly. She says, the next day this man came back. The man says, he was at Corrofin till night.

Sol. Gen. He says, that after the robbery was committed, he went that night as far as Corrofin; and, that being weary himself, he sent his father with the letter to Mr. Forster's, and afterwards came back again in the same evening.

Sol. Gen. My lord, we are informed, that this woman can give direct proof, that some of the goods, and particularly the linnen, came back to the house; and that, being dirty, she washed them.

Court. What goods were taken away, does she know the night Mr. Hurly was robbed?

Interp. She says, they took 12 pair of Holland sheets, and about 30 shirts.

Sol. Gen. I desire to know, did she afterwards wash any linnen, sheets or shirts, and how they were dirtied with ordinary wearing, as by going abroad?

Interp. She says, there was at least four or five pair of Holland sheets that were soiled.

Sol. Gen. Did she wash any linnen?

Interp. She was at the washing of them.

Sol. Gen. Did she observe after what manner they were dirtied, by people lying in them, or otherwise?—*Interp.* She does not know.

Mr. Butler. Does she know of any Holland sheets sent to any gentleman in the country from Mr. Hurly?

Interp. She knows that some of his linnen was sent to Mr. O'Brien's.

Mr. Dean. How came she to stay in the room after shots made at her? How came she to be so stout?

Interp. She says, she durst not stir: one had a pistol in one hand, and a sword in the other, and she durst not stir.

Mr. Dean. How long before the robbery did she see Calaghan Carty?

Interp. That day the robbery was committed, which was Sunday, he dined there.

Mr. Bernard. My lord, I desire to know whether she did not see Calaghan Carty very often after the time the robbery was committed, and how often?

Interp. My lord, she says, that after the robbery was committed, Calaghan Carty was in the house after his return from his errand: he continued in the house until such time as he was taken.

Mr. Bernard. Pray, who took him?

Interp. One Haloway, she says, one Buck, and some dragoons.

Mr. Bernard. Pray, did Calaghan Carty tell her any thing of this robbery during the time he was in prison?

Interp. She says, he did not.

Mr. Bernard. Whether she did not believe this to be a real robbery, until he told her after he came out of prison?

Interp. She did then believe it was a real robbery.

Mr. Bernard. Does she believe now, in her conscience, it was a real robbery?

Interp. She does not.

Mr. Bernard. What is the cause she does not believe it now?

Interp. She says, that she found it out since to be otherwise.

Sol. Gen. Ask her again, What is the reason that she does not believe it to be a real robbery, as well now as at the time it was committed?

Interp. She says, my lord, the reason for believing that it was not a real robbery, is, That she found it out to be otherwise, not only by the actors, but by the servants and the neighbours.

Sol. Gen. Pray, ask her again.

Interp. She believes it was not, for she found it out, and they confessed it: and a portmanteau with some linnen, that was sent away to Mr. O'Brien's, being afterwards come back from Mr. O'Brien's, when the linnen was taken out of it, she saw there the table-cloth that was taken away by the robbers that night.

Att. Gen. Pray, was that table-cloth used that night of the robbery at Mr. Hurly's table?

Interp. She says it was.

Sol. Gen. She was asked, Whether or no she believes it was a real robbery? and she says, it was not a real robbery; and her reason was, that in a portmanteau that came from Mr. O'Brien's house, there came back a table-cloth that was used and taken away that very night of the robbery at Mr. Hurly's house.

Court. Ask her, whether she took notice of any table-cloth that was in Mr. Hurly's house the night of the robbery, that afterwards came back from Mr. O'Brien's?

Interp. She says, they had that table-cloth in the house that night of the robbery.

Court. Was it taken away by the robbers?

Interp. They did take it away that night: it was upon the table in the parlour, and they took it away.

Court. She says, the table-cloth was in the parlour, on the table, the same night the robbery was committed: pray, ask her, was it on the same table where the arms were?

Interp. It was upon a side-board, my lord.

Mr. Bernard. Pray, when did she leave Mr. Hurly's service?

Interp. She says, that she left his service, and continued in his father's house till about Christmas.

Mr. Bernard. Pray, whose service did she go to afterwards?

Interp. She went to service to one Mr. Wogan.

Mr. Bernard. Was she at sir Donogh O'Brien's house after that time? Whether she was sent for by sir Donogh O'Brien and for what?

Interp. She was there after she left her service.

Mr. Bernard. How long after she left her service?

Interp. She believes within two or three days after.

Mr. Bernard. Did she go of herself, or was she sent for?

Interp. One Constance Davoir brought her there.

Mr. Bernard. Is he a servant?

Interp. No.

Mr. Butler. He is a man that keeps an ale-house in Corrofin. Did he tell her sir Donogh O'Brien sent for her?

Interp. No, he did not.

Mr. Bernard. What business had she there?

Interp. He did not tell her what business.

Mr. Bernard. To what end or purpose did she go there?

Interp. She said, that he was her friend, and she went along with him.

Sol. Gen. What did she go thither for?

Interp. To give an account of what she knew concerning this robbery.

Mr. Bernard. Mr. Hurly was very severe on sir Donogh O'Brien. Did she see sir Donogh O'Brien?—*Interp.* She did.

Mr. Bernard. Had he any discourse with her.

Interp. She said nothing to sir Donogh, nor sir Donogh to her, but she was carried before a justice of peace.

Mr. Bernard. What justice of peace?

Interp. She does not know that.

Mr. Bernard. Whether sir Donogh O'Brien was there? Whether she did not hear the country and all the neighbourhood, say, that if they did not make this no robbery, sir Donogh would be ruined?

Interp. She says, she heard no such thing; but was desired to say nothing but truth.

Mr. Bernard. Was there any promise made you of a portion?

Interp. No, there was not.

Mr. Bernard. Was she tampered with by any?—*Interp.* She says, no.

Sol. Gen. Do not ask her if she has been tampered with, for she does not understand it; but, whether she was offered any thing at all for swearing in this cause?

Interp. She says, no; she was offered nothing at all.

Sol. Gen. Now we will call Walter Neylan, who will give an account of this matter out of Mr. Hurly's own mouth.

Walter Neylan sworn.

Court. Give an account to the jury what you know in this matter.

Sol. Gen. Let him tell if he was in prison in Ennis gaol, and on what account, and what passed there between him and Hurly.

Neylan. My lord, the same time that Mr. Hurly was committed upon suspicion of the robbery, I was in prison myself.

Court. On what occasion was you there then?

Neylan. I was bound for Mr. Hurly, and was confined for his debt. I was in conversation with him during his confinement.

Court. Was he confined in the same gaol?

Neylan. Ay, and in the same room.

Court. Who was in the gaol with you? Was there one Donogh O'Brien Andrews there?

Neylan. There was four servants of Mr. Hurly's; Donogh O'Brien Andrews, Daniel Hicky, Calaghan Carty, and, I think, Daniel Carty.

Court. What passed between you and Mr. Hurly?

Neylan. My lord, three of them discovered the robbery, and the other held out for two or three days. But, as I was coming out of the room where I was confined, this man Donogh O'Brien Andrews said to me, do you know whether my master is working any thing for my liberty? No, says I, I do not. Pray, says he, tell him out of charity, that he take care for my releasement, or else I must discover as well as the rest.

Jury. We do not hear him.

Court. He says, he was in prison at the same time with Mr. Hurly and four of his men at Ennis: that he was conversant with Hurly, being chamber-fellows: that three of the persons, that were thus confined, confessed the robbery; but there was Donogh O'Brien Andrews, he stood out, and disowned it for some time; and afterwards this Donogh O'Brien Andrews came, and said to him, pray do you know whether my master is doing any thing for my releasement? and he said no, he did not. Pray, tell my master, out of charity, that if he does not soon work out my liberty, I must discover as well as the rest of my fellow-servants.

Neylan. My lord, upon this I came to Mr. Hurly, and told him the whole matter. Says Mr. Hurly, if this man does own it, I am undone, for he is the man that knows most of it; and called me aside, gave me a piece of money, and desired me to give it to him, that he might not discover; and to tell him, that he would send for security, and get him discharged, though it were from the county of Galway. I went down accordingly with the piece of money into the gaol; and because I was unwilling to hold any discourse with the said Donogh O'Brien Andrews alone, I gave the piece of money to Calaghan Carty to give him, and told him what Mr. Hurly said. Says Donogh O'Brien Andrews, this will not do, for I love liberty better than my life, and I will discover. At the time of this man's saying he would discover, Mr. Hickman, a justice of peace, came into the gaol: whereupon Mr. Hurly desired me to speak to Mr. Hickman, and pray him to speak to the gaoler, that this same Donogh O'Brien Andrews may have more liberty than he had, and desired me to be security for him, and that he would give me counter-security. I told him, I would not speak to him: says Mr. Hurly, you ought to do it, if not in point of friendship, yet in point

of gratitude; for it is through your means I was forced to take those measures.

Court. Mr. Neylan, pray, sir, what did Mr. Hurly say to you when you came to him, and told him what Donogh O'Brien said to you?

Neylan. He said, that was the first man to whom he communicated the contrivance of the robbery; and, that it was most dangerous if he should discover it.

Sol. Gen. Who said so?

Neylan. Mr. Hurly said, that this man was the first man that he spake of of the contrivance; and he said, he was the principal of the four that contrived it.

Sol. Gen. Who did you give this information to?

Neylan. I gave it to Mr. Butler; and there was present three or four justices of peace more.

Court. At the time he was examined before the justices of the peace, he did not give the latter part of the evidence: I asked him why he did not? he says, because he did not recollect himself. The first part he did not give, concerning the piece of money.

Mr. Forster. The prisoner desires to know after what distance of time he recollected himself?

Court. After he had given his examination in to the justices of peace.

Neylan. A month or six weeks, I think, my lord—But I told several people of it before.

Mr. Forster. How came he to send for a justice of peace to take his examination at first, and not to do so afterwards, when the latter part of it came to his memory?

Neylan. Because Mr. Hurly was in gaol at the first time, and I thought he might have come to a trial; but after he was removed up here, I despaired of his coming to a trial, and so did not think it material.

Mr. Hurly. My lord, this is a man that was in trouble for me, and bound to Thomas Arthur on my account: he had a pique to me, and I to him; he lamponed me, and I him. I appeal to the gentlemen of the jury, whether I, that had my wife and sister with me, whether they don't think I should rather have trusted them with such a thing? All that he here says is out of pique and malice, which the gentlemen of the country do know.

Court. Mr. Hurly, you are a man of parts, and you know what is used to be done in this kind: if you please, you may have pen, ink, and paper, to take notes: and, when it comes to your turn, you shall ask what questions you please.

Mr. Hurly. My lord, it is all malice.

Neylan. My lord, I did contrive to make him pay the debt of 200*l.* (for which I was bound for him); but I suffered damage above three-score pounds more—I did indeed get an execution against his goods.

Court. He says, he was mightily damnified by being bound for you; and that, having counter-security, he did order judgment to be entered up against you; knowing that you had

valuable goods in the gaol, he ordered them to be taken.

Mr. Hurly. He says, my lord, that he was so much damaged: I will prove, my lord, that his debt was satisfied, and over and over.

Att. Gen. My lord, we will produce a witness, that saw this Rapparee act perused in Mr. Hurly's house at Moughna; and we will shew you what passed at reading the act.

Captain Charles Mac-Donogh sworn.

Att. Gen. My lord, captain Mac-Donogh will give your lordships and the jury an account of the necessity the prisoner was under; and that the Rapparee act being read on some certain occasion at a certain place, what happened thereupon.

Court. Pray, Sir, give an account to the jury what you know of Mr. Hurly, and his circumstances.

Mac-Donogh. My lord, I was very well acquainted with Mr. Hurly since the time he came out of England; I received letters from him, and I was employed by him in negotiating several affairs in the country, and particularly against his brother, that owed him some money. I thought he was very severe against his brother, and I charged him for being so unkind to him: he said, he was in want of money, and so could not help it. And I was with him when he was reading the late act of parliament relating to the article-men; and he said, he would pass his adjudication according to the articles of Gallway. I said, I thought he was in France, and not in Gallway. Said he, it is no matter, I will prove it. And he came after to Dublin, and passed his adjudication. And after he came down again from Dublin I was with him; and he brought with him the act of parliament, commonly called 'The Rapparee Act;' and he said, that the Rapparee Act was a clever way to recover money from the country.

Court. When was this?

Mac-Donogh. The latter end of Christmas, before the robbery.

Court. Pray, what year?

Mac-Donogh. My lord, it was Christmas 1699.

Mr. Butler. Have you any of those letters of Mr. Hurly, that shews he was in great want of money?—*Mac-Donogh.* Yes, I have.

Recorder. Pray, in what circumstances was he at Christmas 1699?

Mac-Donogh. He was poor and indigent; and he said, he was so great a friend to his brother, and loved him so well, that he would not have prosecuted him, if he had not wanted money.

Att. Gen. Had you any discourse with Mr. Hurly after the robbery? Pray, what was it?

Mac-Donogh. My lord, capt. O'Brien writ me a letter after he came to the place, and was persuaded by him, that it was a real robbery, and desired me to come, that we might consult the matter: and knowing that he had no such money, I wrote him a drolling letter, that I believed it was some Papists robbed him; and

that he would recover his money of the county. I came to Ennis, and he told me, he had lost all that he had in his house to pay his debts; which I smiled at, because I was before in his house when he came from Dublin; and I said to him, I hope you have brought money, for otherwise the country will be too hot for you now, because Mr. Neylan lies in gaol for you; and this sheriff is not your friend. And he did not pretend that he had money; but said he, Never matter that, for sir Toby Butler and colonel John Macnamarra will make my interest good with the sheriff. And so the letter coming after from captain O'Brien to me, that Mr. Hurly had lost such a sum of money, I laughed at it, because I knew that he had no such sum. And when he told me, at the assizes at Ennis, how that he was robbed, he said, he would give me 200 guineas if I managed the business for him, to get the money from the county.

Att. Gen. You had several letters from Mr. Hurly: pray, let us see them.

[Shews the Letter.]

Recorder. Did you receive this letter from Mr. Hurly?

Mac-Donogh. Yes; it is his hand-writing—there has passed many letters between him and I.

Recorder. Did you ever discourse with him since you received this letter about the subject and matter of it?

Mac-Donogh. Yes, I did.

Court. Did you ever answer it?

Mac-Donogh. Yes, I did.

[The Letter read.]

'Dear Cousin; *Thursday, Aug. 17, 1690.*

'Just now I received the enclosed from our never failing little agent. What we have hitherto done, is but very insignificant to the main matter. If this be not duly executed, and without loss of time, there is no other way on earth to do it, but that we thought of and proposed; that is, When the colonel comes in person, immediately after the assizes, to execute the surplus of the *Fieri Facias*, the gentleman will, no doubt on it, send to him (as he did before) to know if he has any against his person? When he sends him word he has not, he will come to him; and when they are together, you must get some clever fellow that will put it into his hands. Spare no cost to do this, my dear friend: You possess the matter fully, and I have several convincing proofs of the sincerity of your intentions towards me; therefore will say no more, but refer it wholly and solely to yourself; and desire once more, you will spare no cost to compass it. The great friend arrived in Dublin, and he expects our cousin there Wednesday next: He goes away Saturday night to Solomon his brother-in-law's house, where it would be a vast comfort for him, towards his journey, and the carrying on the clever touch, to receive a

'box of pills from you, which will be very much wanting. If not, and that you could get a bill for it, from *Pieros Verrony*, who will be there to meet my brother John, it shall be highly serviceable; make it payable to our agent, at Mr. Thomas Hewlet's house in Smithfield, and she will pay it to Mr. Baldwin. Let not our generous friend's good nature be prevailed upon to give any time or forbearance; for, I do assure you, that and more must be laid out to carry on the clever touch; which I have the greater hope will not fail taking the good effect, since you are so positive in it. I hope you have a will. Do your business with sir Theobald—and send his opinion about the *Elegit*. Our cousin will write to you from Dublin, directed as you shall appoint in the answer to this. I will take leave, begging the favour you will remember me most thankfully to our worthy friend, whose services I shall find a way to return as he deserves. The longer he stays after the assizes, the worse it will be for us. Dispatch me back the bearer as soon as you can, and pay an express, if you do not come yourself, of Saturday night to Solomon's: Our cousin will go from thence on Sunday before day. My service to Mr. Conner, and know whether he delivered and seconded the letter to my lord C. J. Put this letter and the enclosed into your fob, lest you should drop it. As you have appeared all along a true friend for me, my dear kinsman, go through with it, and assure yourself your pains shall not be ill bestowed. The executing this, is the clever touch indeed; and I am sure it will succeed, since you undertake it. My most kind service to my worthy friend, I hope he hunted well.'

Sol. Gen. Pray give me that letter. My lord, I shall take leave to read it, and ask some questions out of it. Sir, by the oath you have taken, pray what does he mean by our never failing little agent?

Mac-Donogh. That was his wife, that was here in Dublin. There was a *Fieri Facias* against the goods of his brother John; but that would not do, so he desired his wife to send an execution against his body.

Sol. Gen. Our great friend is arrived at Dublin. Who does he mean by that?

Mac-Donogh. Really, Sir, by what I understand, it was the Attorney-general.

Sol. Gen. Who was his cousin here, Solomon?

Mac-Donogh. He is one Donogh O'Dem, married to his sister, whom he thought an insignificant man; and therefore he called him Solomon, by way of ridicule.

Sol. Gen. What was the clever touch, and the box of pills?

Mac-Donogh. The clever touch was the adjunction; and the box of pills, was the money to be sent to Dublin, to pass the adjunction.

Mr. Butler. Have you any other letters?

Mac-Donogh. Yes, I have.

Moaghna, Oct. 5, 1699.

' I have advice from a very sure hand, dear Sir, that I am liked to be blocked up very soon, or rather regularly besieged by the formidable captain Thomas Bourk, and a select party he brags to have hired of the Ennis-killiu dragoons for that purpose. He received fifty pounds sterling for that generous undertaking, and entered into bonds of two hundred pounds penalty, to have me in Salv. Custod. before the first day of next term. And, as I am resolved to keep my ground, and maintain this post to the last extremity, I have detached corporal Malone for ammunition to put myself in a condition to receive the thrice-worthy captain; for this is no time of day for me, (post varios casus) to give my head for the washing. The Corporal is but very lately arrived into my service, and consequently has but young skill in powder and ball: Therefore must entreat you to chuse and send me a pound of the best powder, and three dozen of carbine, musket and pistol-ball.

' Poor Tom is very much in the right on it, to revenge his quarrel with a party, since his courage never inspired him to do it single hand: And his select party (as he calls them) are resolved to follow the col. general of the French dragoons (Mareschal de Boufflers) maxim: for he was of opinion, no man was fit for a dragoon, that in time of war outlived two campaigns; or, in peace, did not once, at least, in every fifteen days, seek adventures for a broken head: Pray dispatch me back the corporal; and though the enemies lines of circumvallation should be perfect, say their very batteries be raised and fixed, if you let me know the day precisely that you intend to call this way, I will make a sortie to facilitate your entrance. I have not one word from our friend since I saw you. If your leisure will permit it, pray let me know what progress you have made in the last affair that was communicated and recommended to you by, Dear Sir, your affectionate kinsman, and very humble servant,
' PATRICK HURLY.'

For Capt. Charles Mac-Donogh, at Ennis.

Sol. Gen. You see that the gentleman was very apprehensive of debt, and guarding himself against it at this time.

Att. Gen. I desire to know, in this first letter, who it was that was his good friend?

Mac-Donogh. He told me, Sir, he looked upon you to be his great friend.

Court. Had you any communication or discourse with Mr. Hurly about this robbery? did he confess it?

Mac-Donogh. I did not put it to him: but I told him he would be indicted for perjury, and lose his ears. He said, twenty pounds would save them.

Mr. Hurly. He said, I must not stay in the country, if I did not pay Mr. Arthur; I

desire to know whether I did not tell him I was to meet Mr. Arthur?

Mac-Donogh. You told me you would make an end with Mr. Arthur: and you said at the same time, that you had sir Toby Butler and Mr. Macnamarra to make the sheriff your friend: and that did imply to me, that you had no money.

Mr. Hurly. I came to Dublin in August, and they arrested me. I went to perfect bonds to Mr. Arthur for the debt, which was 723 pounds. He exacted upon me, and I was forced to consent to him a bond for the whole demand. I sent for sir Toby Butler, and we made up the account: and Mr. Arthur made it up near 1000 pounds, for which I gave him my bond. Mr. Butler told me, you will be relieved, by preferring a bill in Chancery against Arthur. I did not serve him with a subpoena, but he absconded, and so I got no remedy to this day. And the reason why I paid him not, was to make him come to terms, that I might retrench the extravagant charge.

Court. Did he give that as a cause why he would not pay Arthur, because he had exacted upon him?

Mac-Donogh. He did not tell me so.

Court. Was this the reason, as you apprehended, why Mr. Hurly absconded, that he was on his keeping for fear of Arthur?

Mac-Donogh. For aught I know, it was for fear of others, as well as Mr. Arthur. I remember the night he came home from Dublin, some few days before the robbery, that he was barricading his door, and telling me of making the sheriff his friend? whereby I concluded, that he could not have that money that he afterwards pretended he had lost.

Court. How came you, Mr. Hurly, to barricade that house, when Mr. Arthur had promised not to disturb you at the assizes of Ennis? He swears, the very night you came from Dublin you were barricading that house.

Att. Gen. I desire to know, whether he believes that he had money in his house the night he was robbed?

Mac-Donogh. He did tell me so; but I did not believe him.

Court. Do you know any thing of those counters?

Mac-Donogh. My lord, about February last, the wife of Daniel Hicky, who was suspected to be in the robbery, came to me and said, that her husband was like to be undone for passing some counters: that if he could get his liberty, he would go to Dublin, and swear the cheat of the robbery; and, says she, we have some of the counters that they said was gold, in our keeping, and we will produce them.

Court. Did you see any of those counters at any time?

Mac-Donogh. Yes, I did, when the constable took them out of Hicky's house.

Sol. Gen. It seems that Daniel Hicky's wife told him, that she could produce the counters. We shall shew you, that there was

search for them accordingly. To whom did you make a discovery of this of Hicky's wife?

Mac-Donogh. I told it to Mr. Butler, who is a justice of the peace in the county of Clare, and to capt. Bindon: the woman was taken and indicted for passing these counters.

Mr. Forster. How came she to be discharged after she was taken?

Mac-Donogh. She was bailed at the quarter-sessions.

Att. Gen. My lord, we shall shew you where the counters were found, and who found them.

Mr. Bernard. And we shew, that the man that found them hid them.

The high-constable *Walter Huonin* sworn.

Court. Had you any warrant, and from whom, to search for counters or counterfeit money?

Huonin. Yes, my lord, I had a warrant from dean Blood, to search for goods that were pretended to be robbed from Patrick Hurly. I came to the town of Moughna, and brought with me five men and a petty constable; and I went to the house of John Hurly, Patrick Hurly's father, who was bed-ridden, and removed him out of his bed: and I went to Carty's house, and dug there, and found none; and I came to Daniel Hicky's, and digged about, and there was a bed of dung by the side of the house, where they fodder their cattle, and it was a foot above the floor of the house; and after searching the rest of the house, I ordered the dung to be removed out of the place; and I bid the fellows come and dig there, and they did; and Hicky's wife held the candle herself; and one of the men that was next the wall hit a stone in the ground, and it was a slate over a hole in the floor, and the next of them threw it out, and along with it a saggane and a purse; and when I saw the purse, I would not let him handle it. I opened it, and found it full of yellow counters, and took an handful of them out, and called the people of the town, and reckoned them all before their faces.

Court. What did you find in the purse?

Huonin. My lord, nothing but counters.

Court. Have you them?

Huonin. Yes, I have all that was found—I came to the assizes at Ennis, and my lord chief justice Haly ordered me to keep them till I should appear at the trial. [Shews the saggane and purse with the counters, which was opened, and were 121 in number.] The reason why I was so careful to search there, was because Hicky's wife was pressing for my not touching the dung; and after they were found, when she saw the counters, she dropt the candle, and went away. Says I, good woman, you must go along with me. I brought the woman to Ennis; and I was brought before my lord chief justice, who desired me to keep the counters against the trial.

Mr. Hurly. Whether it be likely, that this woman, that was indicted for these counters, would not have removed them, and thrown

them into a by-hole; and if they were in the ground, whether the purse would not be rotten?

Court. He says, when it was taken up, the saggane that was about it was mouldy and wet, for the purse itself is damnified.

Sol. Gen. Pray, what is the name of the village where the house stands?

Huonin. It is Moughna, where the father of Mr. Hurly lives.

Mr. Bernard. How long after the robbery was this found?

Huonin. It was a whole twelvemonth.

Mr. Bernard. Was you directed to search that dunghill before you went to the house?

Huonin. No, I was not; only a fellow told me that he suspected that place.

Recorder. Was it in the first place, or in the last place you searched, that you found these counters?—*Huonin.* It was in the last place.

Recorder. How near is this Hicky's house to Mr. Hurly's?

Huonin. About a quarter of a mile, or less.

Alderman *Walton* sworn.

Mr. Forster. Sir, Mr. Hurly calls you, to know what money you paid him?

Ald. Walton. My lord, I came over with Mr. Hurly in October, 1697. And some time after he was here, he came to me and told me, he had some money to receive, and asked me if I would receive it for him? I told him it was Mr. Burton's business; but he said he was a stranger to him, and so let my servant receive 400*l.* from Mr. Arthur, and 100*l.* from Mr. Fitz-Symmons.

Mr. Bernard. I desire alderman Walton to tell, when they came over in the war-time, whether he saw any jewels with Mr. Hurly?

Ald. Walton. We did see a ship, that we thought was a privateer, but it proved a friend: he then told me, he had some things of great value, which he was going to secure; but I did not see them.

Sir John Mead. How long was the money in your hands?

Ald. Walton. It was all drawn out in three or four months time.

Att. Gen. Pray, was it all drawn out of your hands before 1699?

Ald. Walton. Yes, yes.

Sol. Gen. The next thing that was drawn out was writs and provisos, to surce Mr. Hurly to pay back the money to Mr. Fisher. My lord, we will call two that were by when these counters were found by the constable.

Thomas Edwards sworn.

Court. Do you know of any search made in any body's house concerning gold or money?

Edwards. My lord, I was commanded by the high constable, Walter Huonin, to the house of Daniel Hicky; and when I came, I found a youth on his knees making up the dung: I asked him, what he was doing there? The woman said, he was endeavouring to hide some potatoes. I told her, there was nobody

would take them away. Now, my lord, there was no potatoes there; but we found the counters under the dung, about eight inches deep in the ground; they were in a leather wallet, whippel about with a thumb-rope of hay.

Court. How did the woman behave herself?

Edwards. When the high constable told her, you must go along with me; she said, Now these are found, I believe I must.

Mr. Forster. Did you see the counters when they were taken?—*Edwards.* Yes, I did.

Mr. Forster. Did they look fresh?

Edwards. Yes, they did.

Sol. Gen. My lord, before we go any further, the gentlemen that are counsel for the traverser would fain insinuate, that the counters were laid there,—that, They that hide can find. Now, therefore, to shew that to be impossible, we shall prove to you, that this woman, the wife of Daniel Hicky, did offer some of these counters for a cow, before this discovery.

Mortogh Mac-Colloghy sworn.
(Per Interpreter.)

Att. Gen. Does he know one Daniel Hicky?

Interp. He does.

Att. Gen. Does he know his wife?

Interp. Yes.

Att. Gen. Had he any dealing with any of them?

Interp. He says, he had a cow, and it was strayed, and he found her, and was hurrying her home by Hicky's house;—he rested there, being weary, and was taking a pipe of tobacco, and they asked him, if he would sell the cow? he said, he would: and he went into a back room, and brought two yellow pieces,—he says, he has the two pieces here to shew. [Produces the pieces, being two yellow counters, the same with those that Huonin produced in the purse.]

Court. Are those the pieces Hicky's wife offered him for this cow?

Interp. He says they are. When he was receiving the two pieces the woman gave him, he asked her what they were? she said, two guineas: he said, he believed they were some of Patrick Hurly's gold.

Court. Why did he say so?

Interp. Because he imagined he had some gold counters.

Court. Did he sell his cow for the money then?—*Interp.* No.

Court. How came he to keep the money then?

Interp. He told her, he did not like the coin, and he would not sell his cow for them, because they were some of Patrick Hurly's gold; and he said, what will you take for them? I have threepence halfpenny, and some tobacco, and if you will take them, I'll give them you for the pieces: yes, said she, I will; and I wish I had so much for every one I have.

Court. He says, he was after this examined by a justice of peace concerning these things; how came he to be examined?

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Interp. He went himself, and shewed them to Mr. Bindon.

Court. Did he go of himself? or, was he sent?

Interp. He says, he told sir Donogh O'Brien what had happened, and he directed him to go to the justice.

Court. Pray, how long was it after he had these counters?

Interp. He says, nine or ten days.

Court. Did he go to sir Donogh of his own accord? or, did any one bid him go?

Interp. He went freely of himself.

Court. When was it that he received those counters he speaks of?

Interp. About Christmas last.

Court. When was it he bought the cow?

Interp. He says, he bought her at Clare fair, about Allholland-tide before.

Court. What time was it that the woman would have bought it of him?

Interp. It was a good while after.

Court. Was it before or after Christmas he was selling the cow to this woman?

Interp. After Christmas, my lord.

Court. How long after?

Interp. He does not exactly remember the time.

Court. Now, pray, gentlemen, we must do right to every body. When he comes to receive the counters, he said, it was about Christmas; and when he comes to tell you when he bought the cow, it was all at the same time.

Sol. Gen. No, no; the matter of the counters was at the time when she cheapened the cow; but he bought the cow at All Saints before, and he was about selling her at Christmas.

Recorder. About nine days after he was in possession of the gold he came to sir Donogh O'Brien, of his own accord, and he bid him go to a justice of peace.

Mr. Bernard. Pray, why did he not go to sir Donogh O'Brien sooner? and, what made him go then?

Interp. He waited for the quarter-sessions.

Mr. Bernard. Who is the nearest justice of peace living next his house?

Interp. Mr. Bindon.

Court. How came he not to go before Mr. Bindon immediately when he got the counters?

Interp. He says, he waited for the quarter sessions.

Court. Pray, how came he not to go immediately to Mr. Bindon, being the next justice of peace, rather than to sir Donogh O'Brien?

Interp. He expected all the justices would be together at the quarter sessions.

Mr. Forster. Mr. Hurly desires to ask that man some questions. How came the cow to go out of the barony after he had bought her? How came the cow there?

Interp. The man that sold him the cow in Clare fair lived there, and she strayed back again.

Mr. Hurly. How came the cow to go astray?

Sol. Gen. We cannot tell you; you may examine the cow, the cow knows best.

Att. Gen. We will now shew, that when Hurly came from Dublin he lodged at capt. John Lynch's house, and he pulled out of his portmanteau a large bag, that looked as if it were full of gold; and capt. Lynch handling of it, and finding it light, he opened it, and found it to be counters. This capt. Lynch is landlord of Moughna, and they were intimate together.

Capt. Lynch sworn.

Att. Gen. Pray, do you know Mr. Patrick Hurly, now at the bar?

Lynch. I have known him these 30 years.

Court. Have you intimate acquaintance with him?

Lynch. He cannot deny but I have.

Att. Gen. Pray, give an account of his coming to your house.

Lynch. I met Mr. Hurly at Loughrea, at one Harry Bargery's house, in the year 1699, either a little before or after Christmas.

Court. Where was he going?

Lynch. He was going to the county of Clare, from Dublin; and as we were drinking a bottle of wine, he went to a portmanteau that lay on a table, and taking out linen, he pulled out a bag that held about a quart; said I, Mr. Hurly, you are well stocked with money coming from Dublin. And I clapped my hand into the bag, took out an handful, and they were counters, my lord, of several sizes, like single and double Louis d'Ors.

Sol. Gen. Shew him some of the counters. [He looks on them.]

Lynch. This is like them.

Hurly. When was it?

Lynch. It was a little before Christmas, or soon after. I wonder, Mr. Hurly, that you should deny it.

Sol. Gen. Upon the oath you have taken, Had you any discourse at this meeting about any acts of parliament?

Lynch. I'll tell you, my lord: he asked how Mr. Banks's money went? (Mr. Banks was one that was robbed of the value of 250*l.* and the grand jury, at the assizes, allowed him the money, when he petitioned for it.) A while after, in our journey, says he, Cousin, I have a great deal of confidence in you, and if you'll assist me to get money—I told him, in any just way I would, but not otherwise.

Att. Gen. Had you any discourse about the Rapparee act?

Lynch. He told me plainly, that if I would but assist him,—and then brought down the statute, and asked me again, how Mr. Banks's money went in our county? I told him, he recovered his money from the county. Says he, cousin, I really want money; and if you'll assist me in such a matter, and come to me, I will deliver you your lease. I told him, I would assist him in any just way, but no further.

Recorder. You said just now, that he spoke of the act.

Lynch. He told me, that the act was a very

good way for a man to get money that wanted it.

Att. Gen. Are you a relation to Mr. Hurly?

Lynch. I have a friendship for him; and if I had known I was to be summoned, I would not have been within forty miles of this place this day.

Court. Pray, what relation are you to him?

Lynch. His brother was married to my sister, and he and his father was tenants to me and my father these forty years.

Court. Had you any linen sent to your house? and by whom?

Lynch. My lord, I cannot tell was it linen or no; but there came a trunk, and I had a letter before-hand (it was in April or May 1700), informing me, that the trunk would be with me that night, and desiring me, that I would not let the men that brought it see it afterwards.

Court. Did the trunk come?—*Lynch.* Yes.

Court. Was it weighty?

Lynch. It was as much as any two could carry. The servants told me, they were counting all night; that they did not sleep.

Court. How far is your house from Mr. Hurly's?

Lynch. Seventeen miles.

Court. Had you any discourse with him in the gaol of Ennis?

Lynch. Yes; I went to see him at the gaol of Ennis, and Mr. Butler met me: I told him, I was going to see Hurly. And as we were taking a bottle of wine together, I said, Cousin, it is not fit for any gentlemen to visit you, for the pranks you played in France, and now this robbery. He said, sir Donogh O'Brien was the greatest enemy he had against him, but he would lose his blood, or he should lose his.

Court. Did the servants that brought the trunk tell you what was in the trunk?

Lynch. They told me, that it was really full of linen. And Ulick Bourk came, and expected Mrs. Hurly that night. My wife was like to die. The servants that brought me the trunk brought me a private token, not to let any body have it, not capt. Bourk himself. But I suspected there was no good in it, and I let them take it away; so the trunk was taken away from my house that night, and brought to a neighbour's about a mile off.

Sol. Gen. What relation is Ulick Bourk to Mr. Hurly?

Lynch. They are married to two sisters.

Mr. Bernard. My lord, this gentleman hath swore very materially, and I desire he may fix a time; and tell us within a fortnight: Was it before or after Christmas?

Lynch. I am not positive, but it was in the year 1699.

Att. Gen. What house was it at Loughrea?

Lynch. It was at Harry Bargery's house.

Mr. Hurly. What time was it?

Lynch. I cannot be positive to time, but it was before the robbery.

Court. Pray, recollect, as near as you can, what time it was you were together at Loughrea?—*Lynch.* I can't be positive.

Mr. Bernard. Was it in the time of Lent, or not? It is strange!

Lynch. If I did know to a day, I would tell it.

Recorder. You say it is strange! he says, that Mr. Hurly's denial to him is more strange! he is particular as to the time of the trunk, and yet he can't be so as to the other time.

Court. Mr. Hurly, you shall make the best use of it you can; when the man tells you on his oath, that he cannot tell; and we cannot make a man swear more than he can swear: he says, it was in 99, and before the robbery. Was it in winter, or summer?

Lynch. In the winter, as I do really remember it.

Mr. Hurly. My lord, I humbly offer this: this gentleman says, he met me at Harry Bargery's house in Loughrea; and that I opened my portmanteau for him to take out a bag.

Court. No, he says you opened the portmanteau to take out some linen; and you took out a bag, and you looked into it.

Mr. Hurly. Was this half a year before the robbery?—**Lynch.** I do not know.

Mr. Hurly. My lord, I will prove I was not there, at Loughrea, the last time I went home. And, my lord, my father held some land from him: there came some difference, and he told his brother, that if I did not give up the land, he would give me a lift.

Mr. Bernard. Was there any one in the room then with you?

Lynch. Nobody but Mr. Hurly and I.

Mr. Hurly. Pray, Sir, what sort of portmanteau was it?

Lynch. It was a cloth wallet, blue and red.

Att. Gen. The next evidence we produce, is one Charles Cassidy; he was thought a fit man for the service, and was solicited to be commander in chief of this robbery.

Charles Cassidy sworn.

Court. Give an account what you know of any robbery of Mr. Hurly's.

Cassidy. My lord, I was a practitioner in surgery; and Mr. Hurly's father fell sick, and I was sent for to attend him three weeks or a month; and then one Dr. Brady, a relation of Mr. Hurly's, was sent for: and as we were going up to see other patients, the said Dr. Brady and I, says the doctor, if you will take upon a business, you shall have twenty guineas. What is it to do, says I? It is to head a party, says he, to rob Hurly, and then he will raise money on the county. And after this, when he came back, the doctor told him what he had offered me. Hurly said, I will give him forty guineas; and said, he would get people himself: and he said, I have four persons, that I will trust with you, &c. but I went away, and never came near him since.

Court. When was this?

Cassidy. It was 13 or 14 months before he was robbed.—I served in the house from before Christmas to Easter.

Court. Mr. Hurly, he swears thus: that

he was employed to attend your father, that was sick at that time; and that after some attendance you took occasion to send for Dr. Brady, a relation of yours: and going with the doctor abroad to visit other patients, he told him, you get little fees from Mr. Hurly; but, says he, if you will head a party for a pretended robbery on Mr. Hurly, he will get money of the county, and you shall have 20 guineas. He said, he did not care to meddle with it, for his relations would suffer by it; but he said, it would be but little that every one would pay: then, said he, I do not care if I do. And when he came home, the doctor told before your face what he had done. You said, what! give him 20 guineas! I will give him 40 guineas. And after when he went home, he thought not fit to do it; for he told you, his face was very remarkable, and known in the county, and that he should be discovered. Oh! Sir, said you, I will help you to another face. You told him, he should have one Donogh O'Brien, Daniel Hicky, and Calaghan Carty to assist him.

Sol. Gen. Has not Donogh O'Brien another name?

Cassidy. I know, my lord, it is Donogh O'Brien Andrews's son.

Court. You have been acquainted since Christmas was two years; when was it that this was said to you by Dr. Brady?

Cassidy. It was the February after.

Mr. Robbins. How long after this discourse of Dr. Brady and Mr. Hurly did you speak of it?

Cassidy. My lord, I did not speak of it; and the night it was to be transacted I ran away from my own house, for fear of being suspected.

Mr. Robbins. Did you go before a justice of peace voluntarily? or, were you called to give that examination?

Cassidy. I kept it to myself till last Sunday; being at church, and after dining at Mr. Hickman's, they were talking of Hurly's business. I said, there is a man in this country that can do Mr. Hurly more mischief, in relation to this robbery, than any other. Who is that? said he. I, being afraid to bring myself into trouble, said no more. Says the minister, you ought to be punished, if you do not do your best for to save your country from ruin. And, upon this, after I came home I recollected myself, and I went to a justice of peace, and swore it; and after I had given my testimony he bound me over to prosecute.

Sol. Gen. He has done like an honest man.

Mr. Forster. How came you to conceal it for two years past? Did you never tell it to any man before?

Cassidy. But to one young man, that I thought would join with me.

Court. What young man is that?

Cassidy. It is one Conner. When I was at Mr. Hurly's house, I often played a game at tables with him: when he had not then money

to send for a bottle of wine, he got me to send my note for twelve bottles of wine at Ennis.

Att. Gen. The persons concerned in the robbery had vizards: we shall shew you, that when Mr. Hurly was in Dublin last, what shop he was at, and what sort of commodities he bought. There was a masque to be acted.

Daniel Kiefe sworn.

Att. Gen. Pray, where do you live?

Kiefe. In town, my lord, with counsellor Turner.

Att. Gen. If your lordship please to ask him, whether he knows Mr. Hurly?

Kiefe. I knew Mr. Hurly these many years.

Att. Gen. Pray, give an account what you observed when Mr. Hurly was going into the country; what shops you met him in, and what commodities he was buying?

Kiefe. In February, 1699, he came into Mr. Bently's shop, and asked for masks to wear at a masquerade: he told him he sold none, but there were some in Christ's-church-yard; and he went in at the gate towards the yard; and when he was gone, I said, Mr. Bently, I wonder what he designs to do with them; I fear it is for no good design.

Att. Gen. Pray, where did he go when Mr. Bently told him they were to be had in Christ's-church-yard?

Kiefe. He went straight into the yard.

Att. Gen. What time was it?

Kiefe. It was in February, 99, the latter end of the term.

Joseph Bently sworn.

Att. Gen. Pray, my lord, that Mr. Bently may give an account whether he knows Hurly.

Bently. Yes, my lord, I do—And I remember he came into our shop to ask for masquerading masks or vizards—And I think it was about January or February—I told him we had none. Pray, says he, can you tell me where I can get any?—I said, I cannot tell, unless you get them in the yard: and he went through the shop into the yard.

Att. Gen. When was this?

Bently. It was January or February, 1699.

Mr. Forster. Did you ever see him before that time?

Bently. Yes, several times.—He bought several things in our shop.

Mr. Forster. But no masks?

Bently. No; but asked for masquerading masks or vizards.

Att. Gen. My lord, the reason why we have been the more particular in this is, that it has made a great rumour and noise, that it would be of great disadvantage to Mr. Hurly; and therefore we go to these particulars, that no man may pretend but the matter is made plain against him. We shall produce some few evidences more.

Recorder. Hurly has lately published a libel against the gentlemen of the county.

Mr. Geary sworn.

Mr. Butler. Had you any discourse with Mr. Hurly? And what?

Att. Gen. Pray, give the court and jury an account, whether you know Mr. Hurly, and his circumstances, and any great quantity of money that he had?

Geary. Mr. Hurly, in February last was twelvemonth, told me his protection was out; and he desired me to get a lodging for him. I desired him to come to my own lodging in Capel-street. When he went out of town I went with him as far as Island-bridge: he said, he had no money: and a day or two after he writ me a letter, and desired me to raise his wife some money on a bond of capt. Mac-Donnel's. I sent to Mr. Connor, and got him to endorse a bill to Mr. Lum, and the money was supplied: and after he came to town again, I went to his lodging, to Mr. Rascow's in Capel-street; there were two soldiers that would not let me in: I spoke to the sheriff, Mr. Cusack; so I went in to him, and told him, I was sorry for him. He said, it was for prosecuting sir Donat O'Brien. Says he, you know sir Richard Nagle's hand, and sir Donat O'Brien's; there are letters to king James; and, said he, you and I must live, and we may get money by it.

Sol. Gen. Now, my lord, we call this gentleman to shew, that, at the time of his sending this money, Mr. Hurly was in an indigent condition. When was it?

Geary. It was in Michaelmas term, 1699.

Mr. Hurly. By virtue of your oath, have you no gratification for coming here?

Geary. No; by virtue of my oath, I have not.

Thomas Connor sworn.

Sol. Gen. What do you know of Mr. Hurly about money?

Connor. That gentleman, Mr. Geary, came to me, and told me, it would be an obligation on him to get 20*l.* for Mr. Hurly's lady: upon that I drew a bill of exchange; so they had the money, but what they did with it, I do not know.

Hurly. Was not the money paid again?

Connor. Yes, it was paid.

Hurly. Then did I want money, when you drew the bill, and the money was paid?

Att. Gen. My lord, Mr. Hurly was not able to pay this bill; and we shall give you an account who paid it.

Captain Mac-Donnel sworn.

Mr. Butler. You heard the evidence of Mr. Geary?—*Mac-Donnel.* Yes.

Mr. Butler. What do you know of the matter?

Mac-Donnel. I did owe some money by bond to Mr. Hurly, and he writ to me to pay 30*l.*: I do not know what the sum was that Mr. Geary had advanced; but I writ him word, I would not pay him any such sum; but I bid

him send my bond to captain Gardiner's in Limerick, and the money should be paid there; and it was sent accordingly, and the money was paid: it was something less than 50*l*.

Att. Gen. Pray, when this robbery was talked of, did any body apply to you to take you off, that you should not oppose the presentment, but suffer it to go on?

Mac-Donnel. Mr. Hurly spoke to me to be his friend. I was always his friend: and captain Bourk spoke to me to speak to a gentleman of the grand-jury that lay with me, (that was much against him) to desire him that he would not appear against him; and that he and his tenants should be freed from paying any part of the money.

Mr. Bernard. My lord, I am counsel for the traverser. The question is, whether he be guilty of perjury in an information sworn before Mr. Blood? If your lordships will hear the proofs, we shall turn the table, and prove Mr. Hurly was a man that came with a good fund of money into this kingdom, and left a good fund in France, and that he drew bills of exchange upon his correspondent in France; that his correspondent gave him an account, that Mr. Arthur discovered where all his effects lay, and all was seized; and the bills came back protested. Then he comes and advises with sir William Hardcock, who advised to an accommodation with Mr. Arthur: and so we did, and agreed to give him what he demanded; and accordingly we gave him bonds. And in 1699, we brought a bill in Chancery. We met Mr. Arthur's brother in Dublin; he said, we should not be disturbed at the assizes at Ennis. We went down accordingly, and carried our money along with us, and we did go another way, and not by Loughrea. And we shall shew your lordships further, that there was a quarrel between Mr. Hurly and sir Donogh O'Brien: sir Donogh had such great interest in the country, prevailed with the jury, for some reasons, that the presentment was not found for us at the assizes; but four men were taken up for the robbery, and laid in irons; and they were told that there was a commission of Oyer and Terminer coming down, and that they should be arraigned—here is life or death proposed: if you confess the matter, and place it upon Hurly, you shall have your lives; but, if you do not, as soon as the commission comes down, you shall stretch for it. The persons were sensible, that those who threatened them could effect it, and they were kept close from all others but these persons, and they solicited them, until they got them to give in examinations against Mr. Hurly. But they came afterwards to Mr. Hurly, and told him, it was the threats and dangers they were in, made them do what they had done, and that they were troubled for it. And after that, they went before my lord chief justice Pyne, and they forswore all. After this the contrivance of the counters, that must be managed; and a bag of counters is brought down to Hicky's wife, and she must hide it where it may be found by

this Huonin. My lord, we shall shew your lordship all these matters. I apprehend they are men of credit that will swear the matters in my brief, that Mr. Hurly was really and truly robbed, and that these prosecutions have been carried on by bribery, and such-like practices, in the country.

Mr. Forster. We will shew you, that Mr. Hurly had 2,000*l*. and that he carried a part of it into the country to pay off Arthur. We shall show where he had the money, and that he brought it down.

(Charles Fitz Symmons, merchant, called, did not appear.)

(*John Hurly sworn.*)

Mr. Foster. Pray, give an account to the court and the jury, whether you were employed to receive money for Mr. Hurly, and of whom?

John Hurly. I was employed in 1696, and I received of Mr. Jeremiah Donovan 200*l*. and colobel Lovet paid me 490*l*. for 500 Louis d'Ors.

Court. In what year did you receive it from col. Lovet?

John Hurly. It was in 1696 or 1697.

Mr. Forster. And how much more?

John Hurly. From Mr. Fitz-Symmons 306*l*. 10*s*. in 1697; and I received a bill in Limerick, of 200*l*.

Mr. Forster. What did he bid you do with the money?

John Hurly. He sent me this money out of Holland, and bid me secure it for him.

Mr. Forster. Did your brother lay out any money for a mortgage?

John Hurly. Not any at all.

Mr. Hurly. I appeal to the gentlemen of the country, whether I did purchase any thing.

Recorder. You are not accused for a purchaser, Sir.

Court. Did you pay him that money again?

John Hurly. Yes, my lord.

Court. Was it before he was robbed?

John Hurly. Yes, it was.

Court. Pray, what discourse had your brother with you concerning any money he had by him?

John Hurly. He told me all along, that he could pay Arthur, and that he had a fund to pay it. And I tell you, Sir, before this robbery, I came to his house, and his wife told me, my brother will do very well; for that he has brought money to pay off Arthur. How do you know that, said I? says she, I saw a bag of gold with him.

Court. Were you there after the robbery?

John Hurly. I came next morning, and I found the trunks broke open, and all the house in disorder.

Mr. Forster. Do you know capt. Lynch?

John Hurly. Yes.

Court. Do you take this Lynch to be a fair, honest man?

John Hurly. I will tell you what I know. About Christmas last, I came to the county of

Galloway to Mr. Lynch. There were some land that my father held from him; and he set the reversion of the land. I told him, that it was ill done, that we should not have the preference of the land; and I told him, my brother would keep him out two years. The servant that was with me, told me, that he proffered him 20*l.* to swear the robbery upon my brother. When he came back, I asked him about it, and he said, he feared he would prove him not to be within the articles of Galloway; and, said he, if he will give me quiet possession of my lands, it is well; if not, I'll give him a lift.

Mr. Forster. Do you know of any jewels that belong to Mr. Hurly, besides the money?

John Hurly. He gave me a diamond ring for my wife, and shewed me a ring he said was worth 100*l.*

Mr. Forster. Do you know of any rewards proffered to swear against Hurly?

John Hurly. One Hicky shewed me a note under Mr. Hickman's hand, and Mr. Cusack's hand, that Hickman and Cusack promised to intercede with the government for pardon for him and others, if they proved the robbery on Patrick Hurly. And that they should be found with good meat, drink, washing and lodging, and discharged without fees. He shewed me this note within a week or some short time after he was discharged.

Court. You say, that this note was no more, than that Mr. Hickman and Mr. Cusack promised they would intercede to the government, if so be he would tell the truth?

John Hurly. Yes: in proving a robbery upon Patrick Hurly.

Mr. Forster. Were you at Ennis?

John Hurly. Yes, I was.

Mr. Forster. Who was there examined on oath to prove this robbery?

John Hurly. There was Dorothy Kemp, and Jane Hurly, and this Margaret Conneene, and she was examined at home.

Mr. Forster. Was Mr. Ronane examined?

John Hurly. Yes, and his man too.

Sol. Gen. Now, Sir, I'll ask the witness a question. Pray what credit did the jury give to it? Was you desired by your brother, before the robbery, or at the time of the robbery, to join with one Casey, to be bound with him for the money?

John Hurly. I was desired to join with Casey. My brother pretended I owed him money. I told him it was an unreasonable thing, for I had my rent to pay.

Sol. Gen. Did you pass a bond to Casey, Mr. Hurly?

John Hurly. I did, Sir; I told you before.

Sol. Gen. Who was bound in that bond?

John Hurly. None but myself.

Sol. Gen. Who did you give the bond to?

John Hurly. I gave it to Casey.

Sol. Gen. My lord, about Christmas last was twelvemonth, he comes to this gentleman, his brother, and desired he would get him 50*l.* and he told him, he craved yet the money, if he

would pass his bond for it to one Casey, which he accordingly did: this bond comes into Patrick Hurly's hand, and he enters up the judgment, and an execution upon it, against his brother's goods, for his own use. Sir, had you any money from Casey?

John Hurly. No, I had none.

Sol. Gen. Who took the execution out, and who took your goods upon that execution?

John Hurly. Charles Mac-Donogh did it; I paid him the money.

Sol. Gen. Who had the money for Charles Mac-Donogh?

John Hurly. I had it, Sir. I will unriddle this matter. I was very unwilling to go to law. I came to Casey, and desired him to pretend to lend me 50*l.* and my brother would give him his bond for it. He will pay you, said I, but will not pay it me.

Court. Did you owe your brother 50*l.*?

John Hurly. I did owe him near it, only he took some cattle of mine.

Att. Gen. Pray, Sir, are you in custody of the Marshalsea, at your brother's suit?

John Hurly. Yes, I am; and likewise at Mr. O'Brien's and Mr. Fitz-Simon's suit. The money that I received from Mr. Fitz-Simon, and paid my brother the same day, I am now in custody for it since April last.

Recorder. You say, that you received several sums of money for your brother, and you said, there was a balance between you and your brother: how much was that balance? and what became of it? how much money had your brother in 1697, 98, and 99.

John Hurly. When my brother went into the country, I discounted with him.

Att. Gen. You say, you received several sums; that you paid 200*l.* to Mr. Gardner, and some other sums: how much did you pay back in specie to your brother?

John Hurly. The money Mr. Fitz-Simon's gave me, I came to my brother's lodging, and paid it him.

Court. This is a matter that has been transacted within the compass of three or four years, and this cannot slip out of your memory. You say, all the money you received of Fitz-Simon's you paid your brother again. What more did you pay him?

Hurly. I paid him the 200*l.* in Limerick. I paid him 190*l.* or thereabouts, more.

Court. When was that?

Hurly. I paid it him in the year 1697, in the beginning of 98.

Sol. Gen. You say, you paid Mr. Burton 200*l.*; did you pay any others?

Hurly. I paid him no more, but what I paid him for the farm; I gave him bullocks, 20 old bullocks, at 4*s.* a-piece, and the rest came to 30*l.* more.

Sol. Gen. There was a sum of 200*l.* paid, and the rest drawn out in small sums from time to time, as he had occasion to call for it: how much was Brien's money?

Hurly. It was about 40*l.* and I gave him a bond of capt. Lynch's, of about 6*l.* 10*s.* and I

gave him a bond on a brother-in-law of mine, and a bond on Lynch.

Att. Gen. How much of the money, that you received for Patrick Hurly, did you lend out, and to whom? Did it amount to 300l.?

Hurly. Yes, it did.

Att. Gen. Did it amount to 300l.?

Hurly. No, it did not.

Att. Gen. Was this money paid back again to Mr. Fitz-Simons?

Hurly. I have a bill in Chancery against him.

Recorder. I desire to know, whether Mr. Fitz-Simons had the 300l. back again?

Hurly. My brother told me he paid him every farthing, and said, he had a discharge from him.

Recorder. Pray, how much of this money had Mr. Arthur?

Hurly. I do not know of any dealing with Mr. Arthur.

Att. Gen. I did hear, that he assigned a bond of captain Christopher O'Brien's to him.

Hurly. That 300l. my brother owed me; and the bond my brother gave for it, I gave Mr. Fitz-Simons the bond, and he arrested him on it.

Att. Gen. Pray, Sir, did you send any Holland sheets, after this pretended robbery, to any place?

Hurly. Yes, I did, to capt. O'Brien's.

Att. Gen. Where did you find them?

Hurly. I will tell you, my lord. We were told, that one Halloway was coming to my father's at the suit of one Neylan, to take all away. My father sent for me, and desired me to come to him, for Halloway was coming to ransack the house.

Att. Gen. How long was this after the robbery?

Hurly. It was a month afterwards. I came there, and one of the maids told me there was a portmanteau in the turf-stack. I took it home that night, and I was ordered by her to deliver it to capt. Christopher O'Brien. I sent for him to a friend's house, and opened it before capt. O'Brien, and took an inventory of what was in it. There were five or six pair of Holland sheets. This was a month or two after the robbery.

Recorder. Another man swore, it was the beginning of May, or the latter end of April.

Mr. Forster. We had this money, and will shew you how we lost this money, and shall prove the robbery.

Dorothy Kemp sworn.

Mr. Forster. Pray, Mrs. Kemp, where did you dwell in 1699?

Mrs. Kemp. I dwelt in Moughna in the county of Clare, within a quarter of a mile where Mr. Hurly lived.

Court. Where did you live at the time that he was robbed? Were you in the house when the robbery was committed?

Mrs. Kemp. Yes, I was.

Court. Pray give an account what you know of that robbery.

Mrs. Kemp. My lord, There was counsellor Ronane three days waiting for Mr. Arthur to pay him some money. My mistress went out of town upon Saturday before, and took some gold out of her chest, and shewed some of it, and put it in again; and she did not come home till Monday morning after the robbery was committed. I went to the trunk, to get some table-linen, and I laid my hand on the bag where the gold was. My master came in the mean time, and said, What do you do there? I said, I wanted some table linen: and my master took away the bag, and put it into the closet.

Court. And so you concluded, that was the bag of gold?—*Mrs. Kemp.* Yes, I did.

Court. Did you know any of the people that were at the robbery?

Mrs. Kemp. No, my lord, I did not.

Court. How many robbers were there?

Mrs. Kemp. As I understand, there were seven of them.

Court. Did you see them all?

Mrs. Kemp. Just after supper, counsellor Ronane got up to go to bed, and went out of the door, and then the robbers got in. We went up to lay down the bed, and my master's man came running and crying, My master is murdered; so we got open the door, and there was five came up with swords and pistols.

Court. Had they any masks or vizards?

Mrs. Kemp. I cannot tell. They commanded us into the room, where my master's father lay bed-ridden these three years past.

Court. How many did you see there at that time?

Mrs. Kemp. I saw five come up, and there was two more in the parlour.

Court. Pray, mistress, by virtue of your oath, what arms was there?

Mrs. Kemp. My lord, we kept arms just by the door, a carbine and fuzee, because he was something in debt.

Court. Were those the same arms your master had before?

Mrs. Kemp. I cannot tell; but they took his pistols, and put gravel into them.

Att. Gen. Who put the gravel into the pistols?—*Mrs. Kemp.* The Tories.

Mr. Bernard. Was there any offers made to her to put counters into Hicky's house?

Mrs. Kemp. My lord, I was promised 10l. to put counters into my master's house.

Court. She says, she was desired by one Murrough O'Brien, to lay counters in her master's house, or Hicky's house: a bribe of 10l. was offered her, and she refused it. But that he sent to Daniel Hicky's wife twenty times; and she has some of the letters he writ.

Court. By whom were these letters written?

Mrs. Kemp. By Murrough O'Brien, for his man brought them.

Court. Pray, when was this, that you were offered 10l. to hide counters in your master's house, or Hicky's?

Mrs. Kemp. It was before the assizes a pretty while.

Sol. Gen. My lord, here is Donogh O'Brien.

Court. Where was it he offered you this money?

Mrs. Kemp. It was at Shenoge, a quarter of a mile from where he lives.

Recorder. And he was to give you 10*l.* to bury counters in Hicky's house?

Mr. Butler. When the rogues came in, how did they use your master?

Mrs. Kemp. They tied him, and counsellor Ronane.

Mr. Forster. You know Murough O'Brien; Pray how often did you see him with Mrs. Hicky?

Mrs. Kemp. I saw him often with her. Said he, Mrs. Hicky, Mr. Hicky is cast down, and he is not worth a farthing, he is tyed neck and heels.

Court. Did you hear this?

Mrs. Kemp. She told me so.

Mr. Forster. We only offer it as far as it will go.

Att. Gen. It will not go at all.

Sol. Gen. I am told, that Murough O'Brien is in court; she speaks of some words and letters between her and him, and Mrs. Hicky.

Mr. Forster. What linen was taken away by the robbers?

Mrs. Kemp. My lord, I partly can swear, that I washed twenty pair of Holland sheets; there was thirty pair, I washed twenty pair myself.

Court. How many was left?

Mrs. Kemp. There was but five pair.

Court. How came they to leave them behind?

Mrs. Kemp. They did not stay to take them away.

Murough O'Brien sworn.

Court. Pray had you any discourse with this woman concerning counters?

O'Brien. By virtue of the oath I have taken, I never had.

Court. Did you never offer her 10*l.* to lay counters in Mrs. Hicky's house?

O'Brien. By virtue of my oath, I did not.

Mrs. Kemp. By virtue of my oath, you did.

Court. Did you send any letters to Hicky or his wife?

O'Brien. Yes, I did write to Hicky, and to his wife.

Court. Upon what occasion did you write?

O'Brien. Hicky's wife came to me, and told me that if I could get a protection for her husband, from sir Donogh O'Brien, he would make it plain, that this was a sham-robbery: and Hicky's wife said, she could produce those very counters. Charles Mac-Donogh was by when she said, if we would procure a pardon for her husband, they would produce the counters, and make the matter plain.

Sol. Gen. This woman says, that Murough O'Brien came to Hicky's wife, and said so and so, and writ letters to Hicky's wife. Mu-

rough O'Brien comes now and says, that Hicky's wife came to him, and told him, that her husband could make out the sham robbery, if he could get a protection for him. Mr. O'Brien, this woman says, that you did send to Hicky's wife, and that you did tamper with her.

O'Brien. It is a very improbable thing, if I had a mind to tamper with her, that I would tamper with Hurly's whore. My lord, if I would have come on such a business, would any one believe that I should employ this woman, that has had a bastard or two by Mr. Hurly?

[Murough O'Brien's letter to Hicky read.]

'Mrs. Hicky;

'I pray do me the favour to come hither as soon as possible; for I have some business to talk with you, which chiefly concerns yourself. And least you may apprehend any evil design against you, I do here promise you, that you shall be as safe as your heart can wish, whilst you are in the company of
'MUROUGH O'BRIEN.'

[A Second Letter read.]

'Mrs. Hicky;

'When I sent for you on Saturday was sevennight, I thought I should see you at Mass, but I missed that opportunity: I desire you will step hither to-morrow, and meet me in some convenient place, where we may talk without censure or suspicion: I have no other design, but to serve you and your husband. Be sure you do not fail to come to me, if you ever expect any friendship from,
'MAC B.'

Daniel Mac-Cay sworn.

Mr. Forster. Where did you live in March 1699?

Mac-Cay. I lived with Patrick Hurly.

Court. Where were you the time of the robbery?

Mac-Cay. I was in his house, my lord; I was there on Sunday the 3d of March, and there was John Ronane and himself, and they were just going to bed, and John Ronane was going out of the door, and there came five persons with naked swords, and rushed in; they were disguised and disguised: My lord, when they came in, they felled him down on his face, and gave him some strokes; and I was there, and they pursued me and Gillian Hurly, and we ran up, and they locked the door after us; they made a shot below; then I was assured it was some bailiffs that came to take my master; some of the family was in bed, and some up.

Recorder. Your master was upon his keeping then?

Mac-Cay. And when he heard the noise below, we got some sticks, and broke open the door, and perceived two fellows at the door; they made a couple of shots at us, but did us no harm; and then came three or four, and

one of them pursued me, and made a shot after me, but did me no harm. We did not go out till these fellows went out, and then we broke open the door, and we found my master tied fast to his own bed-side, and counsellor Rone; and all the trunks were broke. My master bid me go to the next village, and raise the neighbourhood; so I did.

Court. Pray, friend, how many did you see of the robbers?

Mac-Cay. I saw five, my lord, and two without at the window.

Court. The woman said there were five in her master's parlour, and two at the door. Sir, did you know any of the parties that robbed him, upon your oath? What disguises had they? Were they black, or had they vizards?—*Mac-Cay.* I cannot tell, my lord.

Court. Did you take any notice of any of the arms, whether those arms belonged to your master? Take care, upon your oath, you speak nothing but truth.

Mac-Cay. My lord, we had arms of my master, which they seized on, and we found them abroad next morning.

Court. Did the bullets hit any part of the house?

Mac-Cay. No, my lord, I did not observe that.

Court. Pray, friend, was there any more than one shot made?

Mac-Cay. There was, my lord.

Court. Was there any mark of any bullet to be seen?

Mac-Cay. I did not see any.

Mr. Forster. You say, they came in with fire-arms and swords; had your master any swords?

Mac-Cay. There was none but one; and they had five naked swords.

Mr. Forster. They had no fire-arms but your master's?

Mac-Cay. We found them abroad next morning in the street.

Mr. Forster. What road did your master Hurly travel when he went from this town the last time he was in Dublin before the robbery?

Mac-Cay. He went through the county of Gallway, through Mount-Talbot.

Mr. Forster. Do you know capt. Lynch?

Mac-Cay. Yes, he lives in Capperquin.

Mr. Forster. Were you with your master all the way home?

Mac-Cay. Yes, I was.

Court. Mr. Lynch said (I must do him right) that he did not remember what company was with him, but that he drank a bottle of wine with him at Loughrea, and there saw the counters; and it is much about the time this man swears.—*Recorder.* Exactly, my lord.

Mr. Forster. Were you with your master when he was in Dublin? Did you see any quantity of money with him?

Mac-Cay. Yes, I did.

Court. Pray, did you see any counters with him?

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Mac-Cay. No, my lord: I was offered to have my fortune raised for ever, if I would swear that he bought the counters, and brought them to the county of Clare.

Court. You saw money with your master: where was it he received the money?

Mac-Cay. I do not know; but he shewed it me, and said, it was a sad thing to pay away so much money: and he put his hand in his pocket, and pulled out some gold, some broad-pieces and a gold cob; and he said, he would keep the purse, and not take any thing out until he got home to pay Mr. Arthur off.

Carty. Was it in the portmanteau?

Mac-Cay. Yes, it was.

Mr. Recorder. Was this the time that your master was in Loughrea?

Mac-Cay. No, this was in February, and it was before Christmas he was at Loughrea.

Court. Upon what occasion was it that your master shewed you the gold?

Mac-Cay. He told me, at his own lodging in Warbur-street, is it not a sad thing to pay so much money to that rogue Arthur that had served him such a trick?

Court. Did you take notice of it yourself?

Mac-Cay. Yes: it was not counters; no, I know gold from counters.

Court. Were they guineas or louis d'ors?

Mac-Cay. They were louis d'ors.

Mr. Butler. Pray, when you went the last time with your master from Dublin, what way did you go to Mount-Talbot? At what place did you cross the Shannon?

Mac-Cay. I do not know the place; I do not know the name of the place at all.

Mr. Butler. Did you swim over, or go over a bridge?

Mac-Cay. I think we went over a bridge.

Mr. Butler. What bridge?

Mac-Cay. I do not know the name of it.

Court. Did you go through Athlone?

Mac-Cay. Yes, we went through Athlone.

Court. If I had said Lanesborough, he would have said so too.

Mr. Butler. You are positive that in the last journey before the robbery, you nor your master were not at Loughrea?

Mac-Cay. I am positive.

Mr. Butler. Where did your master lie the night before you came to Tiaquin?

Mac-Cay. It was at Balliboy.

Mr. Butler. Pray, Sir, what way did you go from Athlone to Eyres Court or Balliboy?

Mac-Cay. I do not know the names of the towns.

Mr. Butler. Pray, how far is it from Tiaquin to Eyres Court?

Mac-Cay. I do not know.

Mr. Butler. What way did you come to Balliboy back again, for that is on this side the Shannon, and many miles on this side of Athlone?

Mac-Cay. My master had his brother-in-law, Mr. Terry, along with him; and when he came to Balliboy he would see his sister, and so he went to Tiaquin.

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Court. How could you go from Athlone to Balliboy? Did you lie at Athlone that night?

Mac-Cay. No, my lord, we did lie beyond it, at a place where there is a bridge.

Court. Where is that bridge?

Mac-Cay. It is on the Shannon, on this side Aghrim.

Mr. Butler. If you please, Sir, did you carry the portmanteau to Tiaquin?

Mac-Cay. Yes, I did.

Mr. Butler. And was it not left at any other place behind you?

Mac-Cay. No, it was not.

Mr. Butler. You are positive you carried it to Tiaquin?

Mac-Cay. Yes, I did carry it to Tiaquin.

Mr. Butler. Was it left at Gort Inshigory before you went to Tiaquin, or after?

Mac-Cay. My master hired a horse, and he was lame; and he desired me to go on Saturday, before he came himself, or capt. Bourk, and his father-in-law kept him.

Mr. Butler. Was the gold in the portmanteau at that time?—*Mac-Cay.* Yes, it was.

Court. And you carried the portmanteau to Gort from Tiaquin?

Mac-Cay. Yes; I came from my master from Tiaquin to Gort; he sent me on Saturday, and he came on Sunday night.

Mr. Butler. My lord, I will make it appear, by three or four men of undoubted credit, that Mr. Hurly did swear, at the assizes of Ennis, that he was at Loughrea before he went to Tiaquin, and that he left the portmanteau there, and did not carry it to Tiaquin.

Mr. Butler. Did your master pay for the horse he hired? or, did you hear he gave a bond for it?—*Mac-Cay.* I do not know.

Court. Do you know of any bond given by Mr. Hurly, to pay the hire of the horse?

Mac-Cay. I do not know indeed, my lord.

Recorder. He said, his master shewed him the money in town, and said it was a shame to pay it to Arthur. Now, did your master pay the money?

Mac-Cay. He told me, that Arthur promised to come to his house in the county of Clare; and, that he would make him take it on easier terms than if he should pay it in Dublin.

Court. If he had the money, why did he not pay it him?

Mac-Cay. He said, he hoped to compound with Arthur easier than to give him all that he demanded.

Mr. Bernard. My client tells me, that this Mac-Cay is a material witness, as to Calaghan Carty: do you know Calaghan Carty?

Mac-Cay. Yes, very well.

Court. How long have you known him?

Mac-Cay. These two years.

Court. Were you with him before my lord chief justice Pyne?

Mac-Cay. Yes, I was; he made an affidavit, and swore before my lord chief justice Pyne.

Court. What was the substance of it?

Mac-Cay. That he knew nothing of the robbery; and, that he was much concerned he had sworn against Mr. Hurly. They lodged at the Black Ball in Church-street.

Court. Are you confident, that this Calaghan Carty swore before my lord chief justice Pyne?

Mac-Cay. Yes, he did.

Mr. Butler. Where did you lie the night before you went through Athlone?

Mac-Cay. I am not sure of the name of any place where we did lie since we left Dublin.

Mr. Butler. You are positive you did lie in a place that had a bridge upon a river?

Mac-Cay. Yes, I am.

Court. Pray, one question more: you say, you have gone with Mr. Hurly several times to the country; how often did he go Connaught way?

Mac-Cay. He went always Connaught way.

Court. How often has he gone, that you can recollect yourself?

Mac-Cay. We came from the county of Clare the summer after I came to him, to Loughrea, and Eyres Court, and over Banagher-bridge, and so to Munster Evin.

Court. Which is the way you used always to go?

Mac-Cay. That way; but that time he went to Athlone.

Christopher O'Brien sworn.

Mr. Butler. Pray, Sir, by virtue of your oath, did you offer any money to that man?

O'Brien. No, upon my oath.

Mr. Butler. Did you offer him money or promise to raise his fortune, if he would give evidence about counters?

O'Brien. Never, my lord; he came to me and told me, there was some came to his master, and would swear, that ——— were come from France.

Court. Did you ever make him any promise, or any offer at all?

O'Brien. Never in my life, my lord.

Mac-Cay. Did not you, at the Swan tavern, when I carried a letter to captain Bourk?

Court. How long ago was this?

Mac-Cay. Before the term, I think.

Court. Was it before Christmas?

Mac-Cay. No, my lord, it was after Christmas.

Court. Mr. Hurly, you know the contrary to this yourself: if you'll have me, I'll send for the examination sworn by yourself concerning this matter.

Pat. Hurly. He speaks to him more than once.

Recorder. Had you any discourse with Mr. O'Brien about the counters?

Mac-Cay. Yes, once or twice.

Recorder. Had you any discourse about them more than once?

Mac-Cay. He never spoke to me about the counters, but once at the Swan tavern.

Court. That of Mr. O'Brien's tampering with this man; Mr. Hurly, you are complain-

ed of before Christmas last. He said, he was once with a letter at the Swan tavern; and, that Mr. O'Brien did there talk to him about tampering with other witnesses; but it was before that, that you said Mr. O'Brien tampered with himself about the counters.

Court. Where was it?

Mac-Cay. At the tavern.

Court. At what tavern?

Mac-Cay. The Swan.

Court. When was this?

Mac-Cay. Before Christmas, or a little before the last term.

Court. He says, it was the time of his delivering of a letter.

Mac-Cay. My lord, I delivered a letter to captain Bourk at the Swan tavern, and, I think, it was before Christmas.

Court. So that you delivered more letters than one?

Mac-Cay. I delivered several to him.

Court. This gentleman is accused by this Mac-Cay; and how far that will weigh with any man, must be left to the jury.

Mr. Butler. This Mr. Mac-Cay was very positive, that the portmanteau was carried to Tiaquin, and that it was not left behind. I am ready to prove, by two or three credible evidences, that Mr. Hurly did swear at the assizes, that it was left behind at Loughrea, and, that it was not carried to Tiaquin.

Mr. Bernard. My lord, I desire we may first produce another witness to the subornation; John Crips, a person suborned to swear against my client.

John Crips sworn. (Per Interpreter.)

Court. Where does he live? and, with whom?

Interp. He lives at Moughna, in the county of Clare.

Court. Ask him, what he can say of any tampering with him to swear against Mr. Hurly.

Interp. He says, one Halloway and Walter Neylan tampered with him: That Halloway sent for him three weeks after Mr. Hurly was taken to Ennis, and he ran into a rabbit-hole, for he was afraid of him, and sent his wife to know what he would have of him.

Interp. And, my lord, he is telling a long story of this Halloway being a troublesome man; and, that the whole country would join with him, to give an ill character of him, if it were not for the persons he appears against.— And, he says, he was always inclined to do evil, and every body was afraid of him.

Court. Ask him, Was there any offer made to him?

Interp. He says, that Neylan and Halloway offered him 50*l.* to swear against Mr. Hurly, that he contrived the robbery against himself.

Court. Were they both together? or, Did they speak to him severally?

Interp. They spoke to him severally.

Court. Ask him, Where was it that Halloway proposed this to him?

Interp. About three weeks after Mr. Hurly was put into gaol, he says, Halloway first spoke to him.

Court. Did Halloway speak to him any more than once?

Interp. He says, he desired him to go with him before Mr. O'Brien; and he offered him six guineas to go and prove the matter, and, that he would give him the rest afterwards.

Court. Was any body by?

Interp. He says, nobody.

Court. Where was it that Neylan offered him the money?

Interp. He says, my lord, that Halloway used several threatening words, if he did not comply with what he desired him to do; and, that he would send him to gaol at Ennis, where he should not see the light any more.

Court. Can he remember the day that this was?

Interp. About six weeks after Hurly was taken.

Court. Where was it that Neylan proffered him any reward, and what it was he offered him? [At this the fellow spluttered, and made a terrible noise in Irish.]

Interp. My lord, he will not answer to the direct question. He says, my lord, that Halloway threatened him, and broke open his doors, and came there with arms, and brought a disbanded soldier, and took him by the hair of the head, and threatened him, because he did not come to him at the time appointed.

Court. Did he complain to any justice?

Interp. He says, he complained to Mr. Fitzgerald.

Court. Pray ask him, what Neylan said to him.

Interp. He says, he offered him the grazing of six collops free, and an house and garden during his life, to swear against Patrick Hurly.

Mr. Butler. What time was it that Neylan made him this offer? and, in what place?

Interp. My lord, the answer he made to that is, That Halloway, after he had taken him out of his bed, and dragged him by the hair of the head, that then they and Neylan met.

Court. Where was it he met Neylan?

Interp. At Bally-Ryan, in a house there.

Court. What time?

Interp. About a month before Michaelmas last.

Court. Pray ask him, where it was that Mr. Neylan did tell him he would give him the six collops grazing, to swear against Patrick Hurly?

Interp. He says, he will recollect it: he says, last summer.

Recorder. I am informed, my lord, that while this man was asked the question, Hurly said, last Michaelmas.

Mr. Hurly. I never saw any man, so far presumed to be a criminal, behave himself with so much impudence before.

Court. Mr. Hurly, if you don't give over throwing out words to your witnesses, we must put you into the dock. Ask him, interpreter,

does he know Calaghan Carty, that was witness here to-day?

Interp. He has known him since he was a little boy, and his father, mother, and family.

Court. What does he know of that Carty's swearing before my lord chief justice Pyne?

Interp. He says, my lord, that he did swear before my lord chief justice Pyne, and there was a great lady and a young man by.

Mr. Bernard. Now, as to Mr. Lynch, whether he made any proposal or offer, or had any discourse with him on May day last?

Interp. He says, he saw him the day before May day; and, that he was very civil to him: There was some controversy between him and Mr. Hurly, about the land of Moughna; and he said to me, Now Patrick Hurly is gone to gaol, and so is John too; and they are both in irons, and they will never retrieve it, and you had best come and live with me in Connaught. He told him, that neither his wife, nor his mother-in-law, would consent to go to Connaught. Says he, I have set the land from the Hurlys to the Bloods, and Hurly shall never have any thing to say to it more.

Court. Did he ever persuade him to take a false oath against Mr. Hurly?

Interp. He said, that in his agreement with the Bloods, he reserved the grazing of four collops, which he should have, if he would swear that he was one of the robbers himself, and prove the robbery upon Hurly: and he made answer to Lynch, Why should I do that that will hang me? and then Lynch seemed sorry that he had proposed it to him.

Recorder. Ask him, Who was with him when Calaghan Carty swore an examination before my lord chief justice Pyne?

Interp. Daniel Hicky, Daniel Mac-Carty, Donogh O'Brien Andrews, and himself.

Recorder. How came he to go along with these persons?

Interp. He says, that he came there to prevent being persuaded to take a false oath.

Recorder. Does he know what Calaghan Carty swore?—*Interp.* He does not know.

Recorder. Who writ the examination of Calaghan Carty?—*Interp.* He does not know.

Mr. Butler. Was it written at my lord chief justice Pyne's? or, had he it written before?

Interp. He brought it written to my lord chief justice Pyne.

Mr. Butler. My lord, this man does not seem to be a man of any credit. Neylan and Lynch are sworn, pray, let them attend.

Court. If two witnesses speak directly contrary one to the other, must not it be left to the jury, which they will believe? What does the witness Crips say?

Interp. He desires a guard, for the safety of his person.

Mr. Lynch stands up again.

Court. Mr. Lynch, had you ever any discourse with this man concerning Mr. Patrick Hurly and Mr. John Hurly's being in gaol?

Lynch. Yes, I had, my lord: I said to him,

that I heard he has been lately in Dublin, and that he has been an evidence for Hurly. No, really, says he, I was not: I am weary of him; and if I could get these people that you set the land to, to let me be here a year, I would not live any longer with him.

Court. Did you offer him the grazing of four collops?—*Lynch.* I never did, my lord.

Mr. Butler. The credit of this gentleman, and of that fellow, is left to the jury.

Lynch. This discourse was about this time twelvemonth, at the fair of Moughna; and Richard Hurly, Patrick's uncle, declared to me, that it was a sham-robbery.

Walter Neylan stands up again.

Court. Mr. Neylan, had you any discourse with this man about Mr. Hurly?

Neylan. I never had any discourse with him, or saw the man, till this day, never since he was born.

Court. What time was it, he says, that he had this discourse with Neylan?

Mr. Butler. In the place where he says he had the discourse with Neylan in a house; there never was a house, nor so much as a hut there.

Neylan. No, my lord, there never was a house there in my memory.

Court. Mr. Neylan, how far is this Moughna from you?—*Neylan.* Three miles.

Mr. Bernard. And you not know this man?

Mr. Wakeham, my lord chief justice Pyne's clerk, sworn.

Court. Mr. Wakeham, sir, pray, do you know any person that came to swear examinations before my lord chief justice Pyne, concerning the robbery of Mr. Hurly in the county of Clare?

Wakeham. My lord, there came four men, but I was busy; the gentleman read the examinations.

Court. Do you know the persons?

Wakeham. I do not know them; they were ordinarily clad; there was a gentleman, one Mr. Terry, that brought them.

Daniel Hicky sworn.

Mr. Bernard. Pray, give my lord an account of any offers that were made you, or threats used to you, to make you swear against Mr. Hurly?

Hicky. I told it twice before, my lord, in August last. My lord, I was taken by William Halloway and Thomas Bourk; they took me to gaol, and they bolted me; and there was Mr. Neylan in the gaol, and he spoke to me about the robbery that was committed on Mr. Hurly. I said, I knew nothing of it at all: and he told me, I would be hanged, for it was sworn against me: and I was brought before Mr. Hickman and Cusack; and they told me, that there was one Carty had sworn that I was at the robbing of Mr. Hurly, by his own consent; and that if I did not declare it, I should be hanged; and said, that Mr. Hurly will hang

us if we say we robbed him. Never heed him, said they; it will be no harm to any man that swears against him.

Court. How long did you remain in gaol?

Hicky. I was kept in gaol till August, from the 26th of March.

Court. Was any body with you?

Hicky. Calaghan Carty and Daniel Carty.

Court. What had you a-day?

Hicky. We had twelve pence a-day; and Mr. Neylan brought red coats, and would have us swear we had those coats on when we robbed Mr. Hurly. And they carried us before Mr. Butler, and we would not swear; and then we got but nine-pence a-day.

Court. Did you swear, that Mr. Hurly was not robbed?

Hicky. I did swear, that I was not at the robbing of him myself.

Court. But were you examined about this robbery before Mr. Hickman and Mr. Cusack?

Hicky. They desired me to swear, that I was at the robbing of Mr. Hurly with Daniel Carty; and they told me, I should be hanged if I did not swear it.

Court. Did you swear it?

Hicky. Yes, I did.

Mr. Bernard. After you satisfied these gentlemen's importunity, how long was it before you were discharged out of prison?

Hicky. I was kept in prison till after the assizes.

Court. Who did you swear was with you at the robbery?

Hicky. Calaghan Carty, Donogh O'Brien, and Daniel Carty.

Court. Has he any other name but Donogh O'Brien?

Hicky. Yes, he generally goes by the name of Donogh-O'Brien Andrews; some call him so: his name is Donogh O'Brien.

Court. How came you to get your discharge out of prison?

Hicky. My lord, when my lord chief justice Pyne came, we were carried to the bar. When I was at the bar, I was told I must take the affidavit against Mr. Hurly; and if I would not, I should return to gaol again. The gaoler would let nobody come near the bar; for we said, We will tell the truth, and would not tell a lie against Mr. Hurly. And he went out, and came in again, and took us back to the gaol.

Mr. Bernard. How long after this were you discharged?

Hicky. We petitioned my lord chief justice, and sent after him to Limerick, but got no answer; and then they sent a mittimus to keep us in gaol. They said, if we got bail, they would enlarge us: So Donogh O'Brien's friends were bound for him, and I got a friend to be bound for me; and I was bound for another of the prisoners.

Court. Did you ever make an affidavit before my lord chief-justice?

Hicky. Yes; we came to town, and made an affidavit before him.

Court. Who was with you?

Hicky. Calaghan Carty, Donogh O'Brien, Daniel Carty, and Crips.

Mr. Forster. After you gave in that affidavit, and went home, what did you do then?

Hicky. We went home then; and we heard that they had a warrant against us.

Court. You say, you swore before the lord chief-justice, and that Calaghan Carty, Crips, and Donogh O'Brien were there: and you are very sure that Calaghan Carty was one?

Hicky. Yes, he knows me, and I know him; he is my relation.

Court. Mr. Neylan, you are upon your oath: Did you see this person in the gaol at Ennis? Pray, give an account of what passed there, and what fine was put upon him, to make him discover.

Neylan. My lord, when he came to gaol, he sought for me, and I told him that one had discovered: And he asked me, what I would advise him to do? And I said, I would advise him to discharge a good conscience.

Justice Coote. I am not a judge of the fact, but the jury is. *Hicky*, you were brought before me; and when I examined you, you went backward and forward, and I committed you that night to the gaoler's care; and when you were brought into the court, you said, you would stand by the examination you swore before my lord chief-justice Pyne.

Sol. Gen. What did Mr. Hickman persuade you to do, when he tampered with you?

Hicky. When Walter Neylan went from me, I was brought to Mr. Hickman and Cusack; and they told me, there was an examination of Mr. Daniel Carty. It is in vain for you, said they, to deny the fact; but you must say what we will have you to say, or else you shall be hanged; for Carty has sworn, that you and he were at the robbing of Hurly; That you left all the gold and linen in his barn for him.

Att. Gen. And did Mr. Cusack say so too?

Hicky. Yes, he did say so.

Sol. Gen. What should be the seducement of Mr. Hickman, or Cusack, to have you forswear yourself?

Hicky. There was a contrivance between Halloway, Hickman, and Carty, to swear.

Sol. Gen. But why should Mr. Hickman do this? What end could he have in it?

Hicky. I cannot tell.

Att. Gen. You, *Hicky*, is Mr. Hickman a Papist, or Mr. Cusack?

Hicky. No, Sir.

Att. Gen. For what purpose should they come to you, to have you forswear yourself?

Hicky. They did do it.

Mr. Dean. What became of that note Mr. Hickman and Cusack gave you?

Hicky. Calaghan had it, and brought it to town.

Mr. Butler. *Hicky*, you were examined at this bar before: Did not you swear the same thing against Mr. Cusack? And after, when he came into court, and you saw him, did not

you retract in open court what you swore before? Did you? or, Did you not?

Hicky. I cannot tell what I did: I told him that he gave me the note.

Just. Coote. Then I will tell you what you did. Mr. Cusack, to the best of my remembrance, came to the side-bar there. Mr. Hurly, you were there; and after Mr. Cusack came in, this person was asked the question, Whether that Mr. Cusack tampered with him? and he said, No; that he only desired him to swear nothing but the truth.

Mr. Huish sworn.

Just. Coote. I will ask Mr. Huish a question or two; for such a fellow as this is not to be endured. Mr. Huish, Was not you present when this man was brought before me?

Huish. I was, my lord.

Court. I only ask, what happened in my house as to the behaviour of this man?

Huish. When I came first, the book was put into his hand, and he was sworn. but, on examination, he seemed to be sullen, and would not answer: But he owned, that the examination he gave in the gaol was false, and the examination he gave before my lord chief-justice was true. And when you sat down to reduce what he said into writing, he began to retract. When it was written, that he said, that before my lord chief-justice was true, and the other false, he began to fall off and falter, and said, Did I say so? You examined him alone that time, and gave him encouragement to speak the truth. And after it was asked, Had you rather be examined before the judge alone, or before all the people here? then he was for being examined before the judge alone. So I went out, and left him and this Daniel Hicky together for near three quarters of an hour: Then your lordship called us in, and said, This fellow is sullen, and will not give any account.

Just. Coote. I did press this man to tell the truth; Did Hickman or any of those people, entice him to swear any false oath? and one time he said, they did not, and another time he said they did.

Mr. Forster. Did he at any time desire that his examination should be deferred until he came to court the next day?

Huish. Truly, I do not remember that particular.

Mr. Forster. Hicky, what was the meaning, that when you were examined before Mr. Justice Coote, that you said, did I say it? or did I not say it?

Hicky. I was afraid some of them would swear against me: They were following me all day. Mr. O'Brien's man was after me: and Mr. Huonin came and told me, I should be hanged if I did it not.

Donogh O'Brien Andrews sworn.

Mr. Forster. My lord, if it please your lordship, I desire he may give an account of this matter.

O'Brien. My lord, I was then prisoner by

Thomas Bourk, and they would shew no warrant, till they had tied me with a cord, carried me to Ennis, and bolted me; and afterwards brought me before Mr. Hickman. And they told me, that Daniel Carty had given an examination against me, that I was one of the persons employed to rob Hurly; and that if I did swear as Carty did, I should have the same reward Carty had; and that it was not for me to pretend to live in the county of Clare, if I did not swear as Carty did.

Court. And did you swear then?

O'Brien. If your lordship pleases, I'll declare the matter. Tom Hickman and John Cusack told me, that I had reason to curse the time that I did not swear as Daniel Carty did.

Att. Gen. How long is it since Mr. Hickman and you were so familiar, that you call him Tom?

O'Brien. They said, I should be hanged for it, if there were no more men in the kingdom; and I was accordingly sent into the dungeon, and hand-cuffed, and they came and tied me, and told me, that Calaghan Carty and Daniel Carty had sworn; and they would put a lump of gold in my wife's lap, if I would swear I was employed to rob Mr. Hurly: and Hallaway came to me, and said, Declare the truth of the matter, and swear as the rest did, and I'll go and speak to the gaoler, and get you eased as well as Carty. Every day Hallaway came to me, and said, I should want for nothing, if I would swear as they did. So on Sunday morning a yoke was brought to me, and they were going to yoke me, but they did not do it; and after service, that Sunday, Tom Buck came to me, and told me, they came from Tom Hickman, and if I did not say as the rest had said, I should be hanged; but I was weary of the bolt and hand-cuff, and I had not my friends to come near me, nor my wife; so I resolved I would do any thing rather than lie in the condition I was in, and I said, I would swear what they pleased.

Court. And did you swear?

O'Brien. My lord, upon this answer my bolts were taken off, and the hand-cuff; and I was carried abroad to William Butler, and he asked me, when I came before him, Why I was so obstinate against the county as I had been? But if you resolve to do it now, says he, it will do as well; and if you swear as the rest did, you shall have as good a reward as Daniel Carty, and 12d. a day during the time you was confined.

Court. Did you not repeat the words he had then written down? Did not you speak the words he had written?

O'Brien. No, I did not.

Court. But you swore to them afterwards. Did he read the examination to you?

O'Brien. Yes, he did.

Court. Did you swear to it?

O'Brien. Yes, I did it to ease myself.

Recorder. Is the examination true, at this day?—*O'Brien.* No, it is not.

Sol. Gen. I desire that examination may be

read, and he may tell us, what part of it is true, and what not.

O-Brien. My lord, I after went to gaol, and received the allowance Mr. Butler ordered me, 12s. a day. And, my lord, some time in summer before the assizes, Walter Neylan, that was now in court, brought down one of Mr. Hurly's coats, and asked us, Whether we knew these coats that we wore in the robbery? He told us, Mr. Butler desired us to swear to the coats; but we refused to do it; and then we were turned into the gaol, and 6d. of the 1s. taken from us.

Mr. Robbins. Were you sworn last August, and before whom?

O-Brien. Before the lord chief justice Pyne.

Mr. Robbins. Did Calaghan Carty make an affidavit at the same time?

O-Brien. Yes, he did.

Sol. Gen. Who writ your examination?

O-Brien. I writ it myself.

Sol. Gen. Who writ Calaghan Carty's examination?

O-Brien. I do not know; I was by at the swearing of it.

Sol. Gen. Who writ Hicky's examination?

O-Brien. He writ it himself.

Sol. Gen. How long were you in town before you gave in your examination?

O-Brien. It was not passing three or four days.

Sol. Gen. Who came into your company?

O-Brien. Nobody, until I came to Kiltartan; and that night madam Hurly came into the house, and lay in the house that night, she and her brother. She asked me where I was going? I told her, I was coming to town to declare the truth.

Sol. Gen. And did you come to town in their company?—*O-Brien.* Yes, I did.

Sol. Gen. And what other company came along with you and Mrs. Hurly?

O-Brien. There was nobody but Terry and Crips.

Sol. Gen. And within three or four days after you came, you swore the examination?

O-Brien. Yes, I did.

Sol. Gen. How long after you came to town, did you see Calaghan Carty?

O-Brien. I saw him at Kilcock, before I came to town.

Sol. Gen. And where did you meet Daniel Hicky?

O-Brien. Coming towards Kilcock.

Sol. Gen. It was remarkable, that he should accidentally meet Mrs. Hurly and her brother at Kiltartan, and Calaghan Carty and Hicky and she should meet on the road and way together, to clear their consciences! Did Hicky, Carty and you lie in one lodging?

O-Brien. I lay in Church-street.

Sol. Gen. And Calaghan Carty and Hicky lay there too?

O-Brien. Yes, they did.

Sol. Gen. Were you examined in irons?

O-Brien. No, I was not: I had them taken off me, and was carried abroad; and I was

told, that if I did not swear as the rest did, I should be hanged in eight days time.

Recorder. Would Mr. Butler make you forswear yourself?

O-Brien. He would make me swear as the rest did.

Sol. Gen. What distance from the gaol was you examined?—*O-Brien.* Near the gaol.

Sol. Gen. Had you any hand-cuffs, or irons, when examined?

O-Brien. No, I had not.

Sol. Gen. My lord, I must ask this man, whether his father be in town? and whether he had any discourse with his father? do you know your father?

O-Brien. I know my reputed father.

Att. Gen. By virtue of your oath, did you see your father since you came to town?

O-Brien. No, I did not.

Att. Gen. Had you any discourse with your father concerning this pretended robbery? and did you say any thing to him about it, and what was it?

O-Brien. I saw him at home; I never acknowledged to him I was concerned in this robbery.

Recorder. Pray, my lord, did he declare to his father, that he was concerned in this sham-robbery?—*O-Brien.* No, I did not.

Recorder. Did you tell your father any thing of the contrivance? or would your father have prevailed with you to own you were in the robbery?—*O-Brien.* Yes, he would.

Recorder. Did you ever tell your father that you used Mr. Hurly's own arms in the robbery?—*O-Brien.* No, I did not.

Recorder. Well, now we will call your father.

Donogh O-Brien Andrews senior, sworn.

Sol. Gen. Pray, upon the oath you have taken, give an account of what discourse passed between your son and you about this robbery.

D. O-Brien Andrews sen. My lord, this will be looked upon to be very strange, and very unnatural, for a father to appear against his son; yet I must have regard to my oath, and shall not be backward to declare the truth. When this robbery happened, some time passed before the contrivance of it was fully discovered; and when my son was taken and carried to gaol about it, I did not go near him for three weeks. When I went to him, I was passionately concerned for him, and I asked him what should make him so wicked, as to be concerned in such a fact as he and the other rogues were accused of? and I asked him with vehemence, did you do it? he said, yes, I did do it; and he never denied it, nor no one doubted of it until such time as he went afterwards to Dublin. The particulars I was not curious in asking him, because I had an account of them from others; and all men allowed them to be true, because they owned it themselves. After the assizes, and that they came out of gaol, I took opportunity to discourse my son; but found by him, that he had no mind to discourse me. But

then, my lord, I asked him one day, whose arms he had; were they Patrick Hurly's? says he, where else should I get arms?

Court. Had you all this discourse with your son Donogh O'Brien, that young man there?

Old Donogh. Yes, I had.

Young D. O'Brien. When he taxed me with this, I was indifferent in the matter; and when he asked me about the arms, whether they were Patrick Hurly's arms? What else, said I?

Sol. Gen. Is the rest that your father said true or not? You have heard what your father said, that you confessed to him you were concerned in the robbery.

Y. Donogh. I said what I told you of the arms; but as to the other part, I do not remember that ever I said it to him.

Sol. Gen. Old man, do you remember?

Old Donogh. Aye, very well; too well, to my sorrow.

Recorder. Young man, do you believe that he is relating truth or not?

Y. Donogh. I do not know whether he is or no.

Sol. Gen. Are you a married man?

Y. Donogh. Yes, I am.

Att. Gen. Pray, who are you married to? What relation is your wife to Mr. Hurly?

Young Donogh. Mr. Hurly is her uncle.

Mr. Forster. Old man, what relation are you to sir Donogh O'Brien?

Old Donogh. I know no consanguinity between sir Donogh O'Brien and me; but sir Donogh purchased the reversion of my farm, and I live in it paying him rent.

P. Hurly. Pray, whose horse, and whose expence brought him here?

Old Donogh. The horse belongs to one Mr. Everhing.

P. Hurly. At whose charge?

Old Donogh. At the county's charge, who prosecuted you for perjury.

Court. Do you expect any abatement of your rent?

O. Donogh. I am so far from it, that I am raised 50*l.* this year more than ever.

Court. By whom?

O. Donogh. By my landlord, sir D. O'Brien.

Court. Are you to have an abatement from sir D. O'Brien, after this year?

O. Donogh. I am not to have any. I have not any trick or quillet in any way: I do not expect any thing of that sort.

Sol. Gen. There is another part of this young O'Brien Andrews's evidence that relates to the justice of the peace, Mr. Butler, and he is here in court.

Att. Gen. Your lordship has heard the evidence of this young D. O'Brien Andrews, wherein he has been flinging against a whole court and county.

Court. It was never otherwise; though a justice of peace be in the just execution of his office, yet when criminals come to be charged, they will recriminate those that appear against them.

William Butler sworn.

Butler. My lord, I had an account, that this sham-robbery, that Mr. Hurly set up, as I do believe, was discovered by Carty; and I had an account, that Donogh O'Brien, that young man, was in gaol, and was willing to make an ample discovery too; and I rid to Ennis, and went to my quarters where I generally lodge, and sent to the gaoler for him, who brought him to me; and then I told him, my business to town was to examine him, if he were willing to give a true account of the matter. He went then about proposing to make bargains with me, but I told him I had no more to say; but if he would give a true account of the robbery of Mr. Hurly, any kindness I could do for him should be done. He said, he was afraid of the gallows; and, sitting down, gave me that examination which he has given me, and I have writ it down faithfully, as distinctly and truly as if it was for life and death; and I promised him nothing, nor threatened him. He seemed to be so penitent for being concerned in the action, and was so much troubled that it was discovered against Mr. Hurly, that he wept a great deal in my company, and did declare, that if others had not discovered against Mr. Hurly, he never would. And I parted with him, and bid the gaoler be civil to him.

Sol. Gen. Mr. Butler, did you tell him, that he should be hanged, if he did not swear?

Butler. By virtue of my oath, I did not.

Y. Donogh. Did not you tell me, the quarter-sessions was adjourned for a week longer, on count of this commission of Oyer and Terminer?

Butler. No; by virtue of my oath, I did not.—I sent for Mr. Hickman, and he was with me by the time I went midway through this his examination; and when I had finished it, it was read to him distinctly, and he swore to it.

Att. Gen. Now, my lord, if your lordship be pleased, the examination that was taken by Mr. Butler, I desire it may be read paragraph by paragraph.

Sol. Gen. Was this information written by Mr. Butler out of his own head, or did you give him that account as it is down there, or is it a story framed by him?

Y. Donogh. Mr. Butler writ it. I told him several things, but he framed them as he pleased himself.

Sol. Gen. What information did you give then to Mr. Butler?

Y. Donogh. I do not remember.

Sol. Gen. It is impossible for any man to frame such a thing out of his own head.

Mr. Forster. Whether there was not a report, that there was a commission to come down of Oyer and Terminer?

Butler. They did talk so, but I had no discourse of it; I used him mildly, and only desired him to tell the truth.

The Examination read.

Recorder. Did you lie at Daniel O-Keans's house that night after the robbery?

Butler. Yes, I did.

Recorder. Who told Mr. Butler that?

Y. Donogh. I told him it.

Donogh O-Brien's second Examination, taken before lord chief-justice Pyne, read; where he answers what he swore in the former.

Mr. Forster. I desire, my lord, the examination before baron Ecklin may be read.

[Clerk reads Calaghan Carty's Examination before baron Ecklin.]

Sol. Gen. My lord, I desire the same method may be observed in this, as in other cases; for hands may be alike, and not the same.

Mr. Robbins. Here has been two examinations of Calaghan Carty; one he owns, the other he denies. Now, my lord, we have produced three or four witnesses, that he was never before my lord chief-justice, and there swore, that what he had formerly swore in the country was false, that Patrick Hurly did contrive a robbery against himself.

Recorder. Mr. Robbins (with submission, my lord) is mightily mistaken; they said, there was an examination taken before my lord chief-justice, but not that this was it.

Mr. Butler. You cannot here read an affidavit sworn before a baron of the Exchequer; there is no colour for it.

Court. Calaghan Carty, pray, were you examined before any of the judges as to that matter?

Carty. No, my lord, never in my life.

Sol. Gen. Never in his life. There is no proving it but by my lord chief-justice, and to prove that this is the man; for a man may come in the name of another person and swear, and the man he personates know nothing of the matter. Who drew your examination, Donogh O-Brien?

Carty. I did it myself.

Sol. Gen. And who drew Hicky's?

Carty. Himself.

Sol. Gen. And who drew Calaghan Carty's?

Carty. I can't tell.

Court. I never knew an examination, but where the person was examined, whether it was true or not; otherwise it goes for nothing; and if the person does not own it now, it must be proved upon him.

Mr. Forster. My lord, an examination given in before the court, and upon record, we come and desire it may be read, to confront an evidence; for this man is forsworn.

Court. I had the curiosity myself, for the satisfaction of justice, to send for my lord chief-justice's clerk, Mr. Wakeham, and examined him here in open court. Being examined, I remember, said he, there did come such four men, and they were sworn before my lord chief-justice; but, that this is one of the men, I cannot swear.

Sol. Gen. I have no such examination at all.

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If you please, read the Affidavit before baron Ecklin.

Recorder. [Comparing the Affidavits.] These are both the same, word for word, drawn both by Mr. Terry; they are both his hand-writing.

Mr. Butler. I desire Mr. William Butler may give an account (he is sworn) about the portmanteau; Whether Mr. Hurly did not swear, that he left the portmanteau at Loughrea, at Bargery's house, whilst he went to see his brother at Tiaquin?

C. O-Brien. My lord, I asked Patrick Hurly, what care he took of his money at his coming to the country? he said, he left it at Loughrea, and would not carry it to Tiaquin, for that was a loose family. This he told at his own house, after he had sworn it in the court.

Mr. Taylor sworn.

Mr. Butler. Mr. Taylor, declare what you know of Mr. Hurly's swearing at the assizes, about the portmanteau.

Taylor. I was at the assizes at Eunis, and Mr. Hurly swore, that he left his portmanteau at Loughrea when he went to Tiaquin; and that he told Mr. Bargery there was matters of great consequence in the portmanteau, and desired him to take care of it; and that Bargery did so, and delivered it safe to him at his return.

Mr. Hurly. Mr. Butler knows the county of Gallway: I desire to know, whether it is likely for me, going to the county of Clare, that I should leave my portmanteau at Loughrea, and come back again?

Mr. Butler. I don't know that; but you did swear it.

Recorder. And his man swore he carried it with him to Tiaquin. So it is—'Trim Tram, like master like man,' both forsworn.

Sol. Gen. My lord, the persons produced by Mr. Hurly are men, by their own confession, who at some time or other were forsworn; and they are such men as have nothing between them and the gallows but this shifting: they are sensible no jury can believe them.

Mr. Robbins. My lord, we are charged but with one indictment; there is but one Venire, I think.—*Mr. Butler.* There are two.

Att. Gen. Mr. Robbins, if your client be guilty of the perjury, clear him of the cheat if you can.

Court. The constant practice of this court is, that if there goes a Venire between the king and the party indicted, and that there be several indictments against the same party, the court will charge the jury with them all, unless he comes in by counsel, and shew some good cause why you cannot go on with some of them.

Att. Gen. My lord, I think that the contrivance is made out so fully to the satisfaction of every man present, that there never was stronger evidence than of both these villainies, the perjury, and conspiracy to cheat. When a man has lived extravagantly, and then goes about all manner of ways to retrieve himself, if perjury goes unpunished, it shall lie at the door

of those gentlemen that have heard this matter so fully proved to-day; and this poor country must suffer by perjury, if care be not taken to suppress it. It is now growing late, and I will not take up more time in summing up this long evidence to the jury, but leave it to the court.

Justice *Coolc.* Gentlemen of the Jury, you have heard a very long evidence; and I will repeat the heads of it to you as well as I can, that you may discharge yourselves with honour and conscience. You have taken an oath, and I hope you will not be led to the preventing of justice, one way or the other. Mr. Hurly stands indicted here of perjury, for making a false corrupt oath before a justice of peace, Mr. Blood; before whom he swore, in an examination that was read in evidence, that he was robbed of so many guineas, pistoles, and other goods, at his father's house in Moughna, in the county of Clare; that he was robbed by four persons, whose names he knows not, but by their tone they seemed to be Irishmen; and that the same was not done by any contrivance of his. After which he did exhibit a Petition to the judges of assize, and did endeavour to recover from the county the value of what he was so robbed of.

Gentlemen, Mr. Dean Blood proved to you, that the prisoner at the bar did take his oath, that the contents of the said examination was true, and that he signed it in his presence.

Gentlemen, the first witness that was produced unto you to prove the perjury, and that Mr. Hurly was not robbed, but had sworn falsely in that information, was one Calaghan Carty: and he being sworn, tells you, That at the time that this robbery was committed he was in Mr. Hurly's service; and that Mr. Hurly came to him, and made moun to him, that he did owe money; and, that he could pay his debts if this same Calaghan Carty would observe his directions, and do what he would have him to do; and, that thereupon this Calaghan Carty did tell him, he would; and the direction was, that he should join other persons he named, and put on a disguise, and take an opportunity when Mr. Ronane was at the house, and personate themselves to be robbers, and take away the goods and money out of the house, and when they should have so done, to return them again. And this Calaghan Carty was to go to one Mr. Forster's for a suit of black cloaths, and he was to come back again. These were the orders he received, by the direction of Mr. Hurly. He tells you, that he did accordingly join the rest; that they had coats, disguises, and swords left for them in the barn, which they took and put on; that they did actually bolt into the house at Mr. Ronane's coming out of the door, and took those fire-arms that were laid for them; and that they had their intelligence from Mr. Hurly, the better to personate their being robbers. And he tells you, that part of them went up to Mr. Hurly's chamber, and there took the bag; and, that they were directed by Mr. Hurly to pour it out

before Mr. Ronane (the better to make the pretence out against the county), and likewise, when they should get in, tie Mr. Hurly and Mr. Ronane; and that a bed-cord was laid in the window for that purpose: and he tells you, that they had fired off the fire-arms, and, that there was nothing in them but powder. And, gentlemen, you will see anon how far this man swears the truth, out of the mouths of Mr. Hurly's own evidence.

Mr. Hurly, to lessen this man's credit, has produced to you several witnesses, who swear, That he swore an examination before my lord chief-justice Pyne, or baron Ecklin; wherein he pretends, that this Calaghan Carty swears directly contrary to what he swore in his information before a justice of the peace in the country, and to what he pleads now. To this Calaghan Carty says, he never swore any examination before any judge; and if any was sworn in his name, it was done by some other, that did personate him. That examination was produced here; but there was no evidence, that this Calaghan Carty was the person that swore it, and he denied that the name to it was his hand-writing; and he seems to be too ignorant a person to contrive such an examination. Now, whether you credited him, or those persons that swore against him, is left to you.

The next witness in behalf of the king is Margaret Conneene: She tells you, that she was a servant in the house, and, that these persons did come into the house; and she bearing murder cried out by Mr. Hurly's servant, she came out of the kitchen: She tells you, that they made several shots, particularly at her, and, that there was no hurt done, nor any marks of the shot or bullets in the wall. She tells you, that at first she was of opinion, that it was a real robbery; but afterwards, discoursing with Calaghan Carty, he told her it was: and besides, that she was of another opinion upon the account of a table-cloth taken away at the time of the robbery, which she saw afterwards come back in a trunk or portmanteau that was sent to Mr. O'Brien after the robbery.

Walter Neylan was likewise sworn; who gives you an account, that he was in prison at Ennis for Hurly's debt, being bound for him to one Thomas Arthur, and that he was in the prison when Hurly was brought thither; that they were chamber-fellows: that Mr. Hurly did go so far in the confession of this fact to him, that when Daniel Carty became a discoverer, and began to accuse Mr. Hurly of this matter, Donogh O'Brien Andrews, junior, who was then likewise in the same gaol, did desire to know of him, what method Mr. Hurly would take to get him discharged; and, that if he could not do it soon, that he must be forced to confess the whole truth: and he swears, that he did acquaint Hurly therewith; who said, that he should be undone if the said O'Brien Andrews should confess it; and gave him a piece of money to give to the said O'Brien, and bid him tell him, that he would soon get him discharged. Neylan was so cautious of

this, that he would not do it himself; but one Daniel Carty being present, he gave him the money, and he gave it to O'Brien: that O'Brien said, this will not do, I must and will tell the truth. He says, Mr. Hurly went so far, that he told him he would give any gratification in the world to prevent Donogh O'Brien's coming in against him; for if he did he should be ruined entirely. Against this, Mr. Hurly says, that Neylan was exasperated for being in prison through his means, so that he tampered with witnesses, and became his inveterate enemy; and not only swore falsely himself, but tampered with others to swear falsely too; of which he has offered such evidence, as I shall observe to you hereafter.

The next evidence, gentlemen, that was produced to you, was one Charles Mac-Donogh. He tells you, That he was employed as a solicitor to Mr. Hurly; and, that he was intimately acquainted with Mr. Hurly, and knew a great deal of his concerns; and, that one night being come back from Dublin, the very time before he was robbed, he talked with him, and said, he was a strange man to come to the country without money; and, that it would be too hot for him; that the present sheriff was Mr. Arthur's friend; and says, that Hurly did even then fortify his house, because he looked upon himself to be in no condition to pay his debts; that he was so extremely poor, that he durst not appear. He tells you, that Mr. Hurly did tell him, that he brought down money; and though he did tell him so, that yet he did not believe it; because when he told him of the sheriff, Hurly said, that sir Toby Butler and colonel Macnamarra had a great influence upon the sheriff, and would make interest with him, so that he will do me no harm.

He tells you, That much about this time Mr. Hurly employed himself in reading acts of parliament, and one of them was the act relating to the articles of Limerick and Gallway; and, that he had some discourse of being comprehended within the articles of Gallway. That Mr. Mac-Donogh told him, he thought he was then in France, and that he was not there; and he said, he would prove that he was then in Gallway: and reading the Rapparee act, he said, that it was a very pretty way for persons to recover money from the county. He tells you, gentlemen, that after this he left Mr. Hurly, and captain O'Brien writ him word that he was robbed, and desired that he would come and solicit at the assizes of Ennis on his behalf: but he was so far from believing that he was robbed, or yielding to that design, that he writ back a drolling letter, as he calls it himself, and he did not think it proper to be concerned for him. He further tells you, that there were some persons that gave an account to him of certain counters, one Hicky's wife, and that if her husband might be produced, he and she might make great discoveries relating to these counters.

This took wind, and the justices of the peace gave a warrant to the high-constable, Walter

Huonin, to search for those counters. They came to the place where this Hurly lived; the first time he missed, but the second time he sent one before, to take care that nothing might be removed: and when he came there, he observed there was a dunghill; and, by the behaviour of Hicky's wife he had reason to suspect that place. He tells you, that the woman held the candle, and in digging the place where the dunghill lay, at length the spade hit upon a slate where the counters lay: that he took up a bag wrapped about with hay, he called it a soggane: and, that there those counters, which he has here produced, were taken up. He told you, that the woman was under so much consternation, that she dropt the candle; and when she was told she must go along with him, she said, now that was found, she believed she must.

The next person examined was Thomas Edwards. He swears, he was employed to go along with Walter Huonin; that he saw a youth on his knees by the dunghill: he asked him what he was doing? he said, he was hiding his potatoes; but he saw no potatoes, which made him suspect that dunghill: and, that digging there, they found the counters, as Huonin has given an account.

The next man that was sworn was Mortagh Mac-Carty. He tells you, he had bought a cow, and that she had strayed away from him, and finding of her, and bringing her home, he called at this place, where Hicky's wife was, and she agreed to buy his cow, and she brought out two pieces of gold; which she called guineas: says he, these are not guineas; I believe this is some of Patrick Hurly's gold. He asked her what she would take for them? and he said, I have three-pence half-penny, and a quart of tobacco, which I will give you for them; and she took it, and wished that the rest were sold so too. He says, he acquainted sir Donogh O'Brien of this, and he directed him to Mr. Bindon, a justice of the peace, where he gave in the examination: he produced to you these two pieces, which you have here compared with the rest of the counters.

Gentlemen, the next person that was sworn was one Joseph Lynch. He tells you, That he was very well acquainted with Mr. Patrick Hurly, and, that John Hurly was married to his sister; and, that Mr. Hurly, before or about Christmas, came to Loughrea; and, that at one Mr. Henry Bargery's house they were both together a drinking; and, that Mr. Hurly taking out some linnen out of his portmanteau, he saw a bag that held about a quart; and taking it to be money, he looked into it, and found in it all counters; and he asked him what he did with them? he said, he intended to make use of them for his diversion. He tells you after this, that he walked with Mr. Hurly part of the way, and, that Hurly discoursed him about Mr. Banks's robbery. Mr. Lynch told him, that the country had found for Banks, and, that he proposed something in relation to his own robbery, if Mr. Lynch would assist

him; what a pretty way it was to get money! Lynch told him, in what was honest and just he would assist him, but in nothing else. Mr. Hurly then fell into discourse with him about his farm, and said, he would give up his farm too, if he would come into the design he had to get money. Mr. Lynch answered as before, if it be honest and just, I will; if not, I will not; and for the farm, said he, I will force you to do that without it.

He tells you, that Mr. Hurly sent a trunk of linnen to his house after the robbery was committed; and, that Mr. Hurly did desire nobody should see the trunk with him; that he heard his brother Bourk say, that it was linnen, but he did not mind it, his wife being then sick; and says, they took away the trunk that same night after Mr. Hurly was in gaol. He tells you, he had the curiosity to go and see him in the gaol of Ennis, and after discoursing with him, he said, he had done something very irregular in France, and now to come into the country and charge it with a robbery, was very ill.

The next evidence is Charles Cassidy, surgeon; and he gives an account, That this Hurly's father being sick, his sister sent for him to come there; and after he came, they sent for one Dr. Brodin, a relation of Mr. Hurly's; and that this Brodin and he, some time after, went to visit some other patients; and being abroad, Brodin proposed to him, says he, Mr. Hurly gives you small fees, I can put you in a way to get 30 guineas; and told him of the design, and how he might be a party concerned in the pretended robbery; and he answered, He was a man too well known; but he persuaded him to accept of the employ. When they came home to Hurly, the doctor told him, he had offered him 20 guineas; and Hurly was so far from denying it, that he chid Dr. Brodin, and said, he would give him 40 guineas; and then Cassidy said, he was afraid of being known: Hereupon Hurly told him he had provided vizards, to prevent his being known; and after going home, his heart failed him, and he would not be concerned. He told you, he heard of this robbery; but this thing was not discovered by him till last Sunday, where being at church, he went with Mr. Fitz-Gerald to dinner; and Fitz-Gerald talking of this business of Hurly, Cassidy said, He knew a person in the county that could do him more harm than any man living: Says a clergyman there present, you ought to do the county that right, as to find out that person, that the county may not be so oppressed, but justice done to the criminal. And that he went home, and considering it, he went and gave in his examination to a justice of the peace, who bound him over to prosecute; and accordingly he attended here.

The next witness is Daniel Kiefe. He tells you, That he was very well acquainted with Mr. Hurly, and, that Mr. Hurly, some time before this robbery was committed, came to Mr. Bently's shop, and enquired there for

masks, or vizards, such as they use for masquerades; and Bently made answer, That they had none, but they might be had in Christ's-church-yard. He tells you, that Hurly thereupon went into the yard. He tells you, that at that time, hearing Hurly enquire for masks, he was apprehensive that he had some evil design in hand, and told Bently so; and Bently agrees in what Kiefe swears, that he did enquire for masks, and went into Christ-church-yard for them.

Mr. Gray (the next) tells you of the poverty of Mr. Hurly; and that he could not have any such sum of money; that he desired him to raise some money for him, and for better security he lodged in his hand a bond of captain Mac-Donnel's; and, accordingly, that he got Mr. Conner to indorse a bill to Mr. Lumm; and Mr. Hurly afterwards paid the money.

The next that was produced for the king was captain Mac-Donnel; and he tells you, That he had given such a bond to Mr. Hurly, upon account of a farm they had purchased jointly, and that he ordered him to pay this fifty pound that was borrowed; that he would not be concerned in paying part, unless he paid it all; that the money was paid.

Attorney-General. Cassidy tells you, That he had used to play at tables with Hurly at his house; and that Hurly got him to send for a dozen of bottles of wine to Ennis, to drink with Hurly, because Hurly had no money.

Just. Coote. I will give you an account now as faithfully as I can of what, is sworn for the traverser.

But I should have told you first, That captain Mac-Donogh gave you an account of the greatest severity used by Patrick Hurly towards his brother John, which, he said himself he would not have done, but that he was forced to do it, by reason of his own necessitous condition.

Now Mr. John Hurly, he tells you of considerable sums of money he received from Holland, viz. 490*l.* from colonel Lovet, and 200*l.* from Jeremiah Donaven; and in 97 from Mr. Fitz-Symons 300*l.* 10*s.* and 200*l.* more in Limerick. He tells you, that of those sums received, he paid again in cash to Mr. Hurly, all but a little that is received from Mr. Fitz-Symons: he paid him in cash but a little; and he had forty bullocks, and some sheep, towards the balance of what remained unpaid. That there was some money paid to Mr. Arthur, and some to Mr. Burton, and more laid out otherways. He tells you, that he saw with Daniel Hicky a note that was given him by Mr. Hickman, a justice of peace of the county, and by Mr. Cusack, then sheriff, whereby they promised, that if he would make a true discovery of the robbery of Hurly, that they would intercede to the government for a pardon for him. This is the substance of what John Hurly has sworn.

The witness for the traverser was Dorothy Kemp, who was a servant, she tells you, to Mr. Hurly, when this robbery was committed:

She tells you, that seven persons came into the house; that five of them went up into her master's chamber, and two staid in the parlour: that there were several shots made, and that there was no harin done, nor no marks or prints of bullets or shot in the wall or cieling: that there were two men without at the window, and being called rapparees, they thrust their swords through the window: and that Mr. Ronane was going out, when they rushed in, and that they threw him down, and that they tied Ronane and Hurly; and to shew you there was money, she tells you, that the wife of Mr. Hurly took out of a trunk a great bag of gold, and shewed it to her; and then took part of it, and put it into her pocket: and after that this Dorothy Kemp going to the trunk for linnen, she was strangely surprised to find the bag there; that Mr. Hurly came in at the time, and was inquisitive to know what she did there; she told him, she was looking for linnen: That then he took the bag out himself, and conveyed it to his closet.

She tells you likewise, that there was one Murough O-Brien did endeavour to tamper with her, to persuade her to swear about the counters, that they were to be lodged with her, or with Daniel Hicky's wife; and this Murough promised her a great reward, if she would let this trick be put upon her master; but she would not. She tells you, that this Murough O-Brien not only tampered with her, but also with Hicky's wife; and that he sent letters by his servant to Hicky's wife, and that they were delivered; and that the contents of the letters was, desiring her, that she would suffer those counters to be lodged in Hicky's house. She tells you, that Mr. Hurly had a considerable quantity of linnen taken away from him; that she had washed 20 pair of sheets herself, and that there was 10 pair more, and that all was taken away except five pair; which is the substance of what she swore.

But Murough O-Brien was sworn, and he deposed, that he was so far from tampering with Dorothy Kemp, that he did not think it safe to converse with her, because she was kind and civil to Mr. Hurly, and bore a child or two by him; and to the contrary he swore, he had no communication at all with her: but as for Hicky's wife, he says, she told him she would discover all, if he would bring her husband home again; and, in pursuance of that, he writ letters to Hicky, and that the purport of them was only to satisfy him, that he might come with safety, and treat with him. The letters being read, they import no more.

Gentlemen, the next witness, Daniel Mac-Cay, says, that he was a servant to Mr. Hurly a considerable time; that he was in the house when the robbery was committed; and that there was only five of the robbers that he saw; that some of them put the family in terror, and others made it their business to fall on the master: he at first thought they were only bailiffs come to arrest his master; but when they came and broke open the door, that they had

locked upon his master, he found they were Tories: that there were several shots made. I asked him, Was there any hurt made by the shots? and he said, No. Was there any marks of the bullets? he said, No. He said, there was some at the window, that did thrust in their swords. He tells you, there was one Christopher O-Brien, who did endeavour to tamper with him to take off the evidence, to whom he went with a letter to the Swan-tavern, and that Mr. O-Brien discoursed with him about the counters.

He tells you, that his master had a great deal of money; and that when he was to go down into the country with his master, they were so great together, that his master acquainted him with a great sum of money he had, and that he told him he intended to pay Mr. Arthur with it; but that Arthur did exact a great sum for exchange, and therefore he did not pay the money in town, but expected to get easy terms from him in the country; and it was because he feared to be robbed, that he did shew his servant a great sum of money he had to carry down into the country: and then he was examined by Mr. Butler, as counsel for the king, by what road they went at that time to the country, and at what place they went over the Shannon? He said, it was over a bridge, but he did not know what bridge. And being asked, whether they went through Athlone? it being a casual question, he said, they did go through Athlone. And being asked, where he lay that night? he said, at Balliboy, or Eyres-Court. And being urged to be exact, he said, he thought it was Balliboy; and then he said, they laid at Killighy.

Gentlemen, you know the country, and that Balliboy and Killighy are near the King's County on that side the Shannon; and Eyres-Court on the other side, in the county of Gallway.

Now, gentlemen, because Mr. Patrick Hurly, in the course of the king's evidence, denied positively that he was at any time about Christmas at Loughrea; I asked this Mac-Cay, if his master went down any other time? he said, he did a little before Christmas: and then I asked, if he was at Mr. Bargery's house in Loughrea? he said, he was; but he could not tell whether Mr. Joseph Lynch was there or not. And being asked, whether he carried his master's portmanteau to Tiaquin? he said, he did; and that his master hired a horse at Tiaquin, and sent him before him to Gort. I asked him, whether he were sure the money his master produced to him in Dublin was gold, or no? he said, he was sure it was gold, it was Louis d'ors; though, by Mr. Hurly's information, there was more guineas than Louis d'ors. He tells you likewise, gentlemen, that this Calaghan Carty had discovered upon his oath, before my lord chief justice, what he had formerly sworn before a justice of the peace concerning this robbery: and being asked, who were present? he said, my lord chief justice's clerk was there; which gave occasion to the court to send for the clerk.

The next man examined was one Crips. He says that one Holloway did beat him, and take him by the hair of the head, because he would not swear against Patrick Hurly; and that Neylan offered him six collops grazing, if he would swear that Hurly contrived this robbery himself, and that he was by when Calaghan Carty was sworn before my lord chief-justice Pyne; but he cannot tell what it was he swore; and he does not seem to be capable of knowing it, for he does not speak English. And then he says, Mr. Lynch offered him considerably to come and swear against Hurly; and bid him come to Connaught and live with him, for John and Patrick Hurly were both ruined. Mr. Lynch has been examined; and he swears, he had no other discourse with this man, but about the farm at Moughna, that the Hurly's held from him; that they were in ill circumstances, and that he would be rid of the whole family. Neylan tells you, that, to his knowledge, he never saw this man until this day. Crips said, upon his oath, that it was at a house, in such a place, that Neylan tampered with him: and Neylan tells you, upon his oath, that there was not any house at all, within his memory, in that place; and that he never had any communication with this Crips, directly or indirectly. So when persons swear directly one against another, you, gentlemen of the jury, must weigh the evidence, and the arguments they offer to induce your belief.

The next witness is Daniel Hicky; who tells you, he was sent to gaol and bolted there; and after he was told, that one Daniel Carty confessed the whole matter, he was forced before a justice of peace, and there was forced to swear, by the management of Mr. Hickman and Mr. Cusack, who told him, that if he did not swear, he must be hanged: and that, through fear, he was compelled to give that information, wherein he proves the robbery was contrived by Mr. Hurly, and that he was one of the actors in it: And when he was told, that he should be called before my lord chief justice Pyne, and he was brought into the bar, he said, he would swear nothing but truth before my lord chief-justice: That hereupon the gaoler carried him back, and he never after could get opportunity of giving my lord chief-justice an account of the matter, though he sent petitions after him. He says, That before he discovered, he was treated barbarously; but afterwards he was treated very well, and had twelve-pence a day; but that after they were in the court, and said they would say nothing but the truth before my lord chief-justice, they were allowed but nine-pence, and there was a mittimus sent to confine them closer. He says, Daniel Carty procured bail, and he was bailed by some friend of Mr. Hurly's. He tells you, he came to town, and that he went to the lord chief-justice Pyne, and there swore an examination contrary to what he swore before, and says, that he was conscious of the injury he had done Mr. Hurly; that he writ his sole examination himself; and

says, he had been tampered with, and nothing would do. That he was afterwards brought into this court, and there did own his examination before my lord chief-justice to be truth; but after he charged Mr. Cusack, the sheriff, with having tampered with him, when Mr. Cusack appeared here and confronted him, he went back from what he said.

The next is D. O'Brien Andrews junior; he tells you, he was manacled and fettered in the gaol, till such time as by the persuasion of Mr. Neylan, and the threats of the gaoler and of Mr. Cusack, that if he did not swear, he should be severely neck-yoked; he went before a justice of the peace with Mr. Butler, who used several insinuations to him, as he says, to procure him to swear the robbery was contrived by Hurly; which, through fear, he consented to; and says, that Mr. Butler put his information into writing; part, says he, I told him, and part, he says, Mr. Butler put down as he pleased: I did swear to it, says he, but it was against my conscience, for I was forced to it. He says, that Mr. Neylan brought coats to him in the gaol, and they would have him swear they were the coats they robbed in, but he would not swear by any means. He says, that after they were discharged, he was so conscious to himself of the injury done Mr. Hurly, that he came towards Dublin, that he lay in the same house with Mrs. Hurly and her brother at Kiltartan, and, that coming nearer to town about Killocock, he met with Crips and Carty, that they lodged together in one house; and being asked, whether he spoke any thing to his father about this robbery? he said, he never did.

The father is then produced; and he tells you, though it would reflect upon his son, yet he would perform truth, being upon his oath; and so swears, that hearing how his son had been concerned in the contrivance of this robbery, after he had been three weeks in gaol he went to see him, and when he came to him, checked him; and his son told him, as he understood him, that the robbery was only a contrivance of Mr. Hurly's. That after he was out of gaol, he spoke to him concerning the arms, where they had them, and whether they were Patrick Hurly's arms? to which he answered, where else should he get arms? and this Donogh O'Brien Andrews junior, being asked again, whether it was so as his father deposed? he said, it was not so. Now the father and the son swearing one against the other in this matter, you must be judges who has sworn true.

The next is Mr. Butler, who tells you, that in taking the examination, he was so far from using any threats to this Donogh O'Brien Andrews junior, that as soon as he came to Ennis, hearing he was willing to make a discovery of the matter, he sent for him to his lodging; that he caused him to sit down; and that he writ every word as he spoke it; and that there was not a word but what came from his own mouth: and the examination was here read;

and if you observe it, there are several things in the examination, that the party owns came from himself, and several things which could not possibly come within the knowledge of Mr. Butler; so that it is impossible to be contrived by Mr. Butler, because they were things wholly in the informer's own cognizance.

There is one thing offered in the close of the evidence in behalf of the king, which does not only relate to Mac-Cay, but to all the rest. Mr. Butler and Mr. Forster upon their oaths tell you, that Mr. Hurly, when he preferred his petition concerning this robbery before the judges of the assizes, and he did also swear, that when he went to Tiaquin, he left his portmanteau with Mr. Bargery at Loughrea, with a strict charge to take special care of it, for that there was something of great consequence in it; and Christopher O'Brien swears, that Mr. Hurly told him likewise, that he left the portmanteau at Mr. Bargery's when he went to Tiaquin, and said he would not carry it to Tiaquin because that was a loose family; so that Mr. Hurly swore fully against what Mac-Cay swears now.

Hurly swore he was robbed but by four persons, and that agrees with what Calaghan Carty swears. One woman swears there was seven, another swears nine; so that out of the mouth of Mr. Hurly himself his own witnesses are contradicted. But Mr. Hurly would take off the probability of his saying thus (for he denies the saying of it.) Is it likely, says he, that I should come back from Tiaquin to Loughrea, and so go on again to Gortnishigory? But Mac-Cay, his boy, tells you, that his master hired a horse for him to carry the portmanteau before him to Gortnishigory on Saturday, and that his master followed him on Sunday; now, if the portmanteau had been at Tiaquin, why should he send it by Mac-Cay beforehand to Gort on Saturday, that he was following thither on Sunday? and when Mr. Hurly was going down to the country, what can he imagined, why he should make a boy acquainted with his carrying so much money with him? and that Mr. Hurly should leave the key of the trunk with Mrs. Kemp to take out linen, and so great a sum of money there? I do but lay the facts before you as they stand upon the evidence, as well for as against the prisoner; and I hope you will do justice both to the prisoner and to the king. Gentlemen, if you are satisfied upon the whole matter, that Mr. Hurly is guilty of the perjury, you will find him guilty; if not, you will acquit him.

If you think him guilty of the contrivance to cheat the county, you will find him guilty; if not, you will acquit him.

The Jury went out, and returned in half an hour; and brought in their verdict, Guilty, on both indictments.

Att. Gen. May it please your lordship, Patrick Hurly has been indicted for perjury and a cheat, and is found guilty of both indict-

ments: I humbly pray your lordship's judgments.

Court. How have you laid your indictment?—*Sol. Gen.* At common law.

Court. In what circumstance is Mr. Hurly? *Mr. Butler.* I hope, my lord, if it is only a fine, it cannot be less than the sum he designed to get from the county by the perjury.

Court. As to the perjury, the judgment of the court upon that conviction is, that Mr. Hurly be fined for the perjury 100*l.* and be imprisoned till he pay it to the king.

Att. Gen. We will move the court next Monday for your judgment upon the other indictment.

Mr. Butler. My lord, we insist upon it, that the pillory is the punishment for the cheat.*

Court. We know, if Mr. Hurly be not able to pay the fine, he ought to suffer corporal punishment.

* "Originem vocis Cowellus expetit a Græc. *κόλα*, janua, et *ζέου*, video, quod delinquens ac si per januam emisso capite prospiceret, quod ipse certè non probo, nec habeo tamen quod proferam. Sua Gallis relinquo erimanda, hujus enim ipsi nobis sunt authores. Et forte a notiori fonte deducunt, ut pote a vernaculo suo 'pilleur,' quod depeculatore significat; cujusmodi esse noscuntur ipsi quibus hoc supplicii primo institutum fuit, scilicet pistorum, qui suis in pane fallaciis rempulo depeculantur, a quo et ipsa sua nequitia 'pilleurie' dicta fuit quasi de peculatio; et sic vox proprie ad delicti naturam spectat, non ad supplicii instrumentum, quod suo vocabulo collistrigium nuncupant, licet ad hoc etiam postea deferatur. Suadere id mihi quidem videntur ipsa verba statuti de pistoribus, ubi dicitur subeat iudicium pillorie, ac si legeretur subeat iudicium de peculationis." Spelman's Glossary, (v. Pilloria,) as cited (Obs. on 51 H. 3.) by Mr. Barrington, who notices that 'pilleurie' is frequently used in the old French Chronicles, and even by later writers in the sense given to it by Spelman, and who gives several instances of the appropriation of the pillory to the punishment of cheats. For an instance of an Attorney General's prescribing to the court of King's-bench, to sentence to the pillory a person convicted of publishing a seditious libel concerning the government, see the case of Mr. Horne, A. D. 1775. But it appears that Lord Chancellor Macclesfield (see a letter to him from Powis, justice, inserted in the case of Hendley and others, A. D. 1719,) did not approve of the practice of condemning state offenders to the pillory. Of the pillory, as the usual punishment of the 'crimen falsi,' see Selwyn's Nisi Prius, c. 22, sec. 3.

For more concerning the Pillory, see vol. 7, p. 1209, and the passages there mentioned. As to the punishment of the Pillory in Scotland, see Hume's Commentaries respecting Trial, &c. vol. 2, p. 376.

420. Proceedings against Dr. THOMAS WATSON, Bishop of St. Davids, for Simony and other Crimes: 7 WILLIAM III. A. D. 1695, and several following Years. [Now first published from MS. Records of the Delegates, and other MSS. in the British Museum and Bodleian Library.]

OF some parts of the proceedings in this Case, accounts are given in Lord Raymond's Reports, pp. 447, 539. 5 Mod. 433, (in which book the defendant is called bishop of Chester.) 12 Mod. 237. 7 Mod. 56, 117. 2 Lord Raym. 817, which three last Reports relate to the process of Excommunication issued against the bishop for disobedience of the sentence which had been pronounced upon him.

Among the offences alleged against him were the following: Simony; Taking excessive Fees for Conferring Orders, Institutions, Visitations, &c.; Conferring Orders without administering the Oaths according to 1 Will. and Mar. yet certifying under his Episcopal Seal that the Oaths had been taken; Ordaining a man under age; Abuse of a Charity; Putting out a Schoolmaster; Detaining a Deed of Ex-emplication.

In No. 146 of Tanner's MSS. in the Bodleian Library, is the following Article:

THE SUM OF BISHOP WATSON'S IRREGULARITIES, TO BE TURNED INTO ARTICLES.

“ Upon the unhappy death of the reverend and learned Dr. John Lloyd, our late bishop of St. David's in the last arbitrary reign, Dr. Thomas Watson of Cambridge, a man of a scandalous character in the University, and preferred by Papists to succeed him, was pitched upon to carry on the intended ruin of the church; which we presently perceived by his infamous behaviour in that reign, which he has continued until this happy Revolution. He began his government with so much fury and violence against some of the clergy, with so much craft and insinuation towards others, that we stood upon our guard against him. The first thing he did when he came down to his diocese was to press the so well known address upon his clergy, which with strong asseverations assured them would be much to the honour and security of themselves, and the only way to keep our church doors open. He prevailed upon some timorous men, to whom he promised the preferments of those whose consciences would not suffer them to comply with his lordship's importunity, whom he reviled as undutiful to the king, and perjured villains, and guilty of the breach of their canonical obedience to their bishop; the particulars of the several conferences between his lordship and the clergy shall be fully related when oppor-

tunity shall be given, which will not be undiverting, and withal will sufficiently discover his lordship's temper and principles. His next errand to the diocese was to urge the reading of the declaration for liberty of conscience; the refusers he threatened with dragoons and deprivation; some of the clergy of his lordship's own sordid disposition were prevailed upon to mutter it over to their congregations, being frightened by his bloody menaces, delivered in oaths and fury; who not long after died with the shame and regret of what they had done, whose widows his lordship racked to the utmost, as if he had designedly choked their husbands with the declaration for the sake of the ensuing mortuary. The particulars of this passage of his life shall also be fully represented, when commanded, from us, which affords great variety of whatsoever is lewd and scandalous. A gentleman of the long robe over-hearing a boisterous loud dispute between the landlady and some angry man at the Swan in Gloucester, being in the next room, about the little reckoning he had over-night, and observing some noisy oaths to fly about his ears, asked one of the servants if any dragoons were quartered in the house, when he was informed that it was a Welch bishop who opened after that manner; he did not stay for his lordship's benediction, but blessed himself, and said he was terribly afraid the damning prelate would prove to be his diocesan, which perceiving, he rode from him as fast as he could; And that his lordship might not forget his usual oathing style, he made use of it twice in St. David's cathedral in time of Divine service, and by two loud God damme's, expressed his indignation against his nephew Meilley, for blundering when he was reading the service, which learned nephew is made archdeacon of St. David's and prebendary of Llangam; and being a patient, meek, contented man, he suffers his lordship, his uncle to receive his revenues, though secretly complains, but yet he must be contented to want necessaries as long as his dear uncle wants money to pay for his purchase, or may have other foreign occasions for it. That his lordship doth receive the said archdeacon's money we can prove, and that the archdeacon wished himself at his little living in Yorkshire again, though what his loving uncle has entitled him to here in Wales, is worth at least 250*l.* per annum; and his late living in Yorkshire about 40*l.* or 50*l.*

And to give a further specimen of his lord-

ship's morals, he suborned his secretary Slingsby to impeach two of his diocese for high treason in king James's time, forcing him against his knowledge and conscience to declare before a justice of the peace a notorious falsehood, which would have reached the lives of the two said persons, if the worthy justice had not discountenanced the whole matter, discovering it to be the effects of his malice. And if king William had not providentially by his landing put a stop to all villainies of that kind, his lordship had prosecuted them to blood or banishment. We humbly beg the whole story may be openly heard with its circumstances: neither was it revenge alone which prompted his lordship to this wickedness, for by corrupting his secretary and persuading him lately to accuse the two aforesaid persons, his^d lordship his covetous purposes, for if by that artifice they had been ejected out of their employments, which had certainly happened, his lordship had got considerably by the disposal of them, he making no scruple of simony or extortion, though his lordship is well versed in all the jockey-tricks of handy-capping churches, of which we humbly offer this instance. Upon the confession of Mr. P. L. sub-chamber of St. Davids, that his lordship offered him the vicarage of Lanryan, upon condition he would give his lordship ten guineas for continuing in the palace-lands, which he held before at the utmost rack rent, which guineas if he would not give, he told him plainly, he should not have the vicarage (which he afterwards had bestowed upon him. Query, whether the ten guineas were received for the vicarage) or the lands, for which never fine was before given or received. And as his lordship can truck churches, so from simony he naturally ascends to sacrilege, and without any pretence or precedent, he seized upon 16l. a year which always belonged to the college of Brecon. The account of which is given at large, by Mr. Jer. Griffiths and Mr. Barnett, the two succeeding schoolmasters, under their own hands. And for his extortions, which are but an appendix to his simony and sacrilege, they are innumerable, being practised in most of his collations, ordinations, institutions, licences, &c. some of which were by the grand jury at our last assizes in September 1691. And as he deals with his clergy, so also his tenants are not secure from his practices that deserve a pillory or whipping-post. One instance we will now offer, he desired one Mr. Vauhan to shew him a lease, which he would not restore him again, but at his finding the gentleman was resolved to have it, he brought it down cancelled, and made him pay 20l. for a new one. As to his lordship's politic principles, when ever occasions* if offered he shews his disaffection to the government, not only leaving off to pray for the present king and queen when he happens to say grace, which before was his usual custom for k. J.

but by refusing to drink their healths, and as we are informed commanding his chaplain not to pray for the present king and queen in the chapel: we are assured that they were not mentioned in the public service in his chapel, at which his lordship was constantly present; neither is his lordship alone an enemy to the government, but he endeavours to pervert others, as particular he advised the bishop of Landaff's chaplain, Mr. Willis, not to take the oaths the very morning he took them himself, though as we hear with a scandalous reservation.

We can prove that he publicly justified the pretended prince of Wales his legitimacy within these two months, and that by several expressions at the time of his pretended birth, if his lordship were strictly examined, it is to be concluded that he could give some account of the imposture, and that he is acquainted with, and a partner in the cheat; for when the news of his birth came to Brecon (where his lordship then was,) he prohibited the bells and bon-fires, saying that he was sure it could not be true, for to his knowledge the queen was not to be delivered till a month after, and then he would persuade the nurse, whom he owned to be his acquaintance, to teach his little royal highness to say St. David's the first thing he should speak upon; for which he did not doubt but king James would give him 5,000l. to repair his cathedral. We can prove that he cursed the 7 bishops, calling them rogues and traitors, when they were sent to the Tower. As to his religious principles, we have great reason to believe him to be either an Atheist, or a Papist; he has a Papist for his steward, and keeps company with all the male-contents and Papists in the country, who in king James's time called him their bishop. We saw him confirm more Romans with his hands a-cross, though he was warned of it in the late reign: he did not forbear that Roman ceremony at his last confirmation, the 28th of June, 1691, till he was taken notice of by two of the clergy. And though his lordship so much insisted upon canonical obedience in the late reign in the matter of the address and declaration, threatening Dr. Fanconberge with the loss of his head for opposing it; yet when there is any thing to be got by breach of canon, his lordship can dispense with it. As particularly within these six months, he ordained a youth of scarce 19 years of age, both deacon and priest, and instituted him to a rectory, though he was informed that he had not been from school half a year at the university, his non-age also being sufficiently visible in his countenance.

Remember major Crofts and Mr. Taylor of the Inner Temple. He says he will die before he will part with the tythes of Motivey. Vide Mr. Griffith's paper. He fasts upon Saturdays religiously, it being the Roman fast. He consecrated the sacrament, and stood in the posture of adoration all the time of the distribution of elements, with his hands elevated, his back

* So the MS.

set against the altar, to the great scandal of the congregation in the cathedral of St. Davids; and to shew what a profligate spirit he is; when he was told how scandalous he was by being so sordidly covetous, he replied, that he could not help it, and that it was not in his nature to be otherwise: and at another time, when it was told him that it would much lessen his reputation if he did not restore the salary to the schoolmaster, he said he was a cork; and was hardened against whatsoever any man could say of him. At his last visitation he unjustly demanded double fees from his clergy for procuration, and lest they should come to discover the extortion, he commanded his secretary not to mention the particular sums in the acquittances. He keeps correspondence with such as send him libels against the king and the archbishop; one he shewed at the bottom of a letter about three months since, wherein were words to this purpose: 'O misera Eccl'ia Anglicana, cujus Rex est prorepublicanus et Batavus! cujus Archi-Ep'us est Hereticus!' He reviled bishop Thomas of Worcester in several letters which are to be produced, because he would not be persuaded by him to force the reading of the declaration upon his clergy. In one word, there is scarce an action of his life that is not infamous, and which savours not of baseness, Popery, or Atheism; he brings about all his villainies by lying and slander, and employs only the notorious branded rogues in the country as his instruments to trepan and abuse the clergy. He promised one Mr. Pritchard, in the late reign, a prebend; which, when he came to examine him, he asked, if he had read the declaration? when his lordship found he had not done it, he had him get him home like a rogue as he was, for he would not prefer any one that had not done it. When his lordship was obliged to read the altar service at St. Davids upon a sacrament day, he read William and Mary king and queen, instead of our king and queen, which was taken notice of by the congregation, and when it was asked by one of the Canons, why the versicles* was omitted after the anthem? which is a short prayer for the king and queen, the sub-chanter openly declared, that his lordship had forbid him to read it at his last visitation.

The lord bishop of St. Davids, at last great session in Brecknock, was indicted for extortion by grand jury, and there is a *billa vera* against him.

There is a petition to be given to the House of Lords against the said bishop, for the above said and other crimes to be laid to his charge, begging that he may be prosecuted for the same.

* So in MS.

Among the same MSS. are the two following articles:

To the Right Hon. the Lords Spiritual and Temporal assembled in Parliament. The humble PETITION of several Gentlemen who have hereunto subscribed their names on the behalf of their Country.

Humbly sheweth; That whereas Dr. Thomas Watson, the present lord bishop of St. Davids, hath been thought by their majesties and the Lords and Commons assembled in parliament to be a person fit to be excepted and exempted, and is accordingly excepted and exempted from pardon out of the late act of pardon and indemnity, which the said lord bishop has declared in the presence of several persons that he does esteem the same as a great honor done unto him.

And whereas the present lord bishop of St. Davids hath since been presented by the grand jury for the body of the county of Brecon, within the diocese of the said bishop of St. Davids, upon full evidence, to be guilty of extortion for taking of excessives^o fees of Mr. Jeremiah Griffith to the vicarage, &c.

And whereas the said lord bishop of St. Davids hath committed divers and sundry crimes and misdemeanors against the good and wholesome laws of this kingdom, besides acts of oppression, and covetousness, not becoming his function and dignity, to the great prejudice of the clergy of the said diocese, and of many others their majesties good subjects.

Your petitioners therefore humbly pray your lordships' leave, to prosecute the said lord bishop of St. Davids for the crimes, misdemeanors, and offences by him committed, in such form and course as the laws of this realm do admit of without incurring the displeasure of this honourable House, by reason of the said lord bishop being privileged therein.

And your petitioners shall ever pray, &c.

RICE RUDD.

JOHN LEWIS.

CHARLES POWELL.

WILLIAM WILLIAMS, &c.

The Humble ANSWER of Dr. THOMAS WATSON, the present Lord Bishop of St. Davids, to the Petition of several Gentlemen who have subscribed their names thereunto.

He denies and protests against the truth of the matters contained therein, for the following reasons, which he humbly offers to your lordships' consideration.

He did with all humble submission acquiesce in the wisdom of the parliament, and always thought it a great misfortune to be excepted as the petition mentions, but not being conscious to himself that he had done any thing which merited that exception, he hopes it will always appear notwithstanding the malice of some

* So in MS.

persons prejudiced against him, that he had no more pretence or need of pardon, or the benefit of that act, than many others not excepted; and is confident he never declared what is falsely charged, or any thing like it, unless his owning a most just sense of the favour and honor many noble lords did him upon that occasion, by mistake or malice be misinterpreted.

Notwithstanding the indictment and the particulars mentioned in the petition, he utterly denies that he is guilty of any extortion whatsoever, and doubts not but he shall justify himself against that malicious accusation in a proper and legal course of law.

He saith the charge in the last part of the petition is not only false and scandalous, but so general that it is not possible to answer in defence, because there is no certain crime or misdemeanour either in respect of person, time, or place, against whom, when or where it was committed; and further saith, that he is most unjustly and scandalously reflected upon by the petition, without the least occasion for the same.

Because it was subscribed or pretended to be subscribed by persons, some whereof were not in town when the petition was altered or amended or supposed to be.

Because he neither hath nor had acquaintance or dealing with any of them, or knows the face of some of them, who therefore cannot be supposed privy, or knowing the matters objected to be true. There is no oath made by them, or any other, of the matters of the petition before the presenting thereof, which he humbly conceives very extraordinary and irregular, and is advised that method of getting hands to petitions of that nature is of dangerous consequence, and may blast the reputation of the most innocent person in the world without warrant or colour of law.

As to the prayer of the petition, he affirms that he never insisted upon privilege in any particular in the said petition contained, nor doth insist thereon, and as he would not be divested and so delivered to the will of his enemies, he solemnly promises he will never insist upon his privilege but with submission to your lordships' great wisdom and justice, and with all possible regards to the honor of this House.

THO. MENER.

The progress of the proceedings against the bishop was very slow and very tedious. This was occasioned partly by the evasive and procrastinating measures to which the bishop had recourse, and partly, perhaps, (as is suggested in a letter from Mr. Baker to Watson, dated April 7, 1699, which is printed in *Masters's Memoirs of Mr. Baker of St. John's College, Cambridge*), by Tennison's resolution to hear and consider all that could possibly be alleged on the behalf of the bishop, and so to leave him no ground of complaint.

Among the Harleian MSS. in the British Museum, is the following article:

"In pursuance of an order of the House of Lords, Nov. 29,* that the bishop of St. David's should be heard on the Wednesday following, as to the reasons of resuming his privilege at this time: sir Tho. Powys, sir Bart. Showers and Dr. Oldish, were then ready in his lordship's be-

* As to the claim of privilege and some other proceedings in the House of Lords, I find in the Journal the following entries:

11 Will. 3. 29 Novembris.

The House being acquainted, "That the bishop of St. David's had resumed his privilege, in a cause promoted by Robert Lucy, esq. before the lord archbishop of Canterbury, and now depending in the Delegates, wherein he had in this House waved his privilege;" and the said bishop of St. David's desiring to be heard, by his counsel, to that matter:

Upon consideration whereof, it is ordered, by the Lords spiritual and temporal in parliament assembled, that the bishop of St. David's shall be heard, by his counsel, at the bar of this House, on Monday next, at 11 o'clock in the forenoon, what he has to offer, in relation to the resuming his privilege in the said cause; wherunto the lord archbishop of Canterbury may also, if he think fit, be heard by his counsel.

4 Decembris.

Upon hearing counsel, for the bishop of St. David's and the archbishop of Canterbury, pursuant to the order of the 29th of November last; Mr. Attorney General apprehending that something in this case might arise, tending to the diminution of the king's prerogative in ecclesiastical affairs; and desiring to be heard on his majesty's behalf:

It is ordered, by the Lords spiritual and temporal in parliament assembled, that "Mr. Attorney shall be heard, on Wednesday next, at 11 o'clock in the forenoon, what he hath to offer relating to this matter; and then the consideration of what was said by the said counsel on either side shall be resumed."

And several lords were named a committee, to consider, whether, when Mr. Attorney General is heard on the king's behalf, the counsel of other parties concerned may not be present: whose lordships, having considered thereof, and inspected the Journals in this case, are to report their opinions therein to the House.

6 Decembris.

Upon bearing Mr. Attorney General, pursuant to the order of the 4th instant; as also counsel, as well on behalf of the archbishop of Canterbury, as the bishop of St. David's; and hearing the judges, as to the methods by which, as the law now stands, a bishop guilty of any ecclesiastical offence, for which the punishment is deprivation, may be deprived; and after debate of what had been offered in this case:

The question was put, "Whether the bishop of St. David's shall be allowed his privilege?" It was resolved in the negative.

half. And the same orders having added, that the lord archbishop of Canterbury (if he pleased) might be also heard by his counsel, his grace retained serj. Wright, Dr. Walker and Dr. Cooke, to justify his process against the bishop; the illegality whereof had been hinted as an inducement to the House to restore the bishop to his privilege.

"Accordingly, the point chiefly insisted on by the bishop's counsel, was, that the sentence of deprivation (upon which the appeal to the delegates is granted) having been passed by the archbishop of Canterbury, who had no authority to do it, the bishop had just reason to protect himself by his privilege as a peer, from the effects of a sentence so illegal.

"Sir Tho. Powys said, he could not conceive upon what foundation an archbishop could claim that exorbitant power: for 1st, such a deprivation is against all the instances of former times: Stigand, in the Conqueror's reign, was deprived by a synod; and so a little after him was Wulstan bishop of Worcester; grievous complaints were made against Tho. Becket for having suspended the bishop of Sarum, without the consent of suffragans; since the Reformation, Bonner was proceeded against by permission from the king, as was afterwards

It is resolved, by the Lords spiritual and temporal in parliament assembled, that the bishop of St. David's shall not be allowed his privilege.

15 Februarii.

Upon reading the Petition of Thomas lord bishop of St. David's:

It is ordered, by the Lords spiritual and temporal in parliament assembled, that the said Petition shall be, and is hereby, rejected.

12 Will. 3. Die Veneris, 1 Martii.

The Lord Chief Justice of his majesty's court of King's-bench having brought into this House a Writ of Error, at the prosecution of Thomas late bishop of St. David's:

It is ordered, by the Lords spiritual and temporal in parliament assembled, that to-morrow, at 11 o'clock, this House will hear counsel, to this point only, "Whether the Writ of Error be properly brought in this case;" and not to the merits.

And a Committee was appointed to inspect the Journals, as to the methods of bringing and delivering Writs of Error into this House from the courts below; and report their opinion to this House.

Martii 2.

After hearing counsel this day, as ordered yesterday, upon the lord chief justice of the court of King's-bench bringing in a Writ of Error, at the prosecution of Thomas late bishop of St. David's, to this point, "Whether the said Writ of Error be properly brought in this case?"

It is resolved upon the question, that the

Middleton (bishop of St. Davids) in convocation; sentence was indeed executed by the archbishop *jure ordinario*. In the 1st of queen Elizabeth, the high commission was set up for that among other purposes; and it cannot be imagined that the archbishop would have accepted the first place in that commission, had he believed that this authority was vested singly in himself. The high commission being abrogated, the right of prosecuting and depriving a bishop returned into the hands from whence it was taken, a synod or convocation: since which time we have no instances of the kind, except only upon the Revolution, when the non-juring bishops were deprived for non-compliance with an act of parliament. So that these being the only methods of deprivation that were ever practised in England, (a synod, a commission, or an act of parliament,) the archbishop cannot claim such an authority from an ancient usage.

"2. Nor by his legatine authority, which at first was brought into the kingdom with great difficulty. In the year 1100, the pope's legate was zealously opposed; after him another was absolutely rejected; a third in the year 1125 acted, but with great opposition; and so the pope finding there was no other way of estab-

said Writ of Error shall not be received into this House.

Die Veneris, 8 Martii.

The House being this day moved, "To make an Address to his majesty, that the bishopric of St. David's may not be filled for some convenient time:"

It is ordered, by the Lords spiritual and temporal in parliament assembled, that the said motion shall be taken into consideration on Monday next, at 12 o'clock; and all the Lords summoned to attend.

Lord Raymond thus concludes his report of what occurred in the court of King's-bench upon the bishop's application for a prohibition:

"Note, that after this denial of the prohibition, the bishop of St. David's petitioned the lord chancellor Sommers, to have a Writ of Error upon this denial of the prohibition. Who having some doubt, whether it would lie or not, referred it to the attorney general; who certified his opinion to be, that a Writ of Error would lie in this case. Upon which the suggestion was entered upon record, and the denial of the prohibition; and the Writ of Error was granted, and the whole record brought by the chief justice into parliament.

"And afterwards, upon hearing of his opinion, the lords of parliament were of opinion, that a Writ of Error would not lie in this case. Note, that Holt, chief justice, told me, that if the Lords had been of opinion, that the prohibition ought to have been granted, he never would have granted it."

I believe the bishopric was kept vacant till 1705, when Bull succeeded to it, See Godwin.

lishing that authority here in England, made the archbishop of Canterbury, *legatus natus*; but whatever power he pretended by virtue of that title, was by the 28th of Hen. 8, united to the crown.

" 3. The archbishop's right of visitation cannot warrant him proceeding to such extremities against a bishop: the end of that is to detect miscarriages, but when they are detected, the prosecution must go on in a course that is legal and canonical, and the canon law knows no method of depriving a bishop, but in a synod; at least if there be either rules or instances that may seem to lodge that authority in the archbishop, it will lie upon his grace's counsel to produce them. Nor is there any act of parliament that gives the metropolitans of England such a power, or even any power at all over their bishops. And if in the beginning of queen Elizabeth's reign, they had dreamt of any such jurisdiction of right belonging to the archbishop, what occasion or indeed pretence, could there be for vesting the correction of the clergy immediately in the queen?

" 4. From the reason of the thing, it is no way probable that the archbishop's power over his suffragans should bear him out in the deprivation of them: men of the same order, under the same patronage of the king, and enjoying the same common rights of peerage with himself. And how is it likely that the House of Lords should in any instance submit the rights of their peerage to the judgment of one single man? which yet they do in effect if an archbishop may proceed to deprivation; one necessary consequence whereof is the loss of peerage, without any possibility of appeal to their lordships.

" 5. It ought also to be considered how great a share the bishops have in the government of the kingdom, and that by virtue of a temporal barony, which being at the disposal of one single man, may easily be got into such hands as shall keep forward the destruction both of church and state. (Here he spoke what became an orator, of our present security in the known goodness and integrity of his grace the archbishop, and then proceeded.) Suppose for instance the late reign, bishop Cartwright made archbishop; the bishops of the province, upon one pretence or another, proceeded against and deprived, such a delegacy appointed as shall certainly confirm the deprivation, and men found for the purpose to place in the vacant sees. Here in the compass of a few months, the church is utterly ruined, the state very much endangered, and all this mischief done in a canonical way.

" Sir Bart. Showers enlarged upon the grievance brought upon the bishop by the delegacy. Witnesses against him received, though manifestly unqualified, some of the same delegates appointed for the merits of the cause, who had before the archbishop's sentence, denied him justice in a particular point; and by this means himself cut off from the benefit of his appeal, which was from every thing that had been

done against him, while the cause was depending before the archbishop: these grievances lead him to seek protection in his peerage, and no member having power to dispose of his privilege without the consent of the House, he thought it his duty to represent to their lordships, the many unforeseen oppressions to which the waving of it had exposed him: the sentence particularly of an incompetent judge, the archbishop by his own single authority, which was never known in the church before the encroachments of popery, nor any where exercised even by the pope's legates, whose custom it was always to call a synod on those important occasions. The right of visitation may be urged as implying a right of deprivation, as there shall be cause; but that is far from being a necessary consequence, witness the case of a grand jury, who have a right to inquire and inform, but none to prosecute or punish. And so the end of an archbishop's visitational power is to receive complaints, and also to inflict canonical censures upon the inferior clergy; but in the case of a bishop, admonition is the furthest he can go. This my lord of St. Davids, apprehending to be the utmost extent of his grace's authority, voluntarily receded from his privilege, and submitted to the prosecution: a submission that being grounded upon such an error, ought not to be interpreted an owning of the archbishop's right to suspend or deprive; and therefore when instead of an admonition he was surprised with an appearance of deprivation, he thought for his own safety he ought to return to his privilege, and out of duty to the House to desire their concurrence. The rather, because the sentence had indeed left him no other remedy; a certificate of his deprivation into the Exchequer would have immediately taken away his revenues, and there being in this case no such thing as a writ of error, his privilege, and their lordships' protecting of him in it, was his only sanctuary against the oppression of an exorbitant power.

" Dr. Oldish added, that a deprivation by a metropolitan and bishops is the constant doctrine of the four first general councils, and therefore the doctrine of our own church. As to the African churches, the same thing appears evidently in their councils: another calls the bishops upon that account *judices ordinarios*; except this be allowed, there is no possibility of punishing an archbishop, how uncanonical soever. The power of depriving a bishop singly and by himself, is what the pope (after all his contentions for authority) could never get established before the council of Trent. Further, as to the reason of the thing, is it not as natural, that a bishop, as that a temporal lord should have the privilege of being tried *per pares*? Here in England indeed the king's commission (a much shorter, though a less equitable way) had brought the true canonical method into disuse; but the high commission being abrogated by the 16 Car. 2, synodical deprivations are restored in course.

Nor can the archbishop have any pretence to deprive by his own single authority, except it be shewn that he has such a power vested in him by act of parliament.

"This, I think, is the substance of the pleadings in behalf of the bishop: to every particular whereof it could not be well expected that his grace's counsel should reply; their notice being but short, the case wholly new, and many of the instances and authorities unforeseen.

"They had reason, they thought, to be surprised that the bishop of St. Davids, after so long a submission without the least scruple, should now begin to dispute the archbishop's authority. His grace's predecessor had visited the diocese, and upon examinations taken in right of his visitatorial power, suspended the bishop: he notwithstanding that collated; upon information whereof, he was cited before the archbishop, begged pardon and submitted. The present archbishop proceeding against him upon the articles exhibited in his predecessor's visitation, he moved that his suspension might be taken off, with which his grace (desirous to treat him with all possible tenderness) readily complied. After this follows a long process of four years, and in all that time, not the least suggestion against his grace's authority: whereas by all the rules of the civil law, the jurisdiction of a court is not to be protested against but at the beginning of the cause, and the going on without a protestation is always to be interpreted a submission. Nor is there any more reason for the resuming of his privilege, just as the cause was ripe for sentence. At the first beginning, Mr. Lucy had in a petition to their lordships desired that the bishop might be obliged to waive his privilege. He did voluntarily waive it, the House approved what he did, and Mr. Lucy withdrew his petition; what new emergency therefore was there that should induce his lordship to resume it? he knew the archbishop was to be his judge; that the charge was simony, and that the proof of that charge must end in deprivation. Notwithstanding all which, he did not only submit to the proceeding, and thereby drew the promoter into 1,000*l.* expences, but did afterwards himself voluntarily sue for an appeal: and now puts a stop to the proceedings of a delegacy, granted upon his own petition to the lord chancellor. As the moving for such a commission was virtually an owning the jurisdiction from whence he appealed, according to the 25th of Hen. 8, so that being granted, the resuming of his privilege is directly the contradicting of his own suit, and an apparent design to put a stop to justice. The court before which his cause is now depending (if we consider the members of which it consists, and the commission whereby they act) is perhaps the greatest in the world, and if he be innocent, will undoubtedly acquit him; if guilty, he is not fit to be honoured with a place among their lordships.

"As to the archbishop's power of depriving,

the instances whereby his lordships' counsel have endeavoured to overthrow it, are either not true or not conclusive. Stigand was himself archbishop, and therefore no precedent in the present case. With the story of Wulstan's deprivation, (as told by Mat. Paris) there is mixed such a ridiculous miracle about his crossier and St. Edward's tomb, as the whole relation lies under the suspicion of a forgery: however, no inference is to be drawn from any proceedings under the Conqueror, who acted by arbitrary methods, and displaced every man (right or wrong) who discovered the least dislike of his government. On the contrary, archbishop Theodore (as Bede tells us) deprived Wilfrid by his own authority; Courtney afterwards excommunicated the bishop of Lincoln for contempt. But a number of precedents cannot be expected in such a case: it is the glory of the English church not to afford them, and it will then be time enough to produce more instances, when his lordship's counsel have named the bishop, whose behaviour requires such an exercise of the archbishop's authority. Since the Reformation indeed, bishops have been removed both by the king's commission, and by act of parliament; but these deprivations were in cases relating to the civil government, and none of them for crimes purely ecclesiastical, as this is; so that Parker's, &c. accepting a place in the high commission 1 Eliz. did not properly interfere with the archbishop's authority. At least running in the queen's name, and being established by act of parliament, he could not lawfully refuse to join it. As to the legatine authority, that is not pretended to support his grace's jurisdiction; but thus much however may be said of it, that being always vested in the person of the archbishop, many of the actions that are ascribed to the legatine power, may as well be said to have been done by the metropolitanical. It is enough, however, that they have undoubtedly a visitational power throughout their province, which implies a right to enquire, to correct and punish, according to the nature of the crimes detected. In order to which our constitution has assigned them their proper courts, and the canon law (a part of that constitution) has appropriated censures to the particular crimes, the highest whereof is deprivation, which none can deny to be the punishment of simony. There are instances, no doubt, of deprivation in a synod, but it does not follow from thence, that they either have been or ought to be there only. Heretics have been frequently convicted and punished by synods, and yet every body knows, that the ordinary has a right to do it by his own single authority. Besides, no synod can be called, but when his majesty pleases, nor any matter transacted, but by his special permission.

"An equality between an archbishop and his bishops was insisted on by sir Thomas Powys, but what then must be meant by the expressions of Lindwood, '*In virtute obedientie* —

'episcopus nostræ jurisdictioni subditus;' and (speaking of the archbishop) 'ordinarius totius provincie.' Why, also, does our own rubric enjoin canonical obedience to the metropolitan? (Here, as I remember, some quotations were produced out of the canon law books, to shew the coercive power of an archbishop over his bishops; but ancient canons being of no weight on either side, except it should evidently appear that they were received and practised in England, they did not seem to lay much stress upon them.) But it is yet more to the purpose, what we meet with in our own statutes concerning the jurisdiction of an archbishop. The statute of Citations, restraining the power anciently claimed by the metropolitan, of citing any person throughout his province originally before himself, adds an express exception in case of an offence committed by the bishop, which evidently implies that he had before a right to do it, and that in this particular, they confirm and continue to him his ancient authority.

"The statute of the 29 Car. 2d, annulling the writ, 'de hæretico comburendo,' does not refuse to the archbishop the full power of depriving persons under his jurisdiction, as their behaviour shall give occasion for it. Nor are the inconveniences of such an authority (insisted on by sir Tho. Powys) a sufficient ground to presume that the law has not rested it in him. All laws have their inconveniences, and all power is liable to be abused: But this is not to be presumed without some plausible reason that it will be so. A confidence must be lodged somewhere, and where with more safety than in an archbishop; whose authority in this particular is not so considerable as that of a bishop was before the 29 Car. 2d, in his right singly to convict of heresy any person within his diocese, and then to give him over to the secular judge for execution.

"According to an order of the House at the conclusion of the pleadings on Monday was se'night, Mr. Attorney General attended in his place the Wednesday following; and desired leave in his majesty's behalf to show how far he conceived the king's supremacy to be concerned in this question, debated before their lordships. He began with a general account of the nature of and extent of it, to this purpose.

"The king's supremacy consists in the power. 1. Of making canons. 2. Of punishing ecclesiastical persons for the breach of those canons. By virtue of the first he issues forth his writ for calling a convocation: when they are met, he prescribes to them the matters of which they shall treat: and at last confirms or rejects their resolutions. In right of the second, all ecclesiastical jurisdiction is derived from him; to be exercised according to the limitations that have been made from time to time by the statutes of the realm.

"For 1. Whereas the Archbishop had a power of citing any person throughout his province originally before himself, the statute of Citations (25 Hen. 8.) has now restrained him; un-

less in the case of a bishop committing any spiritual offence, and in some other cases particularly specified by that statute. 2. There is a restraint also as to the method of exercising the spiritual jurisdiction. All ecclesiastical causes begun by the archdeacon, shall (by 24 H. 8.) in default of justice be carried to the bishop, and from thence if need be, by appeal to the archbishop, whose sentence shall be final; except only in cases where the king himself is immediately concerned, and in those an appeal shall be to the upper house of convocation. But by the 25 Hen. 8, the final appeal in all ecclesiastical causes whatsoever, is directed to be from the archbishop to the king in chancery. After this it was enacted (1 Eliz.) that the queen as supreme head of the church, should grant a commission empowering certain persons to take cognizance of ecclesiastical matters originally. But that being abrogated (16 Car. 1) the ecclesiastical jurisdiction was left to be exercised by the method prescribed by the 25 Hen. 8.

"According to these limitations of the king's supremacy, he had now a right to take cognizance of ecclesiastical causes, only as they come to him by appeal: and the statute (25 Hen. 8) having said expressly that this appeal shall be from the archbishop, without mention made (directly or indirectly) of any other person or society through whose hands it may come into his majesty's; it follows, that to deny the jurisdiction of the archbishop in any ecclesiastical case whatsoever, is to cut off, in that case, his majesty's cognizance and final judgment; which of right belong to him as supreme head of the church, and yet by law cannot be carried to him but from the metropolitan.

"Suppose therefore a bishop to be guilty of an ecclesiastical offence: where shall he be tried if not before his archbishop? In a synod of bishops, say some; and others in a convocation. But both these suppositions are an equal infringement of the king's prerogative: neither a synod nor a convocation being courts of the archbishop, and ecclesiastical causes by the abovenamed act coming to the king from the archbishop only.

"In a synod, if the suffragans (pretended to be necessary for the trial of a bishop) are to sit there as judges, it is not then the archbishop's court; if only as assistants called in by the archbishop, as such they gave their opinion on the present case.

"In a convocation, say others; when there is no statute that mentions them as a court, besides 24 Hen. 8, in a particular case; and even in that, their right of cognizance was taken away, by the 25th of the same reign. Further, if the right of judging a bishop had been ever lodged in the convocation, it cannot be supposed, but that the law would have specified an appeal from them also to the king, in consideration of his supremacy in all causes; and therefore no such appeal being mentioned, it is evident that no such authority was thought

on at that time. The inconveniences pretended in the trial of a bishop by his metropolitan, conclude much more strongly against a synod and a convocation. For whereas these are both the original and the ultimate judges, against whose sentence and the effects of it, there is no remedy; from the archbishop they have their appeal to a court of the greatest honour and learning, which consists of their own brethren (both as bishops and as peers) and of others the most knowing persons in all the laws and usages of England. This way demand as a right; and have a yet further relief in his majesty's favour, where he sees it reasonable to grant a review.

"Therefore, the king's supremacy and the privilege of the subject, are both of them nearly concerned in this right of the metropolitan, and to plead against it, is an endeavour (as the law now stands) to take away all possibility of doing justice, and thereby to give an impunity and encouragement to the greatest offences."

[By the favour of sir William Scott, I have examined the Records of the Proceedings before the Ecclesiastical Judges, relative to this case, which are extremely prolix. The first entry of the proceedings before the archbishop, is dated Oct. 24, 1695, when bishop Watson, in person, under protestation, &c. declared that he was advised by great lords to take care that he did nothing to the prejudice of the privilege of their House, or to that effect. The definitive sentence of the Delegates is as follows:]

TENOR SENTENTIÆ PER DOMINUM ARCHIEPISCOPUM LATÆ.

"In Dei Nominis Amen auditis visis et intellectis ac plenarie et mature discussis per nos Thomam providentia divina Cant. Archiepiscopum totius Angliæ primatum et Metropolitanum Meritis et Circumstantiis cujusdam Cause sive Negotii Correctionis instituti ex Officio nostro promoti con. Dominum Thomam Watson Sacre Theologiæ Professorem permissione divina Meneven. Episcopum provincie nostræ Cantuariensis Suffraganeum propter diversa Crimina sive excessus et præsertim Crimen Simonie sive Symoniæ pravitatis quæ sive quod coram nobis in judicio inter Robertum Lucy Armigerum promotorem Officii nostri dictum negotium sive Officium nostrum promotorem ex unâ et p'fatam Dominum Thomam Episcopum Meneven. contra quem idem negotium sive officium nostrum provocetur ex altera p'tibus disputaretur veritateq. adhuc et pendet in locis. Terminoq. ad audiend. sententiam n'ram definitivam in dicta Cause sive neg. adventante p'fatoy. Roberto Lucy promotore Officii nostri

ejusq. procuratore l'timo dictoy. Domino Thoma Episcopo Meneven. ejusq. procuratore l'timo coram nobis in judicio comparente et procuratore p'fati Roberti Lucy Sententiam ferri et justitiam fieri ex parte officii nostri contra dictum Ep'um Meneven. procuratore vero dicti Episcopi Menevensis ex directione p'fati Thomæ Episcopi Menevensis nil pro parte sua instanter respective postulantis et potentibus Rimatoq. primitus per nos toto et integro processu in hujusmodi Cause sive negotio coram nobis habito et facto ac diligenter recensitis observatiq. de jure in hac p'te observandis ad nostræ Sententiæ definitivæ sive nostri finalis Decreti prohibitionem in hujusmodi Cause sive Negotio forend. sic duximus procedendum fore et procedimus in hunc qui sequitur modum Quia per acta inestitata deducta proposita exhibita allegata probata pariter et confessata in Cause sive Negotio p'd comperimus luculenter et invincimus dictum Robertum Lucy procuratorem Officii nostri Intentionem dicti Officii nostri in quibusd. actis Allegationibus aliisq. propositis et exhibitis deduct. et ex parte officii n'ri in hujusmodi Cause sive Negotio datis et admittis et penes Registrum n'rum remanentibus (quæquidem Articulus Allegationes aliisq. proposita et exhibitæ pro hic lectis et insertis habemus et haberi volumus) sufficienter et ad plenum quoad inferius per nos pronucianda fundasse et probasse nihil. effectuante ex parte aut per partem antedicti Thomæ Episcopi Menevensis in hac Cause sive hoc Negotio exceptum deductum propositum allegatum exhibitum aut probatum fuisse et esse quod intentionem Officii nostri (quoad inferius pronucianda) elideret seu quomodolibet oneraret id circa Nos Thomam Archiep'um p'dictus Chri' nomine primitus invocato ac ipsum Solum Deum oculis n'ris p'ponens assidentibus nobis in hac Cause sive hoc Negotio Venerabilibus fratribus nostris Dominis Henrico Londinensi Gulielmo Wigornensi Gilberto Sarisburiensi et Johanne Ozoniensi nunc autem electo Coran. et Lichen. respective p'missione divina Episcopis habitisq. provida et natura deliberatione super p'missis p'fatam Thomam Menevensium Episcopum eisdem Johanni Medley Offico ipsius Thomæ Episcopi Menevensis ex sorore nepoti p'bandans de Cliddy in Ecc'ia sua Cathedrali Meneven. fundatam et Arch'p'atum Menevensium in p'dicta Ecc'ia fundatam necnon Dignitatem Thesaurarii in Ecclesia Collegiata Christi Breconensis in p'dicta Diocesi Meneven. fundatam turpis lucri et propii questus Cause interventibus fraude pacto et Symoniæ pravitatis contumias p'fatamq. Thomam Ep'um Meneven. post Collationes respective p'dictas fructus et emolumenta dictorum p'banda Arch'p'atus et Dignitatis Thesaurarii per se et suos per plures annos exegisse percipisse et receptis et in usus suos proprios convertisse pronuciamus decernimus et per presentes declaramus p'fatamq. Thomam Episcopum Menevensium Ecclesiam Parochialem et Rectoriam de Burrough in Diocesi Eborac' quam virtute facultatis cujusdam sive dispensationis a Reverendissimo in

Christo patre Gulielmo nuper Archiepiscopo Cantuarien. p'decessore nostro obtenta et auctoritate Regia confirmata titulo Commendæ retinuit cum omnibus proventibus et emolumentis ad dictam Rectoriam pertinentibus valentem annuatim summam octoginta et quinque librarum monetæ Angliæ aut eo — cuidam Gulielmo Brooks Clerico aut saltem pro Clerico sacris ordinibus insignito se gerente et pro tali a p'fato Thomæ Ep'o p'd'co habito et reputato ad terminum vitæ p'd Gulielmi Brooks si p'fatus Thomæ Ep'us etiam durante Termino p'dicto in vivis existerit Contractu in scriptis habito et celebrato sub annuo reddito viginti * solidorum sibi p'd Ep'o Meneven. solvendorum locasse p'fatumq. Thomam Ep'um Meneven. Comendatar. R'coris de Burrough p'dict. in eod. contractu Curam a'iarum parochiarum p'oæ de Burrough p'dict et omnia Ministeria et Officia Ecclesiastica ibidem celebranda et peragenda in p'dictum Gulielmum Brooks transtulisse eidemq. commississe et postea possessionem Rectoriæ p'dictæ eidem Gulielmo Brooks tradidisse p'fatumq. Thomam Ep'um Meneven. alio pacto manu sua propria totaliter scripto et nomine suo manu sua propria subscripto et sigillo suo proprio sigillato ex incontinenti ad contractum p'dictum adjecto et apposito promississe et seipsum obligasse p'dicto Gulielmo Brooks ut ad rogatum p'dicti Gulielmi Brooks ipse Thomæ Episcopus et Comendatarius p'dictus Rectoriam de Burrough p'd resignaret et vacuam dimitteret p'fatumq. Thomam Ep'um et Comendatarium p'd ratione et Contemplatione p'dictorum respective contractum a p'dicto Gulielmo Brooks Summam ducentarum et viginti librarum monetæ Angliæ petiisse et ex pacto realiter recepisse Et Nos Thomæ Archiepiscopus et Iudex p'd'cus contractum p'd'cum cum pacto p'deo ex incontinenti adjecto numeratione pecuniæ p'dictæ interreniente fuisse et esse Symoniacum Iudicamus Et tum ratione Collationum p'dictorum p'bendæ archinatus et dignitatis Thesaurarii Johanni Medley p'dicto factarum tum ratione contractus et pacti et receptionis Summæ ducentarum et viginti librarum p'd p'fatum Thomam Episcopum Meneven. detestabile Simonie Crimen commississe et perpetrasse et fuisse et esse Simoniacum pronunciamus decernimus adjudicamus et per p'sentes declaramus p'fatum etiam Episcopum Thomam Menevensem subditos suos pluribus exactionibus iniquis prægravasse vexasse et oppressisse pro Collationibus Institue'onibus et procurationibus summas excessivas et multo majores quam de jure et consuetudine Dioceseos Meneven. licuit Multiplicatis et sæpius iteratis vicibus ab iisdem subditis suis turpis lucri et proprii questus Causa exigendo et manibus propriis frequenter recipiendo in ipsorum subditorum suorum gravamen non modicum et Ecclesiæ et Officii sui Episcopalis grave scandalum pronunciamus et per p'sentes declaramus p'fatumq. Thomam Ep'um Mene-

vensem Juramenta de jure et per Statuta hujus Regni Angliæ ab omnibus ad sacros Ordines admittendis p'standa et subeunda et ab omnibus Episcopis hujus Regni Angliæ in collatione Sacrorum ordinum Clericis Ordinandis deferenda et ministranda compluribus Clericis ad sacros Ordines ab ipso Thomæ Episcopo p'deo in festo Sanctæ Trinitatis Anno Domini Mil'imo Sexcesimo nonage'mo. primo admissis non solum non detulisse sed etiam scienter et ultro quendam ipsius Thomæ Episcopi p'dicti Secretarium tempore p'dicto Librum in quo Juramenta p'dca scripta erant afferentem voce et signis prohibuisse et repulisse et sic per ipsum Thomam Episcopum Meneven. p'dictum stetisse quod juramenta p'dca tempore p'dicto a Clericis p'dcis suscepta non erant p'fatumq. Thomam Episcopum Meneven. postea (viz.) vicesimo quarto die Septembris Anno Domini mil'imo sexcesimo nonage'simo tertio complures alios Clericos absq. delatione ministracione aut susceptione Juramentorum p'dictorum ad Sacros Ordines promovisse et admisisse p'fatum tamen Thomam Episcopum p'dictum in Litteris ordinum Clericorum p'dcorum tam in festo Trinitatis p'dictæ quam vicesimo quarto die Septembris p'd Ordinatorum manu sua propria respective subscriptis et sigillo suo Episcopali respective sigillat universis notum fecisse et certa'ss'. Juramenta de jure requisita et necessaria a Clericis p'dictis ad sacros ordines temporibus respective p'dcis promotis suscepta fuisse in magnum Reipublicæ et Eccl'ie detrimentum et p'judicium p'fatumq. Thomam Epum. Meneven. in p'missis Crimen Falsi commississe et perpetrasse pronunciamus decernimus declaramus et adjudicamus per p'sentes p'fatumq. Thomam Epum. Meneven. Collationes Institutiones Sequestraco'es Relaxationes Licentias Dispensationes et alia Jurisdictionis Ecclesiasticæ acta nullis convocatis adhibitis aut quovis modo interessentibus Registrariis Reg'riorum Deputatis notariis publicis aut aliis Testibus legiimis celebrari expediri decerni et sub sigillo suo emanare fecisse clam secreto et clandestine pronunciamus decernimus et per p'sentes declaramus unde fraudibus secretis locus apertus et controversiis de juribus singlor' occasio data et via pate facta est in p'judicium et gravamen publicum Hæc et quam plurima alia Crimina enormia et excessus in processu hujus causæ sive negotii apparentia et probata Que pro his etiam insertis et pronunciatibus haberi volumus contra Sacros Canones et leges in Ecclesia Anglicana receptas et stabilitas p'fatum Thomam Epum Meneven. Fama publica differente Rei evidentia aliisq. juris et facti probationibus in grave scandalum Eccl'ie Meneven. Provinciæ nostræ Cantuariensis et disciplinæ Eccl'ie Anglicanæ et Catholicæ et bonorum omnium commississe et perpetrasse sero licet et serio convictum pronunciamus et per p'tes declaramus Idcirco Nos Thomæ Archiep'us et Iudex antedictus p'fatum Thomam Watson Sacræ Theologiæ Professorem ab omni honore dignitate et loco suo Episcopi Eccl'ie Cath'is Meneven. cum suis juribus et

* Qu. An viginti vel quinque?

pertinentiis universis et ab omni officio et administratione Episcopali et ab omni beneficio ecclesiastico deprivandum amovendum et deponendum fore de jure debere pronunciamus decernimus adjudicamus et per p'sentes declaramus et p'fatum Thomam Watson ab iisdem Honore Dignitate et loco suo Episcopi Ecclesie Meneven. p'dicti et ab omni officio et administratione Episcopali et ab omni beneficio Ecclesiastico (Justicia id poscente) deprivamus amovemus et deponimus per p'sentes p'fatumq. Thomam Watson per p'sentes movendum fore decernimus siq. per presentes monemus eiq. interdiciamus ne in posterum habitum Ordini Episcopali competentem et proprium gerere aut induere aut quibuscunq. Insigniis Episcopalibus uti p'sumat sub pena majoris Excommunicationis Sententiae in ipsum Thomam Watson infligendae p'fatumq. Thomam Watson in expensis legitimis ex parte Roberti Lucy promotoris officii nostri in hac causa sive hoc negotio factis et faciendis eidem Roberto Lucy aut procuratori suo solvendis condemnandum fore et condemnari debere ad omnem juris effectum pronunciamus decernimus et declaramus siq. condemnamus per p'sentes Taxationem vero sive moderationem expensarum p'd nobis aut successoribus n'ris reservando reservamus Hac omnia et singula p'missa pronunciamus decernimus et declaramus per hanc nostram sententiam definitivam sive hoc nostrum finale decretum quam sive quod in hac Causa sive hoc negotio ferimus et promulgamus in hiis scriptis.

“THO. CANTUAR.”

Bishop Burnet, as to this Case, says,

“ Dr. Watson was promoted by king James to the bishopric of St. David's; it was believed that he gave money for his advancement, and that, in order to the reimbursing himself, he sold most of the spiritual preferments in his gift: by the law and custom of this church, the archbishop is the only judge of a bishop, but, upon such occasions, he calls for the assistance of some of the bishops; he called for six in this cause; I was one of them; it was proved, that the bishop had collated a nephew of his to a great many of the best preferments in his gift, and that, for many years, he had taken the whole profits of these to himself, keeping his nephew very poor, and obliging him to perform no part of his duty: it was also proved, that the bishop [having] obtained leave to keep a benefice, which he held before his promotion, by a Commendam (one of the abuses, which the Popes brought in among us, from which we have not been able hitherto to free our church) he had sold both the cure, and the profits to a clergyman, for a sum of money, and had obliged himself to resign it upon demand; that is, as soon as the clergyman could, by another sum, purchase the next presentation of the patron: these things were fully proved. To these, was added a charge of many oppres-

sive fees, which being taken for benefices, that were in his gift, were not only extortion but a presumptive simony: all these he had taken himself, without making use of a register or actuary; for as he would not trust those secrets to any other, so he swallowed up the fees, both of his chancellor and register; he had also ordained many persons, without tendering them the oaths enjoined by law, and yet, in their letters of orders, he had certified under his hand and seal, that they had taken those oaths; this was what the law calls ‘Crimen falsi,’ the certifying that which he knew to be false; no exceptions lay to the witnesses, by whom these things were made out, nor did the bishop bring any proofs, on his side, to contradict their evidence; some affirmed, that he was a sober and regular man, and that he spoke often of simony with such detestation, that they could not think him capable of committing it: the bishop of Rochester withdrew from the court, on the day in which sentence was to be given; he consented to a suspension, but he did not think that a bishop could be deprived, by the archbishop: when the court sat to give judgment, the bishop resumed his privilege of poerage, and pleaded it; but he, having waved it in the House of Lords, and having gone on still submitting to the court; no regard was had to this, since a plea to the jurisdiction of the court was to be offered in the first instance, but could not be kept up to the last, and then he made use of: the bishops, that were present, agreed to a sentence of deprivation: I went further, and thought that he ought to be excommunicated. He was one of the worst men, in all respects, that ever I knew in holy orders: passionate, covetous, and false in the blackest instances; without any one virtue or good quality, to balance his many bad ones. But, as he was advanced by king James, so he stuck firm to that interest: and the party, though ashamed of him, yet were resolved to support him with great zeal: he appealed to a court of delegates; and they, about the end of the year, confirmed the archbishop's sentence. Another prosecution followed for simony, against Jones bishop of St. Asaph, in which, though the presumptions were very great, yet the evidence was not so clear, as in the former case: the bishops in Wales give almost all the benefices in their diocese; so this primitive constitution, that is still preserved among them, was scandalously abused by some wicked men, who set holy things to sale, and thereby increased the prejudices, that are but too easily received both against religion and the church.”

“ The deprived bishop of St. David's complained of the archbishop of Canterbury; first, for breach of privilege, since sentence was past upon him, though he had in court claimed privilege of parliament, to which no regard had been paid: but as he had waved his privilege in the House of Lords, it was carried, after a long debate and by no great majority, that in that case, he could not resume his privilege.

He excepted next to the archbishop's jurisdiction, and pretended that he could not judge a bishop, but in a synod of the bishops of the province, according to the rules of the primitive times: In opposition to this it was shewn, that from the ninth and tenth century downward, both popes and kings had concurred to bring this power singly into the hands of the metropolitans; that this was the constant practice in England before the Reformation; that by the provisional clause, in the act past in the 25th of Henry the 8th, that empowered 32 persons to draw a new body of church laws, all former laws or customs were to continue in force, till that new body was prepared: so that the power, the metropolitan then was possessed of, stood confirmed by that clause: it is true, during the high commission, all proceedings against bishops were brought before that court, which proceeded in a summary way, and against whose sentence no appeal lay; but after that court was taken away, a full declaration was made, by an act of parliament, for continuing the power that was lodged with the metropolitan. It was also urged, that if the bishop had any exception to the archbishop's jurisdiction, that ought to have been pleaded in the first instance, and not reserved to the conclusion of all: nor could the archbishop erect a new court, or proceed in the trial of a bishop in any other way, than in that, which was warranted by law or precedent. To all this no answer was made, but the business was kept up, and put off by many delays; it was said, the thing was new, and the House was not yet well apprized of it; and the last time, in which the debate was taken up in the House, it ended in an intimation, that it was hoped the king would not fill that see, till the House should be better satisfied in the point of the archbishop's authority: so the bishopric was not disposed of for some years: and this uncertainty put a great delay to the process against the other Welsh bishop, accused of the same crime."

The record confirms Burnet's representation, that Sprat discontinued his attendance as a member of the court, before which were had the proceedings against Watson. As to Sprat, see vol. 9, p. 362. Vol. 12, pp. 492, 1051.

Watson being a furious Jacobite, was regarded by others of that class as a sort of martyr, and the proceedings against him were impugned and defended in numerous publications; among others, were, *The Bishop of St. David's Case*, published in 1699. Letter from a Person of Quality, concerning the Archbishop's Sentence of Deprivation. The Extraordinary Case of the Bishop of St. Davids farther cleared. Summary View of the Bishop of St. Davids' Case, by Sir John Coke, L.L.D. 1701. Large Review of the Summary View, 1702; this was drawn up by Ferguson, and an abridgment of it was afterwards published.

The Bishop of St. Davids vindicated, by way of Free Conference between two Bold Britons.

The following are the accounts given of Watson, by Godwin and Browne Willis:

"1687, Jac. 2, 3. Proxime successit Thomas Watson S.T.P. aliquando e Collegio D. Joannis Evangeliste Cant. consecratus vicesimo sexto Junii, 1687. Vir eo sane nomine laudandus, quod Ecclesie Cathedrali reficiendae et exornandae operam impenderat utilissimam. Verum idem anno 1699, criminis Simoniaci reus coram Metropolitano et sex Episcopis, una assistentibus, vocabatur; et causa utrinque dicta, cum facti probationes satis validae essent ab accusantibus allatae; Augusti tertio a Metropolitano iudice, assentientibus una assessoribus (uno tantum excepto) Episcopatu, quem turpiter administraverat, privatus discessit. Verum ad forum civile appellations facta leguleiorum artibus usus, litem in longum protraxit; sed cum ubique victus abiisset, postremo ad supremum tribunal regni Procerum provocavit anno 1705, et cum ibi nihil proficeret, cum infamia profligatus ad patrimonium suum in Wilbraham Magna, non procul a Cantabrigia secessit, ibi etatem senilem misere trahens, octogenarius obiit anno 1717." Francisci Godwini primo Landavenensis dein Herefordensis Episcopi de praesulibus Angliam Commentarius, &c. pp. 588, 9. 1743.

"Thomas Watson, D. D. (fellow of St. John's College, Cambridge, and rector of Borough Green in that county) was consecrated June 26, 1687, by the archbishop of Canterbury, in the presence of the bishops of Rochester and Chester. On August 3, 1699, he was, for pretended charges of simony, deprived, having been all the time he sat here, much maligned, and not long after his election, intolerably affronted and insulted by the rabble. He is still living, and being an opulent man, has disbursed several sums in charity, and on the public, as may be seen in a book entitled, *A Large Summary View of the Articles exhibited against him, and the Proofs made thereon*, printed in the year 1702, in a voluminous quarto; which author would have the world to believe, that this bishop suffered on account of attempting to oblige his canons of St. Davids, and other his clergy, to residence; and that, had he continued here, he would have expended a great deal for the good of his church. He instances in some of his charities, viz. in his laying out above 600*l.* in repairing the decayed episcopal palace at Aberguilly, and house at Brecknock; and of his having given as much to his college at St. John's at Cambridge, to buy livings; 400*l.* for a charity at Hull; and laid out above 500*l.* in building and repairing his parsonage house and church in Cambridgeshire: into which county as I am informed, he is retired and there lives on his fortune." Willis's Survey of St. Davids, pp. 138, 139.

In the Bodleian copy of Browne Willis's work, is the following memorandum respecting

Watson: "He died 3 June, 1717, at Great Wilbraham, Cambridgeshire, and was buried very privately next night, without so much as the common service, by reason the archbishop of Canterbury had excommunicated him, for not paying his fees to his officers, which excommunication prevented his making a will; he died worth 20,000*l.* which went to his brother; on his coffin was this inscription, T. W. B. St. D. aged 80, died 3d June, 1717."

In the copy of Willis (which formerly belonged to Dr. Lyttleton, bishop of Carlisle) now in the Library of the Society of Antiquaries, is a note of bishop Lyttleton's, mentioning that Watson died about 1719.

In Masters's Memoirs of Mr. Baker of St. John's College, Cambridge, is the following passage:

"Mr. Baker's friendship for Watson seems to have got the better of his judgment, since his conduct has been very generally condemned; and what persuades me to think not without reason, is, that it appears highly probable from original papers, now in the hands of — that long after his deprivation, he even sold the turns of those livings he had purchased for and

given to St. John's College, viz. Fulborn St. Vigor, value 130*l.*; Brinkley, value 80*l.* both in Cambridgeshire; and Brand's Burton, near Beverley in Yorkshire, value 200*l.* per ann.; and of which he had reserved the nomination to himself during his life."

Mention of Watson occurs in the case of the Seven Bishops, in vol. 12, and in the second volume of Wood's *Athenæ Oxonienses*. See, also, an account of him in Salmon's *Lives of the English Bishops*.

In the *Lords' Journal* for 1704, 1705, are mentioned some proceedings respecting a "Writ of Error, brought by Thomas Watson, D. D. consecrated bishop of St. David's, and Johanna Watson, upon a judgment given against them in the Exchequer Chamber, in an Information of Intrusion, exhibited in her majesty's name, for a messuage and lands in Abergwilly, in the county of Carmarthen, part of the possessions of the bishopric of St. David's, upon the vacancy of that See." [The Episcopal Palace of St. David's is at Abergwilly.]

The Writ of Error was dismissed on account of the laches of the plaintiffs in error.

421. The Trial of Colonel NICHOLAS BAYARD, in the Province of New-York, for High-Treason: 14 WILLIAM III. A. D. 1702.

ON the 16th of January, 1702, captain John Nanfan, lieutenant governor, and the council, made the following Order:

At a Council held at Fort William Henry this 16th of January, 1702, present the Hon. John Nanfan, esq. &c.

"It is hereby ordered, that alderman John Hutchins do appear before this board to-morrow morning, and then and there produce to the board the address to his majesty, the address to the parliament, and the address to the lord Cornbury, which was signed by several of the inhabitants of this city, and soldiers of the garrison, in this house, about three weeks since, on the penalty that shall thereon ensue. By order of the council, B. COZENS."

Whereupon Mr. Hutchins appeared; and for neglecting or refusing to deliver up the said addresses, on the 19th of January was committed to the common gaol of the city of New York, for the signing of libels, said to be against the administration of the government.

On the 20th, col. Bayard, Mr. Rip van Dam, Mr. Philip French, and Mr. Thomas Wenham addressed the lieutenant governor and council as followeth; viz.

To the Hon. JOHN NANFAN, esq. Lieutenant Governor, and the Honourable Council of the Province of New York: the Humble

ADDRESS of NICHOLAS BAYARD, RIP VAN DAM, PHILIP FRENCH, and THOMAS WENHAM, on behalf of themselves, and some of the rest of the Freeholders and Inhabitants of the Province of New York.

"Humbly sheweth;

"That whereas by a Mittimus, bearing date the 19th of January, 1702, alderman Hutchins stands committed for signing libels, said to be against the administration of the government; which pretended libels we understand to be an address to his majesty, another to the parliament, and another to my lord Cornbury, whom we understand, by certain advice we have received from England, to be nominated by his majesty to succeed the late earl of Bellamont as our governor; copies of which (by the said Mittimus) we find are expected from the said Hutchins, and is part of his charge in the commitment, the copies of which originals (being in our hands or custodies) he cannot deliver. If there be no further crime to be alledged against him, we hope to make the legality of the said addresses [appear]; and pray, that the said Hutchins may be released from his imprisonment, or be admitted to bail: and your petitioners shall ever pray.

"N. B. R. v. D. P. F. T. W."

Colonel Bayard, and the other three gentlemen, having personally delivered this writing, and refusing to surrender the copies of the said

addresses, had time given them, on their parole, to appear next day. And afterwards the same day, the lieutenant governor did deliver the above address to his majesty's attorney general of this province, for his opinion in law therein, which the said attorney general gave in writing; and on the 31st day came into the council chamber, and there delivered it to the lieutenant governor; which was read, and ordered to be entered in the council book, *in hæc verba* :

" May it please your honour;

" I have well considered the humble address of Nicholas Bayard, Rip van Dam, Philip French, and Thomas Wenham, for the release of alderman Hutchins from his imprisonment, sent me by your honour yesterday; and have also weighed the several matters sworn, and otherwise taken in council before your honour, which do in any respect relate thereto; and, upon the whole, in obedience to your honour's commands, I humbly present you with my judgment and opinion in law, as follows :

" First, That neither the address or petition itself, or any matter therein contained, is criminal and illegal.

" Secondly, That the refusal of the petitioners, at the council board, to produce the copies (of certain original addresses mentioned in their petition) owned by them to be in their custody, and by their petition also, is not such a contempt to the council, or other offence against the law, for which the petitioners may legally be committed.

" Jan. 21, 1702. SA. SH. BROUGHTON."

And afterwards the said persons appeared, and continuing their refusal to surrender the said copies, notwithstanding the opinion of the attorney general, the said lieutenant governor and council issued the following warrant :

By the Hon. JOHN NANFAN, Esq. his Majesty's Governor and Commander in Chief of the Province of New York, and Territories depending thereon in America, &c. and his Majesty's Honourable Council for this Province, to ISAAC D'REYMER, Esq. High Sheriff of the City and County of New York, greeting :

" Whereas by an act of general assembly of this province, made in the year 1691, entitled, ' An Act for the quieting and settling the Disorders that have lately happened within this Province, and for establishing and securing their Majesties' present Government against the like Disorders for the future : ' it is among other things enacted, ' That whatsoever person or persons shall, by any manner of way, or upon any pretence whatsoever, endeavour by force of arms, or other ways, to disturb the peace, good, and quiet of this their majesties' government, as it is now established, shall be deemed and esteemed as rebels and traitors unto their majesties, and incur the pains, penalties and forfeitures as the laws of England have for such offences made and

' provided : ' notwithstanding which, colonel Nicholas Bayard, as has appeared by the oaths of several persons examined before us in council, by conspiracy and combination with John Hutchins, esq. lately committed by us, together with several other persons disaffected to this his majesty's government, to the manifest disturbance of the peace of the same, by divers indirect practices hath drawn in soldiers, and others, to sign scandalous libels, whereby they have endeavoured to render the past and present administration, vile and cheap in the eyes of the people : and the said col. Nicholas Bayard hath incited the people to disown the present authority, and cast off his majesty's government, as it is now established : the council have unanimously thought fit, and do resolve, That the said Nicholas Bayard be committed for high treason. These are therefore, in his majesty's name, to require and command you, immediately on your receipt hereof, to take into your custody the body of the said col. Nicholas Bayard, and him in the common gaol of this city in close custody to keep and secure, until he shall be from thence delivered by due course of law ; and for your so doing, this shall be your sufficient warrant. Given under our hands and seals at Fort William Henry in New York, in council, this 21st of January, Anno Domini 1702, and in the 13th year of the reign of our sovereign lord William 3, by the grace of God, of England, Scotland, France and Ireland king, defender of the faith.

JOHN NANFAN,
A. D. PEYSTER,
S. STAATS,
R. WALTERS,
T. WEAVER,
W. ATWOOD.

True copy examined by me,

" J. D. REIMER, Sheriff."

Which Act of Assembly, mentioned in the warrant of commitment, followeth in these words, viz.

An Act for the quieting and settling the Disorders that have lately happened in this Province, and for the establishing and securing their Majesties present Government against the like Disorders for the future.

" Forasmuch as the good and quiet, ease, profit, benefit, and advantage of the inhabitants within this province doth chiefly consist in, and altogether rely and depend upon their bearing true faith and allegiance unto their majesties crown of England, which is, and can only be, the support and defence of this province. And whereas the late hasty and inconsiderate violation of the same, by the setting up a power over their majesties' subjects, without authority from the crown of England, hath vitiated and debauched the minds of many people, &c. and hath also brought great waste, trouble, and destruction upon the good people of this province, their majesties' loyal subjects : For the prevention whereof in time to come, be

it therefore enacted and ordained by the governor and council, and representatives met in general assembly, and it is hereby published, declared, enacted, and ordained by the authority of the same, that there can be no power and authority held and exercised over their majesties' subjects in this their province and dominion, but what must be derived from their majesties, their heirs and successors. And we do hereby recognize and acknowledge, that their majesties William and Mary are, and as of right they ought to be, by the laws of the realm of England, our liege lord and lady, king and queen of England, France and Ireland, and the dominions thereunto belonging, &c. That hereby their princely persons are only invested with the right to rule this their dominion and province; and that none ought or can have power, upon any pretence whatsoever, to use or exercise any power over their subjects in this province, but by their immediate authority under their broad-seal of their realm of England, as now established.

"And be it further enacted by the authority aforesaid, that whatsoever person or persons shall, by any manner of way, or upon any pretence whatsoever, endeavour, by force of arms or otherwise, to disturb the peace, good and quiet of this their majesties' government, as it is now established, shall be deemed and esteemed as rebels and traitors unto their majesties, and incur the pains, penalties and forfeitures as the laws of England have, for such offences, made and provided."

Upon colonel Bayard's commitment, the city militia were, by beat of drum, called to arms, and a whole company daily appointed to guard the prison, for about a week following, and defaulters strictly punished; which was burthensome to the people, and occasioned great clamour; whereupon it was taken off.

The prisoners being informed, that a special commission was ordered for their speedy trial, petitioned the lieutenant governor and council, on the 6th of February, in these words:

To the Hon. JOHN NANFAN, esq. Governor, &c. and the Hon. Council, &c. The Humble PETITION of NICHOLAS BAYARD and JOHN HUTCHINS:

"Sheweth; that your petitioners are very sensible of the favour intended them by your honours, in appointing a special court for their trial; that, in consideration of their age, they might not be confined in a prison till the ordinary time for meeting of the supreme court. But the papers being at present out of their hands, which they shall have occasion for, in order to make their innocency appear, and not being likely to get them in so short a time as is prefixed for the said trial; your petitioners humbly pray, that they may not be obliged to come to trial before the usual sitting of the supreme court. And your petitioners shall ever pray, &c."

To which a verbal answer was given to col.

Bayard's son, that out of mere grace the court should be deferred for five days.

On the 19th of February the commissioners sat, and published their Commission in these words; viz.

"William the third, by the grace of God, of England, &c. To our loving subjects William Atwood, esq. Abraham D'Peyster, esq. and Robert Walters, esq. sendeth greeting. Know ye, That we have assigned you, or any two or more of you, whereof you the said William Atwood we will to be one, our justices, to enquire by the oaths of good and lawful men of the city of New York, and by such other means, ways and methods, which to you shall be the better known, by whom the truth of the matter may be the better known, on the 19th day of this instant February, of whatsoever treasons, misprisions of treasons, insurrections, rebellions, murders, felonies, manslaughters, homicides, rapes, burglaries, misprisions, confederacies, false reports, trespasses, riots, routs, unlawful assemblies, contempts, false negligences, concealments, oppressions, champarties, deceits, misdemeanors, and other misdeeds, offences, and injuries whatsoever, committed by Nich. Bayard and John Hutchins, and also the accessories of them, in the province of New York aforesaid; and by who or by whom, to who or to whom, how, when, and in what manner, and of other articles and circumstances in the premises, either or any of them concerning; and the same treasons, offences, and other the premises for this time, to hear and determine according to the laws and customs of England, and of this our province of New York in America. And we command, that on the said day, at the city-hall of the said city, you, or any two or more of you, as is aforesaid, diligently make enquiry upon the premises, and all and singular the premises hear and determine, and do accomplish those things in form aforesaid, which unto justice appertains to be done thereupon, according to the laws and customs of our kingdom of England and of our said province; saving unto us our amerciements, and other things thereof unto us belonging. Also we command our sheriff of our said city, that on the said day, on the said place, he cause to come before you, or any such two of you, as aforesaid, or more, such and so many good and lawful men of his bailiwick, by whom the truth of the matter may be the better enquired into. In testimony whereof, we have caused the great seal of our province to be hereunto affixed. Witness John Nanfan, esq. lieutenant-governor and commander in chief of the province of New York, &c. in council at Fort William Henry, the 19th day of February, in the 13th year of our reign, Anno 1701."

And proclamation being made in the usual manner, the pannel of the grand-jury was called over: those who appeared and were sworn, were Johan. d'Peyster, foreman; David Prevoost, Martin Clock, Leonard Huygen,

Barent Reynders, Johannis vander Spiegel, Johannis Outman, Hendrick Gillisen, Peter van Tillburgh, Johannis van Giesen, Abraham Keteltas, Aryen Hogelant, Wm. Jackson, John Corbitt, Johan. van Cortland, Caleb Cooper, John van Hoorn, Burger Myndero, Gerret van Hoorn, Jacobus d'Key, Abraham Kipp, Johannis van Santa.

(Jacob Boelen and Johannis Hardenbroeck did not then appear.)

Before the jurors were sworn, the counsel for the prisoner objected against some of them, for declaring before several witnesses, then ready to be produced in court, 'That if Bayard's neck was made of gold he should be hanged;' at the same time boasting, that they were of the jury; and prayed, that since that jury was summoned upon that special matter, such might not be sworn. Which the court over-ruled.

Mr. Atwood, the first commissioner, gave a long charge to the jury, aggravating the facts supposed against the prisoner, and positively asserting, that those facts were treason, not only within the words of this act of assembly, but also by the common law before the statute of the 25th of Edw. 3.

The jurors having received the charge, the court adjourned till next day.

The court being met the 20th, the indictment against colonel Bayard was delivered by the court to the grand-jury; and Mr. Weaver (appointed solicitor general for this service) attended them with the proofs, and insisted to be present with the grand-jury,* and that no person should be sent for, but whom he should name; and, that no question should be asked them, but such as he should approve of. On the other hand, John Corbitt, Caleb Cooper, John Cortland, and John d'Key insisted, that the king's counsel ought not to be present with them at their private debates; and, that they had a right to send for what persons, and ask what questions for their information, they should think needful. Whereupon Mr. Weaver did threaten them, and (to use his own expression) 'would cause them to be trounced,' taking down their names. And the grand-jury broke up without acting.

The court, in the afternoon, met according to adjournment; and the grand-jury being sent for, Mr. Weaver made complaint, that he was obstructed by some of the grand-jury, who would not acquiesce to his being present at the examination of the king's evidence, and would have other evidences sent for than what were by him produced. And thereupon Mr. Atwood did discharge the abovesaid four persons from their further service, and caused Jacob Boelen, who was absent when the others were sworn, to be sent for from his house, sworn, and added to the grand-jury; and the court adjourned till seven o'clock that evening,

* As to this, see the Case of lord Shaftsbury, vol. 8, p. 772, and the others there mentioned.

but did not meet till about midnight; when sending to know if the jury had found the bill, and being informed they were separated, he adjourned the court till next morning at eight o'clock; and in the way from the court, in passion said, 'If the grand-jury will not find a bill against colonel Bayard, I will bring an information against him of high-treason, and try him upon that.'

February 21. The court met, and the grand jury appearing in court, the indictment was brought in by the foreman, endorsed 'Billa Vera,' and signed with his name. Upon which Mr. Atwood immediately discharged the jury.

Whereupon the counsel for the prisoner informed the court, that the bill was not found by twelve jurors. And upon examination it appeared to the commissioners, that of such of the jurors who remained in court, eight of the nineteen were against finding the bill; as appears by the minutes of the court, entered by order; Jacob Boelen, Abraham Kipp, John van Hoorn, Gerret van Hoorn, Johannis van Santa, Wm. Jackson, Burger Myndero, Johan. vander Spiegel.

Which eight importuned the court, that the foreman might be brought upon his oath, and the rest sent for to witness the truth, that they only found the signing the addresses, and not the treason. To which Mr. Atwood made answer, they were no longer jurors; they had presented the bill, and the court was possessed of it; it was now a record, and there is no averment against a record.

Ordered, The prisoner come to trial on Monday next come se'nnight; to which day the court adjourned accordingly.

On Monday the 2d of March, the commissioners met according to adjournment.

Mr. Nicholl. (Counsel assigned for colonel Bayard) moved, that the indictment might be quashed, not being found by twelve men: and to prove the matter of law, offered to produce authorities; and to prove the matter of fact, offered to produce evidences in court, if either were insisted on, the grand-jury being then by subpoena in court.

Sol. Gen. What is moved in behalf of the prisoner, is most improper; forasmuch as the indictment is found, and signed by the foreman Billa Vera, there can be no averment allowed against a record brought in by the body of a grand-jury; and therefore I desire the prisoner may be sent for, and arraigned.

Mr. Nicholl. This is a matter of great weight and moment; and concerns not only the life and fortune of the prisoner and his posterity, but the right of every Englishman in the province: it is not only lawful, but highly reasonable, that an indictment for high-treason should be found by twelve men at least. By the statute 13 E. 1, W. 2, c. 13, reciting, that sheriffs feigning many times certain persons to be indicted of felonies and other trespasses, take men not culpable nor lawfully indicted, and imprison them.

Whereas they were not lawfully indicted by

twelve jurors, it is ordained, "That sheriffs, where they have power to enquire of trespasses by the king's precept, or by office, shall cause inquests, &c. to be taken by lawful men, and by twelve at least, which shall put their seals to such inquisitions." [Here it is observable, that there is twice 'legitimo modo' in a few lines.]

Coke Inst. part 2, p. 387, says, Two things are provided, or rather declared, by this act:

1. 'Per legales homines ad minus duodecim 'faciant Inquisitiones.'

Coke Inst. 1, fol. 125. The indictment is defined an accusation found by an inquest of twelve or more upon their oath.

Poulton de Pace, &c. An indictment of treason, felony, trespass, or any other offence, is an inquisition taken and made by twelve men at least.

Coke Inst. 3, fol. 30. No peer of the realm, or other subject, shall be convicted by verdict; but the said offence must be found by above four-and-twenty, that is, by twelve or above, at his indictment, &c.

11 H. 4, 9. Inquests had been taken of persons named to the justices, without due return of the sheriff; of which some outlawed before the said justices of record, some fled to sanctuary, &c. for treason, some for felony: granted, 'That henceforth no indictment be made by such persons, but by inquests of the king's lawful liege people, in such manner as was used in the time of his noble progenitors; and if any indictment be made hereafter in any point to the contrary, that the same indictment be also void, revoked, and for ever holden for none.'

Crook, Eliz. 654. Clyncard was indicted on the 8th of H. 6. The record was 'ad Scissionem Pacis, &c. per sacramentum A, B, C, D, et aliorum legalium hominum in Comitatu 'predicto presentatus existit,' &c. And it appeareth not that it was 'per Sacramentum 'duodecim;' for it was presented by a lesser number; it was clearly ill, therefore it was reversed.

Mr. Atwood. There can be no averment against a record. If you can produce any authority, that it was ever allowed to make an averment against a record, and speak to that head, you shall be heard; but to go upon this head, whether or no the grand-jurors are or can be brought to reveal the counsel which they are sworn to keep secret, cannot be allowed.

Mr. Nicholl. The grand-jury consisteth of nineteen persons, whereof eight have openly in court protested, that they found no treason.

Mr. Atwood. I have by me the oaths of two men, that the bills were found by fourteen Billa Vera; they are so endorsed, have been publicly read in court, and are of record; for which reason I nor nobody else can enquire further of it.

Mr. Nicholl. This concerns the subject's life, and your honour ought to be counsel for the prisoner; and if a misunderstanding happens by the ignorance of the jurors, so that the

bill is returned contrary to their intendment, the prisoner ought to be assisted.

Sol. Gen. Pray, shew us any authority, where an averment has been offered against a record.

Mr. Emot. May it please your honour, I am joined with Mr. Nicholl as counsel for the prisoner. The question that now seems to lie before your honour is, whether there can be any averment offered against a record? There is an act of parliament of the 11th of H. 4, wherein it is enacted, that a grand-jury shall consist 'de bonis et legalibus hominibus;' and so likewise runs the tenor of the writ of Venire; for want of such persons, the same statute does declare the indictment void. So that it is an exception to an indictment, to aver, that any of the grand-jury was an alien, which is matter of fact. How shall this averment be made, if so be there be no averment against a record? And what benefit has the prisoner of this act, unless an averment be allowed against the record of this indictment, if it should so happen, that some of the grand-jury are not so qualified as the act requires? Which seems to me sufficient reason, that an averment is the case at the bar, is good against a record.

Mr. Atwood. The statute gives the particulars that may be averred, and no others can be allowed.

Mr. Emot. It is very hard upon the subject: the court appoints the foreman of the grand-jury, and he may chance to be a person prejudiced against the prisoner, who may sign and return the bill Billa Vera, without the consent of his fellows, or a sufficient number: and because it is matter of record, shall no averment be allowed against the bill?

Mr. Atwood. A grand-jury in a certain case, on an indictment for words spoken, found Billa Vera; but as to the *malitias*, Ignoramus; which made the bill void. So in this case, if the jury, as to the fact in the indictment, had found Billa Vera, and as to treason Ignoramus, the bill had been void, and the court must have taken notice of it. But to this bill there is no endorsement but Billa Vera: the court has received and published the verdict, and therefore will proceed.

Mr. Emot. But the matter of fact only appeared to the jury; and when they understood the bill to be laid treasonable, they immediately objected against it.

Mr. Atwood. The bill is found, and appears to the court matter of record; so that you need not insist any further upon that head. A grand-jury is an inquest of office; and an inquest of office may be found by a less number than twelve. Mr. Sheriff, bring your prisoner to the bar.

Mr. Nicholl. I have something else to offer.

Mr. Atwood. Sheriff, stay a little.

Mr. Nicholl. I have a second objection in behalf of the prisoner; and it is, that the juries should have been returned by precepts under the hands and seals of the commissioners; which we understand was not.

This appears in Hale's Pleas of the Crown, pag. 134. Sir Edw. Coke's 4th page of the Institutes, title Oyer and Terminer, says the same. There is a special clause in the writ of Oyer and Terminer, which says, We have commanded our sheriff to summons, at such days and places as you shall appoint, such good and lawful men, by whom the truth may be the better known. How shall the sheriff know those days and places, but by the commissioners' precept? And how shall the truth be known, if the grand jury are permitted to have no other evidence but what are brought 'ex parte Regis'?

Sol. Gen. The grand-jury are only to enquire for the king, and to receive or send for no other evidence than what are brought for the king.

Mr. Nicholl. You may tell that to somebody else, not to me; that is contrary to their oath, which is, That they shall diligently enquire, and true presentment make.

Mr. Atwood. All the books speak of the king's evidence only, and agree, that the grand-jury may and ought to find upon probable evidence, as appears in Babington.

Mr. Emol. Sir Edw. Coke says, part 4 of the Institutes, title Oyer and Terminer, that the juries ought to be returned by precepts under the hands and seals of the commissioners. There is no distinction made between the grand-jury and the petty-jury; so that the Venires, as well for one as the other, ought to have been under the hands and seals of the commissioners.

Sol. Gen. When you had the government, Dr. Staats had a bill found against him by eight men of a jury of fifteen.

N. B. A private person opposed the assertion; but he was commanded silence.

Mr. Nicholl. I never heard of it, nor believe it to be true; but that is not to be taken for a precedent, were it true.

Mr. Atwood. Gentlemen, you seem to mistake the lord chief justice Coke, where he says, There shall be 24 peers upon the arraignment of a peer, &c. for if there be but 13 peers, and the majority agree to it, it is understood to be found by 12 of them.

There is something in that which you offer, of the precept being under the hands and seals of the commissioners in the return of the petty-jury; but this does not at all affect the grand-jury: for which reason, if you see cause to move it, time may be granted to mend that mistake. Is there nothing else you have to offer?

Mr. Nicholl. Nothing at present.

Mr. Atwood. Mr. Sheriff, bring the prisoner to the bar. (Which was done accordingly.)

Clerk of the Crown. Nicholas Bayard, hold up thy hand. You stand indicted, &c.

City and county of New York, in the Province of New York in America, Anno Regni Regis Gulielmi Tertii, nunc Angliæ, &c. Decimo Quarto.

"The jurors sworn, and charged to enquire for our sovereign lord the king upon our oaths, do present Nicholas Bayard, of the city of New York in America, esq. for that the said Nicholas Bayard, the fear of God in his heart not having, nor the duty of his allegiance weighing, but being moved and seduced by the instigation of the devil, as a rebel and traitor against the most serene, most illustrious, most clement, and most excellent prince, our sovereign lord William the 3rd, by the grace of God, of England, Scotland, France and Ireland, and of this province of New York, king, defender of the faith, &c. his, the said Nicholas Bayard, supreme, true, lawful, and undoubted sovereign lord; the cordial love, and true and due obedience, fidelity and allegiance, which every subject of our lord the king, that now is, towards him our said lord the king should bear, or of right ought to bear, withdrawing, and utterly to extinguish intending and contriving, and with all his strength purposing, designing, conspiring and endeavouring, with divers other rebels and traitors, to the jurors unknown, the government of this province of New York, under him our said sovereign lord the king, that now is of right happily and duly established, to defame, subvert, change and alter, and to disturb the peace, good and quiet of this his said majesty's government of this his said province of New York, as it is now, and hath been for several years last past established; on the 10th of December last past, and in the 13th year of the reign of our sovereign lord that now is, in the dock-yard of the said city and county of New York, and divers other times and days as well before as after, at the said ward, and elsewhere in the city and county of New York aforesaid, falsely, maliciously, devilishly, rebelliously and traitorously did compass, imagine, contrive, purpose, design, intend and endeavour to defame, subvert, change and alter, and to disturb the peace, good and quiet of this his majesty's government of New York, as it now is, and hath for several years past been established. And the same most abominable, wicked and devilish, rebellious, treasonous and traitorous contrivances, intentions, purposes and endeavours aforesaid, to fulfil, perfect, and bring to effect, he, the said Nicholas Bayard, by conspiracy as aforesaid; afterward, to wit, the said 10th day of December last past, in the year aforesaid, in the said city and county of New York aforesaid, and divers other days and times, as well before as after, falsely, maliciously, advisedly, clandestinely, rebelliously and traitorously, with force of arms, &c. did use divers indirect practices and endeavours, to procure mutiny and desertion among the soldiers in pay, belonging to his majesty's fort and garrison of Fort William Henry, in or near the said city and county of

New York aforesaid, and did draw in numbers of them, the said soldiers and others, to sign false and scandalous libels against his majesty's said government, as it is now, and hath for several years last past been established in this province: which said libels, by the procurement of the said Nicholas Bayard, as aforesaid, were signed by the said soldiers and others, and were likewise signed by him the said Nicholas Bayard; in one or more of which said libels, amongst other things highly reflecting on the last and present administration of the government under his majesty in this province, it is insinuated and declared, that his majesty's subjects within this province are, and have been for some years last past, by persons entrusted with the administration of the said government under his majesty, oppressed; and that the said government hath been, and is rendered cheap and vile in the eyes of the people, as also that the present general assembly of this province is not a lawful assembly. By which, and divers other malicious scandals in the said libels contained, he, the said Nicholas Bayard, hath incited his majesty's subjects of this province to disown the present authority, and government thereof, and to cast off their obedience to his majesty's said government, as it now is, and hath for several years last past been established, against the duty of his the said Nicholas Bayard's allegiance, against the peace of our said sovereign lord the king, that now is, his crown and dignity, as also against the form and effect of one statute or act of general assembly of this province, enacted in the year of our Lord God, 1691, entitled, 'An Act for quieting and settling the Disorders that have lately happened within this Province, and for establishing and securing their Majesties' present Government against the like Disorders for the future.'

Clerk. What say you, are you guilty, or not guilty of the indictment?

Prisoner. Not guilty. (And puts himself upon God and the country, &c.)

Prisoner. I desire I may be allowed two clerks to take the minutes of the trial.

Mr. Atwood. No: you have a solicitor allowed; he may take notes; any other will not be suffered to do it.

Prisoner. I find it was allowed my lord Russel,* and others, to employ clerks to take their trials: I pray the same liberty.

Mr. Atwood. It was allowed my lord Russel; but you would not be willing to meet with the hardships of his trial.

Sol. Gen. Perhaps the counsel will not insist upon the mistake of the *venire*.

Mr. Nicholl. We shall not insist on that.

Mr. Atwood. But we will have it mended. (And thereupon ordered a precept to be directed to the sheriff, under the hands and seals of the

commissioners, to return a petty jury the 6th instant; to which day the court adjourned.)

March 6th. The commissioners met. The prisoner was brought to the bar, and the petty-jury being called, consisting of 80, some of them did not appear: whereupon it was ordered, that the defaulters of the petty-jury be amerced 10*l.* each, if they did not appear in the afternoon, or shew a reasonable cause; and the court adjourned till three in the afternoon, when they met again.

S. l. Gen. moved, That the court might be adjourned till to-morrow morning, the king's evidence being disguised with druck; which was granted.

Mr. Nicholl moved, That it would be a favour to the prisoner to put off the trial till Monday.

Mr. Atwood. No: I will take care to do my duty, whatever other people do. We shall not give Mr. Veasy [Mr. Veasy was then minister at New York] the opportunity of another sermon against us.

Mr. Atwood. I observe Mr. Jamison to have pen and ink: Mr. Jamison, you are not permitted to write.

Jamison. I only take minutes for my private satisfaction.

Mr. Atwood. It is true, an attorney or practitioner of the court may take notes for his private use; but you are no longer an attorney of this court, nor shall you be permitted to practise, until you purge yourself of having signed the addresses. Put up your pen and ink.

March 7th. The commissioners met, and the attorney general was called, but did not appear.

Mr. Atwood. Mr. Secretary, let a minute be made, that it appears to this court, that the attorney general hath neglected his majesty's service. It is no wonder the people here contemn his majesty's authority, since the attorney general, though commanded to prosecute by the government, hath neglected to do the same, and hath given a judgment and opinion directly contrary to the lieutenant governor and council.

Mr. Atwood. Sheriff, fetch the prisoner. (Which was done.)

Mr. Secretary. Before we proceed, read the petition, which was given me this morning by colonel Bayard's son. (Which was read in *hæc verba*.)

To the Hon. WILLIAM ATWOOD, Esq. ABRAHAM D'PEYSTER, esq. and ROBERT WALTERS, Esq. Judges of this Special Court. The humble PETITION of NICHOLAS BAYARD,

"Sheweth; That your petitioner's counsel have informed him, that on yesterday they prayed, in the petitioner's behalf, the favour of this court, to prove before your honour, by the oaths of the major part of the grand-jury, there also subpoenaed in court, that the indictment brought in for high-treason against your petitioner by capt. Johannes D'Peyster (as being foreman of the said grand jury) was not

* As to what was allowed to lord Russel, see vol. 9, p. 584, and see a note to vol. 5, p. 446.

found nor agreed to by any twelve of that jury, though the most part of them (as is evidently known) are your petitioner's mortal enemies, for no other cause, but on account of the unhappy divisions within this province. Which said prayer of your petitioner's counsel (as he is also informed) your honours have been pleased to over-rule, as not being practicable by the common form of the court's proceedings. But, may it please your honours, this being a matter of that moment, whereof hardly a precedent is to be found, as that a foreman shall so far impose upon a whole grand-jury as to bring in an indictment *Billa Vera*, which the said inquest did not find nor agree unto, neither in matter nor form: Your petitioner therefore most humbly prays, That your honours will be pleased to take the premisses into your honours' serious consideration, and to grant your petitioner that favour as to have all the said nineteen of that grand inquest sworn before your honours to discover the truth, and to afford your petitioner such relief therein, as to your honours shall seem most just and expedient. But if it should so happen (as your petitioner does not hope) that your honours do not think fit to grant this your petitioner's most humble request, your petitioner further prays leave to acquaint your honours with the excessive and almost unparalleled hardships your petitioner, in this very trial, labours under. In the first place, for that the grand-jury, although your petitioner had often prayed Mr. Sheriff, that he might have the favour and justice of being tried by Englishmen, and of English extraction, of the best character for knowledge, integrity, justice, conscience, and estates; yet, notwithstanding your petitioner had not one allowed him of English, but all of them of Dutch extraction and education, and several of them ignorant to that degree, that they can neither write nor read, nor so much as understand the English language, though sufficient numbers of Englishmen of very good ability, understanding, integrity, conscience, and estate were to be had in the bailiwick.

"And, for a second instance of your petitioner's hardships, he finds now also a petty-jury impaneled to serve upon his trial, all of them, except five or six, in like manner of Dutch extraction and education, most of them handicraft and labouring men; very few that ever were of any juries whatsoever, and extreme ignorant in the English language.

"Your petitioner therefore most humbly prays, that your honours will be pleased to take the premisses into your honours' favourable and serious consideration, and to afford your petitioner such relief therein as to your honours in justice and equity shall seem fit. And, as in duty bound, &c. N. BAYARD."

Mr. Atwood. Let a minute be entered, that the petition was read; and, that it does appear to the court, that the bill was found by more than twelve of the grand-jury.

Mr. Atwood. Colonel Bayard, the laws do

indulge you with counsel: Did you advise with them concerning this petition?

Bayard. No, I did not.

Mr. Atwood. It were better you had; for you have acted very indiscreetly in this matter, to arraign the justice of the grand-jury.

[The jury being called appeared.]

Timon van Bursert. (Prisoner accepts.)

Sol. Gen. I challenge him for the king.

Mr. Emot. You are not to challenge, Mr. Solicitor, without cause, by the statute 23 Edw. 1.

Sol. Gen. By the common law the king could challenge without cause, but, by the statute, that was taken away; and in the late trial of Peter Cook,* it is said by lord chief justice Treby, That the king should shew cause, if not enough on the pannel to serve, but not else.

Mr. Atwood. It is a thing so plain, I wonder you will insist on it.

Mr. Nicholl. We say the king should shew cause, but do not say when.

Gysber van Inbrough. (Prisoner accepts.)

Sol. Gen. Challenges for the king.

Gerryt Uncle. (Prisoner accepts.)

Sol. Gen. Challenges, &c.

William Janeway. (Prisoner accepts.)

Sol. Gen. Challenges, &c.

Isaac Stoutenburgh. (Prisoner accepts.)

Sol. Gen. I do not challenge him, but desire he may be sworn upon a Voire Dire, whether any person hath been with him on behalf of the prisoner, to desire him to be favourable to the prisoner on this trial. [Who was sworn upon a Voire Dire, and afterwards for the trial.]

Richard Sactet.

Prisoner. I make no challenge.

Sol. Gen. I desire to know whether I may not first have him sworn upon a Voire Dire, and afterwards challenge him.

Mr. Atwood. No; you must challenge peremptorily first.

Prisoner. I pray the Solicitor may first make all his challenges, and only leave me a pannel of forty-eight jurors.

Mr. Atwood. No, that must not be.

[Memorandum.] The rest of the eighty jurors in the pannel were in like manner challenged by the prisoner or solicitor, till the number of twelve were sworn, viz. one of them an alien, two no freeholders, and all the rest Dutchmen, or of Dutch extraction, born here, very ignorant of the English language, and of mean capacities to an extreme degree.]

The names of the petty jurors were as follows: viz.

Isaac Stoutenburgh, Jacob van der Spiegel, Andries Marshalk, Gerret Viele, Thomas Saunders, Jacob Cornelisse, Barent Kool, Goert Olpherto, Samuel Beckman, Cornelis Clopper, Conrael Teneyck, Jacobus Goelet.

* Vol. 13, p. 318.

Mr. Solicitor made an introductory discourse and harangue of about an hour long, and had some sheets of paper in his hand, out of which he read several scurrilous and false reflections on the English inhabitants of this colony with the French, and principal Dutch, having retrospection for many years past, only designed to incense and inflame the jury, charging the prisoner to be the head of a faction, a malignant party, who had endeavoured to introduce popery and slavery, disturbers of our Israel, as they had been that of capt. Leyster's government, which (he said) was now justified at home to be legal: that the said party was a nest of pirates, betrayers of our prince and his laws, a parcel of banditti, who offered the late earl of Bellamont a reward of ten thousand pounds to connive at piracies, and one thousand pounds to himself to solicit it: that some mean and broken merchants in London had made complaints in their behalf to the lords of trade and plantations, and to the parliament, against the said earl; but that the said earl's proceedings were approved of; and used scandalous reflections on Mr. Veasy, minister of Trinity church, and against col. Smith, the first member of council, though nothing relating to this trial, and owned himself of the Leysterian party, and that he would stand and fall by it, &c.

Then called his witnesses; who gave their evidences in the following words, as they were taken in open court, and since agreed unto by all of them respectively, as followeth:

Samuel Clous sworn, saith,

Gentlemen, when I come to speak of the addresses, I must pray you to take notice, that I can speak positively to but very few things that is in them: what I say is to the best of my remembrance and understanding; for I may be mistaken in both.

It was about a fortnight or three weeks before colonel Bayard's commitment, that I happened to come to his house about some business, not at all relating to this matter; concerning which as we were talking, colonel Bayard asked me, if I had seen the addresses? I answered, No. He then shewed me three addresses; the first was to my lord Cornbury; the persons addressing in it called themselves inhabitants of New-York, and others distant from it: and because some of them could not perhaps be present at his lordships' arrival here, did, by way of address, congratulate his lordship into this government, wishing him all health and prosperity here, and that the name of party might be banished from among us. After I had read it, colonel Bayard asked me, if I had any thing to say against it? I answered, No, and then signed it. The other two addresses were, one to the king, and the other to the House of Commons, or to the parliament (I am not positive which): as I had read them, I remember I made this observation in myself, that they contained nearly both the same things; and in them, or one of them, to the best of my remembrance, were contained these

things, the persons addressing, called themselves Englishmen and others, who, though foreigners, were entitled to the privileges of Englishmen here. It speaks concerning the late revolution here, of which I have but a confused idea, and can remember nothing particular: afterwards it speaks concerning my lord Bellamont's administration; in several articles, of which I can remember but one, which is, that the hottest and ignorantest of the people were put into places of trust. Then it speaks concerning the late assembly here, and tells you, that after this assembly had chosen a speaker, some of the representatives were informed that he was an alien; upon which they made a motion to the house, that that matter might be enquired into; but that motion being refused, one half of the representatives, or ten of them, left the house; notwithstanding which, the remaining part of the representatives, with some others they took in, did proceed to make acts: In one of which acts they gave a sum of money to the lieutenant-governor, to tempt him to pass these acts; and likewise a sum to the chief-justice of this province, to find law and form for their proceedings; and, that these things tended to the rendering the government vile and cheap in the eyes of the people.

Sol. Gen. What names do you remember you saw to the addresses?

Clous. I saw several names there; but whether to all three, or two of them, or only to that of my lord Cornbury, I cannot say; but I did, to the best of my remembrance, see the names of Rip van Dam, Matthew Ling, Charles Wooley, Robert Livingstone, and Mr. Anderson; but I am not certain whether I saw Mr. Jamison's name there or no. When I had read them, I told colonel Bayard, they contained things done before my time, and I did not therefore think it proper for me to sign them; upon which he replied, Then do not sign them.

Sol. Gen. I shall read what you said before the council.

Clous. Do so, if you please.

Sol. Gen. Do not you remember that it was said, that my lord Bellamont had put the most ingenious and honestest men of the province out of all places of trust?

Clous. No, I cannot remember that.

Sol. Gen. I think you said so before the council.

Clous. Perhaps I might say something like it when I was before the council, though I do not believe there is any essential difference between what I now say, and what I said to the council; yet if there be, I hope what I then said will not be taken to my prejudice: I was then sent for by the governor's letters, which seemed to import, that he had business with me of a far different nature than to examine me about this matter; so that I was then in a surprize.

Sol. Gen. But you believe what you then spoke was true?

Clous. Without doubt; and I hope Mr.

Cosens took care truly to write down what I then delivered; but, whether he did express my meaning right or no, I know not; for I did not look over his notes till the day I saw them at your chamber.

Sol. Gen. Was not the assembly called an illegal assembly; and, that they had made acts prejudicial to the country?

Clows. No, I do not remember that.

Sol. Gen. Was it not said that the scum of the people were put into all places of trust?

Clows. Perhaps I might before the council use the word 'scum;' but I now think it was, that the 'hottest' and 'ignorantest' were put into places of trust.

Sol. Gen. Mr. Clows, pray tell us, what was the reason why you did not sign the other two addresses?

Clows. I think I am not at this time obliged to tell that, being it does not at all affect the matter.

Mr. Atwood. Yes, but it does; you must tell us.

Clows. One of the chief reasons was, because I then thought, that the saying the assembly had given a gift to the lieutenant-governor, to tempt him to pass their acts, was a reflection upon the lieutenant-governor; but it is my judgment now, that it was no reflection at all upon him.

Sol. Gen. How! and do not you think so now?

Mr. Atwood. He only speaks it as his judgment.

Sol. Gen. Do not you remember, that the assembly was called 'The Pretended Assembly?'—*Clows.* No.

Sol. Gen. Do not you remember it was said, 'their illegal proceedings?' Do not you remember the word 'illegal'?

Clows. No, I cannot remember that; and I did desire you, at your chamber, to put that word out of the clerk's notes.

Col. Bayard. Did I ever ask you to sign them?—*Clows.* No, you did not; you was so far from doing that, that you rather persuaded me not to sign them; and so did madam Bayard, who was then in the room.

Mr. Nicholl. Do you remember any thing of the word 'oppression' in the address?

Clows. No, I do not remember that word.

Sol. Gen. That the king's subjects were oppressed here?

Mr. Nicholl. Was the assembly called an Unlawful Assembly?

Clows. No, gentlemen; I can speak positively to but few of these things; what I say is, to the best of my remembrance and understanding.

Peter Odyre, a Frenchman, sworn; and for that he could speak no English, *Mr. Briesack,* Chaplain to the Garrison, was sworn to be his Interpreter.

Sol. Gen. What do you know of the papers that were at col. Bayard's? and, did you sign them? or, who desired you so to do?

Odyre. Going by colonel Bayard's house, one Mr. Bodinot told me, I must step in to col. Bayard's, and sign an address to the king; and as I was going in, I met col. Bayard coming forth of his house; and going in, I saw the addresses lying on the table.

Sol. Gen. Did colonel Bayard then persuade you to sign them? or, did he tell you it was for your good to sign them?

Odyre. Colonel Bayard then told me, I might sign if I would, or that I might not; and the colonel also told me it was for the good of the country; and that, if I was willing, I might sign them; if not, I might let them alone; and then went away.

Sol. Gen. I will now prove the addresses signed at the coffee-house, and that col. Bayard attended there for that purpose.

W. Richardson, Inhabitant and Housekeeper in the City, sworn.

Sol. Gen. What do you know, Mr. Richardson, concerning the signing the papers at the coffee-house?

Richardson. One day drinking at one Spencer's, I was desired to go to the coffee-house, which I did; and, when there, I saw a great many people, I believe near an hundred; and coming above stairs, I saw papers on the table, which were called 'Addresses,' which I signed with others; and I saw, among others, colonel Bayard there; but he seemed to be no more acting or concerned than any other.

Mr. Atwood. You are very forgetful of what you swore before the governor and council; but, to put you in mind of somewhat of it, did nobody tell you what papers were to be signed?—*Richardson.* Nobody at all.

Sol. Gen. How many papers did you sign?

Richardson. I signed three, but did not know what they were, but was told they were addresses to the king, and my lord Cornbury, and the parliament, but did not read any of them; but, I think, one of them complained, that the people lay under some hardships here.

Sol. Gen. You declared much more before the council.

Richardson. I was then called suddenly before the council, and was surprized.

John Bashford sworn.

Sol. Gen. Mr. Bashford, tell the court and jury what you know concerning the papers at the coffee-house.

Bashford. I was at the coffee-house; where I saw the papers or addresses, but do not know what they were or contained; and I signed four or five papers there, but did not stay half a quarter of an hour. When I was there, I saw colonel Bayard amongst many others in the room, but did not see his name, as I remember, to any of the papers.

N. B. These five papers were the three Addresses and the two Duplicatae.

Mr. Atwood. These witnesses are very unwilling, or very forgetful, having given a much

different account of things upon their oaths before the governor and council.

Bashford. I have now had time to recollect myself, but was then under a surprize, not knowing what I was sent for.

Michael Christian sworn.

Mr. Atwood. Mr. Christian, what do you know concerning the papers or addresses, signed at the coffee-house?

Christian. I remember, some time since, about Christmas I believe, I was at the coffee-house, where I saw the addresses with many other people, but cannot tell how many.

Mr. Atwood. Do you believe there were more than twenty?

Christian. No, I believe there were not. I found three addresses there, and signed them all, but the substance thereof I cannot now remember; it is a good while since, and therefore I cannot speak positively to it. I remember, a question was asked me at the council, whether there were any complaints in the addresses that the soldiers wanted their pay? I believe I might then answer something about it, but I do not know any such thing in the addresses, either of the soldiers or their pay. I remember, that colonel Bayard was then at the coffee-house when I signed the addresses, but do not remember that any body desired me to sign.

Mr. Atwood. How many hands, Mr. Christian, did you see to the addresses?

Christian. I cannot tell how many, but remember colonel Bayard amongst others was there; but he never asked me to sign either of the addresses; nor can I remember that there was any thing concerning either the soldiers or their pay in the addresses.

Mr. Atwood. Certainly these gentlemen are very unwilling evidences: Mr. Christian is a gentleman of good learning, and it is strange that he should be so forgetful, that he cannot remember what was given in on his oath before the governor and council: he has either a weak or a treacherous memory.

Hugh Gray sworn.

Sol. Gen. Mr. Gray, what do you know concerning the signing of those papers at the coffee-house?

Gray. About December last, being at the coffee-house, I met there one Mr. Scot, who asked me to go up into the upper room, which I accordingly did; and when there, I saw on a table some papers, which afterwards I understood were addresses to the king, parliament, and lord Cornbury. Somebody asked me to sign them, which I did accordingly, but do not know who it was. I remember col. Bayard was there amongst others, smoking a pipe of tobacco: I believe there might then be about ten hands to the papers, and about five in the room; that I read all the addresses, but cannot now remember the contents of them.

Mr. Atwood. Mr. Gray, do you remember there were any complaints against the government in those addresses?—*Gray.* No.

Mrs. Hannah Hutchins sworn.

Sol. Gen. Now, may it please your honours, I will prove the papers signed at another place.

Mr. Atwood. Mrs. Hutchins, what do you know concerning these papers brought to your house?

Mrs. Hutchins. About Christmas last col. Bayard brought some papers to my house, and left them with me, but did not stay at all, but bid me shew them to my husband, who was then at church. These papers remained at my house about three days, and then I delivered them to a negro, who was sent for them, but do not remember whose negro it was: col. Bayard was not at our house while the papers lay there.

Sol. Gen. Now I shall proceed to prove what sort of people were drawn in to sign these papers.

John Read sworn.

Mr. Atwood. What do you remember concerning any addresses or papers at the house of alderman Hutchins?

Read. Being on the 26th of December at Mr. Hutchins's house, I there saw some papers, which one Mr. Burroughs, then present, asked me to sign, telling me they were addresses to the king, parliament, and lord Cornbury, made for the good of the country, and which were lying on the bed there; and thereupon I signed them, but did not read them: I did not see col. Bayard there, but believe I saw his name to the papers. I saw a great number of names subscribed to the papers, as near as I can judge, about 200.

Sol. Gen. Of what age are you?

Read. About 17 years of age.

Edward Marshal sworn.

Mr. Atwood. Where did you see these papers? and what do you know of them?

Marshal. Going one day, about Christmas, to the house of Mr. Hutchins, to get a witness to a letter of attorney, I saw there five addresses, which I signed; one was to the king, another to the parliament, and another to the lord Cornbury, congratulating his arrival: I read some of them, but found nothing in any of them that reflected upon the governor: there was some complaint of the speaker of the assembly being an alien. Looking on the names of the subscribers, I saw the name of Edward Marshal before I had signed, but I do not know but there may be more Edward Marshals than one in the province. I did not see col. Bayard at the house, nor his name to the papers.

John Buckley sworn.

Mr. Atwood. What do you know concerning any papers at the house of Mr. Hutchins?

Buckley. Coming home from the fort, and passing by Mr. Hutchins's house, I was asked to walk in by Mr. Hutchins, which I did; and being come into the upper room, I saw some papers there which were called addresses; but I did not read any of them, but that to my lord

Corbury, which, as I understood, was a compliment and congratulation to him at his arrival here. Mr. Hutchins then asked me to sign it, but I refused, because being a lieutenant in the garrison, I was unwilling to do any such thing before any of my elder officers had done it. But I did not see col. Bayard, nor his name there.

Francis Cherman sworn.

Mr. *Atwood*. Give an account what you know concerning any papers or addresses at the house of alderman Hutchins.

Cherman. Coming a while ago to Mr. Hutchins's house, and going up stairs, I saw certain papers there, and some people: Mr. Hutchins asked me to sign those papers, telling me they were addresses to the king and my lord Cornbury; that they were for the good of the country and the English; and I expected by it to be made free of the city, and signed therefore; but did not see col. Bayard there, nor do not remember the contents of the papers.

One *Button* sworn.

Mr. *Atwood*. What do you know concerning the papers, &c.?

Button. Hearing by some of my fellow-soldiers that there were some papers or addresses at capt. Hutchins's, I was willing to go and see what they were; and coming to the house, there I found five papers,* and signed them all five, but do not remember to whom they were directed. Capt. Hutchins was there, but said nothing at all to me about the papers, or signing them; nor can I remember whether they were in paper or parchment. I believe there were then about thirty names subscribed, but saw neither col. Bayard nor his name there.

Robert Crannel sworn.

Mr. *Atwood*. What do you know, &c.?

Crannel. Some time since I came to Mr. Hutchins's, and there found five addresses: I read that to my lord Cornbury, and some of the two others to the king and parliament: in one of them, to the best of my remembrance, was contained a complaint, that the people of this province lay under more hardships than formerly, and that the speaker of the assembly of this province was an alien. I saw col. Bayard's name to that to my lord Cornbury, but am not acquainted with his hand-writing at all. After I had read some part, and been told what the rest of the papers were, I signed them all five, but nobody desired or persuaded me to do it.

Mr. *Atwood*. Your evidence is not so full as when you gave in your information on oath before the council.

Crannel. But it is; and I know nothing more.

* The three addresses, and the duplicates of two of them.

One *Griggs* sworn.

Mr. *Atwood*. What do you know, &c.?

Griggs. I was desired by one Bovell, a soldier in the garrison, to go to Mr. Hutchins's house, and sign some papers: I was told, and believed, it was to make me free of the city: thereupon I went to Mr. Hutchins's, and there signed them, but did not see col. Bayard there.

One *Garnet* sworn.

Mr. *Atwood*. Tell the court what you know, &c.

Garnet. A great many of the soldiers of the garrison signed, and they expected thereby to be made free of the city, many of them being tradesmen.

One *Fleming* sworn.

Mr. *Atwood*. What do you know, &c.?

Fleming. Coming some time since to the house of Mr. Hutchins, I there saw some rolls opened, with a great many names thereto, but did not see any other writing: to this I put my name, and also then put down two or three names for others, at their request, they having first put their marks.* I and the others expected by this to be made free of the city. I believe out of 160 men now belonging to the fort, or thereabouts, there may be about 30 that signed.

One *Bovell* sworn.

Mr. *Atwood*. What do you know, &c.?

Bovell. Coming to capt. Hutchins's, I was shewn some papers, which I was told were addresses, to which I put my mark, without being desired by any body; I cannot write nor read. When I had set my mark, Mr. Hutchins told me, that if any of my fellow-soldiers would come and sign also, they might; if not, they might let it alone. By this signing I expected to be made free of the city, but not from being a soldier; but never heard capt. Hutchins say so.

Sol. Gen. I have now no more witnesses against the prisoner. Here is a paper signed by him; I desire the clerk of the council may be sworn to prove the same.

Mr. *Cosens*, the Clerk of the Council, sworn.

Col. *Bayard*. I own that paper: it is a petition to the lieutenant governor and council in behalf of alderman Hutchins, then in prison; owning, with Mr. French, Mr. Wenham, and Mr. Van Dam, that the copies of three addresses to the king, the parliament, and the lord Cornbury, were in our hands.

Then the Petition was read, and was the same as is entered in p. 471.

After this, the Act of Assembly, on which the mittimus is grounded, was read; and after that the commission to the lord Bellamont at large, and the lieutenant governor's commission.

* After the addresses were full, they signed on the backside.

Sol. Gen. I desire Mr. Emot may be sworn, whether he did not give advice to a certain person about that clause in the address to the lieutenant governor in favour of alderman Hutchins, viz. That the lord Cornbury succeeded the earl of Bellamont as governor in New-York?

Mr. Emot was commanded by Mr. Atwood to be sworn; and being sworn, said, I told Mr. French these words in the said address did not run current, and might give ground of exception to some who would be apt to strain every word to the prisoner's disadvantage. To which Mr. French replied, they had drawn the addresses themselves, and believed it was well enough.

Sol. Gen. I have now proved by the witnesses those false and scandalous libels set forth in the indictment, whereby the good, peace and quiet of the government has been disturbed, which by this Act of Assembly is high treason. I have likewise proved, that the soldiers were drawn in to sign those scandalous libels, and that some did sign blank rolls, which was listing of soldiers, and is treason. By these words in the petition to lieutenant governor and council, viz. 'Who we understand, by certain advice we have received from England, to be nominated by his majesty to succeed the late earl of Bellamont as our governor,' is a disowning and casting off the present authority, and his majesty's government.

Mr. Nicholl. Your honour and the jury will please to take notice, that the indictment consists of divers heads; as, that the prisoner did compass, imagine, contrive, propose and design to defame, subvert, &c. the peace, good and quiet of this his majesty's government.

That he used divers indirect practices and endeavours to procure mutiny and sedition among the soldiers.

That he drew in numbers of them, the said soldiers and others, to sign false and scandalous libels; and that he had signed them himself.

That in these libels it is declared, that the subjects in this province are and have been for many years last past, by those entrusted in the administration of the government, oppressed; and that the government hath been, and is rendered cheap and vile in the eyes of the people; as also, that the general assembly of this province is not a lawful assembly: by which means, &c. he hath incited his majesty's subjects to cast off their obedience to his majesty's said government.

The prisoner is not directly charged here with any fact, except his own signing the said libels, but for endeavours; the rest are forced conclusions and strained inferences drawn from thence. It is not alleged, that the peace of the government hath been disturbed, or that any mutiny or sedition hath been amongst the soldiers, or that any one of his majesty's subjects hath cast off his obedience to his majesty's said government. By the course of the evidence, it appears there was an address to the

king, an address to the House of Commons, and an address to my lord Cornbury, and a petition or address to the lieutenant governor and council; but all the evidence is very lame and weak, as to the three first, if we should admit the making or signing of them to be any fault or crime, more especially if the same should amount to treason: for by none of the evidence it does appear, that those addresses signed at the coffee-house were the same addresses which were at col. Bayard's; or that the addresses at ald. Hutchins's were the same which were at the coffee-house, or the same which were at col. Bayard's: there is no proof that the prisoner signed these addresses: here is not so much as the likeness or comparison of hands produced, alleged, or proved; though if it were, that would not do. In the great Trial of the Bishops, Mr. Pollexfen there affirms, (See vol. 12, p. 297), That comparison of hands is not good in a criminal case; and offers the lady Car's case in Siderfin's Reports, p. 418, 419, where it is so adjudged.

But I shall not dwell upon the evidence; it is certainly the right of the subject to petition the king, whenever he conceives himself aggrieved. In the Bishops Trial, (vol. 12, p. 371), Mr. Pollexfen says, I never thought it, nor hath it since been thought by any body else, to be a crime to petition the king. Serj. Levinz affirms, (vol. 12, p. 392), the subjects have a right of petitioning the king in all their grievances. So say all our books of law; so says the statute of the 13th of Charles 2. they may petition. Sir Thomas Powys, then attorney-general, (vol. 12, p. 400), acknowledges access to the king by petition is open to every body; the most inferior person is allowed to petition the king. Mr. Justice Holloway (vol. 12, p. 406), says, It is the birthright of the subject to petition the king. If it is the birthright of the subject to petition the king, to procure or draw in men to do what is their birthright to do can never amount to a crime.

Mr. Atwood. I do not say petitioning the king is a crime, but it may be to petition the House of Commons in the plantations, where the king governs by prerogative.

Mr. Nicholl. I cannot think it is a crime for the subjects of the plantations to petition the House of Commons; it is every day's practice: consult the votes in every session, you will find many addresses, petitions, and complaints from the subjects of the plantations: It seems to be the right of the subjects to petition the House of Commons. The statute of the 13th of Charles the 2d, c. 5, restrains the common law; by that it plainly appears to be the right of the subject to petition the House of Commons, or the king. The proviso in that act says, 'That neither that act, nor any thing therein contained, shall be construed to extend or hinder any person or persons, not exceeding the number of ten, to present any public or private grievance or complaint to any member of the House of Commons after his election, or to the king's majesty.' The act of recognition

primo William and Mary, declaring the rights and liberties of the subjects, and settling the succession of the crown, thereby it is enacted, amongst other things, 'that it is the right of the subject to petition the king; and all commitments and prosecutions for such petitioning are illegal.' And they do claim, demand and insist, upon all and singular the premisses, as their undoubted rights and liberties; and that no declaration, judgment, doings or proceedings to the prejudice of the people, in any the said premisses, ought in any wise hereafter to be drawn into consequence or example. Here is no grant of any new privilege, but a claim and acknowledgment of an ancient right; and petitions to the parliament are as ancient as parliaments themselves. If the subjects of the plantations may not petition and complain to their prince, they are in a worse condition than slaves. The cries of the oppressions in the plantations have gone up to heaven, and are again come down upon the earth, and have inspired and moved the king and parliament of England to make a law to check the exorbitant actions of governors in the plantations, and make them accountable in England for their miscarriages abroad; which can never be discovered to the king but by petition. The statute is in these words:

AN ACT TO PUNISH GOVERNORS OF PLANTATIONS, IN THIS KINGDOM, FOR CRIMES BY THEM COMMITTED IN THE PLANTATIONS.

"Whereas a due punishment is not provided for several crimes and offences committed out of this his majesty's realm of England, whereof divers governors, lieutenant-governors; deputy-governors, or commanders in chief of plantations, and colonels within his majesty's dominions beyond the seas, have taken advantage, and have not been deterred from oppressing his majesty's subjects within their respective governments and commands, nor from committing several other great crimes and offences; not deeming themselves punishable for the same here, nor accountable for such their crimes and offences to any person within their respective governments and commands: For remedy whereof, Be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in parliament assembled, and by authority of the same, That if any governor or commander in chief of any plantation or colony within his majesty's dominions beyond the seas, shall, after the first day of August, 1700, be guilty of oppressing any of his majesty's subjects beyond the seas, within their respective governments or commands, or shall be guilty of any other crime or offence, contrary to the laws of this realm, or in force within their respective governments and commands, the same shall be enquired of, heard and determined in his majesty's court of King's-bench here in England, before such commis-

sioners, and in such county of this realm, as shall be assigned by his majesty's commission, and by good and lawful men of the same county; and that such punishments shall be inflicted on such offenders, as are usually inflicted for offences of the like nature committed here in England."

This prosecution seems to be made to frustrate and evade this act of parliament. The subject is oppressed, or conceives himself to be so, and complains of this oppression; this complaining is made treason! Here is a strange and fatal dilemma on the subjects of the plantations. They must either suffer their oppressions, or be hanged for traitors if they complain!

What relates to the Act of Assembly of this country, it can by no natural or legal construction be extended to make the prisoner culpable. It is plain by the whole purport of the act, that it has made no new treason; it only recognizes the king and queen; and enacts, That those who shall do any thing destructive to that establishment, by force of arms or otherwise, shall be rebels and traitors; which they would be without this act. If this address and petition had been to the French king, the thing had been of another nature. By the same construction, every petty battery, or other little trespass, may be a treason.

The petition of col. Bayard and the other three, is so far from disowning the government, that it is a direct acknowledging of the same. The direction of the petition is, to the lieutenant governor, and the council: The expression "That they have advice that the lord Cornbury is to succeed the earl of Bellamont" can with no justice or common sense be construed to be a disowning and casting off of the government. I think it will hardly be affirmed, That the council succeeded the earl of Bellamont, and capt. Naulan* the council; if so, after the earl of Bellamont, who was captain general? We had seven captains-general; which is an absurdity, I suppose, none will allege. A familiar example will demonstrate the weakness and falsity of this construction. If a captain of a company be killed or absent, the lieutenant or next officer has the full command of the company, as the captain had, or could have; but I think no man will say he succeeds the captain, or that when another captain is appointed he succeeds that lieutenant or other officer. So that I cannot think there is any fact or crime alleged or proved against the prisoner, to charge him with this high crime of treason, or indeed with any other crime whatsoever.

Mr. Emot. By your honours' permission, I am of counsel for col. Bayard, the prisoner at the bar: but by reason I am unwilling to spend too much of your time, this trial already having been very long; and Mr. Nicholl, who is also

* Sometime after the earl of Bellamont's death, capt Naulan, the lieutenant-governor, was at Barbadoes.

of the counsel on the same side, having amongst other things made it very evident, that for the subjects to petition his majesty, is their ancient and indubitable right; I shall therefore make it my business only, as near as I can, to demonstrate to this court and jury, that had the king's counsel made ample proof that all the matters of fact alleged in the indictment, as the signing the addresses, and other things therein contained, were true; yet, in point of law, they cannot amount to that grand crime of high treason.

In order to this, I shall, with as much brevity as I can, examine into, and put your honours in mind, and withal inform the gentlemen of the jury, what the law of England (by which we are or ought to be governed here) hath been for near the space of four hundred years last past, relating to this grand crime of high-treason; whereby it will manifestly appear, how cautious the parliaments of England have been in making and increasing the laws to take away men's lives, and particularly for high treason. And I shall begin with the statute of the 25th of Edw. 3, a statute to which the greatest regard has been paid of any act of parliament whatsoever, unless *Magna Charta*, as hereafter I shall briefly shew.

I must also observe to your honours, That before the making of this act of parliament of the 25th of Edw. 3, which was in Anno 1350, and which was the very first act relating to treasons, so many things were charged as high treason by the common law, and there were so many ambiguities and diversities of opinions, that both history and our books of the law sufficiently inform us, scarce any man knew how to behave himself. But now, by this statute, the particulars and species of this grand crime are reckoned up, and all others excluded, till declared by parliament. For though nothing can concern the king, his crown and dignity, more immediately than high treason, which our law calls '*Crimen læsæ Majestatis*,' a crime wronging majesty; yet this good king Edward 3, at the request of the Lords and Commons of England, in a parliamentary way, and to make all after-ages happy, makes a plain declaration of such offences as should for the future be deemed for high-treason, and none other, unless declared by parliament.

This act of parliament is branched out by sir Edward Coke, in the third part of his Institutes, into six classes or heads; which I shall the rather take notice of, for that trials of this nature are very rare in the plantations; and they are these:

1. The compassing or imagining the death of the king, queen or prince, and declaring the same by some overt-act.

The killing or murdering of the chancellor, treasurer, justices, &c. in their place doing their office, &c.

2. To violate, or carnally to know the king's consort or queen, the king's eldest daughter unmarried, or prince's wife.

3. Levying of war against the king.

4. Adhering to the king's enemies, and declaring the same by some overt-act; and this must not be '*Inimicus, sed Hostis*.'

5. Counterfeiting of the great-seal, privy-seal, or king's coin, &c.

6. And lastly, bringing into the realm counterfeit-money, to the likeness of the king's coin, &c.

Now, if there is any other offence which was not comprehended within one of these classes, the same was thereby declared to be no treason.

In a clause of which act of parliament we find these words; which I shall rather read, because I apprehend it will very much concern this ensuing trial.

'And because that many other like cases may happen in time to come, which a man cannot think or declare at this present time, it is ordained, that if any other case, supposed treason, which is not above specified, do happen before any justices, the justices shall tarry, without any going to judgment of the treason, till the cause be shewed and declared, before the king and his parliament, whether it be judged treason or other felony.'

By this we may easily perceive, and it is very obvious, that this clause was made to prevent the judges from taking upon them to declare any things to be high treason, but such as are particularly expressed by this statute of the 25th of Edw. 3, or by some other subsequent act.

Again, in the reign of Richard 2, we find sundry other things were declared by parliament to be high-treason, which were not comprehended within the statute of 25th of Edw. 3. But yet upon the coming in of Hen. 4, it was again enacted and declared, That nothing should for the future be adjudged high-treason, but what was so ordained by the aforesaid statute 25 Edw. 3. The words are these:

1 H. 4, c. 10. "That whereas in parliament, in the 21st year of the late king Richard, divers pains of treason were ordained by statute, inasmuch as there was no man who knew how he ought to behave himself, to do, speak or say, for doubt of such pains; it is accorded and assented by the King, Lords, and Commons, that in no time to come, any treason be adjudged otherwise than it was ordained by the statute, in the time of his noble grandfather king Edw. 3."

Now this statute, I am humbly of opinion, is directly in the negative, which says, that for the future nothing shall be adjudged treason, otherwise than it was ordained by the aforesaid statute of the 25th of Edw. 3.

Yet, nevertheless, this indictment is grounded upon an act of assembly of this province; which is, I am humbly of opinion, not only contrary, but directly repugnant to the aforesaid statute (which appeareth to me to limit all new species of treason to be declared by parliament, and not elsewhere) which, if it should admit of such a construction as is now intended, I think I may modestly say, will introduce

five hundred several new species of treason: so that his majesty's good subjects of this province would fall under much greater hardships than whatever the people of England were sensible of before the making of this act (which I cannot too often mention) of the 25th of Ed. 3.

If we look farther downward, upon the coming in of Edw. 6, which was in the year 1546, sundry new species of treason having been again introduced by act of parliament, it was in the very first year of his reign enacted, That no offence, made treason by any statute, should be so deemed and adjudged for the future, but such as were made treason by the aforesaid statute of 25 Edw. 3, other than such as were by that present statute ordained and declared.

But yet in queen Mary's time, in the 1st year of her reign, this grand crime was brought to its ancient standard; and it was then declared in parliament, 'That no act or offence whatsoever should be deemed treason or misprision of treason, but such as were declared by the statute 25 Edw. 3.' And the substance of the preamble is this, 'That the state and safety of the king standeth more assuredly by the love of his subjects, than fear of his laws.'

So that upon examination, we find how careful and cautious the people and parliament of England have been in introducing and increasing of sanguinary laws, and that through the revolution of many ages. And hereby it is very remarkable, what a great regard has been in all ages paid to this venerated statute of 25 Ed. 3, which with great care has been continued down to us to this very time, and is now in its full force. Sir Edward Coke, treating thereof, tells us, that the parliament, in which this act was made, for many years after was called *Benedictum Parliamentum*, the Blessed Parliament.

If we look but into the Bill of Attainder of Thomas earl of Strafford, in the year 1640 and 1641, even in those times, what regard was paid to this statute, which I have so often mentioned, wherein it was provided, that the judgment against the said earl should never be drawn into precedent: and the words are these, 'Provided, That no judge or judges, justice or justices whatsoever, shall adjudge or interpret any act or thing to be treason, nor hear or determine any treason in any other manner, than he or they should or ought to have done before the making of this act.'

Now, if we do but reflect upon the great concern and care that has been taken through all ages, by the wise people of England, in preventing the judges from interpreting any act or thing whatsoever to be treason, but such only as are enumerated in the statute of Ed. 3.

And at the same time give ourselves leave to think, how industriously we labour to introduce an act of assembly of this province, to make, as I said before, even five hundred new and never heard of species of treason: I say, if we do but consider this, it is matter of great amazement, and more especially in such an age as

this, and in so happy a reign, where no man ever questioned, or at least doubted of the true enjoyment of our laws and liberties, though never so remote from the fountain head.

I am afraid, I have already trespassed upon your honours' patience: I shall therefore conclude with some observations upon the act of assembly, upon which this indictment is laid.

Now both the title, preamble and words of this act of assembly, and the cause of making thereof, is very obvious (however the same may be now interpreted), which were these two:

1st. For the future, to prevent the setting up a power over his majesty's subjects in this province, without authority from the crown of England; which was found to be of fatal consequence in the late unhappy disorders in this province.

2dly. To express the love, loyalty and hearty affection of the people to their majesties king William and queen Mary; and, as far as in them lay, to recognize them their sovereign liege lord and lady. I doubt not but your honours will see cause to recommend the same to the jury, in delivering the charge: and that no strained construction of this act of assembly can ever affect the prisoner colonel Bayard, or in the least blast his long-experienced loyalty to the crown of England, and in a special manner to his present majesty king William.

I had almost forgot to beg leave of the court to apply myself to the gentlemen of the jury, to obviate some objections, or rather a vulgar error, that usually hath crept in amongst them upon trials, and particularly upon indictments: which is, they do believe,

That if the matters of fact alleged in the indictment be but proved, they are to have no regard to matter of law: which I take to be a very great and dangerous error in them.

For though it be true, and must be granted, that matters of fact are the most common and proper objects of a jury's determination, and matters of law that of the judges; yet as law ariseth out of, and is interwoven and complicated with fact, it cannot but fall under the jury's consideration: for, should it be otherwise, if a person should be indicted for doing any common, innocent or lawful act, if it be but clothed and disguised in the indictment with the name of treason, or some other high crime, and proved by witnesses to be done, then the jury would lie under a necessity of finding the prisoner guilty. No.

Do we not find in most general issues, upon Not Guilty pleaded, as upon indictments of trespasses, breach of the peace, felony, and even in cases of high-treason; yet the jury do not find the fact of the case by itself, leaving the law to the court, but find the party Guilty, or Not Guilty?

And this will more evidently appear upon indictments of murder, that the jury are judges as well of matter of law as of fact. For is it not every day's practice, where persons are indicted of murder; the jury doth not only find them guilty or not guilty, but many times,

upon hearing and weighing of circumstances, the jury brings in the prisoner not only guilty or not guilty in general, but brings them in either guilty of murder or manslaughter, by misadventure or *se defendendo* &c.

No the jury being well apprized of the true matter of fact, of which they are sole judges, can better apply the matter of law; for, says my lord Coke, 'It is by fitly applying matters of fact and law together, that the jury brings forth their verdict:' which, I hope, you gentlemen of the jury will carefully do.

Prisoner. I desire some of my evidences may be called, to give an account of my life and conversation. (Which was granted.)

Mr. Fausy, minister of Trinity church, being sworn, said, I have been for six years personally acquainted with col. Bayard; during which time his life and conversation recommended him in the world as an exemplary Christian: and the frequent expressions of his zeal and affection to his majesty's person and government convinced me, that he was a good subject.

Pris. Call capt. John Kipp. (Who being called, was absent.)—Call capt. Tudor.

Tudor sworn, said, I have known col. Bayard 26 years, a moderate, civil, good man, has been employed in almost all offices of the greatest trust in the government, never disaffected, but stood up for the Protestant religion and king William.

Pris. To prove that I have upon sundry emergencies, during the late war, advanced of my private fortune upon loan, without interest, several considerable sums of money, for the preservation of his majesty's interest and government in New York, of which upwards of 200*l.* money in specie lent, is still unpaid; I desire Mr. Jamison (who was then clerk of the council) may be sworn.

(Jamison being called, appeared.)

Mr. Atwood. Mr. Jamison has refused to purge himself of signing those addresses, and is *particeps criminis*, for which reason he cannot be allowed to be an evidence.

The evidence having been concluded, the Solicitor General, without answering the authorities offered by the prisoner's counsel, relating to the treason, summed up the evidence, as to matter of fact.

Mr. Atwood gave the charge to the jury, in a long discourse; and among other things insisted, That the indictment was not laid upon the act of 25 E. 3, nor any act of parliament, but upon an act of assembly of this province, confirmed by his majesty, which had power to make acts for high treason, as well as the parliaments of England; and that the said statute was confined to England, because by the same statute it is enacted, that if any doubt should arise, the same be adjourned unto parliament; which must be understood of the parliament of England.

That it is high treason, by the act of assembly, by any manner of ways, or upon any pre-

tence whatsoever, by force of arms, or otherwise, to disturb the peace, good and quiet of the government, as it is now established; which he said was proved by overt-acts laid in the indictment; which were, by signing of libels against the government, and thereby enticing the people to cast off and disown the same; and chiefly, by the soldiers signing complaints against their chief officers; which tended to mutiny, and was treason by the common law.

That by bringing the papers to Hutchins's house, the prisoner had made himself guilty of all that was done there, by the soldiers and others signing those papers.

That the right of petitioning the king was not in dispute, but the manner of doing it made it criminal.

That it was plain the address of the prisoner and his three fellows, was a disowning of the present authority, and casting off his majesty's government as it was then established; for capt. Nausan succeeded the lord Bellamont (as by the commission appeared), and not my lord Cornbury; which was a plain overt-act of treason, by the meaning and words of the act of assembly.

That it appeared undeniable, that the prisoner and his son were always by the papers, and that it was done with a great number of people to affront the government.

That the drawing in soldiers to sign petitions, is mutiny and sedition by the law; and drawing of them in, on false pretences, in hopes of freedom in the city, and subscribing their names on blank lists, is listing of soldiers, and may be applied to invite in any foreign power: and thereupon strenuously insisted on the validity of the evidence, that the facts laid in the indictment were undeniably proved, and that those facts did amount to high treason, within the words and meaning of this act of assembly; and that therefore the jury could not do otherwise than bring in the prisoner guilty.

The constable being sworn to keep the jury, the court adjourned till nine at night: and the jury then not being agreed, the court did adjourn till Monday nine o'clock, the 9th March.

On Monday the 9th, the prisoner was brought to the bar, and the jury sent for: they were asked, if they were agreed in their verdict? they answered, they were not agreed; but desired some direction of the court. Jacob Goelet appeared as foreman of the jury, and read some notes of what he said the witnesses had sworn: which were denied to have been sworn by the counsel for the prisoner, who prayed Mr. Atwood to satisfy the jury of the truth of the evidence,

To this he answered, That he could not do it after the charge given; but affirmed, it was no new thing (as some pretended) after charge given, to satisfy the jury in some matters of law; and told, that he had received letters from the jury, and answered them; which answers were only his private opinion. That if

they were under any difficulty, whether the matters of fact alleged in the indictment, and which were proved to them, were treason or no, they might find the prisoner guilty; who had his advantage in moving in arrest of judgment, and might be relieved as to matter of law.

Mr. Emot. This is not fair, to give the jury a handle to find the prisoner guilty in expectation of relief in arrest of judgment; for they are judges both of law and fact, as the case is now circumstanced: if they will enslave themselves and their posterity, and debar themselves of all access to their prince, they will be worse than negroes.

Mr. Atwood. This is not to be suffered, to offer these things to the jury after they have received their charge; therefore be silent. Then proceeding, he renewed his charge to the jury, aggravating the supposed crimes for the space of about half an hour.

Mr. Emot. I pray your honour to be heard one word. (Which he often repeated, and at last was granted him.) The facts laid in the indictment were not proved, as to the disowning and casting off the government, encouraging of mutiny in the soldiers, or disquieting the peace of the government. Addressing the king is the undoubted right of the subject, both by common law and acts of parliament. If the subject for complaints of grievances, set forth by petition, shall be attainted of high treason, we are in a worse condition than slaves.

Mr. Atwood checked him, and commanded silence.

Mr. Nicholl. The act of parliament to punish governors in the plantations for oppressing the subject, is rendered useless and of no effect, if the subjects are deprived of this liberty to complain, and set forth their grievances, by petition to their king.

Prisoner. I crave that Jacobus Goelet may read over his paper concerning the evidence given, and liberty to controul the mistakes.—(This was denied.)

Pris. I crave that col. de Peyster and capt. Walters, who are joined in the commission, will declare their opinions singly, if they have agreed that to be treason which Mr. Atwood has declared to be so, either by the common law, or act of assembly, if the facts laid in the indictment should be admitted to be proved, as indeed they are not.

To this he received no answer.

After this the jury were sent out, and the court adjourned till three o'clock in the afternoon.

At which time the commissioners meeting, the prisoner was brought to the bar; the jury were sent for: and being come, were asked, if they were agreed of their verdict? which they answered in the affirmative, and that they found the prisoner guilty.

Counsel. We pray time to offer reasons in arrest of judgment.

Mr. Atwood. Let these reasons be offered to-morrow morning.

Court adjourned till eleven o'clock next morning.

March 10th. The commissioners met, and the prisoner being brought to the bar, he offered the following reasons in arrest of judgment, in these words, viz.

Buyard. That no overt-act, alleged in the indictment, is proved by the oaths and testimonies of two lawful witnesses, as by the statute of 7 W. 3, is directed.

That if the overt-act, as alleged in the indictment, should be admitted to be so proved, yet neither by the law of England, or by any legal genuine construction of the act of assembly of this country, on which the indictment is grounded, any of the said overt-acts can amount to high-treason.

Mr. Atwood. Though the reasons offered by the prisoner's counsel are properly and learnedly offered, I could off-hand answer and controul them all; yet I will not do it; let them be left with the solicitor-general.—And adjourned the court until ten o'clock the next morning; which accordingly was done.

March 11. The commissioners met, and the prisoner was brought to the bar.

Mr. Nicholl. It does not appear, that any one overt-act, alleged in the indictment, has been proved by the oaths of two lawful witnesses, as by the statute of 7 W. 3, ought to be done.

Mr. Atwood. The jury are the sole judges of the evidence; and if there has been any omission in that, it is now helped by the verdict.

Mr. Nicholl. Though it is very plain to me, and I suppose to the court, that what I have affirmed in this matter is truth, yet I shall not much insist upon it, because if the acts themselves should be admitted to be true, they do not fall under any of the heads or species of treason so made by the English laws, or by any natural and reasonable construction of the act of assembly of this government; which being wholly matter of law, I shall leave to your honours' consideration.

Mr. Emot. I very well remember, that the court was pleased to tell the jury, after they had been together some days, and not being agreed upon the verdict, that if they were under any difficulty, whether the overt-acts laid in the indictment, if proved, were treason; if they found the prisoner guilty, he had his remedy, by moving the matter of law in arrest of judgment.

I therefore humbly offer in arrest of judgment, that if the overt-acts laid in the indictment were admitted to be proved, yet in point of law they cannot amount to high-treason, within the meaning of the act of assembly upon which the indictment was laid.

For I take it, that all acts of parliament, and consequently acts of assembly, are to be understood and taken by reasonable construction, to be gathered and collected out of the words of the act only, and that according to the natural grammatical, plain and legal sense thereof, without any forced interpretation.

Then if so, this act of assembly, both by the title, preamble, and the enacting part thereof, plainly demonstrates the meaning of the law-makers, and what was thereby designed for the future to prevent. The title of this act is in these words: "An Act for the quieting and settling the disorders that have lately happened within this province, and for establishing and securing their majesty's present government against the like disorders for the future." Now what these disorders were, we have great cause to remember; and they are very well known to this court to have been occasioned by some persons setting up an arbitrary power over the king's subjects without authority from the crown of England, as appears from the preamble of the said act, part whereof is in these words: "And whereas the late and inconsiderate violation of the good and quiet of this province, by the setting up a power over their majesties' subjects, without authority from the crown of England, hath vitiated and debauched the minds of many people, &c. For the prevention whereof in time to come, be it enacted, &c. That whatsoever person or persons shall by any manner of ways, or upon any pretence whatsoever, endeavour by force of arms, or otherwise, to disturb the peace, good, and quiet of this their majesties' government, as it is now established, shall be deemed and esteemed as rebels and traitors, &c."

From hence it plainly appears, that the intention of the law-makers was only to declare such person or persons rebels and traitors, as should for the future set up a power over his majesty's subjects in this province, without authority from the crown of England; which undoubtedly is treason within the statute of 25 E. 3.

But it can never be understood (without offering the greatest violence to the reasonable construction of the said act of assembly, and the plain intention of the makers thereof) to be construed to extend to the signing the addresses mentioned in the indictment, which is the only thing the prisoner is positively charged withal; for all the rest are only presumptive, constructive, and accumulative crimes, drawn from thence.

But, says Mr. Solicitor, the words of this act of assembly are in generals; that if any persons shall endeavour, by force of arms, or otherwise, to disturb the peace, good and quiet of the government, shall be deemed and esteemed rebels and traitors.

Now from the word 'otherwise,' Mr. Solicitor would fain insinuate, that the prisoner is within the meaning of the act of assembly: a very fine explanation! For by such a construction as this, every breach of the peace, sudden quarrel, or small battery, shall be deemed treason. I shall not further add upon this head, but only offer my humble opinion, that here, in the plantations, we are not capable in our assemblies to make and declare any new species of treason, but such as are comprehended in the statute of 25 E. 3, or some other subsequent statute.

Though what already has been offered, I hope will be sufficient to stay and arrest judgment, yet I have several other things in behalf of the prisoner (by your honours' permission) to move in arrest of judgment, and which are not mentioned in the reasons which were assigned in writing; and I pray liberty to offer them *ore tenus*.

Mr. Atwood. Mr. Emot, you have liberty granted you: go on.

Mr. Emot. I thank your honour. And the reasons that I shall now further assign, why judgment ought not to pass against the prisoner, according to the verdict of the jury, are these three:

1st. That Andries Marshall, one of the petty-jury, is an alien, and of foreign birth, born in Zealand, and came over into this province in the year 1684; and that Jacobus Goulet, the foreman of the jury, is also an alien, and hath lately sent to England for to procure a denization.

2dly. That the Visne, or Venire, in the precept to summon the petty-jury, under the hands of the commissioners, is wrong awarded, or rather not awarded at all.

3dly. That the said precept is not returned by the sheriff, or any endorsement thereupon, and signed by him, against the known laws of England, and more particularly the statute of 13 E. 2, cap. 5, called The Statute of York.

Mr. Atwood, in a long speech, said, what the Solicitor has offered is sufficient to over-rule the reasons exhibited in arrest of judgment; for it is evidently proved, that the prisoner has disturbed the peace, good and quiet of the government, as it is now established, viz.

1st, By enticing the people to sign scandalous libels against the government, at the coffee house, and at his own house, by the oath of Peter Odyre, telling him it was for the good of the country; and his bringing them to alderman Hutchins's, makes him equally guilty to the soldiers signing complaints against their chief officers, thereby enticing them to mutiny; which soldiers are part of the 7,000 men raised by act of parliament for the defence of the kingdom; which is high treason by the common law, as well as by act of assembly.

2dly, By the prisoner's disowning the assembly to be lawful.

3dly, By charging the lieutenant governor to be bribed to pass their acts of assembly.

4thly, By charging the government to be in the hands of hot and ignorant men.

5thly, By the address to the lieutenant governor, disowning and casting off the present authority, declaring the lord Cornbury to succeed the late earl of Bellamont in the government.

I hope the prisoner by this time is convinced of his crime, as well as that clergyman who spoke so much in his vindication; and that the prisoner will now be duly penitent, and make a true confession of it.

Col. Bayard. May it please your honour, I ever abhorred that heinous and abominable

crime of high treason, as much as death itself. I call God and my own conscience to witness, that I am as innocent of it as the child unborn : I never spoke to any of the soldiers to make any complaint, or sign any addresses, or other paper whatsoever. I own I was present at the coffee-house, at the signing of an address to the king, another to the parliament, and another to the lord Cornbury ; and I own the two first contained some complaints of grievances we supposed to lie under, and the latter a congratulation.

I had the best counsel I could get for so doing, and that it was the subjects' right to petition the king, by the act of the first of W. and M. and I think the subjects should be worse than slaves, if they shall be arraigned for high treason for complaining to their prince.

I must further beg leave to say, your honour was much mistaken in summing up just now what the witnesses had sworn ; and the jury (by that paper the foreman read in court) had likewise a wrong notion of it ; which I desired then I might controul ; but your honour overruled, as not to be allowed after the charge was given. It was not proved by any of the witnesses, that the peace of the government had been disturbed ; none of them said I had enticed any person whatsoever to sign the addresses ; nor that I was present at the soldiers signing at Hutchins's, much less that I enticed them to mutiny. I knew nothing of their signing ; I was not at the house all that time. Mr. Solicitor had Mrs. Hutchins sworn, who said the same. None of them say, that in the said address the assembly was called unlawful, but only, that the speaker was an alien ; nor that the lieutenant governor was bribed, but tempted ; nor that the government was in the hands of hot and ignorant men, but that hot and ignorant men were put in offices ; and that thereby the government was like to be rendered cheap and vile. And as for the address to the lieutenant governor, it was only said, ' We had received advice from England, that the lord Cornbury was to succeed the earl of Bellamont as our governor ;' which by no colour can be construed to be a casting off, or disowning of, the present authority. And though all had been proved, as it is not, what your honour, as above, has been pleased to say, I humbly conceive it cannot amount to a misdemeanor, and much less to that heinous crime of high treason.

Mr. Atwood. The right of petitioning the king is not in dispute, but the manner of doing it makes it criminal ; neither does that liberty extend to the parliament.

Mr. Esot. I humbly move, that we may have liberty to offer other reasons *ore tenus*. (Which the court granted.)

Mr. Atwood. Adjourn the court till Friday morning, the 13th instant. (Adjourned accordingly.)

On the 13th in the morning, the prisoner wrote a letter to col. De Peyster ; some of the

contents whereof were by Mr. Atwood retorted upon the prisoner in open court, at the time he passed sentence against him ; for which reason the prisoner has permitted it to be published, and it is as followeth :

" Col. De Peyster: Sir,

" I take leave to acquaint you, that though it has pleased God to suffer yourself, and some of your relations to be the likely chief instruments of the total destruction both of myself and all my family and posterity ; that yet, notwithstanding I have that peace with myself (and I can but only thank God for his all-sufficient grace in strengthening me in it) that I am reconciled to all mankind whatsoever, and that I hope one of my last prayers will be, that God out of his infinite mercy, will graciously pardon all those who have had a hand to out me off. Sir, believe me, as you may give credit to the words of a dying man (since I find the job is to be done, and that it is now past your power to stop the current), that I shall also die with a clear and good conscience, and as free of that horrid crime laid to my charge as the child yet unborn. And therefore hope God's merciful hand, who has never left nor forsaken me, will continue to support me to the very last, and that I may look death in the face, as a good Christian ought to do ; humbly submitting my all to his most wise, most just, and most merciful dispensations : for I am sensible there is no more than one death for me, and that, in all probability, considering my age, it might have been very soon, though this tribulation had not befallen me. I shall only add, that I hope in God's mercy for the pardon of all my manifold sins and transgressions, through the only merits of my Saviour Jesus Christ ; and that when I shall be no more, he will continue his grace to my dear wife, and my posterity. And, lastly, that my blood, which is struck at (by your brother's own expressions to myself, and your brother-in-law's to others, both not long since) may be the last to be spilt on account of our dismal and unhappy divisions ; though I fear out of my ashes such further calamities may arise to this poor bleeding province, that posterity will have cause long to lament : for it is not to be expected, that all the plots, contrivances and intrigues used in this matter (many of which, I assure you, are already discovered) will have their exit with myself : it had been more pardonable to have stabbed me in my sleep, or with Joab's hand, under a pretence of friendship, than to do it with Ahab, under a colour and cloak of justice ; and of the two, I leave others to consider, if this latter exceeds not the former ; since it is not to be supposed, that Ahab's was so much out of malice ; but the vineyard being denied him on his offering the worth of it in money, occasioned the innocent to be arraigned and slain for a pretended crime of blasphemy and high treason.

" Sir ; these above lines are the sincerity of my thoughts this morning ; assuring you,

that I never had a thought before late last night to write to yourself one word about this subject, so altogether unknown to all mankind whatsoever, nor do not intend them any farther; wherefore I desire you will make such use of them, for your own consideration, as God may direct you. I am, Sir, your humble servant,
N. BAYARD."

March 13. The court being met according to adjournment, the prisoner being brought up moved, That forasmuch as Mr. Nicholl was out of town, by reason of the indisposition of his family, another counsel might be assigned in his stead. Which was granted, and the court adjourned till Monday the 16th instant, at nine o'clock.

March 16. Before the sitting of the court, the prisoner sent a petition to Mr. Atwood, and the rest of the commissioners, viz.

To the Hon. WILLIAM ATWOOD, Esq. ABRAHAM DE PEYSTER, Esq. and ROBERT WALTERS, Esq. Judges of this Special Court: The Humble PETITION of NICHOLAS BAYARD, sheweth,

"That your petitioner being altogether unacquainted what is practicable and allowable in law to be offered in arrest of judgment; yet since your petitioner's life, and all that is near and dear unto him is concerned, he humbly craves leave (besides the reasons already offered by your petitioner's counsel in arrest of judgment,) to lay before your honours, and to pray your honours favourable consideration thereupon,

"First, That the verdict of the grand inquest was not sufficiently found by any twelve of that inquest, as in his former petition is set forth.

"Secondly, That the petty-jury (in a manner forced upon your petitioner) were all of them parties concerned against your petitioner in the very matter he was tried for, on account of the unhappy divisions within this province; all of them extreme ignorant of the English language, to that degree, that scarcely one of them is able to say the Lord's Prayer in the English tongue, and much less to comprehend the matters of law, and what has been offered in behalf of your petitioner at his trial.

"Thirdly, That all what has been sworn against your petitioner, was, first, that the petitioner's name was seen to the address to the lord Cornbury, but that they knew not whether it was his hand-writing. Secondly, that the petitioner had been present at the coffee-house, and at his own house, when the addresses to the king, another to the parliament, and another to the lord Cornbury, were signed by several of the freeholders, freemen, and inhabitants of this city; but that he had desired none of them to sign the same. Thirdly, that the petitioner had brought some papers, supposed to be the said addresses, to the house of Aldermen Hutehins. Fourthly, that the addresses to the lord Cornbury contained only a

congratulation at his safe arrival, and a hearty desire, that with it all our divisions might be healed, and that the very name of party and faction might vanish, and be extinguished; and that in the two former, or in one of them, either to the king or parliament, some complaints were made of grievances, without remembering the particulars: only Mr. Clows swore, That to his best remembrance, in both, or in one, of the addresses to the king or the parliament, mention was made, that some of the hottest and ignorantest of the people were put in offices: that the speaker of the assembly was challenged to be an alien: that the said assembly had given a gift to the lieutenant governor, to tempt him to pass their acts, and another to the judge; and that thereby his majesty's government was like to be rendered vile and cheap in the eyes of the people: and swore further, that in none of them any reflections were made (as he conceived) to the prejudice of the lieut. governor; and that in none of them, the words unlawful or oppression were mentioned.

"Fourthly, That all the rest of the evidences swore nothing against your petitioner, but that they had signed the addresses at Alderman Hutehins's; that two or three of the soldiers had a glass of wine given them, but not for signing, it being Christmas time; and that some of them expected to be made free of the city, but not of the garrison.

"May it please your honours, your petitioner finds, by the notes himself has taken at his trial, that nothing more has been sworn against him. Whereupon the jury, being ignorant people, found him guilty, because some part of the indictment was proved, as to the signing of the said addresses, and what the contents of them were, only by the oath of one witness.

"Your petitioner therefore humbly prays, that your honours will be pleased to take the premises into your serious consideration, whether by the laws of England, or this province, it can amount to the crime of high treason, what has been sworn against him, as above expressed? And if not, that your honours will favourably order an arrest of judgment for the reasons above mentioned, &c. and what has been already offered to your honours by the petitioner's counsel. And as in duty bound, &c.
"N. BAYARD."

The Court being met, the prisoner was brought to the bar, and the Petition last mentioned read.

Mr. Atwood. Mr. Emot, we are ready to hear the arguments you have to offer, for the last three reasons you have assigned in arrest of judgment.

Mr. Emot. I am ready; 1st. Andries Marshalk, one of the petty-jury, is an alien; we have two evidences to prove the same. And—

Mr. Atwood. We cannot admit you any such proof; for though this might have been a good exception for cause before he or they

had been sworn, but now it is too late; therefore go on to the next.

Mr. *Emot*. This seems very hard; for we ought to have been tried by the king's lawful liege people, and we apprehend these are not such; but we come not to the knowledge of this till after the trial.

Mr. *Atwood*. Pray, Mr. *Emot*, delay the court no longer; but proceed to the second reason assigned.

Mr. *Emot*. The 2d Reason is, That the *visne* or *venue*, in the precept to summon the petty jury, is wrong awarded, or rather not awarded at all. Our happy constitution of government is, that all trials of this nature must be by the verdict of twelve men, and that, as near as may be, of the neighbourhood where the fact ariseth, or is alleged to arise in the indictment. Yet, nevertheless, the precept to summon the jury, we find is directed to the sheriff to return eighty men of his bailiwick; whereas he is sheriff as well of the county of New-York, as of the city; and at the same time, the matters of fact alleged in the indictment are said to be committed in the dock, and eastward of this city. So that this is a mis-trial, upon which no judgment can be given: and of this we have a multitude of authorities in our books: and first, in Arundel's Case, Coke's Reports, part 6, fol. 14, b. It was for the murder of one Parker; and the case was thus: the murder was alleged to be done at the city of Westminster, in a certain street there, called King-street, in the parish of St. Margaret's. For the trial of the issue, a jury was returned, 'de vicinitate civitatis Westm.' Arundel being found guilty, moves in arrest of judgment; assigning for cause, that the jury ought to have been out of the parish of St. Margaret's, and not in general out of the neighbourhood of the city of Westminster; and it was adjudged a mis-trial, and the verdict was set aside: and this I find was done upon a special consult of the judges at Serjeants-inn.

So that we see how cautious the laws of England are, and the judges thereof, that all trials of this nature shall follow the *venue*, and that the jury shall be summoned from the neighbourhood where the fact ariseth. And the reason thereof is grounded upon this supposition and presumption, that the neighbourhood are the best and most proper judges of matters of fact; for indeed it is the rule in the law, that 'vicinus facta vicini presumitur scire.'

But let me observe to your honours, that our case at the bar is much more uncertain, as to the awarding of the *Venire Facias*, or precept to summon the jury; for the fact is alleged to be done at the dock, and eastward of this city, and issue joined thereupon: yet the precept is directed to the sheriff, to summon the jury of his bailiwick; which, as I said before, contains both the city and county of New-York, and without mentioning any neighbourhood, and therefore may come out of the county, as well as from the city; and therefore of necessity must be esteemed a mis-trial.

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To this it may be objected by such as are ignorant of our laws, That notwithstanding the jury was summoned from the neighbourhood of the city of New-York, and not from the county, for that they know the persons to be such. But this not appearing to be so upon record, avails nothing; for the rule of the law is, What appears not is not: 'Existentibus et non apparentibus eadem est ratio.'

Croke's Rep: In London, the parish and ward is mentioned; and therefore it was adjudged, that it was not good to allege any thing done generally in London; but it must be laid to be done in some parish, from which a *venue* may be awarded.

In Croke's Jac. p. 399, Tycos against Westcome. In this case, a *Venire Fac'* was awarded from T. and not 'de vicineto de T.' Resolved to be ill, and not amendable: yet in this precept the *visne* is not so much as of a ward of the city of New-York, nor of any other neighbourhood whatsoever, but in general from his bailiwick. So that I humbly pray, that for this reason the jury's verdict may be set aside, this being a mis-trial, upon which no judgment can be entered: and shall proceed to the third Reason assigned.

3. That the precept to summon the jury is not returned by the sheriff, or any endorsement thereupon, and signed by him, against the known laws of England, and more particularly the statute of 12 Edw. 2, c. 5. This statute enjoins, that the sheriff shall put his name to every return made by him, so that the court may know of whom they took such return, if need be: and I shall endeavour to prove, from sundry adjudged cases since the making of this statute, that this precept to summons the jury not being indorsed by the sheriff, the trial is ill, and not amendable.

The Case of Holdsworth against sir Stephen Proctor, in Croke's Rep. part 2, p. 188. Sir Stephen Proctor moved in arrest of judgment, for that the name of the sheriff was not indorsed upon the Writ of Distringas with *Nisi Prius*; and it was ruled, That the trial was ill, and not amendable by any of the statutes of Jeofails: for, say the judges, it is all one with the case of a *Venire Facias*, where the name of the sheriff is not thereto; which hath been frequently over-ruled, as being no return, nor helped by any statute of Jeofails. For the statute of 18 Eliz. as I shall shew hereafter, from adjudged cases, and from the best authorities in law, doth only help imperfect and insufficient returns, and that only in cases civil, between party and party; but here is no return.

In Rowland's Case, in lord Coke's Rep. book 5, p. 41, in ejectment upon a verdict for the plaintiff, the defendant moved in arrest of judgment; for the *Venire Facias* was not returned or endorsed by the sheriff, though the *Postea* made mention that the jury was returned 'per Mandatum Justiciorum:' yet in this case it was ruled, that that would not help it; for the judges said, That where there is no return, it cannot be helped by the statute of

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18 Eliz. or any other of the statutes of Jeofails; for that statute only helps imperfect and insufficient returns, and such as want form, and not such as are not returned at all.

Again, in *sir Arthur Blackmore's Case*, in *Coke's 8th Rep.* fol. 156, in this case it was adjudged, That the statute of 18 Eliz. doth not help a trial, where no return is made upon the writ of *Venire Facias*; as was formerly, say they, adjudged in *Rowland's Case* before cited. And our books are full of authorities of this nature, but shall not give you the trouble to mention any more.

Sol. Gen. Mr. Emot, these authorities, which you have here cited, it is true, are grounded upon the statute which you have mentioned of 12 Edw. 2, but this statute has only relation to writs; and in this case the sheriff summoned the jury, not by virtue of a writ, but a precept under the hands of the commissioners; which differs the case.

Mr. Emot. Mr. Solicitor, then you say, that the case at the bar is not within the words of this statute of 12 Ed. 2, for that this is a precept to summon the jury, and not a writ, and so consequently the sheriff not obliged to sign and return the same. A very wise distinction!

However, I shall endeavour to shew, that this precept is within the reason and equity of the statute, and that the same ought to be returned and signed by the sheriff. In order thereto, I shall put this court in mind, how statutes have from time to time been taken by equity in divers manners; that those things which are alike in reason, are alike in law; and that where an act of parliament hath been made to remedy some mischiefs, that the same hath been extended to other things, in like degree, and that even in penal laws. As for example:

Stat. of Gloucester. c. 5. By this statute, an action of waste is given against one who holds for years; yet by the equity of this statute a man shall have an action against him who holds but for half an year, notwithstanding the act be penal.

Westm. 2, c. 3. This statute gives an action of 'cui in Vita,' after the coverture dissolved by death; Yet if the coverture be dissolved by divorce, the wife shall have, by the equity of this statute, a writ of 'cui ante Divortium.'

And lastly, the *Stat. 25 Edw. 3, de prodicionibus.* This statute expressly says, That no case shall be taken by equity, unless it be adjudged in parliament; and yet by the equity of the words of that statute, which are, If the servant kill the master, it is taken, If the maid kill the mistress, that this is petit-treason.

So that from hence I am humbly of opinion, That we are fairly within the equity of the stat. 12 Edw. 2. Besides, a writ and precept in this case are only synonymous terms, and signify one and the same thing.

These reasons were over-ruled.—And the court ordered the sheriff to make a return upon the precept to summon a jury conform to the above stat. 12 Edw. 2, which the court said they had power to do, and to help that defect.

Mr. Emot. I find your honour has over-ruled all the reasons that we have offered in arrest of judgment, in behalf of the prisoner col. Bayard, why judgment ought not to pass against him, according to the verdict of the jury, but have not as yet observed, that either col. De Peyster or captain Walters have given their opinion to all, or any of the reasons we have offered. I humbly therefore pray, that we may have their opinion, so that we may know by what hands we fall.

Mr. Atwood. Mr. Emot, you who have been assigned counsel for the prisoner, have hitherto, in all the course of the trial, carried yourselves like men of your own profession; you must not now therefore begin to menace the court. You shall have the opinion of the rest of the commissioners.

Whereupon Mr. Atwood turning himself to them, and whispering them, they severally did declare, that they were of opinion with justice Atwood, in that the reasons offered were not sufficient to arrest the judgment.

Mr. Atwood. Col. Bayard, have you any thing to say why sentence should not pass?

Prisoner. I have nothing more to offer, than what my counsel have offered, and what is contained in my last petition.

Mr. Atwood. I am sorry to find you so impenitent of your crime, which is so heinous and abominable in the sight of God and man. You have lately made reflections upon the proceedings of this court against you as if it had been a design to do the job; comparing your case to that of Naboth's vineyard: But I hope God will open your eyes, that you may be convinced, and repeat of the crime.

Then he pronounced sentence in these words: 'It is considered by the court here, that you be carried to the place from whence you came; that from thence you be drawn upon an hurdle to the place of execution; that there you be hanged by the neck: and being alive you be cut down upon the earth, and that your bowels be taken out of your belly, and your privy-members be cut off, and you being alive they be burnt before your face: and that your head be cut off, and that your body be divided into four quarters; and that your head and quarters be placed where our lord the king shall assign. And the Lord have mercy upon your soul.'

Prisoner. I desire to know whether I may have leave to answer to your honour's speech made before sentence.—Mr. Atwood. No.

Prisoner. Then God's will be done. The prisoner was remanded.

Alderman Hutchins of New-York was tried, convicted and condemned of high treason for the same facts with which col. Bayard was charged, and had the same usage both before, in, and after his trial.

Lord Cornbury, the succeeding governor, not only gave his consent to an act for reversing both these attainders, but procured the queen's confirmation of it. *Smith's Hist. of New York, 103.*

422. The Trial of WILLIAM FULLER,* at the Guildhall of London, for a Cheat and Impostor: 1 ANNE, A. D. 1702.

This Trial was had in consequence of certain Proceedings in the House of Lords, which were as follows:

THE VOTE OR RESOLUTION AND ORDERS MADE BY THE LORDS SPIRITUAL AND TEMPORAL IN PARLIAMENT ASSEMBLED, RELATING TO WILLIAM FULLER, AND THE BOOKS PUBLISHED BY HIM.†

January 19, 1702.

Whereas by order of the House of Peers, of the twelfth instant, William Fuller was ordered peremptorily to produce before their lordships this day Mr. Thomas Jones; and Mr. Fuller attending at the door, was called in, and asked several questions relating thereunto; but the said Fuller not producing the said Thomas Jones, nor making any satisfactory excuse to the House for his not producing of him: the House came to the following Resolution: viz.

It is resolved by the Lords spiritual and temporal in parliament assembled, that in the books published by William Fuller, one intitled, 'Original Letters of the late King's and others to his greatest Friends in England;' the other intitled, 'Twenty-six Depositions of Persons of Quality and Worth,' are contained divers false, malicious, and scandalous matters, reflecting upon several members of both Houses of parliament; which are of dangerous consequence to the government.

And thereupon the following Orders were made:

It is ordered by the Lords spiritual and temporal in parliament assembled, that the directions of this House given to the warden of the Fleet, the eighth instant, that he should not confine William Fuller further than he used to be, be set aside and vacated; and that William Fuller shall be, and he is hereby, committed prisoner to the prison of the Fleet.

It is ordered by the Lords spiritual and temporal in parliament assembled, that his majesty's attorney-general do forthwith prosecute William Fuller, according to law, for writing and publishing the said false, malicious and

scandalous matters; and that his majesty's said attorney-general do also forthwith prosecute Mr. Peter Buck and Mrs. — Baldwin, who printed and published William Fuller's said books.* MATTH. JOHNSON, Cler. Parl.†

The PROCEEDINGS and RESOLUTION of the Right Hon. the Lords Spiritual and Temporal in Parliament assembled, on Saturday the 9th of May, 1702, upon part of the preface to the book, intitled, 'The History of the Last Parliament, began at Westminster, the 10th day of February, in the 12th year of the reign of king William, A. D. 1700.'†

May 4, 1702.

Complaint being made to the House of a passage in the preface of a printed book, intitled, 'The History of the Last Parliament, began at Westminster the 10th day of February, in the twelfth year of the reign of king William, A. D. 1700.'

The passage was read to the House, and is as follows: viz.

"And perhaps there was a third thing in prospect of deeper reach than all these; which was, that should it have pleased God, for our sins, to have snatched from us the king on the

* "June 23. William Fuller, that branded and infamous impostor, being by an order of the House of Lords, of the 19th of January, prosecuted for publishing two false and scandalous libels, the one entituled 'Original Letters of the late king James, and others, to his greatest friends in England;' the other called, 'Twenty-six Depositions of Persons of Quality and Worth,' reflecting upon several members of both Houses of Parliament (particularly the earl of Nottingham, and being fully convicted thereof, was brought to the Queen's-bench bar, where sentence was pronounced upon him, That he should appear in all the courts of Westminster, with a paper, denoting his offence; That he should stand three times in the pillory, and afterwards be sent to the House of Correction in London, there to be whipped and continued to hard labour, until the 24th of October next, and that he should remain in custody, till he paid a fine of 1000 marks. Pursuant to this sentence, Fuller stood three times in the pillory, and was most unmercifully handled by the mob at Charing-cross and Temple-bar, but was more favourably used before the Royal Exchange." Annals of queen Anne, vol. 1, p. 53.

† Die Sabbati 9 Maii, 1702. It is ordered by the Lords spiritual and temporal in parliament assembled, That the proceedings of this House, in relation to this matter, be printed and published. MATTH. JOHNSON, Cler. Parl.

* See mention of him, vol. 12, pp. 175, 176, 1246.

† Die Lunæ 19 Januarii, 1702. It is ordered by the Lords spiritual and temporal in parliament assembled, That the vote or resolution and orders made this day relating to William Fuller, and the books published by him, shall be forthwith printed and published.

MATTH. JOHNSON, Cler. Parl.

sudden, by chance of war, or other fatal accident, during the tumult of arms abroad, and the civil disorders they had raised among us at home, and a numerous, corrupt, licentious party throughout the nation, from which the House of Commons was sometimes not free, they might entertain hopes from the advantage of being at the helm, and the assistance of their rabble, to have put in practice their own schemes, and have given us a new model of government of their own projection, and so to have procured to themselves a lasting impunity, and to have mounted their own beast, the rabble, and driven the sober part of the nation like cattle before them.

“That this is no groundless conjecture, will readily appear to any considering persons, from the treatment her royal highness the princess of Denmark, the heiress apparent to the crown, met with all along from them and all their party. They were not contented to shew her a constant neglect and slight themselves, but their whole party were instructed to treat her not only with disrespect, but spite; they were busy to traduce her with false and scandalous aspersions; and so far they carried the affront, as to make her at one time almost the common subject of the title-tattle of almost every coffee-house and drawing-room, which they promoted with as much zeal, application, and venom, as if a bill of exclusion had then been on the anvil, and these were the introductory ceremonies.”

It was thereupon ordered by the Lords spiritual and temporal in parliament assembled, That Francis Coggan, Robert Gibson, and Thomas Hodgson, for whom the said book is mentioned to be printed, shall, and they are hereby required to attend this House, on Saturday next at 11 o'clock.

May 6, 1702.

The House being informed, That doctor Drake owned himself to be the author of a book, intitled, ‘The History of the Last Parliament,’ for printing whereof some booksellers are ordered to attend on Saturday next; and that he desired he might be appointed to attend at the same time: thereupon it is ordered by the Lords spiritual and temporal in parliament assembled, That doctor Drake do attend this House, on Saturday next at 11 o'clock.

May 9, 1702.

After reading the order made the 6th instant, at the desire of doctor Drake, for his attendance this day, the House took into their consideration the above mentioned paragraph. After the reading whereof, doctor Drake was called in, and the order of the 6th instant read to him.

The Lord Keeper asked him what he had to say concerning the said book? And the book and the said paragraph being shewed him, he owned he writ the book, and that paragraph in particular; and he thought he had just reason to write it, he having heard her highness talked

of disrespectfully in almost every coffee-house.—Then he withdrew.

And, after some debate, was called in again; and the Lord Keeper told him, The House was not satisfied with what he had said, but thought he trifled, and required him to acquaint the House with the grounds of his writing that paragraph.

He answered, he found it mentioned in divers anonymous pamphlets published at that time, and hoped it was no hurt to answer those pamphlets, and desired time to recollect what those pamphlets were; and then withdrew.

After some time he was called in again, and asked the following questions, viz.

If he could charge any person or persons in the kingdom, with the matters asserted by him in that paragraph?

To which he answered, that he did not know any such person.

Then he was asked, whether he had heard any other persons say, that they could charge any person whatsoever with the matters contained in that paragraph?

He said, he did not know of any such person.

Being farther asked, if he had any other grounds besides the pamphlets, and what those pamphlets were?

He said, he had no other grounds besides the pamphlets; and named the several pamphlets following, as the ground of writing that paragraph, viz.

The Two Legion Letters; The Black List; The Jura Populi Anglicani; and Toland’s Reasons for inviting over the Princess of Hanover.

And being asked, if in any one of these pamphlets there was any thing said about setting aside the present queen?

He answered, he did not remember there was.

Then, he being withdrawn, the said paragraph was taken into consideration, and it was proposed to pass a censure thereupon.

And after debate,

This question was put, that a censure shall be now put upon the said paragraph.

It was resolved in the affirmative.

Then this question was put, That in the preface of the book, intitled, ‘The History of the Last Parliament, began at Westminster the 10th day of February, in the 12th year of the reign of king William, Anno Domini, 1700,’ there are several expressions, which are groundless, false, and scandalous, tending to create jealousies in her majesty of her people, and to cause great misunderstandings, fears, and disputes amongst the queen’s subjects, and to disturb the peace and quiet of the kingdom.

It was resolved in the affirmative.

It is resolved and declared by the Lords spiritual and temporal in parliament assembled, That in the preface of a book, entitled, ‘The History of the Last Parliament, began at Westminster the 10th day of February, in the 12th year of the reign of king William,

'Anno Domini, 1700,' (written by doctor Drake, as he owned at the bar) there are several expressions which are groundless, false, and scandalous, tending to create jealousies in her majesty of her people, and to cause great misunderstandings, fears, and disputes amongst the queen's subjects, and to disturb the peace and quiet of the kingdom.

It is ordered by the Lords spiritual and temporal in parliament assembled, That her majesty's Attorney General do forthwith effectually prosecute the said doctor Drake for having writ the said paragraph.

The PROCEEDINGS and RESOLUTION of the Right Honourable the Lords Spiritual and Temporal in Parliament assembled, on Tuesday the 12th of May, 1702, upon the Paragraphs contained in page 89 and 90, of the Book, entitled, 'Tom Double returned out of the Country: Or, The True Picture of a Modern Whig, set forth in a Second Dialogue between Mr. Whiglove and Mr. Double, at the Rummer Tavern in Queen-street.'*

May 12, 1702.

The order being read for the master and wardens of the Stationers' Company, and John Nutt, to attend, to give an account of what they have done in order to find out the author and printers of the book, entitled, 'Tom Double returned out of the Country: Or, The True Picture of a Modern Whig, set forth in a Second Dialogue between Mr. Whiglove and Mr. Double, at the Rummer Tavern in Queen-street.' They were called in, and Mr. Nutt said, that Mr. Barber, the printer, gave him the book to publish, and they withdrew.

Then the House went into consideration of the paragraphs in the 89th and 90th pages of the said book, which were read, as followeth, viz.

"Whiglove. I find we have miscarried in one great design, the train would not take, we were very hot upon it just before the parliament met, all the Whig coffee-houses rung how necessary it was to break into the acts of settlement, and to exclude—

"Double. Mum, Whiglove, talk no more upon the subject, I beseech you; fresh orders are issued out, and since we are not strong enough to make it go, and that on the contrary it has alarmed and provoked all sorts of men, we are now directed to say, that never any such thing was intended by our party, though, God knows, it was the whole discourse of all our elubs. Under the rose, this was one of those embrios that proved abortive upon the 30th of December last; but though it be not season-

able to stir in it now, never fear our abandoning a wicked design, we never quite lay aside any mischief: however, since it has already opened the eyes of a great many, and weakened our interest among several of our own side, whom (with grief of mind I speak it) we cannot work up to be guilty of so much injustice, let us take all occasions of declaring, that we will not violate these acts upon any account whatsoever; which we may the more safely do, because you know it is our principle, not to think that we are bound by any protestations we make, either in private or in public; and it is one of the great advantages we have over the rest of our fellow-subjects, that we can fetter the consciences of others, while our own are at perfect liberty."

Then it was proposed to pass the same censure on these passages, as was passed on part of the preface of Dr. Drake's book.

After debate, the question was put, Whether the House shall be now adjourned? It was resolved in the negative.

Then this question was proposed,

That in the paragraphs which have been read, contained in the 89th and 90th pages of the book, entitled, 'Tom Double returned out of the Country,' &c. there are several expressions which are groundless, false, and scandalous, tending to create jealousies in her majesty of her people, and to cause great misunderstandings, fears, and disputes amongst the queen's subjects, and to disturb the peace and quiet of the kingdom.

Then this question was put,

Whether the words, 'groundless, false, and scandalous,' shall be left out of the question? It was resolved in the negative.

Then the main question was put,

That in the paragraphs which have been read, contained in the 89th and 90th pages of the book, entitled, 'Tom Double returned out of the Country,' &c. there are several expressions which are groundless, false and scandalous, tending to create jealousies in her majesty of her people, and to cause great misunderstandings, fears and disputes amongst the queen's subjects, and to disturb the peace and quiet of the kingdom?

It was resolved in the affirmative.

It is resolved and declared by the Lords spiritual and temporal in parliament assembled, That in the paragraphs which have been read, contained in the 89th and 90th pages of the book, entitled, 'Tom Double returned out of the Country: Or, The True Picture of a Modern Whig, set forth in a Second Dialogue between Mr. Whiglove and Mr. Double, at the Rummer Tavern in Queen-street,' there are several expressions which are groundless, false and scandalous, tending to create jealousies in her majesty of her people, and to cause great misunderstandings, fears, and disputes amongst the queen's subjects, and to disturb the peace and quiet of the kingdom.

* It is ordered by the Lords spiritual and temporal in parliament assembled, That the proceedings and resolution of this House, in relation to this matter, be forthwith printed and published. MATTHEW JOHNSON, Cl. Parl.

sets forth: "That the defendant being an impostor, and a common liar, and a person of an ill name and reputation, falsely, maliciously, wickedly and seditiously contriving, practising and intending the late king William and his subjects falsely and unlawfully to delude and deceive, and discords between the said late king and the peers, and the noblemen of this kingdom, and the great officers and ministers entrusted by the said late king, in business relating to the government of this kingdom of England, and other subjects of the said kingdom, to move, excite, and stir up; and also to bring the noblemen and peers, and the great officers and ministers aforesaid, and other faithful subjects, into hatred and contempt with the said late king; and to get and obtain several great

magnos officarios et ministros dicti nuper Regis per ipsum, ut præfertur, fiduciat, et al' ligoes et fidel' subdit' suos, in maximum odium, contempt', et vilipendium cum eodem nuper Dom' Rege inducere et inferre, ad divers' denar' summas ab eodem Dom' nuper Rege calide, subdole, fraudulent' et deceptivè acquirere et obtinere, ipse idem Willielmus Fuller, præd' primo die Januarii, anno regni dicti Dom' nuper Regis 13, apud London præd', in parochia et warda præd', ad nequissimas machinationes, practicationes, et intentiones suas præd' perimplend', perficiend', et ad effectum redigend', de diversis officariis et al' subditis dicti nuper Regis Willielmi tertii, et de responsione (Anglice Correspondence) inter eos et Jacobum secundum nuper Regem Angl', dum idem nuper Rex Jacobus secundus apud quandam locum vocat' St. Germain, in regno Franciæ residebat, falso pretens' fuisse habit', ac de diversis denar' summis per dictum Jacobum secund' nuper Regem Angliæ, in regno Franciæ in hoc regnum Angl' distribuend' inter diversos subdit' dicti nuper Regis Willielmi tertii falso prærens' fore miss' quoddam falsum, fictum, scandalosum, et defamatorium libellum, intitulat' "Original letters of the late king's" (dictum Jacobum secundum nuper Regem innuendo) "and others, to his greatest friends in England, with the depositions of Thomas Jones and Thomas Witherington, esquires, proving the corruption lately practised to ruin this nation," adtunc et ibidem falso, illicite, nequit', injuste, malitiose, scandalose, et deceptivè composuit, scripsit, et impressit, et imprimi causavit, in quo quidem falso, ficto, scandaloso, et defamator' libello continetur (inter alia) ut sequitur, videl' "Thomas Jones esquire deponeth, That he being at St. Germain's" (præd' locum vocat' St. Germain in regno Franc' innuendo) "the court of the late king James" (præd' Jacobum secund' nup' Regem Angl', &c. innuendo) "in France," &c. Et idem Attorn' dict' Domine Regine nunc general', pro ead' Dom' Regin' alterius dat' cur' hic intelligi et informari, quod prædict' Willielmus Fuller, præd' primo die Januarii, anno 13, su prædict', apud London præd', in parochia et warda præd' ad nequissimas machinationes,

sums of money fraudulently and deceitfully from the said late king; he, the said William Fuller, the first day of January last at London, &c. (to perfect and bring to effect his said wicked practices and intentions, and of and concerning a correspondency between divers officers and subjects of the said late king and the late king James, while he resided at St. Germain in France, falsely pretended to be had, and of divers sums of money by the said late king James distributed among the subjects of the late king William, falsely pretended to be sent here into England; did falsely, wickedly, maliciously, and scandalously write and print, and cause to be printed, a false, scandalous, and defamatory libel, entitled, 'Original Letters of the late King's' (meaning the late king

practication', et intentiones suas prædict' ulterius perficiend', perimplend', et ad effectum redigend', de diversis officariis et al' subdit' dicti nuper Regis Willielmi tertii, et de ficta responsione (Anglice correspondency) inter eos et Jacobum secundum nuper Regem Angliæ, dum idem nuper Rex Jacobus secundus in regno Franciæ residebat, falso pretens' fuisse habit', ac de diversis denariis summis per dict' Jacobum secundum, nuper Regem Angliæ, a Regno Franciæ in hoc regnum Angliæ distribuend' inter diversos subdit' dicti nuper Regis Willielmi tertii pretens' fore miss', quoddam al' falsum, fictum, scandalosum et defamator' libellum, intitulat' (int' al') "Twenty-six Depositions of Persons of Quality and Worth," adtunc et ibid' falso, illicite, nequit', injuste, malitiose, scandalose, et deceptivè composuit, scripsit, impressit, et imprimi causavit, in quo quidem falso, ficto, scandaloso et defamatorio libello continentur, int' al', ut sequitur, videl', "Mr. Jones has also made oath, that he paid 5,000*l.* more by the late king's order" (ordin' dicti Dom' Jacobi secundi, nuper Regis Angliæ, iterum innuend') &c. Et quod prædictus Willielmus Fuller postea, scil' dicto 1 die Januarii, anno regni dicti Dom' Willielmi tertii, nuper Regis Angliæ, &c. 13 supradict', dictos falsos, fictos, scandalosos, et defamatorios libellos, absque aliqua legali autoritate, vi et armis, &c. apud London præd', in parochia et warda prædict', illicite et injuste publicavit, utteravit, et pro veritate affirmavit, ubi revera et in facto præd' Thomas Jones nunquam super sacrament' suum deposuit prout in præd' falso, ficto, scandaloso, et defamator' libello superius mentionat' continetur, ac ubi revera et in facto, omnia et singula præd' scandalos' defamator' libell' content' et superius specificat' fuer' et sunt falsa, ficta, et veritati omnino contrar', in magnum scandal', præjudic' et abusion' dicti Dom' Willielmi tertii, nuper Regis Angliæ, &c. et magnor' officiarior' et ministror' dicti nuper Regis Willielmi tertii per ipsum, ut præfertur, fiduciat, et alior' ligoes et subditos ejusd' nuper Regis, in malum exemplum omnium alior' in hujusmodi casu delinquent', ac contra pacem dicti nuper Dom' Regis Willielmi tertii, coron' et dignitat' suas, &c."

James) and others, to his greatest Friends in England, with the Depositions of Thomas Jones and Thomas Widdrington, esqrs. proving the Corruption lately practised to ruin this Nation.' In which false, feigned and scandalous libel, among other things, are contained as follows: "[1st page.] Thomas Jones, esq. deposeth, That he being at St. Germain, the court of the late king James in France, in January, 1692, the said late king being in his closet, sent for this deponent, and there commanded the said deponent to begin his journey for England, in company with col. Tho. Dallaval, and Mr. George Hayes; and the said late king did then and there deliver to this deponent several letters and papers, to divers noblemen and others in England, to whom this deponent had several times before and since brought letters from the late king and his queen, and pretended secretaries of state, delivered according to order. This deponent further saith, by the oath he hath taken, that the late king James, at the time aforesaid, in his closet at St. Germain, did deliver to this deponent a paper, being an order for this deponent to receive 6,000*l.*; which sum this deponent was to pay to several persons in places in trust then in England, to engage them more firmly to endeavour the invalidating the evidence of William Fuller (who, as the said late king expressed, had been by him, his queen, and chief servants, entrusted and employed in their most secret and weighty concerns, for a considerable time after the late king and queen's coming to France). [P. 7.] And this deponent saith, he informed Mr. Fuller that Dallaval and Hayes were come to town, and lodged at an apothecary's in Holborn, which house Hayes formerly lodged at; but that Dallaval not being well, they could not come to him; therefore this deponent said to Fuller, that they desired him to come to them; but he urged his condition rendered him unfit, begging of the deponent, to entreat them not to fail to attend the House of Commons at the time appointed. All which this deponent imparted the same day to col. Dallaval and Mr. Hayes, and with them went the same evening to three gentlemen that were then members of parliament; and this deponent had a letter from one of those three gentlemen, (that was a member of parliament) directed to one of the secretaries to the then secretary of state, which this deponent was to carry to him the next morning; which accordingly he did by seven o'clock. And this deponent saith, he paid the said under secretary 500 guineas. And this deponent saith, that when he left the secretary, he went directly to the Sun Tavern in King-street, Westminster, where he found the three members with Dallaval and Hayes, and an eminent banker of the city of London: then this deponent desired the banker to give his bill to pay each of those three gentlemen that had been members, 1000*l.* payable on sight; which being done, the said banker delivered also to one of them his bill for 1,500*l.* to be paid on demand, for the use of a considerable person,

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whose station would not permit him to be present. And this deponent saith, by the oath he hath taken, that the several sums of money beforementioned, with several lesser parcels, were so disposed of by him, according to the late king's especial directions. And this deponent saith, he has now by him the receipts of each person for the respective bills and monies he disposed of, with the true copies of his original bills, delivered to him by the late king's own hand. This deponent saith, he delivered to the late king a letter he had for him, from the three gentlemen that were members, and also several others he brought from England. And forasmuch as this deponent saith, as he hath formerly been employed to bring letters, and bills, and orders, from the late king James and the French king and their ministers; this deponent saith, that he has kept a journal of the same, and is ready to lay it before either or both Houses of Parliament when required. And this deponent saith also, by the oath he hath taken, that he can produce his original orders that he received from the late king's and the French king's own hands, for the distributing more than 180,000*l.* sterling for their use, to persons that were in places of trust. And this deponent saith, he can produce the receipt of each person to whom the money was paid, and also the persons from whom this deponent received the said sum or sums by the order aforesaid.

THO. JONES.

(2d Book). "The information further sets forth, That the defendant, the day and year aforesaid, (to perfect and bring to effect his further most wicked practices and intentions against divers officers, and other subjects of the late king William, upon a feigned and pretended correspondence between them and the late king James, whilst he resided in France, and of several sums of money sent by the said king James, out of France into England, to be distributed among the subjects of the late king William) another most false and scandalous libel [title page] entitled, 'Twenty-six Depositions of Persons of Quality and Worth,' falsely, wickedly, and most deceitfully, did write, print, and cause to be printed; in which said false and scandalous libel, among other things, are contained, viz. [5th page]. 'Mr. Jones has also made oath, 'That he paid 5,000*l.* more, by the late king's order, to several persons in places of trust, that they might complete my ruin, and invalidate me for ever. Nor is this all; for the same Mr. Jones will prove, by undeniable witness and demonstration, that he has distributed more than 180,000*l.* in eight years last past, by the French king's order, to persons in public trust in this kingdom.

'W. FULLER.'

"And the said defendant Fuller afterwards, the said day, &c. falsely, unlawfully, and wickedly did publish, utter, and for truth affirm, the said several false and scandalous libels, without any lawful authority: Whereas,

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in truth, the said Thomas Jones did not depose upon his oath, as is contained in the said false and scandalous libel; but that the said scandalous libels were and are false and feigned, and altogether contrary to truth, to the great scandal and abuse of the late king William, and his great officers and ministers, and other the faithful subjects of the said late king, to the evil example of others, and against the peace of the said late king, his crown and dignity."

He pleaded Not Guilty, and issue joined thereupon.

THE CASE.

The defendant Fuller is so notorious a cheat, and his practices so publicly known to all men, that there need not much to be said here to aggravate his offences; for in the year 1691, he was censured by the House of Commons, prosecuted, convicted and punished for those very crimes he now stands to be tried; and notwithstanding that sentence and punishment, he still persists in his villainous practices and designs.

About two years since, he applied himself to the chief ministers at court, and insinuated what discoveries he could make relating to the cheat of the birth of the pretended prince of Wales, and of great sums of money received by several persons of quality here, from the late king James and the French king, and of several correspondences had between them and the great officers of state here in England; but not meeting with that encouragement he expected, he then undertakes to write and publish the two scandalous libels mentioned in the information, and caused great numbers of them to be printed and sold about the town; and then petitions the House of Peers to be heard, to make out the truth of what he wrote and published. The House of Peers, by his importunity, appointed a day for him to produce those persons he mentioned; to make good his accusations and charge, which he undertook to do; but failing from time to time, their lordships ordered him to be committed and prosecuted for an impostor; but the defendant being an hardened rogue, was no way humbled at this order, but immediately thereon applies himself by letters to the Speaker of the House of Commons, alleging the same matters, as he had done before to the House of Lords. The House of Commons ordered him to be brought to their bar, where he only desired ten days time to produce those persons mentioned in his libels; and that House, (to leave him no excuse) granted him a fortnight; but having trifled with the House of Commons, as he had done before with the House of Lords, they voted him an incorrigible rogue, and ordered him to be prosecuted. What the reasons were for this unparalleled impudence, whether for the sake of gain, or malice to those gentlemen he hints at in his libels, are yet secrets.

Att. Gen. (sir Edward Northey). My lord, the charge has been very fully opened, and I need not say much. His crime is his publish-

ing these two books (mentioned in the information). He has been some time setting up for an evidence, pretending to discover a secret correspondence between the late king James and several persons here in England. He made an offer of some such discovery about ten years ago, and he then applied himself to the House of Commons, and they gave him time to produce his witnesses; but after all, he could produce none, and the House ordered him to be prosecuted as a cheat and impostor; and he was prosecuted accordingly, convicted, and set in the pillory. Now some time last winter, he did apply himself to some of the late king's ministers, and pretended he would produce Thomas Jones and Thomas Widdington, to make considerable discoveries. They heard him, but he could never produce these men before them. And afterwards having no encouragement from them, he took on him to publish these two books, mentioned in the information, whereof he stands now accused. And after he was before the parliament, he first applied himself to the House of Lords, and they heard what he had to say, and gave him time to produce his witnesses; but he could not do it, and thereupon the Lords were pleased to direct this prosecution. Then he applied himself to the House of Commons, and they gave him time likewise to produce his witnesses; but he could produce none; whereupon they voted him a cheat, a false accuser, and an incorrigible rogue. My lord, these books were published with a very malicious design, and no doubt he had other people, who do not now appear, to support him in it; and I doubt not but he would have set up witnesses to have sworn whatever he would have them, if he had met with any encouragement. He has the impudence to put in the frontispiece of his books, 'Published by Command'; but being asked in the House of Peers, by whose command? He said, it was by his own command. And he has published in the books, that he would produce witnesses to prove the distributing of 180,000*l.* to persons in places of trust, and to produce receipts for the same, and he had an opportunity now of doing it. We will prove the charge upon him.

Sol. Gen. (sir John Hawles). My lord, the matter of the information has been fully opened; but we are to consider the ill consequences of it. This is a new practice for a man to publish things of this nature, and not be able to prove any thing; but he pretends to set up a second witness to make out what he has said; that is Jones, as if Jones were to relieve him. Now if that were true, it would be a great thing to corroborate what he did say; but he has never produced this Jones, but only has printed something that he calls Jones's. If it were only what depended on his private knowledge, the case were otherwise; but when he pretends to bring Jones to prove it, and does not produce him, he makes himself guilty of the scandal; and it is very necessary that this man should

be brought to punishment. I will not trouble your lordship further, but call our witnesses.

Serj. Darnel. The matter has been opened so fully, that there is no need for me to say any thing; we will now call our witnesses.

Att. Gen. My lord, we will prove that Fuller carried this book to the press, and not Mr. Jones, therefore we may well presume it was his own.

Mr. Coniers. He could never produce Jones, but he could frame depositions for him.

Then Fuller's book was produced.

Serj. Darnel. Call Mr. Buck [who appeared, and was sworn]. Mr. Buck, who caused that book to be published?

Buck. Mr. Fuller.

Serj. Darnel. How do you know that?

Buck. He brought it to me in manuscript, and he said he took these depositions out of the secretary's office.

Serj. Darnel. But what did he desire you to do?

Buck. He desired me to print it: and he said, because it was not done sooner, it had done the king 10,000*l.* damage.

Mr. Coniers. Did he make any alteration in them afterwards?

Buck. No, only altered the mistakes of the press.

Att. Gen. Was that book printed by his order?—*Buck.* Yes.

Fuller. My lord, I will not give these gentlemen the trouble to prove it; I own it was writ by me.

Att. Gen. Do you own the other book too?

Mr. Buck, look on that book [then the other book was shewn him]. By whose order was that printed?—*Buck.* By Mr. Fuller's order.

Fuller. My lord, if it be the book I published, I will own it. [Then it was shewn to him.] Yes, my lord, it was printed by my order.

L. C. J. Holt. Read the title.

Clerk. 'Original Letters from the late King James, &c. Published by Command.'

L. C. J. Holt. By whose command was it published?

Att. Gen. By Fuller's.

L. C. J. Holt. His order is a command, it seems.

Then some paragraphs were read.

Att. Gen. If Mr. Fuller will produce this Jones, to make good what he says, he will do a great piece of service; otherwise, he deserves to be severely censured.

L. C. J. Holt. Read the other part.

Then the Clerk read the title.

Fuller. Pray read the whole title.

L. C. J. Holt. He is in love with it.

Clerk. [Reads the title] 'Twenty-six Depositions of Persons of Quality and Worth, with Letters of the late Queen, Father Corker, and Mrs. Mary Grey, &c. Published by Command.'

Att. Gen. Read the text.

Clerk. 'Mr. Fuller's Answer to the chief Objections made against him, &c.—Mr. Jones made oath, that he has paid 5,000*l.* more to several persons by the late king's order, that he might compleat my ruin and invalidate my evidence for ever,' &c.

Att. Gen. My lord, we have proved his publishing of these books. We will now hear what he can say for himself.

Fuller. My lord, I humbly beg you will hear what I have to say.

L. C. J. Holt. Yes, yes. Have you any counsel?

Fuller. No, my lord, I have none; I have no money to procure counsel. I have put my thoughts in writing, and I beg leave to read it.

L. C. J. Holt. But you must speak to the purpose. What do you say concerning the publishing these books?

Fuller. That is what I have to offer.

L. C. J. Holt. But can you make it appear that they are true?

Fuller. My lord, I hope I shall.

L. C. J. Holt. Have you any witnesses?

Fuller. I have none here at present. But if your lordship will please to bear the terms upon which the witnesses would have come in, I can produce them: if your lordship will grant your warrant for Jones, I will forfeit my life if he appear not.

L. C. J. Holt. You might have had subpoenas for your witnesses against this day.

Fuller. My lord, I did endeavour it; but I had not money to bear their charges.

L. C. J. Holt. You made the same excuse before the Houses of Lords and Commons.

Fuller. If it can be made appear that I had any assistance from the House of Lords, or the House of Commons, I own I am in the wrong.

L. C. J. Holt. What assistance would you have had from them? Or what would you have from me?

Fuller. The House of Lords summoned me before them; and I desired—

L. C. J. Holt. If you take on you to write such things as you are charged with, it lies upon you to prove it at your peril.

Att. Gen. My lord, he did appeal to the Lords; and they gave him from time to time to produce his witnesses, and he could not do it.

L. C. J. Holt. If you have any witnesses, I will hear them; but to hear you make a speech, it is to no purpose.

Fuller. My lord, I hope you will believe it to be to the purpose, if you please to hear me.

Mr. Coniers. What signifies your belief?

Fuller. Why am I not to be believed?

L. C. J. Holt. What? Because you have stood in the pillory for an impostor heretofore.

Serj. Darnel. The whole nation do not believe you; for the Lords and Commons did not, who represent the whole nation.

Fuller. The Lords did not think fit to put it to the trial. These gentlemen charge me to have abused several persons: I would be glad to know who these persons are.

Att. Gen. I cannot tell who they are; your book promises to make that appear.

Fuller. It's a man of an ill character abuse the nation. I hope I shall not suffer for that.

L. C. J. Holt. How came you to write these books that are not true?

Fuller. My lord, I believe they are all true.

Att. Gen. Produce the original affidavits made by Jones, which you caused to be printed.

Serj. Darnel. Produce the receipts for the money which you say you have; and then you will do some thing.

Fuller. Do I say it?

Serj. Darnel. Yes, if that print be yours.

Fuller. I wonder a man of your gravity should assert such an untruth in the court.

L. C. J. Holt. If you have any witnesses, produce them.

Fuller. My lord, I presume you cannot but remember, that in Crone's case I behaved myself honourably, and was owned to have done the nation good service.

L. C. J. Holt. That was formerly, and signifies nothing to what you do now.

Fuller. I ventured several times into France, and back again: shew me a man that ever did so besides.

Att. Gen. If you had made out the discovery you pretended to make, I should have commended you.

Fuller. After I had made that discovery, the court at St. Germain's did what they could to ruin me. There have been a great many books lately printed, to prove the legitimacy of the prince of Wales, and none of them taken notice of.

L. C. J. Holt. You charge a great many persons with corresponding with France, and cannot prove it.

Fuller. I charge none, my lord.

L. C. J. Holt. You charge all that are intimated in the books. The same Mr. Jones will prove by undeniable demonstration, that he distributed more than 180,000*l.* by the French king's order to several persons employed under the government. Now these persons are scandalized; for you produce no proof of what you charge them with: and you say, I had the original of this from Mr. Jones, &c. Where are they?

Fuller. If your lordship will please to grant me your warrant, I will produce them.

L. C. J. Holt. If you take on you to make good these things, you cannot in justice require my warrant to fetch in others to prove what you say; you must prove it.

Fuller. By his own confession, he has been guilty of high-treason; and therefore will not appear without a warrant.

L. C. J. Holt. You cannot pretend to have a right to any warrant.

Fuller. If your lordship please to give me leave to say something in my defence—

L. C. J. Holt. Yes, if it be to any purpose.

Fuller. I am unacquainted with the laws, and have not—

L. C. J. Holt. What is that to the purpose? You are not to make libels nor traduce ministers of state. What have you to say to that?

Fuller. When I had printed this book, I was summoned before the Lords; and after that was committed to the Fleet. My friends were all called before the Lords; and by my lord Jeffreys and other lords, there were such questions asked, as I believe were never asked before—

L. C. J. Holt. This is not to be endured; you do but aggravate your crime.

Fuller. This is not what I would offer.

L. C. J. Holt. If you can offer any matter to prove what you have writ, let us hear it.

Fuller. Mr. Jones has confessed himself guilty of high-treason, and therefore cannot appear.

L. C. J. Holt. Where is he? Where did he make this confession?

Fuller. In the country.

L. C. J. Holt. Before whom?

Fuller. I do not know that; I was not with him when he did it.

L. C. J. Holt. Where is the man?

Fuller. If your lordship will please to give me your warrant, I will produce him.

L. C. J. Holt. Shall I make a bargain with you? Why have you not produced him all this while, before the House of Lords, and the House of Commons?

Fuller. Mr. Attorney did say I appealed to the Lords. I was called before them; I made no application to them, but was called by the order of the House.

Att. Gen. But you was there?

Fuller. I was there; and there were three letters read of mine in the House, and I desire they may be read here.

L. C. J. Holt. What is that to the purpose? Can you produce your witnesses?

Fuller. Mr. Jones is now in Hampshire.

L. C. J. Holt. Have you not had time enough to procure him?

Fuller. My lord, I cannot force him. I was with the Secretary of State, and told him, Jones will not come in voluntarily; if the Lords will grant a warrant, he may be brought. I offered this to the House of Commons too, but it was not granted. I could not force him.

Serj. Darnel. The Secretary of State sent one or two for him.

Fuller. He sent nobody.

L. C. J. Holt. Gentlemen of the jury, you hear what the purpose of this information is, and you hear how it is proved; and you hear the witness say, he brought these two scandalous books to the press, and that he corrected them; and he owns he was the publisher of them: and if you believe he did so, you are to find him guilty.

The jury brought him in Guilty, without going from the bar.

423. The Trials of Colonel RICHARD KIRKBY, Captain JOHN CONSTABLE, Captain COOPER WADE, Captain SAMUEL VINCENT, and Captain CHRISTOPHER FOGG, at a Court-Martial in Jamaica, for Offences against the Articles of War: 1 ANNE, A. D. 1702.

AT a Court-martial held on board her majesty's ship the *Bredah*, in Port-Royal harbour, in Jamaica, in America, the 8th, 9th, 10th and 12th days of October, 1702. Present,

The hon. William Whiston, esq. rear-admiral of her majesty's ships or the West India squadron, president; Samuel Vincent, John Hartnoll, Christopher Fogg, John Smith, John Rednan, George Walton, William Russell, Barrow Harris, Hercules Mitchell, Philip Boyce, Charles Smith. Arnold Browne, esq. judge advocate:

Who being all duly sworn, pursuant to the act of parliament, proceeded (October 8th) to the Trial of John Arthur, gunner of the *Defiance*, on a complaint exhibited by Francis Knighton, third lieutenant of the *Defiance*, and George Foster, gunner of ——— for hiding and concealing forty three barrels of powder in the wadd-room, and covering them with wadds and coins, &c. when a survey of her majesty's stores of ammunition after an engagement was ordered; and denying to the surveyors, that there was any more powder on board, than was in the powder-room and gun-room, viz. one hundred; which, upon a second survey, were discovered. It was proved also that he had two keys to the powder room; and that having lost or mislaid his own, he, without making any application to the commanding officer then on board, who kept the other key, prevailed with William Baker, carpenter of the said ship, to break open the door.

In mitigation of his offence, he alleged, That examining into the powder room, he found three barrels that had received wet, which caused his removal of the forty-three barrels: but had little to say for his concealing them from the surveyors. Whereupon the court adjudged, That the said offence falling under the 33d article of war, the said John Arthur should be carried from ship to ship in a boat, with a halter about his neck, the provost-marshal declaring his crimes; and all his pay, as gunner, to be mulcted and forfeited to the chest at Chatham; and be rendered incapable of serving her majesty in any other employment.

October 8, 9.

Colonel Richard Kirkby, commander of the *Defiance*, was tried before the aforesaid court,

(except captain Samuel Vincent, and captain Christopher Fogg, who appeared as witnesses for the queen.) on a complaint exhibited by the judge-advocate on the behalf of her majesty, of cowardice, neglect of duty, breach of orders, and other crimes committed by him at a fight at sea, commenced the 19th of August, 1702, off St. Martha, in the latitude of ten degrees north, near the main land of America, between the honourable John Benbow, esq. vice-admiral of the blue squadron of her majesty's fleet, and admiral and commander in chief, &c. on board her majesty's ship *Bredah*, Christopher Fogg commander, and six other of her majesty's ships, viz. the *Defiance*, Richard Kirkby commander; the *Falmouth*, Samuel Vincent commander; *Windsor*, John Constable commander; *Greenwich*, Cooper Wade commander; *Ruby*, George Walton commander; and the *Pennennis*, Thomas Hudson commander: and Monsieur Du Casse with four French ships of war: which continued until the 24th of August inclusive.

The witnesses that were sworn in behalf of the queen; viz. The hon. John Benbow, esq. admiral, 2 captains, 8 lieutenants, 5 masters, 5 inferior officers. In all 21.

Who deposed, that the said colonel Richard Kirkby, the van in the line of battle, the 19th of August, about three in the afternoon, the signal of battle being out, the admiral was forced to send his boat on board of Kirkby, and command his making more sail, and get abreast of the enemy's van, for that he was resolved to fight them. About four the fight began; but the said Kirkby did not fire above three broadsides, then luffed up out of the line, and out of gunshot, leaving the admiral engaged with two French ships till dark, and the said Kirkby receiving no damage: That his behaviour caused great fear of his desertion. At night the said Kirkby fell astern, leaving the admiral to pursue the enemy.*

* See as to this inglorious transaction, the *Lives of the Admirals*, vol. 3, pp. 25, 347.

Dalrymple tells us that "King William by his predilection for the land service, more than the other, had weakened the spirit of that other. Of this he felt the effects, when, offering the command of the West India fleet to several officers, they had excused themselves under different pretences, to avoid the danger of the climate and of the service. It is a story cur-

That the 20th, at day-light, the admiral and Ruby were within shot of all the enemy's ships; but colonel Kirkby was near three or four miles a-stern. The admiral then made a new line of battle, and took the van himself, and sent to each ship, with a command to the said Kirkby to keep his line and station; which he promised to do, but did not; keeping two or three miles a-stern, though the signal for battle was out all night. The French making a running fight, the admiral and Ruby plied the enemy with their chase-guns till night. That the 21st day, at light, the admiral was on the quarter of the second ship of the enemy's rear and the Ruby on the board side very near, who plied him warily, and met the same return; by which he was so much disabled, though the admiral came in to his assistance, that he was forced to be towed off: And this prevented the admiral's design of cutting off the enemy's sternmost ship. This action lasted two hours; during which time the said Kirkby lay a-broad-side of the sternmost ship; as did also the Windsor, John Constable commander. The admiral then commanded the said Kirkby to ply his broadsides on him. But this having no effect, the second time he commanded the same; but he fired not a gun: Nay, his own boatswain and seamen repeated the admiral's command to him; but were severely used, and threatened that he would run his sword through the boatswain. And had the said Kirkby done his duty, and captain Constable his, they must have taken or destroyed the said French ships. The admiral, tho' he received much damage in his sails, rigging, yards &c yet continued the chase all night. That the 22d in the morning at day-light, the Greenwich was three leagues a stern; and the Defiance, colonel Kirkby, with the rest of the ships, three or four miles, the Falmouth excepted, whose station was in the rear: That the said captain Samuel Vincent, seeing the behaviour of the said Kirkby, and the rest, came up with the admiral, and sent his lieutenant on board, desiring leave to assist him, which was accepted: The said Kirkby never coming up; and by his example the rest did the same; as if they had a design to sacrifice the admiral and Falmouth to the enemy, or desert. The enemy were now about a mile and an half a-head, standing in to the shore, with a small breeze at W. fetched within Sambey, the admiral firing at the sternmost till night, and continued the pursuit: and a Flemish ship, that was in Monsieu Du Casse's company, on board of which were all the French and Spanish new governors and other officers, made her escape. That the 23d, in the morning, at day-light, the enemy bore North West, distant about four or five miles, the admiral

rent among the seamen, that the king, who like other Dutchmen did not dislike a pun, said, 'Well, since these beaux will not go, I must apply to honest Benbow.' I find not any thing of this in Campbell.

and Falmouth pursuing; but the said colonel Kirkby, with the rest of the ships, being three or four miles a-stern; (though there was not a ship but, before and after the battle, sailed better than the admiral.) About seven in the evening, it having been some time calm, a gale of wind sprung up, the admiral and Falmouth were about two miles from the enemy; and at eight, the said Kirkby and his separate squadron was fair up with the admiral: And this day the admiral sent away the disabled Ruby, George Walton commander, to Port-Royal; and under his convoy the Anna Galley, retaken from the French.

That the 24th, in the morning, about two o'clock, the admiral came up with the sternmost of the enemy within call, and the Falmouth pretty near; but the said colonel Kirkby, with the rest of the ships, according to custom, were three or four miles a-stern. The admiral and Falmouth engaged the said ship; and at three the admiral was wounded, his right leg being broke, but commanded the fight to be vigorously maintained; and at day-light the enemy's ship appeared like a wreck, her mizen-mast shot by the board, her main-yard in three or four pieces, her foretop-sail-yard the same, her stays and rigging all shot to pieces. Soon after day, the said Kirkby, with the rest of the ships, being to windward of the said disabled ship, he the said Kirkby, with the rest of his separate squadron, fired about twelve guns at the said ship; and fearing a smart return from her, he lowered his mizen-yard, his topsails on the caps, set his spritsail, spritsail-topsail, and foretop-sail-staysail, and having waired his ship, set his sail, and run away before the wind from the poor disabled ship, the rest following his said example; though they had but eight men killed on board them all (except the admiral). The other three French men of war were at this time of action about four miles distant from their maimed ship; whereupon the enemy seeing the cowardice of the said colonel Kirkby and the rest of the English ships, in a squall, bore down upon the admiral, who lay close by the disabled ship; and having got in their spritsail-yard, gave him all their fire; and running between him and the disabled ship, remanned her and took her in. The admiral's rigging being very much shattered, was obliged to lie and reef till ten o'clock, and then continued the pursuit; and the rest of the fleet following in the greatest disorder imaginable, the admiral commanded captain Fogg to stand a-breast of the enemy's van, and then to attack him, and having then a fine steady gale, the like not happening during the whole engagement, and further ordered, that he should send to all the captains to keep the line of battle, and behave themselves like Englishmen; and this message was sent by captain Wade, then on board the Bredah. That the said colonel Kirkby on the receipt of this message, and seeing the admiral's resolution to engage, came on board him, who then lay wounded in a cradle; and with-

out common respect of enquiring after his health, he the said Kirkby expressed these words following, "That he wondered that the admiral should offer to engage the French again, it being not necessary, safe, nor convenient, having had six days trial of their strength;" and then magnified that of the French, and lessened that of the English. But the admiral being surprised at his speech, said it was but one man's opinion, and that he would have the rest of the captains; and accordingly ordered the signal to be made for all the captains to come on board; and at this time the admiral and the rest of the ships were to windward, and within shot of the enemy, and had the fairest opportunity that in six days presented, to chase, engage, and destroy the enemy.

That the said colonel Kirkby had endeavoured to poison the rest of the captains; forming a writing under his own hand, which was cowardly and erroneous: the substance of which was, Not to engage the enemy any more. He the said colonel Kirkby brought it to the admiral, who reproved him for it, saying it would be the ruin of all: upon which he the said colonel Kirkby went away, but writ another in the following words:

At a Consultation held on board her Majesty's Ship *Bredah*, the 24th of August, 1702, off of Carthagea, on the main Continent of America.

It is the opinion of us whose names are under-written,

1. Of the great want of men in number, quality, and the weaknesses of those they have.

2. The general want of ammunition of most sorts.

3. Each ship's masts, yards, sails, and rigging, being all in a great measure disabled.

4. The winds are so small and variable, that the ships cannot be governed by any strength: each ship

5. Having experienced the enemy in six days battle following, the squadron consisting of five men of war and a fire-ship, under the command of Monsieur Du Casse; their equipage consisting in guns from 60 to 80, and having a great number of seamen and soldiers on board for the service of Spain.

For which reasons above-mentioned, we think it not fit to engage the enemy at this time, but to keep them company this night, and observe their motion; and if a fair opportunity shall happen of wind and weather, once more to try our strength with them.

RICHARD KIRKBY, CHRISTOPHER FOGG,
SAMUEL VINCENT, COOPER WADE,
JOHN CONSTABLE, THOMAS HUDSON.

That during the six days engagement, he never encouraged his men; but by his own example of dodging behind the mizen-mast, and falling down upon the deck on the noise of shot, and denying them the provisions of the ship, the said men were under great discour-

agement. That he amended the master of the ship's journal of the transactions of the fight, according to his own inclination.

All which being proved aforesaid:

The said colonel *Richard Kirkby* denied the whole, excepting the pretended written Consultation: which being shewn to him, he owned his own hand and name too. He brought several of his men to give an account of his behaviour during the fight; but their testimonies were insignificant; and his behaviour to the court and witnesses most unbecoming a gentleman. And being particularly asked by the court, why he did not fire at the enemies sternmost ship, which lay point-blank with him the 21st of August? He replied, because they did not fire at him, for that they had a respect for him: which words upon several occasions, during the trial, he repeated three several times.

Where, upon due consideration of the premises, of great advantages the English had in number, being seven to four, of guns 122 more than the other; with his acts and behaviour as aforesaid, and more particularly his ill-timed paper or Consultation as afore-quoted, which obliged the admiral, for the preservation of her majesty's fleet, to give over the chase and fight, to the irreparable dishonour of the queen, her crown and dignity, and come to Port Royal, Jamaica: for which reasons the court was of opinion, that he fell under the 11th, 12th, 14th, and 20th articles of war; and adjudged accordingly, That he be shot to death: but further decreed, that the execution of col. Kirkby be deferred till her majesty's pleasure be known therein; but that he be continued a close prisoner till that time.

Captain *John Constable*, commander of the *Windsor*, was tried before the aforesaid court, on a complaint exhibited by the judge advocate on the behalf of the queen, for breach of orders, neglect of duty, and other ill practices committed during a fight commenced the 19th of August, 1702, as aforesaid. (Refer to col. Kirkby's trial.)

The witnesses sworn on the behalf of the queen were, 2 captains, 7 lieutenants, 5 masters, 2 other officers, the hon. John Beubow, esq. admiral: In all 17 witnesses:

Who deposed, That captain *John Constable* never kept his first nor second line of battle, but acted in all things as col. Kirkby had done. That the admiral had fired two guns to command him into the second line of battle. That he did set more sail in order to come into the line, and his station; but upon colonel Kirkby's calling to him to keep his line, he accordingly did. That the admiral sent his lieutenant *Landgridge* to command him the said *Constable* to keep his line of battle within half a cable's length of the ship before him, which was twice verbally delivered. And that he signed the paper, Consultation, as is in colone!

Kirkby's trial aforesaid; tending to the hindrance and disservice of her majesty, &c. and was drunk during the fight, &c.

All which being fully proved as aforesaid; the said captain *John Constable* denied his breach of orders, or neglect of duty; but owned the signing the paper, or Consultation prepared by col. Kirkby, and did it at his request, and for that he had received damage in his masts and rigging; and owned no other article to be true, but that he had signed to. He called several witnesses to his behaviour during the fight; who all declared he kept the quarter-deck during the engagement, and encouraged his men to fight; and that sometimes he gave them drams of rum; and that verbal message delivered by lieutenant Landgridge, was delivered him in some heat and passion, and was understood to be, to keep the line within half a cable's length, and to follow Kirkby, which he did. That he so understood it himself, and several of his men: he prayed the mercy of the court, and so concluded, &c.

Where, upon due consideration of the premises, the court were of opinion, that the said John Constable, captain, fell under the 12th, 14th, and 20th articles of war; and adjudged the said captain John Constable to be immediately cashiered, and rendered incapable of serving her majesty, and be imprisoned during her majesty's pleasure, and sent home to England a prisoner in the first ship the admiral shall think fit; and be confined a prisoner till then.

October 10, 12.

Captain *Cooper Wade*, commander of the *Greenwich*, was tried before the aforesaid court; on a complaint exhibited by the judge advocate, on the behalf of the queen, of high crimes and misdemeanors, of cowardice, breach of orders, and neglect of duty, and other ill practices, committed during a fight, commenced the 10th of August, 1702, as aforesaid. (Refer to that part of colonel Kirkby's Trial.)

The witnesses sworn on behalf of the queen, were, the hon. John Benbow, esq. admiral; 9 lieutenants, 3 masters, 3 inferior officers.—In all, 16 witnesses:

Who deposed, That during the six days engagement, he never kept the line of battle, fired all his shot in vain, not reaching half way to the enemy; that he was often told the same by his lieutenants and other officers; but notwithstanding, he commanded them to fire, saying they must do so, or the admiral would not believe they fought if they did not continue the fire. That during the whole fight the admiral was engaged in, the said captain Wade received but one shot from the enemy; that he was in drink the greatest part of the time of action; and that he signed the paper or Consultation drawn up by colonel Kirkby, as aforesaid; and in the time of fight arraigned the honourable courage and conduct of the admiral.

All which being fully proved as aforesaid:

The said captain *Cooper Wade* denied the arraignment of the honourable courage and conduct of the admiral, during the whole six days engagement; declaring the bravery and good management of the admiral in this time of action, and that no man living could do more or better, for the honour of the queen and nation. He called some persons to justify his behaviour, who said little in his favour. He begged the mercy of the court, and so concluded. Whereupon the court was of opinion, That the said *Cooper Wade* fell under the 11th, 12th, 14th, and 20th articles of war; and accordingly adjudged the said *Cooper Wade* to be shot to death: but it was farther declared by the court, That the execution of the said *Cooper Wade* be deferred till her majesty's pleasure be known therein, but that he be continued a close prisoner till that time.

October 12.

Captain *Samuel Vincent*, commander of the *Falmouth*, and captain *Christopher Fogg*, commander of the *Bredah*, were tried before the aforesaid court, on a complaint exhibited by the judge advocate, for high crimes and misdemeanors, and ill practices in time of admiral Benbow's fight with monsieur Du Casse as aforesaid, in signing a Paper called a Consultation and opinion held on board the *Bredah*, the 24th of August, 1702. (Which is *verbatim* recited in colonel Kirkby's Trial, to which refer). It tending to the great hindrance and disservice of her majesty's fleet then in fight: and the said Paper so written, being shewed to each of them, they severally owned their hands to the same. But the said captain Vincent and captain Fogg, for reason of signing the same, alleged, That being deserted during each day's engagement by colonel Richard Kirkby in the *Defiance*, captain John Constable in the *Windsor*, captain *Cooper Wade* in the *Greenwich*, and captain Thomas Hudson in the *Pendennis*, and left as a prey to monsieur Du Casse, they had great reason to believe they should be captives to the enemy. And the hon. John Benbow, esq. admiral, &c. coming into court, declared, that during the six days fight the said capt. Fogg behaved himself with great courage, bravery, and conduct, like a true Englishman, and lover of his queen and country: and that the said captain Samuel Vincent valiantly and courageously behaved himself during the said action, and desired leave to come into his said admiral's assistance, then engaged with the enemy, and deserted by all the rest of the abovesaid ships; which he did, to the relief of the said admiral, who otherwise had fallen into the hands of monsieur Du Casse.

Whereupon the Court being of opinion, That the signing of the aforesaid Paper brought them under the censure of the 20th article of war, accordingly adjudged captain Samuel Vincent, and captain Christopher Fogg to be suspended:

but the execution thereof is hereby respited, till his royal highness prince George of Denmark, lord high admiral of England, &c. his further pleasure be known therein.

Captain *Thomas Hudson*, commander of the

Pendennis, died on board his said ship, in the harbour of Port Royal, at Jamaica.

At five o'clock the 12th day of October, 1702, the president, &c. having finished all the business before the court, dissolved the same.

424. Proceedings at the Bar of the House of Commons, upon the Complaint of Sir JOHN PAKINGTON against WILLIAM Lord Bishop of WORCESTER,* and Mr. LLOYD, his Son: 1 ANNE, A. D. 1702.†

November 2, 1702.

A COMPLAINT being made to the House by sir John Pakington, against the lord bishop of Worcester, and Mr. Lloyd his son. relating to the rights and privileges of the House of Commons;

Resolved, That a day be appointed to take into consideration the said complaint.

Ordered, That the same be taken into consideration upon Wednesday the 18th day of November instant.

November 18.

The House (according to the order of the day) proceeded to take into consideration the complaint made by sir John Pakington, the second instant, against the lord bishop of Worcester, and Mr. Lloyd, his son, relating to the rights and privileges of the House of Commons. And sir John Pakington in his place acquainted the House, that he had reduced the matter of the said complaint into several heads, which he read in his place, and are as follow:

I. That soon after the last parliament rose, the bishop of Worcester took upon him to send to me to desist from standing to be elected knight for that county, and to threaten me, that if I would not desist, he should think himself obliged to speak against me to his clergy.

II. He sent some letters himself, and his secretary sent others, to several of his clergy, with directions to make what interest they could against me in their several parishes, and where they could not prevail with such who voted singly for me in the last election, to give a vote

* He was one of the Seven imprisoned by James the Second. See their Case, vol. 12, p. 183. As to the debates in parliament as to this attack on Lloyd and his son, see 3 Chandler's Debates (Commons) 206. 2 Chandler's Debates (Lords) 45.

† Mercurii 25 die Novembris, 1702. Ordered, That the evidence given at the bar of this House, upon the charge of sir John Pakington, against William lord bishop of Worcester, and Mr. Lloyd his son, be printed; together with the proceedings of this House thereupon. PAUL JODRELL, Cl. Dom. Com.

for one or both the other candidates, they should desire them to stay at home; and in order to this his lordship sent them copies of the poll of their respective parishes.

III. He aspersed me to his clergy, branding me and my ancestors with several vices; and at his confirmation and visitations solicited his clergy to vote against me, representing me as very unfit to serve in parliament, and threatening them with his displeasure, if they did not vote against me.

IV. He aspersed me and my ancestors to several of the laity, who were his tenants, and threatened them, that if they would not vote against me, they should never renew any estate under him, and that he would set such marks upon them, that his successors should not suffer them nor their children to renew any more.

V. Mr. Lloyd, the bishop's son, aspersed me, and gave scandalous characters of me to several freeholders, whom he solicited to vote against me, and told them, I voted for bringing in a French government.

VI. The bishop's secretary aspersed me to several freeholders in the like manner, representing me as unfit to sit in the House, threatening them with the bishop's displeasure; and said they might as well vote for the prince of Wales as for me.

After which, the witnesses to the respective heads were severally called in and examined at the bar thereunto, viz.

Mr. *William Norton* being examined, saith, that he had a letter from the lord bishop of Worcester's secretary, Mr. Evans, that the bishop would speak with him; that he went accordingly that night to wait upon his lordship, and upon his attending his lordship, his lordship told him, that he took it unkindly that he made interest for sir John Pakington; that his lordship had sent his bailiff to engage votes for Mr. Bromley and Mr. Walsh, and he was sorry that this examinant should be for his enemy sir John Pakington; and that his lordship would send to sir John Pakington, to desist from standing for knight of the shire; and if he would not desist, his lordship was to visit his clergy, and he would set sir John Pakington out in his colours: the said examinant being

asked, what reasons his lordship gave, why sir John Pakington was his enemy; said, he did not give him any reasons, but that his lordship believed he would do any thing in his power to ruin him.

Mr. Charles Stephens, rector of Hampton Lovet, being examined, saith, that on the 30th of June last, he received a letter from the lord bishop of Worcester, under his own hand, to attend him at Worcester before his lordship went his visitation; this examinant attended his lordship accordingly, who desired this examinant to deliver a message to sir John Pakington to desist from standing for one of the knights of the shire; this was in the presence of the chancellor: he said, that sir John should name any body whom he pleased, and that his lordship should take it very ill if any of the clergy voted for sir John Pakington; and if any of his tenants did, they should not renew their leases in his time, and he would leave such intimation to his successors as should make them of his mind; and that if sir John would not desist, he should be obliged to speak against him at the visitation. This examinant being asked what reasons the bishop gave for his being against sir John Pakington, he said, his lordship urged against him the pamphlet written in defence of the bill against the translation of bishops: being asked, if he knew of any that had dispersed any of those pamphlets; he said, that the bishop said, that sir John Pakington's servants had dispersed them; but this examinant saith, that he had none given him, but half a dozen which were directed to him, he knows not by whom, but believes they came no further than from Worcester, being brought by one Davies a carrier, of Wich, as he thinks; being asked several questions about divers pamphlets, if he had seen them, he said, he had bought one at Worcester, being a vindication of the bill against the translation of bishops, and that he had seen another, being a pretended answer, which was sent him in a blank case from London, he knows not from whom, and that he never dispersed any, being always cautious in such matters: being asked, if that cover was franked with sir John Pakington's name, he said, it was not. This examinant saith, that after dinner, at the visitation at Bromsgrove, the lord-bishop said, every body might expect justice from him, but not favour, if they voted for sir John Pakington. Being asked, Whether the bishop charged him upon his canonical obedience, he said No, but that his lordship told Mr. Bolles of Hagley, who said he could not vote as the bishop desired him, being obliged by his patron to vote for sir John Pakington; the bishop replied, And are you not obliged to me? Have you not lately sworn canonical obedience? I am sure you have. This examinant being asked, if he had any living, he said that sir John Pakington had presented him to Hampton Lovet. He said further, that his lordship charged several immoralities upon sir John

Pakington; and being asked the particulars, said, he charged him with drunkenness, swearing, and whoredom. That his lordship insisted at his visitation very much upon the pamphlets, particularly that passage about cutting down wood; and his lordship said, that he could give a very good account of that; and that there were divers passages in the pamphlets, reflecting upon several bishops. That after dinner, at the visitation at Bromsgrove aforesaid, his lordship's secretary, Mr. Evans, stood at the door to endeavour to keep every body in the room until his lordship had particularly spoken to them, and was not willing to let any one go out but this examinant.

Mr. John Cheatte being examined, saith, that he was at the visitation at Bromsgrove, in July last; that he met Mr. Evans, the lord-bishop's secretary, on the stairs-head, who pressed him very much to go in to his lordship, which this examinant was unwilling to do; and being desirous to know the business the lord-bishop would speak to him of, Mr. Evans told him, my lord expected he should vote for Mr. Bromley and Mr. Walsh. This examinant told him that he was engaged, for he had promised sir John Pakington: that the secretary told him in great anger, that then he must not expect to come within his lordship's door any more. He says, that he is a receiver of some of the bishop's rents, and that he voted only for sir John Pakington.

Being asked a question which related to the said election; but that being a discourse that the lord-bishop had with him alone, the examinant said he was receiver of the bishop's rents, and that he desired the judgment of the House, whether it was fit for him to relate that; and then withdrew. And the House did not think fit to examine him to that point, but called him in to other matters.

Mr. Thomas Wellens, curate of Alfrick and Lulsley, being called in and examined about a letter sent to him by Mr. Evans, the bishop's secretary, Mr. Wellens, and the aforesaid Mr. Cheatte, proved it to be Mr. Francis Evans, the bishop's secretary's hand. The letter was read and is as followeth:

Alfrick.—John Field, P; Reynold Barber, P; William Woodcock, P; Sam. Hall, P; Jos. Joyner, P; John Gillam, P; Richard Kendrick, P; Walter Meeks, P; Sam. Meeks, P; Thomas Smith, P; Fran. Shisner, P; Richard Portman, P. B; Rich. Markham, P. W; Sam. Smith, B. W; Christopher Gorey, W; *Lulsley.*—Edmund Kinnerd, P.

Mr. Wellens; Worcester, June 30.
My lord finds that the freeholders at Alfrick and Lulsley voted as above, the last election, twelve of them singly for sir John Pakington. His lordship does not think him a fit person to represent the county in parliament, for many reasons, and therefore desires you will use all the interest you have in the gentlemen above to vote for Mr. Bromley and Mr. Walsh, and

in case they are still engaged for sir John P. if they do vote, desires them to give a second vote either for Mr. Bromley or Mr. Walsh, or rather to stay at home, and so not vote at all: Whatever service you can do in this affair, will be very kindly taken by his lordship. If there be any other freeholders that did not vote at last election, his lordship desires you will endeavour to prevail with them to vote for Mr. Bromley and Mr. Walsh. I am your friend and servant,

FRA. EVANS."

"For the rev. Mr. Wellens, curate of Alfrick and Lulsley. These."

The said Mr. Wellens being farther examined, saith, that some time after, he met Mr. Evans at Worcester, and told him he had received his letter, but that it came too late, his neighbours being engaged before.

Mr. Thomas Pountney, rector of Fladbury, being examined, saith, That he did receive a letter from the lord bishop of Worcester, by one Taylor an apparitor; and the letter being shewed him, he owned it to be the same letter, signed by his lordship's own hand. He saith, That he shewed the letter to Mr. Hodge, as the bishop desired him in the said letter. The letter was read and is as follows, viz.

"Sir; Hartlebury, July 29, 1702.

"I think I have more reason to hope for something of consideration from you, than from most others of the clergy of this diocese, and something also more from the freeholders in your parish, than in most other parts of the county; and therefore I thought I had reason to take it ill of your neighbours, that they should give their votes as they did, for the choosing of sir J. Pakington to be knight of the shire, when, in order to that very election, he had published two libels, full of horrible lies, against myself, and several others of the bishops, that had never given him the least provocation. This grieved me much, but yet I had wherewith to comfort myself, in believing that those libels might not have come to their knowledge; though as I since understand, great care was taken by sir John's agents to publish them all over your neighbourhood. But now, since, I understand there is a third libel come abroad, which is written against me in particular. The declared cause of it is not only my opposing sir J. Pakington's election, which, after my coming into the country, and finding his libels published among my tenants by his servants; I sent him word I thought myself obliged to do, unless he would be pleased to desist from standing, as I earnestly desired him to do more than once: But this author hath found, that I was the writer of a printed half sheet, called, The Character of a Churchman, and that this was written against sir J. Pakington for hindering his election; and for this he scourges me most unmercifully, with such a tongue as that St. James describes. For that Character of a Churchman, I do declare to you in the presence of God, That I nei-

ther writ it, nor know the author of it; but I certainly know, that sir J. Pakington is not once mentioned in it, nor had I at the time when that was printed any breach with sir J. Pakington nor occasion to do this with respect to the election, for it was printed before I came to London, and that was before the dissolution of the former parliament, which if I had foreseen I had certainly staid longer in the country. After all this, it is true that I sent a great number of those half sheets into the country, as I did of such other small things, upon several accounts. They were sent chiefly on the account of our unhappy differences in convocation, and for promoting the most pious design of reformation. On this last account it was, that I sent this Character of a Churchman, without making any reflection upon any particular person. I did indeed know, that the devil would be mad at me for it, and now I have found the effect of his wrath: He hath set a son of his to write against me, which I thank God is the worst he can do. This account I have given you of this third libel, in hopes it may have some effect upon you and your neighbour Mr. Hodge, to whom I desire you to shew what I have written. I hope you will both of you consider whether any such promise as that you have made to this gentleman, to make him your representative in parliament, can oblige you to any thing else but repentance of your having made such a promise, and to bring forth fruits meet for repentance. For my part, I leave this upon your souls, desiring you both to do in this matter as you think you can best answer it to God at the great day, which I doubt not you believe, and expect as well as I. I pray God direct you. I am your faithful friend, and diocesan,

W. WORCESTER."

"The enclosed is a list of the voters from Fladbury at the last election. I pray God direct them this time to vote better or to stay away."

"Fladbury.—Hen. Cocks, P; John Knowles, P; William Cole, P; Tho. Weston, P; Richard Hilyard, P; Jos. Gauderton, P; John Bachelor, P; Tho. Day, P; H. M. T. Woodward, P; H. Wm. Tomlins, P; M. John Francis, P; M. Wm. Gibbs, P; Rich. Tayler, P; Rich. Tandy, P; H. M. Arth. Charlet, P; H. M. Rich. Farr, P; B. Tho. Barretts, B. W; Tho. Hornblow, P; James Bensou, P; H. M. Tho. Sanders, P; Edward Marshall, P; John Bluck, P; John Smith, P; Arth. Gutteridge, P; John Weaver, P; Will. Francis, P; Cl. Perks, P; John Hopkins, P; M. Will. Weston, P; S. G. Jeffrey Hopkins, P; M. Hen. Gibbs, P; John Hopkins, P; Will. Kings, B. W; Will. Haywood, B; H. M. Jos. Charlet, P. B.; S. B. John Sale, P; B. Will. Abry, P; Will. Bushell, P; A. M. Rob. Wright, P; Bart. Hopkins, P; St. B. John Moor, P; Richard Bushell, P; John Bluck, P; Tho. Francis, P."

"To the Reverend Mr. Poutney,
Rector of Fladbury."

This examinant being asked about pamphlets, he saith, that The Character of a Churchman was brought to him by the churchwardens, who received it with the proclamation from the apparitor.

Sir John Pakington produced another letter, directed, to the reverend Mr. Mugg, rector of Inkberrow; which Mr. Cheatle aforesaid proves to be the lord bishop's hand. The said letter from the bishop was enclosed in a letter from Mr. Mugg to sir John Pakington, and delivered by Mr. Mugg to sir John Pakington's servant, who delivered it to his master. The letters are as follow, viz.

"Sir;

"I have here enclosed the bishop of Worcester's letter, which deterred me from coming to your last election, against my own most earnest inclination, to attend and promote it as formerly I did; and refer to Mr. Appletree, and other gentlemen, to say what influence it had more than my single vote, with respect to my age and longer residence in the county than others of the clergy. But this bishop has been so severe in promoting and abetting unjust prosecutions against me, to my vast damage and loss of estate in another place. And since his coming into this diocese, have I just cause to complaint of that want of discipline which from his consistory court should have been exerted against lewdness in my parish; which I take worse than his repeated endeavours to deprive me of my estate. I would lay the matters in particular, and give personal testimony in several instances, if I may be permitted a further day. But Thursday next must attend a commission then held at Nottingham: afterwards, as I have intimation, all excuses and delays set aside, shall be ready to appear, not only to serve you in this cause, but for necessary vindicating the right of the Commons, and that property of the subject that is infringed by such means and methods as I know this bishop has used. I am, Sir, your most faithful, humble servant,

"15 Nov. 1702.

HEN. MUGGE,

"Vicar of Inkborough."

"To the hon. sir John Pakington, bart. member of parliament, humbly present."

"Sir;

July 27, 1702.

"You cannot but have heard, and probably have seen, how the bishops of this church in general, and five or six of them in particular, have been abused with impudent lies in two libels that were published by sir John Pakington, almost a year since, in order to his last election. At that time I had not given him the least provocation; and for the other abused bishops, few of them knew his face. Since that time, finding at my return from London, where I was all the while he was libelling me in the country, that he had published these libels, some of them with his own hands, and the rest by his agents, I could not but think myself obliged by all honest ways to oppose his

election, if he would stand; which I sent to him three times to let him know, and to desire he would forbear.

"Hereupon there comes out a third libel against me, which I have only seen, but could not get a copy of it. I never saw any thing writ with such a furious rage of railing, and scoffing, and lying; which, I thank God, can do me no hurt, nor will it do him service, if I may so call it, in promoting his election, which I think would be the greatest hurt that could happen to him.

"It is for the preventing of this that I write to my friends, earnestly to desire them to get what votes they can for Mr. Bromley and Mr. Walsh; and to keep away as many as they can of them that will vote for sir John Pakington.

"Your diligence in this matter will lay a very great obligation upon, Sir, your faithful friend, and diocesan, W. WORCESTER."

"I have sent you the enclosed, to shew you how the votes of your parish went at the last election."

"To the rev. Mr. Mugg, rector of Inkberrow."

"Inkberrow.—John Philips, B; John Bennet, P; John Gore, W; Job Watts, P; William Walford, P; Geo. Darby, P; Rich. Eaton, P; William Barber, B. W; Hen. Hunt, P; Tho. Huntles, P; Hen. Smith, P; Edward Millard, P; Edward Griffin, P; Edward Harriot, P; Sam. Tandy, P; Rob. Biddle, P; Nich. Hoblins, P; Tho. Hopkins, P; Geo. Gore, P. W; John Churchly, P; John Appletree, P. B; John Sheldon, P; Tho. Walford, P. B; Tho. Marshal, P. B; George Court, B; Hen. Dyson, B; Robert Boney, B; William Wren, B; Robert Willis, P; Tho. Bristow, P; Richard Dewce, P; Henry Glover, P; Tho. Tomkins, P. B; Tho. Ganderton, P; Walter Steward, P; John Harbage, P; James Hemmings, P; William Harvey, B. W; Hum. Eatou, P; William Mallard, P; Tho. Lucas, P. B; William Soley, P; Robert Willis, P; Mich. Jones, P. B; William Hunt, P. B."

. Mr. Thomas Hodge, clerk, being examined, saith, That the lord bishop of Worcester solicited him to vote against sir John Pakington; and then would have persuaded him to stay at home: but he said, he had given his promise to sir John. His lordship told him, that if he voted for sir John Pakington, he should think him led by wicked and carnal principles. His lordship said, that sir John had aspersed him: this examinant said, he hoped not. His lordship told him of a book, and said, he believed he had it; which this examinant denied. His lordship proceeded then to give some account of the book, and to vindicate himself; and said, that sir John Pakington was a whoremonger, drunkard, and swearer; and no such were fit to be law-makers. This examinant told his lordship, he was engaged to go to give his vote: the bishop said, that sir John Pakington

had aspersed him and other bishops: and in conclusion his lordship said, whoever voted for sir John Pakington, he should not think him fit to be a clergyman. And when his lordship renewed the discourse another time, this examinant told him of his promise: his lordship said, it was an ill thing, and that this examinant could not think himself obliged to do an ill thing. Being asked, if the bishop did urge any thing of canonical obedience; he answered, that he said nothing of it.

Mr. *William Bolles* of Hagley, being examined, saith, That at the visitation at Broms-grove, the lord bishop of Worcester told this examinant, that being now come into his lordship's diocese, he expected he should not give his vote for sir John Pakington; and if he did, he must expect no favour from his lordship. This examinant told his lordship that he had great obligations to his patron, to whom he had promised to vote for sir John Pakington. The bishop told him, that he had obligations to him, and that he had lately sworn canonical obedience to him. This examinant said to the bishop, that sir John Pakington's family had been always of great repute; and asked the bishop his opinion of the lady Pakington, who was said to be the author of *The Whole Duty of Man*; his lordship replied, that lady was a very excellent woman; but that sir John had inherited the vices of the males of his family, but none of the virtues of the females. Being asked, whether the bishop had given him any preferment; he said, his lordship had given him a small prebend in the church of Litchfield.

Mr. *Thomas Gibson* of Pershore being examined, saith, That the lord bishop of Worcester first spoke to him at the confirmation at Pershore, about three days before the visitation at Evesham, concerning voting against sir John Pakington; and solicited him much to vote against him. The bishop told him, that sir John was a very ill man, and very unfit to represent the county. He told his lordship, he was under an obligation, having given his word. The bishop said, that if this examinant gave his vote for sir John Pakington, he should think that this examinant thought his lordship not fit to be his bishop. After this, at the visitation at Evesham, the lord bishop called this examinant before the whole clergy, and asked him if he had considered of what he had spoke to him at Pershore? He told his lordship, that he hoped he had been satisfied with his answer: his lordship said, he was not; and added, that if this examinant voted for sir John Pakington, he should look upon him to be the poorest, wretchedest, vilest, deluded hypocrite in the world; and that they may know sir John Pakington's party, for the papists and quakers were for him: this examinant replied, The papists have no votes, and the dissenters and fanatics are of your lordship's side.

Mr. *William Thomas*, clerk, being examined,

saith, That he did receive a letter from Mr. Evans, the lord bishop's secretary, to vote for Mr. Bromley and Mr. Walsh; and that Mr. Evans said, that if this examinant voted for sir John Pakington, it would be taken to be in opposition to the lord bishop. This examinant did also receive a letter from Mr. Lloyd, the bishop's son, to the same purpose; adding further, that sir John Pakington was no friend to the church.

Mr. *William Norton* was again called in, and being examined, saith, That the lord bishop of Worcester sent for him, and pressed him to give his vote, and use his interest for Mr. Bromley and Mr. Walsh: this examinant told his lordship, he had given his word to vote for sir John Pakington: his lordship said, sir John was not a man fit to sit in the House of Commons; that he was a man that strikes at the government; that he was debauched and lewd, and so was his father and grandfather; that his father had filled him so full of Jacobitism, that it could not be rooted out: this examinant said, that he thought sir John Pakington was a true church of England man as by law established; his lordship replied, that he was of the prince of Wales's church. At another time his lordship called this examinant to him, and asked him if he had considered of what he had said; this examinant said he had, but he could not depart from his word which he had given. His lordship said, have not I shewed you kindness in renewing your lease? He replied, it was a very hard fine he had paid. The bishop said, hard or easy, he should never renew again, as long as he lived; and that he would put such a mark upon him, that he should never renew it in his successor's time. A few days after, Mr. Evans, the bishop's secretary, solicited this examinant to vote against sir John Pakington, or if not, to stay at home, and not vote at all, or else he should disoblige the lord bishop; and added, if you do vote as his lordship would have you, it will be something in your way, for his lordship would bear the charge of a law-suit this examinant was engaged in.

Mr. *Robert Fidkin* being examined, saith, That some time before the last election, the lord bishop of Worcester sent for him on a Sunday in the evening, and told him, he was resolved to make all the opposition he could to sir John Pakington in this election, and if any of his tenants voted for sir John Pakington, they should never renew their estates any more as long as he lived. He told his lordship, he could not vote against sir John Pakington, because he had promised his vote for sir John Pakington; but to oblige his lordship, he was willing to stay at home. His lordship answered, he had as lief he should run a sword against him, as offer him that affront; staying at home should not serve his turn: that unless this examinant would vote against sir John Pakington, he should never renew any thing with him; and he would set

such a mark upon him to shew his successors, that neither this examinant, nor any of his, should ever renew their estates any more. This examinant answered, My lord, you have often told me, that I and my ancestors have held our estate under the bishopric for many hundred years, as appears by your books; and I hope your lordship will not do so ill a thing as to ruin me and my children: his lordship replied, It is your own fault, you may thank yourself for it. Being asked, who he voted for? He said, for sir John Pakington only.

Mr. *Robert Wilmot* being examined, saith, That presently after Mr. Lloyd, the lord bishop's son, came from London, before the last election, he sent for this examinant, and pressed him to give his vote for Mr. Bromley and Mr. Walsh: this examinant told him, that he had promised sir John Pakington already. Mr. Lloyd told him, he was sorry; but he must not give him his vote, for he was unfit to be a parliament man, for he was a whoremonger and a drunkard: he told this examinant then he must engage to stay at home and not vote; and bid him consider of it, and come to him again. Accordingly this examinant went to Mr. Lloyd on Monday, who asked him if he had altered his resolution of voting for sir John Pakington: this examinant insisted, that he had given his promise: Mr. Lloyd told him he was acquitted from that promise; for sir John was a very unfit person: that he inherited his father's and grandfather's vices, and not his grandmother's virtues: that he would have him stay at home, and pretend business; and then he would have persuaded him to pretend to be sick. But this examinant still insisted that he had given his promise to Mr. Winington, to vote for sir John Pakington. Mr. Lloyd then told this examinant, that sir John Pakington voted for bringing in a French government, and so did Mr. Winington, and all that party: and if this examinant did not please the said Mr. Lloyd in his voting, this examinant must never come near him more.

At the time of the election Mr. Lloyd came to this examinant, at the booth where the election was, and told him, he was better than his word, for he had not only voted for sir John Pakington, but made interest for him; and further told this examinant, he would be even with him. And accordingly, when this examinant was hunting with him after the election, he sent his servants and broke open this examinant's stable-door, and took away his setting-dog, and his gun and nets, which this examinant had leave from him to keep in the lord bishop's manor, and the said Mr. Lloyd had often made use of them for his own diversion: and when he complained to Mr. Lloyd about it, he reproached this examinant for having voted and made interest for sir John Pakington; and reminded him of his promise at the election, that he would be even with him. This examinant further said, that he had been, before the dog was taken, to wait upon the said Mr. Lloyd,

and offered him to put away his dog, gun and nets, if they gave him any offence; and that Mr. Lloyd said, he need not do that, that those were trifles; and therefore this examinant thought he would not have seized his dog: Mr. Lloyd replied, if I had told you what I intended, you would have sent your dog away. This examinant being asked, whether there was any warrant for breaking open his stable, said, that he understood Mr. Soley had granted a warrant to take his dog and nets; but that there was no constable with them when they broke open the door.

Mr. *Richard Griffin* being examined, saith, that Mr. Lloyd, the first Sunday after he came home, asked this examinant whether he had promised his vote for any one, and for whom? He replied, he had promised sir John Pakington. Mr. Lloyd told this examinant he did very ill to promise before the lord bishop came down; and that he should have my lord's ill-will if he voted for sir John Pakington, for he was not a fit man to sit in parliament, for he aims to bring in a French government. Four or five days before the election, Mr. Lloyd sent to this examinant again, and desired him to vote for Mr. Bromley and Mr. Walsh. This examinant replied, that he ought to be as good as his word, having promised sir John Pakington. Mr. Lloyd then told him, he should have the lord bishop's ill will, and would have him stay at home. This examinant then said, he would go, because he had promised. Upon that Mr. Lloyd replied, if you do go, I wish you may lie lame a month after it. At another time, Mr. Evans, the lord bishop's secretary, desired this examinant to stay at home, and not appear for sir John Pakington, for the bishop would be very angry with him if he should. This examinant further saith, that he had taken in a piece of land, and that Mr. Evans told this examinant that since he would not please my lord bishop in voting against sir John Pakington, he would throw open his inclosure; and accordingly the said inclosure was twice thrown open, and his quick hedge taken away: and that one Greyson, a servant of the bishop's, told this examinant that he did it by Mr. Evans's order.

John Harwood being examined, saith, that some few days before the last election, there was a meeting of some neighbours, where Mr. Evans, the bishop's secretary, was present. Mr. Evans told the company, they were all honest men of one mind, except Harwood, pointing to this examinant; for, says he, he is the only man that will vote for sir John Pakington, who is not fit to be a parliament man, for he is a drunkard and a lover of women: which put this examinant into a passion, and caused him to swear; and the said Mr. Evans pretended to number the oaths by his buttons. Afterwards the said Mr. Evans sent the bishop's keeper in Mr. Evans's name, to fetch this examinant to him, who told him, he must pay five pounds for swearing, but if he would vote

for Mr. Bromley and Mr. Walsh, he would remit it. This examinant told him, he would consider of it. Mr. Evans told him, he had as good vote for the prince of Wales as for sir John Pakington. Being asked, who told him he would remit the five pounds; he answered, Mr. Evans.

Thomas Twitty, gent. being examined, saith, that the day before the last election, being in the College church at Worcester, just as his lordship went out of the church, Mr. Evans the bishop's secretary came to this examinant, from his lordship, and told him, that his lordship hoped this examinant would not vote for sir John Pakington, for that sir John was a very ill man, and voted ill in the House of Commons. This examinant replied, if he voted at all, he should vote singly for sir John Pakington. And this examinant asked Mr. Evans, what was the reason his lordship made such interest against sir John Pakington. He told him that sir John Pakington had abused his lordship; and asked this examinant if he had seen The Character of a Churchman, and Of a Low Churchman. This examinant asked him, if the lord bishop had wrote The Character of a Churchman: he said, he could not tell, but that his lordship had seen and approved it; and that his lordship did not think sir John Pakington a fit person to represent the county. And then he was ordered to withdraw.

Sir John Pakington informed the House, That he had several other persons to speak to the same particulars that the witnesses had already given their evidence to: but that having detained the House so long already, he would submit what his witnesses had said to the judgment of the House, and so withdrew.

Whereupon the House, after mature consideration, came to the following Resolutions:

Resolved, *nem. con.* That sir John Pakington has by evidence fully made out the charge which he exhibited against the lord bishop of Worcester.

Resolved, *nem. con.* That sir John Pakington has by evidence fully made out the charge against Mr. Lloyd, the said lord bishop's son.

Resolved, That it appears to this House, That the proceedings of William lord bishop of Worcester, his son, and his agents, in order to the hindering of the election of a member for the county of Worcester, has been malicious, unchristian, and arbitrary, in high violation of the liberties and privileges of the Commons of England.

Resolved, That an humble Address be presented to her majesty, that she will be graciously pleased to remove William lord bishop of Worcester from being lord almoner to her majesty.*

* The Lords, alarmed at these warm proceedings of the Commons, against a member

Ordered, That the said Resolution and Address be presented to her majesty by such members of this House as are of her majesty's most honourable privy-council.

Ordered, That the further consideration of the matter relating to the lord bishop of Worcester, be adjourned till this day se'nnight.

Ordered, That Mr. Attorney-General do prosecute Mr. Lloyd, the lord bishop of Worcester's son, for his said offences, after his privilege as a member of the lower House of Convocation is out.

November 20, 1702.

Mr. Comptroller reported to the House, That their Resolution and Address to her majesty for the removing William lord bishop of Worcester, from being lord almoner to her majesty, had been presented to her majesty; and that her majesty was pleased to give this most gracious Answer:

' I am very sorry that there is occasion for this Address against the bishop of Worcester: I shall order and direct, that he shall no longer continue to supply the place of almoner, but

of their illustrious assembly, and one who was eminently conspicuous for his piety, charity, and learning, did on the 19th agree upon an Address to the queen, wherein they humbly took leave to represent to her majesty, ' That it is the undoubted right of every lord of parliament, and of every other subject of England, to have an opportunity of making his defence, before he suffer any sort of punishment; and therefore humbly desired her majesty, that she would be pleased not to move the lord bishop of Worcester from the place of lord almoner, nor to shew any mark of her displeasure towards him, till he be found guilty of some crime, by due course of law.' Which being presented to the queen on the 20th, her majesty made the following answer:

' I agree that every peer and lord of parliament, and indeed every other person, ought to have an opportunity of being heard, to any matters objected against him, before he be punished. I have not yet received any complaint of the bishop of Worcester, but I look upon it as my undoubted right to continue or displace any servant, attending upon my own person, when I shall think proper.'

The same day the Lords resolved and declared unanimously, ' That no lord of that House ought to suffer any sort of punishment, by any proceedings of the House of Commons, otherwise than according to the known and ancient rules and methods of parliament.' On the other hand, sir Edward Seymour, comptroller of her majesty's household, having attended the queen with the Resolution and Address of the Commons, for the removing the bishop of Worcester from being lord almoner to her majesty, she was pleased to answer *af supra*. Annals of Queen Anne, vol. 1, p. 145, 146.

' I will put another in his room to perform that office.'

Resolved, That the most humble Thanks of this House be returned to her majesty, for her majesty's most gracious Answer to their Address relating to William lord bishop of Worcester.

Ordered, That Mr. Comptroller of her majesty's household do return the said most humble Thanks of this House to her majesty.

November 25.

The order of the day for taking into further consideration the matter relating to the lord bishop of Worcester, being read;

Ordered, That the evidence given at the bar of this House, upon the charge of sir John Pakington against William lord bishop of Worcester, and Mr. Lloyd his son, be printed; together with the proceedings of this House thereupon.

Ordered, That the clerk's books in relation to the said evidence be examined: and that Mr. Speaker do take care of the printing the said evidence and proceedings.

Ordered, That the further consideration of the matter relating to the lord bishop of Worcester be adjourned till this day se'nnight.— The further consideration of this affair was twice adjourned, and then dropt.

425. The Trial of HAAGEN SWENDSEN, at the Queen's-Bench, for forcibly taking away and marrying Mrs. PLEASANT RAWLINS, 1 ANNE, A. D. 1702.*

ON Wednesday the 18th of November, the grand jury of Westminster found the bill of indictment against the defendants. On that day an Habeas Corpus was moved for, and left at Newgate, and the keeper refused to bring up the prisoner on Thursday, but brought him on Friday morning; and then he was arraigned, and pleaded not guilty: and the court then appointed the trial to be on Wednesday the 25th, that being the last day that he could be tried, to have sentence given against convicted persons in that term.

Mr. Swendsen moved for a longer time, alleging, That a German, a material witness for him, was gone into Yorkshire. The court then told him, that if any person would swear, that any of his witnesses could not be at the trial on Wednesday, the court would put off the trial; but no oath thereof being made, the trial came on upon the day appointed.

The court being sat, at which were present the right honourable the lord chief justice Holt, sir John Powell, sir Littleton Powis, and sir Henry Gould:

Haagen Swendsen being brought to the bar, proclamation was made for silence; and he being a foreigner, claimed, as his right, the benefit of a party jury; which was allowed him and leave to challenge whom he would. He challenged some; and the gentlemen sworn were, viz.

George Ford, esq. Enoch Roofs, gent. Timothy Thornbury, esq. Abraham Falcon, gent. John Pack, esq. James Boyneith, Francis Chapman, Erasmus Johnson, Robert Bampton, Matthew Boddin, Thomas Pitts, Henry Henderson, gents.

Cl. of Arr. Haagen Swendsen, hold up thy hand. (Which he did.)

* See 7 Mod. 101. Holt, 319. Tremaine, 34. See also the following Case.

Cl. of Arr. Gentlemen of the jury, look upon the prisoner at the bar. He stands indicted by the name of Haagen Swendsen, late of the parish of St. Giles in the fields, in the county of Middlesex, yeoman; for that on the 6th of November 1702, one Pleasant Rawlins, gentlewoman, and a virgin, and unmarried, grand daughter and heir of William Rawlins, sen. then deceased, and daughter and heir of William Rawlins jun. before then also deceased, was above the age of sixteen, and under the age of eighteen, and then had substance and estate in moveables and in lands and tenements, viz. in money, goods, and chattles to the value of 2,000*l.* and in land and tenements to the value of 20*l.* per annum, to her and the heirs of her body.

And that the several persons, Swendsen, Baynton, Hartwell, Spurr, and Tho. Holt, the said 6th day of November, with force and arms, the said Pleasant Rawlins, as aforesaid, being unmarried, and heir, and having substance and estate at the parish of St. Giles in the fields, in this county, for the lucre of such estate and substance of the said Pleasant Rawlins, did unlawfully, feloniously, violently, and against the will of the said Pleasant Rawlins, take, carry, and lead away, with intent to cause and procure the said Pleasant Rawlins, against her will, in matrimony to the said Haagen Swendsen to be joined, and to him to be wedded and married; and that the said Haagen Swendsen, being a man of a dishonest conversation, and of none, or very little estate or substance, then, and there, by the help and procurement of the other defendants, did feloniously marry the said Pleasant Rawlins, and was joined to her in matrimony; and then and there her did carnally know; to the great displeasure of God, against the laws of the queen, to the disgrace and disparagement of the said Pleasant Rawlins, and to the great grief and disconsolation of all her friends, to the evil ex-

ample of all others, against the form of the statute, and against the queen's peace, her crown and dignity. And that the said Tho. Holt, after the said Pleasant Rawlins had been so unlawfully, violently, and feloniously taken, carried, and led away, and to the said Haagen Swendsen married and wedded as aforesaid; well knowing the said Pleasant Rawlins to have been so taken and led away against her will, and to the said Haagen Swendsen to be wedded and married, afterwards, viz. the said sixth day of November, in the said first year of the reign of this queen, at the parish aforesaid, the same Pleasant Rawlins, and also the said Haagen Swendsen, did wilfully, knowingly, and feloniously receive, abet, comfort, conceal and assist the said Haagen Swendsen, with the said Pleasant Rawlins to lie, and her carnally to know, then and there did feloniously incite, abet, help, cause, and procure, against the form of the said statute, and against the queen's peace, her crown and dignity.

Cl. of Arr. Upon which indictment he hath been arraigned, and pleaded not guilty, put himself upon God and you the jury at the bar, being half foreigners and half natives.

Cryer. O yes! If any one will give evidence on behalf of our sovereign lady the queen, against the prisoner at the bar, let them come forth, and they shall be heard; the prisoner stands at the bar for his deliverance.

Swendsen. Pray, my lord, let me have pen and ink, I am not allowed counsel. (Which his lordship granted.) My lord, I would beg the favour of your lordship, that the evidence may be examined apart.

Sol. Gen. (Sir Simon Harcourt.) Is it not your lordship's pleasure to call the other jury, the facts are so twisted together, and have such a dependence one upon another, that there will be an inconvenience to us, if it be otherwise?

Serj. Darnel. They may stand at the bar by themselves.

Mr. Montague. Or else it will break our evidence: they may stand on the other side.

L. C. J. Holt. He must be tried single.

Sol. Gen. May it please your lordship, and gentlemen of the jury, I am of counsel for the queen: it was formerly reckoned a less crime to steal a fortune of 10,000*l.* than to steal 12*d.* of her money or goods; but in the third year of the reign of king Henry 7, to cure this defect in the law, an act of parliament was made, whereby the taking away a woman, having goods or lands, or being an heir apparent, contrary to her will, and afterwards marrying her, is made felony, and upon this law the present indictment is grounded.

Pleasant Rawlins was the daughter of Mr. William Rawlins; he having left her a considerable estate, appointed George Bright and William Busby to be her guardians. Mr. Bright being dead, the other guardian, Mr. Busby, for the better education of Mrs. Rawlins, placed her under the care of his sister Sabina Busby. Mrs. Busby and Mrs. Rawlins have lodged about three years last at the house

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of the widow Nightingale. Haagen Swendsen, with Mrs. Baynton, lodged at Mrs. Blake's in Holbourn, and there they first projected and contrived how they might make a prey of this young gentlewoman. The first step they took towards executing this design was to get lodgings at Mrs. Nightingale's house for Mrs. Baynton; for which purpose she was to pass for a country gentlewoman of a plentiful fortune. One Mrs. St. John was sent to Mrs. Nightingale to take lodgings for Mrs. Baynton, commending her to be a very good woman; and that having the misfortune of a lawsuit, and being obliged for that reason to attend it in town, it was her greatest care to lodge in so reputable a house as Mrs. Nightingale's was. Under this pretence, lodgings were there taken for her. At her first coming, she was forced to put on a disguise; she seemed to live a virtuous life, that she might ingratiate herself into the favour of the family, as often as she had an opportunity of conversing with any of them: she pretended she had a brother of a good estate, one of the best men in the world; and she hoped he would shortly come to town, that she might see him. In a little time after came this Swendsen (being nothing related to her) and appeared as her brother, and frequently visited her under pretences of that relation. But Mrs. Baynton was too well known in town to continue long undiscovered; notice was soon given to Mrs. Busby of the vicious life Mrs. Baynton had led, and that she was not fit to be in the same house with her. Mrs. Baynton having discovered this, and finding she had no time to bring about her designs by frauds and wiles, and that no other ways were left but open force, the prisoner at the bar and she took measures accordingly; and in order thereto it was agreed, that a writ should be taken out against Mrs. Rawlins. Mrs. Baynton contrives to get Mrs. Rawlins and Mrs. Busby into a coach, and at a place appointed a signal was given, and the writ executed, and Mrs. Busby, Mrs. Rawlins, and Mrs. Baynton, were all carried in the coach to the Star and Garter tavern in Drury-lane, where particular care was taken to separate Mrs. Busby and Mrs. Rawlins, because unless they did that, they could not hope to accomplish their designs. Mrs. Busby was by force kept at that tavern, without any process against her, till the marriage was over; but Mrs. Rawlins was forcibly carried to Hartwell's the bailiff's house. Mrs. Baynton pretended to be much concerned for Mrs. Rawlins, and went in all haste to call some of her friends to be bail for her. Some time after Mrs. Rawlins was got to Hartwell's, in comes Mrs. Baynton, pretending that by mere accident she had discovered her being there, hearing her name as she was passing by the door; that she had been in search, but could find no help; and that her last hopes was her dear brother Swendsen, and she doubted not but he would bail her: he by agreement had been placed near the bailiff's, and so was soon found, and brought thither, and was very ready to assist

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her. In order to her discharge, the prisoner, the bailiff, and Mrs. Baynton, carried Mrs. Rawlins to another tavern, where they had a parson ready for the purpose; and there this young gentlewoman, through divers artifices, of which you shall have a full account, was constrained to marry. These are the principal circumstances, and they shall be plainly proved to you.

Serj. Darnel. My lord, I think it necessary to open a little the manner of getting this young lady away, and the contrivance of getting her into the coach; for your lordship knows, that if any are taken away without their consent, though they do afterwards consent to be married to such taker, yet he is guilty within this statute. They were resolved to take this woman by force, when they found they could not otherwise accomplish their end. And Mrs. Baynton knowing Mrs. Busby and Mrs. Rawlins were used every Friday morning to go to a chapel, called Oxendon chapel, Mrs. Baynton said, I am going to Golden-square, and if you are going to the chapel, I will set you down, if you please: they, glad of such a convenience, thought no harm, but went in the coach. They had gone no further than Dartmouth-street, but these bailiffs come. Hartwell opens the coach, and goes into it; they cry out to the people for help; Hartwell plucked up the glasses, and those bailiffs about the coach cried, It is an arrest of a cheat, that owes money to tradesmen. By this means they carried her to the Star and Garter in Drury-lane. When they had them there, the next thing was to get her away from her friend Busby, for unless that was done, they despaired of getting her to marry Swendsen. Mrs. Baynton pretended to go and find out Mrs. Rawlins's friends to bail her; but that was to meet with Swendsen: as soon as Mrs. Baynton was gone, the bailiffs forced Mrs. Rawlins from Mrs. Busby, and Mrs. Busby was kept there by force till five a'clock, till all was over. The bailiffs, as they carried Mrs. Rawlins away, called her jade and slut, and bid her pay her debts; and said, Put on your mask, you jade, for we will have no mob to rescue you; she put on her mask, and the rest of the bailiffs followed her, and said, She was a cheat, and was arrested. Then it was time to open the scene. Hartwell carried her to his house, and Mrs. Baynton pretending to be coming by and hearing of her name, opened the door, and by an extraordinary manner burst into the house, and told her, 'Madam, I went to all your friends, but could find none at home; but I have been with my dear brother Swendsen, who will come with another to bail you, and it will not be long before they come'; for they were placed at the Five Bells, very near Hartwell's house: upon this she went out again, and brought in Swendsen, and one Holt, who keeps the Mitre tavern in King-street Westminster. And truly when they were there, and talked of being bail, then they would all go in a coach to the Vine tavern, the place where they designed the marriage; and they had got two proper

instruments there for the business, the chaplain and the clerk of the Fleet. When they had her there, my lord, the bailiff asked if she had any bail? Mrs. Baynton said, that Mr. Swendsen and Mr. Holt would be her bail; the bailiff said, I will not take Swendsen's bail, he is a man I know not; but Mr. Holt I know, I will take his. The poor woman begged upon her knees, for Christ's sake let me send for my friends; and they pretended to send for abundance of them, but none came. Then she was threatened with Newgate, for that often came out; If you cannot get bail to Newgate you must go, and there must lie. This was often said by Hartwell. Then Mrs. Baynton cried, (as she could do at command) O how I pity you, Mrs. Rawlins, is there no way in the law to help you? I believe, if you were married, that would put an end to the action. Then speaking to the bailiff said, If this gentlewoman were married, would it not put an end to it? The bailiff said, I cannot tell but it might, if such a thing were. Well, now her rich brother Swendsen is proposed, she must be married to him; the bailiffs threatening her severely, that to Newgate she must go, if she did not. Immediately they brought in the chaplain and clerk of the Fleet, and read the form of marriage, and after carried her to several places, lest they might be followed and prevented, beds being provided for the purpose at those places, as your lordship shall hear. And, my lord, this taking of this woman thus away against her will, is an offence against the act of 3 Henry 7, and, my lord, we desire that the statute might be read.

L. C. J. Holt. It shall be explained.

Mr. Broderick. My lord, there was a whole night completed before the prisoner was seized.

Then *Mr. W. Busby* is called for, and sworn.

He is asked, Do you know Mrs. Pleasant Rawlins?

Serj. Darnel. Give an account of her.

Busby. She is the daughter of William Rawlins deceased, who left his estate to Dr. Bright and myself, to be sold for payment of his debts and legacies, and left the surplusage to his daughter, which is about 2,000*l.*

Serj. Darnel. What lands has she?

Busby. She has 20*l.* a year.

Serj. Darnel. What age is she of?

Busby. She is near eighteen.

Mr. Montague. Was she ever married, or no?—*Busby.* She was unmarried.

Then *Mrs. Sabina Busby* was called and sworn, as also *Mrs. Nightingale.*

Swendsen. My lord, I beg the favour that only one witness be heard at a time.

Sol. Gen. Mrs. Nightingale, do you know Mrs. Pleasant Rawlins, and Mrs. Busby?

Nightingale. Yes, I do.

Sol. Gen. Have they lodged at your house?

Nightingale. Yes.

Sol. Gen. How long?

Nightingale. Above three years.

Sol. Gen. Have you any knowledge of Mrs. Baynton?—*Nightingale.* Yes.

Sol. Gen. How came you acquainted with her?

Nightingale. One Mrs. St. John came to me to know whether I took boarders? I said, I had taken some, but would take no more, unless it were the same ladies again.

L. C. J. Holt. Who was it came to you?

Nightingale. One Mrs. St. John.

Sol. Gen. Mrs. Nightingale, speak out, that my lord may hear you.

L. C. J. Holt. Did Mrs. Busby lodge with you?

Nightingale. Yes, my lord, we were very intimate before; and since it pleased God to take away her husband, I was pleased with her, and very willing to take her into my house.

Sol. Gen. Acquaint his lordship how Mrs. St. John came to you.

Nightingale. Yes, my lord, as near as I can. She came to me, and asked me, if I took boarders? I told her, no, I would take none, except it were those ladies I had before: she told me she had an acquaintance that was a widow lady, that came out of Wiltshire, about a suit of law, and would be in a very sober family near a church. But however, I denied her lodgings, and did expect to hear no more of her. But about three weeks or a month after, she came to me again, and asked me whether I had altered my resolution.

L. C. J. Holt. Go on.

Nightingale. My lord, Mrs. St. John said, that the lady was come to town on the Saturday night before, very much indisposed in her journey. I asked her, whether she knew this Baynton, or no? Mrs. St. John said, yes; she was very intimate in the family, and she said a great deal more of her, which I cannot remember. She said also, that she would have boarded her herself, and would have been glad of her company, if she had had conveniences for her. Then she asked me, whether she should come herself and give her own character? We thought no harm, she being a woman, and not a man. She further said, that Mrs. Baynton had seen a maid, whom I knew, and she believed she would take her. I enquired of another who lived in the Mews, if he knew Mrs. Baynton; he said, yes, and that she came of a good family. At length she came, and made a very modest appearance in her behaviour and garb. She said to me, that I was very curious in taking in boarders, and for that she liked me the better. I consented she should come. She asked me what I would have a week? I told her 12s. for herself, and 10s. for her maid. She concluded to come on the Wednesday following; which she did with her maid, a modest girl, and a neighbour, which gave me the more encouragement. She carried herself very well till Michaelmas-day at night, when we heard of her new brother; she seemed elevated at the news, and fell into convulsion fits, which I believed were real fits. She said she had a

dear brother, a good Christian, and he would come on the morrow. When he came, he brought two gentlewomen with him, very modest, which I never saw before, nor since. Mrs. Baynton made a pot of coffee, and sent for a bottle of wine, and she told her brother before me, what good lodgings she had, and said she wished he would come and lodge near them, for she knew he had but a puny stomach, and believed he would like her victuals. He said it was not convenient for him, because his business called him every day to the Change. She said also, there was a bowling-green near them, where he might divert himself. But all would not do. She asked me what I would have a meal if her brother should come at any time: I said, when I had other ladies, if any of their friends came, I had twelve-pence a meal of them. On Friday he came; I went to church, and left them together at cribbage, as I found them at my return.

L. C. J. Holt. What day of the week was this?

Nightingale. The Friday before the sacrament. Mrs. Baynton said to Mr. Swendsen, before Mrs. Busby, you have an extraordinary hand at making punch; so they agreed to make a bowl the Monday following; but Mrs. Rawlins hardly drank any, she not liking any strong liquors. After this, she told me, her brother was very ill of his journey, being lately come out of the country, though I do not understand he was in it. The Monday before Michaelmas-day, we were at dinner with two more than our family, when Mrs. Baynton said, she had an interest in a Norway ship, and invited us all aboard; but he, viz. Mr. Swendsen, did not come to our house till four days after; but on Friday we concluded to go on Saturday; there were eight of us in company in all, Mrs. Rawlins, Mrs. Busby, I and my daughter, and Mr. Ball, another lodger, belonging to the Exchequer. We went and had much discourse; after having drank a glass of wine, the cloth was laid, and the master offered a bowl of punch; says Mr. Swendsen, Ladies; I would please you all, and leave you all to your liberties to drink what you please.

L. C. J. Holt. Is this person Mrs. Baynton's brother?

Nightingale. This is he that went for her brother.

L. C. J. Holt. Whereabouts is your house?

Nightingale. Near Tuttle-fields.

Sol. Gen. This Mrs. Baynton came to you under the character of a country lady on a lawsuit; do you understand that she was so?

Nightingale. My lord, she said she came from the Bath.

Sol. Gen. You misapprehend the question; do you understand that her pretence was true or not?

Nightingale. I enquired of several persons, who acquainted me that the Bayntons lived in Wiltshire; but it was not long before we began to suspect her, for there seemed to be an extraordinary love between her and Swendsen,

more than is usual between brother and sister. I said, Madam, I wonder you do not marry your brother. She said, she thought that it was not lawful. I said there was such a thing done in Westminster, of a man's marrying two sisters.

Sol. Gen. Pray call to mind what time it was that you first gave notice to her that she should not continue in your lodgings.

Nightingale. When I first mistrusted her, I gave notice of it in my family. But we being all women, and fearful of her, thought not fit to give her warning till her month was up. But before that, she came to me, and told me, and said, Mrs. Nightingale, I have received a letter from my sister Baynton in the country, which informs me, that the trustees will agree, and so I design to return when my month is up, for this town is very chargeable. Very well, said I, for I expect some ladies very shortly. I went down to my family, and expressed my joy to them, and said I was very glad Mrs. Baynton had prevented me; for if she had not given me warning, I would have given her warning, for I resolved she should not stay.

Sol. Gen. Mrs. Nightingale, it seems you had notice of Mrs. Baynton's ill carriage; did you take any notice of it to herself?

Nightingale. No; I did not, but I gave the maid notice as soon as I suspected any thing.

Sol. Gen. Do you know whether the maid had told any thing to her or not?

Nightingale. The maid said to her, Madam, do not you see a strangeness in the family? Yes, said she, I can see and bear a great deal; but when I am roused, I'll be like a lion.

Sol. Gen. How long was this before Mrs. Rawlins was taken away?

Nightingale. I cannot prefix the time, but it was before she gave me warning.

L. C. J. Holt. Was she gone from your house before this thing happened?

Nightingale. No, my lord; she told me on Wednesday, that her time was out; but said, There is a fellow in town that I fear will cheat me, and I am taking out a statute of bankruptcy against him, which I think will cause me to stay in town a week longer; she also told me, she had taken a place in the coach to go on Thursday; but must lose her earnest, for this business would detain her a week longer.

Mr. Raymond. Did you ever observe they were together in private?

Nightingale. No, my lord; we never had any suspicion of Mr. Swendsen, but of the woman, for she could put on all manner of disguises.

Mrs. Busby being called, she is sworn.

Sol. Gen. Pray, do you know Mrs. Rawlins?

Busby. Yes, I do.

Sol. Gen. How came you first acquainted with her?

Busby. My brother Busby was one of her guardians, and put her under the care of my

husband, while he was living, which was four years ago this Christmas. She came to us by the consent of her guardian.

Sol. Gen. At what place did you lodge?

Busby. We lived in Stretton-Grounds; but since my husband died, which is three years last July, I left house-keeping, and then we went and lodged at Mrs. Nightingale's.

Sol. Gen. How long have you continued at Mrs. Nightingale's?

Busby. We have continued there ever since.

Sol. Gen. Do you know Mrs. Baynton?

Busby. Yes, I do; she lodged at Mrs. Nightingale's.

Sol. Gen. Was there any body who used to come to her there?

Busby. None except a change-woman.

Cous. Do you know any thing of Mr. Swendsen?

Busby. Sir, the first of his coming to Mrs. Nightingale's, was the day after Michaelmas-day. Mrs. Baynton said, that she had a brother that was to come to town, which he did the day after, with two gentlewomen, which I never saw either before or since; but Mr. Swendsen after this came several times to her as her brother, her sister's husband; and she desired that he might dine with her sometimes; for which she agreed with Mrs. Nightingale at 12d. per meal.

Sol. Gen. Was this Mrs. Rawlins at any time in private with Swendsen?

Busby. Never that I know of in all my life; we were always in company together when he dined there, and the times that he dined there we computed to be nine or ten; he was there sometimes when we were not at home.

Sol. Gen. How did Mrs. Baynton behave herself when she was at Mrs. Nightingale's?

Busby. We thought very well of her, till at last we discerned too much freedom between Mr. Swendsen and herself; we suspected her virtue, and thought she would drink; and were informed she would swear: she said she must stay in town about a month or six weeks about a suit of law. Her maid told her of the strangeness of the family; she said they had been civil, or else she would stay and plague them. She told Mrs. Nightingale at length, the town was chargeable, and her business done, and that she would return into the country.

Sol. Gen. What do you know concerning Mrs. Rawlins being taken away?

Busby. Mrs. Baynton knowing it was our custom to go to Oxendon chapel every Friday morning, she came and told us she had occasion to go to Golden-square; and that being in the way, she invited us to go with her in the coach, and she would set us down at or near the chapel. When we came to Dartmouth-street, somebody bid the coachman stop: I expected she should set us down as she promised. On that side where I sat, there were old buildings, and as I was looking out, I heard Mrs. Baynton cry out to the coachman, drive on; and all of a sudden I saw a man in the coach, which was Hartwell the bailiff. Mrs. Raw-

lins and I were in a very great fright, knowing nothing. I said, For God's sake, let's come out, we are not concerned. Hartwell said we were the persons that he came for. I begged of him to let us come out: Hartwell had his arms about Mrs. Rawlins's side, and said, It is this lady and you that I am concerned about. I asked him what it was. Said he, Let you and I have two or three words together, and all will be well enough. I said, You do not think I will say any thing to you, unless I have my friends by me; Mrs. Baynton in the coach, said, No, madam, be sure you don't. I could not tell what he would do with us; at length he carried us all to the Star and Garter tavern in Drury-lane. I pressed him to let us go to Fleet-street, for I had friends there. Hartwell was very angry, and would hear nothing of it. When we came to Drury-lane, Mrs. Baynton would have had us put on our masks; I said I had done nothing amiss, and I would not. When we were in the room at the tavern, Mrs. Baynton hastened out of the room as fast as she could, pretending to go for my friends. Mrs. Rawlins and I were in a great consternation, wondering what they would do with us: I took hold of her arm, and told her I would live and die with her. The bailiffs came in, and said she was their prisoner, and took her by violence from me: they told me she must go with them, for they said she was arrested by a writ out of one court, and I by one out of another. When she was going, I put my head out of the window, and cried Murder! murder! several times: when I pulled in my head again, Spurr said, What have you got by your bawling? and said they were better known there than I. They brought a man to me, who said he had orders to keep me, and that he had only a crown for his pains; but he would not suffer me to send for any body. The gentlewoman of the house came up, and said I had done a diskindness to her house by crying out murder: she said to me, Look and see whether your name be spelt right, for it may be a false arrest, &c. Wakeman that went away with Mrs. Rawlins, came back again, and said, the young woman was well, and that he left her eating fowl and bacon; I said, I wish she was well. The gentlewoman of the house bid the bailiff shew me the writ: he said he could not read well; but there was the name of Sabina Busby, at the suit of one Jones: but when he heard my complaints a considerable while, he said he would go to my friends, and would go as cheap as a porter, and as soon. I sent him to Mr. Thornton and Mr. Nash: he pretended to go, but returned no more till night.

Sol. Gen. You say you cried out murder, how did Mrs. Rawlins behave herself then?

Busby. It was her great fright and crying that made me endeavour her rescue; when we said we would die together, then it was when they forced her from me; the surprize was so great that made me cry out after that manner that I did: upon which some neighbours came

in, but they told them it was an arrest, and therefore they would not meddle in it.

Sol. Gen. Mrs. Busby, they kept you till night, you say; did they take or require bail for you before you was discharged?

Busby. I will tell you, Sir, if you please: I did not know what I was arrested for, it might be murder or treason, for aught I knew. There was a little boy by, said, Madam, I know Mr. Unkle, your friend in New-market, and I will go for him: he went, but when he returned again, he said he was not at home; which I thought was a lie. There was a poor man, a labourer, working in the chimney, he gave me a wink, and said, Madam, I will go for him; but I said to him, Pray do not leave me; I began to be afraid, for I did not know how my life might be concerned. Said the little boy, I will go any where for you. I sent him for two gentlemen, who came: the bailiffs said they had an action of 200*l.* against me; the gentlemen told the bailiffs they were come to bail me: the bailiffs were very impudent, but shuffled about a-while, and left me, and took no further notice.

L. C. J. Holt. Did they take any bail for you?

Busby. No, they left me with these gentlemen.

Mr. Montague. When you went out in the morning, did you design to go any where else but to chapel?—*Busby.* No where else.

Mr. Montague. Was it your invitation to Mrs. Baynton, or her invitation to you to go in the coach?

Busby. It was Mrs. Baynton's invitation to me; I had not a very good opinion of Mrs. Baynton, for we suspected her virtue in the family, by reason of her too familiar carriage to her brother; but being to go shortly away, I apprehended no harm.

Mr. Montague. Did Mrs. Rawlins go with you?—*Busby.* She did.

Mr. Montague. Mrs. Busby, do you know the prisoner? Is this the man that came to Mrs. Nightingale's house?—*Busby.* Yes, Sir.

Judge Powel. How long was it from the time that you were parted after arresting, that you saw Mrs. Rawlins again?

Busby. The first time after was on Saturday, when they were before the recorder.

L. C. J. Holt. When did you find her?

Busby. On Saturday in the afternoon.

L. C. J. Holt. Was you at the finding?

Busby. No, my lord.

L. C. J. Holt. What time was it?

Busby. About noon, I believe.

Mr. Montague. When you saw her put into the coach, did you hear her cry out?

Busby. No, Sir; It was I that cried out.

Mr. Montague. Did Mr. Swendsen make any entertainments, or no?

Busby. But one, as I know of.

(Prisoner speaks to Mrs. Busby, and said, Have you done?)

Busby. I think so.

Prisoner. If you have, I will ask you a question; Did you know of any love between Mrs. Rawlins and me?

L. C. J. Holt. Did you know any thing of love between Mrs. Rawlins and the prisoner, or no?—*Busby.* No, my lord.

(Mrs. Baynton's maid called and sworn.)

Sol. Gen. Pray, did you know Mrs. Baynton?—*Maid.* Yes.

Sol. Gen. Was you her servant?

Maid. Yes, Sir.

Sol. Gen. Who recommended you to her?

Maid. Mrs. St. John.

Sol. Gen. Do you know one Mr. Swendsen?

Maid. Yes, my lord; there he is. [Pointing to him.]

Sol. Gen. Did you ever see him before you were hired to your mistress?

Maid. No, my lord; I never saw him before.

Sol. Gen. Did you see him when you was with your mistress?—*Maid.* Yes, my lord.

Sol. Gen. Do you know whether there was any relation between them?

Maid. Yes, my lord; they went for brother and sister.

Sol. Gen. How long was you with her?

Maid. About a month.

Sol. Gen. How did she behave herself?

Maid. Till the last of her time, very well; but the family had a mistrust of her long before she went away.

Sol. Gen. Do you know the reason why they mistrusted her?

Maid. I do not know, my lord.

Sol. Gen. Do you know what was the cause the family mistrusted her?

Maid. They thought her a loose sort of a woman, and therefore they mistrusted her.

L. C. J. Holt. Did they discern any familiarity betwixt them?

Maid. No more than as brother and sister.

Sol. Gen. After this suspicion, do you know whether the family expressed any resentment?

Maid. No, my lord.

Sol. Gen. Did you live with her when Mrs. Rawlins was taken away?

Maid. Yes, my lord; but I went away the next day.

Mrs. Berkley sworn.

Sol. Gen. Mrs. Berkley, pray was you present when the prisoner was taken up; and do you know whether he and Mrs. Baynton were brother and sister?

Berkley. I went to Mr. Swendsen himself, and said, Is this wicked woman your sister? Says he, I cannot say she is; but I have made her my tool, and she has done my business, and I would get rid of her to-morrow, but that being Sunday I will not; but on Monday I will give her a reward for what she has done, and then I will discharge her, and never see her more.

Mr. Montague. Relate what discourse you had with him to the gentlemen of the jury.

Berkley. I asked Mr. Swendsen, Whether Mrs. Baynton was his sister? He said, No, she is not my sister: but I have gained my end, in making her a tool to my dear wife: I will gratify her for what she has done, and put her away on Monday, and never see her more.

Counsel. I think you lodged in the house with her?

Berkley. No; but I was a neighbour, and was very frequently there.

Counsel. Did you see any thing to cause you to mistrust that there was any thing more than ordinary betwixt them?

Berkley. No cause at all, that I know of.

Mr. Blake and his wife sworn.

Sol. Gen. Mr. Blake, pray do you know Mrs. Baynton?—*Blake.* Yes, Sir.

Sol. Gen. How long have you known her?

Blake. About twelve years.

Sol. Gen. Pray is she a country lady that has got a good jointure?

Blake. I know nothing but that she works for her living.

Sol. Gen. Hath she any estate in the country?

Blake. None as I know of.

Counsel. Do you know the prisoner at the bar?—*Blake.* Yes, Sir.

Counsel. Where did he lodge at any time?

Blake. He lodged at my house.

Counsel. How long?

Blake. About 6 or 7 months.

L. C. J. Holt. Where is your house?

Blake. In Red Lyon Street.

L. C. J. Holt. What other lodgers had you at the same time?

Blake. I had a parliament man lodged with me at the same time.

L. C. J. Holt. Where did Mrs. Baynton lodge?

Blake. In the opposite room against the gentleman.

L. C. J. Holt. How long time?

Blake. About seven months.

Counsel. How long was Mrs. Baynton gone from your house before this matter happened?

Blake. About five or six weeks.

L. C. J. Holt. How long before Michaelmas?

Blake. I cannot certainly tell; but I believe much about that time.

Counsel. When they were in your house, what did you see betwixt them?

Blake. Nothing of any harm as I know of.

L. C. J. Holt. Mr. Blake, did you never see any harm by Mrs. Baynton?

Blake. Not as I know of.

Sol. Gen. Do you know whether she lay in at your house?

Blake. I know not; for ought I know she might: I know nothing of women's lying-in.

Mr. Wakeman called and sworn.

Sol. Gen. Were you one of the bailiffs that arrested Mrs. Busby and Mrs. Rawlins?

Wakeman. I was the man that executed the marshal's court writ, and arrested them.

L. C. J. Holt. Who employed you?

Wakeman. Mr. Hartwell.

L. C. J. Holt. Were you at Mr. Hartwell's house?

Wakeman. My lord, I will tell you the truth of the matter: on Wednesday before they were arrested, Mr. Hartwell was at my house to see for me; but being not at home, but in the country, I came home about 11 at night: my daughter said to me, there was a writ left by Mr. Hartwell for me to be served, and it must be done to-morrow morning. On the morning he came to me, and said, Mr. Wakeman, will you execute a writ? he carried me to the Mitre-tavern, and called for a pot of ale and a bottle of white-wine, and we had a toast and some cheese. While I was there, one Mr. Holt came in, a man that I never saw in all my life, and said the business cannot be done this day.

L. C. J. Holt. What day of the week was this?

Wakeman. Thursday; he appointed me to call upon him at nine next morning. He said, if I came first we should get what we had before: he came in before we had done, and the man of the house was dressing himself in the kitchen: we eat a toast, and drank the wine, and after that we had another. Mr. Holt called Mr. Hartwell out, and said, it cannot be done; by and by he said it might be done; I do not know what it was, but they took me to Stretton-street; Mr. Hartwell and Mr. Spurr was with me: I was ashamed to stand in the street, so I went into an alehouse, and drank a single pot of drink.

Sol. Gen. Had you seen Mr. Swendsen before that morning?

Wakeman. No: I never saw him before in all my life. At that, if it please your honour, Mr. Hartwell and Mr. Spurr went before, and bid me follow the coach. I did so as near as I could, but could not keep pace with the coach, being lame; but at Dartmouth Ground Mr. Spurr stopped the horses, and then I came up to the coach; and Mr. Hartwell I suppose, gave the word of arrest, and into the coach he went; but I did not go in because there was no room, but rid behind it. The coach was ordered to go to the Star and Garter-tavern in Drury-lane. When we came there, we went into a back-room; and the gentlewoman that had a hand-box said to Mrs. Rawlins, I will go to some of your friends.

L. C. J. Holt. What did they do in Stretton-grounds?

Wakeman. They were arrested there: the gentlewoman was carried by Mr. Hartwell to his house, and I followed them; but meeting with a gentlewoman of my acquaintance, she stopped me. When I came to Hartwell's house, where is she? said I. They told me she was below stairs. I said I had a little business elsewhere, that will detain me about an hour: he gave me leave to go. When I went out, Mr. Holt called me over the way, and asked me if Mr. Hartwell was at home? I said, Yes. And is the young gentlewoman there too? I likewise said, Yes. He led me

to the Five Bells in Wich-street, into a room where there were three boxes, and carried me to the middlemost box, and there was a gentleman.

Counsel. Was it the prisoner at the bar?

Wakeman. Yes, I think so. At that Mr. Holt filled me a full glass, which I drank off; and I told him, I was going to do some business in St. Martin's. And when I had done that, I went to Hartwell's house again: I enquired for the gentlewoman. Mrs. Hartwell said her husband was gone along with the gentlewoman to Holborn to make an end of the matter. I asked her, whereabouts? She said at the Vine-tavern. I went thither, and asked for Mr. Hartwell. There was he, and Mr. Butler, and a tallow-chandler going to eat steaks: they invited me to eat some with them; which I did. Mr. Holt came into the room two or three times: then Mr. Holt told me, I was discharged of my prisoner; so away I went.

L. C. J. Holt. You were eating steaks, you say, at the Vine-tavern; Was she there then?

Wakeman. There is a court against the tavern, and I saw the gentlewoman looking out of the Vine-tavern, where there were new sash-windows; as I came over the way through the court, this gentlewoman looked out of the window.

L. C. J. Holt. What, before you went in?

Wakeman. Yes, my lord; but I went in and saw him alone, but knew not whom he was.

L. C. J. Holt. Did you see Mrs. Rawlins there.

Wakeman. No, not at the tavern.

Sol. Gen. When Hartwell took away this gentlewoman, did she go away quietly, or did Mrs. Busby and she make an outcry?

Wakeman. She was a little frightened.

L. C. J. Holt. Where was it you first saw Mr. Swendsen?

Wakeman. At the Five Bells tavern.

L. C. J. Holt. When was it you saw him there?—*Wakeman.* About twelve a-clock.

L. C. J. Holt. Where was it he gave you the pot of drink?

Wakeman. At the Five Bells; but it was Mr. Holt that gave it me.

L. C. J. Holt. How many were there in company there?

Wakeman. Only Mr. Holt and Mr. Swendsen.

Counsel. What was the occasion of your going?—*Wakeman.* Mr. Holt called me.

Counsel. When was it you saw him out of the window?

Wakeman. About an hour and a quarter after.

Counsel. What answer did you give, when they asked you where the gentlewoman was?

Wakeman. I said, she was at Mr. Hartwell's.

Counsel. You said you served a writ on Mrs. Rawlins, had you no process against Mrs. Busby?—*Wakeman.* No, none at all.

L. C. J. Holt. On what account did you keep Mrs. Busby?

Wakeman. I did not keep her; but one Spurr was employed to do it.

Counsel. You came back to Mrs. Busby's;

did not you say that you had been with a young gentlewoman, who was eating fowls and bacon?

Wakeman. Mr. Hartwell asked me to eat some.

Counsel. Did you not shew Mrs. Busby a writ, and read it to her?

Wakeman. I could never read a King's-bench writ.

L. C. J. Holt. Can you read a Marshal's-court writ?

Wakeman. Yes, but not the Latin of it.

Counsel. When you went to Hartwell at the Vine-tavern, did you ask for Mrs. Rawlins?

Wakeman. Yes, yes; I asked where she was? They told me they were making an end of it. My lord, I had like to have forgot; I asked where was the prisoner? And Mr. Holt told me, they had just made an end of the business.

*Mrs. Pleasant Rawlins** sworn.

Sol. Gen. Give an account to his lordship, after what manner you were arrested, and carried from tavern to tavern.

Rawlins. My lord, I was arrested with madam Busby, and carried to the Star and Garter tavern in Drury-lane.

L. C. J. Holt. How were you carried thither?

Rawlins. I was in a coach going to Oxendon chapel, when three bailiffs were about the coach.

Sol. Gen. Where did they carry you?

Rawlins. They carried us to the Star and Garter in Drury-lane.

Sol. Gen. Who did they carry with you?

Rawlins. There was Mrs. Busby, Mrs. Baynton, and I, and Hartwell the bailiff; when we came to the Star and Garter, they forced me up stairs into a back room, but we got into a forward room; but we had not been there long till they parted Mrs. Busby and I; Mrs. Baynton was gone for our friends, as she pretended. I was in a very great fright, but Mrs. Busby saying, we will die together, they took me by force from her; Hartwell swore a great oath, and thrust me down stairs, and forced me out of a back-door into an alley. When he went to put me into a coach, I cried out, murder; then he threatened to put me into Newgate. He carried me to his own house, and nobody came to help me a great while; but Mrs. Baynton said, that as she was going by the door, she heard my name, and came in in a mighty fright; she said to me, madam, I pity you, will nobody bail you? She told me, I will send to my brother, who shall be bail for you. She sent for him, he came into the room, and he said, what is the matter with you? I said, enough is the matter when I am arrested for 200*l.* and owe no man a penny. Said he in a jocosse way, what makes you affrighted at

that? I have a good mind to arrest you myself. Then they took me thence to the Vine tavern in Holborn, where I was an hour or two before I heard any thing of marrying, or any such thing.

Coun. What did they do with you all that time?

Rawlins. They got a dinner ready, and after we had dined, she begged of me to have her brother, and said, that if I did not marry him, I should be ruined. I told her, I would do nothing without the advice of my friends. I desired my friends to be sent for, but they would not admit it. She looked on my ring on my finger, and said, let me see your ring from your finger. I said, no, you shall not. She said, I will force it off. I said, I will try that: but she forced it from me.

Prisoner. Remember you are upon your oath.

Rawlins. I know I am. When she took my ring away, I asked her what she would do with it; she said, she should go and get a wedding ring made by it. I told her, I would not marry without the advice of my friends. Away she went and bought a ring, and came up again, and said to her brother, she had a ring. Well, said I, give me my ring, and do what you will with the other; she said, if I did not marry her brother I should be ruined for ever. There was a minister in the house, whom they said had been there about a quarter of an hour, but I supposed longer; they brought him, with the clerk, up stairs; the parson saying, I hear there is a couple to be married; he asked no questions, but told me, if I did not marry this gentleman, I should be sent to Newgate and ruined for ever.

Coun. Give an account of what was done after the buying the ring.

Rawlins. When they brought the ring, they said to me, will you be married or no? I answered, I will not; there are none of my friends here, and I will not marry without the consent of my friends. They said, if I did not I should be ruined for ever. So with many threats and persuasions, they at last prevailed with me to marry. I was forced to marry him out of fear, not of going to Newgate, but of being murdered.

Coun. Where did they carry you?

Rawlins. To Blake's house in Red Lion-street, Holborn.

L. C. J. Holt. What time of day was it?

Rawlins. I cannot give an exact account; but I think it was candle-light.

Prisoner. It was about twelve o'clock at noon.

L. C. J. Holt. What time was it that you were married?

Rawlins. My lord, it was about three o'clock.

L. C. J. Holt. When you went to Blake's house, who was with you there?

Rawlins. None but Mr. Swendsen, Mrs. Baynton, and I.

L. C. J. Holt. Was there any force or threats used when you were at Blake's house?

* As to the admissibility of this witness, see 4 Blackst. Comm. 209. East's Pl. Cr. chap. 11, s. 5. Peake's Law of Evid. ch. 3, s. 4. Leach's Hawk. Pl. Cr. book 2, c. 46, s. 78.

Rawlins. Yes, there was, my lord.

L. C. J. Holt. Give an account of it.

Rawlins. They thrust me up stairs, and ordered to have a bed sheeted. Mrs. Baynton said to me, undress and go to bed. I said, I would not. She said, she would pluck my cloaths off my back. I said, she should not. She said, she would pluck off my cloaths and make me go to bed.

Coun. What did she do with you?

Rawlins. She put me to bed.

Coun. Did she use any violence with you?

Rawlins. Such violence that made me go to bed.

L. C. J. Holt. How came you to be released?

Rawlins. It was Saturday morning before I was released; there was some of my friends came to the place where I was.

L. C. J. Holt. Then you were with him all night?—*Rawlins.* Yes, my lord.

L. C. J. Holt. Mr. Swendsen, will you ask her any questions?

Prisoner. She must be my chiefest evidence, my lord, when the witnesses come; she must be the chiefest of them all.

L. C. J. Holt. You will not ask her any questions now, but when the witnesses are called?

Prisoner. My lord, I presume she does not go out of court. [Orders given for her to sit down.]

Sol. Gen. We have done with our evidence at present.

L. C. J. Holt. Mr. Swendsen, what do you answer to the evidence?

Prisoner. My lord, I am very much unprepared for a trial at present.

L. C. J. Holt. Why so?

Prisoner. Because I had but little time for preparation, and I am not prepared, I desire that I may be allowed counsel.

L. C. J. Holt. No, no, it cannot be allowed you; and as for the time of your trial, you were told, if you would shew good cause to have it put off yet, the court would have done it.

Prisoner. Then I hope if I speak any thing that may be prejudicial to my cause, that the court will not take advantage from it. The first time I was at Mrs. Nightingale's, I was desired by Mrs. Busby and Mrs. Baynton to make a bowl of punch, which I did; and we were very merry over it; then I invited them to go on board a ship, which they all did, and we in a short time became very well acquainted. My lord, I desire my wife may stand by herself, and none of them near her.

L. C. J. Holt. There is none near her that will hurt her.

Prisoner. My lord, I beg she may stand by herself, that I may have a fair trial; I pray your lordship to grant me this favour. My lord, will you please to grant it?

L. C. J. Holt. Must I grant it only for your humour?

Prisoner. It is not a humour, my lord, but of a great consequence to me; will your lord-

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ship grant me it? I beg it, my lord, for it is the most material thing I have to ask; I beg all those people may be removed from her; it is the greatest and most material thing I have to say.

L. C. J. Holt. I am sorry for it.

Prisoner. It is so; good, my lord, grant me that.

L. C. J. Holt. There is nobody near her that concerns you at all.

Prisoner. There are those by her that will do me no kindness. [Then she was ordered to be removed.]

Sol. Gen. My lord, her standing there is enough to disorder her.

Prisoner. My lord, she is very well.

L. C. J. Holt. Remove her a little further.

Coun. My lord, he does it on purpose to fright her.

Prisoner. We went (as I was telling your lordship) aboard a ship, and they invited me to come the week following, to partake of a treat; accordingly I went, and there was one Mr. Pugh, and he and I made a bowl of punch. Mr. Pugh at that time courted Mrs. Rawlins, and that little time I was acquainted with her, I discerned she had a kindness for me, as I had for her; and I told her I could not be easy while she suffered Mr. Pugh to kiss her; she desired me to be easy, and it should be remedied.

L. C. J. Holt. Mrs. Rawlins, do you remember any such thing?

Rawlins. My lord, I do not remember any such thing, or that any such words ever came out of my mouth.

Prisoner. Did not you say this, Mrs. Rawlins, Mrs. Swendsen I should say, did not you say, if I would not sit by you, you would not eat a bit or a crumb; when I sat by you, and proffered my place to another, can you say you were not offended?

Rawlins. No, I was not.

Prisoner. Are you not upon your oath? did not you give me some encouragement?

Rawlins. I do not know how I could shew it you, I know not of any such thing.

L. C. J. Holt. You ought to speak the truth, because his life depends upon it. Did you, in the first place, ever admit of his courtship, in order to marry you?

Rawlins. No, my lord, I do not remember any such thing.

L. C. J. Holt. Did you ever shew any kindness to him upon any such account?

Rawlins. No, I do not know I shewed him any more kindness than all the rest of the family shewed him.

L. C. J. Holt. Was you ever in his company alone?—*Rawlins.* No, my lord.

Prisoner. To give me more ease and satisfaction, after dinner we had our bowl and walnuts, Mrs. Swendsen peeled the kernels and gave them to me; she gave them faster than I could eat; she heaped my plate with them; every one at the table took notice of it, and she jogged me with her knee, that I should take

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them, and gave some to Mrs. Baynton, and bid her take them and give to me.

L. C. J. Holt. Mrs. Busby, were you there?

Busby. Yes, my lord.

L. C. J. Holt. Did you see any thing of this kind?—Busby. No, my lord.

Prisoner. Will your lordship be pleased to ask her yourself?

L. C. J. Holt. Mrs. Rawlins, did you ever give peeled walnuts to him, or send them to him in particular?

Rawlins. No, my lord, I do not know that I was more kind to him than the rest of the company.

Prisoner. Every body took notice of it, and Mr. Pugh in particular.

L. C. J. Holt. What do you say, Mr. Swendsen?

Prisoner. My lord, Mr. Pugh, if he were here, would say the same as I do. He was afraid I should get away his lady.

L. C. J. Holt. Where is he?

Court. He is in the court.

L. C. J. Holt. You may have him for a witness, if you will.

Prisoner. More than this, before he went away, she told him she did not care for him; this she spoke to make me more easy still. This I believe Mr. Pugh can witness, inasmuch as madam Busby complained to her about it, at Mr. Scoreman's the picture-drawer's, who is one of my evidences; I desire he may be called.

L. C. J. Holt. Well, let him be called. [So he was called, and came.]

L. C. J. Holt. Hear ye, he calls you to be a witness, you are not to be upon your oath,* but are under the highest obligation to tell the truth.

Scoreman. While I was drawing a gentleman's picture, Mrs. Baynton's, there was a fire, it began to be cold, they fell into discourse about Mr. Swendsen and Mrs. Rawlins, Mrs. Busby was there at the same time, they fell into discourse about Mr. Swendsen and the young lady.

L. C. J. Holt. Was she there?

Scoreman. Yes.

L. C. J. Holt. Where was it?

Scoreman. At my lodgings; there were Mrs. Busby, the young lady, and Mrs. Baynton.

L. C. J. Holt. Whose picture were you drawing?

Scoreman. Mrs. Baynton's. They fell into discourse relating to a matter of love between Mr. Swendsen and the young lady. She said the young lady had a love for Mr. Swendsen more than the other.

L. C. J. Holt. You heard her say so?

Scoreman. No; but I can say Mrs. Baynton said so.

L. C. J. Holt. But tell us what you heard.

Scoreman. She should have said so, I did not hear her myself, but afterwards upon a discourse she afterwards said, What she had said she would stand to.

L. C. J. Holt. What did she say?

Scoreman. I do not know that she said so or not.

Prisoner. My lord, may I speak it as well as I can? He cannot speak English right, I will speak it to him, my lord.

L. C. J. Holt. No, no. Did you hear Mrs. Busby say any thing? What did she say?

Scoreman. In way of discourse she said so.

L. C. J. Holt. What, in way of discourse, did she say nothing?

Scoreman. I heard the lady say only that word, That all she said she would stand to.

L. C. J. Holt. What did you hear them talk about?

Scoreman. They were playing at cards, and she took up the tricks of Mr. Swendsen, which discovered love.

L. C. J. Holt. The question is, Whether you did hear them speak any thing of love, or not?

Prisoner. My lord, he would speak better with an interpreter.

L. C. J. Holt. Let an interpreter be called for.

L. C. J. Holt. What countryman are you?

Prisoner. My lord, he is a Dane.

[The interpreter, a jury-man, was sworn; and beginning to talk with Mr. Scoreman, and then he said, He is none of my country, he is a Dutchman, I do not understand him.]

L. C. J. Holt. He speaks English well enough.

Prisoner. Very well; but he knows not where he begins: he would say what Mrs. Busby and Mrs. Baynton were speaking, but knows not how to utter himself.

L. C. J. Holt. He cannot say any thing for you.

Scoreman. I heard but a few words, and cannot say much of it.

L. C. J. Holt. You must have a better witness, or you are in a dangerous condition.

Prisoner. My lord, Mr. Pugh complained to madam Busby, that she slighted him very much.

L. C. J. Holt. What, for love of you?

Prisoner. Yes, my lord, I could tell you of divers things that pass between lovers, that would be impertinent for me to relate to wise men.

L. C. J. Holt. Let us hear some of them.

Prisoner. When we were by ourselves, she kissed me; and squeezed me by the hand, when we walked privately in the garden.

L. C. J. Holt. Did she kiss you?

Prisoner. Yes, my lord, and squeezed me often.

L. C. J. Holt. Did you not think her very coming?

Prisoner. Yes, I did; and when we talked of marriage, she seemed to be very well pleased.

L. C. J. Holt. Mrs. Rawlins, you hear what he says: did you squeeze him by the hand and kiss him? Is it true?

Rawlins. No, my lord, I did no such trick,

* See lord Morley's Case, vol. 6, p. 777.

not I; and as for walking in the garden, I did not walk in the garden alone with him.

Prisoner. I could mention a great many of these little things; but if she denies them I cannot help it. My lord, the last time I was at the house we had a barrel of oysters; I stood with my hands behind me, and as she passed by at any time, she gave me squeezes by the hand.

L. C. J. Holt. What say you to this, Mrs. Rawlins?

Rawlins. My lord, I did not do so, upon my oath.

L. C. J. Holt. She says she did not do it, upon her oath.

Prisoner. Now for the matter of fact; as for the arrest, I never knew any thing of it, directly or indirectly, till I saw her at the bailiff's house.

L. C. J. Holt. If she did know any thing of, or was consenting to the arrest, why did you force her to the tavern, and marry her with a parson you had provided for that purpose?

Prisoner. She married me with as much freedom as could be in a woman.

L. C. J. Holt. What say you to that, Mrs.?

Prisoner. Will your lordship please to ask her, whether I offered any violence to her either by word or deed?

L. C. J. Holt. Mrs. Rawlins, give an account how you were carried from the bailiff's house.

Rawlins. My lord, when I was at Hartwell's the bailiff's house, Mrs. Baynton pretended to come accidentally by, and that she heard my voice, and came in and said, How do you do, Mrs. Rawlins? You know how I do, said I. She pretended to help me, and proposed to go to her brother to bail me; and he came, and I was carried from thence in a coach to the Vine tavern.—[She was asked whether he came into the coach to her?]

Rawlins. Yes, he did.

L. C. J. Holt. Did you cry out when they put you into the coach?

Rawlins. No, my lord, I did not cry out then, I made no noise then.

L. C. J. Holt. What did he do then?

Rawlins. They carried me to the Vine tavern a prisoner.

Sol. Gen. She went willingly enough from Hartwell's house to the Vine tavern, because she thought that there she should be bailed.

L. C. J. Holt. Mrs., What was the pretence of your being carried from Hartwell's house?

Rawlins. My lord, they would not tell me before they carried me to the place.

L. C. J. Holt. Mr. Swendsen, will you ask any other questions?

Prisoner. Not yet, my lord. I desire the parson may be recalled that married us. (Which was done.)

L. C. J. Holt. Come, doctor, you are not upon your oath; How came you to be concerned in this match?

Parson. My lord, it was at the Vine tavern where I saw them, in Holborn.

L. C. J. Holt. Was it the Mitre or the Vine? *Parson.* The Vine, I believe, my lord.

L. C. J. Holt. How came you there?

Parson. There was a gentleman fetched me and the clerk from the Fleet.

L. C. J. Holt. What to do?

Parson. He said there was a gentleman there to speak with us. When we came there, the clerk and I went up one pair of stairs and drank a pint of wine. Then we were led into another room; I asked him what I was to do? He told me, for to marry him to that young gentlewoman.

L. C. J. Holt. Was there a licence?

Parson. Yes, when I saw the licence I read it, and saw it a true licence; Then I asked the gentlewoman her name, to know whether it was the same that was in the licence; and found it was the same.

L. C. J. Holt. Was it written in the licence, that the marriage was to be performed at the Vine tavern?

Parson. No, my lord, but a blank was left.

L. C. J. Holt. Did you take the queen's duty?

Parson. No, my lord, but returned their names to the supervisor: My lord, when I asked her name, I also asked her whether she was willing to be married? She said she was willing, and another gentlewoman was with her, that said she was her sister: I said to her; Madam, if you consent, and your sister is willing, here is a licence, for I believe there is no danger to marry you.

L. C. J. Holt. Did you ask her any other way than in your form, Will you have this man to your wedded husband?

Parson. I asked her, whether she was willing to marry? She said, Yes, she was willing.

L. C. J. Holt. But did you ask her, before you did the office?

Parson. Yes, my lord, I did, and she consented to it.

Counsel. Pray who was the person that came to the Fleet to you, to carry you to the tavern? Was it the gentleman at the bar?

Parson. No, it was not him.

Mr. Mountague. How long was it before you went to him, after you went into the tavern?

Parson. My clerk and I went in, and sat the drinking a pint of wine, about a quarter of an hour, then we went to the gentleman.

L. C. J. Holt. Do you think that they should grant licences to marry in a tavern, and out of canonical hours?

Parson. I never did it in all my life before, and never will do it again.

Sol. Gen. What was the reason why you were conducted into another room, and not where they were?

Parson. I know not the reason.

Sol. Gen. How long were you in the room where they were?

Parson. I cannot well tell.

L. C. J. Holt. Did you marry them as soon as you came in?—*Parson.* Almost as soon.

Mr. Mountague. Did you ever marry any at a tavern before?—*Parson.* No, my lord.

Sol. Gen. Will your lordship be pleased to hear the licence read?

L. C. J. Holt. It may be read. You may see the date and the names. The licence is dated Oct. 14, 1709. The names Hungen Swendsen, in the parish of St. Paul's Shadwell; and Pleasant Rawlins, in the parish of St. Mary Whitechapel.

Counsel. Is there any blank left?

Parson. Yes, there is a blank left, that the marriage may be in the parish church of St. Mary Whitechapel, *vel* a blank.

Mr. Mountague. Were you entertained there?

Parson. Before the marriage the clerk and I drank a pint of wine in the first room.

Mr. Mountague. Had you any victuals then?

Parson. Not before they married, but after.

Sol. Gen. Pray, Sir, did you bespeak a dinner before the marriage?

Parson. No, Sir, the gentleman bespoke a *sewl*.

Mr. Dea. Cotchett was called.

Prisoner. My lord, I desire he may be asked, whether he heard any noise, or whether any violence was offered to the young woman?

L. C. J. Holt. Did you hear any noise, or perceive any violence offered to the young woman?—*Cotchett.* No, my lord.

Prisoner. Ask Mrs. Cotchett, whether any noise or violence was offered to the young lady.

L. C. J. Holt. I will ask her that question: was there any noise or violence used to the young lady?

Mrs. Cotchett. No, my lord, there was no noise; they came in and asked for a room, and I shewed them a lower room, but they would not have that, but went up. Soon after, Mr. Holt the vintner came down and went out, and Mr. Hartwell called for a pint of wine for the coachman; but the drawer grumbled at it, and said he did not know who would pay for it. Then Mr. Hartwell the bailiff told me it was an arrest, and that the parson was to be bail for the lady, and at that I very much wondered; and afterwards they told me there was a wedding above, which we admired at, that there should be a wedding and bailiffs; and after all was over, the gentleman and the lady went out at the back door, and took coach.

Prisoner. Did you see Mrs. Swendsen discontented when she went out?

Mrs. Cotchett. No, my lord, she seemed not discontented: what I know I will speak, and no more.

Sarah Walker called.

L. C. J. Holt. Do you live at the Vine tavern?—*Walker.* Yes, my lord.

L. C. J. Holt. What place?

Walker. Cook, my lord.

L. C. J. Holt. Were you in the house when that young gentlewoman was carried prisoner there? where were you then?

Walker. In the bar, my lord.

L. C. J. Holt. Did you keep the bar?

Walker. No, my lord; but I was washing the bar at that time.

L. C. J. Holt. Did you hear any noise?

Walker. No, my lord.

L. C. J. Holt. Did you hear of a wedding?

Walker. Yes, my lord.

Prisoner. My lord, will you be pleased to ask her, if she was not had before the Recorder, and promised a reward, if she would say any thing for their service?

L. C. J. Holt. What do you say to this?

Walker. My lord, only this, that if I knew any thing, and discovered it, I should be satisfied for my trouble.

L. C. J. Holt. Were you sent up stairs to the gentlefolks to receive directions for the supper?—*Walker.* Yes.

Sol. Gen. When you came up into the room, what condition was the young gentlewoman in?

Walker. She sat at one end of the room, and seemed to be very melancholy.

Sol. Gen. How did she look, when she went away?

Walker. Not melancholy then. When orders were given about the supper, I asked her what sauce she would have; she said she would eat nothing at all.

Mr. Blake's Daughter being called.

Prisoner. Ask what she knew of my wife?

Blake. My lord, she carried it very well; the lady was pleased to say that I should wait upon her. I offered to pull off her shoes and stockings when she went to bed: she held out her legs, and I pulled off her shoes and stockings.

Sol. Gen. Were you present at the beginning, before she began undressing?

Blake. Yes.

Sol. Gen. When she was come in, were you there all the time?

Blake. No, I run to and fro.

Sol. Gen. Do you know Mrs. Baynton?

Blake. Yes, Sir.

Sol. Gen. Pray, did she ever lie in at your house?—*Blake.* Yes, Sir.

Sol. Gen. Hath she a husband?

Blake. I cannot tell.

L. C. J. Holt. Did you make the bed in Mr. Swendsen's chamber?

Blake. Yes, my lord, I made it where he lay, I saw nothing.

L. C. J. Holt. How long was it after from the time they came to the time they went to bed?

Blake. I know not, they came into the house just about dinner.

L. C. J. Holt. What time was it?

Blake. About three or four o'clock in the afternoon.

L. C. J. Holt. How long was it after they came, before they went to bed?

Blake. About two hours, or thereabout.

L. C. J. Holt. Do you think that five or six o'clock was a fit time to go to bed?

Blake. I knew not what was betwixt them.

Sol. Gen. Is it usual to go to bed at that time at your house?

Blake. No; I did not know what was betwixt them.

Mr. Mountague. What time did they rise again?—*Blake.* About seven o'clock.

Mr. Mountague. Did they lie at your house that night?—*Blake.* No; they did not.

L. C. J. Holt. When did they go away?

Blake. They went away as soon as supper was done.

Prisoner. My lord, I desire she may be asked, whether my wife was sorrowful or discontented, or unwilling to go to bed?

L. C. J. Holt. What time was it they went to bed?—*Blake.* About four o'clock.

L. C. J. Holt. Did you know what the design was?

Blake. No, my lord, I did not know any otherwise than as Mr. Swendsen told me the young lady was his wife.

L. C. J. Holt. What time did they rise again?

Blake. About two hours, they rose up, and got to supper.

Judge Powis. What time did they go from your house?

Blake. Between eight and nine o'clock.

L. C. J. Holt. Where did they go? do you know where they went?

Blake. Indeed, my lord, I cannot tell.

Mr. Blake sworn.

Sol. Gen. Mr. Blake, how long have you known Mrs. Bayntoo?

Blake. About twelve years.

Sol. Gen. Did you ever know that Mrs. Bayntoo had a husband?

Blake. I cannot tell; it was reported that she had one.

Sol. Gen. Did you ever see Mr. Bayntoo? did he own her to be his wife?

Blake. My lord, they did not live with me, while he was living.

Sol. Gen. How long has he been dead?

Blake. I do not certainly remember; about three or four years.

Sol. Gen. How long is it since Mrs. Bayntoo lay-in at your house?

Blake. About four months ago.

Sol. Gen. When she was such a woman as this, and brought a gentlewoman to your house, and ordered a bed to be made, how could you admit her into your house again?

Blake. I did not know that it was any clandestine thing.

L. C. J. Holt. Have you any more witnesses, Mr. Swendsen?

Prisoner. Let the constable be called for.

L. C. J. Holt. What questions shall I ask him?

Prisoner. Ask him what it was my wife said to him?

Constable. My lord, the man was in one room, and the woman in another; when I opened the door the gentleman asked her how she did?

L. C. J. Holt. What gentleman was it?

Constable. It was the gentleman that gave me the warrant. He said to her, are you married? Yes; there is my husband. She seemed very much satisfied: he said to her, madam, I wish you much joy, and if you please to go to the Recorder's, there is your guardian to approve of what you have done: but when she was dressed, she would go to the next justice of the peace: they could not agree about going; but they drank each of them a glass of wine and went away. The gentleman that brought me the warrant was also with me.

L. C. J. Holt. Are they here?

Constable. The warrant was to take up the bailiffs and all together.

L. C. J. Holt. Where do you live?

Constable. In Lincoln's-Inn-fields.

L. C. J. Holt. In what house did you see them?

Constable. It was in Red-Lion-street, over-against the Red-Lion-tavern.

L. C. J. Holt. About what time of the night was it?—*Constable.* About seven o'clock.

L. C. J. Holt. What night was it?

Constable. Indeed, my lord, I cannot tell.

Mr. Mountague. Whose house was it? was it Blake's house?—*Constable.* Yes, it was so.

L. C. J. Holt. Where is your warrant?

Constable. They took it away from me.

L. C. J. Holt. But you ought not to have parted from your warrant.

Constable. The men were not there that the warrant ran for.

L. C. J. Holt. Was not the warrant against Mr. Swendsen?

Constable. The warrant was for such men as took the young gentlewoman away. I cannot tell whether his name was there or no.

L. C. J. Holt. Mrs. Rawlins, what were those men who came along with the constable? were they your friends?

Rawlins. Yes, my lord, they were my friends.

L. C. J. Holt. What is this Geary?

Rawlins. He is an acquaintance of madam Busby's.

L. C. J. Holt. Did you say you consented to the marriage before them?

Rawlins. If I did, I did not know what I said.

Prisoner. My lord, I desire she may be asked what she said to the constable?

Rawlins. My lord, I do not know, whether I said such a thing; if I did, I was not in my senses, I did not know what I said.

Prisoner. My lord, I hope you will give me leave to speak. She said to the constable, I am very well content with the marriage, and this is the ring that married us.

L. C. J. Holt. What say you to that, Mrs. Rawlins?

Rawlins. I do not know but I might; but I did not know what I said.

L. C. J. Holt. Had you been in bed then?

Rawlins. Yes, we were in bed about an hour.

Sol. Gen. Was there any threats used by Mrs. Baynton?

Rawlins. Yes, my lord; she said, that I must own him for my husband, or else we were all ruined.

Justice *Baber* called.

Prisoner. My lord, he is one of the chiefest witnesses that I have, I desire it may be asked him, what my wife declared to him of her own accord?

J. Baber. My lord, I think it was Friday night the 6th of this month, the prisoner here at the bar, and I suppose that may be the gentlewoman too [pointing to her] and another gentlewoman and a woman came to me to my house in York-buildings, and desired me, but the prisoner in particular, that I would administer a voluntary oath to the young lady, which she was willing to take, that she was married to this gentleman. I told him that I had nothing to do to confirm marriages, and told them I was loth to meddle with it.

L. C. J. Holt. How came they to you? Had they any officers?

J. Baber. No, my lord, they came in a coach without any officer.

L. C. J. Holt. Was there any oath taken?

J. Baber. No, my lord.

Counsel. What was the reason that you did not tender the oath?

J. Baber. Because I thought I had nothing to do with it.

Counsel. What sort of frame was the young woman in?

J. Baber. In very great disorder; not like a gentlewoman, but in a very confused condition: she spoke what she said by her own consent; but with much disorder.

Prisoner. My lord, I desire it may be asked justice Baber, whether I desired him to tender the oath to my wife?

L. C. J. Holt. Did Mr. Swendsen desire you to tender the oath?

J. Baber. He did put me upon it at first.

Prisoner. I never did so in all my life.

Mr. *Bulkley* called.

Prisoner. My lord, I desire this man may be heard.

Bulkley. This gentleman, on the 7th of November, in the forenoon, stopped at the porch of my door, and gave me orders to wait upon him, upon the business of my calling.

L. C. J. Holt. What is your calling?

Bulkley. A barber. He told me that he was married. I asked him, What, are you married? Yes, said he, I am; and here is my wife; and the gentlewoman she said so too. At that, I wished them much joy and happiness. The young woman said, she did not question it, since what she had done, was with her own voluntary consent.

Mr. *Hudson* called.

Prisoner. What did you hear my wife say?

Hudson. When Mr. Swendsen, with his

wife, came to our house, (my lord) he bid her take Mr. Blake by the hand, and ask him how he does. She said, yes, my dear. She went into the house and took my master by the hand, asked him how he did. Mr. Swendsen said, this is my dear wife; and she said, this is my dear husband, and took him about the neck and kissed him.

L. C. J. Holt. What trade are you?

Hudson. An upholsterer; Mr. Blake is my master.

L. C. J. Holt. You say the young woman took Mr. Blake by the hand, and said, how do you do? Did she ever see Mr. Blake before?

Hudson. Not that I know of. But Mr. Swendsen said, this is my dear wife.

Sol. Gen. When was this?

Mr. Hudson. On Saturday morning.

Sol. Gen. If they lay there over-night, what necessity was there for Swendsen to tell Mr. Blake, that was his dear wife?

Hudson. He did not say so to him, but to his wife; and she kissed him.

Mr. Mountague. What need he to tell Mr. Blake that was his wife when he knew it before?

Hudson. Why may not I, if I had a wife, come to her and say, 'My dear wife?'

Sol. Gen. Mr. Blake, pray was Mrs. Rawlins at your house before then?

Blake. Never, as I know of.

Mr. *Green* called.

Prisoner. I desire that this man be asked what he heard my wife say before the Recorder?

L. C. J. Holt. What did you hear the young woman say before the Recorder?

Green. She owned that she was married to the gentleman, by her own consent, without any force or compulsion.

L. C. J. Holt. Did she marry him willingly?

Green. Yes, my lord, she said so.

Prisoner. My lord, I desire he may tell how she behaved herself there?

L. C. J. Holt. What said she?

Green. She said she was married to that gentleman without force or compulsion.

Counsel. Did she say nothing else?

Green. This is all that I remember.

Sol. Gen. Did the gentlewoman continue in that tone all the time she was at the Recorder's?

Green. No, I believe she did not.

L. C. J. Holt. Was the Recorder by then?

Green. Yes, the Recorder was by. Then he asked her, whether she was married by her own consent?

L. C. J. Holt. What did the Recorder say more?

Green. He said, he was afraid she was drawn in by this man, who he feared was a spark and bully of the town.

Counsel. Pray, when she said she was married by her own consent, had Mr. Swendsen her hand in his?—*Green.* Yes.

L. C. J. Holt. Then I ask you whether Swendsen was afterwards withdrawn?

Green. He was so.

L. C. J. *Holt*. And did you hear what she said after that?

Green. No, I did not, I was thrust out.

L. C. J. *Holt*. Where do you live?

Green. I live in Carter-lane. I belong to the general post-office.

L. C. J. *Holt*. How came you to be acquainted with this matter?

Green. My lord, I came into Red-Lyon-street accidentally, two doors off Mr. Swendsen's: I went to Mr. Swendsen's lodgings, and asked how he did? I was told he was very well, that he had married a fortune, and was in bed with his lady.

L. C. J. *Holt*. What was the man's name?

Green. His name was Blake, my lord; it was a pure accidental thing to me.

L. C. J. *Holt*. How long have you known Mr. Swendsen?

Green. I have known him several years.

L. C. J. *Holt*. Have you dealt with him?

Green. Yes, I have; and I believe here are many present, can give a better account of him than I can.

Prisoner. My lord, I desire he may be asked, what my wife said to the Recorder?

Green. My lord, upon examination, she seemed to be much surprized upon that occasion, but what she did, she said was voluntarily; and that as he was her husband, so she would own him; and when she was asked, whether she was in drink? she said she was never given to drinking:

Prisoner. And as I have been represented by some as a bully of the town, I desire I may have my friends heard, as to my life and conversation.

One of his Friends called.

L. C. J. *Holt*. Where do you live?

Ans. At Ratcliff; my education has been at sea. I have been acquainted with Mr. Swendsen two years, and have found him to be a very honest and ingenuous man.

L. C. J. *Holt*. Had you any dealings with him?

Ans. Yes, my lord, I have dealt with him for 3,000*l.* and better.

L. C. J. *Holt*. In what manner did you deal with him?

Ans. I consigned my effects to him.

L. C. J. *Holt*. From whence?

Ans. From England to Norway.

L. C. J. *Holt*. How could they be consigned to him when he was here?

Ans. He was not here then, but at Norway. In May 1701, he came over, and had a ship of mine, called the Swan, and sold her for my account.

Cous. Did you apprehend that he traded for himself, or as a factor?

Ans. He traded for himself; and I can shew you the bills of lading that will shew they were for his account: and I believe all that know him, will give him the character of an honest man.

Mr. *Evans* called.

L. C. J. *Holt*. What do you know of Mr. Swendsen?

Evans. I was in Norway, and found then that he lived in very good repute and credit there among all people, the best of trading people; and I found he had a familiar converse with them: I was with him at the Generance and Admirance, which are the chief offices in the place: I was by his letter of recommendation credited by the most eminent merchants of Norway. At that time he had several ships consigned to him for lading, at a time when goods were difficult to be gotten, and he did load them.

Another Witness called.

L. C. J. *Holt*. What do you know of Mr. Swendsen?

Ans. My lord, I was born in Norway, where this gentleman lived for some years, and was esteemed worth 10,000 dollars. I have had no great dealings with him; but when he wanted money, when money was short with him, I lent him some, which he paid again very honestly.

Prisoner. Call John Shorey.

Shorey. The knowledge I have had of him was caused by his buying several parcels of goods of me, and ordered them to be shipped, and paid me honestly for them.

Another Witness called.

L. C. J. *Holt*. What say you?

Ans. I have known this gentleman about two years: the first of my knowledge was, I had a bill of exchange of 50*l.* drawn upon him, which he paid very honestly. I never heard any otherwise, but that he was a very honest, just man.

Sol. Gen. I would observe to your lordship, that the principal part of our evidence the prisoner hath given no answer to; that is, the force: if the taking and detaining Mrs. Rawlins was by force, as several of our witnesses have testified: and if she married while she was under that force, no subsequent act or consent of her's can lessen the offence, if the jury could give credit to the prisoner's evidence, and believe her consent was real. The gentleman did herself confess, that after she had been hurried from tavern to tavern, she did declare he was her husband, and that she consented to the marriage; but what afterwards happened, plainly shews that it was through fear and nothing else: had she really consented to the marriage, why was she carried to the justice of peace to take an oath, that she was married by her own voluntary consent? Whilst the prisoner held her by the hand before the Recorder, she confessed that she married with her free consent: as soon as the prisoner was withdrawn, she burst out into a flood of tears, and confessed that she was married by constraint. My lord, there is but one thing more I would answer, and that is the licence

which was given in evidence to give colour to this marriage; but this plainly shews, that this whole management was the prisoner's contriving. The licence bears date three weeks before the time of the marriage, which shews how long they had waited for an opportunity to accomplish this design. When the prisoner took out this licence he swore her age to be 25, and his to be 35.

My lord, now we will examine some witnesses to these facts, and so we will have done. She was carried to justice Baber to take a voluntary oath. If your lordship pleases, he may again be called: we will examine him upon oath.

Justice Baber called.

Sol. Gen. Pray, Sir, give an account of the whole matter.

Just. Baber. They came to me about eight or nine o'clock on Friday night the 6th of this month; and the prisoner here told me the purport of his coming, that it was a light and short business; and pointing to the gentlewoman, said, that she came to take a voluntary oath, that she was married to him with her own consent; she said she was married, and that with her consent. I told her, I had nothing to do with confirming marriages. He told me, amongst other things, that he had a certificate. You know that best, said I; a marriage is a marriage, and I have nothing to do with it.

Sol. Gen. But when she told you that she was married, what condition was she in?

Just. Baber. She was in a very great disorder.

Another Witness.

Sol. Gen. Was you before the Recorder?

Witness. Yes, on Saturday the 7th of this November. While Mr. Swendsen held her by the hand she owned the marriage; but when he was withdrawn she threw herself upon me, and desired me to stand by her, or she was undone.

Sol. Gen. What account did she give when Mr. Swendsen was withdrawn?

Ans. She spoke much to the same purpose as she has done here; and that what she had done was all by force, and out of fear.

Mr. Taylor called and sworn.

Sol. Gen. Do you know any oath the party took, in the taking of this licence?

Taylor. Yes, my lord.

Sol. Gen. How old did he say the gentlewoman was?

Taylor. He said that she was 25, and that he was 35 years old.

Sol. Gen. Are you sure he took the oath?

Taylor. Yes, my lord, there is the surrogate's hand, and the prisoner's own hand to it.

Sol. Gen. Were you present?

Taylor. No, I was not, but my clerk was.

Serj. Darnel. My lord, there is his hand to it, and we can prove his hand.

Sol. Gen. My lord, it is an oath of the court.

Counsel. My lord, I hope that may be of the same force as a deposition in chancery.

L. C. J. Holt. It cannot be read as evidence.

—*Mr. Taylor,* did he ever take a licence at any other time?—*Taylor.* No, my lord.

L. C. J. Holt. Was the licence dated that day he took it?

Taylor. It is always dated the same day it is taken.

Mr. Mountagna. My lord, I desire Mrs. Busby may be asked, Whether she talked at the picture-drawer's about any thing of love, or no? Mrs. Busby, the question is, Whether or no you talked any thing about love at the picture-drawer's?

Busby. My lord, Mrs. Baynton desired me to go with her to the picture-drawer's to see her picture drawn; we were talking by the fire-side that Mrs. Rawlins had spoken by way of discouragement to Mr. Pugh; Mrs. Baynton said that she thought her brother would make her a very good husband, and was able to make her a considerable jointure here in England. My lord, Mr. Pugh came, by the consent of friends, on honourable terms.

L. C. J. Holt. Gentlemen of the jury, this prisoner is indicted for felony, in taking away by force Mrs. Pleasant Rawlins, and marrying of her; this is felony by the statute of the third of Henry 7, which enacts, 'That if any person shall take any woman that hath any substance in goods or land, against her consent, and marry or defile her, he and his procurers and receivers shall be adjudged to be felons.'

Now it hath been proved to you, that this young woman had a personal estate left her by her father, to the value of 2,000*l.* and had another estate in land, to the value of 20*l.* per annum. If any one shall take her away by force, and marry her, he is guilty of felony by that statute. You have heard that she was placed by her guardian, under the tuition of Mrs. Busby, who took a lodging about 3 years last past, at one Mrs. Nightingale's in Stretton-grounds, Westminster; and boarded with her, who took boarders into her house; and if any friend of her boarders came to dinner there, she received 1*sd.* per head: About three weeks or a month before Michaelmas last past, there came one Mrs. St. John, and recommended to her a lodger of her acquaintance, and desired that she might board with her as others did, and said she was a widow that came out of the country about a suit of law, and represented her to be a sober person. Mrs. Nightingale refused her at that time, and heard no more of her till about three weeks after; then she, Mrs. St. John, returns, and prevails with Mrs. Nightingale to take her acquaintance into her house. Mrs. Baynton that is mentioned in the indictment, was the person designed by Mrs. St. John; and she came to Mrs. Nightingale, and desired to be with her as other boarders were; she pretended to be of very good quality, so she was taken into the house; her carriage and de-

meanor there were very civil, and she pretended she had a brother, that would come to see her: The prisoner at the bar was the person that came, and she called him brother, and owned him for such; he dined there several times with the rest of the boarders; he said, He had an interest in shipping, and invited all the family to go on board a ship. They accepted of his invitation, and were very well entertained, and suspected nothing; but at length it was observed there was too great a familiarity between Mrs. Baynton and the prisoner, more than was common betwixt so near relations; they afterwards perceived that Mrs. Baynton was inclinable to drink, which caused some jealousy of her in the family, and she perceiving the strangeness of the family, gave Mrs. Nightingale notice that she should go in a short time, for that she had finished her business at law, and that the town was chargeable, and she intended to be gone at such a time. When that time was expired, she pretended to Mrs. Nightingale that there was another thing had happened that would detain her a week longer: She consented that she should stay. Now you may observe by the evidence, that it was usual for Mrs. Busby and Mrs. Rawlins to go to Oxendon chapel on Friday; which Mrs. Baynton very well knew, and pretends that she was to go in a coach that way into Golden-square, and invites them to go in her coach, and promised to set them down by the chapel: They accepting the invitation, and being come near the place, the coach was stopped by several men. Hartwell the bailiff opened the door, got into the coach, said it was an arrest. At which Mrs. Busby was very much concerned, and thought this arrest was for Mrs. Baynton, and that she and Mrs. Rawlins might go out, for they were not concerned in the matter. At last they perceived it was of themselves; and then Mrs. Baynton pretended to be concerned for them: And when the people in the street asked what was the cause of the disorder: the bailiffs said, that they were cheats and trading-women that owed people money, and now they are arrested for it. Under this pretended arrest, they were carried to the Star and Garter tavern in Drury lane, and put into a back room. They were in a great consternation at their being arrested, being not conscious to themselves that they owed money to any person. One came to Mrs. Busby and said, see that your name be right, that you are rightly arrested. Another of the bailiffs, by force, carried away Mrs. Rawlins, saying, she was his prisoner: and it was pretended, that one bailiff had a process to carry the one to Newgate, and another had another process to take the other to the Marshalsea. Mrs. Rawlins was carried to Hartwell's house. When she was there, Mrs. Baynton pretended, that coming by accidentally, she heard her voice, and came in, and seemed to pity her, and said, Madam, will none of your friends help you? She proposes her brother to be bail, and Holt he was to be

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the other. Under that pretence of being bailed, they carry her to the Vine tavern in Holbourn, where Hartwell pretended to be very willing to take his bail, and said, he knew Holt, but questioned the prisoner. It will appear to you from this evidence, and that which follows, of this force and contrivance, that their design was to bring about the marriage; for when the bail was pretended to be refused, Mrs. Baynton proposes a marriage between the prisoner and Mrs. Rawlins, as the best way to make an end of this troublesome business: She would have the ring from her finger, to get a wedding ring made by it. Says Mrs. Rawlins, I have no mind to be married: Says Mrs. Baynton, it is best for you to be married; and threatened Mrs. Rawlins, that if she did not marry, she should be committed to Newgate. There was a parson and clerk ready, who were called to do the office. The young woman being under this terror, the office of matrimony was performed; and she was forthwith conveyed to one Blake's, and by constraint there was put to bed in the day-time. You must go to bed, says Mrs. Baynton: I will not go, says the young woman: And some violence was used to force her cloaths off, and she was put to bed, where she lay about an hour or two, and thereby the marriage was supposed to be consummated.

The prisoner, on the next day, being discoursed with about this matter, and asked, whether he was Mrs. Baynton's brother? No indeed, says he; I made use of her as my tool; she hath done my job for me; I will make her satisfaction for it, not to-morrow, being Sunday, but on Monday I will do it, and never see her face more. After all this evidence, the prisoner doth insist upon his innocence, because he was not present at the arrest; and hath produced several witnesses to prove, that this young woman was very well satisfied with the marriage; and that reverend divine the parson asked her, whether she was willing to be married to the gentleman? and she said she was willing. And then Mr. Blake's maid and daughter said, that she desired them to pluck off her shoes and stockings, undress her, and put her to bed. And that very night the prisoner and Mrs. Rawlins went to Mr. Baber's, a justice of the peace, at York-buildings, to take a voluntary oath before him, that she married this prisoner by her own free consent. Mr. Baber would not administer the oath. And that afterward they bedded together that night, and the next day they went abroad together in a coach; and meeting his barber, the prisoner bids him come to him to shave him, and says to him, here is my wife; she said likewise, that he was her husband: he wished her much joy; she replied, that she did not question it, seeing that what she had done was by her free and full consent; and declared, she was well satisfied with what was done. The next proof is of their return to Blake's house, where they first lodged; the prisoner Swendsen orders his wife to take Mr. Blake by the hand, and ask

2 Q

him how he did? which she did, and expressed to him how well she was pleased with the marriage, saying, this is my dear husband, and kissed him. His witness tells you, on Friday night a constable comes with the Recorder's warrant, to apprehend the persons supposed to have committed this force; and discoursing with her she expressed herself very well satisfied with her marriage, so that they desisted from serving the warrant. Then he relies upon his reputation, as being a man of great credit, and having had goods consigned to him, and paid bills of exchange; and produces witnesses to prove, that he was a trader in Norway, where he lived, and in good credit, remitted money, drew and paid bills of exchange, freighted ships, &c. and was in very good esteem by the chiefest in those parts. Then he called other witnesses, to let you know how the young woman carried it at the Recorder's; that there she said, that she was married by her own free consent, &c. Gentlemen, this is the sum of the evidence that he hath given. To which it is replied, that as to what was said before the Recorder, that is true; so long as he had her hand in his, she declared her consent to, and satisfaction in the marriage; but when he was withdrawn, and she was examined by herself, she declared her marriage was by violence and force, that she did it out of fear, &c. Then they tell you again of a licence that was taken out by him, and produced by him, but bore date almost three weeks before this marriage was accomplished: it was observed also upon the licence, that this licence was to marry Mrs. Rawlins of the parish of St. Mary White Chapel, when she lived not there.

This is the sum of the evidence on both sides, and these observations are to be made from it:

1. You are to know, that if she be taken away by force, and afterwards married, though by her consent, yet is he guilty of felony: for it is the taking away by force that makes the crime, if there be a marriage, though by her consent.*

2. In the next place it is to be observed, that she was taken away by force, and a stratagem was used to give an opportunity thereunto, and the arrest was but a colour.

3. You may consider upon the evidence, how far the prisoner was concerned in the first force: it is true, he was not at the arrest, and did not appear until she was brought to Hartwell's house; and under that pretence of bailing her, she was carried to the Vine tavern, where there was a parson ready, and the marriage was had in such manner as you have heard. Now, considering these matters, it is left to you to determine, whether the marriage

was not the end of the arrest? and if so, how it would be possible for such a force to be committed to effect the prisoner's design, and he not be privy to it?

4. If it can be imagined, that he was not privy to the colourable arrest, yet she was under a force when he came to her at Hartwell's house; and from thence she was carried by force unto the Vine tavern, where she was married. That is a forceable taking by him at Hartwell's house; and though when she was at the Vine tavern she did express her consent to be married, yet it appears even then she was under a force, and had no power to help herself. Her marriage was by force, when she was carried to Blake's, and put to bed; all this was force: nay, when she was carried to the justice of peace, even then she was under a force; and all that she said was not freely, but out of fear: such a force would avoid any bond, for she was under imprisonment. But however, if the first taking was by force,* and she had consented to the marriage, the offence is the same; it is felony.

And as to his reputation, it is possible he might have been an honest man: a man is not born a knave, there must be time to make him so, nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next: it is a misfortune that happens to many men, and his former reputation will signify nothing to him upon this occasion. If you be satisfied upon the evidence, that he is guilty of this crime, you are to find him so; if not, you ought to acquit him.

Swendsen. I desire, my lord, that my wife may be asked, whether she did not, upon her knees, swear, she went away from me as good a maid as she came to me?

L. C. J. Holt. That is a question need not be asked, since the marriage is so plainly proved, which is sufficient to bring you within the statute.

[The Jury desire the Act may be read.]

L. C. J. Holt. Let it be read. [It was so.]
The Jury ask Mrs. Rawlins how old she is.
Rawlins. Eighteen at Candlemas.

L. C. J. Holt. Would you ask any questions upon this Act?—*Jury.* No, my lord.

[Then the Jury went out, and after three hours' stay, brought him in Guilty. He was sentenced afterwards along with Sarah Baynton.]

* So in the case of the King v. Lockhart and Lauden Gordon, Oxford Spring assizes, 1804, coram Lawrence J. it was held that subsequent compliance of the woman did not purge the preceding forceably carrying her off: but in that case the prisoners were acquitted, because no force was proved in the county in which the offence was laid, *ut audiui*.

* 7 Mod. 102. Leach's Hawk. Pl. Cr. book 1, chap. 41, (continued) s. 8. East's Pl. Cr. chap. 11, s. 4.

426. The Trial of SARAH BAYNTON, JOHN HARTWELL, and JOHN SPURR, at the Queen's-Bench, for forcibly taking away Mrs. Pleasant Rawlins, and procuring her to be married to Haagen Swendsen : 1 ANNE, A. D. 1702.*

A MOTION was made by the queen's counsel, for putting off this trial to Friday, November 27th, but his lordship would not grant it, but ordered it to begin presently.

The Prisoners were called to the bar, and a proclamation made for all concerned to attend.

The Jury were sworn, whose names are, viz. Robert Lympany, John Outing, Francis Parr, Richard Bealing, Charles Murry, John Cannon, Giles Rille, Robert Legg, Thomas Elton, Charles Longland, Simon Smith, Henry Lobb, gents.

Cl. of Ar. Sarah Baynton, John Hartwell, and John Spurr, hold up your hands. [Which they did.] Gentlemen of the jury, look upon the prisoners, and hear their charge.

Then the indictment was read as in the first trial:* upon which they were arraigned, and plead Not Guilty.

Sol. Gen. (sir Simon Harcourt). May it please your lordship, and you gentlemen of the jury: the prisoners at the bar, together with one Swendsen, stand indicted before you for a very great offence; Swendsen (for whose sake this felony was committed, for which the prisoners are now to answer) has already had his trial: the three prisoners at the bar were his accomplices. The law, to shew how odious such offences are, and to deter all persons whatsoever from committing them, has made no distinction between the principal and accessaries: the abettors, procurers, or contrivers, are declared and enacted to be, and to be judged as principal felons. The gentlewoman mentioned in the indictment, Mrs. Pleasant Rawlins, was the daughter of Mr. William Rawlins, who left her a good fortune: her grandfather likewise left her an estate of inheritance. Her father being dead, her guardian, Mr. Busby, placed her under the care of his sister, who boarded with her at one Mrs. Nightingale's. Mrs. Baynton (one of the prisoners at the bar) and Mr. Swendsen lodged at Mr. Blake's, where they projected what was afterwards put in practice. Lodgings were to be taken for Mrs. Baynton, at Mrs. Nightingale's. In order thereto, it was pretended, that she was a country gentlewoman who came to town about a law-suit, and being very tender of her reputation, would board in a sober family. By these insinuations, lodgings were taken for her at Mrs. Nightingale's, where in a little time she got acquainted with the family; and in

conversation, as often as it was possible, would take some opportunity to discourse of her own affairs, particularly of her relations, of her dear brother Swendsen, who was never mentioned without many commendations. Mr. Swendsen, though no ways related to her, often visited her under that character: but Mrs. Baynton having lived a very scandalous lewd life in town, could not long continue under the disguise she came in to Mrs. Nightingale's. Intimation was given to the family of her true character, and notice thereof was soon given to her by her maid. Whereupon she resolved to quit her lodging; and being past all hopes of betraying Mrs. Rawlins, and wheedling her into her ruin with her consent, she enters upon another project, which was to bring about the marriage by force and violence.

In this contrivance, you will find every one of the prisoners at the bar had their several parts to act; Hartwell was to get a writ, Mrs. Baynton, who could not be concerned in the execution of the writ, was to contrive when and in what manner it might be executed: Hartwell sues forth the writ, and Mrs. Baynton appoints the time. She knowing it to be the usual custom for Mrs. Busby and Mrs. Rawlins to go to church on Friday mornings, she prepares a coach, and proffers her service to set them down at the chapel, and prevailed with them to come into the coach. As they were going toward the chapel, Hartwell the bailiff stops the coach, and gets into it; and Spurr conducts the coach to a house they had prepared for their purpose. When Hartwell got into the coach, Mrs. Rawlins and Mrs. Busby, not imagining themselves to be concerned, desired him to let them go out. No, says Hartwell to Mrs. Busby, it is you that I am concerned with; let you and I have a few words together, and all things will be set to rights. But Mrs. Busby refusing to have any discourse with him, away they were all carried (Mrs. Busby, Mrs. Rawlins, and Mrs. Baynton) to the Star and Garter tavern in Drury-lane. While Mrs. Busby and Mrs. Rawlins were kept together, they had no hopes of making Mrs. Rawlins marry; and therefore Hartwell by force takes away Mrs. Rawlins, and carries her to his own house: Spurr, who had no process whatsoever against Mrs. Busby, yet keeps her prisoner at the Star and Garter. Mrs. Baynton seeing her friends used in this manner, pretended a very great concern, and out of kindness went to find their friends to bail them. Mrs. Rawlins had not been long at Hartwell's before Mrs. Baynton came into the house to her, in a great surprize

* See the preceding Case,

to find her there, telling her she fancied, as she passed by Hartwell's house, she heard Mrs. Rawlins's name mentioned: immediately she gave her a very melancholy account, how she had been in search for her friends; but none could be found, and to go she must go, except bail could be got. At last she thought of her brother, she was sure he would be her bail; and having placed him hard by, she brings him to Hartwell's. When he comes there, all three of them (Hartwell, Mrs. Baynton, and Mr. Swendsen) under pretence of setting Mrs. Rawlins at liberty, take her to another tavern, where she was plainly told, she must marry Mr. Swendsen, or go to Newgate, and undergo the miseries of a gaol: if she married, then all should be well. The circumstances of the taking, detaining, and marrying this gentlewoman at that tavern, and of the several facts I have mentioned, our witnesses will prove to you.

Mr. Busby sworn.

Serj. Darnel. I pray give his lordship an account of this young gentlewoman, Mrs. Pleasant Rawlins.

Busby. My lord, her father, Mr. William Rawlins, was a man of very good estate: he ordered his estate to be sold to pay his debts and legacies, and the overplus was given to his daughter, this young gentlewoman, which was about 2,000*l.* Her grandfather likewise, by will, left her an estate of 20*l.* per ann.

Mrs. Nightingale sworn.

Serj. Darnel. Mrs. Nightingale, pray give an account to his lordship, how long this gentlewoman lived in your house.

Nightingale. My lord, she hath lived with me about three years; and since Mrs. Busby and Mrs. Rawlins came to live with me, my husband died: I am likewise a widow too; we all lived together. Mrs. St. John, about nine weeks before this fact, came to me, and asked me whether I took boarders? I said, No, I would take none without it were those ladies that boarded with me before. She told me, this was a country gentlewoman that was coming to town about a suit of law; she was a very good woman, and would be near a church. She told me, that she was a kin to the lady Anne Baynton, and a great deal more that I cannot remember: but I told her, I did not design to take boarders. She came about three weeks after, and asked me, whether I was in the same mind? She told me the gentlewoman was come to town: she told me she was an extraordinary good woman, and that her husband was acquainted with the family, and gave her an extraordinary character. She said she would not have parted with her herself, but that she did not take in boarders, and therefore thought it not worth her while to take her in.

L. C. J. Holt. Did she say, she was her husband's acquaintance?

Nightingale. She told me, That her husband was very well acquainted with the family.

She told me, Mrs. Baynton came to town on Saturday night, and was very weary with her journey. She said to me, Madam, if you please she shall come to you, and recommend herself. At length she came, and repeated the same things, That she was a country gentlewoman, and came up about a suit of law, &c. She said, Madam, I understand you are very nice in taking of boarders, which makes me the willing to come to board with you. I took her to be a very sober woman; and seeing it was but for a little while, I agreed with her. She said she would come on Wednesday: the reason she told me, that she came to town no sooner, was, because her maid was sick of a fever. Mrs. St. John recommended to her a neighbour's child, which was a pretty civil girl; she hired her, which made me still like her the better. On Wednesday, Mrs. Baynton and her servant came: we were all widows, and became very familiar in a short time; for she is a person of a great deal of sense, if it pleased God to give her grace. She invited us on Michaelmas-day, to go on board of a Norway ship; she had a friend there. One of my friends asked, Whether she had any interest in it? She said, Yes, she had. She likewise said she had a dear brother come to town, an extraordinary Christian, that had married her sister: they strived, she said, who should out-do one another in affections; and when her sister was upon her death-bed, she recommended Mrs. Baynton to be both his wife and sister. Mrs. Baynton said, My dear brother will come to-morrow to see me. Accordingly he came, with two gentlewomen with him, that we never saw before nor since: then she sent for a bottle of claret, and desired us to drink; which we did, with them. Then she took occasion to praise the family she was in: she invited her brother to live in the same street near to her, seeing he had but a pingling stomach; and said, She believed he would like their victuals. He declined that, saying, it was out of the way for his business, being obliged to be every day at 'Change. Then she asked me, what I would have a meal, if he should come at any time to see her? I told her 12*d.* for a dinner; for so I had of the young ladies' friends that came to see them.

Serj. Darnel. Pray, how did the country gentlewoman behave herself?

Nightingale. She seemed to be very modest; but shewed abundance of love to her brother.

Serj. Darnel. In her behaviour?

Nightingale. Very well, below stairs; but the maid said she would swear above.

Counsel. How oft did he dine there?

Nightingale. Nine or ten times.

Counsel. You say he dined nine or ten times at your house, did you discern that there was any thing of love betwixt him and Mrs. Rawlins?

Nightingale. Nobody in the house discerned that there was.

Serj. Darnel. Were they observed at any time to be alone?

Nightingale. No, Sir, they were never alone that I know of.

Serj. Darnel. Had you any mistrust of Mrs. Baynton?

Nightingale. Yes, sir; she came twice home elevated with drink, and we began to suspect there was something between her and her brother that was not usual. My lord, her servant took notice, that we carried it with strangeness towards her mistress; insomuch that she said to her mistress, do you not discern the family to be strange? Ay, Betty, (said she) but I do not care; if they rouse me, they will find me like a lion: or to that effect.

Sol. Gen. Did Mrs. Baynton discern that you knew that she said so?

Nightingale. No, Sir.

Sol. Gen. Did you express any dislike of her?

Nightingale. No, Sir, not to her; though I discovered my dislike of her to several of the family, telling them I designed to give her warning when her month was up. But before that, she came to me and paid me, as her custom was, for a week. She told me, she had received a letter from her friends, that the trustees had made up the business; and the city being chargeable, she designed to return into the country. I went to my mother in another room, and expressed to her, with a great deal of joy, the warning she had given me. When her time was expired, she came to me again, and said, there was a fellow would cheat her in town, and that she must take out a statute of bankrupt against him, which would detain her a week longer; and upon her desire, because I would part friendly, I consented to her staying a week longer.

L. C. J. Holt speaking to the prisoner Baynton, said she might ask questions.

Baynton. Yes, my lord. *Mrs. Nightingale,* when I went into your house, there was no such character of me as you speak of; but you invited me, and I said, that if I should be troublesome, I would not come.

L. C. J. Holt. She liked you well by the character that was given of you by Mrs. St. John; but afterwards she had no such good thoughts of you.

Baynton. If they did not like me, my lord, they might have given me warning; but instead of that, when I gave her warning, she seemed to be sorry.

L. C. J. Holt. She was glad of the opportunity of your giving her warning.

Baynton. You were pleased, *Mrs. Nightingale,* to speak of going aboard of ship, it was after Mr. Swendsen had been there a second time: when he came to your house, you said you loved punch entirely; and I said, if you please, Madam, Mr. Swendsen shall make a bowl; and this was before our going on board.

L. C. J. Holt. Was Mr. Swendsen aboard the ship?

Nightingale. Yes, he was; but I knew not of his being there.

Mrs. Busby sworn.

Serj. Darnel. Come, Mrs. Busby, give an account to my lord and the gentlemen of the jury what you know of this matter.

Mrs. Busby. My lord, I know Mrs. Nightingale told me, that Mrs. St. John came to take lodgings for Mrs. Baynton, according as Mrs. Nightingale expressed herself; and I was a little curious in enquiring what she was, and begged her pardon for asking so many questions about her.

Serj. Darnel. After she had been there, how did she carry herself?

Mrs. Busby. At Michaelmas-day, at night, she came up very brisk, and said she had heard from her dear brother, and fell a praising him, and said how happy she was in him; and that her sister upon her death-bed, said, that she should be both wife and sister to him: she said likewise, that she had been a widow four years, and that she would never marry for the love she had to her brother.

Serj. Darnel. Pray give an account, Mrs. Busby, whether there was any talk in the family about this woman's leaving the family?

Mrs. Busby. Sir, as to her leaving the house, we were informed she was not what we took her to be; and Mrs. Nightingale and I were very uneasy; at which Mrs. Nightingale designed to warn her away.

Counsel. Mrs. Busby, pray give an account of your going in the coach with her.

Mrs. Busby. On Friday morning the 6th of this month, Mrs. Baynton said she was going to have her laced-head washed, she sent her maid for a coach, and said she would set us down near the chapel. After she had invited me, and I saw the coach, I did not know how to evade it well, but accepted of her civility. She bid the coach stop at Hedge-lane, and said we should be as near to the chapel, as she went to the place whither she was going. When we came to the old buildings, I was looking out at them, and on the contrary side I heard a bustle; Mrs. Baynton called to the coach to go on, and presently Hartwell was in the coach, with his arm about Mrs. Rawlins's waist. I did think Mrs. Baynton was arrested; I cried out, for God's sake let us alone, we are not concerned. Hartwell pulled up the glass, and said we were the persons concerned. She (pointing to Hartwell at the bar) said, this is the man, and he himself owned it before the Recorder, that he told me, it was the young lady and I were concerned: says he, let me have a few words with you, and all will be well. I said, to be sure I will not say any thing to you except my friends were near. This lady, Mrs. Baynton, said, no madam, be sure do not; she advised me not to be frightened, for such a case once happened to her with her niece. I asked Hartwell what he would do with us? He said, he would carry us to a place where we might send for our friends, and make up the business. Mrs. Baynton seemed to take my part, and said she would go to my friends;

and such discourse as this held till we came to the Star and Garter tavern.

Counsel. Mrs, she pretended to be your friend?

Mrs. Busby. Yes, Sir, she argued with the bailiff, and said, may I not go where I will? and seemed to be very angry with him. Mr. Hartwell also seemed to be very angry with her; and called her Mrs. Pert, saying if she were civil, she should have the more respect.

Counsel. Whom did he call Mrs. Pert?

Mrs. Busby. He called Mrs. Baynton so. Then they carried us to Drury-lane, and she advised us to put on our masks upon our faces: I thought to do it; but afterwards recalling myself, and thinking I had done nothing amiss, I would not. They conducted us to the tavern, and put us into a back room; and Mrs. Baynton hastened out of the room as if she would go for some of my friends, as she said she would: I directed her to Mr. Thornton and another; which she said she went to. The room where we were was very dark; so we pressed into a forward one: we were in a very great fright, insomuch that I said to Mrs. Rawlins, we will live and die together; and then she took me hold by my arm. Hartwell seeing that, took her from me by force, and said she must go with him. I understood she was arrested in one court, and I in another; She must go to the Marshalsea, and I to Newgate. Then they hurried her down stairs out at a back door into a coach: I cried out murder out of the window, and said, for God's sake take care of the young woman, for I know not where they are carrying her. After this, Mr. Spurr said to me, what have you got by bawling? We are better known here than you. My fright was very great, and I was very much surprized: there was a man left with me; I made my complaint for friends to be sent for. Says I to him, is it treason or felony? he told me he did not know, he was only hired for a crown to keep me. I desired that the gentlewoman of the house might come up to me; it was about 12 a-clock, and at last she did. And Mr. Wakeman came up, and said, madam, why do you not eat and drink? He said the young gentlewoman was well, and did both. Said the woman of the house to me, do not you owe money? I said, No. Nor the young lady neither? I answered, None that we should be arrested for. When this Mr. Wakeman was here, said the gentlewoman of the house to me, why do you not enquire into the cause of the action? Wakeman told me, that there was a writ against Sabina Busby, at the suit of William Jones, and that William Jones arrested me. Says the woman of the house, it may be your name is not right, and so you may be falsely arrested. I asked whether I might not send for bail, it being an action of debt. It being an action of debt, says he, you may; and I will go for you as cheap, and as soon as a porter. But I saw him no more till night.

Counsel. How long did they keep you?

Mrs. Busby. It was betwixt 10 and 11 when

they carried me there first, and it was not till near night that I saw him again.

Serj. Darnel. Did he make you give bail for your discharge in the afternoon?

Mrs. Busby. There was a lad in the room said, madam, I will go to some of your friends for you. I directed him to some of them; and when he came again, he said, they were not at home. There was a poor man, a labourer, at work in the chimney, he gave me a private wink, and said he would go for me, for he knew Mr. Unkles; he went, and Mr. Unkles came. I likewise sent for Mr. Thornton and another. They all came, and met together. Mr. Thornton demanded on what account they kept me there? They said they had a writ against me of 200*l.* Then they said they would bail me: They asked them, where the young lady was? They told him, she was with her friends. Then, my lord, after this, the bailiff shifted off, and I knew nothing more of it, but went away to get a warrant to take care of the young lady.

Counsel. Had you any manner of dealings with Mr. Jones?

Mrs. Busby. No manner of dealings with him in all my life.

Mr. Mountague. When you came into the fore-room, was Hartwell then with you in the room?

Mrs. Busby. She and I was in a great fright; several was there, and Hartwell was one of them.

L. C. J. Holt. Was Mrs. Baynton there?

Mrs. Busby. Yes, my lord.

L. C. J. Holt. How long did she stay?

Mrs. Busby. She went out presently; she told me she would go to some of my friends; and away she went.

L. C. J. Holt. Did she come again?

Mrs. Busby. No, my lord.

L. C. J. Holt. Did you see Hartwell there?

Mrs. Busby. My lord, he was there, and forced the young lady from me; and Spurr, when I put my head out of the window, and cried after her, said to me, What have you got by your bawling? we are better known here than you.

Justice Gould. Pray, when was the first time you took notice of Spurr?

Mrs. Busby. Sir, the first time I took particular notice of him was, when I put my head out of the window; but it seems he rid behind the coach; he was left with me when Mrs. Rawlins was taken away, and was in the room when my friends came; and Mr. Wakeman was there too.

Justice Powell. I ask you, did your friends offer bail?—*Mrs. Busby.* Yes, Sir, they did.

Justice Powell. Did any of them require bail?

Mrs. Busby. My friend, Mr. Thornton, asked on what account they kept me? and they said they had an action of 200*l.* against me.

Hartwell. Was I there then? did I ever come back after you were there?

Mrs. Busby. I believe you were, but I cannot be positive; but you were in the coach, and

you were the man that carried away Mrs. Rawlins from me.

Mr. *Wakeman* called.

Sol. Gen. Give an account to my lord and the counsel, of what you are concerned in this matter.

Wakeman. If it shall please your honour, my lord, Mr. Hartwell came on Wednesday (before this thing happened) to my house, and left word there, that there was a writ to be executed, if I would execute it: I was not then at home, but when I came home, which was late at night, my daughter told me of it. I went to him on Thursday morning. He said to me, Mr. *Wakeman*, I have a writ to be executed, will you do it? I said I would. Then he carried me to Westminster to the Mitre tavern, and made no stop nor stay; then he called for a quart of ale, and a quart of white wine, and a toast and cheese; and when he had eat one toast, we had another. The man of the tavern came in, whose name was Holt. Mr. Hartwell said to me, we must not do the business this morning; it cannot be done, said he: but he appointed me to come on Friday morning. He ordered me, if I came first, to call for wine, and the same as we had before. I came first, and called for wine, ale, a toast and cheese; in the mean time Mr. Hartwell came in, and eat some with me.

L. C. J. *Holt.* Who was the writ against?

Wakeman. It was against madam Rawlins. Mr. Holt went out, and called Mr. Hartwell, and said, the business would be done that morning. Then we followed him to Stretton-ground. Mr. Holt said to Spurr and myself, we had best stand near the place: he took Mr. Hartwell with him to the top of the street, the people gazed at us, and I was ashamed, and went into an alehouse; a man came back, and said, the coach is at the door: and Mr. Hartwell came and said, the coach would come by presently; Mr. Hartwell and Spurr went before, and bid me follow the coach; and coming near the park, in Westminster, I was behind; Mr. Spurr stopped the coach. Mr. Spurr stopping the coach, I made up to it; but before I came to it, Mr. Hartwell was in the coach, and what he said to them I do not know.

L. C. J. *Holt.* Who stopped the coach?

Wakeman. Mr. Spurr stopped the coach, and served the writ; it was my writ. Mr. Hartwell ordered the coach to drive to the Star and Garter tavern in Drury-lane; we went all along with it; and when we came there, they led us to a little room, and the gentlewoman did not like it, but went into a forward room; and this gentlewoman [pointing to Mrs. Baynton] with her band-box, was with them.

Counsel. Who was it?

Wakeman. [Pointing to Mrs. Baynton at the bar, said, it was she.] I did not know but she was this lady's friend; I never saw any of them before in all my life. Mr. Hartwell went down, and Mrs. Baynton; and I thought she went to fetch madam Rawlins's friends.

Mr. Hartwell came to the young lady, and said, you must go to my house. The young gentlewoman said, O Lord, do not part us! But he did so, and put her into a coach. I saw the gentlewoman going, but did not go with her myself, for I was stopped by a gentleman of my acquaintance; but when I came to Mr. Hartwell's house, I said, Mr. Hartwell, where is the young gentlewoman? He told me she was below stairs. I told him that I had something of business elsewhere. I asked him, and he gave me leave to go. I went, and when I returned back to Mr. Hartwell's house, I asked for him; but his wife told me he was not within. I asked where the young gentlewoman was? She answered, that she was gone with her husband to the Vine tavern in Holborn. I went and asked for Mr. Hartwell; they told me he was above stairs. I went up, and found him with Mr. Spurr, and a tallow-chandler. I should have told you, that when I went from Mr. Hartwell's house about my errand, I saw Mr. Holt standing near the back-door of the Five Bell tavern in Wich-street, and he asked me where Mr. Hartwell was? I told him he was at home. Then Holt asked for the woman? I said she was at Hartwell's. Afterwards I saw Mr. Swendsen at the Five Bells with Holt, and he gave me a full glass of claret; I drank it off, and away I went. When I went to the Vine tavern, Mr. Hartwell, Mr. Spurr, and a tallow-chandler were in a room by themselves. I saw that gentleman (looking out of a window) that was with Holt; he looked at me, and I at him. Mr. Hartwell asked me if I had dined? I told him no. He said there were some steaks. I dined there; then the gentlewoman, viz. Baynton, at last came out of doors and called Mr. Hartwell to her. When Mr. Hartwell came from her, he told me the matter was made up, and the prisoner was discharged.

L. C. J. *Holt.* Who was the writ against?

Wakeman. Mrs. Rawlins.

L. C. J. *Holt.* When the prisoner was discharged, they gave you the writ again?

Wakeman. Yes.

L. C. J. *Holt.* Had you a writ against Mrs. Busby?—*Wakeman.* I had none against her.

Counsel. How far is it from Hartwell's house to the Star and Garter tavern?

Wakeman. It is about a furlong.

Counsel. What was your writ for?

Wakeman. But 20*l.*

L. C. J. *Holt.* And you said you had an action of 200*l.*

Wakeman. My lord, Mr. Hartwell said so. I do not know the woman, but she will be shewed us.

L. C. J. *Holt.* Look at the prisoner at the bar. Was she in the coach when Mrs. Rawlins was arrested?

Wakeman. Yes, yes. I had no ill design in what I did.

L. C. J. *Holt.* Did you go behind the coach?—*Wakeman.* Yes, my lord, I did.

[The Writ produced and read in court]

Justice *Gould*. Were you there at the Star and Garter when Mrs. Busby's friends came to bail her?

Wakeman. When I came to the Star and Garter tavern, the gentleman came and asked me, whether I knew where Mrs. Busby was? I told him, I left her at the Vine tavern, and believed that there they might find her.

L. C. J. *Holt*. Was Spurr at the Vine tavern any time?

Wakeman. My lord, I left Spurr, Hartwell, and the tallow-chandler, at the Vine tavern.

Serj. *Darnel*. Was it Mr. Hartwell or Spurr that asked you to eat steaks?

Wakeman. It was Spurr.

Baynton. Mr. Wakeman, did you ever see me before the arrest?

Wakeman. No, I never saw you before then.

Mrs. *Berkley* sworn.

Serj. *Darnel*. Pray look upon this prisoner, Mrs. Baynton, do you know her?

Berkley. Yes, Sir, I do know her.

Serj. *Darnel*. How came you to know her?

Berkley. By her lodging in Mrs. Nightingale's house, and no otherwise.

Serj. *Darnel*. Did you ever hear her speak of a brother that she had?

Berkley. Yes, Sir, she said this Mr. Swendsen was her brother.

Serj. *Darnel*. Mrs. Rawlins, are you sworn?

Rawlins. Yes, Sir.

Serj. *Darnel*. Stand forward a little. Do you give my lord an account of the whole matter.

Baynton. Mrs. Rawlins, speak the truth, I desire nothing but justice.

L. C. J. *Holt*. You are upon your oath remember, and therefore speak nothing but the truth.

Counsel. Give an account of your proceedings in the whole matter.

Serj. *Darnel*. Do you know any of the prisoners at the bar?

Rawlins. Yes, I know them all, Mrs. Baynton, Mr. Hartwell, and Mr. Spurr.

L. C. J. *Holt*. Do you know them?

Rawlins. Yes, my lord.

L. C. J. *Holt*. How came you to be acquainted with Mrs. Baynton?

Rawlins. My lord, I came to be acquainted with her by her taking lodgings at our house. She came and took lodgings at Mrs. Nightingale's for a month or six weeks. When her month was out, she said her business was done, and she must go into the country.

Serj. *Darnel*. Give an account of what happened to you on Friday the 6th of November.

Rawlins. We were going to Oxendon chapel, Mrs. Busby and I. Mrs. Baynton told us, she was going that way, and invited us into her coach; she said she would set us down near the chapel; we accepted of her invitation, and went with her. When we were at the broad way in Dartmouth-ground, there was Hartwell, and two more bailiffs; they stopped the coach, and Mr. Hartwell got in. Said

Mrs. Busby to him, for Christ's sake let us go out, we owe no man any thing. He said the matter concerned Mrs. Busby and me; and he ordered the coach to be driven to the Star and Garter tavern in Drury-lane.

Serj. *Darnel*. Did any body come into the coach?

Rawlins. Yes, Sir, Mr. Hartwell.

Serj. *Darnel*. Did he do any thing to the people in the coach?

Rawlins. No, Sir, but ordered the coach to go to the Star and Garter tavern. When we came there we went up stairs, and did not stay above a dozen minutes in one of the rooms, but removed from thence to a room forward: Mrs. Baynton was gone, and Hartwell sent up Spurr.

Serj. *Darnel*. Mistress, Pray look, Do you see the man that came up to you?

Rawlins. I suppose it was the man that is next to Mrs. Baynton; if I be not mistaken it is him; I cannot be positive.

Serj. *Darnel*. Some of them came up to you and said, They must have the young lady down stairs?

Rawlins. Yes, Sir; and Mrs. Baynton said, Nay. They after that forced me away.

Serj. *Darnel*. Who was it that did that?

Rawlins. It was Mr. Hartwell that did it.

Hartwell. Who is Mr. Hartwell?

Rawlins. Yourself, Mr. Hartwell, took me about the middle, and drove me down stairs. I cried out Murder, and desired some good body to go with me; he said, if I did not hold my tongue he would send me to Newgate that minute.

Serj. *Darnel*. Where did he carry you?

Rawlins. He carried me from the Star and Garter tavern to his own house.

Serj. *Darnel*. Where is his house?

Rawlins. In Wich street.

Serj. *Darnel*. How long did he keep you there?

Rawlins. I do not know justly, but I think it was about an hour.

Serj. *Darnel*. What did they do with you there?

Rawlins. They put me into a back room, there was nobody with me: but at last Mrs. Baynton came in and pretended she was going by and heard my name, and therefore came in. I was very much frightened. She said she had been at several of my friends, but could get nobody to come. She told me she would send for her brother, and he should be bail for me.

L. C. J. *Holt*. You say she would send for her brother to be your bail?

Rawlins. Yes, my lord.

L. C. J. *Holt*. What followed then?

Rawlins. She went for her brother to come to be my bail, and it was hardly half a quarter of an hour before she came in again with her brother.

Counsel. What is her brother's name?

Rawlins. Swendsen. Mr. Hartwell came into the room where I was, and, said, is Mrs. Rawlins's friend come yet? Mrs. Baynton answered, Yes. They had a coach prepared at

the door, and in that they carried me to the tavern in Holborn; there was in the coach, Mrs. Baynton, her brother, Mr. Hartwell, and I.

Mr. Mountague. Where did they carry you?
Rawlins. To the Vine-tavern in Holborn.

Mr. Mountague. What did they do with you then?

Rawlins. They carried me up stairs, put me into a room; I cannot tell exactly how long I was there.

Mr. Mountague. What did they do then?

Rawlins. Then Holt was there to be the other bail; they were very willing to take his bail, but were very scrupulous in taking Mr. Swendsen's bail. They told me, in short, that I must marry Mr. Swendsen, and that would put an end to it, or else I must go to Newgate.

L. C. J. Holt. Who said so?

Rawlins. Mrs. Baynton said, if I did not marry her brother, I must go to Newgate. I replied, that I would not marry without my friends' advice; but I was not so much afraid of going to Newgate, as I was of being murdered, or sent away somewhere into the country, where I might never see or hear of my friends.

Counsel. How did they behave themselves in the room?

Rawlins. They importuned me to marry Mr. Swendsen, and for that end Mrs. Baynton would have my ring from my finger; I would not let her have it, but she forced it away from me. I asked her what she would do with it? She told me, she would go and get a wedding ring made by it. She went and bought a wedding ring, and gave me my own again: Then the minister and clerk was brought into the room; the minister and clerk came in and married Mr. Swendsen and me.

Serj. Darnel. How long did you stay in the room after you were married?

Rawlins. Not a quarter of an hour.

L. C. J. Holt. Where was Hartwell?

Rawlins. They were in the room over-against us.

L. C. J. Holt. Who brought the parson into the room?

Rawlins. Holt brought them in.

L. C. J. Holt. Where did they carry you then?

Rawlins. To Mr. Blake's house in Holborn.

L. C. J. Holt. Who went with you?

Rawlins. Nobody but Mr. Swendsen, Mrs. Baynton, and myself.

L. C. J. Holt. What did they do then?

Rawlins. They ordered the sheeting of a bed, and put me to bed.

Counsel. Was there any compulsion in going to bed, or did you go voluntarily?

Rawlins. I did not go freely, but was forced to bed; Mrs. Baynton asked me to go to bed; after which she asked me the reason why I would not go to bed? Says I, my reason is, because I do not care to go to bed so soon.

Serj. Darnel. Who undressed you?

Rawlins. Mrs. Baynton and Mr. Blake's daughter.

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Serj. Darnel. How long was you in bed?

Rawlins. About an hour or two.

Mr. Mountague. When you went out, had you any expectation to go any where else but to church?

Rawlins. No where but to church upon my word.

Mr. Mountague. Did you go voluntarily to the tavern in Drury lane, or against your will?

Rawlins. To be sure it was against my will.

Hartwell. Did you see me, Madam, at the Vine tavern the time that you were confined there?

L. C. J. Holt. Did you see Hartwell at the Vine tavern before you were married?

Rawlins. Yes, Mr. Hartwell, you may remember that you were once in the room where I was: I will give you an instance of it; you were smoaking a pipe of tobacco; Mrs. Baynton said to you, What would you have with her? You said I was the prisoner.

L. C. J. Holt. Did they take the bail that was offered?

Rawlins. Mr. Hartwell said he would consider it with Mrs. Baynton, and they all went out, and left me alone by myself. Mrs. Baynton, after they had consulted together, came in and told me that they refused the bail.

Baynton. When you were left by yourself, Mrs. Rawlins, if you had not a mind to marry Mr. Swendsen, why did not you make your escape?

L. C. J. Holt. Did she come there by her consent?

Baynton. No, my lord; but when she was left to herself, she might have easily got away.

L. C. J. Holt. Mrs. Rawlins, you were left alone in the room, was there any proposal of your marriage to Mr. Swendsen made before that?

Baynton. My lord, if I may have leave to speak, they contracted friendship almost a month before.

L. C. J. Holt. Mrs. stay your time. [To Mrs. Rawlins.] Consider the question.

Baynton. My lord, the ring was bought before she was left alone, she knows it very well, and was looking upon it when I came into the room again.

L. C. J. Holt. [To Mrs. Rawlins.] Had you the ring before that?

Rawlins. Not as I know of, my lord.

Baynton. You had the ring upon your finger, and said it was a very handsome one; but I had bought it a little too wide for you.

Rawlins. It is very ridiculous; I said no such thing.

L. C. J. Holt. She was left in the room alone, when you both went out; but it seems it was upon her desire to be bailed, and therefore she would not escape.

Serj. Darnel. Yes, yes, it was with the intent to be bailed that she did this.

L. C. J. Holt. Mrs. Baynton, it is now time for you to make your defence.

Baynton. My lord, I will. Mrs. Busby, when Mr. Swendsen came to her house first,

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called him her dearly beloved likeness. Did she not say so, Mrs. Rawlins?

L. C. J. Holt. Did you ever hear Mrs. Busby call Mr. Swendsen her dearly beloved likeness?

Rawlins. My lord, I desire she may answer for herself.

Baynton. Pray, my lord, let her stand by herself a little, that nobody may speak to her.

L. C. J. Holt. Did you ever hear her speak of Mr. Swendsen, that he was her dearly beloved likeness?

Rawlins. Yes, my lord; I do not know but she might say so.

L. C. J. Holt. What, when Mr. Swendsen was by?

Rawlins. No, my lord.

L. C. J. Holt. Do you remember that you ever heard Mrs. Busby call him so?

Rawlins. Once, my lord, to Mrs. Baynton.

L. C. J. Holt. What say you, Mrs. Busby, did you call him so?

Busby. My lord, I thought him very much like my husband in one part of his face, and Mrs. Baynton herself called him my beloved likeness.

Baynton. My lord, how could I call him her beloved likeness, and never saw her husband with my eyes?

L. C. J. Holt. Well, what questions will you ask?

Baynton. My lord, I will ask Mrs. Rawlins several questions. The second Sunday when I was at their house, Mrs. Rawlins, you know you staid at home, and I did so too; did not you say then, that you wished Mr. Swendsen was there, when they were all at church? Did not you say so? Remember you are upon your oath.

L. C. J. Holt. Upon your oath, do you remember any such thing?

Rawlins. No, my lord; and I would not for all the world say any thing but the truth.

L. C. J. Holt. Did you, or did you not?

Rawlins. Indeed, my lord, I do not remember that ever I said any such word.

Baynton. Mrs. Rawlins, did not you come to my bed-side often, and kiss and hug me, and would be talking with pleasure of Mr. Swendsen?

L. C. J. Holt. Do you remember that you sat at her bed-side, and spake of Mr. Swendsen, and kissed and hugged her?

Rawlins. My lord, indeed Mrs. Baynton did much talk of her brother.

L. C. J. Holt. But did you talk of her brother?

Rawlins. My lord, if I did say any thing, I did not speak with a design to have him; it may be I might do so.

Baynton. Mrs. Rawlins, did not you bid me to tell him, that there was a good lady, that had her fortune in her own hands, and at her own disposal, that would make him a very good wife? Did not you tell me this?

Rawlins. I did not say so; but said there was a very good lady that would make a very

good wife whenever she married; but did not say, that she would make him a good wife.

Baynton. Mrs. Rawlins, have you not been the most uneasy woman in the world, when he did not come to dine at Mrs. Nightingale's?

L. C. J. Holt. Speak out.

Baynton. My lord, Mr. Swendsen had a cold, and she told me she could not be easy till he was cured of it.

Rawlins. I never said such a thing. Can you say so, Mrs. Baynton?

Baynton. My life is upon it, and I will not for my life say any thing but the truth.

L. C. J. Holt. Did you express any such thing to Mrs. Baynton, of your uneasiness till Mr. Swendsen had got rid of his cold?

Rawlins. No, my lord.

Baynton. But, madam, did you not seek to tell me these things by yourself? You told me, you had a great deal of ill usage, and told me, you lived more like a servant than any thing else: You said, that when there was another lodger there, because you want to see her in her room, you were chid severely for it, and charged never to go near her.

Rawlins. I do not know but that I might do it.

L. C. J. Holt. But why did you do it?

Rawlins. My lord, I can give you no account.

L. C. J. Holt. Did you bid her tell him, that you knew a gentlewoman, at her own disposal, that would make him a very good wife?

Rawlins. My lord, I do not know but that I said to Mrs. Baynton, I wished her brother a very good wife.

L. C. J. But did you say that you knew a gentlewoman at her own disposal, and a fortune, that would make him a very good wife?

Rawlins. My lord, I did not speak with a design to marry her brother, but was resolved to take the advice of my friends.

Baynton. Did not you say that you wished yourself Mr. Swendsen's wife several times?

L. C. J. Did you ever tell her, that you wished yourself Swendsen's wife?

Rawlins. My lord, I do not know whether I did or no.

L. C. J. How came you to have such a good opinion of Mr. Swendsen?

Rawlins. Mrs. Baynton told me he was a very good-tempered gentleman, and never out of humour.

L. C. J. Would you marry a man for his good humour only?

Rawlins. I never had married, if there had not been a force put upon me.

L. C. J. Did you tell Mrs. Baynton, that you never would marry, but by the consent of your friends?—*Rawlins.* Yes, I did.

Baynton. My lord, I never heard her say so in all my life.

L. C. J. Did you tell her, notwithstanding what you said of Mr. Swendsen, that you would never marry without the consent of your friends?

Rawlins. My lord, I did often say, that I would never marry without their consent.

Baynton. Mrs. Rawlins, did not you, when

you were acquainted with Mr. Swendsen, alight Mr. Pugh?

L. C. J. Did you shew any dislike of Mr. Pugh upon Swendsen's account?

Rawlins. My lord, I cannot tell; if I did shew any ill-will to Mr. Pugh, it was not with a design to have Mr. Swendsen.

L. C. J. Hath there been any courtship carried on betwixt Mr. Swendsen and you?

Rawlins. My lord, no more courtship to me, than to all the family; my lord, I did not perceive that Mr. Swendsen shewed me more favour than any in the rest of the family.

L. C. J. Have you any more questions, Mrs. Baynton?

Baynton. When Mr. Swendsen was walking in the garden, did you not say, that you would go and walk with him, but that they would take notice of it? But pray, said I, do not, you may make them angry by it. Did not you say, that you would go up and look out of the window, with expectation to have been called down by me? Did not you walk with Mr. Swendsen, and discourse with him about the things of love, and he said he would have nobody but you; and you likewise said, that you would have nobody but him?

L. C. J. Were you alone with Mr. Swendsen at that time in the garden?

Rawlins. I think I was with him in the garden at that time, but not alone.

Baynton. My lord, she was alone with Mr. Swendsen in the garden several times.

Rawlins. I can speak it upon my oath, that I was never in the garden with Mr. Swendsen but that time.

Baynton. Did not you say that you would have nobody but Mr. Swendsen?

Rawlins. No, I never said any such thing.

Baynton. What made you go up stairs, and cry for an hour together; and said to my servant, that you would have your belly full of crying before you went away: Betty can testify this, she is in court, but must not be heard.

L. C. J. She may be called, if you will.

Baynton. Pray, Mrs. Rawlins, did you not once come up to me, and said you had been twice there, and wished that you could see Mr. Swendsen, and that you could not be easy without his company?

Rawlins. As I am upon my oath, I never said such a thing.

Baynton. Mrs. Rawlins, did not you say a hundred times, that you loved Mr. Swendsen above any man in the world?

Rawlins. I never said any such thing in my life.

Baynton. Did not you peel walnuts for Mr. Swendsen, and desire me to carry them to him?

Rawlins. I never did so.

Baynton. My lord, I would have her asked, whether she consented to be taken away, directly, or indirectly?

L. C. J. What say you to that, Mrs. Rawlins?

Rawlins. My lord, it was all against my knowledge and will, I never consented to it.

Baynton. Mrs. Rawlins, is not this true, that you pulled your ring from your finger, and gave it to me to have a wedding ring made by it, which discovered your free consent to the marriage?

Rawlins. No, Mrs. Baynton, do you think that I would have given any manner of consent to be married to him, without the advice of my friends, if I had not been forced to it?

Baynton. Did not you send all Mr. Pugh's letters back again, and desired him in your letter to come no more at you; and that you would have nothing to say to him, and that if he came, he would put you to such a fright that you would not be capable of seeing him?

L. C. J. Did you tell her so?

Rawlins. I do not remember that I told her any such thing.

L. C. J. Did you send back Mr. Pugh's letters?

Rawlins. I do not remember that I spake any thing to Mrs. Baynton, though I did send back the letters.

L. C. J. Why did you so?

Rawlins. It was not upon Mr. Swendsen's account that I did so.

L. C. J. Do you remember, that you repeated to her any of the contents of a letter that you had written to Mr. Pugh about sending back his letters?

Rawlins. No, my lord, I did not.

Baynton. My lord, I had it from her own mouth, else how could I have known of it? I did not know it till she told me. Mrs. Rawlins, how can you say you told me not these things?

Rawlins. No, Mrs. Baynton, I did not.

Baynton. Mrs. Rawlins, you do not say true. I never knew nothing but what I had from her own mouth.

L. C. J. You sent his letters back again, pray, on what account did you do so?

Rawlins. It was upon things that we heard of Mr. Pugh, that was not very handsome. Mrs. Busby can tell the same.

L. C. J. Did the courtship break off?

Rawlins. My lord, it was but the day before this thing happened.

Serj. Darnel. Mrs. Busby, did you know of the sending back the letters? and who was it that put Mrs. Rawlins upon sending of them back?

Busby. Yes, Sir, it was by our advice.

Serj. Darnel. Whose hand was it that wrote the letter?—*Busby.* Mrs. Berkley.

Serj. Darnel. Was it by her inclination and consultation of her friends?

Baynton. Had not you a mistrust, that there was love betwixt Mr. Swendsen and Mrs. Rawlins?

Busby. I had no mistrust of any such thing.

Baynton. Why did you tax me with it then?

L. C. J. When was this?

Baynton. My lord, it was at the limner's; I heard something as if Mrs. Rawlins should speak words of discouragement to Mr. Pugh. Mrs. Busby, when I told her of it, she denied it, and said, Mrs. Baynton, I do not know this.

But here is Mrs. Rawlins herself, and she shall answer for herself, if such a thing is: she thought, if there was any strangeness between Mrs. Rawlins and Mr. Pugh, it was occasioned by Mrs. Rawlins's love to Mr. Swendsen. When they asked my advice of the thing, Mrs. Rawlins and Mrs. Busby told me, that Mr. Pugh had 3 or 4,000*l.* stock: I said, if Mr. Pugh had such a love for Mrs. Rawlins as he pretended to, that he would do well to have drawn out 1,000*l.* and given it to the young woman.

L. C. J. Mrs. Baynton, have you any thing to ask?

Baynton. Perhaps I may have more to say, but I am in confusion, my lord: Mrs. Busby, as well as Mrs. Rawlins, was never easy, but when Mr. Swendsen was there.

L. C. J. Mrs. Rawlins, upon the oath that you have taken, did you consent to your being taken away after the manner as you were, or gave any encouragement to Mr. Swendsen?

Rawlins. No, my lord, I do not know that I gave him any manner of encouragement.

Baynton. My lord, she gave him all the encouragement imaginable.

L. C. J. I pray, Mrs. Baynton, do not put yourself into a passion: I speak in favour to you; you will not deliver yourself so well in passion, as without.

Baynton. She lay baiting of me night and day, and always speaking to me of her love to Mr. Swendsen; and to hear her speak the quite contrary, really it moves me, my lord.

Betty, Mrs. Baynton's Maid, called.

Baynton. Betty, have not you told me, that Mrs. Rawlins said she would fill her belly with crying before she went, and that she would enquire for Mr. Swendsen?

Betty. No, I said no such thing.

L. C. J. Speak the truth, without being biased by one side or other. Did you hear that ever Mrs. Rawlins went into the chamber to cry, or enquire for Mr. Swendsen?

Betty. No, my lord, I never heard it.

Baynton. My lord, I never was the woman that asked this maid any question any way, but she frankly told me all this; and she often said, that she was sure Mrs. Rawlins had a very great kindness for Mr. Swendsen; and one day she hearing of such a noise of laughing, and the doors flinging, that she went down stairs to see what was the matter; Mr. Swendsen was there then, and Mr. Pugh. Mr. Pugh was so offended at Mrs. Rawlins's mirth, that he went away in a great distaste; and she said, that Mrs. Rawlins was never easy, but when she was talking of Mr. Swendsen.

Baynton. Betty, did not you say, that she asked you several times of Mr. Swendsen, and wished he would come and dine with them?

Betty. I never heard her but once.

Mr. Swendsen's Jury return to give in their verdict, all twelve.

Gentlemen, are you agreed in your verdict?

Ans. Yes.

Who shall say for you?

Ans. The foreman.

Erasmus Johnson, a Dane, and one of the Jury, said, He was not satisfied.

Johnson. If it shall please you, my lord, I am not satisfied; I do not find, from any of the evidence that hath been given, that he was privy to the arrest; my conscience will not let me comply with the rest, that he is guilty.

L. C. J. What kind of a conscience have you? do you not believe what the witnesses have said? have you any evidence that Mrs. Rawlins went away with her own consent?

Johnson. I do not find, my lord, that it was done by him.

L. C. J. Did not he go to Hartwell's house, and from thence, while she was under the force, went with her to the Vine tavern, where he married her? which was a forcibly taking by him.

Johnson. But, my lord, it was with her consent; else how could he marry her?

L. C. J. Though she did consent to the marriage; yet if she was taken by force, it is the same offence.*

Foreman. My lord, he did agree that this was a point of law, and would leave it with your lordship; he believes she was forced, but he thinks he was not privy to the woman's actions that he employed.

Johnson. My lord, I do not see there were any evidence against him.

L. C. J. When the bailiffs were employed to take her, it appears by the sequel, that it was with an intent that he might marry her: what can be plainer? Govern yourself by reason.

Johnson. I believe that there was a force by the bailiffs.

L. C. J. Did not he take the advantage of the force? And was that to any other purpose, but for him to marry her? There was no cause of action either against her or Mrs. Busby.

Johnson. It proved so, my lord.

Foreman. My lord, he would know whether he were in that statute, in point of law, if this maid did consent to it?

Judge Powell. He was guilty of the thing; he was consenting to it afterward.

Johnson. They were in streets and houses before they married; and so, if she had not consented, she might have cried out.

Judge Powell. Did not he go to Hartwell's house, and to the Vine tavern?

Johnson. I cannot believe him guilty, as I would answer it before God and the world.

L. C. J. Pray consider, do not give a verdict contrary to plain evidence.

Johnson. By all the circumstances, she was as willing as he: all that I can say to it, my lord, is, that he had something of connivance with this woman.

Foreman. He believed that all along.

* See the preceding Case, and the books there referred to.

Johnson. I say, Mr. Foreman, at the beginning there was such a thing as was done by Mrs. Baynton, without his knowledge.

Foreman. He did consent before you to take your lordship's judgment; that if your lordship be of opinion that he was concerned in the first force, then that will carry it.

Johnson. I do not know that she complained to any body, my lord: I do not speak for any favour or affection, my lord; but it is merely out of a tender conscience.

Foreman. He agreed, that if the first force was within the statute, then he would comply; and that we came away upon, to have your lordship's opinion. He believed, Mr. Swendsen did employ the woman.

L. C. J. Do you agree?

Johnson. I cannot, but I leave it to your lordship's pleasure.

Mr. Montague. The fact he does agree to; he does agree that she was taken away by force.

L. C. J. Was she taken away by force?

Johnson. She was by the bailiffs.

L. C. J. Did not he take the advantage of this?

Johnson. She was under the force before.

L. C. J. Besides, did not you perceive that she consented for fear she should go to Newgate? The law of England says, that is a void consent, which is obtained out of fear.

Johnson. My lord, I do not know there was any violence used by him either in word or deed.

L. C. J. Was not he present when violence was used?—*Johnson.* Yes, my lord.

L. C. J. Then was violence used by him.

Johnson. But she was very well satisfied both before and after she was married.

L. C. J. She was under force, before she was married; and indeed, all that night, and afterwards.

Johnson. She was not hindered to send letters.

Coun. Who, would you have, carried them, the bailiffs, or Mrs. Baynton?

Johnson. No, my lord; but somebody for half a crown, or a crown.

L. C. J. It appears very evident, if you will believe witnesses, that she was under a force, before she was married, when she was married, all night after, and the next day when she was at the Recorder's. If you are not satisfied, I will say no more, not one word more.

Foreman. We must go, my lord, and have been fasting all day. He is prepared for fasting, if it be for a day, or two or three.*

Judge Powell. The question is now, whether you do not believe, upon all this evidence you have heard, whether this lady was not under an arrest, and taken by these bailiffs?

* Mr. Baron Masses, in his Account of the Sentiments of the Canadians concerning the Introduction of the English Laws and the Trial by Jury into the Province, printed among the

Johnson. Yes, I do believe that; but I do not believe Mr. Swendsen employed them; all that I speak upon is this, that she had her free liberty.

“Additional Papers concerning the Province of Quebec,” p. 324, says:

“Some of the Canadians observed that it was a strange thing, and a hard one, to force twelve persons, who really think differently upon a doubtful matter, that is referred to their determination, to say, upon their oaths, that they are all of the same opinion, and to continue to be shut up together without food or light, till they do say so. This, they said, was putting the decision of causes into the power of those jurymen who had the strongest constitutions, and could go longest without food. And it was also forcing some of them to break their oath, and commit a kind of necessary perjury, by acceding to the opinion of their brother jurymen, when they really entertained a contrary opinion. These reflections were made upon the unanimity required amongst jurymen in delivering their verdict. And, I must confess, I think these reflections just: inasmuch that I am convinced that this unanimity could never have been required in the original institution of juries, but must have grown up from some accidental and collateral cause in the practice of this mode of trial; as, for example, from the unwillingness of judges to take the trouble of adding a number of fresh jurymen to the first twelve, where they could not agree in their verdict, and causing the evidence, that had been before given in the cause before the first twelve jurymen, to be repeated over again by the witnesses to the additional jurymen, till a verdict was obtained in which twelve, at least, out of the whole number of jurymen, were really unanimous. For this was the way of proceeding in this matter in the days of king Henry the third, that is, about the year 1260, (or about fourscore years after the first institution of juries by king Henry the second,) as appears by the following passage in the famous lawyer, Bracton, where he treats of the issue of *non disseisvit*, in a writ of *novel disseisin*, which appears to have been at that time a very common action. ‘Contingit etiam multotiens quod Juratores in veritate dicenda sunt sibi contrarii, ita quod in unam declinare non possunt sententiam. Quo casu, de consilio curie, affortietur assisa,’ [that is, the assise or jury shall be re-inforced, or increased,] ‘ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor vel sex, et adjungantur aliis; vel etiam per se ipsos, sine aliis, de veritate discutiant et judicent et per se respondeant: et eorum veredictum allocabitur et tenebit, cum quibus ipsi convenerint.’ That is, it often happens that jurymen, when they come to deliver their verdict, appear to be of different opinions, so that they cannot bring in an unanimous verdict. In these cases, the court must order the assise or jury, to be re-inforced or increased by the ad-

Foreman. My lord, he was resolved to stand by what your lordship should say.

Judge Powell. If he did not set them to work, yet his act afterwards made it as bad as if he had actually employed the bailiffs.

Johnson. I can say no more, I must agree with the rest.

Cl. of Ar. Gentlemen, Are you agreed?

Omnes. Yes, my lord, we are all agreed now.

Cl. of Ar. Then, is he guilty, or not guilty?

Foreman. He is guilty.

Cl. of Ar. And so you say all?

Omnes. Yes.

Cl. of Ar. What goods or chattles, &c.?

dition of as many new members as there are in the majority of the jury who already agree in one opinion and differ from the minority, or at least by the addition of four or six new members. And these additional members of the jury shall join with the former jurymen in considering and debating the matter in question. Or they may, if the court shall so direct, consider and debate the matter by themselves, without any such conjunction with the original jurymen, and give their answer, concerning the matter in dispute, separately by themselves. And the verdict of those members of the original jury with whom these new jurymen shall agree in opinion, shall be allowed and hold good. See Bracton de Legibus et Consuetudinibus Angliæ, lib. 4, cap. 19, de Assisâ novæ disseisinæ, folio 185, page 2:” And accordingly, in his plan of administering justice in that province, the baron proposed that a majority of the jurymen should carry the verdict.

Mr. Barrington, (Obs. on Magna Charta, cap. 29), has inserted part of the passage in Bracton, and proceeds: “ This continued likewise to be the practice in the next reign, when Fleta is supposed to have been written, ‘ Si autem juratores sibi invicem fuerint contrarii, quia in unam non poterunt ire sententiam, in electione justiciariorum erit vel assisam afficiare per alios, dum tamen summonitos juxta numerum majoris partis dissentientia, vel eodem juratores compellere ad concordiam, quod vicecomes videlicet ipsos sine cibo et potu custodiri faciat, donec unanimes fuerint vel concordet.’ This passage shews, that the judge had a power of insisting upon the unanimity of the first jury impanelled; and as it was probably found, when new jurors were added, that it was in reality the trouble of trying the cause over a second time, and so *toties quoties*; at last, for the greater dispatch of business, they insisted in all cases upon the unanimity of a jury.”

See too, upon this subject, vol. 8, p. 730, vol. 12, p. 474, and some observations in the conclusion of chap. 8, book 6, of Paley’s Principles of Moral and Political Philosophy.

In Dr. Hensley’s Case, the jury had, by consent, candles. 1 Barrow, 647.

Foreman. We know of none.

L. C. J. Mrs. Baynton, Will you go on?

Baynton. I hope your lordships will take notice that my servant owned it once.

L. C. J. What was it?

Mr. Montague. Only whether he was to dine there.

Baynton. That which I said, my lord, she said to me.

Baynton. Mrs. Rawlins, Will you be pleased to answer me some questions?

Rawlins. I will.

Baynton. Did not you sit down in the great chair in the dining room, and you said, Now I must go to bed? Did not you pluck off your things, and gave them to me, and I gave them to Mr. Blake’s daughter?

Rawlins. I consider, Mrs. Baynton, that you undressed me.

Baynton. You sat in the chair, and undressed yourself, how can you deny it?

Rawlins. Mrs. Baynton, I can deny it, for I did not.

Baynton. Nay, more than that, when you were in bed, did not you call to Mr. Swendsen, My dear husband, why do not you come to bed?—*Rawlins.* I said no such thing.

L. C. J. Where was this?

Baynton. My lord, it was at Mr. Blake’s.

Baynton. Did not you say, Come to bed, my dear husband, you must love nobody in the world but me?

Rawlins. No, Mrs. Baynton, I did not; I have taken an oath this day, and I said no such thing.

Baynton. Did not you say, that you loved him above all the men in the world?

Rawlins. No, Mrs. Baynton, I did not tell you any such thing.

Baynton. Did not you say these things?

Rawlins. No, Mrs. Baynton.

Coun. Speaking to Mrs. Baynton, said, Do you know that ever Mrs. Rawlins writ any letters to Mr. Swendsen?

Baynton. She would; but I would not let her.

L. C. J. Why would you not let her?

Baynton. I told her I would not carry any letters to him, but if she desired me to tell him any thing by word of mouth, I would do it; and, my lord, when Mrs. Rawlins was arrested, I going down Wych street, the coach that she was in coming along then, and I seeing her in it, that was the only reason that I went into the bailiff’s house. When I came there, she hung about me, kissed me, and said she desired me to stand by her; when your lordship hears, you will believe me no other than a friend to her. She begged me not to leave her. I offered bail to Mr. Hartwell, but he would not take it; but said I behaved myself saucily. And when Mr. Swendsen came in, she said, now she was happy. Besides, my lord, when he was there, he did not desire her to go out of the house.

L. C. J. If you had no design but for her good, how came you to Mrs. Nightingale’s

upon such a design with pretence that you had a law suit, &c.? And why did you carry her out in the coach, in order to be arrested?

Baynton. My lord, it was not the first time that they went with me in a coach, they desired me several times to set them down, and I did so.

L. C. J. Why did you this? You pretended that you had a law suit, and that you came to town about it, and it appears not that you had any.

Baynton. No, my lord, I did not.

Nightingale. My lord, it was Mrs. St. John that recommended Mrs. Baynton to me.

L. C. J. We know that.

Baynton. If I were such a woman as they represent me to be, Why did they not warn me out of their house? Mrs. Rawlins, say the whole truth, and remember that you are upon your oath, I desire not favour or affection. Did not you say to Mr. Swendsen, this is my own dear husband, and this is the ring that married us? Did not he begin to speak, and you said to him, hold your tongue, and let me speak?

Rawlins. Mrs. Baynton, you know I was very much intoxicated, I hardly knew I had a head.

Baynton. Mrs. Rawlins, you can drink your glass of wine as well as any body else. Mr. Swendsen was often there at cards, and she was the most uneasiest creature in the world when he was not her partner. Did not you desire me to let you sit by him in particular?—*Rawlins.* No, I did not.

Baynton. Mrs. Rawlins had said this several times to Mr. Swendsen, to desire him to sit by her. We played at cards, and saved the winnings till it should come to 20s. and designed it for a treat. Did not you say you would treat Mr. Swendsen, and would send for walnuts, and apples? But I said, No, you shall not.

Rawlins. I did send for walnuts and apples; but it was not with a design to pleasure Mr. Swendsen.

L. C. J. Mrs. Baynton, Why did you say Mr. Swendsen was your brother?

Baynton. I never said he was my own brother.

L. C. J. You said it.

Baynton. No, my lord, I said he was my sister-in-law's husband.

L. C. J. How was she your sister-in-law?

Baynton. By adoption, my lord.

L. C. J. By adoption, What do you mean by that?

Baynton. Mrs. Rawlins, if you had no mind to him, why did you give him such encouragement, as to kiss him, and go betwixt his legs and kiss him?

Rawlins. I take it upon my oath, that I never did so in all my life.

Baynton. Did you not love him?

Rawlins. No, not well enough for to make him my husband.

Baynton. My lord, it is very hard that all these things that I have said to her, are all true,

and she hath made a resolution to say nothing but No.

L. C. J. Mrs. Rawlins, did you design to have Mr. Swendsen for your husband?

Rawlins. My lord, I was threatened to be sent to Newgate, if I did not marry him. You know, Mrs. Baynton, that you said, that if I did not marry your brother, they would carry me to Newgate.

Baynton. I never in my life said any such thing.

L. C. J. Pray, Mrs. Baynton, give an account how you have lived?

Baynton. I never run into any body's debt.

L. C. J. Had you a husband?

Baynton. Yes, my lord.

L. C. J. How long hath he been dead?

Baynton. Eight years to-morrow.

L. C. J. But you have had a child lately, within this four months: Are you married now?*

Baynton. Yes, my lord, I am married.

L. C. J. How do you prove that?

Baynton. I could give your lordship an account; but it is not proper now, before the whole court.

L. C. J. Is it not proper now?

Baynton. No, my lord, for some reasons.

L. C. J. I think it is very proper. Pray give an account how you have lived?

Baynton. I have a sister at Barbadoes that hath been very kind to me.

L. C. J. Was you married to Mr. Baynton?

Baynton. Yes, my lord.

L. C. J. Mr. Hartwell, Who directed you to take out this writ against Mrs. Rawlins, at the suit of one Jones?

Hartwell. My lord, I was sent for to the Star and Garter-tavern in Drury-lane, by Mr. Holt.

L. C. J. Where is he?

Hartwell. He is not yet taken. He sent for me twice before I went. When I came to him, I received money for a writ against that lady; on which I sent my assistant for a writ.

L. C. J. Who was your assistant?

Hartwell. (Pointing to Spurr, said, he was his assistant.) I sent the writ to Mr. Wakeman, to get him to serve it. He was not at home, and I went to him the next morning. I asked him whether he would serve the writ? he told me he would; and I told him the same that Mr. Holt told me, that it could not be done till Friday morning. On Friday morning Mr. Holt went with me, and these officers, Wakeman and Spurr. He bid us be ready, and said the coach was coming. So we served the writ as we were ordered, and went to the Star and Garter-tavern in Drury-lane; from thence I carried her to my house. If I had had any mistrust of any bad design, I would have carried her back again. But I came forward with her to my house. In a little time after she had been there, came Mrs. Baynton, and

* See vol 10, p. 643. Peake's Law of Evid, part 1, ch. 3, s. 2.

one that is gone now [meaning Mr. Swendsen] was sent for, by some stratagem that I knew not of. They being together, told me, that every thing was agreed of and made easy.

L. C. J. What was made easy?

Hartwell. The debt, as I thought, my lord. When I carried the young gentlewoman first to my house, I left her with my wife and a young woman. When I came home again, I found Mr. Swendsen and this gentlewoman there, who told me, that every thing was made easy. (On which they desired me to go to any tavern, I knew not where: but they agreed to go to the Vine tavern in Holborn.)

L. C. J. Why did you take her from her friend Mrs. Busby?

Hartwell. It is usual with officers to do with prisoners as they please.

L. C. J. That is a barbarous thing to separate them one from another, when you could apprehend there was no danger of being rescued.

Hartwell. My lord, I beg your lordship's pardon, I have no counsel but myself; I may speak things in point of law that may prejudice my life; but as to the purpose I will speak the truth.

L. C. J. You made her put on her mask; you forced her to it.

Hartwell. Mrs. Rawlins, did I force you to put on your mask?

Rawlins. Yes, he forced me, but I would not at first; but he forced me. When I cried out murder, he said, put on your mask, and hold your tongue, or you shall go to Newgate.

L. C. J. What writ had you against Mrs. Busby?

Hartwell. There was no such thing, my lord.

L. C. J. You said you had a writ against Mrs. Busby, and another against Mrs. Rawlins.

Hartwell. My lord, as to a writ against the young lady, there was one; I know no other positively.

L. C. J. Why did you refuse Holt's and Swendsen's bail?

Hartwell. It was no such thing, my lord; I cannot help what the people swear: I hope to prove to the contrary, both from the beginning to the end.

L. C. J. Why did you part with your prisoner at the Vine-tavern without bail?

Hartwell. My lord, I no sooner came into the Vine-tavern, but the person that employed me, gave me the money; which was this woman [pointing to Mrs. Baynton.]

Baynton. You said Holt employed you. I gave him no money, my lord; and he declared, that he never saw me before in his life.

Mr. Parker called.

L. C. J. Where do you live?

Parker. I lived at the Star and Garter then, and Mr. Holt was there, who sent me for Mr. Hartwell.

Hartwell. My lord, when I came there, Mr. Holt was drinking, and it was all out but a glass. He asked me to drink; which I did. Then we went from the Star and Garter down

to the Mitre in Westminster, which was Holt's house. Being there, and I smoking a pipe, in came this lady [pointing to Mrs. Baynton] and gave me money for a writ. I sent my assistant for the writ, and the first person I lit off, which was Mr. Wakeman, I made use of to assist me in it. When I served it at the Star and Garter-tavern, this gentlewoman [pointing to Mrs. Baynton] asked me where I lived? I said in Wich-street. Said she, take care of her (Mrs. Rawlins) and take her along with you to your house, or you will lose your money. So I carried her to my house, and having business elsewhere, I left her with my wife and a young woman to keep her company. When I came again, I found Mr. Swendsen and this gentlewoman there drinking a pint of sack. They told me if I would go to any tavern, the business should be made up. We took coach and went to the Vine-tavern, and there the matter was made an end of. They told me that they would satisfy me for my trouble on Monday night, if I would meet them at Mr. Holt's. Away I went, and was taken ill to that degree that I thought I should have died.

L. C. J. How can you prove that she employed you?

Hartwell. I believe I shall have somebody to prove that. But, my lord, the main witness of mine is not come in, and that is Mr. Holt.

L. C. J. He is fled.

Hartwell. But, my lord, I suppose his wife is here. My lord, I hope you will allow Mr. Wakeman to come into the court, that I may ask him some questions.

Justice Powell. A woman cannot be a witness for or against her husband;* then for what reason should she be called?

Hartwell. What can be more material than my going to Holt's? I have no other persons to appear for me.

L. C. J. Did Holt first employ you?

Hartwell. He first sent for me, my lord.

L. C. J. Have you any other witnesses?

Hartwell. My lord, I thought they called for Wakeman.

Mr. Wakeman called.

L. C. J. Ask him what questions you will.

Hartwell. Mr. Wakeman, who was it employed me?

Wakeman. He never told me who employed him till he came to the Recorder's, and then he told me that this woman [pointing to Mrs. Baynton] employed him. The Recorder asked me who it was employed me? Hartwell made answer, and said, I employed him; and said likewise, that the woman brought him money for the writ.

Baynton. I never gave Hartwell money, nor employed him, nor confessed to the Recorder.

Wakeman called a witness, who said for Hartwell, that it was Mrs. Baynton confessed

* See Peake's Law of Evid. part 1, ch. 3, s. 4. Leach's Hawk. Pl. Cr. book 2, ch. 46, s. 70, et seq. Selwyn's Nisi Prius, ch. 8, s. 2.

before the Recorder upon her examination, that she gave money to, and employed Hartwell to sue out a writ against Mrs. Rawlins, at the suit of W. Jones for 20*l.* and gave for reason, on farther examination, that the said Jones owed Mrs. Baynton 20*l.* And he wrote to Mrs. Baynton to get arrested Mrs. Rawlins for 20*l.* due from her to Jones; and that on such arrest, Mrs. Rawlins would pay the money to Mrs. Baynton.

L. C. J. Have you any thing more to say?

Hartwell. My lord, I never saw Mr. Swendsen before he came to my house with Mrs. Baynton, when the young gentlewoman was there. When I came in, they were drinking a pint of sack together. The young lady was very free to go to the Vine tavern. Madam, Were you not free to go?

Rawlins. I do not deny but I was free to go.

Hartwell. Did we offer any rudeness to you at that place?—*Rawlins.* No, not then.

L. C. J. That is the thing you are to answer to, your taking her away by force.

Hartwell. My lord, I know nothing of it; I cannot help it, my lord, there is nothing in it.

Hartwell. Mr. Wakeman, Did I know any thing of your being with Mr. Holt and Mr. Swendsen at the Five Bell tavern?

Wakeman. I do not know that you did.

Hartwell. No, my lord, I knew nothing of it till last Thursday he told me of it.

L. C. J. Who sent for Mr. Swendsen?

Rawlins. Mrs. Baynton.

Hartwell. Mrs. Rawlins, was I in the house at that time?

Rawlins. No, I did not see you there then.

Hartwell. My lord, with submission to your lordship, I understand by something I have heard, since I have been in custody, that this gentlewoman, Mrs. Baynton, said to Mrs. Rawlins, Shall I send for my brother?

L. C. J. Do you keep a public house?

Hartwell. No, my lord, only a prison-room, but sell no drink: This gentlewoman was in the parlour all the while.

L. C. J. Have you any thing more to say?

Hartwell. Nothing at all, my lord; I was ruled by the person that employed me.

Just. Powel. What did you apprehend by this?

Hartwell. She told me there was one gone for; and she said she would bring a gentleman to pay me the money.

L. C. J. Mr. Spurr, what say you?

Spurr. I know nothing more of the matter, than Mr. Hartwell's giving me money for taking out the marshal's court writ, and I was employed by him.

L. C. J. When Mrs. Busby cried out, did you not say, What have you got by your hawling? [No answer made.]

Mr. Mountague. We have a few words to reply, if the prisoners have done. The gentlewoman at the bar insists upon it, that Mrs. Rawlins was consenting to the matter, was in love with Mr. Swendsen: We think, not only by the evidence given, but what they say them-

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selves, that she was carried away by force. Indeed, when she was taken into Hartwell's house, there was nobody by at that time, but those she was not afraid of. To conclude; if there was any consent by Mrs. Rawlins, it was only to have her bailed; it was that only that she designed. Hartwell says, he was only employed as a bailiff, by Holt: He carried them from his house to the Vine tavern: Now, what occasion had he to carry them to the tavern for bail? We shall prove further, that when they came to the Vine, Hartwell himself was said to be the bail for the action.

Anne Cotchett called and sworn.

Mr. Mountague. Mistress, pray will you give an account how Hartwell brought the prisoner there.

Cotchett. Mr. Hartwell, when the coach came, ordered a pint of wine for the coachman. The drawer said, We draw, and draw, but do not know who will pay for it. Mr. Hartwell came to me, and said, that it was an arrest for 120*l.* that he would see us paid.

L. C. J. Was it the woman in the white gown that was arrested for 120*l.*

Cotchett. Yes, my lord.

Hartwell. Did you see me in company with the parson?

Cotchett. You came down stairs, and ordered a pint of wine for the parson, and half a pint besides; and told me the parson was the bail.

Hartwell. I did not know that the parson was in the house, till I had just done my business, and was going away. Did you see me with the parson, Madam Rawlins?

Rawlins. I do not tell you so.

Mr. Mountague. All that is to be proved in this indictment is, that she was taken away against her will, and afterwards compelled to marry.

Cotchett. I did not see Mr. Hartwell after that.

L. C. J. Holt. Gentlemen of the jury, these three prisoners are indicted for felony, upon the statute, made in the third year of king Henry the 7th; that they with Hragen Swendsen now convicted, and Thomas Holt, that is fled, did violently and feloniously assault one Pleasant Rawlins, being seized of an estate of inheritance of about 20*l.* per ann. and possessed of a personal estate of the value of 2,000*l.* and took her away by force against her will; and that he, Swendsen, did marry her. Now the question is, Whether the prisoners at the bar are guilty of this crime? First, as to Mrs. Baynton, you have heard what an account is given of her: she was a person that came to lodge at Mrs. Nightingale's house in Stretton-Grounds, in Westminster: she went for a widow, by the name of Sarah Baynton. It seems, Mrs. Busby and Mrs. Rawlins did lodge about three years in Mrs. Nightingale's house. They being all single, were very well satisfied one with another. Mrs. Rawlins was placed by her guardian under the care of Mrs. Busby;

and has a personal estate of 2,000*l.* and 20*l.* a year. About three weeks before Michaelmas last, you hear of one Mrs. St. John, that was an acquaintance of one Mrs. Nightingale's, came to her, and told her of Mrs. Baynton, a well-disposed gentlewoman, that was come to town about a suit of law, and thought that she should stay about a month, and thought that her house was a proper place for her lodging, and gave her a very good character, that she was a civil religious woman of a good conversation, and desired to be near the church. After some time, Mrs. Baynton came herself. She said, as Mrs. St. John had done before, that she came to town about a law business, was a widow in the west. Mrs. Nightingale, by reason of the character that was given her, received her into her house. When she was there, she behaved herself very civilly for some time; so that Mrs. Nightingale and Mrs. Busby were well pleased with her, and thought her to be a gentlewoman of very ingenious conversation. She tells them, she had a brother, that had interest in shipping; and so there was an invitation of Mrs. Busby, Mrs. Rawlins, and Mrs. Baynton, to go on ship-board, where they were treated by Mr. Swendsen. Mr. Swendsen used to visit Mrs. Baynton, and she used to call him brother: while she was there, Swendsen dined nine or ten times. She had not been there long before they began to have different apprehensions of her from what they had at first, and were very uneasy at her continuance. Mrs. Baynton did apprehend there was some appearance of uneasiness; and came to Mrs. Nightingale, and told her she had made an end of her suit of law, and had no occasion to stay in town, but would return into the country. It seems Mrs. Nightingale and Mrs. Busby were well pleased with Mrs. Baynton's warning. Before she went away, she understood, that Mrs. Busby and Mrs. Rawlins used to go to Oxendon chapel; she came to them and said, she had occasion to go that way with a hand-box to her milliner's; told them she went in a coach, and if they pleased, they might go with her, and she would set them down at a place near the chapel. They accept of her civility, thinking nothing of any design; and as the coach was driving along, it was stopped by bailiffs, and all on a sudden, Hartwell opens the coach, and thrusts himself into it. Mrs. Busby and Mrs. Rawlins were not conscious of any cause of an arrest, thought the arrest was upon Mrs. Baynton, they began to be concerned for her; but it appeared that it was upon them, and then Mrs. Baynton seemed to be as much concerned for them, when they were both to be carried away; but asked Hartwell what it was for? He told them it was no great matter; but if you and I talk together a little, all will be well. Mrs. Baynton expressed herself to be much concerned for Mrs. Busby; she advised her not to talk any thing with him, without her friends were nigh. And when they were in the coach, it was directed to be drove away; Mrs. Busby desired to be carried

to Fleet-street to her friends; but Hartwell would carry her to the Star and Garter tavern in Drury-lane. Mrs. Baynton continued in the coach until they came thither, and then pretended to go for Mrs. Busby's friends; and when they were at the Star and Garter tavern, they were carried into a back-room. Mrs. Busby forced herself with the young woman into a fore-room. Then Hartwell laid hands upon Mrs. Rawlins, and said she was his prisoner, and carries her away by violence, forces her down stairs, and swears at her to put on her mask, otherwise he would carry her to Newgate. Mrs. Busby, the prisoner above stairs, was to go to Newgate, as was pretended; but Mrs. Rawlins was to go to the Marshalsea. Away she was carried to the house of Mr. Hartwell; but Mrs. Baynton, who pretended, that as she was going by chance that way heard Mrs. Rawlins named; thereupon she goes in, and very luckily finds her there, and pretends to pity her condition, and said she had been with several of her friends to be her bail, but could procure none of them to come. Then she said she would go for her brother Swendsen, who she was sure would be her bail. Upon that message he came, and then Mrs. Rawlins was to be carried to the Vine tavern. Mrs. Baynton went with her thither, as they pretended to make up the business. Then it was proposed that Holt and Swendsen should be bail. Hartwell refused them as insufficient: upon which she was told she was in danger of going to Newgate, and bail could not be taken; and the only way was, that she must be married to Swendsen; and if she did not marry, she should go to Newgate. Mrs. Baynton took the ring from off her finger, in order to get a wedding-ring to be made by it; which being procured, there was a parson in the house ready provided with a clerk to do the office, who came into the room where the marriage was made, and so ended that arrest. From the Vine tavern she is carried with Mr. Swendsen and Mrs. Baynton to Mr. Blake's house, and there she was forced to bed: within an hour and an half, they arise again, at seven o'clock at night; and thus the marriage was consummated. As for Mrs. Baynton there is this further proof upon her, that she did pay Hartwell for this very arrest, which is proved upon her by her own confession before the Recorder. Then, as to Hartwell, he is affected by these circumstances. First, there was no process against Mrs. Busby, but yet she was arrested and carried to the Garter tavern, where she was kept in custody till the evening, and could not procure any friends to be called to her; and during the time of her being there, Mrs. Rawlins was married to Mr. Swendsen at the Vine tavern. And it is further proved against him, that when the parson was come, he told the mistress at the Vine tavern, that the parson was to be one of the bail. It is also proved, that he insisted upon very good bail; for he told the woman of the house the arrest was for 120*l.* when as it appeared it was but for 20*l.* Now

you are to consider what hath been said in their defence. Mrs. Baynton says, that Mrs. Rawlins was in love with Mr. Swendsen, and did complain of her confinement and hard usage; and that she told her she could help Mr. Swendsen to a young lady at her own disposal; and that there was one Mr. Pugh that made application to Mrs. Rawlins; but she returned his letters that she had received from him: that Mrs. Rawlins did say, that she could help Mr. Swendsen to a lady that had a fortune at her own disposal, which is owned by Mrs. Rawlins; and that by that lady she did mean herself; but that she had any familiar discourse with him in the garden, or that she was sick for him, and went up and cried for him, that she deues upon her oath. And further says, that she never intended to do any thing against the advice of her friends, or that she had set her love upon him. Then Mrs. Baynton charges Mrs. Busby, that she had a kindness for her brother Swendsen, because she said he was her beloved likeness. Mrs. Busby owns, that he was something like her husband, and on that account might innocently call him so. As for Hartwell, he relies on his being a bailiff, and in execution of his office, being employed by Mr. Holt and Mrs. Baynton, and that she paid him for the writ. Mr. Holt sent for him, and he knew nothing but of the arrest, and was not privy to any other design. It is proved, indeed, that Mr. Holt did send for him. This is the sum and substance of his defence. I must tell you, that if Hartwell was employed in this design, in order to take her into custody to carry on this marriage, and was privy to it, then he is equally guilty; but if he did only act as a bailiff, and did not know the design, then he is not guilty. But his arresting Mrs. Busby against whom he had no process; and taking Mrs. Rawlins from Mrs. Busby to his own house, and from thence carrying her to the Vine tavern; his pretending that the warrant was for 120*l.* when as in truth it was but for 20*l.* and his pretending that the parson was to be the bail, though he was not present in the room where the marriage was, but hard by; yet he was in the same house, which is all one, if he knew what design was a-foot: these are the things you are to consider of. As for Mrs. Baynton, she pretended she was a widow, and you hear how she proves it; and when she is taxed with having a child, then she says she hath a husband. And when she is asked about him, she will give no account, nor how she supports herself. She said indeed she paid every body their own, and that she has no difference with any body whatsoever. She pretended she was Mrs. Rawlins's friend in what she did; but it is plain by what she owns herself, that she employed Hartwell, and paid him for the writ. And her pretending to set them down at Oxendon chapel, there it was her design to bring them under that force to effect this marriage. I must leave it for you to consider, whether from the beginning to the end she was not an actress and a manager of this whole business.

She hath been asked how Mr. Swendsen came to be her brother? First she says, he was her deceased sister's husband. Then being asked who was that sister? she said, he was an adopted sister's husband. It was very extraordinary for her to go to Mr. Hartwell's house to the young gentlewoman, and pretend that she came by chance, and heard her name, I must leave it to you gentlemen of the jury to consider of the whole matter: and as for Spurr, he was an under-officer, a bailiff's follower, and might be ignorant of the business. You have not evidence enough to make it appear that he was privy to this design, and therefore you are to acquit him; but as to Mrs. Baynton and Hartwell, if they were privy to the design of a forcibly taking away of Mrs. Rawlins, with an intent to marry her to Swendsen, as it is plain that he was an actor, and she abettor in the force; then, gentlemen, you are to find them guilty: if you are not satisfied, you are to acquit them.

The Jury went out for half an hour, and brought in the following verdicts:

Mrs. Baynton, Guilty; Mr. Hartwell, Not Guilty; Mr. Spurr, Not Guilty.

L. C. J. said to Hartwell, 'You have had a very merciful jury, let it be a warning to you for the future.'

Baynton. My lord, I am with child.

L. C. J. That will be considered.

On Saturday, November the 28th, the Prisoners were called to the bar to receive sentence of death.

Sol. Gen. I pray your lordship's judgment against the prisoners at the bar.

Cl. of Arr. Haagen Swendsen, hold up thy hand. Thou hast been convicted of felony done by thee, and committed on Mrs. Pleasant Rawlins, and the jury hath found thee guilty; what have you to say for yourself, why you should not receive sentence of death according to law?

Swendsen. I could say a great deal, but I shall say but very little. I do not doubt but the honourable court observed how various she was in her evidence. What she denied in my trial, she confessed in Mrs. Baynton's; and so I leave it to the court, if there may be an arrest of judgment till the next term.

L. C. J. Unless you can shew us some cause for it, it will not be granted.

Swendsen. My lord, she said those things in her trial, which she denied in mine.

L. C. J. Some things she mentioned in your trial, that she had no occasion for in hers.

Swendsen. The same things were in my trial that were in hers.

L. C. J. There were some things in her trial that were not in yours.

Cl. of Arr. Sarah Baynton, hold up thy hand. Thou hast been indicted for felony, and found guilty. What hast thou to say for thyself, why you should not receive sentence of death according to law?

Baynton. My lord, I am with child.

L. C. J. That is no plea against judgment.

Baynton. My lord, I desire that it may be taken into consideration, how that she contradicted herself in her evidence; that she spoke those things in Mr. Swendsen's trial that she contradicted in mine. I think I have a great deal of injustice; I am as innocent as any person in the court.

L. C. J. That you did this thing is most apparent: that you deluded this young person, and pretended yourself to be a person of quality, a religious woman, and one that came out of the country about a law-suit; that you pretended that this Mr. Swendsen, the prisoner at the bar, was your brother, your sister's husband; and all this false dealing was to bring him in to delude this woman. It is plain that you had no suit of law as you pretended. It is plain that you took out this process against the young gentlewoman. It is plain, that you pretended you would set them down at a chapel.

Baynton. It is not the first time, my lord, that I set them down.

L. C. J. But you made use of this stratagem to accomplish the arrest. You have deluded the world by these things: and indeed it is very hard against you.

Baynton. My lord, they desired me to set them down.

L. C. J. The licence was taken out before the 6th of November a considerable time.

Baynton. My lord, she cannot deny but she spoke for it to me. She herself ordered it to be done. My lord, when I was upon my trial, abundance of people prompted her to speak those things she knew nothing of; Mrs. Busby in particular; though I do not question but she herself would have married Mr. Swendsen, for she expressed love for him in calling of him her beloved likeness.

L. C. J. She said he was like her husband, and therefore on that account she might say so. Crier, make an O Yes.

Swendsen. My lord, my trial has already made a great noise in the world; and I do not know but that by this time it may be come to the queen's ear, therefore I desire that your lordship would be pleased to make a favourable construction of it to her.

L. C. J. Well, I do not question but her majesty hath heard of it. Crier, make an O Yes, while judgment is given.

Justice Powell. You that are the prisoners at the bar, Haagen Swendsen and Sarah Baynton, you have been both tried and convicted of a very great offence, for which you are brought to receive the judgment that the law requires. You have had a very solemn trial, and have both been convicted upon very plain and full evidence. Your offence is of a very high nature; and I am glad that you have had such a solemn trial, that all people may know how great a crime this of fortune-stealing is (which is death by the law) and may take warning by you; it may be, a great many people do not know how penal this offence may be, but I

hope your trial may be a means to deter others from making use of such wicked practices. Your offence hath been in a nation where property is better preserved than in any other government in the world. Here it is death for a man to take away any thing, though never so small, by way of robbery: how much worse is it for you to take away the child of a man, and with her all that he hath gotten by his industry all his life-time, at once? This is most certainly a very great offence against the public, being so great a violation of property, and the injury you have done to this woman is very great too, and cannot be repaired: all the satisfaction that can be given is by taking away the lives of those persons that were the contrivers of it. You Haagen Swendsen have had the privilege (the law allows to foreigners) of a party-jury; and I believe, had there been any room for a jury to bring you in not guilty, you had not been found guilty; but the fact was proved so plain upon you, that they could not possibly avoid it. It is true you insisted upon it that you were not present at her first taking, and that she gave her consent to the marriage. It is true, that you were not present when she was first taken, but there were strong presumptions to conclude that you were privy and consenting to it, which will render you equally culpable as if you had been present. For when she was taken into custody, she was brought to a house where Holt and you were seen together; Holt being the man that set the coach, and gave directions to the bailiffs when to seize her; and besides, you had a licence prepared for your marriage to her. These are very great circumstances of your being privy to the first taking. But admitting you were not privy to the first taking, you were privy to her being in custody under an arrest, when you was brought to bail this woman; and word was brought in that they were contented to take bail, but excepted against yours: and when she was told by Sarah Baynton she must go to Newgate unless she married you, you were present at all this; and this being done and acted whilst the first force was continued upon her, is in law a forceably taking; so that you are plainly guilty of a forceable taking. And then also, if that were necessary, of marrying her by constraint, she being under menaces, that if she would not marry you, she must go to Newgate: you yourself were conscious, this was no such consent as marriage requires, since that evening you made application to a justice of peace to take an affidavit from her that she had given her consent. When you brought witnesses to give an account of your former life and conversation, that some years since you were an able merchant in your country, one in great credit, an ingenious man, and of good interest and acquaintance there, I confess, I had great commiseration for you, and thought this misfortune befel you upon the account of your acquaintance with this ill woman; the acquaintance with such a woman will make a rich merchant quickly poor,

will soon reduce a wealthy man to a morsel of bread. I am afraid that she hath been a very great instrument in your ruin.

And you, Sarah Baynton, when you were asked to give an account of what kind of life you lived, it appeared to be but a very sorry one indeed, so that I could not but conclude you to be a very lewd woman. You had wit and parts enough, which might have been of great service to you, if you had lived honestly; but you made use of them to another end, and it is not fitting that you should live longer that cannot live better. You contrived and carried on all this wicked design from first to last; and that you might the better perform it, you went to a civil house under the character of a gentlewoman that came out of the country about a suit of law. There you pretend to be a very good woman, and seem to be much pleased with the family, because they were sober people; but your design was to entice and delude this young woman. Whether your design at the beginning was to commit this fact I cannot tell; but being not used to this course of life, you could not wear your disguise long without discovery; you began to be suspected and to be seen through; the family was very willing to be rid of your company; which you perceiving, you resolved you would achieve your design before you went. For that end you invite them into a coach, promising to set them down where they were going; but instead of that, you employ bailiffs to arrest them; for you with your own hand paid the bailiff that was to do it; and after they were taken you pretended to pity them. And when Mrs. Rawlins was at Mr. Hartwell's house, you pretended that you accidentally and providentially overheard her name mentioned in Mr. Hartwell's house, as you passed in the street. You go into the house, and pity her condition, and propose your brother for her bail; but instead of that, all your design was to bring about this marriage; and for that end you forced her ring from her to get another made by it. It was you that told her she must go to Newgate unless she married your brother; and after that forced her to bed. From the beginning to the end you carried on this wicked design to the ruin of this young woman; you have a great deal to answer for. I have stated this matter, that you may be satisfied that this fact hath been proved against you both very fully, and therefore you can expect no other than an award of the punishment the law requires, that is, death. I hope you will reflect upon those evil courses that have brought you to this end. You have but a short time to live, and therefore it would be well for you to consider your future state: you may have better instructions for that than I can give you; therefore I will now proceed to the Sentence, which is,

‘That you shall go hence to the place from whence you came, and from thence to the place of execution, and that there you severally hang by your necks until you are dead; and so the Lord have mercy upon your souls.’

Swendsen. My lord, now I am bound to do this woman justice. She hath not been the contriver of it. It was all done by my direction; and for her sake I desire the queen may know of it.

L. C. J. Well, that will clear up the doubt to some of your countrymen, who did think that you were not the contriver of it.

Swendsen. I desire, my lord, that the matter may be represented to the queen as favourably as you can.

Cl. of Arr. Sarah Baynton, hold up thy hand.

Baynton. My lord, I am with child.

L. C. J. Let a jury of matrons be sent for.

They are sent for. Upon the hearing of her sentence, she fell into fits.

Cl. of Arr. You the matrons of the jury, shall view and diligently enquire and a true verdict give, according to your evidence, whether Sarah Baynton be with child, quick with child, or not. So help you God.

The names of the jury of matrons are as follow: Mrs. Sarah Johnson, Mrs. Christian Walker, Mrs. Susannah Goff, Mrs. Mary Herbert, Mrs. Sarah Randall, Mrs. Mary Vere, Mrs. Sarah Webb, Mrs. Dorothy Mordit, Mrs. Eliz. Guernella, Mrs. Mary Rogers, Mrs. Jane Smithson, Mrs. Margaret Leach.

L. C. J. You the matrons are to consider well the oath you have taken, which is diligently to enquire whether this woman be quick with child: if she be with child, but not quick, you are to give your verdict so; and if she be not quick with child, then she is to undergo the execution of the sentence in convenient time.

About half an hour after, the jury of matrons came in.

L. C. J. Are you agreed in your verdict?

Ans. Yes.

L. C. J. Who shall say for you?

Ans. The Fore-woman.

L. C. J. Do you find the prisoner to be with child, with quick child or not?

Mrs. Johnson. Yes, my lord, she is quick with child.

L. C. J. Is this your verdict?

Mrs. Johnson. Yes, Sir.

L. C. J. And so you say all?

Ans. Yes, my lord.

L. C. J. Hark ye, Mrs. Baynton! These women by their verdict give you longer time to prepare you for death, and therefore I hope you will improve your time, for the judgment is past, and will be executed soon after your delivery.

Sarah Baynton was reprieved, but Haagen Swendsen was executed.

He made no speech at the place of execution, but referred himself to the following Paper, which he left with the two Divines who attended him.

“I do believe the world will expect I should say something for their satisfaction. That I

had a design to have Mrs. Rawlins for my wife is most true. I was told of her by a neighbour and friend of hers, and then made a further enquiry, and found her quality such as I might, without any exceptions, presume to, her father being the son of a tradesman; the next was, how to get into her acquaintance; and not knowing how to be introduced, I prevailed with, and persuaded Mrs. Baynton to take a lodging in the same house with Mrs. Rawlins, by which means I found easy access to my wishes, and was as welcome to the family, as if I had been one of themselves. I had their company on board a ship, where I gave them an entertainment, and was invited to dine with them, and by degrees I possessed myself of Mrs. Rawlins's affection so far, that she seemed uneasy without me, and frequently importuned for my speedy return, and obliged me to sit next to her at table, saying, that if I did not, she would not eat, and treated me with many private caresses, by which lovers, who have not frequent opportunity of speaking, do by signs and tokens express themselves.

"I do declare that I had as good reception as a lover could wish for, and all the encouragement imaginable; insomuch that nothing seemed disagreeable to my intentions, but all things did promise to facilitate my design with success, she herself having told me that she was at her own disposal, and would marry to please herself.

"My familiarity with Mrs. Rawlins before my marriage was so great, that there was no room left for me to practise violence upon her; though I must say I was impatient of delays, and wished for an opportunity to accomplish my desire.

"But as for the unhappy contrivance of the arresting Mrs. Rawlins, I had no share in it, but was persuaded to consent to it by Mr. H—— and his wife; and when the intrigue was brought to perfection, I complied, and laid hold of the opportunity, in order to marry Mrs. Rawlins, which with little difficulty, and less persuasion, I accomplished; she having, without any force or violence, declared to the minister that she was at her own disposal, and free to marry me, which the minister declared in open court, at my trial.

"After we had been in bed, comes in one Mr. Bennet, a constable, with some of Mrs. Rawlins's relations, who required me to go with them before a justice of peace; finding they had no warrant, I refused to give obedience to their commands, which created some dispute; and my wife hearing the noise, came out of the bed-chamber, desiring me to be quiet, and let her speak to them; which accordingly she did, in these express words following: viz. Cousin, I have married this gentleman with my own free consent, he is my husband, and this is my wedding-ring, (shewing the ring on her finger:) as for Mr. Busby, I will give him under my hand he shall come into no trouble, and what would you have more?

"Then said they, if it be so, then God bless

you both together, and drank a flask of wine or two with me, and then departed; they were no sooner gone, but I asked her, whether she would be willing to appear and declare what she had said to her friends to a justice of peace? And she said she would with all her heart. Then we went to Mr. Justice Baber, in York-buildings, and declared the same to him; he told her he would take notice of her face, and bid her stick to that.

"The next day about eleven of the clock, there came a constable with a warrant, and carried us before the Recorder, unto whom she said the same thing over and over. Then said the Recorder, Alas! Child, they made you drunk, and you did not know what you did. To which she answered, That there were a great many there present that knew her life and conversation, that she did not use to be drunk; and when the Recorder could not prevail with her; he conceived, that my being personally with her, obliged her to stand so firm to her marriage; he then ordered me to be pulled away by force from her, at which she fell a weeping: how she afterwards was lectured by her friends, was sufficiently attested by my prosecution, trial, and sentence; and after I was committed to Newgate, I was removed by a Habeas Corpus to the Queen's-bench bar, there to be arraigned, and pleaded Not Guilty to the indictment. I pleaded for longer time to prepare for my trial, but was allowed but four days; when I was brought to my trial, I moved for counsel to plead my cause, as being a stranger, and not acquainted with the laws of England; my life being thus at stake, a powerful interest against me, and the court not for me, rendered my case both despicable and deplorable; and as for some of my evidence, I do verily believe they were bribed by the adverse party, others taken off by sinister art, and some hindered by force from appearing in court for me. As for justice Baber, he shewed himself but coldly in giving his testimony, and said, that my wife did confess before him, that she was married by her own free consent; but at the same time he added, that she seemed very much disordered: as for that gentleman, I forgive him, and shall leave God to be judge between him and me.

"It is to be noted, that my wife did not deay, in open court, that she had made the declaration aforesaid, of her marriage, to Mr. Bennet, the constable, and others, that night we were married: but said, she did not know what she did when she said so, and many other things she positively, upon oath, denied at my trial; which makes me have pity upon her poor soul, considering she confessed many things at Mrs. Baynton's trial, which she denied upon oath at mine: the world may see what it is to be a stranger, and unacquainted with the laws; nay, I myself heard my wife openly confess in court, in Mrs. Baynton's trial, that there was a young lady in the world, who was at her own disposal, that wished me a good wife; and at last confessed she herself was the person.

" Amongst my many misfortunes, I was represented by my wife's friends to the court, to be a sharper and a bully; but I called in, and produced several gentlemen of repute, to give account of my life and conversation, who have accordingly attested the honesty of my principles by my practice.

" It is further observable how my jury disagreed about the verdict. There was one of them, Mr. Erasmus Johnson, a person to me altogether a stranger; for I declare, in the presence of Almighty God, that I do not remember to have been in his company three times in my life, except in church: This Mr. Johnson alleged, That none of the evidence did prove, or swear, that I had any hand in the arrest, nor used any force or violence to the gentlewoman, but she confessed the marriage, which was proved by several witnesses; which rendered my case so hard that the said Mr. Johnson insisted upon it to have me discharged according to the dictates of his conscience; but at last he was over-ruled.

" Since my conviction I have used all the means I could to procure my pardon: but finding little or no probability of it, I am now going to beg for entrance at the gate of mercy in heaven, which I beseech God to open for me.

" I expected my trial should be published, that the world might see my treatment; what I have done, and what I have left undone in my case; but I am informed it may not be printed. I have said this only to do myself justice, although I could say a great deal more of moment to the purpose; but my time being so very short and precious, I must employ that little time to the saving of my most precious part, my soul.

" I humbly beseech mankind to believe me; and that I have said, or shall say, are the words of a dying man; this is not the time for me to equivocate, nor to go out of the world with a lie in my mouth: I do therefore declare, and call the great omnipotent God of heaven to my witness, that I have asserted nothing, to the best of my knowledge, but the whole truth, nor uttered a syllable out of malice, or bitterness of heart, against any person whatsoever; but so far from it, I do frankly forgive all my enemies, and beseech God to put it in their hearts to repent of their sins.

" As for my wife, I am so much in charity with her, that I cannot believe the severity ex-

tended to me, did altogether proceed from herself; but her consenting to spill my blood, makes the guilt her own. God of his great mercy give her a true sense of her crimes, that the heavy judgment hanging over her head may not descend on her.

" As for Mrs. Baynton, who is likewise under sentence of death on the same account with myself, as I have in the court, so do I now again positively declare she had no hand in the intrigue of my marriage, any more than what she did by my special direction and persuasion: for Mrs. Baynton was wholly a stranger to Mrs. Rawlins, until the unhappy contrivance of my marriage made them acquainted, neither did I know Mrs. Baynton till June last past; though some have been pleased to say that I kept her company for three years, and have had two children by her; all which I declare is a wrong notion, and nothing of truth in it. The only load I have on my conscience is her death, of which I am the unhappy instrument. I beseech God in his mercy to move the queen's clemency to spare her life, that her blood may not rise in judgment against me.

" As for myself, I am now a going to suffer an ignominious death, for a crime which my own conscience doth not accuse me of, but the rigour of the law hath made it my unpardonable crime. And as I forgive all mankind, so I beg forgiveness of those, whom, through inadvertency, or otherwise, I have injured or offended, beseeching God, of his great mercy, to vouchsafe them forgiveness whensoever they shall ask it.

" My great comfort is, that I have reconciled myself with my God, and that I die in my natural senses, and that short time I have had since my trial, I trust in my Saviour I have not mis-spent.

" And now, O Lord God! of thy infinite goodness hear my petition, pardon my offences, and forgive me my sins, forgive mine enemies, and lay not my blood to their charge, but grant that a sincere repentance may wash away their guilt.

" I am now going out of this vale of calamity and sin to my eternal repose, where, through the merits of my Saviour Jesus Christ, I hope to see God in his glory; and so I conclude, O Lord receive my soul into thy boundless mercy, for the merits of my Saviour Jesus Christ! Amen."

427. The Trial of RICHARD HATHAWAY, at Surry Assizes, for a
Cheat and Impostor : 1 ANNE, A. D. 1702.*

PROCLAMATION was made for all persons concerned to attend.

The prisoner being brought into court, and acquainted what liberty he had to challenge those gentlemen that were called; he making no challenges, the gentlemen that were sworn on the jury were, Charles Bludworth, Henry Tendall, Walter Kent, John Burchet, John Pettward, Thomas Lowfield, Will. Draper, Rich. Nicholas, Cæsar Bradshaw, esquires, John Cater, Sam. Pearson, Rich. Hammond, gentlemen.

The KING v. RICHARD HATHAWAY, for an Impostor.

Surry ss. The king's Attorney General has exhibited an Information against the defendant, by the name of Richard Hathaway, of Southwark, in the county of Surry, labourer; and the information sets forth, That the said Richard Hathaway being a person of an evil

* In the former edition, this trial was stated to have been had 2 Ann.; but erroneously, as appears from the Records of the Sentences passed on the convicts, transcripts of which have been imparted to me by the prompt and obliging kindness of Mr. Dealtry. They are as follows:

Die Jovis proximo post mensem Pasche, anno primo Annæ Reginæ.

Surrey.—REGINA v. RICHARDUM HATHAWAY, THOMAM WELLYN et ELIZABETHAM UXOREM ejus et ELIZABETHAM UXOREM WALTERI WILLOUGHBY.

Defendentes existentes convicti de Riottis et insultis Ordinatum est quod Defendens Richardus Hathaway solvat centum marcas pro fine suo occasione prædicta, et committitur Marrescallo; et quod Defendens Thomas Wellyn solvat quadraginta marcas pro fine suo occasione prædictâ, ac etiam viginti marcas pro fine Elizabethæ uxoris ejus et committuntur Marrescallo per spatium unius mensis, et quod Walterus Willoughby solvat quatuor nobulos pro fine Elizabethæ uxoris ejus et Defendens Elizabetha committitur Marrescallo pro una septimanâ proximâ post sequente.

DOMINA REGINA v. RICHARDUM HATHAWAY.

Richardus Hathaway ductus fuit hic in Curiam sub custodiâ Marrescalli hujus Curie per regulam hujus Curie, et existens convictus de grandibus malegesturis, ordinatum est quod solvat Domine Reginæ centum marcas pro fine suo occasione prædictâ, et committitur Marrescallo. Et quod stabit in et super || pilloriam

|| See vol. 7, pp. 1308, 1309.

name and fame, and an impostor, and contriving, and maliciously intending, one Sarah Morduck, the wife of one Edward Morduck of Southwark, in the said county, waterman, who for the whole course of her life was an honest and pious woman, and not a witch, nor using witchcraft, incantment, charm or sorcery, to bring into the danger of losing her life, the 11th day of February, in the 12th year of the reign of the king, at Southwark, in the said county, in the presence and hearing of divers persons, falsely, maliciously, devilishly, and knowingly, and as a false impostor, did pretend and affirm, himself, by the said Sarah to be bewitched, and by the occasion of that pretended witchcraft he could not eat, and by the space of ten weeks to fast, and was affected with divers diseases; and that he, by drawing blood from the said Sarah, by scratching, should be freed from the said pretended witchcraft; that the said Richard Hathaway did then and there, with force and arms, scratch the said Sarah, and did draw the blood of her the said Sarah, by scratching; and thereupon he, the said Richard Hathaway, did then and there falsely, maliciously and knowingly, by affirming himself to be freed from the said diseases, by drawing the said blood, whereas in fact and in truth, the said Richard Hathaway was never bewitched, and had not fasted for the time aforesaid, nor for any great time, and that whereas in truth and in fact, the said Richard, then and there, well

loriam Die Sabbati proximo in magis publico et aperto loco in Southwarke, inter horam duodecimam et horam tertiam ejusdem diei per spatium duarum horarum cum papiro super Caput ejus denotante offensam suam: ac etiam stabit in et super pilloriam Die Martis proximo apud regale Excambium in Cornhill, London, inter horas prædictas per spatium prædictum cum papiro prædicto super Caput ejus: ac etiam stabit in et super pilloriam Die Mercurii proximo apud Temple Bar in Fleet-street, London, inter horas prædictas per spatium prædictum cum papiro prædicto super Caput ejus, et quod Marrescallus prædictus deliberet Defendentem vicecomitibus London ad exequendum Judicium prædictum; et post executionem Judicii prædicti vicecomites prædicti redeliberent Defendentem Marrescallo prædicto; et quod Marrescallus prædictus deliberet Defendentem custodi Domûs Correctionis in Southwarke prædicto salvâ custodiâ custodiendum, et quod flagelletur die proximo post adventum suum in Domam Correctionis prædictam, et quod Custos prædictus Custodiat eum quotidie ad durum laborem per spatium dimidii unius anni.

Queen Anne succeeded to the throne, March 8, 1701-2.

knew himself not to be bewitched by the said Sarah, to the great contempt of our lord the king and his laws, to the evil and wicked example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity, &c.*

* The Record is as follows :

REX versus HATHAWAY.

Surr' ss. Memorand', quod Edwardus Northey, Ar' Attorn' Dom' Regis nunc General', qui pro eodem Dom' Rege in hac parte sequitur, in propria persona venit hic in curia dicti Dom' Regis, coram ipso Rege apud Westm', die Jovis prox' post tres septimanas sancti Michaelis isto eod' term', et pro eod' Dom' Rege dat cur' hic intelligi et informari, quod quidem Richardus Hathaway, nuper de Southwark in com' Surr' Laborer, existens persona malor' nominis et fame, et impostor, et machinans et malitiose intendens quandam Saram Morduck, ux' cujusdam Edwardi Morduck de Southwark in com' præd', Waterman, feminam per totum vite sue tempus existen' honestam et piam, et non Sagan (Anglice a Witch) nec Magiam (Anglice Witchcraft) Incantamentum (Anglice Incantment) Incantamentum (Anglice Charm) Fascinationem (Anglice Sorcery) unquam exercen', in periculo vite sue amissionis inducere, 11 die Febr', anno regni dicti Dom' Regis nunc 18 apud Southwark præd' in com' præd' in presentia et auditu diversarum personarum, falso, malitiose, diabolice, et scient', et ut falsus impostor, prætendebat et asserbat seipsum per eand' Saram fuisse fascinatam (Anglice bewitched) occasione prætens' fascination' illius non posse edere, ac per magnum tempus, scil' per spatium decem septimanar' jejunasse, ac diversis morbis adtunc et ibid' affici, et quod ipse per ipsius Richardi extractionem sanguinis ejusd' Saræ per scalpationem a prætens' fascinatione præd' liberat' foret, quodq; præd' Richard' adtunc et ibid', vi et armis, eandem Saram scalpsit, et sanguinem ipsius Saræ tunc et ibid' per scalpation' ill' extraxit, et superinde præd' Richard' adtunc et ibid' falso, malitiose, et scient' asseruit seipsum a morbis illi', per extraction' sanguinis præd' liberari, ubi revera et in facto præd' Richard' nunquam fascinat' fuit, et non jejunasset per spatium præd', nec per aliquod magnum tempus, et ubi revera et in facto præd' Richard' adtunc et ibid' bene sciebat seipse minime fascinatam fuisse per eand' Saram, in maximum dicti Dom' Regis nunc, legumq; suarum contemptum et vilipend', in valde malum et perniciosum exemplum alior' in hujusmodi casu delinquentium, et contra pacem ejusd' Dom' Regis, coron' et dignitat' suas, &c. Unde idem Attora' dicti Dom' Regis nunc general' pro eod' Dom' Rege, pet' advinamentum cur' hic in præmissis, et debitum tegis processum versus præfat' Richard' Hathaway in hac parte fieri ad respondend' dicto Dom' Rege de et in præmissis, &c.

VOL. XIV.

Mr. Raymond. May it please your lordship, and you gentlemen of the jury, the information sets forth, That the defendant being a person of an evil fame, and an impostor, and maliciously contriving to take away the life of one Sarah Morduck, the wife of Edward Morduck, who always was a good woman, and not a witch, nor using witchcraft, the 11th day of February, in the 12th year of the reign of the late king, at Southwark, in the presence and hearing of divers persons, did falsely, devilishly, and knowingly, and as a false impostor, pretend and affirm himself to be bewitched by the said Sarah, and that by reason thereof he could not eat, but had fasted for ten weeks, and was also affected with divers diseases, and that by his drawing blood from the said Sarah, by scratching, he should be freed from his said pretended bewitching: that the defendant did thereupon scratch the said Sarah, and did draw the blood of the said Sarah by such his scratching, and thereupon he falsely affirmed, that by drawing the said blood he was freed from the said diseases; whereas in truth and fact he was never bewitched, nor had he fasted as aforesaid, and he knew himself not to be bewitched by the said Sarah, in contempt of the said late king and his laws, and against the peace of his crown and dignity.

Mr. Conyers. May it please your lordship, and you gentlemen of the jury: this is an information against Richard Hathaway, for a cheat, for endeavouring to impose upon the people a belief, that he had been bewitched by one Sarah Morduck, and that as an effect of her pretended witchery, he vomited up nails and pins, and that he could not speak nor open his eyes, and that great noises were heard in the house where he lay, and that there could be no remedy for him, but by his scratching and fetching blood of this Sarah Morduck; and by this means the poor woman has been very much abused by her neighbours, reputed a witch, and brought to a trial for her life as such; but that there was nothing but a malicious design in it will appear by the evidences that will be produced. This Richard Hathaway was for some time an apprentice with one Welling, a blacksmith, in Southwark. About September last was twelvemonth, he gave out that he was bewitched, and he went to this woman's house and scratched her; and the pretence was, that scratching and fetching blood of her recovered him. The minister of the parish, Dr. Martin, hearing that it was noised about, that the defendant had been relieved by scratching Morduck, came and visited him. He could neither speak nor see, as he pretended; but understood what was said to him, and gave assent to what was proposed to him, by holding up of his hands. Dr. Martin tells him, he heard this woman had bewitched him, and that his scratching of her was the means by which he was relieved; and that he desired to see the experiment himself, and therefore had brought Sarah Morduck there, and desired him to hold up his hand, if he un-

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derstood what he said ; which he did. Dr. Martin had another woman there at that time (though that was concealed from Hathaway,) and Sarah Morduck, by the doctor's direction spoke to him, and came to his bed-side, and the defendant was by the doctor bid to scratch her. When he came to scratch, the doctor took the hand of the other person, and put it into the defendant's hand, and as soon as he had scratched the other person, his eyes began to open and he could speak ; and immediately it was made known to himself and the company, that the person he had scratched was another person and not Sarah Morduck. But notwithstanding this, he was not satisfied, but still there was a prosecution of Sarah Morduck for a witch, and she was forced for some time to go and reside in London : and there the rabble got about her, and abused her ; of which complaint was made to a magistrate in the city, and Sarah Morduck was had before him, and then Hathaway was sent for, and there again scratched her ; and it was so far credited there, notwithstanding the account given by Dr. Martin of the experiment he made, that the poor woman is committed for a witch, and afterwards brought to a trial for her life ; and upon the trial it appeared plainly, that all this was a contrivance, and there was no evidence to charge her with the bewitching this man ; and after a long hearing upon a full evidence, the jury acquitted her, and the man was committed for a cheat. But notwithstanding this acquittal, he still goes on to persuade people, that he was bewitched ; that he had fasted several days together, and could not eat ; and then for a further conviction that he was an impostor, and only endeavoured maliciously and falsely to impose this belief on people, he is about the beginning of last November committed to the care of a chirurgion, one Mr. Kensey, where for two days he did not eat ; but afterwards his stomach began to come to him, and when he could get any victuals privately, he had a very good stomach, and could eat and drink till he was drunk. And it was contrived that holes were made in the room where he was, and the maid that looked after him was directed to give him notice, that she would help him privately to victuals ; and from the second day after he was there, till the eleventh day, he did constantly eat every day, though he pretended he fasted all that time, and had done so for fourteen weeks, and he was seen to eat through those holes. All this, and much more, will be fully proved by the witnesses. So that there has been a great affront to the public justice of the nation by this proceeding, many having abetted it, and they have put up hills in several churches to pray for him against the trial, and gathered money to support him in this false and malicious pretence.

Mr. Brodrick. My lord, the discovering and punishing such a cheat as this is highly necessary ; and not only for the vindicating the public justice of the nation, but for the sake of

religion itself, which suffers by nothing more, than by the countenancing of indirect practices, made use of upon a pretence of maintaining and supporting its credit. Religion has in itself such genuine and native truth, as must work conviction upon the understandings of all persons, who allow themselves leisure to consider it without prejudice : but when tricks and little arts are carried on for a time, and attain a general credit, and appear afterwards to be what are called pious frauds, they do far more mischief than all the good proposed by such practices can make amends for. For when men who are sceptically inclined, find that the generality of mankind run away with stories of this nature, and those facts afterwards prove undeniably false, they carry their doubts on much too far, and are apt to conclude, that they cannot securely rely upon the relation of others, and general consent of mankind, for the certainty of any fact whatsoever. It is therefore the duty of all persons, that are concerned for religion in general, to endeavour to detect such practices, which weaken one of its most solid foundations.

And, my lord, we conceive this prosecution very necessary, in order to the vindicating the justice of the nation. Here was a woman that underwent a solemn trial, and upon a full hearing was acquitted, yet afterward, notwithstanding the thorough examination of the fact, and such an evidence given as convinced every unprejudiced hearer of the innocence of the defendant, and the malice and hypocrisy of the accuser, such a spirit did reign, that it was represented that the accuser had hard measure ; and not only the jury, but the court too were reflected on : nay, it went so far, that after the innocence of the woman appeared by her acquittal, a magistrate (whose name the witnesses will disclose in their evidence) gave public countenance to this impostor (for by that name I will venture to call him) and so far gave credit to him, that when the poor woman was abused by the rabble, and her life being in danger, she made application to that magistrate for protection, who, instead of affording it to her, encouraged her prosecutors, as if she had really been guilty of the witchcraft laid to her charge ; and considerable collections were made for this man, to support his spirits under the disappointment he met with in her being acquitted.

This prosecution was necessary too, upon the account of the poor woman, who, unless some check be put to the unruly proceedings of unthinking people, is not yet safe in her house, but in danger to be torn in pieces ; and it was thought most proper that this matter should be thoroughly examined in this place, where the scene of his counterfeiting for the most part did lie ; that prepossessed people might be ear-witnesses of the fairness of the proceeding, and that all persons might have an opportunity, if they thought fit, of offering any thing fit to be offered in his defence.

My lord, we need not trouble the court with

evidence tending to prove, that the accused person is not guilty of witchcraft: she is acquitted of that, and it ought not to be suffered to be made a dispute. But our evidence will go beyond that, not only that there was no colour or foundation for the charge on her of being a witch; but that the defendant did maliciously, without any ground, and contrary to his own knowledge, charge her with the having bewitched him. And I think our evidence all through will prove this matter fully upon him, that he was not bewitched, nay, that he did not believe himself to be so, yet charged and prosecuted her.

The first part of his pretended witchcraft shewed itself by his vomiting pins: how that business was managed, and how he was detected in it, the witnesses will declare. And though we are not obliged to endeavour the giving an account of what it was that induced him first to undertake this imposture, I think it will appear by the evidence, that he had some aim and prospect of gain to himself. For, upon his first pretending to vomit pins, we shall prove he had prepared a narrative of his own being bewitched; and he himself carried it to a printer, that so he might bring a concourse of people to him: but the printer being a man of some understanding looked on him to be a cheat, and would not meddle with the copy. He practised this trick of vomiting pins several times; but pretending to it once before one who did not take every thing upon trust, but was curious enough to observe nicely, and search him, after some resistance, several rows of pins were found in his pocket.

The next discovery of his imposture was the affair wherein Dr. Martin was concerned, who brought two women to him; the particulars of which having been already opened, I will not repeat them. The doctor put an innocent delect upon him, but it was in order to disclose a vile imposture. When the woman was brought to him to be scratched, being conscious to himself how little real effect the barbarous experiment would have upon him, the whole company observed, that he felt three or four times from her hand to her elbow, before he scratched, that he might be sure it was a woman's hand: and when he had scratched, and felt blood, his eyes were opened, though it was the wrong woman.

Another instance of his acting a part, with design to impose upon the world, was, when he was carried from the King's-bench to Mr. Kensey's. It was necessarily to be imagined, that if he eat or drank nothing, nothing would come from him, either by stool or urine. He considered this, and for fear it should be taken notice of, that he discharged himself after so long a fast as he pretended; having occasion to make water, he found the lid of a box, and making water in it, put it out of sight, on the bed's tester; and the first discovery of his counterfeiting at Mr. Kensey's, was by the dropping of that water on the clothes of the bed. After he had been two days there (during

which time he really did not eat) Mr. Kensey not knowing but that his complexion might incline him to such a sullenness as to starve himself, rather than directly confess his cheat, having first examined his mouth and throat, and finding nothing there but as it was in all other men, and that he had not only all other organs, but that of swallowing, without any obstruction, as other people had, thereupon he framed this design: he took occasion to pretend a quarrel with the maid-servant who lived in his house, within the hearing of the defendant, and told her she was as very a hypocrite as this fellow; and after warm words on both sides, and a seeming resolution by her, that she would quit her service, the master went away, leaving the maid and the defendant together. She, to insinuate herself into the defendant, said, her master was an odd kind of a man, a dangerous man, therefore she would not have the defendant take any thing from him; and said, she would take care to supply him whilst he staid in the house. Then his stomach came to him very readily, and he was so far from being unable to drink, that he drank brandy and other liquors to excess, and this for several days. But still those in the house being wary, thought it might be pretended by people who were very willing to believe him, that this happened by the charm's being dissolved, and that he was unable to eat before; and therefore it was thought advisable to bring in several persons of reputation, who should observe him through a hole fit for the purpose: who, after they had seen him eat, examined him how long he had been a faster? And he made signs that he had fasted twelve weeks, and clung up his belly, as a proof of his emptiness, according to his common practice, though he had in their sight, just before, eaten a plentiful meal. So that, gentlemen, it is evident, that what he did was done maliciously, and with a design to deceive and impose upon the world. After this, there being sufficient proof of the imposture, it was thought fit to bring him before a court of justice; thereupon this information was exhibited against him: and if we prove it, I doubt not but that you, gentlemen of the jury, will do that right to the government, and to religion, as to find him guilty of it, that he may be brought to the punishment that such a crime deserves.

Mr. Phipps. My lord, I humbly pray your lordship's indulgence of the same side; and beg leave to observe, this man was formerly troubled with fits, and there was a design laid by him and his friends to create a belief in people, that those fits were the effect of sorcery and witchcraft; but whether to get money, or take away the life of the woman, or both, I submit to your lordship's judgment upon the evidence. It is certain, they proceeded so far as to bring her to a trial, and did what they could to take away her life. And the better to carry on their designs, and to prepare the world to believe the impostor, we shall shew, that when he had these fits, it was indus-

triously published, that he was bewitched, and that it was by this woman; and if he could but scratch her, he would be well. Dr. Martin, the minister of the parish, hearing of it, came to him; and to make an experiment to discover the imposture, brought another woman with the pretended witch, and said to Hathaway, if you think the scratching this woman, meaning Morduck, the pretended witch, will do you any good, hold up your hand: which he did. Then the doctor put the other woman's hand into his; and although at that time he pretended to be blind and dumb, and he and his friends would have had it thought that he lay under the strongest of the old woman's charms; yet he was apprehensive of what he did, and so jealous lest he should be imposed upon, and thereby his imposture discovered, that he felt several times from the wrist to the elbow, to discover whether it was the arm of the pretended witch or no before he would begin scratching; and then believing it to be hers, (it being much about the same size) fell to scratching, and being told he had fetched blood, his eyes were immediately opened, and his speech restored.

The doctor thinking every body was convinced of this imposture, and believing the poor woman would be quiet for the future, went away.

But notwithstanding this detection, the people were dissatisfied; and Welling, the master of Hathaway, and others, being angry at the discovery, pursued the woman with more malice than before: wherever they found her, they cried out, a witch; and used her so harshly, she was forced to leave Southwark, where she had lived many years, and all her employment which had been profitable to her, and to go live in London.

Their malice pursued her thither; and there Hathaway, with soldiers and others, in a riotous manner, got into the house where she lodged, and would have broke open the door where she was; but a constable being called in, the soldiers went off, and Hathaway was carried before an alderman of the city; and the poor woman and her friends acquainted the alderman of the riotous and illegal proceedings, and prayed that justice might be done upon them. But instead of punishing them, he was pleased to say there was too great provocation for what they had done; and giving credit to the accusation of Hathaway against the woman, ordered her to be carried up stairs to be searched, to see if she had any teats, or other signs of a witch, and permitted her to be scratched by Hathaway, and then committed her for a witch; refusing 500*l.* bail, and dismissed Hathaway.

The woman afterwards was brought to a trial at Guildford assizes, and was acquitted; and he was committed for a cheat. And to make more ample discovery of the imposture, he was taken to the house of Mr. Kensey, a chirurgeon, and there he was obstinate, and would not eat for the first two

days; and a quarrel was feigned between Mr. Kensey and his maid, he saying she was as bad an hypocrite as Richard Hathaway, and gave her warning to be gone. The maid seemed very angry with her master, and said to Hathaway, whatever you do, do not eat any thing that is given you by my master or his brother, for they are your enemies; and promised she would help him privately to what he wanted. Whereupon he thinking she had been his friend, and that he was safe in her hands, took meat and drink from her from day to day, and eat heartily, and drank so very plentifully of strong beer and brandy, and was so merry, that he played on the lute, and danced, and shewed tricks before the maid; but when any body else offered him meat or drink, he refused it, making signs that he could not swallow, and signified to them, that he had fasted all the fourteen days that he had been at Kensey's, and that he had fasted many weeks before. And as to vomiting pins, it will appear to you, that he carried papers of pins in his pocket, to make use of on occasion. But when he vomited in a bason, and his hands were kept down, and he not permitted to carry them up to the bason, there was not one pin in the bason.

I will not trouble your lordship with a detail of all the particular instances of this cheat, but will call our witnesses; and when we have proved the several matters that have been opened, there will be no room to doubt but that the defendant is an impostor, and the greatest this age hath produced.

Mr. Conyers. We will first call Dr. Martin. (Who was sworn.) We will go on with our evidence in the course of time. The first time that notice was taken in the parish of this business was in September was twelve month. Dr. Martin, pray give my lord and the jury an account, Whether you know Richard Hathaway, and when was the first discourse of this witchery.

Martin. February last was twelve month, (the ninth day, to the best of my remembrance) I came to church in the afternoon; and after the curate was gone into the desk to read prayers, I was going into the pew; but hearing a great hurly-burly in the church, I sent the sexton to know what was the occasion of it. He brought word, that there was a witch in the church; so the curate could not go on in reading prayers; and the sexton went and brought in one Sarah Morduck to me, and after her came a great many of the people into the vestry; so that though it be pretty large, it was presently filled. And this Sarah Morduck came up to me, and told me what was the occasion of her being brought there. I asked her how she had behaved herself amongst her neighbours, that should give such occasion to deal thus with her. She began to cry, and said, she had given no occasion for it. I told her, I had nothing to do to enquire into the business, but bid her continue in the vestry, the whole congregation being so much dis-

turbed, that they would go out of the church if she staid in it. So I turned every body out of the vestry, and locked her in. And sermon being ended, I came into the vestry, but found she was gone; and upon enquiry, I understood the reason was this, The sexton told me, that she said, if she staid till all the people went out, she should be torn in pieces, and begged of him to let her out while the psalm was singing after sermon, that she might go away undiscerned; and accordingly she went. Afterwards many of my parishioners made application to me to go to Richard Hathaway, who was supposed to be bewitched; and told me, that it was taken very ill that I had deferred it so long. Upon this, I went to him the next day; and meeting his master below stairs, I asked him what condition his servant was in? He said, he was blind and speechless, and was a very dismal object. I said, I desired to be excused, for I did not love to see any dismal sights. But he said, he was very sensible, and knew every one by their voice. And with that, I went into the room, and his master (speaking to Richard Hathaway) said, Mr. Martin is come to see you. Says I, Richard, I am come to see you, and if you know me, hold up your hand: He did so, and took me by the hand and kissed it. I asked him whether I should pray with him in the prayers of the church, and if he desired it, I bid him hold up his hand: He did so, and I prayed with him, and he did seem to be affected with it, and lifted up his hands several times. Afterwards I took my leave of him, and went down; and I discoursing with his master for some time, I asked him what he thought was the reason of it? He said, an evil tongue, and a bad woman, Sarah Morduck, had bewitched him. But how do you know that? His master then told me, he had scratched her, and found good by it; and said, he was utterly undone by it, and if he did not speak to the church-wardens to take him off his hands, he should be ruined. And hearing of this scratching it came into my head to try an experiment too; so I went away, but without discovering my intentions. And about ten o'clock at night, to prevent jealousy, I went to the house where Sarah Morduck lodged, and found she was gone to bed. I left word that I desired to speak with her the next day; But instead of her coming to me, her brother, Mr. Hearne, came to me, and thanked me for preserving his sister from the mob. I gave him the reason why we did that, and I told him then what I intended to do. He answered me, I am afraid my sister will be so silly, that it will fail in the execution. I bid him leave that to me, I would give such directions in the matter, that it was impossible for it to miscarry: So he left me to my liberty to do what I thought fit. Then, says I, when I send for her, do you come with her. I went to the house where Hathaway lay, and went into the room, where he lay with his eyes fast shut, and seemingly speechless. I spake to him, I am in-

formed you have received benefit by scratching Sarah Morduck formerly; now if I can get this woman for you to scratch her, Do you believe by scratching her you shall receive any benefit? If you do, hold up your hand: So he did; and by and bye there came a message that Mr. Hearne and the witch were come. I then desired Mr. Bateman, whom I brought with me for that purpose, to sit by the bed-side, while I went down, and I bid them let in as many as would come in; and when the room was full, the door was locked. I had before met with a poor woman, whom I ordered to follow me, who received alms of the parish, designing she should be the person the experiment should be tried on. I told them, I designed to try another woman, and I will make him believe he scratches the witch. The answer was, This will signify nothing. Welling's wife said, he had scratched another woman, and it signified nothing. Now this was to the best of my remembrance, one Willoughby, who is a very big woman, and very much unlike Sarah Morduck: but I desired the satisfaction to see it done myself; upon which, it was consented to. Then I asked the woman I brought about it; I told her I would give her a shilling if she would let this man scratch her: She flew off, and said she would not suffer it for all the world. At last somebody said, here is a woman will suffer herself to be scratched; and this was one Johnson. I asked her if she would suffer herself to be scratched; she said she would, if there would come no damage by it. Says I, whatever damage you sustain, I will make it good to you; and you being about the size of Sarah Morduck, are a very fit person. She did decline it for some time, but at last she consented; and after some instructions given to her and Morduck, we went up together, with many of the neighbours. Though you cannot see, says I, to Richard Hathaway, you can hear that there are many people in the room; now, before all these people, Do you believe that Sarah Morduck has done you this mischief? If you do, hold up your hand. He did so. Do you believe you shall be relieved by scratching her? If you do, hold up your hand. He did hold up his hand. Sarah Morduck, Do you speak to him, that he may know you are the person. Says she, What is the matter with you? Do you believe this woman, said I, to be the person that has bewitched you? If you do, hold up your hand. He held up his hand. Then asked Sarah Morduck, are you willing this man should scratch you? Yes, with all my heart, he shall have my heart's blood, if it will do him any good. Then says I, pray, give me your hand. Here it is. And instead of taking her hand, I took Johnson's, and clapt it into his; and I did observe, that two or three times he felt from her wrist to her elbow; and I said, I have something else to do than to wait on

you (and I spoke to him somewhat eagerly), if you will not scratch, I will be gone. Then he scratched her, and she whispered me in the ear, she believed she would faint. I saw he had razed her skin; and I said, You have drawn blood, and you may be satisfied. With that he left off, and turned on his back in his bed. I turned out Johnson immediately, and I and Morduck stood together, and he lay still for some time; but I saw nothing would do, if I did not work him up. Now, says I, I would fain see how his eyes are now; come some of you, look, do not his eyes twinkle? with that both his eyes were as open as mine are now, and he caught hold of the apron of Sarah Morduck, and looked her in the face. Then I told him his mistake; and Johnson came in with her arm bleeding. Says I, this is the woman you scratcht, you have not touched Sarah Morduck's arm, not fetched one drop of blood from her. The fellow upon this seemed very much cast down. Now, says I, give way to no humours, and go about your business, and serve God and your master. Then I went down, and several people were satisfied. Well, says I to Welling, your man's eyes are open now. It is well, says he, if his eyes continue open. He can speak and see too now. I do not know, says he, it is strange if he should do well after this. Farewel, said I; and I went into Loudon. Upon my return, about five a'clock, I enquired about him, and found there was a greater mob in the house than before; and I was accosted at my first coming in by the master and mistress of that fellow: what have you done? you have ruined both me and my family—

L. C. J. Holt. Who said so?

Martin. The master and mistress of this fellow. Why, what hurt have I done you? You have given it out to be a cheat. Did you get any money by it? No, I never did expect it. But pray go and look on him now, he is in a worse condition than he was before. Here hath been two doctors, and they will take their oath that he is bewitched. So I went away; but as I went out, I was stopt by Johnson. She cries out, what have you done? What is the matter, said I, does your arm fester? No; but this wicked woman has spread abroad that by scratching me he was relieved, and she is not the witch, but I am the witch; and it had reached her husband's ear, and he was become so jealous of her, that he would not have any thing to do with her. I went away after this, and going home met her husband, and gave him all the satisfaction I could, that his wife was no witch. And I was informed the next day, that Sarah Morduck had been dragged again to the house, some time after I went away, and brought to Hathaway's bedside, and he scratched her, and his eyes were opened, and he eat and drank, and walked about. Upon this, I sent one evening to him to come to me; and I took him into my study, and said, What is the meaning of it, that you make such a trouble in the parish, to condemn

his woman for witchery? I see no reason for it. Says he, she has done me a great deal of hurt; said Hathaway, she has bewitched me. He said that was the woman had done him all the prejudice he laboured under. Then says I, you are a poor sort of fellow, you must get your living by your labour; now you had better go into the country out of her reach. No, Sir, says he, I am bound apprentice to my master; and if I go, I shall be as bad there as I am here: and seeing I was bound here, this parish must keep me; and if I should go into the country, they will send me back again. Why will you not try? No, I will not. Do you not believe I am bewitched? No, I do not. Then, says he, I may as well not believe what you say in the pulpit; I may say to you as our Saviour said to the Jews, Though you see miracles, you will not believe. Whereupon, I turned him away, and did not think I should have had any thing more to do with him. But about Easter last, sir Thomas Lane sent to desire me to come to him; the witch being then got into London for shelter.

I went accordingly, and when I came, I found Hathaway, his master, and several others there. I found him looking briskly, and eating heartily, and I asked the meaning of it. It was answered, that before sir Thomas Lane, he had drawn blood of Sarah Morduck, and that had brought him to himself. I sent in my name to sir Thomas Lane, and he sent for me in. There was sir Owen Buckingham, and I think Dr. Hamilton. There were several people examined, while I was there, about this person; and after all sir Thomas Lane desired me to tell what I knew in this matter. I gave an account of what I have done here. Says sir Thomas Lane, Richard Hathaway, do you know that gentleman? Yes. How? I have seen him in the pulpit. What, no where else? Did not you see him by your bedside? No. Was not I with you at your bedside? No. All this while he was eating bread and cheese; till sir Thomas Lane spoke to him, lay by your bread and cheese, and be not so unmannerly. Says I, this is very unaccountable, that he should not know me; and yet he had said, that after Mr. Martin was gone, I was a great deal worse than I was before. This is a very unaccountable thing, and I desire to know how this is consistent; therefore I do desire that his master may be called in. And his master was sent for, and Hathaway was going out to call him. No, says I, I desire he may not go out, I will call his master myself. When Welling came in, I asked him whether he did not tell me that Hathaway was sensible from the time I came to him? Yes, he was. Now I desire to know how these things are consistent? and to put this out of doubt, that this man did see me, the woman stood at the side of the bed by me near the feet, and he took hold of her apron readily. How can he come off in this matter? Says sir Thomas Lane, they tell you he had a most violent fit after, and that made him forget what was done before. Another question was

asked Mr. Welling, you know you desired me to get this servant of yours off your hands, and that I would speak to the churchwardens about it. Now I am informed, this servant of yours was going to Goodman's-fields, and as he was going, the press-masters met him, and he being a likely fellow, they whipt him aboard. Is this true or no? Yes. And then you got a letter, and went down and fetched him up. Yes. Then, says I, how come his master to be so much concerned to be rid of him as he pretended; and yet when he might have been rid of his servant, would not take the opportunity? To that sir Owen Buckingham answered, it was only his charity for him to fetch him from aboard; he could do no less considering his condition: so I came away. In a little time after, I heard that this Sarah Morduck was bound over to the assizes, and I was subpoena'd to give my evidence the last assizes at Guilford.

Then the indictment was read, upon which Sarah Morduck was tried and acquitted of bewitching Richard Hathaway.

Mr. Conyers. Dr. Martin, pray go on.

Martin. I was subpoena'd to go to the assizes; but before the assizes came on, there were bills put up in several churches, and particularly at Christ-Church, where I happened to preach. I read the bill, 'A poor man being afflicted by an evil woman, now coming to her trial, desires the prayers of this congregation.' I went down to Guilford to the trial; and when I came up, I thought all people would be satisfied with the justice that was done. But when I came to town, I was abused by many people, both openly and privately: You have the blood of that innocent man to lie at your door; the woman had been hanged, if you had not saved her; the judgments of God will fall on you. One woman followed me to the waterside, and said, I was the occasion of the ruin of that innocent man; for she herself—

L. C. J. Who is this?

Martin. I do not know her, I only give evidence of the abuses I underwent.

Mr. Conyers. Do you know any thing after the assizes, how he behaved himself?

Martin. No, sir, I know nothing of that.

Serj. Jenner. What was done by other people, ought not to be given in evidence.

Mr. Broderick. If this man does prove an impostor, it will aggravate his crime, if the consequence be mischievous, and the world be still abused with a persuasion that he was bewitched.

Serj. Jenner. What was done by other people signifies nothing to us.

Mr. Broderick. This is very material, for it is a confirmation that there was a design carried on—(being interrupted).

L. C. J. to serj. Jenner. What other people did, must not affect this man. But hear what answer can be given, you that are the queen's counsel.

Mr. Broderick. The charge of the informa-

tion is, That he, as an impostor, pretended himself to be bewitched by Sarah Morduck, to deceive the world, and prejudice the woman. And what can be more proper evidence of that charge, than that although he really was not bewitched, yet he had so prevailed upon the opinions of the people, that they still believe him bewitched, and affronted Dr. Martin for being instrumental in her acquittal: it is all of a piece, a continuance of the same imposture.

L. C. J. This evidence is proper. He is indicted for a cheat, for endeavouring to begot an opinion in people by his fraudulent practices that he is bewitched. Now, Dr. Martin says, the people were still possessed with such a belief; and thereupon affronted him, because they thought he was instrumental in having the woman acquitted. Now, is not this an evidence that his pretending himself to be bewitched, begot that opinion in the people?

Ser. Jenner. What the doctor has said all along, has been of what others have done.

L. C. J. No, it has been what he saw himself. You say this man's evidence is most of what others have said. Not so, he has by himself prayed with him, and tried an experiment with him upon a wrong woman.

Serj. Jenner. He tells you what Welling said, and others; how does this affect my client, what another man, or another woman said?

L. C. J. He was insulted upon the account that Hathaway pretended himself to be bewitched, blind, speechless, and not able to eat.

Serj. Jenner. My lord, with submission, other people's censuring the doctor cannot be brought as evidence against my client, unless they make it appear that he had a hand in it, unless he put them upon it.

L. C. J. What other people have said, abstractedly considered, ought not to affect Richard Hathaway; but if there be evidence that Hathaway hath been guilty of deceit, and a design to deceive people, will you not allow it to be given in evidence, that the people have been deceived? And how came they to be deceived, but by his feigning himself to be bewitched?

Juryman. Mr. Serjeant, if you have any thing to object, we desire to hear what you say, for you speak so low we cannot hear you.

Serj. Jenner. I object to what the doctor says by hearsay only.

Juryman. I believe that will be little considered by the jury.

L. C. J. The information is for an impostor and cheat: now what is that? a cheat is a design to impose on the credulity of others, to induce them to believe a thing that is not true. Now Dr. Martin's evidence is what Hathaway did, and that people did believe him to be bewitched; and they abused Dr. Martin, and told him he had done very ill in the case of this woman; and if it had not been for him she had been condemned.

Martin. I have only one thing more to

say; it was reported that I had been bribed; I was told I had received several guineas; that the judge was bribed and the jury bribed, and the judge would not suffer the woman to be searched, he being bribed.

Mr. Conyers. Doctor, have you done?

Martin. I have.

Mr. Conyers. We will next call Mrs. Johnson, who was scratched.

Mr. Broderick. Sir, I think you mentioned a gentleman that you sent for up? Where is he?—*Martin.* He is here.

Mr. Broderick. What is his name?

Martin. Mr. Bateman.

Mr. Broderick. We will call him to give an account of that.

Mr. Conyers. We will first call this woman. Mrs. Johnson, were you at any time with Dr. Martin at such time as Hathaway pretended to be bewitched?—*Johnson.* Yes.

Mr. Conyers. Then pray give my lord and the jury an account of what you know about it.

Johnson. I went into the room to see Sarah Morduck.

Mr. Conyers. What rooms?

Johnson. I was in the room where Dr. Martin fetched her to be scratched; and Dr. Martin told me, he designed that he should scratch some other woman; and he desired me to let him scratch me; but I denied him, and said, I was a wife, and was not willing; at last I consented, and he told me I must not speak when I came into the room where Hathaway was; and he brought me to the fellow; and he said to him, if you think the blood of this Sarah Morduck will do you any good, hold up your hand. Which he did. Then he bid Sarah Morduck speak to him; which she did. Says he; are you willing this man should scratch you? She said, yes: my heart's blood, if it will do him good. So with that he scratched me, and Sarah Morduck cried out. He had rased the skin of my arm, but no blood came presently. Dr. Martin desired me not to speak, and I did not; the blood came afterwards, but none then.

Mr. Conyers. Were you in the room when the doctor spoke to him?

Johnson. I went into the other room; Dr. Martin put me out before him.

Mr. Conyers. Was not you brought in again?

Johnson. No, I went in of my own accord.

Mr. Conyers. In what condition was he then?

Johnson. He looked in this manner, his eyes staring open.

L. C. J. Were his eyes shut when you first came and was scratched, or open?

Johnson. No, they were fast shut.

L. C. J. Did he speak then?

Johnson. No, he said nothing when I came back, till his eyes were open, and then he said, 'O Christ Jesus!' or 'O Lord Jesus!'

Mr. Phipps. But did he feel your arm before he scratched you?

Johnson. Yes, over and over.

Mr. Conyers. Call William Bateman (Who appeared and was sworn.) Pray, give an account what you know of this defendant's vomiting pins.

Bateman. About a twelvemonth ago I went to see Richard Hathaway.

Mr. Conyers. Were you desired to go to him by Dr. Martin?

Bateman. I cannot remember that.

L. C. J. Where do you live?

Bateman. In Pembrokeshire.

Mr. Conyers. Then you do not remember any thing that past then?

Bateman. I do not say I do not remember any thing, but I do not remember whether Dr. Martin desired me to go to him.

Mr. Conyers. Give an account of what you know about his vomiting pins.

Bateman. About this time twelvemonth, on a Sunday night, a woman came to Dr. Martin's house to enquire for him. I went to the door; and the woman said, if Dr. Martin would but come now, he might see Hathaway vomit pins. Can I see him, says I? Yes, says she. So I went immediately; and in the house there were little chinks that I could see through; and I saw him walk about the house, and heard him talk to the people, and I stood some time to hear him. At last I knocked, and he came and let me in; and seeing me, he seemed to be troubled, and feigned himself to be in some pain.

Mr. Raymond. You say you looked through the chink; how was he then? repeat that.

Bateman. He seemed to be as well as he is now.

Mr. Raymond. What did you do then?

Bateman. I knocked, and he let me in; and when I came where the light was, he knew me; and I said to him, I hear you spew pins. Yes, says he. Says I, prithee let me see thee. So he sat on a low seat, and they gave him something in a cup, and by drinking this I was to see him vomit pins; and he took some drink; but, as far as I could perceive, he did not swallow any.

Mr. Conyers. What was the effect of it?

Bateman. He pretended then to be in an agony, and vomited several times, and there were pins on the ground. I had the room swept very clean, and gave him the same again. He vomited again, and there were abundance of pins on the ground again. I believe he vomited fourteen or fifteen times, and I believe there were some hundreds of pins on the ground; but I thought the pins were dropt from one or other; and I took up some of them, and they were dry; and I took up two or three in a chain; and I said I believed those were the pins that were shewn at our house. No, no, says his master, these are not the same; and he did endeavour to satisfy me that he did vomit these pins; so I desired he might have a pot to vomit in; and I had a pot brought and made very clean, and I searched his mouth and found no pins there; and I held the pot to his mouth close, and he often endeav-

voured to put his hand to the pot, and I would not suffer him; for I perceived his hands often moving to his pocket. He vomited several times, and there were some pins scattered on the ground, but none in the chamber-pot. Says I, these pins do not come out of his mouth; but the people were very pressing on me to believe they did.

L. C. J. Who were they?

Bateman. They were all strangers to me. Upon this I told them, I believed he had a slight of hand to convey them there, and I took hold of his pocket. He stopt my hand, and would not let me put my hand into it. But after some time, says one, Let him, let him search your pocket. So I did, and took out several things, and among the rest, several parcels of pins, and I believe these were they that he conveyed on the ground.

L. C. J. Did you see him take them out of his pocket?

Bateman. No, but I took out several hundred.

Juryman. What sort of shape were they of?

Bateman. They were of a very odd kind of shape.

L. C. J. Were they straight or crooked?

Bateman. They were crooked in strange figures, like them on the floor.

Mr. Broderick. And he made a great difficulty of letting you meddle with his pocket?

Bateman. Yes.

Mr. Phipps. And when you would not let him put his hand to the pot, there were none in the pot, but only on the ground?

Bateman. Yes, Sir.

Juryman. Did you see any pins come out of his mouth?—*Bateman.* No, Sir.

Serj. Jenner. What became of the pins you saw on the ground? you say you saw abundance; what became of them?

Bateman. They were swept away.

Serj. Jenner. Who swept them away?

Bateman. Some of the family.

Juryman. I think he said that several of the pins were taken up dry: were any of the pins that were on the ground dry?

Bateman. Yes; and I said, these pins did not come from him.

Serj. Jenner. When was this?

Bateman. About a twelvemonth ago.

Mr. Broderick. Now, my lord, we will shew your lordship that he drew up a narrative for the press, giving an account of this business. [Call Richard Ball, who was sworn.] Mr. Ball, pray give an account of what you know of Richard Hathaway's endeavouring to print a story of his vomiting of pins.

Ball. About a twelvemonth ago, in December, Richard Hathaway brought a writing, and withal a dishful of crooked pins, and told us, those pins he had vomited, and that he had been afflicted by a woman in Southwark, and I think he said he had not eat any thing from my Lord Mayor's Day.

Mr. Broderick. What did he desire you to do?

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Ball. To print this paper. And after he had told this story, he said he had been with a woman in Goodman's-fields. There was a boy with him. And he desired us to print this paper. It related the story of his vomiting of pins. He said, he had taken quicksilver, and it would not move him; and madam Goodwin was mentioned several times in the papers, that she had cured him.

Mr. Conyers. How came it that you did not print his paper?

Ball. My master stood by; says he, you look very well; I will have nothing to do with it; I believe you are a cheat. I believe no such thing, says he; and upon that went away. But the next day there was a paper printed by somebody; and Richard Hathaway comes to us afterwards, and says, you have printed a paper, though you would not have it of me: but it is not true, says he; I can give a better account.

Mr. Broderick. Then he talked very freely to you, though he had not eat in six weeks before?—*Ball.* Yes, Sir.

Mr. Broderick. And he looked very well?

Ball. Yes, Sir; and we wondered at it.

Mr. Conyers. Call Mr. Hearne, (who was sworn). Mr. Hearne, pray give my lord and the jury an account of what you know of this matter.

Hearne. About September was twelvemonth, my sister was fallen upon by this Hathaway, and scratched and abused in a barbarous manner; and about six weeks after, she was scratched again. After this, we went before justice Riches, and justice Riches persuaded them to be quiet, and not to trouble this woman; and he persuaded her to remove to some other place. After this there was a tumult made about her in Newgate-street.

Mr. Conyers. Were not you present when Dr. Martin was with the defendant?

Hearne. Yes, Sir.

Mr. Conyers. Then give an account of that.

Hearne. I went to Dr. Martin; and Dr. Martin told me that he would try a stratagem (to see whether he was bewitched) by making him scratch another woman. I told him, I was afraid we should be betrayed. Says he, let me alone to manage it: so I said no more. Says he, do you go and fetch Sarah Morduck to me, and I will go before. So I came with my sister to Welling's house, where Dr. Martin was, and there was a house full of people: and then he ordered the door to be shut; and then Dr. Martin left me at the bed-side, and he got a woman that was willing to be scratched. She refused at first, but afterwards consented. And then Dr. Martin brought them into the room where Hathaway was; and he asked him if he did believe that scratching Sarah Morduck would do him any good; if he did, he should hold up his hand; and he held up both hands. Says he then to Sarah Morduck, are you willing to be scratched? Yes, her heart's blood to do him good. Then give me your hand, says he; but instead of hers, he took Mrs. John-

son's hand, and gave it into Hathaway's hand. And Hathaway took her by the wrist, and felt her several times. Then says Dr. Martin, if you will scratch her, scratch her, I cannot wait on you always. Then he fell to work, and Dr. Martin said, he will open his eyes presently, there is blood enough; and he presently opens his eyes and catches Sarah Morduck by the apron, and holds her as fast as he could, and the woman that was scratched was gone into another room: with all the strength I had, I could hardly loosen his hands from Sarah Morduck. Now, says Dr. Martin, you are mistaken, this is not the woman you have scratched; and then his countenance changed, and he looked like a fool, he was so surprised. Then says Dr. Martin, where is the woman that he scratched? And I fetched Johnson out of the other room, and shewed him her arm, that she was the woman he had scratched. Says Dr. Martin, I see what you are; go and mind your business; or to that effect; and then we went away. This was about twelve or one o'clock the 11th of February. And when we were gone, the same day, as soon as it was dark, they got half a dozen lusty fellows to go to Sarah Morduck's house, and there they abused her.

L. C. J. How do you know that? did you see it?

Hearne. My lord, I will tell you presently. When she had had this mischief, she sent for me; and when I came, her shift on her back was as wet as muck. She sent for me, because she had none to assist her but me, and I found her that night in that pickle. They said, as soon as we were gone, the fellow was bad again, and they have put this trick upon us; but we will have the right witch to scratch her.

L. C. J. Who was at the house that night that you say she was in an ill condition?

Hearne. There were several at the house then; Mrs. Sarah Hays, the landlady, was there, and others.

L. C. J. You say they were in a hubbub, and would have the right woman scratched. Who was it that would have it so?

Hearne. I heard so. But when I came to her, I found her in a lamentable condition. Then I went to justice Riches, and desired his warrant to take some of them; and he granted it, and I took up one Osbourn; and when I came with him to justice Riches, we had nobody to swear that she was lame a-bed, and so he was discharged; and justice Riches said, if there be no other to prove it on the trial, you will spend a great deal of money to no purpose, and therefore he let him go. So she was moved to Paul's wharf, but a company of fellows followed her thither.

L. C. J. How do you prove that?

Hearne. I heard of it, and desired the landlord to send for a constable; he did so; and when we came there, all the people made their escape, except Hathaway and another person. So then she was carried before sir Thomas Lane; and they telling him that he had vo-

luted pins, and other things, sir Thomas was persuaded to believe it. I told him, these fellows had disturbed this woman's peace, and very much abused her. Sir Thomas, will you not let me know who this man is?

L. C. J. What man do you mean?

Hearne. Jones. I begged, pray let me know this fellow's name. Says he, it is no matter, there was provocation enough. And then, when we were talking of the pins, Dr. Hamilton looked in Hathaway's mouth, and found his mouth very well; and he gave him beer; and he, when he had taken it, struggled with all his might to keep it out; then he cried out. Let her be scratched, said sir Thomas. Dr. Hamilton said, forbear a little, let us see the effect of this beer; and so they forbore a little longer. Then they talked again of the pins, and Dr. Hamilton would have her scratched again; so he spake to the woman about it, but she would not consent; for she said she had been abused, and would not be scratched, unless they would secure her for the future. But sir Thomas would have her scratched; and so she was; and then, when she was scratched, and he had drawn her blood, the fellow bristled about like a cock-sparrow; and then they called for bread and cheese; and so he that before pretended he could not swallow any thing, showed like an antick to the people, for he was very greedy. And when he had eaten that, he called for more; and Welling said, pray, let him not have it, it will do him hurt, because he has not eat so long. Then sir Thomas Lane ordered her to be stripped, and she was stripped above stairs, and then he would commit her to prison.

L. C. J. Why? did any body say she had any thing extraordinary about her?

Hearne. No. Dr. Hamilton said, she had nothing about her: I offered 100*l.* security for her; and sir Thomas Lane would not take it. But when Dr. Martin had been with her at night, I bailed her out.

Baron Hatsell. Was this Hathaway dumb when he was at sir Thomas Lane's?

Hearne. He spake before, and when sir Thomas Lane bound her over to the Old Bailey, and all that time he was as well as could be.

Serj. Jenner. Was you at the assizes at Guilford?

Hearne. Yes, and gave testimony for her there.

Mr. Conyers. My lord, we have a great many others that were present with Dr. Martin; but we have proved that matter sufficiently. Now we will shew how he behaved himself at Mr. Kensy's. [Call Mr. Kensy, who appeared and was sworn.] Mr. Kensy, do you know Richard Hathaway?—*Kensy.* Yes.

Mr. Conyers. Was he not committed to your care?—*Kensy.* Yes.

Mr. Conyers. When was it?

Kensy. It was in November last.

Mr. Conyers. Now pray give my lord and the jury an account of what you know of his fasting.

Kensy. He was brought to my house the 1st of November last, about noon. I went to see him at the King's-bench, where, about nine in the morning I found him in bed. The servants in the prison told me his tongue was swelled. At my request he put out his tongue, which I found in a very good state and colour, free from any induration or contraction. I observed the glands under the tongue, also his throat, so far as I could see, free from any preternatural accident or impediment. He was brought to my house about twelve the same day. I kept him in the room where we dined, and offered him meat and drink several times, which he refused. About eight at night we put him to bed, and took his cloaths out of his chamber. The next morning we offered him meat again, and he refused to eat; and we brought him his cloaths, and he was surly, and would not rise. At night I offered him a glass of cordial, which he also refused. At the same time we found his rug wet, which we discovered to be his urine dropping through the tester of the bed, he having hid his urine upon it in the cover of a large box, through which it drained. And I threatened to discover him, and said, Pray, discover who set you to work in this matter; I look on you as a poor innocent fellow, and that you are set on by others that have more wit; but he would discover nothing. The next morning I forced him to rise, and I found him resolute in his humour of fasting: I found persuasions and promises of a pardon could not prevail, nor threatenings that I would starve him if he would not confess; so I feigned a quarrel with my maid, and railed at her in his presence, saying, she was as very a hypocrite as Richard Hathaway, and that I would be troubled no more with her. And I ordered her, so soon as my back was turned, to rail against me as bad as she could, and charge him not to take any thing from me or my brother, for she alone would take care to feed him. After this, we took him up every day, and contrived places and holes, whereby we discovered him to eat and drink heartily; sometimes three times a day, he thinking nobody was witness to it but the servant. Particularly one day I had fish and oysters for dinner, and I ordered the maid to give him some, and to give him strong beer and brandy too, and he eat and drank freely. And afterwards he brought up his dinner, and I coming in, told him I was glad the witch was found out at my house, and I told him to-morrow I would find out the pins and needles. He took the poker, and raked the ashes over it, that it might not be seen what he had vomited.

L. C. J. But did he know that you saw him eat?

Kensy. No, my lord. The next day I offered him something to eat, to see if I could make him speak; but he pretended to be so faint, that he could not get off his chair; this was after he had eat several days. And he danced and played on the tongue.

L. C. J. But did you not see him drink?

Kensy. Yes, my lord.

L. C. J. But did he know you saw him?

Kensy. He thought nobody saw him but the maid; but I saw him drink.

Mr. Broderick. How did you see him?

Kensy. I hid myself in a dark place in my own buttery, and did see him eat and drink several times. I did not see him eat every day. But the eighth day he endeavoured to make his escape. My brother and my sons went into his chamber with his cloaths, and Hathaway having dressed himself, watched his opportunity, and jumped out of the room, and bolted them in. But they staying so long, I sent the maid up, and she met him stealing down stairs, and then he went back again and let them out. On Monday the 10th, I gave him his cloaths, and I being alone, he had not patience to dress himself, but immediately seized me; but struggling with him, he pretended feebleness, and fell on the bed.

Mr. Conyers. Can you give an account of any thing afterwards?—*Kensy.* Yes.

Mr. Conyers. What discourse had you with him then?

Kensy. I will tell you. He was very surly. That was the first day he spoke. I came to him, and told him he was a fool; that his friends were in custody, and had not been true to him, but had discovered the whole matter; and advised him to make a discovery himself; and if he would, I would go with him to my Lord Chief Justice. Upon that, he cried passionately, and said he would tell the Lord Chief Justice the whole truth: But my lord not being at his chamber, he, in about an hour, recanted, and said he was bewitched. When he cried, he asked if his mother was safe.

Mr. Conyers. Did he at any time tell you how long he had fasted?

Kensy. Yes. He made signs that he had fasted several times, when we had seen him eat; and he took his cloaths and wrapt them over him. And I said unto him, How long hast thou fasted before you came to my house? He made signs that he had fasted ten weeks.

L. C. J. Did he pretend to be dumb?

Kensy. Yes; and I asked him how long he had fasted at my house? and he pointed, two more.

Mr. Conyers. You say he made signs that he had fasted ten weeks before he came to your house, and two weeks while he was there: Now, how often did you see him eat at your house after the two first days?

Kensy. I saw him eat several times at noon and night; and after I had seen him eat, I would have persuaded him to eat, and he made signs still, as if he could not eat, and shook his head.

Serj. Jenner. How did you know what he meant by shaking his head?

L. C. J. How did you know what he meant by his counting? How did you know that he meant weeks?

Kensy. He counted upon his fingers, my lord. I asked him how many weeks he had

fasted before he came to my house? and he counted ten fingers: And how long he had fasted at my house? and he counted two more. And I asked him, whether he had fasted twelve weeks then? and he made signs of twelve.

Serj. Jenner. You say he was dumb, and yet could hear!—*Kensy.* Yes.

Serj. Jenner. How is that likely, that he should hear, and yet was dumb?

L. C. J. Cannot a man hear, though he be dumb?

Mr. Conyers. Call Elizabeth Baker. Where is she? [She was sworn.] Were you a servant to Mr. Kensy when this man was at his house?—*Baker.* Yes, I was.

Mr. Conyers. Then pray tell my lord and the jury what you know of him.

Baker. Richard Hathaway came to my master's house about twelve o'clock on Saturday. When we went to dinner at one o'clock, my master offered him meat and broth, and he refused it; he was asked to eat several times, but still refused it. They asked him again at night, and he shook his head, and would not eat. And when he went to bed, we took his cloaths, and locked him in. And the next day he refused to rise; and at noon they went to see if he would eat any thing, and offered him a glass of sack, and he refused it. And on Monday morning he was asked to rise again, and he would not; but my master would have him rise; and would have him come down and sit by the fire; and when he was come down, asked him to eat, but he would not. And at last he looked in his mouth, and said, he saw nothing but that he might eat and drink, if he would. And my master said to me, when I am with him, I will call you up, and take an occasion to fall out with you, and when I am gone, do you rail at me, and tell him he should take nothing of me or my brother. And so I did; I said, my master called me presbyterian jade, but I said I did not know what religion he was of; and that he was not more willing to have me go, than I was to be gone. And I told him he should take nothing of my master or his brother, I would look after him while I staid. So I went out of the room, and fetched a glass of brandy, and gave it to him. But there was a child with me, and he refused to drink it, with a sign pointing to the child; so I said I would hide the child, and I stood between him and the child; and then he drank it. And the same day I gave him some pudding and small beer; and at night I carried him a pint of ale and a toast, but found he had not eat the pudding. I saw him eat the toast and drink the ale; but I did not see him eat the pudding, though I suppose he eat it afterwards; for I saw it no more.

Juryman. In what manner did you convey this provision to him?

Baker. My master gave me the key, and I went in and staid while he eat and drank, and I made him believe I had got the key by stealth. And I gave him a glass of brandy on Monday night, and he drank it. And the

next day he eat and drank; he drank some broth, and eat boiled mutton at noon; and at night he eat a chop of mutton, bread and cheese, and drank beer and brandy. On Wednesday we had a shoulder of mutton roasted, and after they had dined, I gave him a plate of meat, and he eat it in the kitchen with me, and drank freely. And so he did every day after while he was at our house.

Mr. Conyers. Did any ever see him eat besides yourself?

Baker. Yes. That day that we had fish, he was in the kitchen; and being there, he went and washed his hands, and I gave him a plate of fish, and set it by him; and he took it, and eat it. And I gave him a bottle of stout, and told him, it was my birth-day, and he must drink my health; and after he had drank it, he pointed to his forehead, signifying it was got into his head; and about two hours after, he was very merry, and danced about, and took the tongs and played upon them. But after that he was mighty sick, and vomited sadly. And, says my master's brother, we shall see the pins and needles now. And to hide it, he falls a pulling the fire over it.

Mr. Conyers. Did any of the neighbours see him eat?

Baker. The 11th day of the same month, we had a shoulder of veal for dinner; and after dinner, my master bid me set by some for him, and he would have some gentlemen to see him eat it. They were accordingly hid in the buttery and coal-hole; and Richard Hathaway was brought down, and he took his bread and meat, and eat heartily, and drank with it.

Mr. Raymond. Who were those gentlemen that saw him eat?

Baker. Mr. Collet, Mr. Norberry, Mr. Page, and Mr. Stanton.

Mr. Conyers. These persons are here.

Serj. Jenner. My lord, all this is of what was done after the trial, this evidence ought not to be given; the record bears date the first day of the term, and all this is said to be done in November; it is all after the record.

L. C. J. It is to prove the imposture committed before now. What Mr. Kensy says of his pretending to fast twelve weeks, though two or more be not within the time of the information, I hope they may give it as evidence subsequent to prove what was done before.

Serj. Jenner. But I oppose all this of eating at their house.

L. C. J. It is an evidence of his cheating since that time, and that out of the information; but it is an evidence also to prove that his pretended fasting before was a mere deceit; for he then pretended to have fasted ten weeks before he came thither, and after pretends to continue fasting in the same manner: if that be proved to be a fraud, it is strongly to be inferred, that this pretended fasting before was so too.

Serj. Jenner. But then they may not give evidence in matter after.

L. C. J. Matter afterwards that proves a

thing done before; for if a confession be made subsequent to an indictment for a crime, shall not that confession after be brought as evidence of the thing done before? Sure it may.

Serj. Jenner. And will that prove what was before?

L. C. J. It is certainly so. The thing is, Whether I can give in evidence any thing after to prove what was done before? If he pretends to fast twelve weeks, ten weeks before he came there, and the two weeks after, he did not fast but only pretended it: Whether what he did after be not evidence of what he did before? Sure it is. For he that cannot hold out fasting two weeks, but was glad to eat, though he pretended to fast, may strongly be presumed to have eaten during the ten weeks, though then he pretended to fast.

Mr. Conyers. Call Mr. Stanton. (Who appeared.) Was you at Mr. Kensy's house to see Richard Hathaway eat?

Stanton. Yes. Mr. Kensy came to me the 11th of November, and desired me to come to his house, to see whether he eat or drank or not; and I went, and was put into a dark place, and I saw the victuals before he was brought; there was five slices of meat, and bread, and beer. And he was brought where it was, and he looked about him earnestly to see if any one saw him, and then he fell to, and eat as heartily as any man could. And hearing a noise whilst he was eating, he run away with it and set it on the dresser. The maid said, there is nobody coming: and then he went to it again, and eat it up, and drank the drink, and sat down by the fire. And afterwards we went to him, and carried a bottle of drink with us, and drank to him; but he made signs that he could not drink, and shewed us that his belly clung to his back, which we thought was very strange.

Mr. Conyers. Call Matthew Shipps, and — Baxter. (They did not appear.) Jo. Hunt. (He was sworn.) My lord, we call this man to give you an account of the strange noises that they pretended were heard in Mr. Welling's house; and we will make it appear how that noise came. Mr. Hunt, pray give an account what you know in this matter.

Hunt. My lord, an acquaintance of mine, one Kelpin, told me that he had watched with Richard Hathaway one night; and the next day he came to me, and told me he fell asleep, and had not watched him as he ought; and desired me to sit up with him, and to observe him as narrowly as I could, and see if I could find any deceit in him. Accordingly I did so; and when I came into the room, I sat down on the bed side. There were two gentlemen in the room, Mr. Pocock, and Mr. Butler, and Thomas Welling. He lay as if he were almost dead. In a little time his master, Tho. Welling, brought in some pins in a coffee dish, and said he had brought them up that day, and that he believed he would bring up more. And after this seeing of the pins, I went to Mr. Pocock, and said,

I did imagine the pins might lie in his mouth, rather than in his stomach; and therefore it was very proper to have his mouth searched. And Mr. Pocock replied, Who will venture to do it? And I said, if they would wash the fire poker clean, and put it into his mouth, to prevent his biting my finger, I would do it. Immediately upon this Hathaway raised himself, and began to make a reaching, as though he would vomit; and then Welling and his wife said, Now he is going to bring up pins. Thereupon I kneeled down by his bed-side with a candle in my hand to observe his motions; and after he had strained some time, he made a motion with his tongue at each side of his mouth, but I could not perceive any thing come up his throat, though his mouth was wide open; and by and bye he drew up his mouth, and turned out two or three bright pins, and presently after two more, which I caught in my hands, and shewed them to the company, saying, they are bright and new; and his master said he believed they came out of some chandler's shop. Afterwards Hathaway lay down very quiet, and so continued for some time. And Welling's wife coming into the room, asked, why the charms were not put on? I replied, I have been told the charms have been always taken off from him by the witch; but was resolved to watch so narrowly that night, that they should not be taken from him. Then Welling and his wife offering to put on the charms, Hathaway made a struggling, as though he was unwilling to have them on; and Welling said, You have always found benefit by it, Why will you not? They are ordered by Mr. Butler.

L. C. J. What are those charms?

Hunt. Three little things in black bags, I did not know what they were. And they asked him whether he was willing they should be put on; if he was, he should hold up his hand: But he was unwilling. But I said, I was minded to have them put on; so he lay still, and Mrs. Welling, or some other woman, sewed them to the bosom of his shirt. After the charms were put on, I watched to see what would become of them; and perceiving Hathaway to make several motions with his hands about them, I struck his hands. I bid him either keep his arms straight in the bed, or else put them out of the bed, for that the charms should not be taken off that night. Then I and the company sitting still about the bed, Welling said, Harken, you will not believe; hear what a noise there is: the like is heard here almost every night. Whereupon all were silent. At last I heard a small scratching or rubbing at the bed's feet; and putting my head close to the bed's feet, listening, I heard something shriek; and perceiving the bed cloaths stir, I took hold of the fellow's foot, and said, I have caught the witch that made the noise. I thought it had been mice at first; but seeing the cloaths move, I caught his foot. Thereupon Hathaway rose up, and in a passion made a motion towards me with

both his hands; but I lifting up his foot, he fell back upon his pillow, and lay still, and the noise ceased; and about five o'clock in the morning I left him, and the charms upon him.

Mr. Conyers. Call Elizabeth Brand. (Who appeared.) Pray give an account what you know of any collection of money for Richard Hathaway.

Brand. There was betwixt six and seven pounds gathered.

L. C. J. How was it gathered?

Brand. We went about to get money for him to bear his charges to Guilford, and we got betwixt six and seven pounds.

Mr. Broderick. Do you know of any other sums that were gathered for him?

Brand. Yes; but I know not how much.

Mr. Conyers. Who employed you to do this?

Brand. A great many of the neighbours.

L. C. J. Who was the money paid to?

Brand. To Mrs. Welling.

Mr. Conyers. Do you know any thing of his scratching Sarah Morduck?

Brand. I over-persuaded her to let the fellow scratch her.

L. C. J. Did she consent to it?

Brand. Yes, my lord, I called her, and said to her, let me persuade you to let this fellow scratch you; and she bid me go and fetch him, and he came, and sits him down on a low seat. Says she, will you engage he shall not scratch my eyes out? At last he scratches, and there came no blood; and he scratches again, and then the blood came; and he cried, O my eyes! O my eyes! and I said, now the blood comes, and he stared. Says I to him, can you see me? Yes, says he, as well as ever I could.

Mr. Conyers. Mr. Hearne, you was at Guilford assizes; How long did this fellow pretend he had fasted?

Hearne. I cannot be positive what he said at the trial as to that; but they said he had fasted six weeks, before Dr. Martin tried the experiment with him.

Mr. Conyers. Call Matt. Shippo. (He was sworn.) Was Richard Hathaway under your custody?

Shippo. Yes: He was brought from Guilford assizes upon the 31st of July last. He came home at eleven a-clock at night, and they told me he was come a prisoner from Guilford to the Marshalsea, where he continued four days, and he was ordered to lie with me, and every night that he lay there, he slept very well to my thinking: And several times I asked him how he did? He answered, he was pretty well; and every day while he was there, he eat and drank with me, as the rest of the servants of the house did, and was not in all that time in any fit as I could perceive, but went very well out of the prison.

L. C. J. What did he say at the assizes about his fasting?

Shippo. I was not at the assizes.

Mr. Conyers. Then we must leave it here.

Mr. Broderick. My lord, we have the woman here that they pretended was the witch; but it

may be, they may think it not proper, and therefore we shall let her alone.

Serj. Jenner. My lord, and you gentlemen of the jury, I am counsel for the defendant, Richard Hathaway, who is indicted for a cheat and impostor; and it is for pretending himself to be bewitched, and that he has used indirect arts and means to make people believe he was so bewitched; and that this Sarah Morduck was the person that had bewitched him; and that this was contrived by him, in order to bring mischief and damage on this Sarah Morduck, and to the evil example of the queen's subjects. You have heard the evidence that has been given, and therefore I shall not repeat it, but only observe some good things to you. The doctor has taken a great deal of pains in this cause; but that which he does tell you by hearsay, what other persons have told him, is not such evidence as you are to take any notice of, that is, what Johnson told him, and likewise what other persons told him concerning this man; for what they have said to him of this man, though it may be true, is not to come under your consideration. There are several others that have given evidence of what other persons have said, and they have given it as their opinion that what this man did was the cause of their doings; of which you are to take no notice. But, my lord, that which seems to bear most hard upon us, is, That because the doctor, and several others have been abused, both before and after the trial, for what they endeavoured to do; therefore they would insinuate as if my client had had a hand in it. But if a man be doing any thing, and another takes the advantage of it, to do another a mischief, I hope that mischief shall not be laid to his charge. My lord, there is one man that has given a great deal of evidence as to his vomiting of pins, and says that he was by, and he swept the ground, and after he had vomited, there were pins upon the ground; and when he had a chamber-pot to vomit in, he could not find any pins there, but there was some upon the ground again. So likewise for his fasting, you have had evidence to prove that a cheat. And this seems to affect him most, that all this pretence to be bewitched, and vomiting of pins, and fasting, was a cheat. This is the matter that they accuse him of. Of which if he be really guilty, I come not here to defend him; but I am to defend him as far as witness will do. And now, my lord, if my brief be true, we shall satisfy you that my client was in a very lamentable condition, such as one would think no man could be in and live; and I will lead you by these steps. When he was thus disabled, could neither speak, nor take sustenance, his master, after he had served him two years, and he had lived very civilly, and behaved himself well in his master's service, till he fell thus ill: Then he was so ill, that after the master had spent a great deal of money with doctors and apothecaries, he could get no cure for him; then he got him into the hospital, and there he continued a long time, and at

last they gave it in that he was incurable, and they turned him out. But his master made interest, and got him in again, and he continued some time there again; and there it was that he was first thought to be bewitched: For they had him twice, and could do no good with him, and the tenders told him, he must lie under some evil tongue; and thereupon he was turned out as incurable, and with that instruction that it was an incurable disease. So he came home again, and his master and mistress were acquainted with it; and they consider what person it should be that should have any evil design against him. And at last they recollect, that his master had taken a room over the head of this Sarah Morduck, and she had gone to the shop often, and had given them very ill words, and she should be even with him one time or other; and therefore they concluded this woman was the person. Upon this there were many things contrived, what course they should take to do him good, and there was one thing concluded upon in order to his ease (which I think none should advise,) that is, the business of scratching. But this woman, when she was accused by them of bewitching him, offered herself to be scratched, and she was scratched, and from thence this man found ease. But afterwards he fell ill again, and he went into London, and was examined at sir Thomas Laue's, and upon examination they thought that this man did lie under such an affliction. I cannot say it is an irreligious thing to say there are witches in the world; but this man lay under such a distemper, that no doctor could know what to do with it. And they could not imagine who should do it but this woman, and she was there scratched by him, and he did find relief by it. My lord, this being the matter of fact, we shall call very substantial witnesses to prove it. As to his fasting, we shall prove that he was put under the care of very substantial persons, and that he did not eat or drink for three weeks or a month; so that it will appear we had no contrivance in the world, but only would get ease if we could. We have twenty witnesses to call.

L. C. J. Let them all be called. Call as many as you will.

Serj. Jenner. Call Anne Eaton. (She appeared.) Do you know Richard Hathaway?

Eaton. Yes, Sir.

Serj. Jenner. How long have you known him?

Eaton. Ever since he came to his master.

Serj. Jenner. How long is that?

Eaton. About five or six years?

Serj. Jenner. Do you know what condition he was in two years ago?—*Eaton.* Yes.

Serj. Jenner. Then pray give my lord and the jury an account of it.

Eaton. I watched with him several nights.

Serj. Jenner. Where did you watch with him?—*Eaton.* At his master's house.

Serj. Jenner. In what condition was he then?

Eaton. He was in a very bad condition, he was dumb and blind, and his senses were gone,

and he seemed as if he were dead; and when his senses have come to him, he has burned like a flame of fire.

L. C. J. How long did you watch with him?—*Eaton.* About nine weeks.

L. C. J. Did he fast all that time?

Eaton. Yes, my lord.

L. C. J. Might he not eat in that time, and you not see him?

Eaton. I was constantly with him at nights, but not in the day; I have been with him four or five days and nights together, and did not see him eat or drink.

L. C. J. What time was this that you watched with him?

Eaton. From the time that he came from madam Davenport's till your lordship confined him.

L. C. J. Who put him to madam Davenport's?

Eaton. I had nothing to do with that.

Serj. Jenner. Can you not tell what month that was in?—*Eaton.* I cannot tell that.

Mr. Raymond. Did you observe him all that time?

Eaton. When I went out, I left one always in my room.

L. C. J. You say you were with him four or five days and nights together.

Eaton. Yes, my lord.

L. C. J. Were you with him all night and all day?

Eaton. My lord, some days I had occasion to go out, but then I left some neighbours with him.

Serj. Jenner. Call Gibson. (Who appeared.) Do you know this man, Richard Hathaway?

Gibson. I have seen him in a deplorable condition.

Serj. Jenner. When was this that you saw him?

Gibson. About two years ago. His master asked me to go and see him; and when I came up, I saw him foaming at mouth; I thought he would not live till morning. The next day his master desired me to watch with him at night; and I did, and he was so bad, that I thought he would not live till morning. Afterwards I saw him again, and he was blind and dumb, as it appeared to me. And he had a strange motion, he threw himself forward, and afterwards threw himself backward, as if his head lay in the reins of his back; and I said to this woman then, I believe he has broke his back. I believe this was after he came from madam Davenport's, about the time that he appeared at the bar at Westminster.

L. C. J. The first time that you speak of, when you say he was blind and dumb, you say that was two years ago; was he blind and dumb, when you saw him the second time?

Gibson. Yes, the second time I saw him he was blind and dumb. I saw him in a deplorable condition three times.

Juryman. We desire to know the circumstances of his condition.

L. C. J. The jury desire to be satisfied of

the circumstances of his condition. You say you saw him two years ago, and he was then in a deplorable condition, and you saw him twice after; the jury would have you describe the circumstances of it as plain as you can.

Gibson. His master desired me to go to him, and I was willing to oblige him; and when I came to him, he was both blind and dumb.

L. C. J. How long was this after you saw him the first time?

Gibson. About half a year after.

L. C. J. Are you a neighbour?

Gibson. Yes, my lord.

L. C. J. You say you saw him two years ago, and you say he then foamed at mouth and nostrils; was he blind and dumb then?

Gibson. No, my lord; but he was when I saw him the second time.

L. C. J. When did you see him after?

Gibson. It was about a twelve-month after that I saw him.

L. C. J. And not before?

Gibson. He was seven weeks in the hospital.

Mr. Broderick. Then you did not see him in the hospital?

Gibson. I did; but he went almost double.

Mr. Broderick. Did you hear any thing of Mrs. Morduck then?—*Gibson.* No, Sir.

L. C. J. What trade are you?

Gibson. I am a glazier.

Mr. Conyers. Have you no other trade?

Gibson. Sometimes I work at the Custom-house. One Sunday we went to hear Dr. Pead; and Richard Hathaway went with us. And when we were gone out a door, he could not speak; and when we came upon the bridge, his face was drawn awry so strangely that it astonished me; he staggered the length of this table, and his face was drawn back again, and he fetched a reel; but in a quarter of an hour he spake, and his speech continued till he came to Gracechurch-street, and there we met Mr. Fox; and so he continued till we came to Bishopsgate: but coming to Houndsditch, he made motions that his speech was gone again.

L. C. J. Did you hear him speak at Westminster?—*Gibson.* No, my lord.

Serj. Jenner. Call Flummery. (Who appeared.) Do you know this man?

Flummery. Yes, I am a neighbour.

L. C. J. What is thy name?

Flummery. Flummery. After Guilford assizes I went to see him, and he was in a lamentable condition; he was like a stock, or stone, blind and dumb. I went to see him—

L. C. J. Did you ever see him before?

Flummery. I saw him several times, but took no notice of it; but then his eyes stood wide open.

L. C. J. And yet you say he was blind; how could that be?

Flummery. My lord, I will tell you how; I tried him, I wagged the hair of his eye-lids, and put the candle to his eyes, and he took no notice of it.

L. C. J. How could you know that he did not see?—*Flummery.* I tried him.

L. C. J. How did you try him?

Flummery. I tried him with my fingers, and his eyes would not wag.

L. C. J. Did he not look then as he looks now?—*Flummery.* No.

Mr. Broderick. Did you speak to him then?

Flummery. Yes; but I could not make him hear nor answer me.

L. C. J. Could he speak then?

Flummery. No, may it please your lordship.

Anne Pearse sworn.

Serj. Jenner. Anne Pearse, pray tell my lord what you know of this Richard Hathaway.

Pearse. I belong to the hospital. When he came into the hospital, he was very bad.

L. C. J. Was he blind and dumb when he came in?

Pearse. After he was brought in, he was put to bed, and he was taken with a fit, and I was called to him, and I came to him, and he did not stir much, and turned up his eyes. And afterwards one of his master's journeymen came to him, and he raised him out of his bed; and one came to me, and said, Sister, he is come to the fire, but he is very bad still. Says I, What did you raise him out of his bed for? He went upon his ankles almost, he went very weakly, and continued so for some time.

Serj. Jenner. How long was he in the hospital?—*Pearse.* About five months.

Serj. Jenner. Was he out, and came in again?

Pearse. Yes, he was. He complained he could not go to stool; and the doctor gave him quicksilver; and when it came from him, I heard the apothecary made him take it again, and swallow it again.

Serj. Jenner. When he came in the second time, were you there then?—*Pearse.* Yes.

Serj. Jenner. How long was he there the second time?

Pearse. How long he was there the second time I cannot tell.

Serj. Jenner. Can you tell when he was put in the second time?—*Pearse.* No.

Serj. Jenner. What was your opinion of him?

Pearse. I apprehended him to be in a very strange condition; he lay seven or eight days, and did not eat or drink; he had taken quicksilver, and it did not come from him, and the doctor wondered it should lie so long in his body.

Mr. Broderick. Did the doctor or you apprehend any thing of witchcraft in the case?

Pearse. No, Sir. But at this time his eyes were set in his head.

Mr. Broderick. When he was recovered out of those fits, did he pretend that he was bewitched?—*Pearse.* No.

L. C. J. Did you never hear him complain that he was bewitched?

Pearse. No, my lord, I did not hear of that.

Serj. Jenner. Call Jo. Smith. (Who appeared.) Mr. Smith, Do you know this person, Richard Hathaway?—*Smith*. Yes, Sir.

Serj. Jenner. How long have you known him?—*Smith*. About five or six years.

Serj. Jenner. How far do you live from him?

Smith. I believe about two stoness-throw.

Serj. Jenner. Were you well acquainted with his condition two years ago?

Smith. Yes; I have done business for the family several years. About five years ago I found him much afflicted with convulsion fits at his coming to his master.

Serj. Jenner. How was he about two years ago?

Smith. He was in a very strange condition; and I advised his master to get rid of him, and to get him into the hospital.

Serj. Jenner. What did he ail?

Smith. He lay in a very strange condition.

Serj. Jenner. How did he lie?

Smith. He lay struggling and striving often, and sometimes like a man that was dead; and once, when he lay in that condition, I laid cupping glasses to him, and that enlivened him.

L. C. J. What did you imagine ailed him? Did you think he counteffeited or not?

Smith. Indeed, my lord, I cannot tell that.

Serj. Jenner. Why did you advise his master to put him into the hospital?

Smith. I cannot tell.

Mr. Phipps. You say, you have known him five years, and that he has been troubled with fits. Did he ever talk of being bewitched till within this two years?

Smith. No, not till within this two years.

Baron Hatsell. When he lay seemingly dead, you do not know whether he counteffeited or no?—*Smith*. No, my lord.

Baron Hatsell. Do you think a man can be in such a condition as he seemed to be, and yet only counteffeited?

Smith. Indeed, my lord, I know not. I examined him, whether he was subject to those fits formerly; and he told me, he was very much troubled with them in the country.

L. C. J. You do not answer the question. Cannot a man counteffeited in such a case? What do you think of that?

Smith. Without doubt, it may be counteffeited.

L. C. J. You say, when he was in those fits, you put cupping-glasses to him, and it enlivened him; now, if he were in a real convulsion, do you think it would have enlivened him?

Smith. Sometimes it may be so.

Serj. Jenner. Call Elizabeth Willoughby (she appeared). Mrs. Willoughby, pray, give my lord an account whether you know Richard Hathaway, and what you know of him.

Willoughby. Sir, I have seen him since the seizures at Guildford.

Serj. Jenner. Did you never see him before?

Willoughby. Yes.

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Serj. Jenner. Then give an account of what condition you have seen him in.

Willoughby. I have seen him when the breath came out of his mouth like the barking of a dog. I had a child that was troubled with fits, and I was above stairs, and I heard a great noise; and I went out of the door to see what was the matter, and over the hatch lay Richard. Lord bless me, says I, is it you makes this noise? And I could not fancy any thing, but that it was like the barking of a dog.

L. C. J. How thick was it? Was it not like other folks?—*Willoughby*. No.

Serj. Jenner. What ailed him?

Willoughby. I cannot tell what ailed him.

L. C. J. Do you think he was bewitched?

Willoughby. I believe he was, my lord.

L. C. J. I suppose you have some skill in witchcraft. Did you ever see any body that was bewitched before?

Willoughby. My lord, I have been under the same circumstances myself, when I was a girl, in sir Edward Bromfield's time.

L. C. J. How do you know you was bewitched?

Willoughby. There was a woman taken up upon suspicion for it.

L. C. J. For bewitching thee?

Willoughby. Yes, my lord.

L. C. J. Did you scratch her?

Willoughby. My lord, I had no power to do any thing. I flew over them all.

L. C. J. You say, you were in the same condition with this man, and you say you flew; did you fast too?

Willoughby. One held me by one arm, another by the other, and another behind, and I flew sheer over their heads.

L. C. J. Woman, can you produce any of these women that saw you fly?

Willoughby. It was when I was a child; they are dead; it was in old sir Edward Bromfield's time.

L. C. J. What became of that woman that made thee to fly?

Willoughby. I cannot tell, I have been well ever since I was married.

Serj. Jenner. How were you cured of that witchery?—*Willoughby*. How do I know?

Mr. Conyers. Did you scratch her?

Willoughby. How should I scratch her, when I had not power to see her?

Mr. Conyers. And yet you believe this man was bewitched as well as you. What condition was this man in! How long did he lie in this condition?

Willoughby. Night and day he has lain over the hatch, and over the bed, and made a great noise with his breath.

Serj. Jenner. Who did you suspect had done him this harm?—*Willoughby*. I know not that.

Mr. Broderick. Are you a widow?

Willoughby. No, Sir.

Serj. Jenner. Call Keeling (who appeared). Do you know any thing concerning this Richard Hathaway?

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Keeling. I watched with him nine nights.

Serj. Jenner. What did he eat or drink all that time?

Keeling. He did neither eat nor drink, nor had he any stool all that time.

L. C. J. Did you watch with him nine nights and days?

Keeling. There was another man that watched with him in the day; as I came out, he was let in; and as he came out, I was let in.

Serj. Jenner. How long was this before the trial?

Keeling. Two or three days before he came before sir Thomas Lane.

Bridges sworn.

Serj. Jenner. Did you watch with Richard Hathaway?—*Bridges.* Yes.

Serj. Jenner. How long?

Bridges. Nine days.

Serj. Jenner. Did you watch with him the same days that he watched with him in the nights?—*Bridges.* Yes.

Serj. Jenner. Did you not stir from him till he came?—*Bridges.* No.

Serj. Jenner. Did you see him eat or drink all that time?—*Bridges.* No.

Serj. Jenner. Where was it that you watched with him?

Bridges. In an old empty house.

L. C. J. Where was this house?

Bridges. By a dock on the Bank-side in St. Mary Overy's parish.

L. C. J. How came you to put him into that house?

Bridges. The masters of the parish put him in it.

Mr. Webb sworn.

Serj. Jenner. Mr. Webb, did you get a house to put Hathaway in?—*Webb.* Yes.

L. C. J. How came you to do so?

Webb. His master used to work for me, and he came to me, and said, I cannot tell what to do with my man, unless the masters of the parish take some care of him; and I did speak with some of them about it; and they said, we will not trouble the parish about it, we will spend a crown a-piece, and put these men into the house with him.

L. C. J. You took the house then?

Webb. We borrowed the house, it being empty, and put in these two men. There were four or five neighbours more, and I said to him, they say you vomit pins; I will be satisfied whether it be true or no; and we stript him, and could find none about him; we searched his shirt, his stockings, his breeches, and his hat, but could find no pins about him.

Serj. Jenner. Did he eat or drink all the time you were there?—*Webb.* No, my lord.

Serj. Jenner. Did he vomit?

Webb. Yes; I went to him on Thursday morning, and he had a husky cough, and I thought he would have been choaked; and at last he made a crumb of spittle out of his

mouth, and there were three pins came from him in the spittle, as rusty as if they had laid in a ditch seven years. About Saturday following, he had, I believe, four pins more came from him; I took them, and I think the hands of man could not join them as those pins were. On Sabbath-day, in the morning, a gentleman came and desired him to go to church with him, and desired him to drink a pint of ale, but he did not drink half; and about five o'clock in the afternoon came Mr. Sutton the apothecary, and I staid with him till six on Monday, and heard not a word from him.

Juryman. What people came in to see this fellow while you watched him?

Keeling. No man, woman, or child, came to him the time I was there, but only that Sunday night that my masters were there; and I said, you do not put him here to starve him; and they bid me ask him if he would eat any thing: if he would eat any thing, he might have it.

Mr. Conyers. Did not you use to carry him out sometimes?

Keeling. We never carried him out.

Mr. Conyers. Just now you said he was out on Sabbath day.

Keeling. Yes, but never otherwise.

Mr. Broderick. Was he in a ground-room, or up stairs?

Keeling. He was in a ground-room.

L. C. J. Were there any windows in it?

Keeling. Yes.

L. C. J. Was there any casement?

Keeling. Yes, there was.

Juryman. We desire to know of this witness, whether he never was asleep in that time while he watched with him?

Keeling. No, I sat just at his head. I slept in the day-time.

L. C. J. You that watched with him in the day, did you not sleep all day?

Bridges. No.

L. C. J. How came you to concern yourself in this business? Are you one of the masters of the parish?

Webb. No, I am not; but it was my turn to be overseer, and his master spoke to me to speak to the church-wardens; and I did, and they said, they would not put the parish to the charge, but do it themselves.

L. C. J. What trade are you?

Webb. A lighter-man, my lord.

Dell sworn.

Serj. Jenner. Do you know this Richard Hathaway?—*Dell.* Yes.

Serj. Jenner. How long have you known him?—*Dell.* Ever since he was an apprentice.

Serj. Jenner. Did you know him two years ago?—*Dell.* Yes.

Serj. Jenner. What condition was he in then?

Dell. I was at the assizes at Guilford—

Serj. Jenner. What did you know of him before that time?

Dell. I took no notice of such things.

Serj. Jenner. Can you say any thing of him?

Dell. I can say, that the night before he was before sir Thomas Lane I watched with him, and he went to stool, and in his excrements there was a lump of hair, loose pins, a stump of a nail, half a nut-shell, and two or three pieces of stone.

Serj. Jenner. And this you saw?

Dell. I saw him in a very deplorable condition.

L. C. J. How? In what condition?

Dell. This is all I have to say.

Serj. Jenner. What do you call a deplorable condition?

Dell. He lay in such a condition as if he were dumb; and if he was not, I believe he is the greatest villain in the world.

L. C. J. How do you know those excrements came from him?

Dell. I was one of the three men that watched with him that night. We had two chamber-pots; these things were in the first stool, and when he had done the second stool, he sat on the pot, and when he had done, we looked, and there was nothing in it.

L. C. J. And were these things in the first?

Dell. Yes, in the first; in the other there was none. And there were twenty neighbours more that saw them.

Serj. Jenner. Was Benn there?

Dell. Yes, he was there.

Serj. Jenner. Mr. Benn, was this so?

Benn. Yes.

Serj. Jenner. Did you help watch with him?

Benn. Yes.

Serj. Jenner. And are you sure those excrements came from him?

Benn. Yes, I am sure. I stood over him with a naked sword.

Serj. Jenner. Why did you stand over him with a naked sword?

Benn. Because people said he was bewitched.

L. C. J. Who employed you to watch with him?

Benn. I went into the house, and I told his master, if they would watch him in the day, I would in the night.

Powell called.

Serj. Jenner. What do you know of this matter?

Powell. This man and I went up one night——

Serj. Jenner. When?

Powell. February was twelvemonth. We went up and looked upon him, and he lay as one dead, and he did not wag his eyes; and presently he hooked his neck about in such a manner that I thought he had broke it; and he foamed, and we took the foam from his mouth, and in it were five pins, the crookedest rams-hornest things that I believe no man could do them so.

Serj. Jenner. That was one night. Did you see the same at any other time?

Powell. Yes, sir.

L. C. J. But you did not see them come from him?

Powell. I took it from his mouth, and they were rusty.

L. C. J. How should they be rusty?

Serj. Jenner. The stomach will make them rusty. Call madam Davenport (she appeared). Madam, pray give my lord and the jury an account what you know concerning Richard Hathaway, when he came to your house, and how he was managed there.

Davenport. My lord, one Saturday I accidentally went to Dr. Hamilton's to visit his wife, and I saw with the doctor this fellow's master standing there; and I perceived he was come to desire the doctor to perform a promise he had made to him formerly——

L. C. J. Was this before the trial or after?

Davenport. It was after the trial. I came accidentally to the doctor's, and saw the fellow's master with the doctor.

L. C. J. Was the fellow there himself?

Davenport. No, my lord, I never saw him there. But standing there, I perceived him expecting the doctor to make good a promise he had made him about this fellow. I found the doctor demurred upon it, not knowing where to put him. At last, says he to me, Mrs. Davenport, will you let me have a garret in your house? Doctor, says I, you shall have my whole house at your service, if you have occasion for it: I thought nothing of this fellow, till the doctor told me it was for him. And the doctor told me he should come that night. Says the fellow's master, I will not send a bed, that the doctor may be satisfied there is no cheat. And the doctor, to prevent any cheat, desired me to go and buy an old bed. So I went and got a bed in Long-lane, and at night he was brought by his master and some of his neighbours. And truly I was surprised when I saw him, he seemed very weak.

Serj. Jenner. What did you do with him?

Davenport. They said he had fits, and I found I must take other measures with him than I thought of. His master desired he might be searched; and my son and two men more searched him. So he went to bed, and was watched with that night, and in the morning he was struck blind.

L. C. J. At your house?

Davenport. Yes, my lord.

Serj. Jenner. Did you appoint any persons to watch with him?—Davenport. Yes.

Serj. Jenner. Did you watch with him yourself?—Davenport. Yes, several times.

L. C. J. How long at a time did you watch with him?

Davenport. But one night at a time myself.

L. C. J. When you did watch with him, did you watch the whole night?

Davenport. Yes, several nights; and this gentlewoman or myself took care of him always.

Serj. Jenner. What did he eat or drink while he was there?

Davenport. Nothing. As for his fasting, the doctor gave me a great charge, and said he knew I would do it.

Serj. Jenner. All the time you watched with him, you say he did neither eat nor drink.

L. C. J. How many nights did you watch with him in the seventeen?

Davenport. But two.

L. C. J. How many days?

Davenport. Every day.

L. C. J. Did you watch with him every day yourself?

Davenport. Either myself, or this woman, or the servant, or my son *Davenport*. He is now gone to sea. My lord, I do not tell you I kept him in the garret all this time.

Serj. Jenner. When you left him, who relieved you?

Davenport. This gentlewoman or my servant.

Serj. Jenner. What is that gentlewoman's name?—*Walker.* *Walker.*

She was sworn.

Serj. Jenner. Mrs. *Walker*, did you watch with him in this place?—*Walker.* Yes.

Serj. Jenner. Did he eat or drink while he was there?

Walker. He did neither eat nor drink.

Mr. Congers. How often was it that you watched with him?

Walker. I cannot tell whether one or two nights.

L. C. J. I would be satisfied in some things. Is that *Davenport* you speak of your son?

Davenport. Yes, my lord. He is now gone to sea.

L. C. J. How long has he been gone to sea?

Davenport. But a week.

Mrs. Dorman sworn.

Serj. Jenner. Mrs. *Dorman*, did you watch with this man at Mrs. *Davenport's*?

Dorman. Yes.

Serj. Jenner. Within the seventeen days that he was there, did he eat or drink?

Dorman. No.

Mr. Phipps. How many nights or days did you watch with him?

Serj. Jenner. Give an account of the time when you watched with him, and no longer.

Dorman. Two nights, and every day.

L. C. J. He might have eat, and you not see him, might he not?

Dorman. But the time I saw him, he did neither eat nor drink. And he made water, and I believe five times more came from him than he took.

Mrs. Dean sworn.

Serj. Jenner. Mrs. *Dean*, do you know *Richard Hathaway*?—*Dean.* Yes.

Serj. Jenner. How long have you known him?

Dean. Not till he was at madam *Davenport's*.

Serj. Jenner. Were you there all the seventeen days?

Dean. Not all the time. I sat up with him two nights.

Serj. Jenner. Who sat up with you?

Dean. Madam *Davenport*.

Serj. Jenner. While you were there, did he eat or drink?—*Dean.* No.

Serj. Jenner. Call Dr. *Hamilton*. (He was sworn.) Doctor, pray give an account of what you know concerning this *Richard Hathaway*.

Hamilton. My lord, I have very little to say upon my own personal knowledge. But happening to be at sir *Thomas Lane's* when he was brought before him, I heard what passed, and I desired sir *Thomas* to let me try his throat,—and I did try it, and found nothing amiss. But at last I found there was nothing to be depended upon, for there are abundance of legerdemain tricks, therefore his vomiting pins, and other actions, were not to be trusted to; and therefore there was nothing to be depended on but his fasting; and if you would discover whether he be an impostor, or no, he must be locked up in a room for a fortnight, and watched. And then I said to the fellow's master for my curiosity, if you please, I will lock him up in a room a fortnight, and I shall find out whether he counterfeits or no. And he came to me afterwards, and said, Doctor, you promised you would make this trial of my man. I did so, says I, and if I can I will. I had thoughts of putting him in the garret; but then I considered, if I should put him in the garret by himself, he might die. But at the same time Mrs. *Davenport* happened to come to my house; and I said to her, I dare trust you with an experiment, for I believe he is an impostor; and I desired her to let me have her garret to put him in, and she consented. And I desired her either to go herself, or send to Long-lane, and buy things for him; and that she should strip him, and see that nothing may be about him to hide bread or any thing else in; and, said I, let none come to him, and let one or two of your family sit up with him every night. And she promised me she would.

Accordingly she bought a bed for him and other things, and he was sent to her; and the next day they sent me word that he had strange kind of motions; but I said, there is nothing to be depended on as to these things; but I would fain know whether he fasts or no. I have heard of many that have fasted many weeks, but they have taken water or some such thing, which, though they are very weak things, yet may keep one alive; but none can live without taking something: and if he should live to the end of the seventeen days without eating or drinking any thing, I should have something to take hold of. They told me—

Serj. Jenner. That is no matter what they told you. Did you see him afterwards?

Hamilton. I was mightily concerned for the poor creature when I saw him at sir *Thomas Lane's*; and I was willing to try him.

Serj. Jenner. Did you see him after that?

Hamilton. Yes, when he was blind for several days. And I sent to Dr. *Martin*, and do-

sired the favour of him to call upon me; and I said—

Serj. Jenner. Did you see him after he had been at madam Davenport's?

Hamilton. Yes.

Serj. Jenner. Did you see him while he was there?

Hamilton. Yes. The thing that I depended upon was purely his fasting. I saw him myself several times, and I could not believe but that he had eat, because his pulse were strong; that was one reason that I thought he must eat.

Serj. Jenner. Did you see him the last day of the fortnight?

Hamilton. I was just going to dinner when Dr. Martin came to me; and I said to him, Dr. Martin, let us try every thing: will you go along with me to him? Says he, if I go he will fall in a passion. But after I had dined I went, and enquired about him, and they told me he had strange motions.

Mr. Broderick. You say you reject every thing except that of his fasting.

Hamilton. Yes.

L. C. J. Doctor, do you think it is possible in nature for a man to fast a fortnight?

Hamilton. I think not, my lord.

L. C. J. Can all the Devils in Hell help a man to fast so long?

Hamilton. No, my lord, I think not; and that made me to suspect him.

Mr. Phipps. Do you think the pulse of a man can be strong when he has fasted eight days?—*Hamilton.* I think not.

Sir Thomas Lane called and sworn.

Serj. Jenner. Sir Thomas, be pleased to tell my lord and the jury what you know of this man.

Sir Tho. Lane. It was above a twelvemonth ago that his master brought a woman before me, upon suspicion that she was a witch, and that she had bewitched his man; but there having been a trial, I shall waver that. I enquired what kind of life he had lived; and his master said he had behaved himself very civilly, and gave him a very good character. He told me how grievously he had been afflicted, and that he had been six or seven months in the hospital, and had fasted a great while, above eight weeks, and had voided and vomited pins; and two witnesses swore to chains of hundreds of pins that came from him in his excrements. And it seems they had a fancy that scratching Sarah Morduck would give him relief, and they were in earnest with me that I would command this woman to be scratched, and I appeal to them, whether I did not refuse it. I said, if I should order this, it would be an assault; but if she will consent, you may do it. Says she, If I may be secured for the future, I will let him. Says I, if you do it, do it in your own way: there are several here that know it was so. And she did give her consent; and he scratched her, and I pulled away her arm from him. The fellow had

bread and cheese brought him; and as soon as he had scratched this woman, he took the bread and cheese and eat prodigiously; and he had about a quart of drink, and he drank it up at a gulp. I asked Mrs. Morduck, and her friends, whether they did ever know that this fellow had got any money by these tricks? No, they could not tell of any; so that there appeared to be neither profit nor revenge in the case. And I thought he could not be such a fool to pretend all this for no end, and run the hazard of being whipped.

L. C. J. The question is not whether he shall be punished for a fool; but whether he be a knave? Whatever punishment he may suffer, if convicted, does not belong to you to determine.

Sir Tho. Lane. I sent for Mr. Martin, and I sent for him, and I sent for the woman, and I examined them both; and Mr. Martin told me he suspected the fellow might be an impostor, for he had got a woman to be scratched for Sarah Morduck. And he asked the woman that Mr. Martin had hired, and she said, in her opinion he could see no more than a post.

L. C. J. Call Johnson again. This man scratched you? When he had done it, did you see him afterwards?

Johnson. Yes.

L. C. J. Were his eyes open?

Johnson. Yes.

L. C. J. But could he see?

Johnson. No. When he scratched me, they were shut.

L. C. J. Every body can see when their eyes are open.

Sir Tho. Lane. This woman said, she believed he could neither see nor hear any more than a post.

Martin. It was after I was gone; I heard nothing of it.

Sir Tho. Lane. I sent for him after the examination; all the evidence that was before was of his fasting.

L. C. J. Anne Eaton, how long did you watch with him?

Eaton. Nine weeks.

L. C. J. Was he dumb and blind so long?

Eaton. No, my lord.

L. C. J. How long did he fast?

Eaton. Thirteen weeks in all.

Serj. Jenner. Did you watch with him all the time?

Eaton. Sometimes by night, but not by day.

Heycock sworn.

Serj. Jenner. What do you know of this man?

Heycock. I saw this man in a very dreadful condition since the last assizes.

Serj. Jenner. Where did you see him?

Heycock. At Mr. Welling's. I saw him blind and dumb, and his eyes were ready to start out of his head.

Serj. Jenner. How long since was it that you saw him thus?

Heycock. I saw him several times in that

condition. And I was once in company, when there were four or five to hold him in his bed, whereas at another time he had not half the strength of a man.

L. C. J. When was this?

Heccock. Since the assizes.

Spurling sworn.

Serj. Jenner. What did you see of this person?

Spurling. I saw him at madam Davenport's.

Serj. Jenner. How often did you see him?

Spurling. Three times.

Serj. Jenner. Did you watch with him there?

Spurling. I went to see him, because I heard he was under a supernatural power.

L. C. J. What do you think that was? Was it an infernal power?

Spurling. A diabolical spirit.

L. C. J. Did you ever hear the power of a diabolical spirit described?

Spurling. But I suppose those that are under witchcraft are under such a spirit.

L. C. J. But can a diabolical spirit enable a man to fast forty days?

Spurling. I cannot tell that. I was acquainted with one that was under a supernatural power, that was in such a condition as this man was.

L. C. J. Did he fast too?

Spurling. I know not that.

L. C. J. I never heard that the devil ever made such a bold attempt.

Spurling. That person, the devil, acted him so subtly, that it was impossible to prosecute him.

L. C. J. How could you know that?

Spurling. Because when his eyes were shut, he could tell any man's name that was couing up.

L. C. J. Was not he very well pleased to be bewitched?

Spurling. No, he was actually possessed.

L. C. J. Was he sick, or out of order?

Spurling. No, my lord; but he had crooked pins came from him.

L. C. J. Did he accuse any body of bewitching him?—*Spurling.* Yes.

L. C. J. What is become of that person he accused?—*Spurling.* He accused several.

L. C. J. How many did he accuse?

Spurling. Five women; especially one.

L. C. J. Where is that woman?

Spurling. She is deceased.

L. C. J. Gentlemen of the jury, you have heard a very long and tedious evidence. The information is against this Richard Hathaway, for that he, with an evil design to take away the life of Sarah Morduck, pretended to be bewitched, and to have fasted for a considerable time, being not able to take any sustenance for divers days; nay, for several weeks, which he pretended to fast. And his fasting was imputed to this woman's bewitching him; that he did not pretend to fast a considerable time; that he did procure this woman to be committed for being a witch; that she was in-

dicted, tried, and acquitted, is plainly proved to you, without all manner of question. The only question that you are now to try, is, Whether this man did do this by reason of any disability of his mind, or delusion that was upon him; or did counterfeit? (what was the reason to induce him to counterfeit, does not appear, whether to get money, or what else, will not be material;) but if this man was under a delirium of his mind, and did fancy himself to be bewitched, then there will be no reason to convict him.

Now it is urged, that he did this maliciously, and with a design to take away the woman's life. First, they tell you, that this man had been a servant to one Welling a blacksmith; he came to him about four or five years ago; then he had fits, and was put into the hospital; and being there, he pretends he could not eat. After that, he was dumb; and after that, he began to be blind; and being blind and dumb, and fasting, these were looked upon to be the three tokens that he was bewitched. Then the man had a fancy that he was bewitched by this woman, but for what reasons does not appear; but his fancy appeared to be very strong; that she brought him into these mischiefs. Therefore he must go and scratch her; which he did, and presently he could see and eat. This was looked on as very strange, and people concluded that this woman was the cause of these maladies that were upon this man. It seems that this scratching was thought to be so effectual, that he was well for about six weeks; after which he appeared to be ill again, and his sight and his stomach were gone again, and then it was proposed he should scratch her again. It seems that before that, Dr. Martin was desired to come to him, and pray with him, and he did: and to try whether he was sensible or not, he took him by the hand, and by the signs he made, found he was sensible; and therefore he did pity his condition, but could not tell what to make of it. But Welling his master told the doctor he had received great benefit by scratching the woman before; and thereupon desired she might be scratched again. But he suspecting this might be a mere counterfeit, and that it could not have that effect, he thereupon gets the woman seemingly to consent to be scratched, being resolved to try whether this was an impostor or no. And Hathaway pretending himself to be blind, gave him an opportunity to make the experiment; for he procured another woman to represent Sarah Morduck, and she consented to be scratched in her stead; Hathaway was laid up in a bed, and Sarah Morduck was in the room, and spake to him. It was observed, when this other woman, whose name was Johnson, was brought to represent this Morduck to Hathaway, she put her hand into his, and then he examined it, and her wrist, and her arm; and so it seems he had some apprehensions of a design to impose upon him. And then he proceeds to scratch that other woman, who takes it patiently, till the blood was ready to come;

and then she was suddenly taken away; and some of the company said the blood is come, and presently his eyes opened, and he laid hold on Sarah Morduck, and seizes her, and did not only appear to see, but to speak. This is proved to you by other evidence besides Dr. Martin. Upon this, says Dr. Martin, you are mistaken; you have deceived the world, you have not scratched Sarah Morduck, but another woman. When he understood that, he was very much concerned, and seemed to begin to be ill again; and Welling said, He will not be well till he hath scratched the right woman; so to appearance he fell ill again. You have heard how the matter had been carried on afterwards; for many looked on this blindness and fasting as an errant imposture. Welling and his wife complained to Dr. Martin, saying, You have undone us all, and our family too. What should be the meaning of that? What, because he had discovered a cheat, therefore they were undone. It seemed likely, that if it were a cheat, and Welling not conscious to himself of carrying it on, he need not have been concerned at it. But they rest not here, the woman, Sarah Morduck, must be scratched again; which was performed with violence, against her consent; and the woman being pursued by the rabble, not able to live quietly in Southwark, was forced to go on the other side of the water, and take a lodging there for her security; where she was again pursued, and assaulted by Hathaway and others, in a riotous manner, in order to scratch her again; and though complaint on her behalf was made of this violence to sir Thomas Lane, he did not think fit to give her any relief, being (as it seems upon some evidence) possessed with an opinion that there might be some grounds for pursuing this woman in that manner. She was carried before him, and he being informed that this fellow could not eat nor drink, thereupon it was thought convenient by sir Thomas, in order to make a full discovery, that she should be scratched again; and accordingly she was persuaded to submit to be scratched, and presently after the scratching, Hathaway did eat and drink very greedily; and thereupon this woman was committed to prison. This was thought a great evidence of this man's being bewitched by this woman, Sarah Morduck. What rule they have for it either in philosophy or divinity, I cannot tell. There was a trial, and the woman was acquitted, and upon full evidence. He then pretended to have fasted for a long time. That of our Saviour's fasting forty days, is mentioned in scripture as miraculous, and an effect of divine power, being one evidence of the truth of the Christian religion. Who can imagine, that without such assistance, a man can fast forty days, or above, and yet continue in health? It is not within the compass of my understanding to conceive it: I must leave you to consult your own, and to consider with yourselves, whether you have any evidences to induce you to believe it to be in the power of all the witches in the world, or all the Devils in

Hell, to enable a man to fast beyond the usual time that nature will allow; they cannot invert the order of nature: and if the thing be impossible, and he endeavour all this while to make the world believe he has fasted so long a time, it is most evident he is a cheat; for he must contrive to have some victuals some way or other secretly conveyed to him; of which the impossibility of his being able to fast so long is a demonstration. But notwithstanding this trial, and that this woman was acquitted, yet this matter must be carried on still. He was bailed out, and then returns to his fits again; and though then he was not blind, or pretended to be so, yet he seemed to fast, and to be dumb again for a long time. This made a great hubbub about the town, and the people clamoured that the man had injustices done him in the trial at the assizes; and reports were spread, that the woman was acquitted by favour or corruption both of judge and jury. Upon this account, the woman was pursued by a rabble, and came to be in imminent danger of her life. Wherefore it was thought highly necessary that the prosecution against this man, and others concerned with him, should be speedy; and thereupon he was apprehended, and bound to appear in the King's-bench, and there he pretended still to be dumb. His bail delivered him up, and he was sent to the Marshalsea. There he lay without eating or speaking for some short time, till it was considered, that if he was under any real affliction, it was proper he should be under the care of some proper person: therefore he was put to the house of Mr. Kensy, a chirurgeon in Fetter-lane, who was ordered to take care of him, and use him well; also to watch him, and endeavour to make a discovery of the truth of his condition. He was delivered into his hands the first of November last. The people of the house took care of him, and he fasted from Saturday till Monday; and Mr. Kensy asked him how many weeks he had fasted, he counted on his fingers twelve: but Mr. Kensy thought he did not deal truly, but had a mind to impose upon the world, and therefore he locks him up. He eat nothing all Saturday and Sunday: but Mr. Kensy found he had made water, for he discovered the rug or counterpane or the bed to be wet; and that it appeared to come from the tester of the bed: he made water it seems in an old box, and set it over the bed. Drink was offered him, but he refused it. After this Mr. Kensy makes use of this stratagem: he pretends to quarrel with his maid, and gives her reproachful language in the hearing of Hathaway; calling her hypocrite, like unto him. At which the maid seemed to be provoked; and out of revenge, to prevent her master's design in making a discovery, she takes an opportunity and says to him, take heed of my master, he will betray you. And she had insinuated herself so far into him, that he began to trust her. She gave him on the Monday a glass of brandy, which he drank; and a piece of pudding, which he received and put into his

pocket; and afterwards a toast and beer, which he eat and drank, and afterwards he entirely trusted this woman. And day by day he did eat plentifully for several days together in her presence, from Tuesday to Friday se'ennight following, thinking Mr. Kensy did not see him; but he being in a secret place, undiscovered by Hathaway, did see him eat and drink several days, sometimes he drank so much, that he was perfectly drunk: and all this while he pretended to fast, though divers others besides Mr. Kensy and the maid were witnesses to his eating and drinking. Then it was thought to be time to discover this to the world; and he was told plainly by Mr. Kensy, that he was discovered, and if he would tell the truth, he should be pardoned, seeing he could carry it on no longer. Now it is plain this man had counterfeited during the time he was at Mr. Kensy's; though that particular time he not laid in the information, yet it is a continuance of that time which is laid therein.

And if he was an impostor by pretending to have fasted while he was at Mr. Kensy's house, I leave you to consider whether he was not so all the while before. You hear what management there has been, how he was at Welling's home, how pins were pretended to come from him, how they were made use of, and charms sewed to him. You hear how some time ago one Mr. Bateman came to him, hearing at the beginning of the business he vomited pins: He saw some on the ground; when he vomited a considerable number, they were linked up together: for it is hard to manage so many loose pins; but when they are linked together, they are the easier to manage in the mouth. Here he pretended to vomit pins, and would be still putting his hands to his pocket, and Mr. Bateman fancied he pulled them out from thence. Therefore he took the chamber pot, and would not let his hands come near it; then he vomited no pins there; and he searched his pockets, and there were great quantities of pins found therein; neither did he at any time seem to vomit any pins, until he had drank a draught of ale. But notwithstanding all this, there are people that come and tell you that he was sick; he was disturbed, and had these fits. One woman tells you, she has watched with him several times; sometimes by night: Another woman tells you, that she watched him when the other did not, and sometimes by day; and that he did not eat, but was sick, and out of order. And another tells you, he saw him; that he was in great disorder, threw himself backward and forward, and would turn his face round towards his back; and that he was blind, though his eyes were open. But how could he tell that he was blind? Said he, when I pulled him by his eye-lids, his eyes did not stir; and therefore he saith that he was blind. And then they give you an account that he was in the hospital five months; and that he was weak, and went upon his scabes, and had quicksilver given him; and that he lay seven or eight days, and did not eat;

but then there was no apprehension of witchcraft. And one Mr. Smith, an apothecary, a witness called on his part, and a neighbour, said, he knew him four or five years ago; and that Hathaway was then with his master and had fits, and would fall down, and seem to be dead; whether he was really sick, or counterfeited, he cannot tell; he applied his cupping-glasses to him, and presently brought him to himself. This is one of his own witnesses. And then there is Mrs. Willoughby; she saw him in his master's house, and she said his breath made a noise like the barking of a dog, and she believed he was bewitched, for herself had been bewitched and was made to fly, and she fancies he was bewitched, because of his breathing in that manner. And then they tell you what care was taken of him, and he was put into an empty house about nine or ten days, and one man watched with him by day, and another by night, and how they came to do that: And they swear they never saw him eat or drink all that time; but they say, he did several times vomit pins in that time; but it seems he was put there merely out of charity, the parish would not be charged with him: Then they tell you there were people appointed to watch with him, there were two chamber-pots, and in one there were excrements, and there were pins in it, and hair, and a piece of a nail, but after he sat on the second put, there was nothing found therein; but they conclude him bewitched. Then there are others that say he lay as dead, and that they took out of his mouth several pins. And then you have an account after the trial, what happened at Mrs. Davenport's, where he was sent by Dr. Hamilton to be tried whether he was an impostor or not. She says, she watched with him herself sometimes, another woman at other times, and another at other times, and that they could never perceive that he eat any thing. But there is one Mr. Davenport that was with him some other times, but he is gone to sea, and could not appear. Then comes in at last Dr. Hamilton, and he tells you he was by when this matter was brought before sir Thomas Lane, and he could not tell what to think of his fasting, but as to his fits and the pins, he says, those may be easily counterfeited by legerdemain tricks; but, says he, fasting for so long, as some people did believe he did, is more than nature can bear; nobody can think the devil has such a power to enable a man to undergo it. Tricks the devil may play, but not work a miracle; it is not to be thought that God should let him loose so far. This is the sum of the matter: his pretending to be dumb and blind, and to fast, and to be restored to his speech, his sight, and stomach, by scratching this woman, is fully proved. You are to consider whether he did labour under these infirmities, or counterfeited them, and whether scratching and drawing blood of the old woman could be effectual to the cure of them, if they had been real? If not, then it is a strong argument that these infirmities were counterfeited.

His scratching and drawing blood of a strange woman, instead of Sarah Morduck, did seem to avail him, as much as if he had scratched her, until he understood he was imposed upon; then he seemed to relapse to his former condition. You will remember what passed at Mr. Keny's, and the manner of vomiting of pins as was pretended. You are to consider whether this man was *non compos mentis*, or under a delusion; therefore I shall spare troubling you with more words, but leave it wholly to you. If you do believe, upon the whole

matter, that this man has imposed upon the magistrate and on the world, or endeavoured, by counterfeiting these infirmities, to persuade people to believe that this woman was a witch, and had bewitched him, then there is all the reason that can be to find him guilty. But if you believe he did not counterfeit, or that he was *non compos mentis*, or under any kind of delusions, you must acquit him.

The Jury consulted, and, without going from the bar, brought him in Guilty.
(See the next Case.)

428. A short Account of the Trial held at Surrey Assizes, in the Borough of Southwark: on an Information, against RICHARD HATHAWAY, THOMAS WELLING, and ELIZABETH his Wife, and ELIZABETH WILLOUGHBY, Wife of Walter Willoughby, for a Riot and Assault, &c. : 1 ANNE, A. D. 1702.

March 26.

THE Information sets forth* that the defendants, with divers other persons, the 25th of

September, in the 12th year of king William, at Southwark, in a riotous and unlawful manner assembled themselves, and made a great

* The Record is as follows :

REGINA v. HATHAWAY, 1 ANNE.

Surr' ss. Memorand', &c. quod quidam Richard' Hathaway, nuper de Southwark in com' Surr', Laborer, Thomas Wellyn, et al', cum diversis al' personis eidem Attorn' General' ignotis, 25 die Septemb', anno regni dicti Dom' Regis nunc 12 apud Southwark prædict', in com' præd', vi et armis, &c. illicite, riotose et routose sese assembler', et magnam affraiam et riotam adtunc et ibid' fecer', et sic assemblat' existen', vi et armis, &c. adtunc et ibid' in et super præd' Saræ, in pace Dei et dicti Dom' Regis adtunc et ibid' existen' insult' fecer', et ipsam Saræ adtunc et ibid' verberaver', scalps'er', vulneraver', et malectraver', ita quod de vita ejus maxime desperabatur, et al' enormia eidem Saræ adtunc et ibid' intuler', ad grave dampnum ipsius Saræ, in contempt' dicti Dom' Regis nunc, et contra pacem coron' et dignitat' suas. Et idem Attorn' dicti Dom' Regis nunc general' ulterius dat cur' hic intelligi et informari, quod præd' Richardus, et al' &c. cum diversis al' person' eidem Attorn' General' ignotis, postea, scil' præd' 11 die Febr', anno 12 ult' suprad', apud Southwark præd' in com' præd', vi et armis, &c. adtunc et ibid' in et super præd' Saræ insult' fecer', et ipsam Saræ adtunc et ibid' verberaver', scalps'er', vulneraver', et malectraver', ita quod de vita ejus desperabatur, et alia enormia eidem Saræ adtunc et ibid' intuler', ad grave dampnum ipsius Saræ, in contempt' dicti Dom' Regis nunc, et contra pacem coron' et dignitat' suas, &c. Unde idem Attorn' dicti Dom' Regis nunc general', pro eodem Dom' Rege, pe' advisamentum cur' hic in præmissis, et debitum legis processum versus præfat' Richardum, et al' &c. in hac parte fieri ad respondend' dicto Dom' Regi de et in præmissis, &c.

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præd' Richard', et al', &c. cum divers' al' person' eid' Attorn' general' ignotis, 11 die Febr', anno regni dicti Dom' Regis nunc 12 suprad', apud Southwark præd', in com' præd', vi et armis, &c. riotose, routose, et illicite sese assembler', et magnam affraiam et riotam adtunc et ibid' fecer', et sic assemblat' existen', vi et armis, &c. adtunc et ibid' in et super præd' Saræ, in pace Dei et dicti Dom' Regis adtunc et ibid' existen' insult' fecer', et ipsam Saræ adtunc et ibid' verberaver', scalps'er', vulneraver', et malectraver', ita quod de vita ejus maxime desperabatur, et al' enormia eidem Saræ adtunc et ibid' intuler', ad grave dampnum ipsius Saræ, in contempt' dicti Dom' Regis nunc, et contra pacem coron' et dignitat' suas. Et idem Attorn' dicti Dom' Regis nunc general' ulterius dat cur' hic intelligi et informari, quod præd' Richardus, et al' &c. cum diversis al' person' eidem Attorn' General' ignotis, postea, scil' præd' 11 die Febr', anno 12 ult' suprad', apud Southwark præd' in com' præd', vi et armis, &c. adtunc et ibid' in et super præd' Saræ insult' fecer', et ipsam Saræ adtunc et ibid' verberaver', scalps'er', vulneraver', et malectraver', ita quod de vita ejus desperabatur, et alia enormia eidem Saræ adtunc et ibid' intuler', ad grave dampnum ipsius Saræ, in contempt' dicti Dom' Regis nunc, et contra pacem coron' et dignitat' suas, &c. Unde idem Attorn' dicti Dom' Regis nunc general', pro eodem Dom' Rege, pe' advisamentum cur' hic in præmissis, et debitum legis processum versus præfat' Richardum, et al' &c. in hac parte fieri ad respondend' dicto Dom' Regi de et in præmissis, &c.

2 Y

affray and riot, and upon one Sarah Morduck, the wife of Edward Morduck, being an honest woman, and not a witch, nor ever using witchcraft, enchantment, charm or sorcery, did make an assault, and under a wicked colour, against the law, to try whether the said Sarah was then a witch, (the defendant Hathaway then falsely and maliciously affirming himself to be bewitched by her the said Sarah, though in truth he was never bewitched, and well knew himself not to be so) her the said Sarah did then and there scratch, wound, &c. against the peace, &c.

The information further sets forth, that the said defendants, the 11th of February, in the 12th year of king William, at Southwark aforesaid, assembling themselves together riotously and unlawfully, did then and there make a great affray and riot, and also assaulted the said Sarah, and beat, scratched and wounded her, in contempt of the King, and against the peace, &c.

The information further sets forth, that the said defendants, the said 11th of February, did assault the said Sarah, and wounded her the said Sarah, against the peace, &c.

The defendants pleaded not guilty, and issue was taken thereupon. The counsel for the king opened the case to this effect: That the defendants' case was the same in the other information. Hathaway pretended himself bewitched, and the contrivance was carried on by the other defendants and divers others; but whether for the hopes of getting money by it, or out of malice to take away the poor woman's life, or what the design was, was not then known; but it was certain that several riots and assemblies were made, and great numbers of people came together in a body at several times to Morduck's house, and in a violent manner entered the same, and by force took her out and carried her away to the defendant Welling's house, where the defendant Hathaway scratched her; and the other defendants also in a very barbarous manner beat her, pulled out her teeth, tore her face, hair and clothes, threw her on the ground, stamped upon her belly, and threw her into the street, where she lay as murdered, until taken into a neighbour's house; which the defendants and others in a riotous manner beset, and threatened to pull it down, unless Morduck (the pretended witch) was again delivered to them. These riots and assaults happened to be encouraged by an accident, which fell out as Morduck was going through Newgate-Market, where the people crying out, a witch, the rabble seized her, and threatened to throw her into a horse-pond; that one of these rioters being taken away, was carried before a magistrate in the city, but he was so far from taking notice thereof, that he declared that there was cause enough for it; and being desired to ask the person's name, refused it; but the same magistrate afterwards ordered the defendant Hathaway to scratch Morduck in his presence, where were also present some of the Aldermen

of London. These matters being acted by public authority, gave the licentious mob such a confidence, that even after the woman was tried and acquitted, and the defendant Hathaway committed for an impostor, yet he, with the other defendants, did again in a riotous manner assault, scratch, and wound the said Morduck, and pursued her after a cruel manner from day to day, till they were taken into custody, in order to be punished for the same. For which several barbarous facts the defendants were then to be tried.

Then the Counsel for the King called their evidence to prove the several branches of the information.

Sarah Morduck being called and sworn, deposed to this effect: That in September last, Richard Hathaway came to this informant in Surrey, as she was opening her window, and being behind, scratched her face in a very cruel manner, and forced out one of her teeth, and carried away her cloaths. And upon the 11th of February last, Thomas Osbourn, Thomas Hatton, with four other persons unknown, all in disguise, came to this informant's house in Surrey, and forced her out of her house, and carried her to the house of Thomas Welling, who is master to the said Richard Hathaway; and there the said Hathaway, by the encouragement of the said Osbourn and Hatton, and the rest of the company, did again scratch this informant in a most barbarous manner; and afterwards Elizabeth, wife to the said Thomas Welling, fell upon her and scratched her in a most cruel manner, and tore her face, and tore off her head-cloaths and hair; and then the said Thomas Welling gave this informant two or three kicks on her belly, and threw her on the ground and stamp upon her, and so much bruised her, that she was forced to keep her bed for about a fortnight. And this informant further deposes, that in September last, one Elizabeth Willoughby, the wife of Walter Willoughby, came to this informant's house in Surrey, and brought a great many persons unknown to this informant with her; and the said Elizabeth gave this informant several blows with her fist, and would have pulled her out of her house, for him the aforesaid Richard Hathaway to have scratched her, he standing at a corner hard by, but was prevented by Mrs. Sarah Hall. And further saith, that in the month of September last, she having occasion to go into Newgate-market, a boy, his name is John Hopkins, called out, saying, there goes the old witch; whereupon a great company of people, in a riotous manner, flocked about her, and threatened to throw her into a horse-pond: and this informant being got into an ale-house by the assistance of some women, avoided the fury of the rabble, otherwise she had been murdered, as she verily believes; and afterwards Mr. Burrel her landlord, with others his assistants, came and conveyed her home.

Sarah Hall was the next witness, who said, that in September 1700, about 8 in the forenoon, the defendant Willoughby came with Hathaway and others, pretending to buy fruit of Morduck, and told Morduck she came to have her out, that Hathaway might scratch her; and Willoughby struck Morduck several blows, and forced her out of doors, before Hall could come to her assistance, who with difficulty got Morduck into her house again; upon which the defendants Willoughby and Hathaway, and others, beset her house and threatened to pull it down, unless they had Morduck delivered to them; but Hall calling up her husband, who was a-bed, the person went away.

Robert Adams and *John Bower*, both watermen, declared, that plying for their fare at Mason's Stairs, they saw the defendant Hathaway come behind Morduck as she was opening her window, and took her about the neck with one arm, and pulled her almost to the ground, and scratched her face in several places till the blood came, and tore her mouth, and tore her hood and head-cloaths from her head; and being taken off, Morduck got into a neighbour's house, whom Hathaway would have pursued in at a window, had not Adams stopp him.

To prove the Riot and Assault in Feb. 1700,

Sarah Morduck declared, that the 11th of February, 1700, Thomas Osbourn, Thomas Hatton, with four others unknown, all disguised, came to and forced her out of her house, and carried her to the house of the defendant Welling, Hathaway's master; where Hathaway, by the encouragement of the company, scratched her barbarously, and after that, Welling's wife scratched her, and tore her hair, and face, and pulled off her head-cloaths; then Welling kicked her two or three times on the belly, and threw her on the ground, and stamped on her, and bruised her so much, that she was forced to keep her bed for a fortnight.

Mrs. Hall said, that in February 1700, in the evening, several persons unknown came to her house, and forced Morduck from thence, and carried her to Welling's (as she was told): That about half an hour after, Morduck was cast into the street, and being received into a neighbour's house, Hall went to her, and found her face much torn, in a most barbarous manner, and her legs, arms, and body cruelly bruised and black.

Then the counsel called witnesses to prove the third part of the information.

Samuel Burrel being sworn, deposed, that Edmund Jones, in company with two more, came to his house, and desired to speak with Morduck, who lodged there; who being called to Jones, he asked her to go over the water to be scratched by Hathaway; who declared he was bewitched by her; but she refusing to go, Jones said, if she walked London he would

have her scratched; and further, that about Easter or Whitson week last, the said Jones came to his house with about fourteen strangers, among whom was Hathaway, and would have forced into Morduck's chamber; but a constable coming, they all but Jones dispersed, whom the constable took, and carried before sir Thomas Lane; but sir Thomas would take no notice of it.

Thomas Knowlton being sworn, deposed, that in Easter week last, Jones and Hathaway, and several others, went into Burrel's house, and asked for Sarah Morduck, who was called down to them, when Burrel desired them to go up stairs into the common drinking-room, and desired Knowlton to see Morduck had no harm done her. That soon after came in about fourteen persons, one of which said, they came to give Hathaway ease, and that they would do it before they went: upon which Morduck, at Knowlton's desire, retired into her chamber.

Thomas Noon being sworn, declared, that all the time aforesaid he saw three or four persons, who were of Jones's company, endeavouring to get into Morduck's chamber; and upon Noon's asking them their business, they cried they would speak with Morduck, but upon his threatening them they went into the room below stairs from whence they came.

Henry Armstrong declared, that in September was twelvemonth he saw a great number of people following Morduck, calling her witch; and going home afterwards, he saw a crowd of people at an alehouse door, near St. Paul's church-yard, who declared Morduck a witch; and that he assisted Burrel in securing Morduck from the rabble.

James Hearne being called, deposed, that in Easter or Whitson week last, one Jones was apprehended for a riot by him and others committed in Burrel's house, and carried before sir Thomas Lane, who discharged Jones, saying there was cause enough for the riot, and though often intreated by Hearne, yet sir Thomas refused to let him know Jones's name. And the said Hearne further declared, that the day after Jones was carried before sir Thomas, he and Burrel, by sir Thomas's directions, carried Morduck before him, where were present sir Owen Buckingham and Dr. Hamilton, and the defendant Hathaway. That sir Thomas would have had Morduck scratched by Hathaway, which she refused, unless she might be at peace for the future: And after Dr. Hamilton had given Hathaway some beer, sir Thomas would have had Morduck scratched; but the doctor said, let her alone a little, to see what effect the drink would have on Hathaway; and said, if she was scratched, it would be said that the scratching, and not the drink, made the alteration. And when sir Thomas had heard some more discourse of Hathaway's vomiting pins, &c. sir Thomas said again, let her be scratched; but Hearne opposed it; saying, she had been too much abused already; notwithstanding which, Sir

Thomas ordered Hathaway to scratch her, and ordered her to be strip and searched by some women in his own house. That Hearne seeing sir Thomas's resolution, bid him satisfy himself. After which sir Thomas committed Morduck to Wood-street-compter, and refused 500*l.* bail for her appearance: But upon application made to him by Dr. Barton and Dr.

Martin, sir Thomas accepted Hearne's and his brother's bail for Morduck.

The witnesses for the defendants being called and heard, and the right hon. Lord Chief Justice Holt having spoken to the Jury, they withdrew, and soon after brought them all in Guilty.

429. Proceedings in the House of Commons, House of Peers, and in the Queen's-Bench, in the Great Case of ASHBY and WHITE,* &c. 2 & 3 ANNE, A. D. 1704, 1705.

MATTHEW Ashby, having commenced and prosecuted an action at common law against William White, mayor of Aylesbury, and others, the constables of that town, for refusing to receive his vote at an election of burgeses to serve in parliament, for the said borough; but

being cast, he brought a Writ of Error into the House of Lords, who, upon strict examination of witnesses, and upon mature deliberation, gave judgment in favour of Ashby. The Commons looking upon these Proceedings as an encroachment on their privileges, proceeded as follows:

* See Salk. 19. 2 Salk. 508. 3 Salk. 17. 6 Mod. 45. Holt, 524, 526. Lord Raym. 1105. 1 Bro. Parl. Cas. 45. Raym. Ent. 479. Harg. Co. Litt. 81, b. n. 2. This Case gave rise to much altercation in pamphlets and otherwise. Among the pamphlets was one (by sir Humphrey Mackworth) entitled, 'Free Parliaments, or a Vindication of the Fundamental Right of the Commons of England, &c. being a Justification of their Proceedings in Ashby v. White,' and an Answer to it, entitled, 'The State of the Case between Ashby and White, &c. dedicated to my lord chief justice Holt, occasioned by his late incomparable speech in the Queen's-bench the last day of the term, when the Aylesbury Electors moved that Court for a Habeas Corpus.'

DEBATES IN THE HOUSE OF COMMONS, UPON THE GREAT QUESTION, WHETHER AN ACTION LIES AT COMMON LAW FOR AN ELECTOR, WHO IS DENIED HIS VOTE FOR MEMBERS OF PARLIAMENT ?

As to the privilege and power of Parliament, and the Lex et Consuetudo Parliamenti, see in this Collection the Cases of major Streater, vol. 5, p. 365. Skinner, vol. 6, p. 709. Barnardiston and Soame, vol. 6, p. 1063. Shirley and Fagg, vol. 6, p. 1121. Lord Shaftesbury, vol. 6, p. 1269. Richard Thompson, vol. 8, p. 1. Fitzharris, vol. 8, p. 277. Jay and Topham, vol. 12, p. 321. Sir Wm. Williams, vol. 13, p. 1369, and the other cases and authorities referred to in the cases above-mentioned, particularly Mr. Hargrave's learned investigations upon those subjects. See, too, Leach's edition of Hawkins's Pleas of the Crown, book 2, chap. 15, sect. 73, and the Note. See, also, Parl. Hist. vol. 6, pp. 225—229. 377—382.

January 17, 1704.—The House being informed, That there had been an extraordinary judgment given in the House of Lords upon a Writ of Error from the court of Queen's-bench, in a cause between Matthew Ashby and William White, wherein the privileges of the House were concerned, appointed some of their members to search the Journals of the House of Lords as to their proceedings upon the said Writ of Error, and to report the same to the House. They also ordered the same members to inspect the Journals of the House of Lords, as to what they had done formerly in the case of Soame and Barnardiston; and likewise to report that matter to the House.

January 18.—The House ordered, that the members who were appointed to search the journals of the House of Lords as to their proceedings upon a Writ of Error from the court of Queen's-bench, in the cause between Ashby and White, should likewise search the several offices of the court of Queen's-bench, for the record of the judgment, and all other proceedings there in that cause, and report the same to the House.

These Proceedings respecting the Aylesbury-men were frequently adverted to, and many of the points agitated in the course of them, were discussed at the bar and on the bench with very great ability and learning in the Case of sir Francis Burdett, bart. against the right hon. Charles Abbot, Speaker of the House of Commons, reported 14 East, 1.

January 20.—Ordered, That the Report, with relation to the proceedings of the House of Lords and court of Queen's-bench, in the case of White and Ashby, should be made on the morrow morning.

January 21.—Mr. Froeman reported, That the members appointed to search the Lords'

Journals, touching their proceedings upon a Writ of Error from the court of Queen's-bench, in a case between White and Ashby, and what the Lords had done in the case of Soume and Barnardiston, had searched the same accordingly; and he read in his place what they found therein, and he delivered the same at the table, where the same was read. And Mr. Brewer also reported, That the members appointed had also searched the offices of the court of Queen's-bench, for the Judgment and proceedings there in the case of Ashby and White, and had obtained a copy of the record of the Judgment, which he delivered in at the table.

A COPY OF THE RECORD *inter* ASHEY
AND WHITE, *et al.*

Placita Coram Domino Rege apud Westmonasterium de Termino Sancti Hillarii, Anno Regni Domini Willielmi Tertii, nunc Regis Angliæ, &c. decimo tertio, Rotulo 460.

Bucks, *ss.* Mattheus Ashby ponit loco suo Robertum Greenway juniorem Attornatum suum versus Willielmum White, et Richardum Talboys, Willielmum Bell, et Richardum Heydon, de placito transgressionis super Casum.

ss. Willielmus White, Richardus Talboys, Willielmus Bell, et Richardus Heydon ponunt loco suo Johannem Burnham Attornatum suum versus Mattheum Ashby de placito predicto.

ss. Memorandum quoddam alias scilicet Termino sancti Michaelis ultimo preterito coram Domino Rege apud Westmonasterium venit Mattheus Ashby per Robertum Greenway juniorem Attornatum suum et protulit hic in Curia dicti Domini Regis tunc ibidem quandam Billam suam versus Willielmum White, Richardum Talboys, Willielmum Bell et Richardum Heydon, in custodia Mareschalli, &c. de placito transgressionis super Casum, et sunt pleg. de proseguendo scilicet Johannes Doe et Richardus Roe: quæ quidem Billam sequitur in hæc verba; scilicet Bucks, *ss.* Mattheus Ashby queritur de Willielmo White, Richardo Talboys, Willielmo Bell et Richardo Heydon, in custodia Mareschalli Mareschalis Domini Regis coram ipso Rege de existentibus pro eo, videlicet quoddam cum vicesimo sexto die Decembris Anno Regni Domini Willielmi Tertii nunc Regis Angliæ, &c. duodecimo è Curia Cancellarie ipsius Domini Regis nunc apud Westmonasterium in Comitatu Middlesexie emanavit quoddam breve ipsius Domini Regis nunc tunc Vicecomiti Comitatus Bucks predicti directum, recitando quod dictus Dominus Rex de advisamento et assensu Concilii sui pro quibusdam arduis et urgentibus negotiis eundem Dominum Regem statum et defensionem Regni sui Angliæ et Ecclesie Anglicane concernentibus quoddam Parliamentum suum apud Civitatem suam Westmonasterii sexto die Februarii tunc proximo futuro teneri ordinaverit et ibidem cum

Prelatis Magnatibus et Proceribus dicti Regni sui colloquium habere et tractatum; idem Dominus Rex nunc eidem tunc Vicecomiti Comitatus Bucks per dictam breve preceptum firmiter injungens quoddam facta Proclamatione in proximo Comitatu suo post receptionem ejusdem brevis tenenda de die et loco predictis duos Milites gladiis cinctos magis idoneos et discretos Comitatus predicti et qualibet Civitate Comitatus illius duos Cives et de quolibet Burgo duos Burgenses de discretioribus et magis sufficientibus libere et indifferenter per illos qui hujusmodi Proclamationibus interfèrent juxta formam Statuti inde editi et provisæ eligi et nomina eorumdem Militum Civium et Burgensium sic eligendorum in quibusdam indenturis inter ipsum tunc Vicecomitem et illos qui hujusmodi electionibus interfèrent iade conficiendis licet hujusmodi eligendi presentes forent, vel absentes, inseri, eosque ad dictos diem et locum venire faceret; ita quoddam iidem Milites plenam et sufficientem potestatem pro se et Communitate Comitatus illius ac dicti Cives et Burgenses pro se et Communitatibus Civitatum et Burgorum predictorum divisim ab ipsis haberent ad faciendum et consentiendum hiis que tunc ibidem de communi Consilio dicti Regni ipsius Domini Regis nunc (savente Domino) contigerint ordinari super negotiis antedictis, ita quoddam pro defectu potestatis hujusmodi seu propter improvidam electionem Militum Civium aut Burgensium predictorum dicta negotia infect. non remanerent quovismodo et Electionem illam in pleno Comitatu ipsius tunc Vicecomitis factam distinctè et apertè sub sigillo suo et sigillis eorum qui Electionibus illis interfèrent eidem Domino Regi nunc in Cancellarium suum ad dictos diem et locum certificaret, indilate remittens eidem Domino Regi alteram partem Indenturarum predictorum eidem brevi consutarum una cum brevi illo; quod quidem breve postea et ante predictum sextum diem Februarii in brevi predicto mentionatum, scilicet vicesimo nono die Decembris, anno duodecimo supradicto, apud Burgum de Aylesbury in dicto Comitatu Bucks, cuidam Roberto Weeden Armigero ad tunc Vicecomiti ejusdem Comitatus Bucks deliberatum fuit in forma Juris exequendum; Virtute cujus quidem breve predictus Robertus Weeden Vicecomes Comitatus Bucks predicti ut prefertur tunc et ibidem existens postea et ante predictum sextum diem Februarii scilicet tricesimo die Decembris Anno duodecimo supradicto apud Burgum de Aylesbury predictum in dicto Comitatu Bucks fecit quoddam preceptum suum in scriptis sub sigillo ipsius Roberti Weeden Officii sui Vicecomitis Comitatus Bucks predicti Constabulario Burgi de Aylesbury predicti directum, recitantes diem et locum Parliamenti predicti tenendi, proinde eos requirens et eis in mandato dans quoddam facta Proclamatione infra Burgum predictum de die et loco in eodem precepto recitatis causarent libere et indifferenter eligi duos Burgenses Burgi illius de discretioribus et magis sufficientibus per ipsos qui hujusmodi Proclamationibus interfèrent

juxta formam Statuti in talibus causibus editam et provisam et nomina dicatorum Burgensium sic electorum licet presentes forent vel absentes inseri in quibusdam Indenturis inter dictum Vicecomitem et illos qui haberent interesse in hujusmodi Electionibus, et quod eos venire faceret ad diem et locum in eodem precepto recitatos, ita quod dicti Burgenses haberent plenam et sufficientem potestatem pro se et Communitate Burgi predicti ad faciendum et consentiendum hiis que tunc ibidem de communi consilio dicti Regni (favente Domino) contingerent ordinari super negotiis antedictis ita quod pro defectu hujusmodi potestatis aut propter improvidam electionem Burgensium predictorum dicta negotia infecta non remaneret et quod electionem indilate eidem tunc Vicecomiti certificarent, mittentes eidem Vicecomiti alteram partem indenturarum predictarum dicto precepto annexarum ut idem Vicecomes eandem certificaret dicto Domino Regi in Cancellaria sua ad diem et locum predictos; quod quidem preceptum postea et ante predictum sextum diem Februarii scilicet eodem tricesimo die Decembris anno supradicto apud Burgum de Aylesbury predictum in dicto Comitatu Bucks eisdem Willielmo White Richardo Talboys Willielmo Bell et Richardo Heydon ad tunc et usque ad et post retornatum ejusdem brevis Constabularis Burgi de Aylesbury predicti existentibus in forma Juris exequendum deliberatum fuit; quibus quidem Willielmo White Richardo Talboys Willielmo Bell et Richardo Heydon ratione Officii sui predicti Constabulariorum Burgi predicti executio precepti illius de jure ad tunc et ibidem pertinuit, virtute cujus quidem precepti ac vigore brevis predicti Burgenses Burgi predicti existentes in ea parte debite premoniti postea et ante predictum sextum diem Februarii scilicet sexto die Januarii anno duodecimo supradicto apud Burgum de Aylesbury predicti coram eisdem Willielmo White Richardo Talboys Willielmo Bell et Richardo Heydon Constabulariis Burgi predicti assemblati fuerunt ad duos Burgenses pro Burgo illo eligendos secundum exigentiam brevis et precepti predictorum ac durante assemblatione illa ad intentionem illam et antequam hujusmodi duo Burgenses virtute brevis et precepti predictorum electi fuerunt scilicet die et anno ultimis supradictis apud Burgum de Aylesbury predictum in comitatu predicto idem Mattheus Ashby ad tunc et ibidem existens Burgens et Inhabitans Burgi predicti et eleemosinas ibidem aut alibi ad tunc aut antea non recipiens sed debite qualificatus et intitulatus existens ad suffragium suum ad eligendum duos Burgenses pro Burgo predicto secundum exigentiam brevis et precepti predictorum dandum coram eisdem Willielmo White Richardo Talboys Willielmo Bell et Richardo Heydon quatuor Constabulariis Burgi illius quibus tunc et ibidem debite pertinuit ad suffragium ipsius Matthei Ashby de et in premissis capiendum et allocandum parat. fuit et obtulit suffragium suum dare pro eligendo Thomam Lee Baronetum et Simonem Mayne Armigerum duos Bur-

genses pro Parlamento illo virtute et secundum exigentiam brevis et precepti predictorum, ac suffragium ipsius Matthei Ashby ad tunc et ibidem de jure debuit admitti, et predicti Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon sic Constabularii Burgi predicti tunc et ibidem existentes ad tunc et ibidem requisiti fuerunt per ipsum Mattheum Ashby ad suffragium ipsius Matthei Ashby predictum in premissis recipiendum et allocandum, iidem tamen Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon ad tunc et ibidem ut prefertur Constabularii Burgi predicti existentes premissoribus non ignari sed machinantes et fraudulenter et malitiose intendentes eundem Mattheum Ashby in hac parte damnificare et de privilegio suo de et in premissis predictis impedire et totaliter frustrare eundem Mattheum Ashby suffragium suum in ea parte dare ad tunc et ibidem obstruxerunt, et ad tunc et ibidem penitus recusaverunt eundem Mattheum Ashby suffragium suum ad eligendos duos Burgenses pro Burgo illo ad Parlamentum predictum dare permittendum ac suffragium ipsius Matthei pro electione illa non receperunt neque allocaverunt ac duo Burgenses de Burgo illo pro Parlamento predicto Mattheo Ashby sic ut prefertur excluso sine aliquo suffragio ipsius Matthei Ashby ad tunc et ibidem virtute brevis et precepti predicti electi fuerunt in enervatione predicti privilegii ipsius Matthei Ashby de et in premissis predictis. Unde idem Mattheus Ashby dicit quod ipse deterioratus est et dampnum habet ad valentiam ducentarum Librarum et inde producit Sectam, &c.

Et modo ad hunc diem scilicet diem Veneris proximum post Octavas sancti Hilarii isto eodem Termino usque quem diem predicti Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon habuerunt licentiam ad Billam predictam interloquendi et tunc ad respondendum, &c. coram Domino Rege apud Westmonasterium veniunt tam predictus Mattheus Ashby per Attornatum suum predictum quam predicti Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon per Johannem Burnham Attornatum suum: et iidem Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon defendunt vim et injuriam quando &c. Et dicunt quod ipsi non sunt inde culpabiles et de hoc ponunt se super Patriam et predictus Mattheus Ashby similiter &c. Ideo ven' inde Juratores coram Domino Rege apud Westmonasterium die Jovis proxime post Octavas Purificationis beate Marie Virginis et qui nec &c. ad recognitionem &c. quia tam &c. idem dies datus est partibus predictis ibidem &c.

Postea continuato inde processu inter partes predictas de placito predicto per Juratum Patrie inde inter eos in respectu coram Domino Rege apud Westm. usque diem Mercurij proxime post quindenam Pasche extunc proximam sequentem nisi Justiciarii Domini Regis ad Assisas in Comitatu predicto capiendas assignati prius die Lunae nono die Martii apud Ayles-

bury in Comitatu predicto per formam Statuti, &c. venerint pro defectu Juratorum, &c. ante quem diem dictus Dominus Willielmus Tertius nuper Rex Anglie &c. diem suum clausit extremum ac etiam ante eundem diem loquela predicta adjournata fuit per breve Domine Anne nunc Regine Anglie &c. de communi adjournamento coram eadem Domina Regina apud Westmonasterium usq; a die Pasche in tres septimanas ad quas quidem tres septimanas Pasche coram eadem Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum et prefati Justiciarii coram quibus, &c. miserunt hic Recordum suum coram eis hic in hec verba, scilicet, Postea die et loco infra contentis coram Edwardo Ward Milite Capitali Barone Scaccarij Domine Anne nunc Regine Anglie, &c. et nuper Capitali Barone Scaccarii Domini Willielmi Tertij nuper Regis Anglie et Thoma Knight Armigero hac vice associato eidem Edwardo Ward, et Thoma Bury Milite uno Barone Scaccarii dicte Domine Regine nunc et nuper uno Barone Scaccarii dicti nuper Regis Justiciariis ipsius Domine Regine ad Assisas in Comitatu Bucks capiendas assignatis per formam Statuti, &c. presente prefato Thoma Bury non expectato virtute brevis de si non omnes, &c. venerunt tam infra nominatus Mattheus Ashby quam infra scripti Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon per Attornatos suos infra contentos et Juratores Jure' unde infra fit mentio exacti similiter venerunt qui ad veritatem de infra contentis dicend. electi triati et jurati dicunt super Sacramentum suum quod predicti Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon sunt culpabiles de premissis in narratione infrascriptis interius eis impositis modo et forma prout predictus Mattheus interius versus eos queritur. Et assidunt damna ipsius Mathei occasione infra contenta ultra misas et custagia sua per ipsum circa Sectam suam in hac parte apposita ad quinque libras et pro Misis et Custagijs illis ad quadragiuta solidos; sed quia curia dicte Domine Regine nunc hic de Judicio suo de et super premissis reddendo nondum advisatur, dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem Veneris prox' post crastinum Sancte Trinitatis de Judicio suo inde audiendo eo quod curia dicte Domine Regine nunc hic inde nondum, &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum; sed quia curia dicte Domine Regine nunc hic de Judicio suo de et super premissis reddendo nondum advisatur dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem Veneris proximum post tres septimanas Sancti Michaelis de judicio suo inde audiendo eo quod curia dicte Domine Regine nunc hic inde nondum, &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum et prefati Justiciarii coram quibus, &c. miserunt hic Recordum suum coram eis hic in hec verba, scilicet, Postea die et loco infra contentis coram Edwardo Ward Milite Capitali Barone Scaccarij Domine Anne nunc Regine Anglie, &c. et nuper Capitali Barone Scaccarii Domini Willielmi Tertij nuper Regis Anglie et Thoma Knight Armigero hac vice associato eidem Edwardo Ward, et Thoma Bury Milite uno Barone Scaccarii dicte Domine Regine nunc et nuper uno Barone Scaccarii dicti nuper Regis Justiciariis ipsius Domine Regine ad Assisas in Comitatu Bucks capiendas assignatis per formam Statuti, &c. presente prefato Thoma Bury non expectato virtute brevis de si non omnes, &c. venerunt tam infra nominatus Mattheus Ashby quam infra scripti Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon per Attornatos suos infra contentos et Juratores Jure' unde infra fit mentio exacti similiter venerunt qui ad veritatem de infra contentis dicend. electi triati et jurati dicunt super Sacramentum suum quod predicti Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon sunt culpabiles de premissis in narratione infrascriptis interius eis impositis modo et forma prout predictus Mattheus interius versus eos queritur. Et assidunt damna ipsius Mathei occasione infra contenta ultra misas et custagia sua per ipsum circa Sectam suam in hac parte apposita ad quinque libras et pro Misis et Custagijs illis ad quadragiuta solidos; sed quia curia dicte Domine Regine nunc hic de Judicio suo de et super premissis reddendo nondum advisatur, dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem Veneris prox' post crastinum Sancte Trinitatis de Judicio suo inde audiendo eo quod curia dicte Domine Regine nunc hic inde nondum, &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum pre-

dictum, sed quia curia dicte Domine Regine nunc hic de Judicio suo de et super premissis reddendo nondum advisatur, dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem Sabbati proximd post Octabas Sancti Hilarii de Judicio suo inde audiendo, eo quod curia dicte Domine Regine nunc hic inde nondum, &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum, sed quia curia dicte Domine Regine nunc hic de Judicio suo de et super premissis reddendo nondum advisatur, dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem Mercurij proximum post quindenam Pasche de Judicio suo inde audiendo, eo quod curia dicte Domine Regine nunc hic inde nondum, &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum, sed quia curia dicte Domine Regine nunc hic de judicio suo de et super premissis reddendo nondum advisatur, dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem Veneris proximum post crastinum Sancte Trinitatis de judicio suo inde audiendo, eo quod curia dicte Domine Regine nunc hic inde nondum, &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum, sed quia curia dicte Domine Regine nunc hic de judicio suo de et super premissis reddendo nondum advisatur, dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem Sabbati proximd post tres septimanas sancti Michaelis de judicio suo inde audiendo, eo quod curia dicte Domine Regine nunc hic inde nondum, &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum super quo visis et per curiam dicte Domine Regine nunc hic plenius intellectis omnibus et singulis premissis maturaq; deliberatione inde habita consideratum est quod predictus Mattheus Ashby nil capiat per Billam suam predictam sed pro falso clamore suo sit inde in misericordia, &c. Et predicti Willielmus White Richardus Talboys Willielmus Bell et Richardus Heydon eant inde sine die, &c.

The *Speaker*, (Mr. Harley, afterwards earl of Oxford) after the Reports were over, told the House, That he thought it to be his duty to put them in mind of the great consequences and importance of this matter, and that it behoved them to take very great caution in their proceedings, not only that the grounds and foundation be good, but also that the method and manner of treating it be according to ancient usage and custom of parliament: and to that end he desires the House would give him leave to state this matter, as it appeared to him, and according to what occurred upon the sudden to his memory, that the House

might take proper methods upon this occasion.

The *Speaker* then proceeded to give the House an account of the state of elections by custom of common law, and that the great alteration in point of elections was in the beginning of Hen. 4's time, since whose reign the returns for parliament have been made by indenture. That by the statute of 7 H. 4, there is a method prescribed of election and return, and the occasion he took to be this: H. 4 came to the succession of the crown by the deposition of R. 2, when the parliament was sitting. That parliament was continued to H. 4's time: for though in the rolls it was called a new parliament, and returns were made as by the sheriffs of the counties, and also by the boroughs, as if it were a new parliament; yet it was the same parliament, for they were the same men, and there were too few days between one parliament and the other, to have a new election. But Henry 4, having made such an extraordinary step, he would not leave it as a precedent to be found out. Afterwards, when times were a little more settled, in his 7th year, and that practice was necessary to be condemned, it was provided, at the great complaint of the Commons, that it should be done by indenture, that the same or like deceit should never be put upon the kingdom afterwards, and one part was to be kept below. This continued for about four years, when there was another complaint of the proceedings of sheriffs (he said he need not mention the regulation of 40s. a year, and some other things which are not directly to this case); and upon that there was a penalty put upon the sheriffs of 100*l.* which he took to be in the 11th year; and it was put under the inquiry of judges of assize, and so it stood all that king's reign till H. 5. And then there was another law made for electors and elected, that they should be all resident. Some of the law books give a pretty construction of it, that though there was such a law, yet the custom of parliament was to be the rule. But he said he thought it to be a better construction, that it being then reckoned a service, and a hard service, none but residents in the borough were compellable. Thus it continued till about H. 6's time, and then if the sheriffs had made a wrong return, if indicted or prosecuted at the assizes, there was to be immediate execution for this 100*l.* without any traverse. Upon this there was a statute to allow the sheriff a traverse for this 100*l.* and that he should not be liable to it till he was legally convicted; so it stood till about a year afterwards, that the parliament thought it necessary to make another act about 8 H. 6, and then there was great complaint again of the ill proceedings of sheriffs. And the law was enforced again, and it was declared who should be the electors, and the sheriff was made liable to the penalty of 100*l.* and imprisonment without bail or mainprize, and it was inquirable by the judges

of assize. Another statute was made the 10 H. 6, which enforceth the manner of elections, so it stood. Then 23 H. 6, there are two statutes, one relating to the wages of knights, citizens and burgesses, and how they should be levied; another reciting the statute of H. 5, and H. 6, and it says, that there were not sufficient penalties on sheriffs, who, besides that sometimes they sent no writs to boroughs, made insufficient returns, &c. And the mayors and bailiffs were guilty of the same; and therefore over and above the first penalty of 100*l.* they laid another penalty of 100*l.* more, which was to the plaintiff, with costs of suit; and this was to be tried before the judges of assize, and the courts at Westminster, and at the sessions, and the action is to lie either for a knight, or burgess, or any other person that would bring the same, but within a time limited, three months from the commencement of the parliament. Thus elections stood in point of law, till the modern alteration within every body's memory, and he hoped whatever time gentlemen took this matter into consideration, they would do it as became the House of Commons, and examine all particulars, as well as the judgments of law, and they would do what became a House of Commons, and that nobody would see the dignity of the House of Commons impaired. And however differences were between them in other things, they would be unanimous in preserving the rights of the Commons, and of doing it in a right and justifiable manner: and offered to their consideration, whether it would not be best to proceed in the old method, by going into a grand committee for the courts of justice to consider this matter, and that by taking this course, they would walk in the steps of their predecessors, and avoid many inconveniences, which were easily to be foreseen would happen, by taking another course.

But it being moved and seconded, to consider of the said Reports in a committee of the whole House, the question was put, and carried, That the House on Tuesday then next following, would resolve itself into a committee of the whole House, to consider of the said Reports.

Ordered, That the same members do also search the offices of the court of Queen's-bench, what proceedings were there in the case of *Barnardiston and Soame*, and for a copy of the record of the judgment in that case, and report the same to the House.

THE GRAND DEBATE THEREON.

January 24.—Mr. Brewer reported, that the members appointed to search the offices of the court of Queen's-bench, as to what proceedings were there in the case of *Barnardiston and Soame*, and for a copy of the judgment in that case, had searched the same accordingly; and he presented to the House a copy of the said judgment, the consideration whereof was referred to the committee of the whole House,

who were appointed to consider of the Report relating to the case of Ashby and White.

January 25.—This day the House resolved into a committee of the whole House to take into consideration the Report of the Lords Journals touching their lordships' proceedings on a Writ of Error in the case between Ashby and White, et al. and also touching their lordships' proceedings in the matter mentioned in the Petition of Mr. Bathurst; in which last case of Mr. Bathurst, as it was alleged, their lordships had taken upon them an original jurisdiction, in controuling an order made by the court of Exchequer for the fling of a record that had been several years lodged in Mr. Grange's chamber of the Temple. But the committee in the first place agreed to go on with the business of Ashby and White; and the Debate of that matter was carried on with great order and temper, and was to the effect following:

Mr. FREEMAN in the Chair.

Mr. Brewer. Sir, we are now in a committee of the whole House upon the consideration of the case of Ashby and White; which I take to be a matter of the last consequence to the privileges of the House of Commons, which I think are dangerously invaded by the Lords pretence of judicature upon them. But, as I do not doubt every gentleman here thinks it his duty to support and maintain the just rights and privileges of this House, as intrusted by those who sent us hither; so we shall do it in such a manner, as will consist with, and maintain a due correspondence with the Lords. I shall open the true state of the case, with the judgment given upon it in Westminster-hall, and some of the reasons, which, in my opinion, support that judgment; and then speak to the reversal of it by the Lords, (which, with submission, I take to be a new attempt of their lordships, to bring this, and all our privileges before them in judgment) which I believe, neither this, nor any other House of Commons will endure, or want will or power to relieve themselves against such an usurpation.—The plaintiff declares against the defendants, that whereas, on the 26th day of December, in the 13th year of king William the third, a writ issued to the sheriff of Bucks, commanding him to cause to be elected two burgesses for Aylesbury; the sheriff directed his precept accordingly to the constables, to whom it belonged to execute that precept; and the burgesses being assembled, and the plaintiff duly qualified to give his vote, he offered to give it for sir Thomas Lee and Mr. Mayne; but the defendants, falsely and maliciously intending to defeat him of that privilege, did refuse to receive it; which he lays to is damage, and issue being joined, that cause was tried at the assizes, and a verdict for the plaintiff, and 5*l.* damages.—The fact being thus tried, the matter in hand (that is to say, whether this action is maintainable by the rules of law or not) was often argued by

counsel learned at the bar, and afterwards considered by the judges in the Queen's-bench; and upon their mature consideration, judgment was given for the defendants, that is, that the plaintiff had no good cause of action.

Now I understand the chief reason was, for that the right of voting in such cases hath ever been, and ought to be cognizable and determinable by the House of Commons, and not elsewhere; for by the law and usage of parliament, the House of Commons have heard and determined the right of their own elections, and consequently and necessarily the right of the electors to vote; and for this purpose, at the opening of all parliaments a committee of elections is nominated of members of our own, to hear and determine of such right of elections, to whom petitions (after presented to the House) are referred; and if any elector had been refused his vote in the country he is, notwithstanding, allowed his vote here in case he had right; and it shall avail the candidate as much as if the vote had been received below: and the committee, after judgment upon the case, report to the House all the special matter, and their resolutions; where the whole matter may be afresh debated, and the House agree or disagree with the committee, as shall appear reasonable. So that this determination and method of trial hath two digestions, and more likely to be well founded than that of a common jury, who we know are made by under-sheriffs, and often of persons so corrupted or ignorant that new trials are often granted by the judges. But it may be objected, that no single petitioner will be received by the House: in answer to this, I say he may; and I have known petitions touching elections preferred by very few persons, and by the same reason may by one: I am sure we have no order of the House against it; and if gentlemen object, that no single petition of this nature was ever received, if they will shew me when it was offered, I will shew them when it was received; I believe they cannot shew me it was ever refused. But I would ask if they can shew me that such an action as this was ever brought against the officer, as in this case. I am sure they cannot, and which, in our law, is allowed a good argument, that no action lies; especially it being a case which cannot be presumed, but may happen very often, almost in every election: And I believe there never was a new parliament called, but frequent occasions might have been taken for such an action, and better founded than this of the plaintiff's, who was a poor hostler, and removed from that parish by the order of two justices, as being likely to become chargeable. But it seems our ancestors reposed a confidence in their representatives to have right done them in such cases: They sought not relief from common juries. And what is now done by this attempt? Why, the judges, upon their oaths say, that they have no cognizance of the cause; but notwithstanding, the Lords say they have

recognizance, and reverse that judgment; and the consequence of that is, the Lords will judge of this our undoubted privilege, never till now drawn into question: and by the same reason and law, the Lords may sit in judgment upon all other our privileges, and thereby we become depending upon them; which some without doors, I find, are willing to submit to: for that, they say, where one is deprived of his right he ought to have damages, which the House of Commons cannot give. I allow, where one is injured he shall have relief, by our law, in one place or other; but we have not one shop to cure all distempers. The Queen's-bench relieves chiefly in matters criminal; the Common-pleas in civil pleas between party and party; the Exchequer in matters of revenue: Chancery in cases of fraud; and in the case in question, relief may be had (as said before) in the House of Commons, by law and usage of parliament, which all lawyers know, is a very considerable, known, and approved part of the laws of England. And though no damages are usually given here, yet the officer, for misbehaviour, and arbitrarily refusing votes who had right, may be, and has been punished, by the power and authority of the House, and even at common-law: as when an alderman is refused by the mayor, or other person who ought to admit him, the remedy is by *Mandamus*, which though it is chargeable to the person injured, yet I do not know any damages are given him, otherwise than that the party injured is admitted; which is a relief, the alderman having what he complained for: And so the elector; his vote is allowed as good as if the constable had took it. And, by the way, give me leave to observe how small a relief the new devised remedy by damages, is: I dare affirm and demonstrate, that the plaintiff, in the case in question, is above 100*l.* out of pocket, more than the costs and damages recovered, which I take to be *infelix victoria*. But if gentlemen say, the poor hostler could not expend so much, I believe so too, but if at the expence of any great man, I think it is less justifiable, to make a tool of that poor fellow, perhaps, in order to enlarge a jurisdiction.—I must confess I take the case of the elected to be much stronger than the case of the electors; and yet, in such cases, relief at common law was always denied, as in the case of sir Samuel Barnardiston and Soame, there the sberiff made a double return; and in the case of Mr. Onslow*, a false

* The Case of Denzil Onslow, esq. was tried at the assizes holden for Surry on Wednesday the 20th day of July, A. D. 1681, at Kingston upon Thames, before the lord chief justice of England, sir Francis Pemberton.

THE DECLARATION.

Denzil Onslow, esq. had brought his action on his case in the court of Common Pleas, against William Rapley, late bailiff of the borough of Haselmere; thereby setting

return; and the persons injured by those returns were put to very great charges and kept long from their seats in the House, and yet, at common law could never obtain a relief. The judges were of opinion (as they now are in the case of the elector) that it was a matter of

forth, that Haselmere was an ancient borough that used to send burgesses to parliament, that a writ issued to the sheriff of Surry, to cause knights and burgesses to be chosen for the parliament to be held the 17th of October, anno 31 Caroli regis. The sheriff made a precept to the borough of Haselmere, to chuse burgesses. That, August 31, anno 31 Caroli secundi, the plaintiff was duly elected one of the burgesses, and returned, by indenture, with sir William Moore. That the defendant, intending to deprive the plaintiff of the honour and benefit of his election, did, by another indenture, return sir William Moore, bart. and James Gresham, esq. as duly elected, whereas the said Gresham was not duly elected: whereby the plaintiff was hindered from sitting in parliament, and put to great charge to assert his right, to his damage of 200*l.*

After Not Guilty pleaded, upon evidence given on both sides at the trial, the case appeared to be thus:

THE CASE and EVIDENCE.

At the election in this borough for the last parliament at Westminster, there were four competitors, viz. sir Wm. Moore, the plaintiff, Mr. Dorrington, and Mr. Gresham. The electors meeting and voting, the poll was demanded, granted, and taken: the defendant took time to peruse and consider the poll until the afternoon; and having considered of it, came again to the place of election, and declared the plaintiff and sir William Moore had the majority of the ancient and lawful burgesses, and proclaimed them two to be duly elected, and sealed an indenture thereof accordingly; and Mr. Gresham being then present, opposed not the same, but desired that sir William Moore (with regard to his title and quality) might be first named in the indenture, although (as was then admitted) Mr. Onslow had the majority of him; which was done accordingly, Mr. Onslow readily and generously consenting to the doing thereof.

That about a week or a fortnight after, the bailiff was prevailed with to seal and return another indenture, whereby sir William Moore and Mr. Gresham were returned as elected. Whereupon, Mr. Onslow's right to sit was controverted, and he suspended from sitting; and was put to his petition to the House of Commons, who, upon hearing of the whole matter, and consideration had of the indirect dealing of the defendant and others, declared Mr. Onslow duly elected, and committed the defendant. And Mr. Onslow sate in the last parliament at Westminster for that borough, and that Mr. Onslow had been at great charges to clear his election.—First, the defendant's counsel insisted on the sta-

parliamentary cognizance, of which they were not competent judges. And should we now admit this matter to be determined by the courts below, what great confusion and inconvenience would follow? I presume no body will pretend to exclude the jurisdiction of

tute of 1 H. 5, c. 1, That a person elected must be free, resident, and dwelling within the borough. To which it was answered, and resolved by the court, that little or no regard was to be had to that ancient statute, forasmuch as the common practice of the kingdom had been, ever since, to the contrary; and it was the way to fill the parliament house with men below the employment: and the objection was disallowed. Secondly, it was agreed unto by the parties and their counsel on both sides, that the right of choice of burgesses for this borough to parliament, lay in the burgage freeholders resident, and inhabiting within the borough, and none others.

Then the plaintiff's counsel insisted and proved, that there voted for him 13, having good and unquestionable votes; unto one whereof, the defendant's counsel excepted, for that he before the election had mortgaged his estate: which the party himself, present in court, denied upon oath: and the court was of opinion, it had not been a good objection, if true, so long as the mortgager continued the possession, and had the benefit of redemption in him.

The defendant's counsel said, there voted for Mr. Gresham 14, having good votes: which, if so, would have made a majority; but the plaintiff's counsel excepted to six of the 14, as being no good electors, for that one of them lived not within the borough; which was proved, by ancient reputation and perambulation, that the house where he lived was left without the bounds. As to the other five, the objection was, they were no real burgage-tenants; and that, if any conveyances had been made to them of burgage lands, they were lately made, and fraudulently contrived, to make votes against an election: and because the defendant's counsel could not deny but these conveyances were late made, the court put the defendant to produce and prove them, which was done; and upon reading of them, it appeared, two of the five were made after the test of the parliament writ, and three of them in order to carry on sir Philip Floyd's election in the borough, about five years since. Two of them were conveyances by one Vallor, who had a garden of about 30 rods, and conveyed to each of his two sons a piece of it, containing about ten rods, of which they had made jointures to their wives, each share being worth, at best, 2s. per annum. Another of the five was made by a father, who had a close containing two acres, and made a conveyance to his son of about a quarter of an acre, which always after lay undivided, and was constantly enjoyed by the father. Another conveyance was made by a son-in-law to his father-in-law, of a cart-house. The last was a conveyance to one Jackson, of a little tenement: but it was proved that collateral security was given to re-convey, and

the House of Commons, in this case; and yet, if they judge one way, and the courts below another, and neither have power to supersede or reverse the determination of the other, under what uncertainty will the officers and all parties concerned lie? Whereas, in other cases, where

that the grantor had repaired it. As to all five, there appeared several badges of fraud, as a continued possession in the grantors, &c. and the several confessions of the purpose and intent of making them for the elections.

The court censured such proceedings as evil and unlawful; Mr. W. (Recorder of G.) one of the defendant's counsel, stood up to justify these proceedings, and said, it was part of the constitution of our government to do so. At which the court seemed very angry, and wondered that any one, especially a man of the gown, should say so, and said, Do you think our government hath no better constitution? With which the gentleman not being satisfied, he was told by the court, he deserved to be taken notice of for saying so, and that he seemed to have advised the thing done.

To conclude the evidence, the plaintiff's counsel delivered into Court ten or twelve several conveyances, that were proved by the party that wrote them, to have been made by Mr. G.'s order, to make so many votes at a former election, wherein Mr. Gresham was concerned; and the election being over, they were cancelled and delivered up; concerning which, Mr. Gresham endeavoured to say something by way of excuse, but was told by the court, it was too bad to be excused; and it was well an act of general pardon had passed since this was done, else he should have answered it in another place. During the whole time of the trial, the same was managed with great patience and circumspection; for, so soon as the cause was opened by the plaintiff's counsel, the court perceiving the nature of it, commanded silence and attention in the jury: The court declaring it was of great weight, as great as any that ever came there to be tried. And the evidence being fully given on both sides, the court, by way of direction, told the jury, that the plaintiff need not, as this case is, prove any express malice in the defendant; for it shall be intended when a man shall do such an evil thing as this is, contrary to his own knowledge and declaration made upon the election, and afterwards also (for it was proved against him, by one or two witnesses, that a little time before this trial, he did confess Mr. Onslow was duly elected, and that he had told Mr. Gresham what would come of it). And the court further told the jury, that this was a cause of moment, and deserved more than ordinary consideration; and the making votes by such means was a very evil and unlawful thing, and tending to the destruction of the government, and debauching of parliaments: and although some of the conveyances were made some time before his election, to serve a turn at a former choice; yet that they were fraudulent, and void

one court errs, a superior court reverses; but here, both adjudications shall stand together, though inconsistent the one with the other.— But it is said, in this case, the action lies, because the defendant refused the plaintiff's vote *maliciose et falso*. I take those to become words of course, and no evidence of that is given to

in their creation, and ought not to be made use of at any time against any other person; and that it was senseless to think such practices were part of the constitution of our government, or to imagine that persons whom we intrust with our lives and fortunes ought to be made and chosen by such evil devices: and that such practices deserve to be severely punished, and directed the jury to give signal damages. Whereupon the jury withdrew, and after a short stay, gave a verdict for the plaintiff, and 50*l.* damages.

And the court, in the course of evidence, having observed one Billinghurst to be much concerned in the proof and management of their fraudulent deeds, conceived him to be privy to much of the practice thereabouts, and commanded him to stay in the court till the jury had given in their verdict: which when they had done, the court required him to find sureties to appear in the court of King's-bench next Michaelmas-term, to answer to an information touching the said misdemeanor: and in the mean time to be of good behaviour, which accordingly he did do; and sir William Moore, and sir George Woodruff, whom he had served in the last election at Haselmere, were his sureties. And the court required the plaintiff, Mr. Onslow, to see that an information be preferred; which he promised to do: And the court declare it was a very great offence, and should be severely punished.

I shall give a few instances of what the House of Commons have done in former ages to punish and prevent evils about elections.

1. Anno 20 Jacobi, doctor Harris, minister of Blechingley in Surrey, for misbehaving himself by preaching, and otherwise, about election of members of parliament, upon complaint, was called to the bar of the House of Commons, and there as a delinquent, on his knees, had judgment to confess his fault there, and in the county, in the pulpit of his parish church on Sunday before the sermon.

2. Anno 21 Jacobi, Ingrey, under-sheriff of Cambridgeshire, for refusing the poll, upon the promise of sir Thomas Steward to defend him therein, kneeling at the bar, received his judgment, to stand committed to the serjeant at arms, and to make submission at the bar, and acknowledge his offence there, and to make a farther submission openly at the quarter sessions, and there also to acknowledge his fault.

3. Anno 20 Jacobi, the mayor of Arundel, for misbehaving himself in an election, by putting the town to a great deal of charge, not giving a due and general warning, but packing a number of electors, was sent for by warrant, and after, ordered to pay all the charge;

the jury.—Sir, to conclude, the House lately passed a resolution, that no lords should intermeddle at any of our elections: But if this be allowed as law, they may at the last judge and make (for aught I know) all our elections. But for my part, I am for continuing the possession of this, and all other just privileges, as derived down to us from our predecessors, who ever enjoyed and exercised them as now we should; and I hope before we rise we shall think of some remedies, and not lie wholly under the power or mercy of the Lords.

Sir Thomas Powis. Mr. Freeman; I believe I should hardly have rose up in this matter, but that I think it more particularly my duty to speak to this thing, if it were possible, than any other; for in truth, I have had a more particular opportunity of knowing the nature of this case, and the proceedings in it, and what the consequences of it will be, than many others have had. I must acquaint you I was of counsel in this cause, in the House of Peers, upon the Writ of Error with White, and the other constables that were prosecuted in this action, and did to my power defend what I took to be the rights and privileges of this House. I would stand right in the opinion of every body; for what I did there for my client, in the course of my profession, I do not think myself obliged to maintain here: for then it was my duty to do my best for him as his counsel, but now he hath done with me, and I have done with him, in this place. It hath been to the great honour of some judges in Westminster-hall, who have argued in cases below, at the bar, and have been brought on the bench before the cause hath been determined, that they have argued at the bar one way, and when upon the bench, have given judgment another way, against their very clients, and thereby done their duty in both places. Now, when I have said this, I hope I do stand fair and clear, that I now speak as a member of the House of Commons. You are upon a point which I wish had never happened, for there is nothing I enter upon with greater reluctancy than what looks like a dispute with the other House; for

and the House appointed certain persons to adjust the charges.

4. And lastly, 3 Car. 1. Sir William Wrey and others, deputy-lieutenants of Cornwall, for assuming to themselves a power to make whom they pleased knights, and defaming those gentlemen that then stood to be chosen, sending up and down the country letters for the traile-bands to appear at the day of the election, and menacing the country, under the title of his majesty's pleasure; had judgment given upon them to be committed to the Tower. 2. To make a recognition of their offence at the bar of the House, upon their knees; which was done. 3. To make a recognition and submission at the assizes in Cornwall, in a form drawn by a committee. See this Case in a folio pamphlet, printed 1661.

no man pays a greater honour to the House of Peers, and to every peer there, than I do; however, as I am intrusted, I shall endeavour to maintain the rights of this House. And I do say, if the Peers of England can determine all our properties at law, upon Writs of Error, and all our rights in equity upon appeals; and if they can determine our elections in consequence of this action, as I am of opinion they may, if this action prevails, they have a greater power than ever that House had in the days of their noble ancestors, when they were in their greatest grandeur. I will shew what will be the ill consequences, and I think it very fit for you to take this matter into consideration, if there be any way to come at it. First, I cannot deny but generally speaking, a man has right to bring his action at law; but then I hope, though a man hath a right to bring an action, yet he cannot bring it in detriment to any other man's privilege; for if a member of this House be sued in time of privilege, though a person have a right to such action, yet he cannot prosecute it in breach of the privilege of such person, much less can a man prosecute an action in breach of the privilege of this House. And suppose this should come before the Lords in question, by Writ of Error, and they should be in possession of the cause, sure every determination of the Lords, upon a Writ of Error, is not without more ado to be conclusive to the Commons in their rights and privileges, so as that they may not take an alarm, and be concerned if all their privileges are about to be taken from them. Suppose any member of this House, (as I think by the privileges of this House he may,) should, in this House, have just occasion to take notice of some great misdemeanor in any great officer of the crown, and should assert matters highly intrenching on the honour of a peer of England; and suppose, when the parliament was up, the peer should bring his action of *scandalum magnatum* against the member, at law, for words that he had spoken here, and lay them as spoken elsewhere, for so in a transitory action he may, and he should justify that they were spoken in the House of Commons, where, by the privileges of the House, freedom of speech is allowed; and suppose judgment in that case, as in this it was, should be given against the plaintiff, and afterwards this, by a Writ of Error, should be brought before the Peers, and they should reverse this judgment, and give judgment for the plaintiff; can any thing be more destructive to the constitution of parliament, if such a case as this should happen? And must the Commons in such case sit down by it?—Suppose any man should presume to arrest any member as he was going into the House of Commons, nay, the Speaker himself, and afterwards he is committed by order of the House, and the person committed should bring his action for taking him into custody, and the serjeant who took him into custody should plead this matter, and the judges give judgment for him as they did for the defendants in

this case, and by Writ of Error, it being brought into the House of Peers, they should reverse this judgment, and give the plaintiff his damages; will any one say, we could not take notice of this? Would it not destroy all our rights and privileges? So no doubt in this case, though they have gone by way of action at law, and judgment in Westminster-hall, and Writ of Error in the House of Peers, it cannot be said, but if it concerns our rights, we may take notice of it. In the case of sir John Elliot, &c. [vol. 3, p. 293.] the Commons declared the judgment, 5 Car. 1, illegal, and against the privilege of parliament. It is my poor opinion, it is our right (and I think nobody can doubt it,) for we are in possession of it, to determine our own elections; and I would be glad to be acquainted when first we began to hear and determine our own elections: I believe nobody will say with certainty when we did not. I know we have a turbulent author, who generally affected to be in the wrong, and, though a member of this House, made it his business to write against their privileges, and was always hunting among the records of the Tower, from whence he brought away a great deal of dirt with him, and yet could never pretend or produce more than two instances, where the Commons resorted to any other place for the settling the right of their elections: the man I mean, is Mr. Prynne; he takes occasion to do it from what is said by my lord chief justice Coke, (who, with your favour, I must take notice so far, as to say he was not only a very great man in our profession, but had been Speaker of the House of Commons in his time) and he, in his 1 Inst. fol. 116, and 4 Inst. 1 cap. fol. 14, 15, and 23, asserts, 'That the law of parliament is as much part of the law of the kingdom, as any other, and indeed the highest:' he calls it 'Lex et consuetudo parliamenti;' and says, this is a law that each House hath possession of, and judgeth by, and each House is a House of Judicature; and he puts upon this a great many instances, and some of them may seem strange to those who have run upon the Commons of late. He tells you of a case 8 Eliz. (at that time Onslow was Speaker, and it is in fol. 19, of the book of the House of Commons of that year) one Long was returned a member for Westbury; and it being complained of that he came into the House by undue practices, it was enquired into by the House of Commons, and found that he had given four pounds to the mayor of Westbury; and they having examined and tried this matter, did not only expel Long, but they fined and imprisoned the mayor of Westbury, 'Secundum Legem et Consuetudinem Parliamenti.*' Mr. Prynne, the author I mentioned, supposeth there was a time when the Commons used to apply to the king, in case wrong was done in the matter of their elections; and in his comment on the 4 Instit. 31, goes back to 12 Ed. 2, there the king was

* As to this, see vol. 6, p. 1122.

pleased by commission to appoint several persons to hear the matter of an election. He pretends too, another instance, and that is in Henry the 6th's time, in the case of Huntington; and there was a petition to, and a commission from the king in like manner. The latest of these instances is above 300 years ago, and neither of them make any thing for a power in the Lords to determine the elections of the Commons; but, on the contrary, rather for a power to be delegated by the king; and the instances are but two. Now, I say, Sir, we are, and have been in possession of this right for a very great length of time, and have it confirmed to us by act of parliament; for the late act of 7 and 8 of king William, hath, in effect, declared, that the determination of the right of the electors is in the House of Commons: for it says, That the sheriffs and officers of all sorts, shall follow the last determination of the House of Commons, as their rule and guide in such cases. And surely nothing is more absurd, than to say that this House shall examine, try, and determine who are elected; and yet Westminster-hall, and the Lords shall examine and determine the right of the electors. How can any one examine the election, but the first step he takes must be to consider and determine who are the electors? And the determining the one, is determining the other.—I would trouble you a little with the reasons they give why this action should lie. It hath been said, and I think it is true, for the honour of England, and I believe it hardly can be found to fail, that where a man hath a right, and a wrong done him, he is somewhere to have a remedy, but now let us see the application of this rule. Are they not by the same law that settles the right, and declares the wrong, to enquire where the remedy is to be had? For, though you have a remedy, you mistake that which is the proper remedy; and the same law that settles the right, and declares the wrong, gives the remedy; you must therefore go to the place where the law directs, for your remedy, not where yourself would desire the remedy. 'Therefore' says my lord Coke, in his Preface to his 4 Iustit. and likewise fol. 14, and 15, 'we have several jurisdictions, some ecclesiastical, some temporal, &c. some governed by one law, and some by another; and all must have their rules and bounds, which must be observed.' If your right be ecclesiastical, as for instance, before the Statute of Tithes, could you in Westminster-hall have brought your action? Or if issue had been joined in such an action, and the parties had gone to trial, will any body say but that the judges must have arrested judgment, and said that it was out of their jurisdiction? If a lord of a manor should refuse to admit a man, to whom a surrender is made of a copyhold estate, the lord has done him wrong, and damage too; but yet he cannot bring his action at law for it, for it is an equitable right, and he must go to a court of equity for his remedy; and so I could put a thousand in-

stances, but I will not spend your time. So that I say, it is not enough to say you have a right, and must have a remedy, and therefore you may bring your action at the common law; but you must seek it in a proper place, though perhaps costs and damages, and a trial by a jury, may be more desirable by the party.—Now, in this case I would know, whether this is not a matter of parliamentary jurisdiction, and also a parliamentary right? Is any thing more plain? He that hath a right to vote, hath a right to send a person to represent him, and sit in parliament; therefore it is a parliamentary right; where then must be your remedy? In the House of Commons, where you have a right to send a person to sit and represent you; there you may complain, I was denied my vote, or misused upon the election. This, by the law of parliament, shall be examined here, and for this purpose you constantly appoint a standing committee of elections. Indeed I cannot but wonder at the bringing of this new invented action; for if there be any thing certain of the common law, it is this, that where you claim a right to any thing, it must be founded upon common usage in that case, or in some case that carries the same reason, and is just like it; for the common law, generally speaking, is nothing else but common usage. Now let us see for the usage in this case, and whether there has been any thing like this action before. Say they, how do you know but such actions have been brought before? I do not see that there can be a stronger negative proof in any other case than in this; for we have had parliaments, as appears by our statutes in print, for 500 years, and we have had parliaments in every reign since, and in several reigns a great many parliaments: and let us consider, whether this case would not have happened frequently in 500 years, in so many elections in counties, boroughs, and cities where there are such infinite numbers of electors? And therefore this case must frequently have happened if such an action lay at law. If it be asked, how do I know that such an action hath not been brought before; I answer, it is wonderfully plain there never was such an action brought before; for as we have our acts of parliament in print, so we have faithful reports of all our law cases, which we call the Year-Books, and which are memorials of all cases so long back as from Ed. 2's time, that is 400 years, followed by a series of reports till this time, and are now grown so numerous, that they become a burden: and I will desire any gentleman of the law here, or in England, to shew me the footsteps of any such action as this, or of this kind till now, ever brought before. We have always said, our fore-fathers were wiser men, and greater lawyers than we are; and so they were: but such an action as this never entered their thoughts.—But it may be said, how does it appear that there was occasion for these kind of actions formerly, for men heretofore were

unwilling to serve in parliament, they were hired, and almost prest to it, and it was hard to get men to come up? I answer, it was so far otherwise for many years past, that so early as Henry 4's time, there were great contests about elections, and the sheriffs in those days were apt to do wrong, as appears by 7 H. 4, cap. 15. And therefore 11 H. 4, cap. 1, there was imposed 100*l.* penalty to the king on the sheriff that did not do his duty, according as the statute does direct: so that it does appear there was occasion for these actions, if they had lain by law; and yet you will find that never, till 23 H. 6, did it enter into the thoughts of any man, that an action at common law could be brought for an injury in an election; and therefore that act recites, that there was not before that time, a sufficient remedy for the party grieved, and therefore gives 100*l.* to the party, and costs, if a knight, and 40*l.* if a citizen or burgess, and that by a law made on purpose to help the party to an action, where there was no such remedy before. Thus it rested till the famous case between Nevill and Strode, in 2 Siderfin, fol. 168, (in that time they sent five knights of the shire out of Berkshire.) Mr. Nevill brought his action against Strode the sheriff; and he alleged that he being one of the five chosen for that county, Strode had maliciously and falsely refused to return him, &c. and the jury gave him 1,500*l.* damages. This action made a great noise, and the judges looked upon it as a great novelty, and thought fit to consult the parliament in it;* (in former days, in matters re-

* Sir Humphry Mackworth, in his Vindication of the Fundamental Right of the Commons of England, p. 27, saith, In the case of Strode and Nevill, A. D. 1655, in an action on the case, against the sheriff for a false return, to the damage of 2,000*l.* after a verdict for the plaintiff and 1,500*l.* damages, the court of the King's-bench adjourned the case into parliament, *propter difficultatem*, whether the action did lie or not? Where it is to be observed, that it was not adjourned into the House of Peers, but into the House of Commons, as the only proper judges, in all cases of that nature concerning elections; so careful were they of the rights of the Commons. And let not the iniquity of those times of rebellion be objected to this instance: the Argument from thence extremely confirms the right of the Commons; for if it be considered that Cromwell had then created a new House of Lords, and wanted nothing but a House of Commons to establish his usurpation, that to this purpose he had formed a new model of an House of Commons, and overturned the method of election, depriving all the boroughs of their rights, and causing the choice and returns of members to be made by the county; yet the name of a House of Commons remained; and even that was so revered in those days, that none would attempt to deprive them of their essential privilege, of judging of

lating to the parliament, they used to consult the parliament,) and the judges heretofore, when they were asked their opinion in difficult matters relating to the parliament, or law of parliament, would say, this was above us, and therefore to be decided by parliament. And this case being referred to the parliament, they looked upon it as so extraordinary an attempt, that though Mr. Nevill had a verdict for 1,500*l.* damages, yet he never got a farthing of the money, or any benefit by the verdict: *Sed ibi dormivit.*—After this, came the great cause, that hath been mentioned, of Soame and Barnardiston; and methinks this deserves very much our consideration, and how far the determination of the House of Peers ought to be a rule in this very case. That cause set forth with great prospect of success; sir Samuel Barnardiston, in that case, did not slight the determination of the House of Commons, but first petitioned this House as the proper place to determine his right, and had it decided for him, that he was the person duly elected, and the other return was taken off the file; and then he brought his action at common law, and set forth this whole matter, and that the sheriff falsely and maliciously returned another with him, whereby he was kept out of his right, &c. a long time, and put to very great expence and costs. This came to be tried at the bar of the King's-bench, and there was a verdict given for sir Samuel Barnardiston for 800*l.* This was looked upon as a great case, and my lord chief justice Hale bid all persons about him take notice, that they did not determine the right of the election, for the judgment in that case belonged to the parliament; but said, since the House of Commons had determined the right, he thought they might follow their judgment to repair him in damages, and so gave judgment for the damages the jury had given the plaintiff.—This case was looked upon so improper for the common law, that upon a Writ of Error brought in the Exchequer-chamber, that judgment was reversed, because the common law could not any way intermeddle with elections to parliament, further than was directed by acts of parliament. It might have been said, and I know it was said, that the reversal of this judgment was by an extraordinary high hand: and therefore upon the revolution, in the very beginning of king William's reign, sir Samuel Barnardiston brought a Writ of Error in parliament, complaining that in the Exchequer-chamber, they had reversed this judgment unjustly, and went upon these reasons, as may be observed from the Journal of the House of Lords, which were the reasons of some very few protesting Lords: 1. Because it was a denying sir Samuel Barnardiston the benefit of elections; no influence could bias the judges; they thought it so inherent, that they would not presume to intermeddle in it.—Former Edition.

the law, which gives relief as to all wrongs and injuries; and here is a very great damage to the plaintiff, and therefore he ought to be repaired. 2. Say they, if it should be allowed that sheriffs and bailiffs may make false returns and no remedy but a 100*l.* forfeiture, it would be of dangerous consequence, and might tend to the packing of a House of Commons, which may overturn the whole constitution. But the Peers then did not think these reasons sufficient for this new action at common law, and accordingly the House of Peers affirmed the judgment of reversal in the Exchequer-chamber, and said the judgment was well reversed, for that no such action did lie at the common-law, though the injury done did tend to the plaintiff's damage; and all the other mischiefs which are now suggested, were insisted on; and thus it stands to this day.* And yet now it is said upon the same reasons, the action does lie for this person, though he be only an elector, and must receive much less damage than the person elected; and there is no one reason for the elector, but holds more strongly for the elected. The elected cannot maintain an action, and yet now it is clear that one of the electors may, though he can have no substantial damage; for if a man comes and gives his vote, (as here in this case) it is not in the power of the officer to hinder him of the benefit of it; for his vote will be as well given as if the officer had put it down, and this with respect both to the person who gave the vote, and him for whom he voted; and so really it is no substantial damage to any man.—The next thing I shall mention to you, is another case of Mr. Onslow: he brought his action against the sheriff of Surrey for making such a return upon him, (I believe I have the gentleman in my eye who brought that action) he declared in the same manner, that it was done falsely and maliciously, and had a trial and a verdict; and yet notwithstanding the court of Common Pleas, (being governed by sir Samuel Barnardiston's case) did unanimously, 33 Car. 2, say, we must not presume to determine the merits of elections, or returns, there is a proper jurisdiction for it; and they gave judgment against the action, and I think he hath acquiesced in it ever since. I am sure I have

* See the Case of Barnardiston and Soame, reported vol. 6, p. 1063. Roger North (book 3, chap. 7.) gives of it a copious history, related in his ordinary style of partiality, vehemence and grossness. He concludes his account thus:

“The matter of this cause of Barnardiston and Soames rested, lying as embers with the ashes raked over them, during all the rest of king Charles the second's, and all king James the second's reign; for the party durst not bring the cause into the House of Lords, without a vote of the House of Commons to aid it. But, after the revolution, when the Lords were thought more propitious, sir Sa-

heard no more of it; the reasons given by the court, appear in the Report of the case in 3 Levins, fol. 29, and 30; and are worth the reading.—There was a case a year ago between Prideaux and Morris, in the county of Cornwall. Mr. Stratford was returned, and Mr. Prideaux

muel Barnardiston removed his cause into parliament by Writ of Error. But then the lord chief justice North, who had been lord keeper also, and sir William Soames, the defendant, were both dead, and the latter utterly insolvent. It was therefore wondered to what end it was done; for, if he prevailed, nothing was to be got, and few spend their money at law for the public good. The riddle was resolved by some attempts about that time; the analogy between which and this, made it more than guess, that, if the reversal had been reversed in the House of Lords, as being what they called illegal; then sir Samuel Barnardiston had petitioned for leave to bring in a bill to charge his damages (the defendant being dead insolvent) upon the estate of the late lord keeper North, by whose undue solicitations and means (the petition had said) that illegal judgment was obtained; and who, at that time, would say to the contrary, or require proof of it? Let none start at the monstrosity of this supposition; for it will be more familiar, when I have shewn that, in another case by the same faction, the like was attempted, and much more intended. And it is certain that some surviving friends of the lord keeper were told they must expect it would follow; and thereupon, however none of them meddled with the cause in the House of Lords, as knowing no concern his family had in it, they caused his lordship's argument to be printed, and so it fell into the hands of the Peers, who were better prepared thereby to understand the lawyers language, when the cause came to be heard. And thus sir Samuel Barnardiston went to law by himself before the Lords; without any opposition at all. And, at last upon solemn hearing of the cause, the House, by advice of the judges, especially Holt, then lord chief justice of the King's-bench, who clearly explained the law to be for the reversal in the Exchequer-chamber, confirmed that judgment; and so, for the justification and lasting honour of the lord chief justice North, it hath rested ever since. This was not the only correction that gentleman, sir Samuel Barnardiston, received upon account of his engagements, which were deep, with that faction. He was accounted an honest man, but mistaken, and betrayed into many inconveniences by popularity. He lived to be undeceived; for, finding by experience so much more of wickedness in his own party, after they had power, than he had ever dreamt of, he turned, and took in with that party in parliament that opposed them. And now, since his death, his posterity live with much honour and respect, and seem to be out of all danger of falling into those errors of pa-

brought an action in the Common Pleas, in the time of king William, against the Viander for making a false return against him to his great damage, and laid it with all aggravation. This went to a trial in Cornwall, and there was a special verdict found; and the question was, whether this action would lie, before the Commons had determined the right of election? And the whole court unanimously gave judgment, that the action could not be brought till the matter had been first brought before the House of Commons, and they had determined the right.

Now here is a total silence in all books of the law, that any such action as this is doth lie: here are the acts of H. 6, and king William, which provide remedies at law, because there was no other provision before. Here are not only these solemn judgments in Westminster-hall, but the judgment of the House of Peers, in the case most like to this of any that can be thought of, that no such action doth lie: and yet I cannot tell how, there are abroad persons that endeavour to run upon the House of Commons, and use them ill on all occasions, and are zealous for this cause, which seems to be set on foot to undermine all our elections, and bring them to another judicature.—Now see the consequence: no man ought to have a foot against him, two judgments at once in two several courts; whereby one may punish him at the same time for doing a thing, and the other for not doing it. I believe such proceedings would be looked upon as barbarous even in Turkey, and yet that will be just our case: a gentleman petitions the House of Commons, and says, the right is in such a set, or sort of men; as for example, in all the freemen, or free burgesses; and that according to that way of election, he was chosen, and not the person that is returned: and this is determined by the committee of elections, and afterwards by this House against him that petitioned. This man goes immediately and

popular flattery, as cost sir Samuel, and consequently them, so dear.

“This final determination had that cause, which, in the beginning, proceeding, and conclusion, was pure and pite factious; and every step of it shewed the true genius and spirit of the party against king Charles 2, so united and uniformly did they move, and act, as if one single soul animated the whole. O that the regular and honest sort of men had that soul! It is not so easy to come at intrigues to resolve them in greater affairs; the mask upon them is more worn.”

It is observable, that sir Francis North was, when Attorney General, leading counsel for the party, in whose favour he afterwards, as chief justice of the Common Pleas, gave judgment. Barnardiston was very odious to the court in the reigns of Charles the second and his brother. See his Case, vol. 9, p. 1333. As to the enormity of his fine, see Emlin's Preface, vol. 1, pp. xxxv, xxxvi.

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brings an action in Westminster-hall against the officer that returned the other; nay, every one of these persons that he affirmed the right of election to be in, bring their actions, and it comes into Westminster-hall to be tried, and the jury find the right to be in these men, as he has alleged, contrary to the determination of the House of Commons, and judgment is given against the officer in every one of these actions, for the men you have determined the right not to be in. You cannot set one of these judgments against the other; I cannot defend myself in Westminster-hall, by saying, the House of Commons have determined that these men, who sue me, have no right to vote. There is nothing like this in the world; two independent courts cannot controul one another, but both may go on together in the same cause; and both having a right to judge, one judges one way and the other the other, and the officer is crucified between them.—Let it be considered again, that at this rate none but knaves, or beggars, will be mayors, or bailiffs in an election year: For suppose as at Westminster, where I think there are ten thousand electors: or suppose it be as in some towns near Wales, for one of which I have the honour to serve, where descendants of every burgess claim a right to vote, and by consequence they will bring it in time almost to all the sons of Adam: for all the sons, and all the daughters' husbands, and all their descendants claim a right to vote. Now what a miserable case must that officer be in, when persons shall come from east, west, north and south, and say their pedigree is so and so, (for they are good at pedigrees in those countries,) yet, what a condition is he in? He is bound to determine whether they have a vote or not; and though he is no lawyer, or herald, yet however he is bound to give judgment one way or another at the peril of an action: And suppose but a hundred men should bring their actions against the officer, what man can stand a hundred actions, though he be in the right? There are not only these difficulties in the case, but there is revenge: and in popular elections there are those heats, and the voters engage with that animosity, that the losing side next day will be ready, perhaps only for revenge, to send for a multitude of writs, and have the pleasure of ruining the officer who was against them, though he was in the right; for every one has a right to bring his action whose vote was disallowed, though it should be found at last that he had no right.—As to the words ‘falso et malitiose’ laid in this declaration, which seem to be a great ingredient in this action, I agree, in some cases where there is a jurisdiction, these words may make a great aggravation of the offence; but they cannot make a thing unlawful that is lawful, nor give a jurisdiction where there was none before: For no man will say, if a person should bring an action at common law for a legacy, and allege, that the executor, though he had sufficient assets, yet he ‘falso et malitiose,’ refused to pay it; that would give a jurisdiction to the courts of common-law.

3 A

These words are *verba clericorum*, words of course for the most part. Besides, how dangerous and hazardous it would be for an officer, though ever so innocent, to depend upon these words; when every body knows that falsity and malice rest in the mind, they are in the imagination, and the jury that are to try this action are at liberty to judge with what mind the officer acted: that would be the hardest thing in the world for an officer to undergo in every action. It would be enough for the jury to presume it was done maliciously, (seeing few mayors, or bailiffs, but have their inclinations, and give their votes themselves for their friends,) because the officer made an interest for the other side; and the consequence of this new invented action, if countenanced, will be, that every triennial parliament will bring a triennial harvest to Westminster-hall. I speak against my own private interest, if that was to be considered. Elections, without actions, keep up animosities too long, so that they are hardly healed in three years time; but these actions will help to vex and worry corporations from three years to three years; and mayors and bailiffs will be the most miserable men in the kingdom, and ought to run their country rather than stand a popular election; whereas the officer is accountable to you for his behaviour at the election.—This is not a matter that stands in need of the aid and assistance of Westminster-hall, that they should invent a new action and remedy, as if there was a failure of justice. Has any one come with a complaint against any officer to this House, and they have not been willing to hear it? Have not the committee a right to hear and report matters with respect to the electors, as well as the elected? And have we not known that the electors, though but a small number of them (as in a late case of this sorry town of Aylesbury) about five, I think, of the electors came and complained, and their complaints were fully heard. And if any single elector should come with a petition and represent that he was abused by an officer, or ill treated by any mayor, or bailiff at the election, I do not think but the House would be ready to do him justice: and they have a right so to do, for the officer is accountable to them for his behaviour. It is not now only so practised, but always was so; for in the same treatise of my lord Coke's 4th Inst. fol. 49, he says, That they will make him change his very return; they will make him raise out the name of one, and put in the name of the other. So they have a jurisdiction adequate in this case; and surely if they can hear the complaint of several electors, they can hear the complaint of any one elector. I would not trouble you with arguments that may be proper in Westminster-hall, because we are here upon a matter of our constitution; but I know no action more obnoxious to the true reason of the common-law, which abhors multiplicity of actions: and a man shall never have a particular action, for that which naturally draws on multiplicity of actions, and may be reformed in a

more compendious manner. Upon this reason that famous case in 5 Rep. called 'Bolton's case,' is founded: If a man builds a dove house near a common field, where men make all their profit by plowing and tillage, and therein keeps a great number of pigeons that live upon his neighbours' corn, is not this a great wrong and injury to them? And yet no action lies: for, if one man that is wronged thus may bring his action, a great many more may do the like, and so there will be infinite actions; therefore it shall be presented in the court-leet, as that book says. So there is that case of Williams in the same book, where the lord of a manor had a chapel for himself and tenants to repair to, and to hear divine service, within the parish of Aldbury: he brought his action against the vicar who was obliged to officiate, for that he had neglected, &c. though he had used time out of mind to officiate, and had an allowance for it: says the case, if this action should be allowed, all the tenants and servants of the lord might have the like action, and so there would be a multiplicity of actions, and therefore he shall not have this action; but, if it had been to have been performed in his own private house or chapel, he alone might have had an action. But since it would draw on a great many actions, which may ruin any man, therefore the remedy must be taken in such manner as it is given where there is public offence. In the case before us, every person is chosen *pro bono publico*; for though he be chosen for a particular place, he serves for the whole kingdom; and for that reason you shall not proceed by way of action, but in such manner as it hath been always used, where the whole thing shall be examined at once, and all determined upon one petition, wherein all the parties injured may join, instead of a multitude of actions.—I shall not propose to you any thing, but hope you will at least come to some determination that may assert our right in this point; that this door may not be open to bring in a new jurisdiction, to examine and determine whether any of us sit here rightfully or not.—It is a standing order of the House, that no peer hath a vote in the election of a commoner; but in the next elections, if this be allowed, every peer may vote, for they are freeholders, and many of them burgesses and members of corporations, and they may all come and demand your votes, and if refused, bring their actions. These and many more inconveniencies are obvious, if this action should be allowed, and I believe it may have a great effect upon our constitution. Very much more might yet be said, but I have taken up too much time already.

Sir John Hawles, (Solicitor-General, temp. Will. 3.) Mr. Freeman, we are jealous of our privileges, and I think we have just reason so to be; but we must take care that that does not carry us too far out of the way. I would not have it taken for granted, that whatsoever is said against the Lords here, tends to assert the privileges of this House, or that what is said

for the Lords here, is against this House. I am as much for the privileges of the Commons of England as any man, and I own they have lost a great deal of power; I think the Commons had a great power, when the greatest part of the judicature of this government was their sole right: I mean that of trying the fact of causes, which heretofore was in the Commons alone, nay, if a peer had had a matter of contest with another peer, or with a commoner, and issue was joined, that issue was to be tried by commoners, and not by peers. It is true, if the prosecution of a peer was in a capital matter at the king's suit, it was to be tried part by commoners and part by their peers; the bill of indictment was to be found by commoners, but the issue was to be tried by peers; but if a peer was prosecuted in a capital matter by a commoner, or a peer, as by an appeal, the issue was to be tried by commoners. I must confess, as to the Lords' jurisdiction in matters of equity, the Commons have great reason to be jealous, because, there, all facts, as well as law and equity, come to be tried and judged by the Lords alone.—Sir, I say, when all facts were tried, and most of the officers of government were chosen by the freeholders of the county, the Commons were somewhat greater than now they are; when they had the election of the sheriffs of the counties; when they had the election of what they called the conservators of the peace, officers that were the same with our now justices of the peace, with this difference only, those the Commons made, these the crown makes. The Commons had a great power when they were to elect their captains that led them out to war, which heretofore they did, and had a right to do, till it was taken away from them by the act that settles the militia, though I own it was disused many years before. The making of sheriffs is now placed in the crown: we have nothing left now, but matters of trials in particular cases, and even that is so far cramped, that the jury is returned by an officer that the crown puts upon the county. But yet I am not for carrying things farther than we have a right to do; I am for keeping what we have, and for that reason I am not for encroaching upon the allowed jurisdiction of the House of Lords: we have always allowed them a right to hold plea of Writs of Error. The parliament in Hen. 4th's time, did declare the right of Judicature to be in the House of Peers; and I never found any inconvenience in it, if the Peers kept only to matters of law, and left the facts to be tried by the Commons; nor did I ever know that right of the Lords questioned till now. A great deal hath been said for, and against the right of bringing this action; I do not think that that is now the question: the question is, Whether a judgment being given in the King's-bench, a Writ of Error does not lie in the House of Lords? But whether the Lords did right, in giving that judgment they have now given in the case before you, that is another thing. I speak to the right of holding plea of this parti-

cular Writ of Error: nobody hath denied but that they have a right to hold plea of a Writ of Error in general, upon a judgment given in Westminster-hall; but, say they, the Lords ought not to have done it in this particular case; and several reasons have been given for it. First, Here is the privilege of the House of Commons in question in the case: that hath been argued and insisted on, but I confess, that argument does not influence me. The Lords have held plea of a Writ of Error, in which the privilege of the Commons hath been in question, and the Lords have done right to the Commons in it, particularly in that matter of the parliament of 1640, when some were supposed to have done irregular things in the House of Commons, and were prosecuted for it by information in the King's-bench, and were fined in king Charles 1's time; whereupon a Writ of Error was brought in the House of Lords, and that judgment reversed in the time of king Charles 2. There the Lords did right to the Commons in the matter of privileges of the Commons, for it was for laying hands upon the Speaker in this House; and I think every body commended what was done in that matter by the House of Lords, and no body ever said but that they had a right so to do. Some things are not to be come at otherwise, than by a Writ of Error in the House of Lords; and I believe if you look a little back, there have been Judgments given in Westminster-hall, not only in matters of, but against the privilege of the Commons: and these Judgments stand unreversed, though I think they are fit to be reversed, and I know no other method to do it but by Writ of Error in the House of Lords. I think there is one Judgment upon an information against the Speaker, for licensing papers to be printed, which he did by order of the House.* There is another instance of a person taken into custody by order of this House; it was the case of Mr. Topham serjeant of this House:† the party brought his action; the serjeant pleaded his warrant, that it was done by

* See vol. 13, p. 1360.

† See in vol. 12, p. 821, the Case of Jay and Topham; the material parts of the pleadings in which case Mr. East has inserted in a Note to vol. 14, p. 102, of his Reports. It appears that other suits were brought against Topham. See vol. 13, p. 823.

" 1682, May. Mr. Verdon, under-sheriff of Norfolk, did, at the last assizes at Cambridge, recover 500*l.* damages against Topham, serjeant at arms, who attended the late House of Commons, and did, by their order, take the said Verdon into custody; but the said Topham moved the court of K. B. the 20th for a new trial for excessive damages, and had it granted.

" 1682, August. Mr. Topham, serjeant to the late House of Commons, having obtained of the court of King's-bench the last term, a new trial upon a verdict of 500*l.* against him for detaining Verdon, under-sheriff of Norfolk, two days after the parliament was prorogued, it ac-

order of the House of Commons, and Judgment was given against him, and this Judgment stands unreversed. Now what method have you to reverse these Judgments but by Writ of Error? If you think to do it by a bill in this House, that must likewise pass the House of Lords, and so will be the same thing as a Writ of Error. Another thing is said, that this person was not damnified; or if he was, there are such a number of persons who were then likewise damnified, that may bring their actions, that nobody will execute such an office. I think that argument ought not to prevail, for at that rate you will allow the officer not only to be a judge, but, the supreme judge, and the parties damnified shall be without relief; he may do what he pleases, and he shall never be questioned afterwards, save in this House, which I will consider by and by. It is agreed, you may punish an officer that misbehaves himself in matters of elections, and that is practised now very much; but at the same time you punish the officer, the person damnified hath no satisfaction; though our law allows satisfaction, in cases where he that did the wrong shall not be punished, and allows satisfaction in all cases where a person is punishable, if another hath received a particular damage. A man is liable to be fined to the king or queen, that is a punishment; but if he pays so much to the party damnified, that is satisfaction. If a man's horse breaks into another's ground, he shall not be punished, but the person damnified shall have satisfaction; but in this case you allow the officer shall be punished, but you will not allow the man injured any satisfaction for the damage he has received? which cannot be supported by reason, or by the authority of any particular case. In all cases I take it to be true, where a man is punished for doing another damage, the person damnified shall have satisfaction. But that rule does not hold true in the contrary.—It is said there are a great many persons concerned, and if you give every one an action, there will be no end of these actions, and therefore none shall have an action. This is a strange argument: If a

cordingly came on this assizes at Cambridge, and the jury gave the like value of 500*l*.

“1683, May 11, was a trial at bar between Mr. Verdon, under-sheriff of Norfolk, and John Topham, esq. serjeant to the House of Commons, in an action of the case, for keeping the plaintiff in custody by the space of three days after he had notice of the prorogation of the parliament. This was tried by a jury of Cambridgeshire, and was fully proved by the plaintiff, so that the jury presently gave in their verdict for the plaintiff, and to his damage of 460*l*. to the wonder of all people, thinking them very excessive.” Narcissus Luttrell's *Brief Historical Relation of State Affairs*, MS. in the library of All-Souls' College, Oxford.

See, too, the Case of *Verdon v. Deale* and others, 2 Show. 307 [299]. See mention of Topham, vol. 8, p. 12.

man injures one or two persons, each shall have an action for their respective damages; but if he injures an hundred, none of them shall have an action: as if when a man is moderately injurious, he shall make satisfaction; but if he is extravagantly injurious, he shall be scot-free, and make satisfaction to none. This rests to be made good either by reason or authority, which hitherto hath not been done. The case cited, I own, is true; but you must take it with this difference, if any thing is done which might have been of damage to a hundred people, but was of damage to none, none shall bring their action, though the criminal shall be punished; but where there is particular damage done to any person, an action will lie for the damnification of that person. If a man digs a pit, any man may fall into it, and no person shall bring an action for that; but if any person doth fall into it, and hath particular damage by it, he shall bring an action and have satisfaction. And with submission, that argument will not hold, that because a person may be ruined, if he be obliged to make satisfaction for the wrong he hath done, therefore he shall not make satisfaction to any particular person he hath damnified.—It hath been said, admitting it to be so, that the party ought to have satisfaction, yet he ought to take his remedy in a proper court; as if a legacy was given, an action would not lie in the Queen's-bench for it; which is true. But it would have been well if that gentleman had told us which was the proper court to give satisfaction, for the wrong supposed to be done in this case. If the Queen's-bench be not the proper court, what court is? It is said the House of Commons is a court, I was always of opinion it was so: It is a Court of Judicature, my lord Coke says, and a Court of Record. I wonder when all this is allowed, it should be said this court hath not a power to administer an oath to a witness; I think that was never denied to any other court whatsoever. Every Court of Record has power to administer an oath; but though this be a Court of Record, this cannot, it hath not that power. It would have been very well if those, who are against this action, could shew us that this is a court that can give satisfaction; some courts can punish, but cannot give satisfaction, whereof I think this one; satisfaction was never given here that I know of; was it ever? or pretended to be had here? In the first instance, it is true, this House hath punished, and by such punishment compelled the delinquent to make satisfaction to a person, by increasing, or remitting such punishment; but that is not the case before us. It hath been said there has been no instance of this kind of action brought; and that the court of Queen's-bench have declared they have nothing to do with the business of elections, for that the right of elections ought to be determined here, and for that purpose the declaration of the Lord Chief-Justice Hale, in the case of *Barnadiston and Soame*, has been cited. I must confess I cannot but wonder at

that case; we did lately think that the Judgment given in the King's-bench in that case was rightly given; and afterwards, when it was reversed, people were astonished at the reason of it; and more when that Judgment of reversal came to be affirmed in the House of Lords. Nobody hath ever said why that Judgment was reversed; I do not see but, on the same reason, several Judgments within these few years, nay, even in this reign, may be reversed likewise; for the court of King's-bench, in that case, did not pretend to a Judicature of determining the right of elections; the matter in that case had been determined before in this House; but they only gave damages for the wrong sustained, that was all the court did in that case, and yet that Judgment was reversed. I believe there hath been some Judgment given by this House, within these twelve months, that where the House hath determined the right of election, the party grieved shall be allowed to maintain an action at law for his damnification.—But I take it that there is a difference between the case of *Barnardiston and Soame*, and this present case. Time was, when it was doubted, where a man that was elected and the officer refused to return him, whether the person elected was damnified or not. It is very certain, heretofore, persons were not so ambitious of sitting in this House as now they are; and some persons purchased charters of exemption, to be excused sitting in this House; and so it had been practised in the House of Lords. The act that hath been mentioned before, expressly commands, that the person chosen shall come and be present in parliament. And afterwards there was a penalty put upon such as were chosen, if they did not appear here; to which another punishment was added, which was, that the person elected, if he did not come hither, he should lose his wages. It was not reckoned a damage that any person was not returned a burgess to sit here, but a kindness; but that did not hold so in the case of an elector. Every body agrees, as the electors had a right to chuse, so there was no statute to compel them so to do; but they looked upon it not only as their right, but their interest, to be present at the elections. And none can say but it is a man's interest, to make choice of such a person to serve in parliament, (who hath the power over his estate, and life too for ought I know,) as he could trust. Nobody ever doubted that a person who had a right to vote, had an interest, and might be damnified if his vote was refused. So that none of the cases that have been put of the right of the person elected to serve in parliament, as knight of the shire, or as burgess, come up to the case in question.—I would say one thing as to the damnification of the persons elected; there is a late act that gives double damages where the return is contrary to the last determination. Now, I do take it, that act supposes that a man might have been damnified before; and if he was damnified before, he was so by the common-law, for no statute gives him any

damages: It is true, that statute gives double damages, but still that statute supposes there was a damage before, and builds upon that foundation; so that with submission, that very statute runs against all the cases that have been put as to the persons elected.—It is said, at this rate, the Lords may come to vote in elections. I am of opinion the Lords have no right to vote in elections for a knight of a shire or a burgess; and the reason I go upon is this, every person who had a right to vote, ought to have contributed to the expences of him that was elected; if he was a freeholder, he was an elector for the county, if a burgess, for the borough; and the expences of the knight of the shire were to be levied of all the freeholders, and the expences of the burgesses upon all that were resident in the borough. But the Lords were excused of that charge, they were not to be contributors to the expences of a knight of the shire, or burgess, because they were of another house. There was a law made which says, that for lands purchased by any Lords, such lands should continue chargeable to the expences of knights of the shire, as they were before such purchase; so that it is plain before that act, the lands the Lords were seized of, or purchased, were excused of that charge.—But, Sir, I think this matter is not to the case in question. This is nothing but a collateral action for a damnification, whereof the consequence is not much, not above five pounds: though I acknowledge the smallness of the sum does not influence this case. Nor is the question, whether the Lords have done right or not, in reversing the judgment given in the Queen's-bench: 'Humanum est errare.' If they have a jurisdiction, we cannot justly complain; though I am of opinion they have done right: I think the plaintiff in this case was damnified, and I think the court of Queen's-bench ought to have given judgment against those who did him the injury, for the damage he sustained; and I think the Lords have done right in reversing that judgment, and in giving such judgment as the court of Queen's-bench ought to have given.

Sir Edward Seymour. It is enough for me that we have the law on our side, and we are very much obliged to the pains and understanding of those learned gentlemen that opened this debate, in presenting us with a true state of our disease; it only remains now for your prudence, to apply a remedy. And I cannot but take notice, that this is an action without any precedent to warrant this proceeding; and I believe it might have remained so still, (for I do not think there was virtue enough in the cobbler of Aylesbury, nor had he purse enough) if a lord had not acted that part.—For my part, Sir, I do not think this to be the single instance of the House of Lords, we have reason to complain of: I think in a great measure, by their proceedings, they seem to hold forth, that the axe is laid to the root, and that they have a dislike of this House of Commons,

and endeavour to get rid of them. I shall not instance in particulars, but I hope there is one you will not let go, without applying some remedy to; and that is, that noble Representation* in which they have vilified you in the highest degree, and lay all the mischiefs of the last reign and this, at your door. I could show you, there is nothing in it but stuff, *populum fallere*; and we see the consequence of it, and what pains and endeavours they have taken to disperse it all over the world, to make impressions upon the people. But that which I would have some resort to, is this, that these worthy persons that have spoke before, though they have truly represented the state of our condition, yet they have been very tender of applying a remedy.—It does, I think, consist of two parts; one is what relates to the inferior courts, the other to the judgment of the House of Lords upon this Writ of Error. Now that there is a right to bring a Writ of Error, the learned admit; but I would take away the foundation, and make this declaration:—That no inferior court below should presume to inter-meddle with the elections of the House of Commons; and I am sure then there will be no foundation for a Writ of Error. In the next step, with relation to the judgment given in the House of Lords; it is true, the Lords make a great complaint, that in matters of parliament we have addressed, without advising and consulting with them: I will not say how far it is justified by their proceedings; I need not remind you of the address they made without you, when you addressed against my lord of Worcester;† before you had presented your address, they presented a counter-address to yours. But I take the distinction to be here, it is one thing in matters of state, and another thing when the matter depends between the two Houses: where it is a matter of state, with relation to the queen's prerogative being violated and invaded, as you are her great council, you are to advise the queen in that matter, and not let any thing of that kind pass upon her.—But however I would go the regular way, by condemning this judgment, in relation to the House of Lords; and, after you have made that condemnation, I would apply to the House of Lords, to see if they would recede from this judgment of theirs. But I am afraid arguments or debates will help your case but little, you must have recourse to remedies that are in your own power. We see what they did upon the last occasion, when they thought their privileges were concerned; they adjourned, and all to prepare the way to make the world believe they were injured, and prepare them for their proceedings afterwards.—And I say, this

* This refers to the Representation of the Lords to the Queen, concerning the Address of the Commons, (2 Anne, 1704) complaining of the Lords examining Conspirators in the Scottish Plot. See Cobb. Parl. Hist. vol. 6, p. 180, &c.

† Dr. Lloyd. See his Case, p. 546, of this volume.

is not a thing that falls out by chance, but carried on by all their power, to represent you as inconsiderable, and to make you useful for nothing but giving money, and then to send you home into the country. But if you do not keep the power in your own hands, you will be without remedy. I conclude with what I mentioned in relation to the courts below, to declare that they have no power to intermeddle in matters of our elections.

Marquis of Hartington, (afterwards duke of Devonshire.) I shall not pretend to follow that hon. gentleman near the bar, in all the steps he hath made, though I think I may be as regular as he. I think he hath only shewed, that there is not so much reason in this case to find fault with the Lords, but it is necessary to find fault with them one way or another.—I think this is a matter of great consequence, and as long as I sit here, and as long as I live, I shall be as tender of the privileges of this House as any body. I think it is upon the due balance of both Houses, that the safety of the whole does consist; and I must confess, I think the liberty of a cobler ought to be as much regarded as of any body else; that is the happiness of our constitution.—I think it was very well observed by an experienced member, that this writ came very regularly before the Lords: if so, then I think the question is between us, and the persons that elected us; and I think, though gentlemen would not formerly allow of any distinction between the privileges of the House, and those of the people of England, yet they must allow it now, or they cannot complain that this action is any prejudice to this House. For when a person offers his vote at an election, and is not admitted to give it, and upon such refusal brings his action in the courts in Westminster-hall, (which I take to be the present case), if giving judgment upon it be contrary to the privileges of this House, then it is pretty plain, that our privileges do interfere with the rights of the people that elected us. I shall plainly give you my opinion in this case: I cannot think this action to be a breach of the privilege of this House; for, Sir, the party grieved, can be no way relieved, but by applying to the law: and I think the learned gentleman below, is out in all his instances; for he hath given an account of people injured applying to you, but they were candidates, and certainly that was their proper remedy; but in the case of an elector, I do not see he can have satisfaction by applying to you.—Gentlemen talk of the law of parliament; I cannot see how that can give any interruption to the law of the land, that it shall not do right to the party grieved. How shall a man, injured in the manner I have mentioned, receive satisfaction, by applying to the parliament? It is true, the officer offending may be punished, but the party injured cannot receive that satisfaction he would in the courts below, by giving him his damages.—I think this is a matter of great consideration, and it is necessary to con-

sider well of it, and not to determine rashly. I think it may be of use to us, since there are judges who have been of opinion, that the subject ought not to have his remedy in this case. A judge that will, out of fear, or any regard to one House, do contrary to his oath, I believe at another time will be influenced by the other. I think it is the duty of a judge to act according to law, and not be afraid of either.

Mr. Lowndes. Sir, there is no doubt but all the judges, (as hath been said) and every body else, are obliged to behave themselves according to the laws of the land: but the question is, what is the law of England in this case? If the House of Commons has an original right to determine all matters concerning elections of their own members, (as it hath been always understood to have) and if we have a power to punish officers for making false returns, or any other misfeasances committed by the returning officers; then it will not be necessary, that the judges in Westminster-hall should have any jurisdiction at all, in the matter now in question; and if they have none, then by consequence the Lords will have as little by Writ of Error.—I do confess, Sir, when I first heard of this case, it gave me some apprehension that it might be of fatal consequence (by reason of the novelty of it), to your privileges, which are indeed the privileges of the commonalty of England, which we represent. But since I have thought of it from time to time, and it hath been better opened by the learned gentlemen that have spoke in this debate, I conceive our coming to some resolutions declaratory of our right in this affair, may preserve the liberties of this House, and of all the Commons of England, who have entrusted us with the preservation of their rights.—I think the learned gentleman over-the-way took his ground too narrow; I might yield him this point, that where there is a Writ of Error brought from a judgment in Westminster-hall, in cases where a Writ of Error lies, and where that court and the House of Lords have a jurisdiction, there the House of Lords are at liberty to give what judgment they please. But I have read, The House of Lords is not an unlimited jurisdiction, but is bounded, as well as the courts of Westminster-hall, by the law of England. I speak it with the greatest reverence, that the regal power, (which is the most supreme in England) is obliged to the observance of the laws; and it would be absurd at the same time to say, that any part of the parliamentary constitution is not limited by the known laws of the land, or the laws and customs of parliament; and I doubt not but it will appear, a Writ of Error doth not lie, and never did lie before the Lords in such a case: and so it comes at last to this point, what is the law of England in this case? And I will tell you my thoughts of it. I have read and learned, and believe it is true, that matters of parliament are to be determined by the laws and customs of parliament; and I believe there is as good

authority for it as there is for Writs of Error, or any thing else; and that this law and custom of parliament is a principal part of the law of England, and to be learned by experience and precedents, and I reckon that we must come to them at last. Now, Sir, let us see what experience or precedents we have to found this jurisdiction of the House of Commons upon, for examining and determining matters concerning their own elections. It is true, we have no journals extant before Edw. 6th's time: and there is a book they call Seymour, I think it is a book of no great authority, and if it be, there is but a small matter in it. I have read it over carefully myself more than once, and find only titles of bills depending, and when they were read; and all I learned from it was, that sometimes bills in those days were read four times. And, Sir, there is as little concerning elections in queen Mary's reign; but in the beginning of queen Elizabeth, you have the matters of elections plainly set down, and so they have been ever since. And from that time to this it hath been a standing rule in the House of Commons, in the beginning of every parliament, and, as I take it, of every session, to appoint a Committee to examine all matters concerning Elections. Now, if the right of electors is not a matter concerning the election, then I own myself under a mistake: but if that be a material part, and comprehended within the general words, and if those committees have from time to time proceeded to examine the right of electors, and this House hath proceeded from time to time to give judgment in such cases, sometimes according to general qualifications settled and adjusted in the House, and very frequently upon examining and considering the rights of particular voters; then I think we have as good authority for the jurisdiction of this House, in the matter of these elections, as can be had for any thing whatsoever. I do say, in this case, we ought to take our ground and foundation upon the right which the Commons of England have, and ever had by the law and customs of parliament, to be exercised by the representatives of their own choosing; which right is grounded upon manifold precedents and constant usage. For if we have a power to hear and determine the right of the electors; and to punish officers for abridging them of their right, and give satisfaction to the party, all which most evidently appears, not only in your Journals but by a continued and uninterrupted practice, time out of mind; then I think we need look no further. I do say, that from time to time there has been never a session of parliament but this power has been exercised; and in your committees they have often come to resolutions to determine the right of all electors, and frequently of particular electors; and for that purpose only they have examined whether persons had burgage-tenures, or have paid scot and lot, or have been freemen, and other circumstances necessary for the information of the committees; and as matters have appeared, they have judged them qualified or

unqualified: and where the votes of persons having right have been offered, though refused at the election, the committees have usually allowed those votes as if they had been given; and upon their determination the House have agreed with the Committee very frequently, and sometimes have disagreed with the Committee, as the merits of the cause have appeared to the House. So that nothing is plainer than that the House of Commons have, from time to time, exercised this jurisdiction in all the parts of it; and sometimes elections have been tried at the bar, and determined by the House upon such trial. Then how comes this action to be brought in Westminster-hall? I have considered that point, and take nothing to be plainer than this, that Westminster-hall never had a power to meddle with elections, but where, by some special act of parliament, you have given them power. I know that there are some opinions that elections have been tried in Chancery, and in the House of Lords; but I cannot find any thing of that nature ever settled, though some attempts have formerly been made that way. I know that witnesses have been carried up sometimes to the House of Lords' bar to be sworn, but the trial of elections, and of the right of the electors, hath always been in the House of Commons; so that here would be no defect of power or justice if nobody else meddled in this matter. Then consider what acts have altered this original right; I think there are two that are most material to be considered; one is that of 23 of Hen. 6, cap. 15. What is the importance of that? It takes notice, that convenient remedy for the party grieved was not ordained in the former statutes against sheriffs, mayors and bailiffs offending; whereby one would infer, that the parliament in those days did not think or know any thing of the remedy now endeavoured to be set up in Westminster-hall and the House of Lords. And this statute provides, that if any sheriff do contrary to the statutes about elections, he shall incur the penalty of the former statutes, viz. 100*l.* to the king, and a year's imprisonment, and shall forfeit 100*l.* more: to whom? To the party that ought to have been returned; and if he do not sue, there is an action given for the same to any body else. And a mayor or bailiff, for a false or undue return, is to forfeit to the king 40*l.* and 40*l.* to the party that should be returned; and if he do not sue, then a popular action is given for the last penalty: so it is plain, by this statute, no action is given to the voter, who had his remedy in the House of Commons. Your ancestors were so careful of your liberties, that they never trusted their elections to all persons; such as held in villeinage, all customary tenants who held at the will of their lords, and might be influenced by them, and, (as I take it) tenants by escuage, till escuage was reduced to certainty, were excluded, and afterwards all freeholders under forty shillings a year; and when the officers were by law to admit some votes and reject

others, they were to use the best of their judgments, without being liable to multiplicity of actions, (unless in the cases I have mentioned,) but for their defaults were always responsible to the House of Commons. Let us consider then the statute in king William's time, I think it is in the 7th year of his reign; there the statute takes notice of the injury done to gentlemen by double and false returns, and thereby a double return is made a false return; and by that statute it is provided, that if any returning officer return contrary to the last determination of the House of Commons, of the right of election; such return is thereby adjudged to be a false return, and void. This statute of the 7th of king William, admits the very determination of the right of election to be in the House of Commons; it does not say the determination of the election, but of the right of election. I will endeavour to avoid repetition. But how does this matter stand by the law and custom of parliament, which is a most material part of the law of England? The House of Commons have the jurisdiction in these matters of their elections; but, by one or two statutes, the House of Commons have given power, in one or two cases, to proceed in the manner therein prescribed; but none of the cases allowed by those statutes, are like the case of this man at Aylesbury, for he is not a person who has suffered because he was not duly returned, nor the person mentioned in 7 Willielmi; nor is his action founded upon any statute; so that this case is left out of the statutes, and it must be determined according to the law and custom of parliament. As to the case of Mr. Nevill, it never came to be determined in parliament: we read it was put off to the parliament because of the great weight of it; and the judges were of opinion that it was a matter too high for them. And in the case of Mr. Onslow, where the case of Mr. Nevill was cited, they positively said, it was a matter of too great presumption for the judges to meddle with it. Then how comes it to pass, if this action might have been brought at common law; I say, how comes it to pass, that this action was never brought before? Certainly that is an argument it never lay, for there must have been occasion for such an action, if the common law would have maintained it. But the judges, who knew best the grounds and reasons for this pretended action, have refused meddling in this matter, because it concerned the parliament, and the parliament had not entrusted them with it. As to the case of Barnardiston and Soame, first adjudged in the King's bench, the reason was, because it had been adjudged in parliament; for sir Samuel Barnardiston had a majority by near 100, and the House of Commons had tried the cause, and gave him his right of sitting in this House; so that one would have thought that he had liberty to have gone into Westminster-hall. But afterwards this judgment was reversed in the Exchequer; and judge Ellis, in his Argument, says plainly, that the right of determin-

ing elections belongs to the House of Commons, and the House of Commons have determined it for sir Samuel Barnardiston, and for that reason you ought to affirm this judgment. This matter was brought, presently after the Revolution, into the House of Lords, and when it came there, all but five or six lords were for affirming the reversal. Now, Sir, by reading the reasons of these five or six lords that dissented, we may easily infer what were the reasons that induced the whole House to affirm the reversal. Two reasons were given; first, say they, because otherwise there will be a defect of justice. One may infer, if these five or six lords were of opinion that there would be a defect of justice, all the other lords were of opinion there would be no defect of justice. The five or six lords that dissented said, that the plaintiff ought to have this action by the common law; certainly if the other lords had been of this opinion, they would have maintained the action, but they concluded no such action did lie, because no such action was given by the common law. I take this matter to be of infinite moment, and I think there is no degree or state in this realm but what is bound by the known laws of the land; and if the Lords in parliament, and the judges are limited by the laws of the land, so that they have no jurisdiction in this case, then I do not see how a Writ of Error can give them jurisdiction. Sir, I appeal to you, and all the gentlemen here, whether what hath been said on one side hath been at all answered by the other: If an action of *scandalum magnatum* should be brought against a member, for what he has said in this House, no doubt but that member would plead the privilege of this House, and it is to be hoped the judges would allow it, and put the plaintiff off *sine die*. But notwithstanding, a Writ of Error, according to this doctrine, might be brought, and the Lords might give judgment that this action does lie, and then what would become of your liberty of Debate? This is an instance worthy your regard. It hath been told you how the Lords have taken notice of the privileges of this House, in the case of Hollis and Elliot.* Let that be set in its true colours, and see whether any thing can be drawn from that case to fortify the judgment lately given in the House of Lords. There was a disorder in the House of Commons, and the Speaker was violently forced back into the chair, and scandalous words against the king's privy council and judges, were uttered by Elliot, Hollis and others, and upon that a prosecution was brought, 5 Car. 1, against those particular gentlemen in Westminster-hall; as well for the words spoke in the House of Commons as for the force; and fines were set upon them. This matter, after the Restoration of Charles 2, was brought before the Lords, at a conference, and they took notice of the privileges of this House, not to set them aside, but to confirm them; and

their lordships declared the judgment to be illegal, and against the freedom and privilege of parliament, and desired the lord Hollis to bring the roll before them by Writ of Error; and so, by agreement, the judgment was reversed, as being against the freedom of speech in parliament, allowed by Strowd's act; which their lordships acknowledged to be declaratory of the ancient and necessary rights and privileges of parliament. Their lordships then would not let any matter appear upon record, to destroy the Commons' privileges; and I wonder how this precedent comes to be cited, to justify a proceeding which tends directly to take away your privileges.—I wish with all my heart the House would have appointed some persons to have searched precedents, and I am sure they would have found an infinite number to be producible, to have justified the power of the House in this case, how it hath been in their power, time out of mind, how they have a power to punish officers, and in some instances they have given damages. I remember one in my time; Mr. Tankred caused a person to be brought hither, and he cleared himself; and the House (as I remember,) made an order, that, as he was the occasion of the man's coming up, and had done him an injury, he should make him reparation, and he was forced to do it by paying him a sum of money.*—Not that I would go so far as to say, that this House is a proper court for imposing fines: But if they are not a proper jurisdiction for the business of their own elections, I think they have no jurisdiction at all. I will not say this House has a power to fine: I know we read something of that in your Journals, but I think those fines came to nothing, because there was no means to estreat them, or cause them to be levied; and so that matter has slept ever since, and I hope, will for ever.—But not only your freedom of debate, but right of sitting in this House, is concerned in this case: And if you have not a power to determine matters of elections to this House, I wonder how any author comes to say this House has any judicature at all; for if they have not a jurisdiction to this, they have no jurisdiction to any purpose whatsoever.—If this point be settled, that this power belongs to the House of Commons, the next consideration will be how to attain it; and in this, I hope gentlemen will take such steps as are proper for them, and for those they represent; for we are sent here *ad tractandum*, &c. in the name of those we represent: And we have but a delegated power, and cannot without breach of trust, give up the rights of the commonalty. For my own part, I have taken an oath to preserve the privileges of the people that chose me, but, without such an oath, should be of opinion that I cannot give up this privilege which I am to execute on their behalfs; but I will use all the lawful and just methods I can to come at it, and I think you may

* See their Case, vol. 3, p. 393.

* See this Case, Comm. Journ. 20 Jan. 9 Will. 14 Febr. 10 Will. stated in a Note below.
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do this without interfering with the House of Lords, or the judges. There is no doubt but the judges in Westminster-hall are bound to take notice judicially of your legal proceedings here; and if you come to make a declaration, that the power of hearing and determining all matters concerning elections, does belong to the House of Commons in parliament; I doubt not but they will take notice of it, as becomes them. And give me leave to say, nobody can help bringing this action, as this was done; for a person may take out a writ and declare upon it, and carry it down to trial, without the privity or knowledge of any court; and then, when the cause is tried, the other side comes and moves in arrest of judgment, and the court gives sentence. But I wish the defendant had demurred, and then that would have put it as a point of law to the judges; and if they had determined it judicially for you, I believe it would have gone no further. For it is one thing to determine it upon demurrer, and another thing when the cause has been tried and damages given, to have the court's opinion *ex post facto*.—The judges determined the action does not lie; but as matters stand now, perhaps in the like cases, there will be brought a Writ of Error before the Lords, and they will give such a judgment as they have given now, for aught I know. I should not think it proper to come to any question now, by which you shall determine your right, if you are not fully satisfied about it; but it ought to be considered farther. The law and custom of parliament is to be found out by experience and precedents: But if you are satisfied, then I think the proper question is, that by the law and custom of parliament, the hearing, examining and determining all matters concerning election of members to serve in the House of Commons, is to be by the same House. I think that is to be your question, or to that effect.—The consequence will be, if this be part of the law of England, as it plainly is, you may as well stand upon that declaration, as upon any new law to be made by parliament, if you could get it: But I believe you have no great reason to expect a new law in this case to pass in the House of Lords. Then what would you do? If you should try to get a new law and fail, it will be construed, that you had not this power before, but endeavoured to get it, and the House of Lords denied it you. But it is plain and clear you have this power already, and a sufficient ground to stand upon; and I doubt not but Westminster-hall will take notice of it, and the House of Lords too; If they do not—[Here Mr. Lowndes was interrupted by a noise made by some few of the members, who said, What then? but he proceeded.]—I say, if they do not, it will be time enough to confer with them afterwards: And give me leave, I am not afraid to say, if a private man, much more the House of Commons, have the law of England on their sides, let them be undetermined ever so much, one way or other the will obtain their right sooner or later. The

rights of the people of England are safer in the hands of their representatives than any other; if they do not like them, they can turn them out and chuse new ones; but they cannot do so in the case of the Lords.—I beg pardon for my great prolixity: I take it to be of importance to avoid all contests with the House of Lords, and with Westminster-hall, and I think you may do it, by proposing and adjusting a plain declaration of your right by the law and custom of parliament.

Mr. Solicitor General, (Sir Simon Harcourt, afterwards lord Harcourt and lord-chancellor). After what hath been said at large concerning the law in this case, especially since it hath received no contradiction in any instance whatsoever; I will avoid the repetition of what has been already offered, and endeavour to shorten your debate, by bringing it something towards a point. It hath been said that the question now before you is, Whether judgment being given in the court of Queen's-bench, a Writ of Error does not lie in the House of Lords, to reverse that judgment? I cannot, by any means, agree that to be the question.—But that which I take to be the proper question before you is, Whether or no it be the sole right of the Commons of England to determine their own elections? If you are of that opinion, never let your disease grow to such a head, as to put you upon the necessity of complaining of a judgment of the Lords, but rather check it in its infancy.—It may perhaps sound harsh, that a man shall not be admitted to make use, and have the benefit of the law; and yet when that thought is thoroughly digested, I believe no gentleman in this House, but will agree, that there may be many such instances, where you will not endure any suit at law. I cannot give you any better instances, than what have been mentioned to you by a learned gentleman on the other side, who approves of this proceeding by Writ of Error; the prosecution against sir William Williams for publishing a libel (as it was called) by direction of this House, and an action against the serjeant for obeying your commands. If such an action should be brought against the Speaker or Serjeant, should we sit still here to see what they would do in the courts below, and afterwards wait for the event in the House of Lords by Writ of Error?—It is very true, these judgments that are mentioned by that gentleman continue still unreversed. As to that given against the Speaker, he mentioned it as a precedent not fit to be followed; indeed, it is a reproach to the House to mention it, since no parliament hath reversed it. As to the other action against the Serjeant, he says, judgment was given against him, and that stands in full force; as I remember that case, it went off upon the form of pleading.—But nothing of that kind being the question now, I beg leave to state what this action is that is now before us; for gentlemen in the country, who have frequently met with ac-

tions, prosecuted without censure for matters relating to elections, may, perhaps, be surprized, till they come to consider what the point is. This is not an action grounded upon any statute whatsoever. It is agreed an action may be maintained where a statute gives a particular remedy, but this is an action founded upon the common-law. Whatever your privileges are, if you will consent to an act of parliament to make other persons judges of those privileges, so far as you consent, if they pursue the power given them by act of parliament, there is no wrong done you: but an action brought at common-law, is that which, I think, interferes with the inherent right of this House.—We have, I think, attained to one piece of knowledge upon this debate, that this was the first action that was ever brought of this kind; and gentlemen will not much wonder why this is brought now, when they consider what endeavours have been used to make this House contemptible. I believe this may be thought the most probable method to attain that end.—I would not repeat the precedents that have been quoted, yet I cannot but take notice of that of Barnardiston and Soame: those arguments that were made use of for this judgment, in that case were rejected, and the judgment of the Lords was then directly contrary. I should be very glad to hear how the Lords' judgment of reversal in that case, and in this, are reconcilable. The Commons, at that time, would scarce have suffered such an attempt upon their privileges, and I hope we shall be as careful and as zealous to preserve ours: we have as much power as our predecessors, we shall never suffer for want of power, if we do not suffer for want of will to exert it.—I expect to hear of the great authority of one learned judge, that differed from the rest; I have the utmost esteem for his judgment, but am sorry to hear any insinuation, that those judges who have given their opinion otherwise, are guilty of a breach of their oaths. It hath been touched upon, that, whenever any question has been asked the judges, concerning the privileges of the Lords, or the privileges of the Commons, their answer is recorded for the instruction of all their successors, and to the honour of both Houses of Parliament: that it was a matter above their knowledge: the law of parliament is above the judges of the common-law, and is not to be subject to their judgment; it is *alieni fori*.—And, Sir, as I have been informed, this was the answer given in the House of Lords by one of the present judges, and by what I have heard, it was well he escaped their censure; shewing too much respect to this House gave very great offence.—I beg gentlemen to consider, (I shall not enter into particulars that have been mentioned) whether any thing of this kind would not make you despicable, to the lowest degree in the world, and expose electors to such mischiefs that none could endure? Upon every election that comes before you, it is impossible to judge the right of elec-

tion, but by the right of the electors. If you will endure any person, after you have said he has no right, to go into Westminster-hall, and bring an action in the courts there, a jury may find a verdict, that the House of Commons are mistaken, and that this person hath a right, and judgment shall be given accordingly. Will not this proceeding, that very moment, submit your resolutions to the examination and censure of the inferior courts? May not they say, they vote for one another, we have detected them all? That they are a parcel of people packed together, and not one of them elected as they should be?—What condition the magistrate will be in, hath been mentioned already; when a multitude hath a right, and every body may bring his action, can any magistrate, (a constable as in this case) bear the expences of a hundred or a thousand actions at law? There will not be wanting some to prosecute a magistrate with all the violence possible.—Though I can by no means agree, that this matter is to be determined according to the common rules and methods of law, but according to the course of parliament; yet I shall compare it with some other cases in the law.—That which makes these persons hardships the greater, is, these magistrates are not people that officiously interpose to take a poll at elections, and make a return; but these are men, who, by the duty of their office, are obliged to do it; and if they do not execute their office you punish them; and if they do execute their office, and give you satisfaction, yet if you let this be examined in another place after you have said they have done well, they may be punished for doing so.—I will compare this with one or two common cases that have not been mentioned; suppose a person should exhibit an indictment against another maliciously: he does this wilfully, and an action does lie against him; but if a grand-juryman find a bill against a man, the law will not admit an averment that it was done maliciously, because he was obliged by his office to do it: so it is in the case of a witness, because he is brought in by the process of the court: so it is in the case of judges. And is it not equally the duty of a magistrate to determine upon the poll, and afterwards to make a return? and is not that examinable before you?—A great deal might be said further upon this, but I hope it is pretty unnecessary: and that nobody can have any doubt but that our privileges are very much concerned in this question, and what the consequences would be; therefore I would humbly propose for the question what another gentleman hath hinted at, which may reduce this debate to a particular point.—We certainly have such a thing as the law and custom of parliament, and that is very well known, and upon that foot I desire you would put a question to this effect:

‘ That the sole right of examining and determining all matters relating to the election of members to serve in parliament, except in such cases as are otherwise provided for by act

' of parliament, is in the House of Commons ;
' and that neither the qualification of the
' electors, or the right of the persons elected,
' is elsewhere cognizable or determinable.'

Members. The Question ! the question !

Mr. Smith.—Sir, I speak only to your order, that gentlemen would not interrupt one another by calling for the question, but give diligent attention to the debate, for this is a matter of great consequence.

Then *Mr. Freeman* (in the chair) stated a question on his paper to the effect proposed by *Mr. Solicitor*, and read the same to the committee.

Sir Christopher Musgrave.—I am very willing to hear any gentleman that will stand up and speak, and you have had a very good hint given you by an honourable person, that this is a business of great moment ; and I hope we shall continue to do as we have done, that is, to hear gentlemen patiently : and that we may not be guilty of any disorder, I move you for candles to be brought in.

Then the question was put, and carried for candles. And they were brought in accordingly.

Mr. Dormer. (afterwards a judge.)—*Mr. Freeman*, you have now a question upon your paper, but that which I take to be the question is, Whether a freeholder, or a freeman, who hath a right to give his vote for his representatives in parliament, may arbitrarily and maliciously be deprived of that privilege, without any redress in any court whatsoever?—This I take to be the case before you, it is said to be of great consequence, and I do take it to be of as great consequence as any thing that ever came before either House ; and I do not look upon it only to concern the jurisdiction of the Lords and Commons, but to affect every part of the constitution, and the queen the head thereof, in the highest degree. For it comes to this ; if the Lords have not a right to determine in this matter, which by Writ of Error is regularly brought before them, we shall be turned into a state of villenage, and the people will be deprived of choosing their own representatives without relief, and shall not have relief by her majesty in the court of Queen's-bench, nor before her in the court of parliament, where, in consideration of law, she is always present, and where will be a failure and an interruption of justice, and our constitution, in relation to ourselves, will be so far changed, that it will be impossible there should be any right representatives of the people : for it will not be the people then that will chuse, but the officer may arbitrarily refuse and return whom he thinks fit, and the particular person will be without remedy. For, whatever gentlemen apprehend, if the right of return be not controverted, which way can any particular man bring his

case before you? And what remedy shall he have, if not by action? I will not say there has not, (but I will turn the argument, and put it upon them to shew there has;) but I believe there never was any particular application to the committee of privileges, where the injury has been done to a particular man, which is the present case: and this matter is found by a jury that was struck, and not one man of the jury but of quality, and approved on both sides: and I think, though it never came before the parliament, nor the committee of privileges, they might consider of a particular injury.—And as for the notion that hath been taken up, that where the House of Commons have a jurisdiction, there the party is in all cases without remedy in any other court; sure that is not according to truth: for in the case of a false return, there is a public injury, that does not hinder the party from obtaining satisfaction as to his particular injury; and if no action lies, there can be no satisfaction; for this House hath not awarded damages in any case, notwithstanding the case cited, for that was only costs for the man's trouble in coming up to be examined before this House. And, if they should award damages, there is no way of levying those damages; what writ can we issue out? And if this person be without remedy at law, he must sit down without any redress whatsoever.—There may be a multitude of cases, where this House hath a jurisdiction as far as concerns the public and themselves, and the party shall have his action also. If I receive a blow in this House, it is a violation of the privilege of this House, and this House can take jurisdiction of it, and censure the person that hath done the injury; but will any man say, that an action of battery will not lie at the common-law in that case? There was the case of *sir Thomas Clarges*: at the time of his election there was one *Roe* spoke words to his prejudice: he might certainly have complained to this House of it; you had an instance, I think, last session, of one that complained, for some such injury, against the lord bishop of Worcester, and the House took it into consideration; (which *sir Thomas Clarges* might have done,) but he brought his action, and recovered considerable damages: and afterwards a Writ of Error was brought in the King's-bench, and judgment was affirmed.—There is a case not within any provision of your law, and that is, where a sheriff made a return, and he delivered this to a private messenger to bring up to the crown-office. The messenger by the way thought fit to vitiate the return, and make another return than what he received from the sheriff: for this an action was brought, and he recovered at law against this messenger, for the private damage he had done him. Certainly otherwise the law would be defective.—In another case, the sheriff adjourned, in prejudice to a candidate, to a corn-field: an action was brought against this sheriff, at law, for the damages he had done this gentleman, and it

was maintained, and I dare say more cases may be put; which shews that your having a jurisdiction as to what concerns the public, does not exclude the party, but he may have an action for his private injury.—A great many positions I have heard, which I take not to be true, particularly this, ‘That there is no remedy at law, but in cases provided for by the statutes.’ That is not so; these statutes imply the contrary. The first says, Whereas there was not a sufficient remedy, therefore, that gives a more complete remedy, and so the judges declared in the case of Barnardiston and Soame.—Sir, they have told us of the cases of Barnardiston and Soame, and of Nevill and Strode; with humble submission to you, those cases go so far as to prove the jurisdiction of the Lords, and the inferior courts: that of Barnardiston and Soame was an action tried before the court of King’s-bench, and a set of as learned judges as ever were before, or since; and three of them were of opinion for the action, and my lord chief justice Hale was one of them; who, the term before he surrendered his character, did thus express himself: ‘He gave thanks to God, that he had spared him to that time, that he was able to keep his cushion, and declare his conscience in that place.’ But afterwards it had its fate; a Writ of Error was brought in the Exchequer-chamber; Mr. Justice Levinz, that reports it, says it appears, that those who argued against the judgment in the King’s-bench were made judges, and they themselves afterwards determined the case. And every body knows how valuable it was at that time, to know the price of an House of Commons, and an English parliament. Three judges were then made in the Exchequer, and I think two in the Common Pleas. Afterwards it came into the House of Lords, and there the reversal in the Exchequer was affirmed, for reasons different to what are urged now, and I believe for several good reasons. The sheriff in that case had made a double return, and the sheriff might do it for his own indemnity, for it was no more than finding a special verdict; and therefore the saying, *falso et malitiose*, being put to a thing that was in itself right, it would not alter the nature of the thing. Another reason they went upon was, they said this double return was a void return, and for that reason the action did not lie; and upon these reasons depended that judgment. That gentleman who said that only four or five lords dissented, is under a great mistake; four or five lords only I believe, entered their dissent, but there was a great number, and near an equality against that judgment: and divers lords, now in that House, were against that judgment, that did not enter their dissent.—Then, Sir, there is the case of Nevill and Strode, and that was first a judgment in the Common Pleas, and when it had taken its progress in Westminster-hall, it came before the House of Lords; and the Lords returned it back again to Westminster-hall, and ordered all the judges of England to deliver their opinion in it. That was found-

ed upon an ordinance of those times: Berkshire was to send five knights, and Nevill was one of them that were elected, but not returned: there they said, in that case that ordinance was entirely new, and that case did not recommend itself by the known laws of the land, and for that reason they would not give judgment, for wages could not be levied for five such knights. And, when afterwards they were to give judgment, the right constitution had recovered itself.—Now, as to the Lords’ right to receive a Writ of Error in this case: you have addressed to them that they would receive a Writ of Error, at a time when your privileges were invaded. That was the case of my lord Hollis, who with others was informed against, 5 Car. for having spoke words in this House that did affect the government: and he pleaded to the jurisdiction of the court, (is there any such thing here? No, they have submitted to it;) and the court over-ruled their plea to the jurisdiction, and that judgment continued in force, (as some others which have been since do now, which it were well if they were reversed,) until this House took notice of it; and in 1667, they desired a conference with the House of Lords. The chairman was my lord chief-justice Vaughan, and this House there complained how they were grieved by that judgment; and after repeated conferences, both Houses did consent to this expedient, that my lord Hollis being the only survivor, should be desired to bring a Writ of Error in the House of Lords, and he did so, and the Lords in that case did you justice, and reversed the judgment. As to your passing this vote, what it will signify I cannot tell. What signified a vote you passed before about the year eighty, That the putting the laws in execution against Protestant dissenters, was an injury to the public, and a subversion of the government; and that those that put them in execution, should be looked upon as enemies to the king and kingdom? The consequence was, that all the laws against Popery were put in execution against Protestants more than they were before. The judges in Westminster-hall said, this vote had not passed into a law, and they could not take notice of it. I hope we shall do nothing that will lessen ourselves, nor any thing but what will be effectual for the ends for which it is proposed.

Sir Joseph Jekyll (afterwards Master of the Rolls).—Mr. Freeman, I consider you have been a long time in this debate, and a great deal of it has been spent, either in suggestions contrary to what appears before you, or else in questions altogether improper for the consideration of the committee, and therefore it is necessary to look back to that which gave occasion to the present dispute.—The committee hath a copy of the proceedings of this action referred to them, but it hath not been read; and I am confident if it had, and had been attended to by gentlemen, they would scarce have said that the Lords in the judgment they gave, did any

thing in opposition to your judgment, or in derogation of your privileges.—Before the action was brought, there was a resolution of the House of Commons, That the right of election for the borough of Aylesbury, was in the inhabitants not receiving alms. It is from that resolution the plaintiff hath taken his rise, and has brought his action; for by this declaration he makes his case to be, that he was an inhabitant of that borough, not receiving alms; and that the constables, falsely and maliciously, obstructed and hindered him from giving his vote at the election there. The constables plead, Not Guilty, and the matter goes to a jury, and they find for the plaintiff, and give him 5*l.* damages: Which is in effect a finding that the plaintiff was an inhabitant not receiving alms, and that he was obstructed and hindered from voting by those constables, and that it was done *fulsè et malitiose*, and to his damage. And this may serve to demonstrate, that the proceeding at law has not been in opposition, but in conformity to your judgment.—Now let us consider, whether the bringing of this action is a violation of your privileges: A great many things have been said not proper for you to deliberate upon; one, that this will encourage a multitude of suits; another, that this action was never brought before, and several other matters which go to the question, whether the action will lie. Now that is not the question here; but the true and only question before you, is, whether this action was brought in violation of your privileges; for, if there be no breach of privilege in it, I know of no authority we have to stop the course of legal proceedings. And as to that, but one thing (as I conceive) has been said materially, which is this, that this is a parliamentary case, and appertains to your jurisdiction; and the judges of the common law, are not judges of the law of parliament, and therefore they ought not to have given the plaintiff his judgment, (and it ought be admitted the Lords ought not to have given any judgment, but what the judges ought to have given.) To maintain this, it hath been said, and undoubtedly it is true, that this House hath a right to judge of elections; and it is as true, that in order to come to that determination, it is incidently necessary that the House do judge of the right of the electors; and it has been said, (but that I deny) that the right of the electors is by the law of parliament.—I take the right of every elector in England to accrue to him by the common law, for he is under one or other of these qualifications: Either he is a freeholder, and then he has a right to vote for knights of the shire; or he has a right by charter, or a right by prescription; which two last rights take in the right of voting in all cities and boroughs. Now I would be glad to know whether the right of a freeholder is not by the common law? Is it not an estate, with all its privileges and services, created by that law? Whether a right by charter is not by the common law? Is it not that law that enables the crown to grant charters, and qualifies

that power? Whether a right by prescription is not by the common law? Is not prescription common usage? And is the common law any thing but common usage? So that the right of every elector being by the common law, the judgment of that right is primarily and originally in the courts of law. The freeholder's right of voting, is of the essence of his freehold; and you may as well take away his freehold, as take away his right to vote, which he has by virtue of that freehold, and then tell him he must come to the House of Commons to recover it. And the same may be said of those several interests, which give a right of voting in cities and boroughs. And thus, I hope, I have made it out, that a right of voting is not a parliamentary right, but an ordinary, legal one, and the common law. Judges have the judgment of it originally; and it is incidently only that the House has a power of judging of it, and that too according to the rules of the common law; which is a further demonstration, that it is a common law right; for it would be absurd to say, a man has a right by one law, which is to be judged by the rules of another.—Then what course has the plaintiff taken? He has a right by the common law to chuse burgesses for Aylesbury: That right has been invaded, and he has gone to the common law for redress, and from no other power could he have it; for this House, or the Committee of Elections, cannot give a remedy in this case, that is, cannot make the person injured reparation for the damages done him, by obstructing him in the exercise of his privilege: And that is the thing the learned gentlemen, who have spoke in this debate, have passed by: And these are the material points: That this is a right at common-law, and this House cannot apply a remedy.—But it has been said, that the House will examine, not only on behalf of the elected person, but of the electors. It is true, but in order to what? To see whether you have a right member here, and for no other end; for I challenge any gentleman, to shew me one instance of a single man who came hither and complained, that he had a right to vote, and was hindered from voting, and made that solely to be the offence of the officer. Did the House or would the House ever receive such a complaint? And yet he may go with that complaint to the law: For whether the person he would vote for be returned or not, the injury is the hindering him from enjoying his privilege: and it cannot be made an injury or not an injury, by matter 'ex post facto'; that is, by the officer's returning, or not returning the candidates. And though the officer should repent him, and not carry his injustice so far as to make a false return, yet it is of use, that the law will redress the wrong done to the voter, and thereby, perhaps, stop the first steps or approaches towards a false return.—But if I should admit the House would receive the single petition of a voter who was refused, and when the person he would have voted for was returned, yet the House cannot make him

reparation; all we can do, is to censure the officer, but we cannot make the person complaining whole, in point of damages. Indeed it has been said, the House can give damages, and there was an instance given of Mr. Tankred, who complained against a clergyman, and the House ordered Mr. Tankred to pay him costs; No was sir George Meggot ordered to pay costs to the member he causelessly petitioned against,* and the like is provided for at the beginning of every session. But are these instances of any petitioner repaired in damages by this House? No, these are instances against petitioners, not in favour of them; nor are damages given in those cases, but costs; all that is provided for, is, that persons, frivolously complained against, shall not be out of pocket. And by a mean you have a jurisdiction in point of expences, but not in point of damages; for you may order the wrong doer into custody, and make his payment of costs to the injured person the price of his liberty; but there is no direct remedy, even for costs. But it is apprehended here may be a clashing of jurisdictions, and if the party should be allowed to go to law, the courts of law may be of one opinion, and this House of another. This is a supposi-

* The Case of sir George Meggot, 23 Nov. 8 Willielmi R.

A Complaint being made to the House, that sir George Meggot had prosecuted at law several persons, for what they had testified the last session at the committee of privileges and elections, upon hearing the matter touching the election for the borough of Southwark; it was referred to the committee of privileges to examine the matter of the said complaint, and report their opinion.

4 Decemb. 8 Willielmi. A report was made of the matter of fact, and that the committee had come to this resolution; That sir George Meggot having prosecuted at law Thomas Malyn and John Ladd, for what they testified at the committee of privileges and elections the last session, upon hearing of the matter touching the election for the borough of Southwark, was guilty of a breach of privilege.

The House then agreed with the committee, and ordered sir George Meggot to be taken into custody of the Serjeant at Arms.

The Case of Mr. Tankred, 20 Jan. 9 Willielmi R.

Mr. Tankred complained to the House of a breach of privilege against Mr. Edward Morris, minister of Attdborough, in the county of York; for that the said Morris had intercepted letters of Mr. Tankred's which were sent by the post.

14 Feb. 10 Willielmi R. Mr. Morris attending, was brought in, and the House having heard him, and his witnesses, resolved, that there was no ground of complaint of breach of privilege, and ordered that Mr. Morris should be discharged from any further attendance, and that he should be paid the charge of his attendance by Mr. Tankred.

tion the law does not allow of, for this is to suppose courts of justice will not do right. It will be allowed to me your determination will always be just, and other courts the law supposes will do right too, and then they will determine as you do; and your determination, and that of the law, as I said before, has been the same in this case. But then, as the supposition of law is, that all courts will do right, so human frailty supposes there may be an error in judgment: And yet courts must have jurisdiction, or else there can be no administration of justice among men, since there is no judicature short of another world, that can pretend to an unerring judgment. And now I will shew you where several courts have different jurisdictions of the same fact, and the law allows them, notwithstanding there may be diversity of judgments. The court of Common Pleas may punish a person for assaulting an officer in the execution of their process as a contempt to that court; but at the same time, for the same matter, the offender may be punished in the King's-bench, as it is a breach of the public peace; and the officer may, if he pleases, bring his action in the court of Exchequer for the damage done him. I would observe a little upon the cases cited, and that as short as possible; The first is that of Nevill and Strode: I have looked into the Journal of 1659, and the only book of our law, where that case is reported, and that is Syderfin's second Reports; and that was upon writs issued out by Cromwell, whereby he appointed counties to chuse differently, some three, some four, some five members. Mr. Nevill, who was a member of the long parliament, stood for one of the five knights for the county of Berks; they chose him, but he was not returned, and therefore he brought his action in the Common Pleas: That action depended there some time, and thereupon the justices brought the record into this House for difficulty, and desired the House would come to a determination in it, (and by the way, there was no House of Lords in being at that time; for it was in the time of the long parliament, who had usurped the whole legislative, as well as the executive power:) and no wonder the judges complimented them with the determination of that question, since they were their creatures, and had their commissions from them. Well, but the record being brought in, the House appointed a day to consider of the matter, and when they saw the plaintiff had proceeded according to the known methods of law, they gave no judgment in it, but sent it back to Westminster-hall, and there it was again argued, but never adjudged. And that there was no judgment given, is easy to account for, if the judges thought such an action would lie; for at that time, the Long Parliament was upon the point of bringing in the king, and restoring the laws: And if they had given judgment for the plaintiff, they had given a sanction to the highest usurpation of the Protector, and all his wild fancies of changing the constitution at his will and pleasure. And indeed the plain-

tiff had disaffirmed the authority of the Long Parliament, which he had with great zeal asserted, and of which he was himself a member. But if the judges had thought such an action would not lie, they might, without any scruple, have given judgment for the defendant. And this seems to me a strong authority that Westminster-hall thought such an action would lie: And it is very remarkable, that when that House of Commons (as they called themselves) had usurped the exorbitant power I mentioned before, they did not proceed to assume the jurisdiction of the common law.—The next case is that of Soame and Barnardiston, in which Westminster-hall was divided: My lord Hale was of one opinion, and my lord North of another, and there were six and six of a side, and the matter came by Writ of Error into the House of Lords, and a gentleman said 800*l.* was worth contending for. But I am apt to think sir Samuel Barnardiston did not hope to recover one farthing of the money, for Soame was dead, and I believe without assets: for, in all the proceedings in the House of Lords, none appeared on the behalf of his widow, she had no counsel there: But it was argued against sir Samuel Barnardiston, by Mr. Montague, the late Lord Chief-Baron, to vindicate the proceedings of the Exchequer-Chamber, and judgment was given, as hath been said in the House of Lords.—But what happened next? The Commons were so uneasy under that judgment, and the injury which might be done to the people, from whom they derived their authority, by double or false returns, that the next thing was the interposition of the legislature to apply a remedy, and the Lords came into it, though it was a great discredit to the reversal of that judgment; for the act of the 7th of the late king, declares false returns to be against law, and provides an action shall lie where an officer makes a return falsly and maliciously; they never thought it an censuring thing, but new malice might be tried in that as well as in many other cases: and I wonder to hear *fulset malitiose* should be so much words of course. Men are tried for their lives every day, where malice is the main point in issue. If a man does without any provocation kill another, the law intends malice, and that is murder: So here, if an officer refuseth the vote of one, who hath a clear and indisputable right, the law presumes it done maliciously; but if the officer refuses a man's vote, and there is any probable cause, or colour to do it, or his right of voting is doubtful, the judge will tell the jury they ought to find for the defendant; and therefore it is only in a plain and glaring case, that a man can prevail in such an action; and this by the way, is an answer to that objection, that such actions as these will bring all your elections to be determined by the Lords; since an officer can never be found guilty by a jury upon this action; where there is a controversy or dispute, much less can the Lords try or determine any thing of the right.—There is another case, and that

is the case of Mr. Onslow against the bailiff of Haselmere; that judgment was against the action; and was given by my Lord Chief-Justice North, and the rest of the judges of the Common-pleas, upon the authority of the judgment in the case of Soame and Barnardiston, in the Exchequer Chamber: and no wonder they would not give a judgment contrary to what some of themselves had given in another place. Sir, this question hath been before this House not long since, Whether a candidate should be hindered from proceeding upon an action at law, before he had come to this House for their determination, whether he was chosen or no? And this House upon a solemn debate adjudged that he might go to law before he had come thither; and I desire your clerk may read a word or two in your Journal, it is Monday, March 13, 1698.

Clerk reads. [‘The House being acquainted, That John Buller, esq.; who was candidate at the election for choice of members to serve in this present parliament, for the borough of Lescard, in the county of Cornwall, hath brought an action upon the statute made in the 7th year of his majesty’s reign, against Mr. Richard Roberts, mayor of the said borough, for the sum of 500*l.* for making a false return of William Bridges, esq.; although the said Mr. Buller never petitioned against, or questioned the said return in this House, and a debate arising thereupon, resolved that the debate be adjourned until Wednesday morning next.’]

Sir Joseph Jekyll. Now I desire you to look upon Wednesday the 15th day of March, when that debate was resumed.

Clerk reads. [This was the 15th of March. The House resumed the adjourned debate relating to Mr. Buller; and after a long debate, the same fell, without any thing done thereupon.’]

Members. Well, what then?

Sir Joseph Jekyll.—I take this to be a plain authority, that will govern the case before you: for if it was not reasonable to restrain a man from proceeding at law upon the statute, before he had come thither for a determination, when it was to controvert the very election, which was undoubtedly proper for the judicature of the House; much less will it be reasonable to restrain a proceeding at law, which is not to controvert the election, and upon a case not proper for the judicature of the House; and the House doing nothing upon that complaint, is a declaration, that the House could not justly do any thing upon it. For if a man makes a motion in any other court, and the court declares they will do nothing upon it, I desire to know whether that be not a declaration of that court, that the motion is unreasonable, and it is all the judgment the court gives in such a case. And I had the honour to sit in parliament when that motion was made, and very much pressed; and some

that have spoke in this debate, were then of an opinion contrary to what they are now, and were not for stopping the course of law.—Sir, I apprehend the action is well founded in this case; this man had a right to vote, he had an injury done him in respect to that right, he hath sought to be repaired in a proper way, and he could not be repaired in any other: I am for doing nothing to his prejudice, and therefore am against your question.

The *Speaker* (Mr. Harley).—Sir, I shall trouble you but with a few words after this long debate: and rather to understand the terms you are debating on, than to think any thing I can offer to be of any great weight. But I take the question not to be as some have represented it, but to be singly this in general, whether an action does lie at common law in the case before you?—There is no need to mention the particular circumstances of Aylesbury election; for if that was the single case, you might have taken another method. I will not insist, that in this very election, a great number of those inhabitants petitioned this House upon this point, that their votes were denied: And after this petition had lain in the House some time, it was withdrawn by their own consent: I do not trouble myself whether this particular man was amongst them, nor will I trouble you with what may reasonably be urged from this; but leave that to other gentlemen.—But I desire we may understand the terms upon which we are debating; we have had maxims of the common law, and the rights of parliament mentioned. The common law is the common usage of the realm; I take the laws of parliament to be the common law of the land, and the usage of parliament to be the law of parliament; and the law of parliament is to be known by usage, as the common law is.—Then how shall we know whether this belongs to the common law? If there be any other way, I should be glad to be informed; but I think there is no other way of knowing, whether an action will lie at common law, but by reason or usage, and precedents. Now, if by reason; it is to be made out by what necessarily attends this case, or some other cases like it. And pray what do they offer, that lies at common law? Do they give you any precedent? What reason do they offer? I suppose that which was read last is no precedent in this case; for that was an action upon the statute; or that the courts below take upon them a legislature instead of a judicature, which must be, if there be no rule for them to go by. I take the question you have read, to consist of two parts; one asserting your own right, the other is negative, that no other courts have any right, but in cases particularly directed by the statute.—I cannot think this of electors and elected a privilege; I take it to be a service both in the electors and elected; and formerly it was reckoned a hard service; I know not how they find it now. It is a

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service, I take it, because all who are electors are liable to pay the wages, and I take that to be a burden: and not only from that, but the very towns that were boroughs, and elected, when one paid fifteenths, the other paid tenths; so that I take it to be a service: and if a franchise, see the consequence, it will be in the power of the crown to create as many boroughs as they please.—Then consider, this House is in possession of this power, as of right, and I do not find the common law in possession of any such right. Then what do they offer to bring it in, but that there would be some failure of justice? Now I took it, that the Judges are *ius dicere*, and not *ius dare*: if any thing want a provision to be made for it, it must be done by the legislative power; and if the electors want it, provision must be made for them, that they shall have an action. And those gentlemen, who think that necessary, may bring in a bill to that purpose, and take the sense of the legislature upon it in a regular way.—The question before you now is, Whether the examination, hearing, and determination of all matters relating to elections, where some statutes have not particularly directed otherwise, does not belong to this House? There was a famous case of Goodwin,* that was a case contested by the crown, and the crown pretended to send out another writ. And there they say, that as to members of parliament, their attendance, &c. they are the sole judge: and this they lay before king James in the first year of his reign, and claim it as their sole right, and the king's second writ was determined to be void.—But a gentleman makes an argument, if one should strike another in the House, what remedy? Why there is an act made for that case in Henry the 6th's time. I think now the matter will turn upon this: Say they, it is true you can try elections, and who are the electors; but here is one thing remains, that is, to give satisfaction. Have they any precedents for this? I believe the precedents are without; they have a power for what is necessary; nothing less than a law can give the other.—Gentlemen say, there may be a difference in judgment in courts below, but they are subordinate, and there lies an appeal: but in this Case, all courts will be co-ordinate with you; and therefore if that be a grievance, nay a solecism in government, prevent it now.—It is said, what will your vote do? That is pretty odd: if they would have an act of parliament, your vote must be the ground of it.—You are judges of the whole; but say some, you cannot give the pecuniary satisfaction. Well, suppose so; but you can restore all to their right. But let me say this, if you would not set up a co-ordinate power with you in matters of elections, and which will be too hard for you at last, I hope it will be a warning to you, to take more care in the judging of your elections for the time to come.—If

* See it in vol. ii, p. 91, of this Collection.

the judgment belongs to you, and you are possessed of it for so long a tract of time, that nobody can offer any thing against it since Hen. 4th's time; till gentlemen shew me some reason, why the common law should lay hold of it, I must be of opinion, that it does belong to you, and no court can take cognizance of it but you, except where it is otherwise provided for by statute.

Sir *Thomas Meres*. Sir, I shall not enter into a discourse, and repeat what I remember of former times: I will say but this, let others answer it better if they can: As to the words *facto et malitioso*, it seems one Chief-Justice said, they were words of importance, and must be proved; another Chief-Justice said, they were only words of course, that is, like pepper and vinegar to a slice of roast beef: so there is one Chief-Justice, that spoke last but one, against another.—As to making satisfaction, I confess, I like very well what that gentleman said on the right hand. If there was any precedent for it, I agree it would do very well, that this House could give damages, and we will make the best of it; but most of these things have spite in them, and these actions are brought with spite. Now this we can do, we can punish the officer, and there is revenge in that; and that is a sweet bit, and some satisfaction. What farther occurs to me, hath been spoken by other gentlemen, better than I can do it: and I shall not repeat, it being so late in the night.

Mr. *Cowper*, (afterwards earl Cowper). I perfectly agree with that honourable and learned gentleman that spoke last but one in this debate, in what he laid down as an undoubted maxim or groundwork for the opinion he delivered, that the law and custom of parliament is part of the law of the land, and as such, ought to be taken notice of by all persons. And I think it is the exact standard by which we ought to walk; and the deduction my poor judgment is apt to make from that principle, is this, that we ought not, out of zeal to our own jurisdiction, to go one step farther than that known law and custom of parliament will warrant us to do. Now I take it upon this debate, that this law and custom of parliament doth not give the subject, who is injured by his vote being denied him, any satisfaction or recompence for that damage: and am the rather confirmed in that opinion, because that very learned and honourable gentleman, who is particularly knowing in the laws and precedents of parliament, has not pleased to represent to you any one precedent, where the subject so injured hath complained to the parliament, and had redress in that particular; but all petitions have been either from the candidates, or electors, complaining of an undue return. So that it cannot be shewed, that it hath been the law and custom of parliament to give that remedy, or relief in parliament, which is the subject-matter, or end of the action now in question.

I go likewise along with him, and every gentleman that hath spoke in this debate, that by the law and custom of parliament, none but yourselves can determine who are rightly elected, in order to displace, or place them here; and incident to that end, you have the sole right of considering the right of the electors; I say so far forth, as it is necessarily incident to determine, who shall, and who shall not sit here; and no other court can consider the right of the electors, in order to determine the right of any to sit in this place, further than you, by some act of parliament, have given them leave. But this matter having now been disputed a great while, you have had it fully represented to you, how they came to hold the scales in this action in Westminster-hall, not as in a case where the right of election, or the privileges of this House was a subject-matter of the question: the action was brought there only to entitle the injured subject to damages. And this matter ought to be considered, as it relates to different ends and purposes, and upon that it turned in the case of *Soame and Barnardiston*. They who thought that action lay, thought the courts below might try the merits of an election to repair in damages, not to determine who should be admitted to sit in parliament. And I will venture to say, that the judgment of the House of Lords that confirmed that reversal, was in no wise at that time satisfactory to the Commons of England. But the act of parliament that hath been mentioned, was built upon this, that the reversal of the judgment between *Barnardiston and Soame* was not right, and so that act was procured to set up the right of the Commons of England, that was thought to be invaded by that reversal, or judgment, that the action upon the case did not lie. I will go a step farther, that as you have the sole power to try the right of election, and consider the right of the electors, to the end I mentioned, to determine who shall be admitted here; so I grant it hath been the law and custom of parliaments, (how ancient I will not enquire) to punish the offenders, particularly the officers and magistrates presiding at the election, for doing any wrong or injury in his office on that occasion, in order to make him an example; or as an offender against the public, and the constitution of parliament: so far I grant you have a just right to go, and nobody ought to interfere with you. But now we are carrying the matter yet further: the question now is not, Whether we have the sole right to punish the officer as a public offender? this action is not brought to that end, nor is there a word in the declaration who was, or was not duly elected, or that the constitution or privilege of parliament was violated. But the plaintiff only says he had a right to vote, and that he was injuriously denied it (whether the right or wrong member was returned, he meddles not with it) and he submits it to the court and the law. Whether he ought not to have damages for that wrong? And the question now is, whether that demand

of damages was not well founded? Or, whether there is any thing in this, contrary to the law and constitution of parliament? Law depending on custom, certainly consists not in, and is not to be made out by one act, but by often reiterated acts: and that must be very far from being the law and custom of parliament, which is so far from being a frequent repetition of acts, or precedents, that in this case, there is not one instance, where an elector hath brought his petition, without regard to the return made, and desired his particular right to vote might be tried and asserted, he having been obstructed and injured in giving his vote: nor was ever such elector repaired in damages here, nor ever had his particular right to vote resolved, or asserted by any judgment, or declaration of this House. The learned and honourable person, upon whose reasoning I am humbly offering my thoughts, with great deference, was pleased to instance in the case of five persons in the town of Aylesbury, who exhibited a petition, and complained of an injury done them at an election for that town, at which their votes were refused. And if they complained of nothing farther, and did not conclude to the right of the return, and complain that they were unduly represented, I admit it had been so far an instance to this purpose. But if they had so complained only of the injury done the petitioners in denying their votes: yet he is pleased to tell you, this petition was withdrawn, and by the consent of the persons who presented it, and so came to nothing. I suppose this is the single precedent to prove the law and custom of parliament, because there is no other instance given. It does not appear upon what ground or reasons it was withdrawn; and I having no particular memory of that passage, you will pardon me, if I am mistaken in my conjecture. I believe no man that seeks a remedy would desist, if he expected to succeed; so I take the most probable reason, till another appear, to be, that they were hopeless of doing any good with it: and one petition not prosecuted, will hardly shew, that parliaments used to give redress in such cases. Now, if that precedent had been successful, if the petition had been referred to a committee, if damages had been given upon the complaint, and a declarative vote had passed to assert the petitioner's right, (but I did not observe there were any such proceedings;) then, indeed, I must admit, that it was one precedent in point, and a very material one; and it would have proved, that we had once held plea of this matter, and by consequence, if we had often done so, that nobody else had to do with it. But if that precedent be defective, and none can shew, that ever any petition was exhibited by any elector, for a personal injury done him in rejecting his vote, though the person he would have voted for was returned, this action may lie for such an injury done to an elector, without interfering with any law, or usage of parliament, that hath yet been made evident; and that brings me to another matter of that

honourable person's discourse, and I acknowledge be entered into it with a great deal of candour and fairness. He was pleased to say, he thought it was admitted in this debate, that the like action is not to be found in all the reports or books of law. I would allow his objection its due weight, and admit what I take his meaning to be, that this action, in the particular species of it, may be new, though it is old in its genus, or the principal materials on which it is built; and I take it, if by the general rule, or reason of law for such an action, it be warranted, this action, (as a thousand other actions on the case may,) will lie, though in all the parts it is not to be exactly paralleled; for it is the very nature of, and implied in the name of an action upon the case, that every man may maintain it on his particular case, provided it carry in it the general reason, or ingredients required by law to support such an action, though in many circumstances, it may be perfectly new. I see that honourable person understands clearly the necessary incidents of that action; that is, there are to be *damnum et injuria*, which I take to mean a damage to the subject, not arising from a lawful, but, which is the consequence of an unlawful act. Now, says he, first here is no damage, because anciently the attendance was thought a service and a burden, and the right of electing was a service too, and in being deprived of a service, there can be no damage; and therefore one of the main ingredients of an action of the case is wanting. This is clear reasoning, and either to be answered or submitted to. It is said, the right of electing was a service; how true, I doubt upon the reason of the thing: A service was often a part of the tenure, by which a man held his land till it came up to the crown; and the service was originally created by grant and reservation. Now, can any one imagine, that where one holds a small freehold, any such tenure was created between him and his immediate lord, originally by reservation, as that he should vote to send members to parliament?—But if it might be considered as a service so created, it will not do the business of the argument, unless you consider it also as a service of burthen, without advantage or privilege; for if it be a privilege too, (though in its creation it might be a service) then the depriving a man of it is an injury. Now nobody can think but that the right to elect a parliament-man, which is a distinguishing character from the vulgar, and hath its weight in the legislation, is a privilege; and therefore to be deprived of it, is to be deprived not only of a service and burden, but of a very valuable privilege; and I believe any Englishman would think we dealt hardly by him, to deprive him of it, though we should tell him at the same time, we deprived him only of a service or burden, and not of a valuable privilege.—There is another thing that occurs on this head: we have been so far from thinking the being elected, a service or burden only, that, in the nature of a repeal of those judgments of Some

right must have a remedy, but then the subject must be first deprived of that right, which in this case he was not; and even when he is, he must have his remedy in a proper manner, and in a proper court. There are several sorts of rights, and several sorts of laws in England, and there are several courts of justice for the administration of those laws: a man that has a right to a legacy cannot bring an action at common-law, but he has a proper remedy in the spiritual court. The like may be observed of cases that belong to the courts of Chancery, Admiralty, Stanneries, and of the Forest-laws. The subject cannot bring actions at common law in cases that belong to the jurisdiction of other courts. And when my lord chief justice Coke enumerates the several laws in this kingdom, he gives the precedence to the law and custom of parliament, which he tells us is superior to the common-law in Westminster-hall. And as every court at law has its customs and privileges peculiar to itself, and is sole judge of them, so also the high court of parliament, 'suis propriis legibus et consuetudinibus subsistit,' hath its own proper laws and customs, and is sole judge thereof. And if an action at common law will not lie for a legacy, where the spiritual court has a jurisdiction, though the temporal courts have, in many respects, a superior authority, such an action will much less lie in a case concerning the parliament, which is the highest court of the kingdom, and who are sole judges of all cases relating to themselves: but some carry this further, and say that every right must have a remedy with damages. This may be true in most cases, where a man is deprived of rights of property and possession; but there are many instances to be given, where a right of franchise or privilege is not entitled to any damage: as a person elected mayor of a corporation, if the proper officer refuses to swear him, has no action at law for damages, but his remedy is by a Mandamus out of the Queen's-bench: there is a remedy by *Quare impedit*, but not to recover damages. In a writ of right you shall recover the land, but no damages: so in this case, the proper remedy is to have the vote allowed, which can only be done by the House of Commons. Some gentlemen have found out a new distinction which I never heard before, that the House of Commons have the sole privilege to judge of the rights of electors, and of the behaviour of officers, to one intent, but not to another; that is, in order to determine who are the legal representatives, but not to give damages to the party injured. But, with great submission, there is no weight at all in this distinction; for, as it is plain that the elector is not in this case deprived of his vote, and therefore suffers no damage, so it is also evident that the judgment of the House of Commons, in matters properly cognizable before them, cannot be contradicted by any other judicature; and therefore their judgment of the qualification of the elector, and of the behaviour of the officer,

must be conclusive to all intents and purposes whatsoever. It is contrary to the reason of all laws, that the behaviour of an officer should be subject to the determination of two independent jurisdictions; or that he should be innocent by the judgment of a superior court, and guilty by the judgment of an inferior; or that he should be twice punished for the same offence. No man can serve two masters: the officer, at this rate, will be every way ensnared and made liable to punishment, whether he does his duty or not; if he accepts illegal votes on the poll, he will forfeit 500*l.* by the statute, for a false return; if he refuses them, he may be ruined by a multitude of actions; for if one may bring an action, there may be five hundred, since every man, at this rate, may offer a vote, and bring an action for not entering it upon the poll. How is this consistent with the freedom of elections, in which there ought to be no terror neither on the electors, nor on the officers? But as the electors should be free to offer their votes, so the officers should be free to judge whether they ought to be entered on the poll, or not; and they ought not to be accountable to any but the House of Commons, whose servants they are, in all matters relating to elections, and who are entrusted with the determination of all matters and cases relating thereto; and they may as well punish them for taking illegal votes on the poll, as for not taking those that are legal. In neither of which cases have the judges of the common law any jurisdiction, though there is the same reason in both, to take care that every the meanest subject may have relief for any injury done him; but we are not to take more care of the meanest subject than of the whole House of Commons. The greatest subject in England ought to have no relief but what is consistent with the law of parliament and the safety of the constitution. If an action lies, and upon a judgment on that action a Writ of Error lies in the House of Peers, the Lords will be the sole judges at last, who have votes to chuse a House of Commons; which is directly contrary to the fundamental maxim of the law and custom of parliament, that the two Houses are mutual checks to each other, and sole judges of their own privileges.—This is an excellent constitution and admirably well contrived for the common safety: but how can this constitution be preserved if the Lords can punish our officers and govern our elections? This will be the way to destroy all checks, and to make the House of Commons dependent on the Lords; and then I cannot see upon what foundation you can be said to sit here to do any service for your country.—Others insist that this is a right that is incident to the freehold and freedom of electors; therefore as their freeholds are cognizable at common-law, so is every incident belonging to it. This argument is plausible at first sight, but in reality there is nothing in it, for though the Commons of England have submitted their private differences to arbitrators, or judges, in-

differently chosen and appointed by the prince, the common parent of the people: yet they have never submitted their fundamental rights and privileges, which they hold in their public and political capacities, as a free branch of the high court of parliament, to any other but their own representatives, who are chosen and appointed by themselves. This is not a case, properly speaking, between party and party, but between the Lords and Commons; because the determination of this case brings the whole right in question, who have a privilege to judge of the qualification of electors to give their votes in election of members to serve in parliament, whether the Lords or the Commons? It is not now the question, who hath the best right to a freehold or freedom, or to any thing that is incident to it? but whether the Commons of England shall have any freeholds or freedoms at all? or, which is the same thing in effect, whether they should have any security for those rights or not?—For if the Lords are judges of your privileges, you can hold no right but during their pleasure.—The Lords seem to contend for the right of the subject, but I wish it is not for a power to enable themselves to judge and determine, as they think fit, of all our rights and liberties; for this is the necessary consequence of allowing an elector to have a remedy in any other place but within these walls.—This is my humble opinion, and if I am mistaken, other gentlemen will set me right. This is certainly a matter of the highest importance to the welfare of the subject, and I doubt not but they will very well consider it before they give way to the establishing a precedent that tends to destroy the privileges of this House or the liberties of their country.—A great tenderness is expressed for this poor man, whose vote has been refused: but whether he had a right to give his vote is very much questioned, and never yet determined by this House, which has the proper judicature thereof. But admitting he had a vote, whether ought to be preferred a private interest or the public safety? Whether will be most for the honour of this House and the interest of our electors, the care of a private person by new invented action, neither warranted by reason, precedent, or any established law; or the care of the parliament, and the constitution, on which depend the rights and liberties of all the Commons of England?—Sir, I beg pardon for taking up so much of your time, but I must confess it seems to me, that our all depends upon a right determination of this matter: for I cannot see any other reason why this new device is supported by the Lords, but only to render you precarious and useless.

Sir Gilbert Dtolben, (afterwards a judge in Ireland.) Mr. Freeman; I shall not trouble you very long at this time of day: I think the point in debate has been truly stated by the gentlemen who have insisted on this question, Whether an action will lie for an elector,

for having been refused his vote at the election of a member to serve in parliament? A learned gentleman would have the question to be, not whether an action will lie, but whether this House has the sole right of determining that matter, and of giving remedy in it? I confess I think it is more properly stated the other way; but the thing is scarce worth a dispute, since which way soever you turn the tables it comes to the same point, and one of the questions will in consequence be resolved by the resolution of the other. For if that question be put which is proposed by the gentleman, and carried in the affirmative, that this House has the sole right of determining this, and all other matters whatsoever that concern the right of election; then it must follow, that whoever is wronged in any such respect, cannot be redressed by action, since the right of determining in cases of this nature is not in the courts below, but solely in this House. I shall not offer you any arguments to prove this sole right, many having been urged by others; but I will consider some things (without taking up much of your time), that have been offered as objections to it. Some gentlemen have made a distinction in this case, between the right of the electors and of the elected: and they will have it, that the courts below may decide the first, but not the last: whereas, in my poor opinion, the decision of the elector's right must necessarily, in many cases, decide who has right to be elected. For suppose a common case, that one of the candidates insists upon an election by a select number, and the other upon a popular election: If, in this case one of the populace be refused his vote, upon a pretence that he is not of the select number, whereupon he brings his action against the officer; will not the event of that trial determine (in consequence) the right of the candidates? Surely it must; since if it go for the plaintiff, he for whom the plaintiff offered to vote, and who had the popular interest, will appear to have had the right of election; and so will the other candidate, if it go for the defendant. Several other cases to the same purpose might be put: So that if an action of this nature should lie, it must (as I apprehend) unavoidably follow, that Westminster-hall by original action, and by Writ of Error the House of Lords, will have power to determine, (at least consequentially,) who has right to sit in this House, and who not. And how consistent such a determination will be with your undeniable right (acknowledged on all sides), of determining the elections of your members, exclusive of all other jurisdictions, I leave to gentlemen to consider. A learned person was pleased to object, that right is founded upon usage; and if this House had the sole right of judging in a case of this nature, where a single elector is wronged, doubtless there would be some precedent of relief given to such an injured person. But, says the gentleman, there is no such precedent, and therefore it must follow, that this House has

not the sole right of relieving in that case. I think I may safely deny his first proposition, as he applies it to the rights of this House, which (generally speaking) are not founded upon usage. Sir, the rights of parliament are chiefly founded upon the nature and constitution of parliaments. Usage is indeed a corroboration, and an evidence of those rights; but the foundation of them, is our being a part of the legislature, whereby we necessarily become invested with such rights and privileges, as enable us to act, and to discharge our duty, in that great capacity: So that it is not so much what has been used, as what is necessary to the support of our constitution, that must be the rule and measure in determining the rights of the House of Commons. But neither has usage been wanting in this case: For whereas, the gentleman asserts, that there is no precedent where this House has given relief to a wronged elector, (with submission,) several such precedents appear upon your books, particularly in the case of Banbury, where four or five of the inhabitants complained, and the House gave a remedy. And I cannot see why, if it has been given to four, it may not be given to one; nay, I should think if more than one have been relieved, *à fortiori* one should be relievable. But it seems to me, that the argument drawn from usage, goes much further than the learned gentleman intended it should: for if all right be founded upon usage, all right of action must be so founded; and then what becomes of this action which the gentleman has laboured to support? If usage be nothing else but the repetition of the like acts, then this action (according to the gentleman's rule, that usage is the foundation of right,) cannot be rightful, unless there hath been a repetition of the like action. Nor can it be said, that this is the first time any such cause of action has arisen, and that therefore it could not have been brought before; for there has scarce been a parliament called in any reign, but some or other has, without doubt, been wrongfully refused his vote; So that the cause having been frequent, it must have had the like effect ere now, in case such a wrong could have been redressed by bringing such an action. But no gentleman has pretended to say, that any action of this nature was ever brought before; and therefore we may infer from the learned gentleman's own position, as likewise from the authority of Littleton's text, that, since none has been brought, none can be brought. And this has been the constant opinion of the courts in Westminster-hall, the judges having, upon every occasion, where the rights of parliament have fallen under their consideration, in all times declared, that nothing of that kind is within their jurisdiction; nor can they judge of any such matter, farther than as they are empowered by particular statutes. And this was the reason why the judgment in Barnardiston's Case, given in the King's-bench, was reversed in the Exchequer chamber, because it was a thing purely of parliamentary cogni-

zance; the House of Commons having the sole power of determining all matters relating to elections and returns, except in statute-cases. Nay, the court of King's-bench had declared, they would not have proceeded in that action of Barnardiston, had it not been grounded upon a precedent judgment given in the House of Commons. But the judges in the Exchequer chamber thought, that even the determination of the House was not a sufficient authority to the courts below, to hold plea in an action relating to the rights of parliament, though the action was grounded upon that determination; and therefore they reversed the judgment given in that action, and (which is a mighty strong circumstance in the case) that reversal was afterwards affirmed in the House of Lords. So that it is plain, even the Lords themselves were, at that time, of the same opinion with the judges, that nothing which concerned elections was cognizable in Westminster-hall: For otherwise they could not have affirmed the judgment given in the Exchequer chamber, which was grounded entirely upon that maxim. This appears farther, by what their lordships did in the case of Hollis and Elliot, against whom judgment had been given in the King's-bench, for what they had said and done in this House. In the year 1667, the House of Commons voted, that the Judgment given in the King's-bench against those persons was illegal, as being against the privilege of parliament. And this vote was (as I remember) delivered to the Lords at a conference, with a desire of their concurrence to it: Accordingly, the Lords sent a message, that they did concur. Nay, they were so zealous, as to desire the lord Hollis to bring a Writ of Error upon that Judgment, which was done, and the Judgment was reversed. From whence it must be inferred, that their lordships were then of opinion, whatever Judgment is against the privilege of parliament (that is, of either House of parliament,) is an illegal judgment.—Now to lay these two opinions of the Lords together: if the House of Commons has the sole privilege of judging all matters relating to elections, (upon which ground their lordships affirmed the reversal of the Judgment in Barnardiston's case) and if every Judgment given against the privilege of parliament be illegal (as their lordships both resolved and judged in the Case of Hollis and Elliot,) how comes it to pass, that the Lords have lately thought fit to reverse the Judgment given in this Case of Ashby and White, which was grounded upon that very opinion, established by their Lordships in the Case of Barnardiston, that all matters concerning elections are determinable only in the House of Commons? And consequently, how can we avoid saying, (pursuant to the other opinion, and to the Judgment they gave in the Case of Hollis) that their lordships' Judgment of reversal given upon the Writ of Error in Ashby's Case, being against what themselves have owned to be the privilege of the House of Commons, is an erroneous, (not to say an ille-

gal) Judgment?—I confess I cannot much wonder at its being so, when I consider, that the steps their lordships made in proceeding to this Judgment of reversal, were so very hasty, as not to afford them sufficient time to weigh and to deliberate upon a matter of such importance. This cause had depended near a twelve-month in the King's-bench, it had been argued several times at the bar, and at length *seriatim* by the justices, three of whom, upon the reason of former resolutions, gave Judgment against the plaintiff, that the action does not lie: and yet, no sooner was this Writ of Error brought, but the errors are immediately argued; and upon the first argument the opinions of the judges are required; and notwithstanding they desired time but till the next day to consider of the Case, the Lords (as I am very well assured) would not allow them an hour; but obliged them to deliver their present thoughts, which though several of them expressed very doubtfully, and several others were for affirming the Judgment; yet their lordships were so very clear, and so determinate in the point, that, without any farther consideration, the Judgment was reversed.—And now I desire gentlemen to judge, whether, in this instance, the Lords have shewn that regard either to the privileges, or to the dignity of this House, which their ancestors, and themselves had formerly expressed upon the occasions before mentioned.—I will take notice but of one thing more, which fell from a learned gentleman, who insisted, that the election to parliament is not a service, but a privilege, because double damages are given by the late act concerning returns. I have cast my eye upon that act, and I think, if the preamble be read, it will appear, that gentleman was somewhat unfortunate in appealing to it; for the preamble calls the election to parliament, a service in express terms, and certainly with good reason; if the House will give me leave, I will read it.—“Whereas false and double returns of members to serve in parliament are an abuse of trust in a matter of the greatest consequence to the kingdom, and not only an injury to the persons duly chosen, by keeping them from their service in the House of Commons and putting them to great expence to make their elections appear; but also to the counties, cities, boroughs, and cinque ports by which they are chosen, and the business of parliament disturbed and delayed thereby; be it therefore enacted.”—Sir, not to trouble you any longer, I am entirely for the question, as it is stated.

Mr. King, (afterwards lord King, and lord Chancellor.) That which calls me up, in the first place, is what that honourable gentleman, just against me, was pleased to intimate, as if the right of electing was only a service, and not a liberty, or privilege; and I find a worthy member, that spoke last, is of the same opinion. Truly, I am loth to tell you my own, without desiring the act 25 Car. 2, cap. 9, may

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be read. [*Members.* No! no!] It is an act to enable the county-palatine of Durham to send members to parliament, and it recites, that they had not, before that time, had the liberty and privilege of electing and sending any members to parliament: where you see the legislature call it a liberty and privilege; and if the legislature call it so, I think I may venture to call it so too. And if it be a liberty and privilege, then the question will be, whether it does not stand on the same bottom with our liberties and privileges? In case of any other franchise or liberty, an action lies at common-law for the breach thereof; and why an action should not lie at common-law for the breach of this franchise, as well as for the breach of every other franchise, is to me very strange. Gentlemen take it for granted, this is purely an action at common-law, and no statute hath any influence on it. Now there is a statute which hath not been mentioned, only I must first premise that which, I think, nobody will deny, viz. That wherever an act of parliament does forbid any thing, if any body be injured by the doing of the thing so prohibited by that act, in consequence of law, the person injured hath an action: I say, there is a statute that forbids disturbances or hindrances in matters of elections; and, by consequence of law, that statute gives an action to the party injured against the person disturbing or hindering him in his election. The statute I mean is the 3 Ed. 1, cap. 5. That is a positive law whereby all disturbances in elections are forbid: every man is forbid to hinder or disturb by force of arms, by malice, or menacing any man, to make a free election.—I shall only instance in one parallel case, though I could in many more: the statute in Rich. 2's time, de Scand. Mag. only forbids the speaking evil of great men; there is not one word of an action; yet, by operation of law, it was always held, that an action would lie upon that statute for a scandal of a great man, because it was prohibited by that statute. So here, the statute forbids the disturbing of any man by force or malice to make free election; the jury have found, that the defendants did, in this cause, maliciously disturb and hinder the plaintiff from voting at the election; and by a like consequence and operation of law, this action is maintainable.—Gentlemen say, this is a new action never heard of before; it is true, this particular action was never brought before; but actions of the same kind and nature, and grounded on the same principles and reasons of law, have been brought before, ‘*Et ubi eadem est ratio, idem jus.*’ I could give you many instances of this kind. Was it ever heard, until the 20th or 21st Car. 2, that an action lay against an officer, for denying a poll to one who stood candidate for a bridge-master? The mayor denied the poll, and said, he was judge of the election; and upon this the person injured brought his action, and recovered. At the same time it was said, there was no such action ever heard of before; it is true, not that species,

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but the genus was heard of. Another action was brought 30 Car. 2, (which was never heard of before) against a mayor, for refusing the plaintiff's vote for a succeeding mayor.—I believe every body knows that all the law books for 400 years say, that the reversioner had liberty to go into an estate of a tenant for life, to see if he commit waste. And no action was ever brought till 16 Jac. 1, by a reversioner against a tenant for life, for refusing to let him in to see whether waste was committed. No action was ever brought against a master of a ship, for the negligent keeping, and loss of goods on board his ship, till about the 24 Car. 2, and yet the action lay.—There was another action, in king Car. 1st's time, brought for a false and malicious prosecution of an indictment of a man for treason. There was the same objection; and it was said, that this would deter people from prosecuting. And nobody ever dreamt of it before, it is true, but it stood upon the general reason of the law; if you do me a wrong, I must have a remedy. And as to what a worthy gentleman hath said, that there are instances at common law, where a man shall recover, and yet have no damages; it is true in real actions, but let him give me an instance of that in an action of the case. He recovers nothing there: if he does not recover damages in real actions, he recovers the land itself.

Members. The question, the question.

Mr. King. I find gentlemen are very uneasy, I will trouble you no further.

Members. Go on, go on.

Mr. King. I agree the determining the right of election belongs to the House of Commons; and they ought to apply to the House of Commons in that case: and I shall not depart from that, I think I cannot, without ruining the constitution; but that which I say is, that this action does not at all relate to the right of election. This action is brought by a man that hath an undoubted right of voting, against an officer for maliciously refusing his vote. Put the case this had happened in a county, (for the law would have been the same) that a freeholder, who had a right to vote, had tendered his vote to the sheriff; and though he knew he was a freeholder, yet, the sheriff should maliciously refuse his vote: hath the sheriff done this man an injury, or no? This man does not bring his action, because the person he would have voted for is not returned, but it is because there is an injury done to his franchise. If I thought the right of election was concerned in this case, I would go as far as any, for I think that does belong to the House, but I do not think this is concerned in the present case.

Sir Thomas Littleton. I shall be shorter than some imagine. It has been discoursed, whether this be a privilege, or a burden, &c. Let them think it a burden that call it so: if it

be a burden, it is such a burden as some men spend a great part of their estate for, as if it was a privilege. I think this resolution which is proposed, tends to the encouraging one man to injure another man's franchise without any reparation, which I believe is not very consistent with law or reason. You have no doubt a power of punishing the offenders, but you cannot give damages: I think this is a plain case; here was a man who had a right to vote, and was not admitted.

Members. No, no.

Sir Thomas Littleton. That is admitted upon the judgment: for the case is made upon the right; and if he had not proved his right, he could not have recovered: then if he was denied his right, nobody will say, we can give him damages. What would you have a poor man do, come with a petition, and fee counsel, and attend the parliament for a month together? The man it seems thought it better to go this way. I think if he had complained, we might have punished the officer; but for damages, he could have them no way but this.—Suppose the judges in Westminster-hall had been of opinion, that this action did lie, and the constables had brought a Writ of Error; what would you have said in a case where a man had been denied his privilege of voting, and the law had given damages, if the Lords had said no, there shall be no action? I think the Lords have done what is right, I think they have relieved the person injured according to justice; and it does not interfere with your rights, for he founds his action upon your determination.

Members. No, no.

Mr. Walpole. *Mr. Freeman,* I desire to have the question read.

Accordingly *Mr. Freeman* in the chair read the question again.

Mr. Serjeant Hooper. A gentleman that spoke last but one, was pleased to say, that if he thought the right of electing members was any ways concerned in this question, he would come heartily into it: I know not what that gentleman means by it; but believe all future elections will depend much upon the determination you make now. If you give the Lords this jurisdiction to take cognizance of matters relating to elections, we must come to them to know whether we have a right to sit here. One gentleman said, he could not tell whether the sitting here was a burden, or a privilege: I believe it is a privilege to some, who by sitting here obtain a good place; but I think as to others, it may be looked upon as a great burden, for to come up and spend a great deal of money for the public service; and all the privilege that I know they have, is to protect their estates, and serve their country. There is no extravagant thing but may be brought into the House of Lords, if you countenance them in the jurisdiction they have now taken

upon them. Any action whatsoever, let it belong to any temporal jurisdiction, may be there determined. I will still suppose, notwithstanding what is objected against the judges; they will do their duty; but Westminster-hall is now no barrier; for whatever is there determined, may be brought by Writ of Error into the House of Lords, and they will determine it as they think fit. In the case of Soame and Barnardiston, the law was taken to be, that Westminster-hall had not a right to intermeddle in these matters. What then hath since altered the law, unless the Lords have the legislative power in them? And that I dare say they will have, if you allow them this.—This I must take notice of from the report now before you, that here is a step made, which if it had been made in another jurisdiction, I should have given a hard name to it.—I think, in the first place the party should be brought in by the queen's process. When errors are to be assigned, there uses to go out a *Scire Facias*, which is the queen's Writ; but here is only a Order made, and for what? That the party shall join issue upon the Writ of Error. Suppose there had been a release of errors, must he have joined issue upon the errors? And yet it is here so ordered before the party is heard. I say, if they have a jurisdiction, the party ought to be called in by *Scire Facias*: and no judge, or judicature, can grant execution, or process, but it must be in the queen's name. As for your question, I come heartily into it.

Sir William Strickland. Mr. Freeman, I think this question depends upon two parts, and I believe it the best way to divide your question; one part of it concerns the rights and liberties of this House, and I think every body will come up to it; and as I would not lessen the privileges that belong to the House of Commons, so I would not lessen any privilege of the Commons of England, whom we here represent. As one are the privileges of this House, so the other concerns the liberties of the people of England, who cannot otherwise come to a remedy when they are abused in this manner. The gentleman that called it a hard service, if he would tell his country so, I believe he might be excused, and they would send another in his room.

Mr. Walpole, (afterwards sir Robert, and Chancellor of the Exchequer, and afterwards earl of Orford.) I will trouble you very little at this time: I think the point of learning and law hath been so well spoken to, by those learned gentlemen that have been against the question, that, if I was able, I should say nothing more to that. But I think the question as it is going to be put, is not right; for as the question stands, though I cannot give my negative to one part, I think it is impossible to give my affirmative to the other. The matter before you comes to this single question, whether you will encourage, and give a power to an officer, be he whom he

will, to act arbitrarily; or rather clause, in such a case, to do something in favour of the electors? I am sure if I desire to be elected by those that had the right, I would never give the officer an authority to the prejudice of the electors. Where you come to say, that the sole judging of the qualification of the electors belongs to the House of Commons only, those, I apprehend, are words of too large extent and ill consequence. Suppose there was an action brought upon the last act of parliament, for a false or double return—

Mr. Freeman. There is an exception in the question as to that.

Mr. Walpole. I know there is; but suppose an action is brought upon that statute, the officer may have proceeded with the greatest impartiality, may have taken the poll with the greatest exactness and justice, and there may appear to be an equal number of votes for each candidate; whereupon he makes a double return, and this brings it to be determined by the committee of elections, and they vote one of them duly elected. This gentleman that had the favour of the committee, (though afterwards possibly it might be made appear, that by bribery or corruption, and at a great expence, he procured himself to be elected,) after you have voted him duly elected, he hath nothing to do but to try his action, and see if he can make his double damages amount to his expences. The first thing he is to do, is to produce the vote of the House of Commons, that declared him duly elected, contrary perhaps, to the last determination in parliament, which in every place is to be the guide to the returning officer. But shall there then be given in evidence no qualification of the electors? Nothing to prove that the persons admitted to vote were qualified according to such last determination? Or shall that vote of the House of Commons, that was intended only to bring him into this House, recover him 5 or 600*l.* damages? I take it to be so, as the law stands. Now it ought to be seen who hath the greater number of legal votes, and whether duly qualified; and in that case you must suffer the matter again to be tried by the court, and, you do in some measure, make them judges of the qualifications of the electors; if it were otherwise, they could not inquire into the majority of legal votes.—What happens in the case of a mayor, may be in the case of a sheriff: If a mayor or a constable may deny a man his vote that hath an uncontroverted right in a corporation, a sheriff may refuse a freeholder, and strike off enough to make a majority for whom he pleases. You had once the case before you, whether a sheriff could refuse a scrutiny, and one or two gentlemen would have given that power to a sheriff; but a learned gentleman thought it a dangerous question, and he desired to come to the merits of the election; and that was determined, and you voted the worthy member duly elected, and thought it a dangerous thing to determine whether the officer had that power one way or

another. I think that part of the question, which concerns the qualification of the electors, ought to be left out.

Mr. Freeman. I will read the question. (Which he did.)

Marquis of Hartington. Sir, I think it is a constant rule, where a question is complicated, it is the right of every member, if he desire it, to have the question divided, and I think it regular to do it by an amendment; and therefore I second that worthy gentleman, that you would leave out those words that relate to the qualification of the electors.

Mr. Solicitor General. My lord is undoubtedly right in what he desires; that if there be any words in the question to which gentlemen have a dislike, that question is not to be put; but, only whether those words shall stand part of the question: therefore if those words of the qualification of the electors do give offence, it must be put, Whether they shall stand part of the question? But I hope at the same time gentlemen will apprehend, that leaving out those words, leaves out all that you have debated on.

Sir Christopher Musgrave. No doubt, if any question is complicated, gentlemen do not know how to give an affirmative or a negative, and you must divide it: but I hope gentlemen will consider the latter part of the question is the main thing whereon you have debated; for, if you do not assert that you have the power of determining the qualifications of the electors, you give up the right of the Commons of England: I do agree that the question may be divided.

Mr. Freeman. That which is debated now is, Whether these words shall stand part of the question?

Sir Thomas Meres. Sir, I think the question ought to be divided.

Mr. Freeman. The question, as I have it upon my Paper, is this:

"That according to the known law and usage of parliament, neither the qualification of any elector, or the right of any person elected, is cognizable or determinable elsewhere than before the Commons of England in parliament assembled, except in such cases as are specially provided for by act of parliament."

But some gentlemen are for leaving out these words, ["Neither the qualification of any elector, or,"] So that I must put a question, Whether these words shall stand part of the question? (Members. Aye, aye.)

Then Mr. Freeman put the Question, and the Committee divided.

Teller for the Ayes, Mr. Gulston - - - 215

Teller for the Noes, Mr. Wyld - - - - 97

So it was carried, that those words should stand part of the question.

And the main Question being put,

Resolved, 2. "That according to the known law and usage of parliament, neither the qualification of any elector, or the right of any person elected, is cognizable or determinable elsewhere than before the Commons of England in parliament assembled, except in such cases as are specially provided for by act of parliament."

Resolved, 3. "That the examining and determining the qualification or right of any elector, or any person elected to serve in parliament, in any court of law, or elsewhere than before the Commons of England in parliament assembled, except in such cases as are specially provided for by act of parliament, will expose all mayors, bailiffs, and other officers, who are obliged to take the poll, and make a return thereupon, to multiplicity of actions, vexatious suits, and unsupportable expences, and will subject them to different and independent jurisdictions, and inconsistent determinations in the same case, without relief."

Resolved, 4. "That Matthew Ashby having, in contempt of the jurisdiction of this House, commenced and prosecuted an action at common law against William White, and others, the constables of Aylesbury, for not receiving his Vote at an election of burgesses to serve in parliament for the said borough of Aylesbury, is guilty of a breach of the privilege of this House."

Resolved, 5. "That whoever shall presume to commence or prosecute any action, indictment, or information at common law, which shall bring the right of electors, or persons elected to serve in parliament, to the determination of any other jurisdiction than that of the House of Commons, except in cases specially provided for by act of parliament, such person and persons, and all attornies, solicitors, counsellors, sergeants at law, soliciting, prosecuting, or pleading in any such case, are guilty of a high breach of the privilege of this House."

Ordered, "That the said Resolutions be fixed up on Westminster-Hall Gate, signed by the clerk."

These Resolutions, with this, (to wit,

Resolved, 1. "That according to the known laws and usage of parliament, it is the sole right of the Commons of England in parliament assembled, except in cases otherwise provided for by act of parliament, to examine and determine all matters relating to the right of elections of their own members.")

Before passed in the committee, were reported to the House.

January 26, 1704. Mr. Freeman reported the five Resolutions agreed to by the committee, the first Resolution was not opposed, but after the second Resolution, viz.

"That according to the known law and usage of parliament, neither the qualification of any elector, or the right of any person elected, is cognizable or determinable elsewhere

than before the Commons of England in parliament assembled, except in such cases as are specially provided for by act of parliament."

Was read the second time by the clerk, the question (according to order) being proposed to agree with the Committee in that Resolution, the marquis of Hartington stood up in his place, and spoke to this effect :

Marquis of Hartington. I do not expect the House will be of a different opinion from the Committee; but I think it is my duty, when I apprehend what you are doing will be of ill consequence to the constitution, to give my dissent in every step. I think it will be dangerous to the very being of this House: if this maxim had been allowed formerly, I think there would have been no need of taking away of charters, and of *quo warrantos*; by the influence of officers they might have filled this House with what members they had pleased, and then they could have voted themselves duly elected.

Sir William Strickland. Mr. Speaker, I cannot agree to this Resolution; I think it deprives the people of England of their birth-right: for they who have freeholds in any of your counties, or freedoms in any corporation, have as much right to vote in elections to parliament, as they have to their estates. And if any gentleman would subject them to such arbitrary proceedings, that a sheriff, or any other officer, may deny them this privilege, give me liberty to say, I must be always against any such thing; for though you can punish the officer, you cannot give any satisfaction to him that receives the injury.

Mr. St. John. Sir, I do not rise up to trouble you long, but to speak to one point that was mentioned by a noble lord over the way. I shall be as tender as any man alive of doing any thing against the liberty of the people; but I am for this, because I take it to be the greatest security for their liberty. The noble lord was pleased to take notice, that in the consequence the crown would have a great influence on those that are to return the members of the House of Commons; and when they were in, they might vote for one another. I cannot think that the liberties of the people of England are safer in any hands below, or that the influence of the crown will be stronger here than in other courts.

Marquis of Hartington. I think that gentleman hath not answered what I said. I shall never have any suspicion of any that sit in this House now; but when those that have no right are returned, and make a majority, I think it will not be safe.

Mr. Ward. I do not apprehend that consequence from this Resolution. I think if it was so, this should have been offered before the first Resolution was passed, which hath passed in the House and Committee, *nemine contradicente*; for you cannot determine the right

of any members sitting here, without determining the right of the electors.

Mr. Lowndes. I cannot but think it will be harder to influence this House to get an ill vote, than it will be in another place: however, if I am a freeholder, and have a right to vote in a county, or a freeman, and have a right to vote in a borough, by admitting persons to vote that have no right, it may be as much prejudice to me, for that may make my vote signify nothing: and there is as much injury one way as the other. If all the people of England who have a vote, should go together by the ears in Westminster-hall and dispute there who has a right to vote, and who not, I believe the judges of the common-law and noble peers of the other House, would be glad, in a little time, to restore the right where it is, it would breed so much confusion. If gentlemen are not satisfied already, they may easily be so, That there is no defect of power in this House, but they have a power to do justice in all cases of elections, and I hope every body will take care not only to maintain the rights of the people that sent them hither, but the trust lodged in them, which they cannot depart from by the rules of justice.

Then the second, with the other three Resolutions passed in the Committee, was agreed to by the House without a division, with this amendment only, of leaving out [at common-law] in the fifth Resolution.

But the House, though they voted Ashby guilty of a breach of privilege, in commencing and prosecuting the said action, yet there having been no declaration of the House in that case before, they made no order for taking him into custody, as usual in cases of breach of privilege.

PROCEEDINGS IN THE HOUSE OF LORDS.] Upon these Proceedings of the House of Commons, the House of Lords appointed a Committee, who drew up the State of the Case upon the Writ of Error in their House; which is as followeth:

The Report of the Lords Committees appointed to draw up the State of the Case upon the Writ of Error, lately depending in the House of Peers; wherein Matthew Ashby was plaintiff, and William White, and others, defendants. With the Resolutions of the House of Peers, relating thereunto.*

* 27 Martii, 1704. "It is ordered by the Lords spiritual and temporal in parliament assembled, That the Report made from the Lords Committees appointed to draw up the State of the Case upon the Writ of Error, lately depending in this House; wherein Matthew Ashby was plaintiff, and William White and others defendants, and the Resolutions made this day relating thereunto, shall be forthwith printed and published. Matth. Johnson, Cleric. Parliamentor."

ASHBY against WHITE, et al⁶

The Plaintiff in this action declares, That the 26th of December, in the 12th year of king William the 3rd, a writ issued out of Chancery, directed to the sheriff of Bucks, reciting, 'That the king had ordered a parliament to be held at Westminster, on the 6th of February following: the Writ commanded the sheriff to cause to be elected for the county two knights; for every city, two citizens: and for every borough, two burgesses; which writ was delivered to the sheriff, who made a precept in writing under the seal of his office, directed to the constables of the borough of Aylesbury, commanding them to cause two burgesses of the said borough to be elected, &c. which precept was delivered to the defendants, to whom it did belong to execute the same. By virtue of which writ and precept, the burgesses of that borough being summoned, did assemble before the defendants to elect two burgesses; and they being so assembled, in order to make such election, the plaintiff being then a burgess, and inhabitant of that borough, being duly qualified to give his vote at that election, was there ready, and offered his vote to the defendants for the choice of sir Thomas Lee, bart. and Simon Mayne, esq. and the defendants were then required to receive and admit of his vote.

The defendants being not ignorant of the premises, but contriving, and fraudulently and maliciously intending to damnify the plaintiff, and to defeat him of that his privilege, did hinder him from giving his vote, and did refuse to permit him to give his vote; so that the two burgesses were elected without any vote given by the plaintiff, to his damage, &c. Upon not guilty pleaded, the cause went down to trial, and a verdict was given for the plaintiff, and five pounds damages, and also costs.

It was moved in the court of King's-bench in arrest of judgment, that this action did not lie, and that point was argued by counsel, and afterwards by the Court.

The Lord Chief Justice Holt was of opinion, that judgment in this case ought to be given for the plaintiff; but Mr. Justice Powel, Mr. Justice Powis, and Mr. Justice Gold being of a different opinion, judgment was entered for the defendants; whereupon the plaintiff brought a Writ of Error in parliament; and the cause being argued at the bar of the House of Lords by counsel, and ten of the judges, who were present in the House, being heard, and the matter fully debated by the Lords,† the

House was of opinion, that the judgment given in the King's-bench was erroneous, and that the plaintiff had a good cause of action, and ought to have judgment.

The Plaintiff, Ashby, being a poor, indigent person, and coming to settle in Aylesbury, the overseers of the poor there warned him out of the parish, unless he would give security to save the parish harmless; and to that purpose complained to the next justices of the peace, to get an order to remove him: whilst this matter was in controversy, the election for burgesses of parliament came on, and the said Ashby offering himself to be polled, the constables, (now the defendants) refused to receive him to poll, being, in their opinions, no settled inhabitant there, nor did he ever contribute to the church or poor, either before or since the election. After the election was over, the said Ashby brought his action on the case against the constables, wherein he sets forth, that he had right to vote for burgesses there, and that at that election he offered to poll for sir Thomas Lee, and Mr. Mayne, and that the constables refused to receive his poll, to his damage of 200*l*.

The constables pleaded Not Guilty, and thereupon a trial was had at the assizes at Bucks, and Ashby got a verdict against them, and had 5*l*. damages given.

Whereupon, according to the constant course of that, and all other courts, it was moved in arrest of judgment in the Queen's-bench, where the action was brought; that notwithstanding the verdict, which only found the fact, yet no such action did by law lie against the defendants; and after several arguments at the bar, and at last at the bench, three judges, against the chief justice, held, that the action did not lie, and so judgment was given for the constables.

And now the plaintiff, Ashby, hath brought a Writ of Error in parliament.

The defendants conceive the judgment in the Queen's-bench well warranted by law.

1. No such action hath ever been brought, notwithstanding the many elections that have been controverted every new parliament; whereby it is evident, that it hath been the constant opinion of all lawyers, and others, in all ages, that such action would not lie.

2. Several acts of parliament have been made to give remedy by actions in Westminster-hall, in some particular cases of elections to parliament, which shew there was no remedy at common law in those courts.

3. There never were but three actions upon the case brought by Candidates for false returns, viz. Nevill's case in the late times, and sir Samuel Barnardiston's case, and Onslow's case in the time of king Charles 2, in all which cases the defendants prevailed upon the point of law, viz. that such action would not lie. And if such action doth not lie for one elected, much less will it lie for an elector.

4. To support every action upon the case, there must be damage in *presenti*, or a possi-

⁶ Salkeld's Reports, fol. 19, in Case.

† The Case of William White, Richard Talboys, William Bell, and Richard Heydon, constables of the town of Aylesbury, in the county of Bucks, in the year 1700. In a Writ of Error brought in the House of Lords by Matthew Ashby, upon a Judgment given for the constables against him in the court of Queen's-bench, last Michaelmas term, as drawn up by their counsel, and presented to the House.

To maintain this opinion, these three positions were laid down :

I. That the plaintiff, as a burgess of this borough, had a legal right to give his vote for the election of parliament burgesses.

bility of damage *in futuro*, which there cannot be in this case, unless it be presumed, that, contrary to the act of parliament, the plaintiff was to have money for his vote.

5. If there was *damnum*, (which there is not) yet it cannot be pretended there was *injuria*; and *damnum absque injuria* is not sufficient to support an action upon the case. As at the common law; if the lawful patron presented his clerk to the bishop and he refused to admit him, it is conceived, no action upon the case lay against the bishop, but a *quare impedit*, in which, at common law, no damages were given, which is a much stronger case than this.

6. This is not to be compared to other cases, where the party hath no remedy elsewhere than in Westminster-hall; for here the plaintiff hath a proper remedy by applying to the House of Commons, it being usual for electors, who think themselves aggrieved by the chief magistrates in an election, to petition the House of Commons, although the election is not contested by the candidates, and parliamentary causes are to be determined in parliament: And therefore,

7. It is conceived, that since this matter concerns the election of members to serve in parliament, the courts of Westminster-hall being not empowered by any act of parliament in this case, have no cognizance of it, but the House of Commons have the determination of it: and this jurisdiction is confirmed to them by parliament; for by the act 7 and 8 Will. 3, cap. 7, If any person shall return a member to serve in parliament, contrary to the last determination in the House of Commons, of the right of election in such place, the return shall be adjudged a false return; by which it is evident, that the Commons are the only judges in all matters where the right of election may come in question, as it must of necessity do, in all cases where the question is, who are the electors.

8. If this action should prevail, the chief magistrates, in all places where the elections are made, would be in a miserable condition upon every new parliament, by reason of a multitude of actions, which probably would be brought against them upon all contested elections, and by the different judgments that possibly may be given in the House of Commons, and in Westminster-hall, touching the same election.

9. The laying it to be done *falso et malitiose* (which are grown to be almost words of course in actions on the case) cannot give a jurisdiction where it was not before, and, if those words shall be sufficient, by being annexed to a man's intention, almost all a man's actions may be brought into Westminster-hall by those words, and subjected to the power of a jury.

T. POWRS, CON. PUPRS.

II. That, as a necessary consequence thereof, and an incident inseparable to that right, he must have a remedy to assert and maintain it.

III. That this is the proper remedy which the plaintiff hath pursued, being supported by the grounds and principles of the ancient common law of England.

To make good the first position, that the plaintiff has a legal right to give his vote at the election of burgesses for this borough, it was said, that it is well known, the House of Commons consists of knights, citizens, and burgesses.

The knights of shires represent all the freeholders of the counties. Anciently, every the least freeholder had as much right to give his suffrage, as the greatest owner of lands in the county. This right was a part of his freehold, and inherent in his person by reason thereof, and to which he had as good a title, as to receive the natural profits of his soil. This appears by the statute of 8 Hen. 6, cap. 7, which recites the great inconvenience which did arise in the election of knights of the shires, by men that were of small substance, who pretended to have an equal right with knights and esquires of the same county, therefore that right was abridged, and confined only to such freeholders as had 40s. per annum. But thereby it appears, that the right which a freeholder hath to vote in the election for knights of the shire, is an original and fundamental right belonging to him as he is a freeholder.

The second and third sort of men, which compose the great representation of the people of England, are citizens and burgesses, who, though they differ in name, yet are in essence and substance the same, for every city is a borough, and, as such, sends members to parliament.

There are two sorts of boroughs, the one more ancient, the other more modern.

Of the first sort are the most ancient towns of England, whose lands are held in burgage, and by reason thereof had the right and privilege annexed to their estates, of sending burgesses to parliament. The second sort are those cities and boroughs that have a right by prescription, time immemorial, or by charter, within time of memory, to chuse burgesses for the parliament: both these are upon several foundations, the one as belonging to their burgages, the other as belonging to their corporations; the first is a real right belonging to their houses and lands, the other is a personal right belonging to their body politic.

As for the first, it is sufficiently described in Littleton's Tenures, Sect. 162, 163, 164. A tenure in burgage is a tenure in socage, and is called a tenure in burgage, because these are the most ancient towns in England, and from thence came the burgesses to parliament, and they who have this privilege, have it as belonging to their estates or possessions.

The other right of chusing parliament burgesses, is not annexed to any freehold or estate

in possession, but vested in the corporation of the place, and is created in this manner, viz.

When a town was incorporated, a grant was either then, or after, made to the body politic, that they shall have two burgesses for the parliament, to be chosen either by all the freemen and inhabitants of the place, or such a selected number as is prescribed by the charter.

The inheritance of this privilege is in the whole corporation aggregate, but the benefit, possession, and exercise is in the persons of those, who by the constitution of those charters, are appointed to elect.

And in all cases, where a corporation hath such a privilege, the members thereof, in their private capacity, have the benefit and enjoyment thereof, because the corporation, as such, is not to be represented: For it is not necessary that it should have any estate, but by being a corporation, they have only a capacity to have estates. Jones 165. Hyward and Fulcher. For as the citizens and freemen of a place are incorporated for the better government of those of the place, so is this privilege of having burgesses given for the advantage of the particular members thereof, whose estates are to be bound by the acts of their representatives.

And therefore the wages of citizens and burgesses were always levied, not upon the estates or goods of the corporation, but upon the goods and estates of the members thereof.*

It appears by other instances, that it is usual and proper for corporations to have interests granted to them, which enure to the advantage of the members in their private capacities. Moore 832. Sir Thomas Waller versus Hanger. The king granted to the mayor and citizens of London, that no prisage be taken and paid for wines of the citizens and freemen of London. This enures to the benefit of every citizen and freeman of London for his own wines, in which the corporation of the city hath no interest.

But there is no such notion in the law of England, as a right without a remedy.

The same thing appears by the Case of Waller and Spateman, 1 Saund. 343, and by the Case of Meller and Walker. These instances make it sufficiently appear, that though the inheritance of this franchise be in the body corporate, yet it is for the benefit of the particular members thereof: And it is certainly a great advantage for the men or inhabitants of a place to chuse persons to represent them in parliament, who thereby will have an opportunity, and be under an obligation to represent their grievances, and advance their profit.

Of this opinion have two parliaments been, as appears by two several acts, the one 34 and 35 H. 8, cap. 13, the other 25 Car. 2, cap. 9. The first is an act for making knights and burgesses within the county and city of Chester, which begins in this manner, In humble wise shew to your majesty, the inhabitants of your grace's county Palatine of Chester, that they

being excluded and separated from your high court of parliament, to have any burgesses within the said court, by reason whereof, the inhabitants have hitherto sustained manifold losses, and damages, as well in their lands as goods and bodies: Therefore it was enacted, that they should have knights for the county, and citizens for the city of Chester: The other act, which constitutes knights and burgesses for the county Palatine, and city of Durham, recites, that the inhabitants thereof hitherto had not that liberty and privilege of electing and sending knights and burgesses to the High Court of Parliament.

The application of these two acts is very plain; the first saith, to be excluded from sending knights and burgesses to parliament, is a damage to lands, goods, and body; the other saith, that it is a liberty and privilege to send them.

Thus the right of election is explained, and shewed to be a legal right.

That of electing knights of shires, belonging to and inherent in the freehold.

The other, of electing burgesses, is belonging in some cities and towns to the real estates of the inhabitants; and in others, is vested in the corporation, for the benefit of the particular members, who are the electors; the having of which is a great benefit and advantage to the people thereof, and will prevent great loss and damage that otherwise would ensue.

II. It follows, that in consequence of this right or privilege, the possessors thereof must have a legal remedy to assert and maintain it.

It was said, that there are many rights for which a man has no remedy by the common law, as in case of a legacy given, if it be not paid, the party cannot bring an action for it. This is very true, but not applicable to the present purpose; for the constitution of the English government has wisely distributed to several courts, the determination of proper causes, but has left no subject, in any case where he is injured, without his adequate remedy, if he will go to the right place for it; if a man will seek for a remedy at common law, for a legacy, which by our constitution is to be recovered in the Ecclesiastical Court, it is his own fault if he do not recover; as it would be, if he should begin a suit for land in the Court of Admiralty, or go for equity to the Common Pleas.

He who loses or quits his remedy, loses his right: if a man has a bond for payment of 1,000*l.* he has no remedy to recover this money but by action: therefore, if he releases all actions, he loses his right to the money, because he has given away the means to recover it. Coke's 6th Rep. 58, Bredman's Case. If a man purchases an advowson, and at the next avoidance suffers an usurpation, and brings not the *quare impedit* in time, he hath lost all manner of remedy, and in consequence his right, to which neither he nor his heirs can ever be restored. Would it not look very strange in a constitu-

* 46 Edward 3, m. 4. verso, &c.

tion so formed, that the Commons of England have an undoubted share in the legislative authority, which is to be exercised by their representatives chosen by themselves, in which every freeholder of 40s. per ann. hath a right to vote for the county, every citizen for a city, and every burgess for a borough: that, if the sheriff, or other officer, who is to cause the election to be duly made, shall hinder or deprive any of those electors of his right, the person injured shall have no remedy, though the injury be done to such a right, upon the security whereof the lives, liberty, and property of all the people of England so much depend?

That the defendants, in this case, by hindering the plaintiff from voting, have done ill, cannot be denied; because they have excluded one who has a right from his vote. Then, if the law doth not allow an action to the party injured, it tolerates the injury, which is absurd to say is tolerable in any government.

There was much weight laid upon the case of *Ford and Hoskins*, 3 Cro. 388, Mo. 842, which is, that where, by the custom of the manor, every tenant for life might name his successor for his life, whom the lord is to admit; if one be named, and the lord refuses to admit him, it was held, an action on the case would not lie; because the nominee had no right without being admitted. But the reason given for that opinion shews it has no relation to this case, for the plaintiff's right of voting is vested in him, without any previous admittance, therefore though it should be law, that no action will lie for not giving a right, yet certainly an action must lie, for defrauding and injuring a man to enjoy a right that he hath.

When any statute requires an act to be done for the benefit of another, or to forbear the doing of an act, which may be to his injury, though no action be given in express terms by that statute, for the omission or commission, the general rule of law, in all such cases, is, that the party injured shall have an action, *Coke*, 10 Rep. 75. The Case of the *Marshalsea*, 19 Rep. 100, Co. Mag. Cur. 118. This is a maxim allowed and approved of in all ages.

There is the same reason where the common law gives a right, or prohibits doing a wrong: but in this case an Act of Parliament is not wanting, for the statute of West. 1, c. 5, enacts, That elections shall be free; if he who hath a right to vote be hindered by him who is to take his vote, or to manage the election, that election is not free, such an impediment is a manifest violation of that statute, as well as an injury to the party whose vote is refused. This statute of West. 1, shews what opinion the king and parliament had, of the great consequence it was to the whole realm, that people should have their freedom in choice; and though the common law was the same before, as appears even by the statute itself, the words whereof are, Elections ought to be free; yet it was judged necessary to add the sanction of an act of parliament thereunto; the king com-

mandeth, upon great forfeiture, that no great man, or other, by force of arms, or by malice, or menaces, shall disturb any to make free election. The defendants did not, by force of arms, drive the plaintiff away from the election, nor by menaces deter him, but they did maliciously hinder him (so it is charged by the plaintiff in the Declaration, and it is found by the jury to be done by fraud and malice) and so the defendants are offenders within the very words of the statute of West. 1. Where the law is so clear as to the right, and the duty so strictly enjoined by act of parliament to be observed, it seems a great presumption to make it but a light thing.

It being apparent that the plaintiff had a right, and that the defendants have done him wrong, and that by consequence of law he must have some remedy to vindicate his right, and to repair the wrong.

III. The third thing to be shewn is, that the remedy the plaintiff pursued by bringing this action, is the proper remedy allowed by the ancient law of England.

This action is that which is called in the law, an action upon the case: that is, founded upon the particular case of the party injured.

The law, in all cases of wrong and injury, hath provided proper and adequate remedies.

1. When a man is injured in his person, by being beaten or wounded, the law gives him an action of trespass, assault and battery; if by being imprisoned, an action of false imprisonment.

2. If his goods be taken away, or trespass done unto his house or lands, an action of trespass lies to repair him in damages.

3. If a man hath a franchise, and is hindered in the enjoyment thereof, the proper remedy is by an action upon the case.

The plaintiff, in this case, hath a privilege and a franchise, and the defendants have disturbed him in the enjoyment thereof, in the most essential part, which is his right of voting.

4. Where any officer or minister of justice, entrusted with the execution of the process of law, does an injury, an action of the case lies against him. If the sheriff will not execute a writ by arresting the party-defendant, or taking his goods, the party shall have his action upon the case, because he refused to do his duty, to the plaintiff's damage.

The precept which the defendants received from the sheriff in this case, was founded upon the king's writ: and the defendants are commanded, to cause two burgesses to be elected for the borough of Aylesbury, of which they are to give notice, and to admit every one who hath a vote to make use of it; if they refuse any man to vote who hath a right, they act contrary to the duty of their office.

It was objected, that it did not appear that the persons for whom the plaintiff voted, were elected, nor that they would have been elected if his vote had been admitted.

The Answer is, that it is not material

whether the person for whom the plaintiff voted was chosen, or would have been chosen, if his vote had been taken; his right and privilege is to give his suffrage, to be a party in the election; if he be excluded from it he is wronged; though the persons for whom he would have given his vote were elected.

The right of action must accrue upon the refusal of the vote, and is never to be made better or worse by the return, which is a matter *ex post facto*.

It was said in the arguing this case, that the plaintiff had no damage; or at least, that there was no such injury or damage done to him as would support an action.

The Answer to that is, that the law will never imagine any such thing as *injuria sine damno*. Every injury imports damage in the nature of it. If a man pick a lock, and come into a house without the consent of the owner, perhaps there is no pecuniary damage done to the value of a farthing; yet the owner shall have an action against him, and recover damages for the invasion of his possession and property. There are many cases of the same nature, which have been determined upon this ground. In the case between Starling and Turner, 24 Car. 2, in Com. Ban. (see Ventris first part, page 206), and afterwards in Ban. Reg. The plaintiff Turner, amongst others stood to be one of the Bridge-Masters of London Bridge, which officer is to be elected by a common hall of the city of London: the question was, who had the greatest number of voices? the plaintiff demanded the poll; and the defendant, being then lord-mayor of London, refused it: it was adjudged, that the action was maintainable for refusing the poll; because every candidate has a right to have it; and though perhaps if the poll had been granted to the plaintiff in that action, it might have been against him, yet the denial of that right was a good ground of action. Upon the same reason, the case 29 Ed. 3, 18, was determined; and also the case of Hunt and Dowman, 2 Cr. 478. 2 Roll, 21.

It is apparent by what has been said, that the plaintiff in this present case hath been injured, in being denied his right; and no good reason can be assigned that so affects this case, as to make it differ from other cases; though to that purpose several matters were urged and insisted upon. As first, that this would be the occasion of many actions.

If that be so, there is the greater reason to support this action, to punish the many wrongs that have been done, which will prevent any more of the like nature. If offences multiply, remedies against them ought to be advanced. If other officers of boroughs have been, or shall be guilty of the like mis-feasances, as these defendants have been, it is fit they should be liable, as these defendants are, to make satisfaction. If one man be beat and imprisoned, is it any objection against his having an action, because all others who shall be as evilly treated as he hath been, shall have the like remedies?

The only means to hinder corruptions, that will soon become frequent amongst those officers of boroughs and corporations, is, to let them see that they are obnoxious to the law, and that their purses must make satisfaction to all whom they shall injure in this manner. It is true, if one act which tends to the injury of many persons be committed, no one person injured shall be allowed to have an action, because the rest might have the same. Co. 5, Rep. 72, Williams's case, 3 Cr. 664, Pineux ver^s Hovenden; as the case of not saying divine service in a chapel of a manor, to the lord and tenants; or for stopping of a lane or common way, because the defendant, for one act, would have a multitude of suits against him, the injury alike affecting a multitude: but the refusal of every vote is a distinct act: the party grieved, whose vote was denied, can only bring an action for the refusal; the others whose votes were admitted are not concerned. And if an officer denies an hundred, who have a right, these are a hundred several wrongs, for which he ought to be liable to as many several actions. As if a man will make it his business to sling stones, and shall hit a hundred several men, he must make satisfaction to them all: but surely this is so far from being an objection, that it is a strong argument to support the action: for if the mayor or bailiff of a borough shall have liberty to refuse men who have votes, he can easily make a majority to vote on his side; and then, what will become of elections? The officer will return him that is elected by a majority of his own making, by excluding the votes of others that have right.

This would encourage officers to be partial and corrupt, and to return divers persons to be elected in that manner, who at least must have possession of seats in the House of Commons for some time, and give voices in the making of laws, and imposing of taxes, until the right of election be determined. And though, upon hearing the cause in the House of Commons, this matter may be set right at last; yet, what can compensate for the mischief that may be done to the kingdom in the mean time, by the votes of those who shall be partially returned, and are not the representatives of the people of the place who are to chuse them?

Besides, the fore-mentioned rule against multiplying actions, is confined to such acts where there is another remedy to be had; but where there is no other remedy but an action, the wrong doer must answer to so many several actions as there are persons injured. Suppose a man will plough up the ground in which a hundred persons have a common, he must answer all their actions. If the inhabitants of a town have a common watering place, and a stranger stops the current, whereby the water is diverted, every inhabitant shall have his action, because there is no other remedy.

The injured plaintiff, in this case, has no other remedy besides this action; no indictment lies, because it is a personal wrong to the party, and no wrong to the public, but

only in the consequence of it, as an evil example, which tends to the encouragement of other such officers to commit the like transgressions; nor is there any danger to an honest officer, that means to do his duty; for where there is a real doubt touching the parties' right of voting, and the officer makes use of the best means to be informed; and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such a case, nor can any court direct them to do it; for it is the fraud and the malice that entitles the party to the action: in this case, the defendants knew the plaintiff to be a burgess, and yet fraudulently and maliciously hindered him from his right of voting; and justice must require, that such an obstinate and unjust ministerial officer should not escape with indemnity.

That the officer is only ministerial in this case, and not a judge, nor acting in a judicial capacity, is most plain; his business is only to execute the precept, to assemble the electors to make the election, by receiving their votes, computing their numbers, declaring the election, and returning the persons elected: the sheriff or other officer of a borough, is put to no difficulty in this case, but what is absolutely necessary in all cases. If an execution be against a man's goods, the sheriff must at his peril take notice what goods a man has.

Another objection was made in respect to the novelty of the action; it was said, never any such action was brought.

In answer to this objection, it may be said, that probably there have not been many occasions given for bringing such suits. It is to be hoped, that very few have ever been so presumptuous as to make an obstinate and malicious refusal of an undisputed vote. If the case has happened before, perhaps the party, out of consideration that only small damages were to be expected, might be discouraged, and think it better to acquiesce. And it is probable, the ill-designing officer would be at least so cautious, as to refuse the votes of such persons only, as he thought, by reason of the meanness of their circumstances, were unable to vindicate their right. It is not every one that has such a true English spirit as the plaintiff, who could not sit down meanly under a wrong done to him, in one of the most valuable privileges of an Englishman. It is not the novelty of the action that can be urged against it, if it can be supported by the old grounds and principles of law: the ground of law is plain, certain, and indeed universal, that where any man is injured in his right, by being either hindered in, or deprived of the enjoyment thereof, the law gives him an action to repair himself.

The case of *Hunt and Dowman*, which was, 16 Jac. 1, A. D. 1618, of an action by the landlord against the tenant, for hindering him from searching his house to see whether it was in repair, was never brought before that time: and that of *Turner and Starling* was not brought till 23 Car. 2.

The law of England is not confined to particular precedents and cases, but consists in the reason of them; which is much more extensive than the circumstance of this or that case: 'Ratio legis est anima legis; et ubi eadem ratio, ibi idem jus,' are known maxims.

An action against the master of a ship, for that the ship, lying in the river of Thames, was robbed, was maintained upon the same reason as against a common carrier; yet, such an action was never known until 23 Car. 2, in the Case of *Moss and Slue*. 1 Cr. 15. Jones 93. Palmer 313. Smith and Cranshaw, an action of the case was brought for maliciously, and, without any probable cause, indicting the plaintiff of high treason: this was the first action that was ever brought in such a case; and yet it was adjudged maintainable, upon the same reason as upon a malicious indictment of felony, 2 Levinz, 250. *Heming and Beal*; an action of the case was brought against the mayor of a town, for refusing the plaintiff to give his vote at the choice of a new mayor: and there was not any scruple made, but that the action did well lie, though that was the first precedent.

It is granted, that if a freeman, who hath a right to give his vote for the choice of a mayor, be denied his vote, he may maintain an action upon the case.

There can be no difference between that case and this, unless it can be supposed that the right to vote at the election of a mayor is of higher estimation in the eye of the law, than a right to chuse members to serve in the high court of parliament.

This action is not only founded upon the reason of the common law, but it hath the sanction of an act of parliament, viz. the statute of West. 2, cap. 24, which says, That whensoever, from thenceforth, it shall fortune in Chancery, that in one case a writ is found, and in a like case falling under like right and wanting like remedy, none is found, the clerk of the Chancery shall agree in making a writ, and by consent of men learned in the law, a writ shall be made, lest it should happen hereafter, that the king's court might fail in ministering justice to complainants.

The objection most insisted on was, that this is a matter relating to parliaments, and ought to be determined by the law and custom of parliaments, and for that reason is not cognizable in the Queen's courts.

In answer to this objection, it was shewed, first, that this case is proper in the nature of it, to be determined in the Queen's court.

2. There is no other provision made for the plaintiff, who is highly injured in his right, but by bringing his action in the courts of law, that have power to determine of men's lives, liberties and properties.

First, the case in the nature of it is proper for the Queen's courts. This will be apparent, if the several rights of electing members to serve in the House of Commons be considered.

The right of chusing knights of the shire, is

founded upon the elector's freehold. Matters of freehold are determinable originally and primarily in the Queen's court, by the rules and methods of the common law, by a jury sworn, and by the evidence of witnesses upon oath: and, as the right of the freehold is determinable there, so are all benefits, rights and advantages depending thereupon, or belonging thereto.

If a freeholder's voice be refused by a sheriff, what is it should hinder the Queen's court from trying and determining this matter, like all other questions of freehold, by a jury, upon the oath of witnesses, or evidence in writing, whether the plaintiff that supposes himself wronged was a freeholder, or not?

The right of chusing citizens and burgesses depends either upon prescription or custom, or upon letters patents; these are also primarily and originally cognizable by the Queen's courts: customs and prescriptions are triable by the country, that is, by a jury of twelve men of that county, where the custom is alleged to be: this is known law in all cases, without exception.

And, as to letters-patents, if pleaded specially, the court must judge of them; and, if either party conceives the court hath judged amiss, he hath his remedy by Writ of Error, till at last it comes where it will receive a final judgment. So that every right which an elector can have, is proper for the determination of the Queen's courts. There are various ways of election in different boroughs, but they all depend upon charters or customs; and therefore are not more difficult to determine, than other franchises or liberties which depend upon the same foundations.

And, whereas it was said, that by a late act of parliament in the 7 and 8 Will. 3, the last determination of the House of Commons concerning the right of elections, is to be pursued; it amounts to no more than this, that the officer who is to make the return, is to take care to return him to be elected, who is chosen by a majority of electors, qualified according to the last determination of the House of Commons; if he does so, he incurs no danger, he is not liable to an action, but the House of Commons itself is not bound by that rule. Now, suppose the officer will deny a man a vote, who according to the last determination there, ought to have one; and this the officer did well know, what is it hinders him that had right, according to that determination, from bringing his action against the officer who hath injured him? It cannot be the act of parliament, for the Queen's courts are by law the first and original expounders of the statutes of this realm.

But secondly, there is no other court of jurisdiction appointed by the law of England, for determining the right, and repairing this injury, but the courts of Westminster.

It is a general rule, that whoever impeaches the jurisdiction of one court, must entitle some other court to have a jurisdiction of that cause; but that is impossible to be done in this case.

It was said that the determination of the right of elections of members to serve in parliament is the proper business of the House of Commons, which they would always be very jealous of; and this jurisdiction of theirs is so uncontested, that they exercise a great power in that matter; for they oblige the officer to alter his return according to their judgment; and that they cannot judge of the right of election, without determining the right of the electors; and if electors were at liberty to prosecute suits touching their right of giving voices, in other courts, there might be different judgments, which would make confusion, and be dishonourable to the House of Commons, and that therefore such an action was a breach of their privilege.

As to these objections, several Answers were given.

It was admitted, that the House of Commons exercise a jurisdiction, in determining the right of election of their own members; and though the time may be assigned, when that jurisdiction was exercised in another place, yet there has been a usage long enough to hinder that point from being drawn in question, especially after the sanction given to it, by the act made in the seventh year of king William's reign.

But though it be true, that the merit of the election of a member, be a proper subject for the House of Commons to judge of, because they only can give the proper and most effectual remedy, by excluding the usurper, and giving possession of the place to him who has the right; yet there is a great difference between the right of the electors, and the right of the elected; the one is a temporary right to a place in parliament, *pro hac vice*, the other is a freehold, or a franchise: who has a right to sit in the House of Commons may be properly cognizable there; but who has a right to chuse, is a matter originally established, even before there is a parliament: a man has right to his freehold by the common law, and the law having annexed his right of voting to his freehold, it is of the nature of his freehold, and must depend upon it. The same law that gives him his right, must defend it for him, and any other power that will pretend to take away his right of voting, may as well pretend to take away the freehold, upon which it depends.

To say the plaintiff, in this case, may apply to the House of Commons, is not sufficient, unless proved; never any single elector of any county or borough did complain to the House of Commons, that he was debarred of his vote, and desire them to determine his particular right. Sometimes some of those who have right to chuse in a borough have complained, that persons have been returned by the officer, who were not duly elected, as being an injury done to the whole community of the borough, to have a person without right sit there as their representative; but this is only to bring

the merits of the election in question, of which that House hath cognizance, and therefore, as incident and necessary thereto they may try the right of electors, which of them, by custom, or letters patents, have voices; but this is no more than all courts have. In the ecclesiastical courts, which proceed according to the civil law, if the suit be originally proper for their jurisdiction, they have power to determine things foreign thereto, as if letters patents or conveyances of lands come in question, though primarily and originally determinable in the courts of common law. Matrimony is properly under the jurisdiction of the ecclesiastical court, and if a question arises between the supposed married parties in their life time, or upon dower or bastardy, it shall be tried and determined there: but when an action is brought by a man and woman, supposing her to be his wife, if the defendant pleads in abatement, that they were not married, it shall be tried by a jury where the action was brought; so if any one's title to lands depends on a marriage, if an action be brought to try the title, the marriage may be determined by a jury. This shews plainly, that because the House of Commons may determine who are electors, and who are not, incidentally, and so far only as it is necessary to try the right of the election, it doth not follow that when the right of election is not in question they can try the right of an elector.

When the right of the candidate is examined in the House of Commons, it is in order to determine which person hath the right to join with them in the making of laws, and other public services, and if, in order to the determining this point, the House of Commons must judge of the electors, they do it only to this purpose. But the courts of law judge of an elector's right wholly to another end, as it is a legal right to assert that, and to repair in damages the elector who is wrongfully hindered from exercising it. This is what the House of Commons cannot do, nor to this day was there ever any application made to them to do it, and it may be reasonably supposed they will not now begin to take it upon them.

It commonly takes up a great part of the time of a session, to determine the cases of elections, before they can be sure the House is composed of such as have a right to sit; but should they once pretend to take cognizance of particular men's complaints, in order to decide the rights of electors, it would be impossible for them to have any leisure to employ themselves about the 'ardua et urgentia ne-gotia regni,' the safety and defence of the kingdom, for which the writ calls them together. It is granted, that the deciding of the right of electors is a matter of great weight, and, in consequence, concerns the lives and liberties of the subjects of England, but the law hath provided a proper remedy to be pursued in the ordinary methods of justice, a remedy that is adequate, where damages may be recovered. The plaintiff, in this case, knew he had a right

by law to give his vote, and when he found himself deprived of it, he resorts to the law for his remedy: and it is probable, most of the electors of England will be of his mind, and think it for their interest to resort to the courts of Westminster-hall, for asserting this great right of theirs upon occasion, where they may prove their case by witnesses upon oath, and have their damages assessed by their countrymen duly sworn, nothing of which can be done, if they are to seek for a remedy in the House of Commons.

Where a man is injured, if he cannot bring his action to recover the thing itself he hath lost by the injury, the law will always give him damages in lieu thereof.

It was said in the debate of this case, that instances were to be given, where the party injured did not recover damages, as in case where one has a right of presentation, and is disturbed, he could not recover damages at the common law, and that was resembled to the right of an elector, which was said to be only a right of nomination. But the answer to this objection is plain; there the law gives the party a remedy to recover the presentation, the thing that was taken from him, to which he is restored by the judgment; but, in the present case, there is no possibility for the plaintiff to recover the thing he has lost, which was his vote at the election, for that election is over, and can never be had again, so that the plaintiff cannot possibly have any reparation, unless it be in damages, and this sort of reparation the House of Commons cannot give him.

If the plaintiff, and all other injured electors, should be obliged to go to the House of Commons for satisfaction, it may be reasonably supposed, the parliament may be dissolved before it could come to his turn to have his cause heard: what would be the consequence of this? If the plaintiff must be thereby without remedy, would not the law be notoriously defective; and yet none will say, that another parliament did ever take cognizance of any injury done, upon account of an election to a preceding parliament: but, suppose the next House of Commons will determine it, what endless work would the House of Commons be engaged in? for, probably, the ensuing election would make as many new questions as that which went before, and which the parliament did not live long enough to dispatch.

As to what was objected, that the same matter may come in question in the House of Commons, where it may be determined, that this plaintiff hath no right; so that great confusion would arise from different judgments in different courts; it is no more than what may happen every day in Westminster-hall, where the several courts may be of various opinions upon the same question, and yet no hurt is done to the public; nay, this is no more than happens often in the House of Commons, where the right of election in the same borough is decided different ways in different parlia-

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If the plaintiff, and all other injured electors, should be obliged to go to the House of Commons for satisfaction, it may be reasonably supposed, the parliament may be dissolved before it could come to his turn to have his cause heard: what would be the consequence of this? If the plaintiff must be thereby without remedy, would not the law be notoriously defective; and yet none will say, that another parliament did ever take cognizance of any injury done, upon account of an election to a preceding parliament: but, suppose the next House of Commons will determine it, what endless work would the House of Commons be engaged in? for, probably, the ensuing election would make as many new questions as that which went before, and which the parliament did not live long enough to dispatch.

As to what was objected, that the same matter may come in question in the House of Commons, where it may be determined, that this plaintiff hath no right; so that great confusion would arise from different judgments in different courts; it is no more than what may happen every day in Westminster-hall, where the several courts may be of various opinions upon the same question, and yet no hurt is done to the public; nay, this is no more than happens often in the House of Commons, where the right of election in the same borough is decided different ways in different parlia-

ments, and they do not think themselves dishonoured by it.

This contrariety of judgment can never appear, for the House of Commons never gives a direct judgment, on this or that individual elector's right; the voting is either upon a general question of the competitors, or where the right of election in the borough is placed, whether all inhabitants, or those under a particular qualification, or whether the whole commonalty, or a selected number, have voices, and all these are but ways and means to determine the right of election.

If the House of Commons judge of the right of a particular elector at any time, it is only 'pro ista vice,' so far as it relates to the particular case before them; but surely the House never thought the elector's freehold finally concluded thereby, because he is no party to that suit, his right came not there in question originally, but consequentially, in a cause litigated between other persons, to which he is no party; and it cannot be agreeable to right reason, or the principles of law, for a man's right to be conclusively determined, in a cause between other parties.

And, after all, where is the damage to the public, if there should be a variety in the determination of the House of Commons, and the courts of Westminster? It is not impossible, in the nature of things; for the courts of law have great advantages, which the House of Commons want; they want the help of juries, and the power of giving oaths, and they ought not to be displeas'd with their electors, if they resort to courts provided with these powers, for asserting their right of election, especially when it is considered, that the person whose pretensions the House of Commons approves of, will sit there, which is all they are concern'd in: They are the elected: and it would be strange, if that should entitle them to challenge the sole power of deciding the rights of their electors; which is, indeed, to chuse their electors.

It was urg'd as a great argument against the maintaining this action, that it had been adjudg'd, in the case of Mr. Onslow, in the 33d year of king Charles 2, (second Vent. 37.) that no action did lie at common law for a false return of a member to sit in parliament; and that in the case of Barnardiston and Soame, it was adjudg'd the candidate could not maintain an action against the sheriff for a double return; and if the person elected to serve in parliament cannot maintain an action against the officer, it was urg'd *à fortiori*, that the person electing, who, perhaps, is but a cobbler, ought not to be allowed to have such an action.

It was answer'd, that the law of England has no respect to persons: If an elector be a cobbler, he is a freeman of England, and has that great privilege belonging to him to be represented in parliament. It was remember'd with what variety of opinion among the judges, that case of sir Samuel Barnardiston was determin'd, and what an alarm that judgment

gave to the House of Commons, to such a degree, that in the session of parliament 1679, a committee was appointed to enquire into it, as a grievance. And it was observ'd, that the great design of the act of parliament made in the seventh year of the late king (which was often mention'd in the debate of this case to other purposes) was to cure the many inconveniences arising from that judgment, and the judgment in Mr. Onslow's case, which only follow'd Barnardiston's, and was judg'd upon the authority of it. But there is no resemblance between those cases and the case of an elector. In Barnardiston's case of a double return of members, the reason on which the judgment was found'd, was, that a double return was no return which the law took notice of, but was only allow'd of by the custom of parliament. When an officer, who doubts, makes a double return, he submits to the judgment of the House of Commons; and, if that House admits of such a return, as they had often done, it would be hard the law should subject a man to an action, for submitting a matter of fact, (the truth of which the officer doubts) to the determination of those who have a jurisdiction of the matter, and approve the manner of such a return.

In the other case of a false return of a member, several reasons may be assign'd for the judgment, which are not applicable to the case of an elector; perhaps it might be because such a return is a manifest injury to every one of the electors (though principally to the candidate) and therefore it might fall within the reason of Williams's case above-mention'd, that every elector might sue him; and therefore none of them severally can maintain the action. But there is another reason very obvious, because the candidate has a proper remedy to recover his place, from which he is excluded by the false return; the right of election is cognizable in the House of Commons, there he will recover his seat in parliament, which is what the law has the principal regard to, and there is no reason he should have another remedy elsewhere.

It is absurd to say, the elector's right of chusing is found'd upon the law and custom of parliament. It is an original right, part of the constitution of the kingdom, as much as a parliament is, and from whence the persons elected to serve in parliament do derive their authority, and can have no other, but that which is given to them by those that have the original right to chuse them; this doth not touch the jurisdiction claimed and exercis'd by the House of Commons to try the right of election of their own members; they who pretend to be admitted to sit there, ought to make out their right to the House; but there is no ground to infer from thence, that the House hath power to try or determine the right of other persons, who are not their members, and do not pretend to any place amongst them.

It was said, that if this action were allow'd,

there would be a way found out for the Lords to let themselves into, to judge of the right of the members of the House of Commons to sit there, and by parity of reason to judge of their own privileges, as if actions were brought for words spoken in the House of Commons, or other things happening in that House; which would be of ill consequence.

But it was said in the first place, that this objection was little applicable to the present case, but it has no relation to the sitting of that member, for whom the elector who brings his action gave his vote.

And, secondly, if things are so ordered by the constitution of the English government, that the ultimate resort in point of judicature is lodged with the Lords, let the case concern what it will, when it is brought before them by Writ of Error, they are bound to give Judgment one way or other; and as to the particular instance mentioned, relating to the words spoken in the House of Commons, it was said, there never was a greater attempt made upon liberty of speech in the House of Commons, than by the information brought in the King's-bench, 5 Car. 1, against sir John Elliot, Denzil Holles, and Benjamin Valentine, esqrs., for words spoke in the House of Commons; they pleaded to the jurisdiction of the court, as being for what was done in parliament, and therefore ought not to be examined or punished elsewhere; but Judgment was given against them, and great fines imposed upon them (Cro. Car. 181.) In the parliament which met in 1640, these proceedings were taken into consideration with great warmth, and the 8th of July, 1641, it was resolved in the House of Commons, that the exhibiting of that information was a breach of the privilege of parliament; and that the over-ruling of the plea to the jurisdiction of the court, and the Judgment, and all that followed thereupon, was against the law and privilege of parliament, and many other severe votes were passed. Thus the matter rested till after the Restoration of king Charles 2; but when things grew to be settled, and there was leisure to consider the consequences of former proceedings, the House of Commons began to think, that those votes were not to be depended upon as a sufficient security, in a case of so high a nature, since upon liberty of speech all parliamentary debates were founded; and they could not think that great privilege safe while so solemn a Judgment stood in force. Therefore, in 1667, the consideration of this matter took up a great part of the session, and the best expedient they could find out was, first, to come to a resolution among themselves, that the Judgment given, 5 Car. 1, in that case, was an illegal Judgment, and against the freedom and privilege of parliament; and then to present this resolution of theirs to the Lords at a conference, which was done December the 10th, 1667, and to desire their concurrence. The next day the Lords concurred in the resolution, and at the same time (which was a thing aimed at and desired

by the House of Commons) the Lords ordered the lord Holles to bring a Writ of Error in parliament, to the end there might be a judicial determination of that great point, which was done according; and on the 15th of April, 1668, that cause coming to be heard in parliament, the Judgment in the King's-bench was reversed to the great satisfaction of the House of Commons.

So little did the House of Commons entertain jealousies of this kind, that they themselves resorted to the judicature of the Lords, in the manner that has been mentioned upon so weighty an occasion.

It was objected, that many inconveniences would follow, if this action were allowed: but they were very sparing in giving particular instances of those inconveniencies.

But nothing is plainer, than that by the plaintiff's prevailing in this action great inconveniencies will be prevented, and the subjects' right and property secured against the partialities and corruption of officers, who are trusted in a matter of so great moment, as the receiving and allowing their suffrages upon elections.

This tends to encounter false returns in the first approach, and to have just returns is all the House of Commons ought to desire.

How endless would the inconveniences be, if this action did not lie? How would occasions of complaint be multiplied? The officers who had the return would become the masters of elections, and admit and reject electors as they pleased with impunity; for if the electors are only to seek for a remedy before the House of Commons, it would be a remedy worse than the disease; the greatest part of their cases would never be determined for want of time; and they who could get their cases heard, could have no amends, that is, no damages given them for reparation of the wrong, besides the absurdity of having, for the most part, the parties to the injury, those who sit by a false return, parties to the Judgment.

So that to deny this action, is to deny the benefit of the law in a matter of the most tender concern to an Englishman.

To pretend it to be a breach of privilege of the House of Commons, for an elector to seek for remedy at law, if he be wrongfully excluded of his vote, is very strange.

That certainly can never be esteemed a privilege of parliament, that is incompatible with the rights of the people. Every Englishman is entitled to reparation for the injuries done to his rights and franchises, in the ordinary and common methods of justice, where the juries who try, and the witnesses who give evidence, are to be upon their oaths; *Magna Charta*, cap. 29, is very express. No freeman shall be disseised of his freehold, or liberties, or free customs, unless by the lawful judgment of his peers, or by the law of the land.

By the lawful judgment of the Peers, in the case of a commoner, is meant, by a jury of lawful men upon their oaths.

If one be injured in such a manner as the plaintiff in this action hath been, no man can say that *per legem terra*, by the law of the land, he can have a remedy for satisfaction, and asserting his right in the House of Commons; if there be any such law, it must be either statute law, or common law. No statute gives him such a remedy, nor doth the common law, because that is constant usage for time immemorial; and there is not one precedent can be produced, that ever any man, upon such an occasion, did ever apply to the House of Commons for relief.

Upon the 14th day of January, 1704, the House of Lords reversed the judgment, and gave judgment, that the plaintiff should recover.

RESOLUTIONS OF THE LORDS UPON THE CASE.

This State of the Case being read and approved of, the House came to the following Resolutions, viz.

“ It is resolved by the Lords spiritual and temporal in parliament assembled, that by the known laws of this kingdom, every freeholder, or other person, having a right to give his vote at the election of members to serve in parliament, and being wilfully denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and recover damages for the injury.

“ It is resolved by the Lords spiritual and temporal in parliament assembled, that the asserting, that a person having a right to give his vote at an election, and being hindered so to do by the officer, who ought to take the same, is without remedy for such wrong by the ordinary course of law, is destructive of the property of the subject, against the freedom of elections, and manifestly tends to encourage corruption and partiality in officers, who are to make returns to parliament, and to subject the freeholders and other electors, to their arbitrary will and pleasure.

“ It is resolved by the Lords spiritual and temporal in parliament assembled, that the declaring Matthew Ashby guilty of a breach of privilege of the House of Commons, for prosecuting an action against the constables of Aylesbury, for not receiving his Vote at an election, after he had, in the known and proper methods of law, obtained a Judgment in parliament for recovery of his damages, is an unprecedented attempt upon the jurisdiction of parliament, and is in effect to subject the law of England to the Votes of the House of Commons.

“ It is resolved by the Lords spiritual and temporal in parliament assembled, that the deterring electors from prosecuting actions in the ordinary course of law, where they are deprived of their right of voting, and terrifying attorneys, solicitors, counsellors, and sergeants at law, from soliciting, prosecuting and pleading in such cases, by voting their so doing to

be a breach of privilege of the House of Commons, is a manifest assuming a power to controul the law, to hinder the course of justice, and subject the property of Englishmen to the arbitrary Votes of the House of Commons.”

The Declarations and leasly of the House of Commons to Ashby, had not that effect as might have been expected; for before the then following sessions, not only execution was taken out upon the said Judgment, but Mr. Mead brought actions of like nature for John Paty, John Oviat, John Paton, jun. Henry Basse, and Daniel Horne, five other inhabitants of Aylesbury, for being denied their Votes at the election of members to serve in parliament for the said borough of Aylesbury; of which complaint being made to the House of Commons, they proceeded as follows:

ALL THE PROCEEDINGS IN RELATION TO THE AYLESBURY-MEN, COMMITTED BY THE HOUSE OF COMMONS: WITH THE REPORT OF THE LORDS JOURNAL, AND THE REPORTS OF THE CONFERENCES AND OF THE FREE CONFERENCE.*

November 21, 1704.—A Complaint being made to the House of Commons that Robert Mead, an attorney at law, had proceeded in the Cause of Ashby and White, and others; (*ut supra*) since the last session of parliament, and taken the defendants in execution, in breach of the privilege of this House:

Ordered, That the matter of the said Complaint be heard at the bar of this House upon Thursday morning next. Ordered, That the said Robert Mead do attend this House upon Thursday morning next.

Nov. 23.—The order of the day being read for the hearing the matter of the complaint against Robert Mead, an attorney at law, for having proceeded in the Cause of Ashby and White, and others, since the last session of parliament, and taken the defendants in execution, in breach of the privilege of this House: Ordered, That the hearing the said complaint be adjourned until Tuesday sevensnight. That the said Robert Mead do attend this House upon Tuesday sevensnight.

A further Complaint being made to the House, That since the Resolutions of this House the last session, upon the Case of Ashby and White, there had been several new actions brought by John Paty, John Oviat,

* Martii, 13 die Martii, 1704. Ordered, “ That all the Proceedings in relation to the Aylesbury-Men, committed by this House, and this Report of the Lords' Journal, and Reports of the Conferences, and of the Free Conference, be printed.—(Ordered, That Mr. Speaker do appoint the Printer of the said Proceedings and Reports.”

John Paton, junior, and Henry Basse, and prosecuted by the said Robert Mead, against the constables of Aylesbury, in breach of the privilege of this House. Ordered, That the matter of the said complaint be also heard at the bar of this House upon Tuesday seven-night. That the said John Paty, John Oviat, John Paton, jun. and Henry Basse, do attend this House upon Tuesday seven-night. That copies of the original Declarations in the said actions be laid before this House.

Nov. 24.—Ordered, That Daniel Horne, a plaintiff in one of the actions brought against the constables of Aylesbury, of which complaint was made to the House yesterday, do attend this House upon Tuesday seven-night.

Dec. 5.—The orders of the day being read for the hearing the matter of the complaints of several breaches of privilege committed by Robert Mead, John Paty, John Oviat, John Paton, jun. Henry Basse, and Daniel Horne, and for their attending this House: the serjeant at arms was called upon, to give an account of what had been done for the summoning of them; and he acquainted the House, that his messenger had been at Aylesbury, and left a copy of the order at Mr. Mead's house, and at his chamber in Thavies-Inn, but that he does not attend; but that all the other persons had been summoned, and do attend.

And thereupon, Mr. Arthur Crabb was called for, and brought in with the mace to the bar, who said: that he was attorney for the late constables of Aylesbury in five several actions, at the several suits of John Paty, John Oviat, John Paton, junior, Henry Basse, and Daniel Horne: and that he did serve Mr. Robert Mead, the 6th of March last, with the Resolutions of this House of the last session of parliament, relating to the Proceedings in the cause of Ashby and White and others, by giving him a copy thereof, and shewing him the Resolutions signed by the clerk of this House: and that he afterwards, viz. the 10th of June last, had from Mr. Mead copies of five Declarations in the said actions, viz. one from Mr. Mead himself, and the other four left at his house, which Mr. Mead afterwards owned, and that he paid Mr. Mead for them all.

And the copy of the Declaration between Paty and White et al^s was read, and is as followeth:*

Passche, Anno Tertio Annæ Reginæ.

Bucks, sr. Johannes Paty queritur de Will'o White, Ric'o Talboys, Will'o Bell, et Ricardo Heydon, in Custod' Mar' &c. pro eo, viz. quod cum vicesimo sexto die Decembris Anno Regni Dom' Williel' Tertii nuper Regis Ang' &c. duodecimo e Cur' Cancellar' ipsius nuper Re-

* This Declaration of Paty relates to the election of members to serve in the parliament called in the 12th year of his late majesty's reign.—Former edition.

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gis apud Westm' in Com' Mid' emanavit quoddam Breve ipsius nuper Regis tunc Vic' Com' Bucks pred' direct' recitando quod dict' nuper Rex de advisamento et assensu Concilii sui pro quibusdam arduis et urgentibus negotiis eund' nuper Regem Statum et Defensionem Regni sui Ang' et Ecclesie Anglicane concernen' quoddam Parliamentum suum apud Civitat' suam Westm' sexto die Februarii tunc prox' futur' teneri ordinavit et ibidem cum Prelatis Magnatibus et Proceribus dicti Regni sui colloquium habere et tractatum Idem nuper Rex eidem tunc Vic' Com' Bucks predict' Breve precepit firmiter injungend' quod factu Proclamatione in prox' Com' suo post reception' ejusd' Brevis tenend' de die et loco predict' duos Milites Gladiis cinctos magis idoneos et discretos Com' pred' et de qualibet Civitate Com' illius duos Cives et de quolibet Burgo duos Burgesses de discretioribus et magis sufficient' libere et indifferenter per illos qui hujusmodi Proclamation' interforent juxta form' Statut' inde edit' et provis. eligi et nomina eorundem Militum Civium et Burgensium sic eligend' in quibusdam Indentur' inter ipsum tunc Vic' et illos qui hujusmodi Election' interforent inde conficiend' licet hujusmodi eligend' presentes forent vel absentes inseri eosq; ad dictos diem et locum venire faceret Ita quod iidem Milites plenam et sufficient' Potestatem pro se et Communitate Com' illius ac dicti Cives et Burgenses pro se et Communitate Civitat' et Burgor' pred' divisim ab ipsis habere ad faciend' et consentiend' hiis que tunc ibidem de Communi Concil' dicti Regni ipsius nuper Regis (favente Deo) contigerent ordinari super negotiis antedictis Ita quod pro defectu potestatis hujusmodi seu propter improvidam Election' Militum Civium aut Burgensium pred' dicta negotia infecta non remaneret quovismodo et Election' ill' in plen' Com' ipsius tunc Vic' fact' distincto et aperte sub Sigillo suo et Sigillis eorum qui Election' ill' interforent eidem nuper Regi in tunc Cancellar' sua ad dict' diem et locum certificaret indilate remitten' eidem nuper Regi alteram partem Indentur' pred' eidem Brevi eor' una cum Brevi illo. Quod quidem Breve postea et ante predictum sextum diem Febr' in Brevi pred' mentionat' scil' vicesimo nono die Decemb' Anno duodecimo sup' dicto apud Burgum de Aylesbury in dicto Com' Bucks cuidam Roberto Weedon Arm' ad tunc Vic' ejusd' Com' Bucks deliberat' fuit in forma Juris exequend' Virtute cujus quidem Brevis predictus Robertus Weedon Vic' Com' Bucks pred' ut prefertur tunc et ibidem existen' postea et ante predict' sextum diem Februar' scil' tricesimo die Decemb' Anno duodecimo sup' dicto apud Burgum de Aylesbury pred' in dicto Com' Bucks fecit quoddam preceptum suum in Scriptis sub Sigillo ipsius Roberti Weedon Officii sui Vic' Com' Bucks pred' Constabular' Burgi de Aylesbury pred' direct' (recitand' diem et locum Parliamenti pred' tenend' perinde eos requiren' et eis in mandato data quod facta Proclamatione infra Burg' pred' de die et loco in eodem Precepto recitat' causarent

libere et indifferenter eligi duos Burgenses Burgi ill' de discretioribus et magis sufficien' per ipsos qui hujusmodi Proclamatione interforent juxta form' Statut' in talib' casib' edit' et provis' et nom' dictor' Burgens' sic elect' licet presentes forent vel absentes inseri in quibusd' Indentur' inter dictum Vic' et illos qui habent interesse in hujusmodi Election' et quod eos venire facerent ad diem et locum in eodem precept' recitat' Ita quod dicti Burgenses habent plen' et sufficien' potestat' pro se et Communitate Burgi pred' ad faciend' et consentiend' iis que tunc ibidem de com' Consilio dicti Regni (favente Deo) contingerent ordinari sup' negotiis antedict' Ita quod pro defectu hujusmodi potestat' aut propter improvidam Election' Burgensium pred' dicta negotia infecta non remaner' Et quod election' indilate eidem tunc Vic' certificarent mittend' eidem Vic' alteram partem Indentur' predict' Precept' annex' ut nlem Vic' eandem certificaret dicto nup' Regi in Cancellar' sua ad diem et locum predict' Quod quidem Preceptum postea et ante predict' sextum diem Februarii scil' eodem tricesimo die Decemb' Anno duodecimo sup' dict' apud Burgum de Aylesbury pred' in dicto Con' Bucks eisdem Will'o White Ric'o Talboys Will'o Bell et Ric'o Heydon adtunc et usque ad et post return' ejusdem Brevis Constabular' Burgi de Aylesbury predict' existen' in forma Juris exequend' deliberat' fuit quibus quidem Will'o White Ric'o Talboys Will'o Bell et Ric'o Heydon ratione Officii sui pred' Constabular' Burgi pred' executio Precepti ill' de jure adtunc et ibid' pertinuit Virtute enjus quidem Precepti ac Vigore Brevis pred' Burgenses Burgi pred' existen' in ea parte debite premoniti postea et ante predict' sextum diem Februarii scil' sexto die Jan' Anno duodecimo sup' dicto apud Burgum de Aylesbury pred' coram eisdem Will'o White Ric'o Talboys Will'o Bell et Ric'o Heydon Constabular' Burgi predict' assemblat' fuer' ad duos Burgenses pro Burgo ill' eligend' secund' exigentiam Brevis et Precepti pred' ac durau' assemblation' ill' ad intention' ill' et antequam hujusmodi duo Burgenses Virtute Brevis et Precepti pred' electi fuer' scil' die et Anno ult' sup' dict' apud Burg' de Aylesbury pred' in Com' pred' idem Johannes Paty adtunc et ibidem existen' Burgen' et Inhabitan' Burgi predict' et eleemosinas ibidem non recipien' sed debite qualificat' et intitulat' existen' ad suffragium suum ad eligend' duos Burgenses pro Burgo pred' secundum exigentiam Brevis et Precepti pred' dand' coram eisdem Will'o White Ric'o Talboys Will'o Bell' et Ric'o Heydon quatuor Constabular' Burgi ill' quibus tunc et ibidem debite pertinuit ad Suffragium ipsius Johannis Paty de et in premissis capiend' et allocand' parat' fuit et obtulit suffragium suum dare pro eligend' Thomam Lee Bar' et Simon Mayne Ar' duos Burgenses pro Parlamento ill' Virtute et secundum exigentiam Brevis et Precepti pred' ac suffragium ipsius Johannis Paty adtunc et ibidem de jure debuit admitti et pred' Will'us White Ric'us

Talboys Will'us Bell et Ric'us Heydon sic Constabular' Burgi pred' tunc et ibidem existen' adtunc et ibidem requisit' fuer' per ipsam Johan' Paty ad suffragium ipsius Johan' Paty pred' in premissis recipiend' et allocand' iidem tamen Will'us White Ric'us Talboys Will'us Bell et Ric'us Heydon adtunc et ibidem ut prefertur Constabular' Burgi pred' existen' premissorum non ignari sed machinan' et fraudulent' et malitiose intenden' eundem Johan' Paty in hac parte dampnificare et de Privilegio suo de et in premissis pred' impedire et totalit' frustrare undem Johan' Paty suffragium suum in ea parte dare adtunc et ibidem obstruxer' et adtunc et ibidem penitus recusaver' ad eundem Johan' Paty suffragium suum pro eligend' duos Burgenses pro Burgo ill' ad Parliament' pred' dare permittend' ac suffragium ipsius Johan' Paty pro Electione ill' non receper' neq; allocaver' Ac duo Burgenses de Burgo ill' pro Parliament' pred' (predicto Johanne Paty sic ut prefertur exclus') sine aliquo suffragio ipsius Johannis Paty adtunc et ibidem Virtute Brevis et Precepti pred' electi fuer' in enervation' pred' Privileg' pred' Johannis Paty de et in premissis pred' Unde idem Johannes Paty dicit quod ipse deteriorat' est et dampnum habet ad valentiam ducentar' lib' ac inde producit Sec-tam, &c.

J. Tomson, pro Quer.

Crab per Ja. Closs, pro Def. } Pleg' &c.

The other Declarations were :

Johannes Oviat,	} versus }	Thos. Ray &
Johannes Paton, jun.		al' Constabular' Burgi de
Henry Basse,		Aylesbury.
Daniel Horne,		

And, *mutatis mutandis*, were the same with the former Declarations against White and others.*

Which copies of Declarations the said Mr. Crabd produced to the House, together with notice in writing from the said Mr. Mead, the 22d of July last, that he would try one of the said actions, but not the other four, at the then next assizes. And then he withdrew. And the notice was read. And the copy of the declaration between Paty and White et al' was also read, and is, &c.

Then the said John Paty, John Oviat, John Paton, jun. Henry Basse, and Daniel Horne, were severally called to the bar, and examined, and then withdrew.

Resolved, That it appears to this House, that John Paty of Aylesbury has been guilty of commencing and prosecuting an action at common law against William White, and others, late constables of Aylesbury, for not allowing his Vote in the election of members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House.

* These Declarations relate to the election of members to serve in the parliament called in the first year of her present majesty's reign.—Former Edition.

That it appears to this House, that John Oviat of Aylesbury has been guilty of commencing and prosecuting an action at common law against the late constables of Aylesbury, for not allowing his Vote in the election of members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House.

That it appears to this House, that John Paton, jun. of Aylesbury, has been guilty of commencing and prosecuting an action at common law against the late constables of Aylesbury, for not allowing his Vote in the election of members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House.

That it appears to this House, that Henry Basse of Aylesbury, has been guilty of commencing and prosecuting an action at common law against the late constables of Aylesbury, for not allowing his Vote in the election of members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House.

That it appears to this House, that Daniel Horne of Aylesbury, has been guilty of commencing and prosecuting an action at common law against the late constables of Aylesbury, for not allowing his Vote in the election of members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House.

That it appears to this House, that Robert Mead has been guilty of soliciting and prosecuting (as attorney at law) divers actions at common law against William White and others, late constables of Aylesbury, for not allowing divers Votes in the election of members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the privileges of this House.

Ordered, That the said John Paty, John Oviat, John Paton, jun. Henry Basse, and Daniel Horne, be, for their said offence, committed prisoners to her majesty's gaol of Newgate; and that Mr. Speaker do issue his warrants accordingly.

Ordered, That the serjeant at arms attending this House do take care that the said warrants be executed.

Ordered, That the said Robert Mead be, for his said offence taken into the custody of the serjeant at arms attending this House."

Feb. 1, 1705.—Ordered, That the keeper of Newgate do to-morrow morning bring to this House, John Paty, John Oviat, John Paton, jun. Henry Basse, and Daniel Horne, committed by this House; and that Mr. Speaker do issue his warrant or warrants accordingly.

Feb. 2. The House being informed, That the keeper of Newgate attended, according to order, with John Paty, John Oviat, John Pa-

ton, jun. Henry Basse and Daniel Horne, committed by this House, several of them were severally called in and examined, and then withdrew. And also the keeper and his clerk, and turnkey, one Edward Hill, were called in and examined, and then withdrew.

Ordered, That the said John Paty, John Oviat, John Paton, jun. Henry Basse, and Daniel Horne, be remanded prisoners to her majesty's prison of Newgate; and that Mr. Speaker do issue his warrants accordingly.

Feb. 24. The House being informed, That there have been endeavours to bring a Writ of Error, on the proceedings in the court of Queen's-bench upon a Habeas Corpus granted there for the persons committed by this House to Newgate for breach of their privilege, and thereby to bring the commitments of this House under the examination of the House of Peers :*

Resolved, That an humble Address be presented to her majesty, humbly to lay before her majesty the undoubted right and privilege of the Commons of England, in parliament assembled, to commit for breach of privilege; and that the commitments of this House are not examinable in any other court whatsoever: And that no such Writ of Error was ever brought, nor doth any Writ of Error lie in this case. And that as this House hath expressed their duty to her majesty, in giving dispatch to all the supplies, so they have an entire confidence in her majesty's goodness and justice, that she will not give leave for the bringing any Writ of Error in this case; which will tend to the overthrowing the undoubted rights and privileges of the Commons of England.

Ordered, That the said Address be presented to her majesty by such members of this House as are of her majesty's most honourable privy council.

Resolved, That whoever has abetted, promoted, countenanced, or assisted the prosecution of the several Writs of Habeas Corpus, brought for the prisoners committed by this House, and since their being remanded, have endeavoured the procuring Writs of Error, are guilty of conspiring to make a difference between the Lords and Commons in parliament assembled, are disturbers of the peace of the kingdom, and have endeavoured, as far as in them lay, to overthrow the rights and privileges of the Commons of England in parliament assembled.

Ordered, That a committee be appointed

* What incensed the Commons yet more, was the behaviour of John Paty and John Oviat, two of the prisoners, who thinking themselves wronged in their being remanded to Newgate, humbly petitioned the queen for a Writ of Error, in order to bring the judgment of the court of Queen's-bench before her majesty in parliament. The Commons were no sooner informed of these Petitions, but they made the above Votes. *Annals of queen Anne*, vol. 3, p. 188.

to examine what persons have been concerned in soliciting, prosecuting, or pleading, upon the Writs of Habeas Corpus, or Writs of Error, on the behalf of the persons committed to Newgate, for breach of the privilege of this House: or what other persons have promoted or abetted the same. And a committee was accordingly appointed.

Feb. 26.—Mr. Secretary Hedges acquainted the House that their Address of Saturday last, in relation to the Writs of Error therein mentioned, having been presented to her majesty, according to the Order, her majesty was pleased to give this gracious answer:

“ Her majesty is much troubled to find the House of Commons of opinion that her granting the Writs of Error mentioned in their Address, is against their privileges: of which her majesty will always be as tender as of her own prerogative; and therefore the House of Commons may depend, her majesty will not do any thing to give them any just occasion of complaint: but this matter, relating to the course of judicial proceedings, being of the highest importance, her majesty thinks it necessary to weigh and consider very carefully what may be proper for her to do, in a thing of so great a concern.”

Resolved, That this House will take her majesty's gracious Answer into consideration to-morrow morning.

The earl of Dysert reported from the Committee appointed to examine what persons have been concerned in soliciting, prosecuting, or pleading upon the Writs of Habeas Corpus, or Writs of Error, on the behalf of the persons committed to Newgate for breach of the privileges of this House, or what other persons have promoted or abetted the same, the matter as it appeared to them; which they had directed him to report to the House, which he read in his place, and afterwards delivered in at the clerk's table, where the same was read:

Upon the examination of several persons, it appeared to the committee, That Mr. Alexander Denton (afterwards Mr. Justice Denton) moved in the court of Queen's-bench for the writs of Habeas Corpus, on behalf of the persons committed to Newgate for breach of the privileges of this House.*

That Mr. Serjeant Hook moved in the court of Queen's bench, to shorten the day for the return of the said writs.

That Mr. Francis Page (afterwards Mr. Justice Page), Mr. James Mountague, Mr. Nicholas Lechmere, and Mr. Alexander Denton, pleaded on the returns of the said writs.

That Mr. James Mountague (late lord chief baron), and Mr. Nicholas Lechmere (late lord Lechmere) attended as counsel at the lord chief

* The arguments on the Habeas Corpus are inserted after these proceedings, that there may be no interruption in the proceedings of the House of Commons. Former edition.

justice Holt's chamber, to consider what entry should be made of the Remittitur.

Hollingshead, a messenger attending this House, informed the committee, That he endeavoured to serve the summons upon Mr. Lee of Clement's-inn; but not meeting with him, he shewed his clerk the original order of summons, which his clerk refused to read; thereupon he offered him a copy of it, which he refused to receive: however, he left the copy in Mr. Lee's chamber.

Kingham, another messenger, informed the committee, He had personally served Harris with the order of summons, and he said he would attend: but neither Lee nor Harris attended the committee, according to the summons of the committee.

Resolved, That it appears to this House, That Mr. Lee, of Clement's-inn, having been summoned to attend a committee of this House, and not attending thereupon, is guilty of a contempt and breach of the privilege of this House.

Ordered, That the said Mr. Lee be, for his said contempt and breach of privilege, taken into the custody of the serjeant at arms attending this House.

Resolved, That it appears to this House, That Harris having been summoned to attend a committee of this House, and not attending thereupon, is guilty of a contempt and breach of the privilege of this House.

Ordered, That the said Harris be, for his said contempt and breach of privilege, taken into the custody of the serjeant at arms attending this House.

A motion being made, and the question being put, That the farther consideration of the said report be adjourned till to-morrow morning: It passed in the negative.

Then a debate arising upon the said report, and the time being come for the House to attend her majesty, as she had appointed, with an address:

Resolved, That the debate be adjourned.

Resolved, That the debate be adjourned till six o'clock in the evening.

p. m.—The House resumed the adjourned debate upon the report from the committee appointed to examine what persons have been concerned in soliciting, prosecuting, or pleading upon the writs of Habeas Corpus, or Writs of Error, on the behalf of the persons committed to Newgate for breach of the privilege of this House; or what other persons have promoted or abetted the same.

Resolved, That Mr. Francis Page, in pleading upon the return of the Habeas Corpus, on behalf of the prisoners committed by this House, is guilty of a breach of the privilege of this House.

Ordered, That the said Mr. Francis Page be, for the said breach of privilege, taken into the custody of the serjeant at arms attending this House.

Resolved, That Mr. James Mountague, in pleading upon the return of the Habeas Corpus, on the behalf of the prisoners committed by

this House, is guilty of a breach of the privilege of this House.

Ordered, That the said Mr. James Mountague be, for the said breach of privilege, taken into the custody of the serjeant at arms attending this House.

Resolved, That Mr. Nicholas Lechmere, in pleading upon the return of the Habeas Corpus, on the behalf of the prisoners committed by this House, is guilty of a breach of the privilege of this House.

Ordered, That the said Mr. Nicholas Lechmere be, for the said breach of privilege, taken into the custody of the serjeant at arms attending this House.

Resolved, That Mr. Alexander Denton, in pleading upon the return of the Habeas Corpus, on the behalf of the prisoners committed by this House, is guilty of a breach of the privilege of this House.

Ordered, That the said Mr. Alexander Denton be, for the said breach of privilege, taken into the custody of the serjeant at arms attending this House.

Ordered, That John Paty, prisoner in Newgate by order of this House, for a breach of the privilege of this House, be discharged from his said confinement there, and immediately removed and delivered over into the custody of the serjeant at arms attending this House.

Ordered, That John Oviat, prisoner in Newgate by order of this House, for a breach of the privilege of this House, be discharged from his said confinement there, and immediately removed and delivered over into the custody of the serjeant at arms attending this House.

Ordered, That John Paton, junior, prisoner in Newgate by order of this House, for a breach of the privilege of this House, be discharged from his said confinement there, and immediately removed and delivered over into the custody of the serjeant at arms attending this House.

Ordered, That Henry Basse, prisoner in Newgate by order of this House, for a breach of the privilege of this House, be discharged from his said confinement there, and immediately removed and delivered over into the custody of the serjeant at arms attending this House.

Ordered, That Daniel Horne, prisoner in Newgate by order of this House, for a breach of the privilege of this House, be discharged from his said confinement there, and immediately removed and delivered over into the custody of the serjeant at arms attending this House.

Ordered, That Mr. Speaker do issue his warrants for the removal and delivery over of the said John Paty, John Oviat, John Paton, junior, Henry Basse, and Daniel Horne, into the custody of the serjeant at arms attending this House.*

* Though the Commons had resolved before to take her majesty's Answer into consi-

Feb. 27, 1705.—The House calling upon the serjeant to give an account what he had done in execution of the orders of this House made yesterday, he gave the House an account thereof accordingly, as followeth, viz.

That he had received into his custody the five persons which were committed to Newgate, this morning, and had found Mr. James Mountague at his own house, and taken him into his custody; but that he shewed a protection from the House of Lords, upon the petition of the said persons, by which the said Mr. Mountague and Mr. Page, Mr. Lechmere and Mr. Denton, and William Lee and John Harris (who were yesterday ordered to be taken into custody) were assigned counsel and attorneys for the said persons, and protected by the House of Lords; and that all officers, serjeants at arms, and other persons, were thereby forbid to meddle with them; with which Mr. Serjeant told Mr. Mountague he would acquaint this House.

That he had also like to have taken Mr. Nicholas Lechmere, but that he got out of his chamber in the Temple, two pair of stairs high, at the back window, by the help of his sheets and a rope; and that the said Harris was also taken into custody; but that Mr. Page and Mr. Denton, and Mr. Lee, were not then found.

Ordered, That some members be appointed to search the Journals of the House of Lords, what proceedings have been in that House, in relation to the five persons committed to Newgate for breach of the privilege of this House; and report the same to the House.—And some members were appointed accordingly.

The orders of the day being read:

Ordered, That the consideration of her majesty's gracious Answer to the Address of this House of Saturday last, relating to the Writs of Error therein mentioned, be adjourned till tomorrow morning.

Feb. 28.—Mr. Bromley reported, That the members appointed to search the Journals of the House of Lords, what proceedings have been in that House, in relation to the five Persons committed to Newgate for breach of the privilege of this House, had searched the same accordingly, and had taken thereout what they found relating to the same; and also copies of two Petitions of the said persons; which he read in his place, and afterwards delivered in at the table, where the same were read, and are as follow, viz.

deration, yet being apprehensive lest her majesty should grant the Writs of Error, whereby the five Aylesbury-men might be discharged from their imprisonment, they ordered them to be removed from Newgate, and taken into the custody of their serjeant at arms; which order was executed at midnight, with such circumstances of severity and terror, as have been seldom exercised towards the greatest offenders. *Annals of Queen Anne, vol. 3, p. 199.*

Feb. 26.—“ Upon reading the Petition of Daniel Horne, Henry Basse, and John Paton jun. as also the Petition of John Paty, and John Oviat, prisoners in Newgate, in relation to some proceedings for obtaining the Writs of Error, and praying, amongst other things, the protection of this House for their counsel and agents. It is ordered by the Lords spiritual and temporal in parliament assembled, That the said Petitions shall be taken into consideration to-morrow at 12 o'clock, and all the Lords summoned to attend; as also the judges in town, who are to come prepared to speak to the point, whether a Writ of Error be a Writ of Right or a Writ of Grace? And that the Petitioners have notice, that when they send to this House the names of their counsel and agents they desire to be protected, they shall have the protection of this House for them.

“ In pursuance of the Order of this day made, Daniel Horne, Henry Basse, John Paton, jun. John Paty, and John Oviat, prisoners in Newgate, sent the names of their Counsel and Agents, viz. James Mountague, esq., Nicholas Lechmere, Alexander Denton and Francis Page, Counsellors at Law.—William Lee and John Harris, Attorneys at Law. Whereupon, it is ordered by the Lords spiritual and temporal in parliament assembled, that the said persons shall, and they have hereby the protection and privilege of this House, in the advising, applying for, and prosecuting the said Writs of Error; and that all keepers of prisons, and jailors, and all serjeants at arms, and other persons whatsoever, be, and they are hereby, for, or in respect of any of the causes aforesaid, strictly prohibited from arresting, imprisoning, or otherwise detaining or molesting, or charging the said persons, or either of them, as they and every of them will answer the contrary to this House.”

To the Right Honourable the Lords Spiritual and Temporal, in Parliament assembled:
The Humble PETITION OF DANIEL HORNE,
HENRY BASSE, and JOHN PATON, JUN.:

Sheweth; That your petitioners having a right to vote at the election of members to serve in parliament for the borough of Aylesbury, were refused their votes, to their great wrong and damage.—That the Lords having given judgment in the case of Ashby and White, viz. that by the known laws of this kingdom, every freeholder, or other person having a right to give his vote at the election of members to serve in parliament, and being wilfully denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and recover damages for the injury; your petitioners thereupon brought the like actions in their own cases.—That they have for so doing been committed to Newgate, by virtue of a warrant from the Speaker of the House of Commons.—That your petitioners have endeavoured to obtain their liberty by such legal methods as by their counsel they have been

advised, without success; so that they have been deprived of their liberty for about twelve weeks, for no other reason, but the endeavouring to pursue their legal remedies, according to the Judgment of this honourable House.

Wherefore your petitioners humbly beseech your lordships to take the premises into consideration, and to do therein as to your great wisdoms you shall think fit.—And your petitioners, &c.

DANIEL HORNE, JOHN PATON, jun.
HENRY BASSE, his X mark.

To the Right Honourable the Lords Spiritual and Temporal, in Parliament assembled:
The Humble PETITION OF JOHN PATY, and JOHN OVIAT.

Sheweth; That your petitioners having a right to vote at the election of members to serve in parliament for the borough of Aylesbury, were refused their votes, to their great wrong and damage.—That the Lords having given judgment in the case of Ashby and White, viz. That by the known laws of this kingdom, every freeholder, or other person having a right to give his vote at the election of members to serve in parliament, and being wilfully denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and recover damages for the injury; your petitioners thereupon brought the like actions in their own cases.—That they have for so doing been committed to Newgate, by virtue of warrants from the Speaker of the House of Commons, copies whereof are annexed.—That they did by the advice of their counsel, on the 5th day of this instant February, move for their writs of Habeas Corpus, directed to the keeper of Newgate, to bring your petitioners before her majesty's court of Queen's-bench: whereupon the said court, viz. Mr. Justice Powell, Mr. Justice Powys, and Mr. Justice Gould, did grant the said Writs, directing the same to be made returnable on the 10th day of February aforesaid, notwithstanding that your petitioners said counsel did insist, that the same was an unusual return, and prejudicial to your petitioners; on which said day of return, your petitioners counsel did argue on their behalf, that by law they ought to be discharged; but by the opinion of the said three judges, they were remanded to the said prison.—That your petitioners being thereupon advised, there was a manifest error in the said judgment, and that they were properly relievable by bringing a Writ of Error returnable before her majesty in this high court of parliament, they did severally exhibit their petitions to her majesty, setting forth the proceedings upon the said writs of Habeas Corpus; and humbly prayed, that a Writ of Error might be granted to them respectively returnable in this high court.—That your petitioners have not been able as yet to obtain her majesty's warrant for authorizing the curritor to make out the said Writs of Error, as is usual in such cases.—

That your petitioners being advised, That a Writ of Error is a writ of Right, do humbly beseech your lordships to take the premisses into consideration, and to give such directions thereupon, as to your lordships shall seem just: and your petitioners do further pray, that your lordships will be pleased to give the protection of this House to your petitioners' counsel and agents, employed by them in the advising, applying for, and prosecuting the said Writs of Error; without which, they refuse to assist your petitioners.—And your petitioners, &c.

JOHN PATY, his H mark.

JOHN OVIAT, his O mark.

The Dates of the Warrants annexed to the Petition.

Martis 5 die Decem. 1704. for John Oviat.

Veneris 2 die Feb. 1705. Ditto.

Martis 5 die Decem. 1704. for John Paty.

Veneris 2 die Feb. 1705. Ditto.

The Serjeant at Arms being called upon to give an account what he had done pursuant to the Orders of the House on Monday last, since the account he gave yesterday:—He gave the House an account accordingly; That he had found Mr. Denton at his own chamber, and had him in custody; but that he could not find the other persons.

CONFERENCE BETWEEN THE TWO HOUSES.

Feb. 26, p. m.—A message from the Lords, by Mr. Justice Tracy, and Mr. Baron Smith. “Mr. Speaker, The Lords desire a present Conference with this House in the Painted chamber, about some antient, fundamental Liberties of the kingdom.”

Resolved, That this House doth agree to meet the Lords at a present conference as desired.

And the messengers were called in again, and Mr. Speaker acquainted them therewith.—Then managers were appointed, who went to the conference: And being returned, the lord marquis of Hartington reported the Conference, and that it was managed by the earl of Sunderland, who expressed himself as followeth:

“That the Lords have desired this Conference with the House of Commons, in order to a good correspondence between the two Houses, which they will always endeavour to preserve. When either House of Parliament have apprehended the proceedings of the other to be liable to exception, the ancient parliamentary method has been to ask a Conference; it being ever supposed, that when the matters are fairly laid open and debated, that which may have been amiss will be rectified, or else the House that made the objections will be satisfied that their complaint was not well grounded.

“Such hopes as these have induced the Lords to command us to acquaint you, that, upon consideration of the Petition of Daniel Horne, Henry Basse, and John Paton jun., and also of the Petition of John Paty, and John Oviat, complaining to the House of

Lords, that they have been prisoners in Newgate for about twelve weeks, upon several warrants, signed by the Speaker of the House of Commons, bearing date the 5th of December last, for their having commenced and prosecuted actions at common-law against the late constables of Aylesbury, for not allowing their votes at an election of members to serve in parliament; which actions, they alleged, they were encouraged to bring, by reason of a Judgment given in parliament upon a Writ of Error, brought in the last session by one Ashby against White, and others; and also representing by the same Petitions, what had been done by them respectively since their said commitment, in order to obtain their liberty, and praying the consideration of the House of Peers upon the whole matter; and also upon consideration of a printed paper, entitled, ‘The Votes of the House of Commons,’ signed with the Speaker’s name, and dated the 24th of this instant February; the House of Lords found themselves obliged to come to several Resolutions, which they have commanded us to communicate to you at this Conference; and are as follow:

“1. It is Resolved by the Lords spiritual and temporal in parliament assembled, That neither house of parliament hath any power, by any Vote, or Declaration, to create to themselves any new privilege, that is not warranted by the known laws and customs of parliament.

“2. That every freeman of England, who apprehends himself to be injured, has a right to seek redress by action at law: and that the commencing and prosecuting an action at common law, against any person (not entitled to privilege of parliament,) is no breach of the privilege of parliament.

“3. That the House of Commons, in committing to Newgate, Daniel Horne, Henry Basse, and John Paton, jun. John Paty and John Oviat, for commencing and prosecuting an action at common law, against the late constables of Aylesbury, for not allowing their votes in election of members to serve in parliament, upon pretence that their so doing was contrary to a declaration, a contempt of the jurisdiction, and a breach of the privilege of that House, have assumed to themselves alone a legislative authority, by pretending to attribute the force of a law to their declaration, have claimed a jurisdiction, not warranted by the constitution, and have assumed a new privilege, to which they can shew no title by the law and custom of parliament: and have thereby, as far as in them lies, subjected the rights of Englishmen, and the freedom of their persons, to the arbitrary votes of the House of Commons.

“4. That every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law.

“ 5. That for the House of Commons to censure, or punish any person for assisting a prisoner to procure a Writ of Habeas Corpus, or by vote, or otherwise, to deter men from soliciting, prosecuting, and pleading upon such Writ of Habeas Corpus, in behalf of such prisoner, is an attempt of dangerous consequence, a breach of the many good statutes provided for the liberty of the subject, and of pernicious example, by denying the necessary assistance to the prisoner, upon a commitment of the House of Commons, which has ever been allowed upon all commitments by any authority whatsoever.

“ 6. That a Writ of Error is not a Writ of Grace, but of Right, and ought not to be denied to the subject, when duly applied for, (though at the request of either House of Parliament,) the denial thereof being an obstruction of justice, contrary to Magna Charta.”

“ In these Resolutions, the House of Lords have expressed that regard and tenderness which they have always had, and will ever maintain for the rights of the people of England, and for the liberties of their persons; and also their zeal against all innovations to the prejudice of the known course of law, whereupon the happiness of our constitution does depend; and they hope that, upon recollection, the House of Commons will be of the same opinion in all the particulars resolved by the Lords, and agree with their lordships therein.”

Ordered, That the said Report be taken into consideration to morrow-morning:

March 1, 1705. The House (according to order) proceeded to take into consideration the report from the conference with the Lords yesterday.

Ordered, That it be referred to the managers that managed the last conference, to draw up what is proper to be offered to the Lords at the next conference; and that they do withdraw into the Speaker's chamber, and do sit *de die in diem*, and have power to send for persons, papers, and records.

March 3, 1705. The earl of Dysert reported from the Committee appointed to examine what persons have been concerned in soliciting, prosecuting, or pleading upon the writs of Habeas Corpus, or writs of error, on the behalf of the persons committed to Newgate for breach of the privileges of this House, or what other persons have promoted or abetted the same: That upon the examination of witnesses, it appeared to the Committee, that one Mr. Clifton being summoned to attend the said Committee, did not appear, though his wife owned he had the said summons, and told her he would attend accordingly. Mr. Smith, one of the officers of the prison of Newgate, said, That the said Mr. Clifton used to come often to the prison, to visit the five prisoners committed thither by this House; and he has received of him about 15*l.* for their lodging, and about 5*l.* more of the turnkey, that has been

left with him upon the same account, by persons unknown to him. That there is nothing owing for their lodging but since Saturday night. That they paid 50*s.* per week for their lodging, and used to provide their diet from the sutler's. And that the Committee having issued out several summons for Mr. Henry Cesar, one of the cursitors of London and Middlesex, to attend them, in order to give the Committee an account what persons had applied to him to make out Writs of Error on the behalf of John Oviat, and the other prisoners lately committed by this House to Newgate: it appeared (upon the examination of Kingham the messenger, who served the said summons) that he left a copy of the summons on Tuesday night at Mr. Cesar's chamber at Symonds-inn, with his laundress, he not being within, that the said messenger since left a second summons at the said Mr. Cesar's chamber, who has not obeyed the same.

And a debate arising in the House upon the said report;

And a motion being made, and the question being put, That the debate be adjourned;

It passed in the negative.

Resolved, That it appears to this House, that Mr. Clifton having been summoned to attend a Committee of this House, and not attending thereupon, is guilty of a contempt, and of a breach of the privilege of this House.

Ordered, That the said Mr. Clifton be, for his said contempt and breach of privilege, taken into the custody of the serjeant at arms attending this House.

Resolved, That it appears to this House, that Mr. Henry Cesar, one of the cursitors of London and Middlesex, having been summoned to attend a Committee of this House, and not attending thereupon, is guilty of a contempt, and of a breach of the privilege of this House.

Ordered, That the said Mr. Henry Cesar be, for his said contempt and breach of privilege, taken into the custody of the serjeant at arms attending this House.

March 6. The serjeant at arms attending this House, acquainted the House, that a person had this morning brought him a Writ of Habeas Corpus, under the great seal, for Mr. Mountague (in his custody by order of this House,) to be brought, as he was informed, before the Lord Keeper of the great seal of England: And he delivered the Writ, under seal, in at the table. And it appearing by the label to be returnable *immediatè*, but not before whom he was to be brought, nor any officer's name thereto, the Writ was opened by the Clerk, and read, and is as followeth:

‘ Anna Dei gratia Ang’ Sco’ Franc’ et Hibern’ Regina, Fidei Defensor, &c. Samueli Powel Ar’ serv’ ad arma attendens’ Honorab. Dom’ Commun’ ejus deputato et deputatis salutem. Precipimus vobis et cuilibet vestrum quod corpus Jacobi Mountague Ar’ nuper capt’ et in custod’ vestra vel alicujus vel unius vestrum ut dicitur detent’ sub salvo et secure

'conduct' una cum die et causa captionis et
'detentionis pred' Jacobi Mountague quo-
'cunque nomine idem Jacob' Mountague cen-
'seatur in eadem habeatis seu aliquis vel unus
'vestrum habeat eor' predilecto et fidel' nostro
'prehonorab' Nathan Wright Mil' Dom' cus-
'tod' Mag' Sigil' nostri Angl' apud Dom'
'Mansional' suam in parochia sancti Egidii in
'campis, in com' Mid' immediatè post recep-
'tion' hujus brevis ad faciend' subjiciend' et
'recipiend' ea omnia et singula que dictus do-
'minus custos Magni Sigil' nostri Angl' de co-
'tunc et ibidem cons' in hac parte et habeatis
'seu aliquis vel unus vestrum habeat ibi hoc
'breve. Teste meipsa apud Westm' sexto die
'Martii anno regni nostri tertio.'*

The Label.

'Samuel' Powel Ar' servien' ad arma, &c.
'II. corp' pro Mountague Ar' R. immediatè.
'Endorsed. 'Per statutum tricesim' prim'
'Caroli secundi Regis. N. WAIGHT, C. S.'

The serjeant also acquainted the House, that he heard there was another Habeas Corpus granted for Mr. Denton, in his custody also.

While the matter (upon occasion of the said forementioned Writ) was debating, the serjeant acquainted the House, that the other Writ of Habeas Corpus was just served upon his deputy, who had Mr. Denton in his custody: and he also delivered the same in at the clerk's table, where it was read, and was the same, *mutatis mutandis*, with the former.

And the precedents of what was done in the year 1675 were, by order, read: and several members mentioned, upon their memory, what was done in the year 1680, in the Case of one Mr. Sheridan.†

But the House were of opinion, that any person committed by the House of Commons was not bailable within the act of Habeas Corpus of 31 Car. 2, but came not then to any resolution.

REASONS of the Commons, to be offered at a Second Conference.

The same day Mr. Bromley reported, from the Committee appointed to draw up what is proper to be offered to the Lords at the next Conference, that they had drawn up the same accordingly, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the Clerk's table, where the same was read, and with some amendments, agreed unto by the House: And the same is as follows, viz.

The Commons have desired this Conference with your lordships, in order to preserve that good correspondence between the two Houses,

* This writ of Habeas Corpus ad Subjiciendum, Blackstone calls, 'the great and efficacious writ in all manner of illegal confinement.' See his account of it, in 3 Comm. chap. 8, p. 131.

† See Parl. Hist. vol. 4, p. 1252.

which the House of Commons shall always sincerely endeavour to maintain, and which is so particularly necessary at this time of common danger, that the Commons would not engage in any thing that looks like a dispute with your lordships, were it not for the necessity of vindicating from a manifest invasion, the privileges of all the Commons of England, (with which the House of Commons is entrusted) even those privileges which are essential not only to the well being, but to the very being of an House of Commons, and the preventing of the ill consequences of those misunderstandings, which, if they are not speedily removed, must otherwise interrupt the happy conclusion of this session, and the proceedings of all future parliaments.

It was this consideration alone which has so long prevailed with the House of Commons, not to insist on due reparation for those violent and unparliamentary attempts, made by your lordships upon their rights and privileges, at the end of the last session of parliament, but to apply themselves to the giving the speediest dispatch to those supplies which her majesty so earnestly recommended from the throne, which are so necessary to enable her majesty to pursue the advantages that have been obtained against the common enemy, by the great and glorious successes of her majesty's arms; and which are now delayed in your lordships' House, in so unusual a manner.

The Commons do agree to your lordships, that when either House of Parliament has apprehended the proceedings of the other to be liable to exception, the ancient parliamentary method has often been to ask a Conference; because it ought to be supposed, that when the matters are fairly laid open and debated, that which may have been amiss, will be rectified, or else the House that made the objections will be satisfied that their complaint was not well grounded. But your lordships seem so little to desire to have matters fairly laid open and debated, that to the great surprise of the Commons, when your lordships had invited them to a Conference about some ancient fundamental liberties of the kingdom, they found only the ancient and fundamental rights of the House of Commons, and their proceedings, censured, and treated in a manner unknown to former parliaments; and that your lordships had anticipated all debates, by delivering positive Resolutions; and these proceedings of your lordships, grounded only upon the petitions of criminals, that had fallen under the just censure and displeasure of the Commons, and upon a printed paper, which was not regularly before your lordships.

Though this manner of proceeding, as well as the matters of your lordships' Resolutions, might have justified the House of Commons in refusing to continue conferences with your lordships, as their predecessors have done upon less occasions; and though the Commons cannot submit their privileges to be determined or examined by your lordships, upon any pretence

whatsoever; yet, that nothing may be wanting on their part to induce your lordships to retract these Resolutions, they proceed to take them into their consideration.

Your Lordships' first Resolution is, viz. 'That neither House of Parliament hath any power, by any Vote or Declaration, to create to themselves any new Privilege that is not warranted by the known laws and customs of Parliament.'

As the Commons have guided themselves by this rule, in asserting their privileges, so they wish your lordships had observed it in all your proceedings. This had entirely taken away all colour for disputes between her majesty's two Houses of Parliament, and many just occasions of complaint from those the Commons represent. This would effectually put an end to that encroachment in judicature so lately assumed by your lordships, and so often complained of by the Commons; we mean the bearing of appeals from Courts of Equity, in your Lordships' House. This would have hindered the bringing of original causes before your lordships, and your unwarrantable proceedings upon the petition of Thomas lord Wharton, complaining of an Order of the Court of Exchequer, bearing date the 15th of July, 1701, for filing the record of a survey of the honour of Richmond and lordship of Middleham in the county of York; an attempt which (contrary to the ancient, legal judicature of parliament heretofore exercised for the relief of the subject oppressed by the power of the great men of the realm) was in favour of one of your own body, to suppress a public record, which all her majesty's subjects had an undoubted right to make use of; an attempt that tends to render all fines and recoveries, and other records upon which estates and titles depend, precarious; and consequently subjects the rights and properties of all the Commons of England to an illegal and arbitrary power.

A due regard to the same rule, would have prevented your lordships entertaining the petitions mentioned at the last conference, which set forth, "That the Lords having given judgment in the case of Asliby and White, viz. That by the known laws of this kingdom, every freeholder, or other person, having a right to give his vote at the election of members to serve in parliament, and being wilfully denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts, against such officer, to assert his right and recover damages for the injury." The petitioners thereupon brought the like actions in their own cases.

Whereby an extrajudicial vote of your lordships is stated as a judgment of parliament and standing law in that case, your lordships having no foundation for the entertaining such petitions, unless, that after having assumed to yourselves the hearing of appeals from courts of equity, you would now bring appeals to your

lordships from the proceedings of the Commons, who are not accountable to your lordships for them.

Your Lordships' second Resolution is, 'That every freeman of England, who apprehends himself to be injured, has a right to seek redress by action at law; And that the commencing and prosecuting an action at common-law, against any person (not entitled to privilege of parliament) is no breach of the privilege of parliament.'

To which the Commons say, that every freeman, and every subject of England, has a right to seek redress for an injury; but then such person must apply for that redress to the proper court, which hath, by ancient laws and usage, the cognizance of such matters; For, should your lordships' Resolution be taken as an universal proposition, all distinction of the several courts, viz. common-law, equity, ecclesiastical, admiralty, and other courts, will be destroyed; and, in this confusion of jurisdiction, the high court of parliament is involved in your lordships' Resolution.

However, the Commons conceive it no wonder your lordships should favour the universal proposition, that all rights whatsoever are to be redressed by actions at law, when your lordships pretend to have the last resort in cases of judicature by Writs of Error; so that your lordships are, in this, only extending your own judicature under the colour of a regard and tenderness for the rights of the people, and liberties of their persons.

The Commons are surprised to find your lordships assert, that the commencing and prosecuting an action against a person not entitled to privilege of parliament, is no breach of the privilege of parliament, since it is most certain, that to commence and prosecute an action which would bring any matter or cause solely cognizable in parliament, to the examination and determination of any other court, is more destructive to the privileges of parliament, than to commence and prosecute an action against a person only who is entitled to such privilege.

That some matters and causes are solely cognizable in parliament, hath ever been allowed by the same judges of law, and is evident from many precedents; and to bring such causes to the determination of other courts, strikes at the very foundation of all parliamentary jurisdiction, which is the only basis and support, even of that personal privilege to which the members of either House of Parliament are entitled; and consequently, to commence and prosecute any action, whereby to draw such causes to the examination of other courts, is equally a breach of the privilege of parliament, whether the defendant, against whom such action is brought, is entitled to the privilege of parliament, or not, which, besides the nature and reason of the thing, is fully evident from the constant usage of each House of Parliament, in committing for contempts only against their

respective bodies, as appears from many precedents upon the Journals of both Houses.

Your Lordships' third Resolution is this, viz.

'That the House of Commons, in committing to Newgate, Daniel Horne, Henry Basse, and John Paton, jun. John Paty, and John Oriat, for commencing and prosecuting an action at common-law against the constables of Aylesbury, for not allowing their votes in election of members to serve in parliament, upon pretence, that their so doing was contrary to a declaration, a contempt of the jurisdiction, and a breach of the privilege of that House, have assumed to themselves alone a legislative authority, by pretending to attribute the force of a law to their declaration: have claimed a jurisdiction not warranted by the constitution, and have assumed a new privilege to which they can shew no title, by the laws and customs of parliament; and have thereby, as far as in them lies, subjected the rights of Englishmen, and the freedom of their persons, to the arbitrary votes of the House of Commons.'

In answer to which, the Commons affirm, that the said commitment is justified by ancient precedents, and by the usage and customs of parliament which is the law of parliament, and the rule by which either House ought to govern their proceedings; and that the terms of assuming to themselves alone a legislative authority, or attributing the force of a law to their declaration, of claiming a jurisdiction not warranted by the constitution, of assuming a new privilege, to which they can shew no title by the law and custom of parliament, and of arbitrary votes; are more applicable to this Resolution of your lordships, which hath no one precedent to justify it.

According to the known laws and usage of parliament, it is the sole right of the Commons of England, in parliament assembled, (except in cases otherwise provided for by act of parliament,) to examine and determine all matters relating to the right of election of their own members.

And, according to the known laws and usage of parliament, neither the qualification of any elector, nor the right of any person elected, is cognizable, or determinable elsewhere, than before the Commons of England in parliament assembled, excepting such cases as are especially provided for by act of parliament.

And were it otherwise, the mayors, bailiffs, and other officers, who are obliged to take the poll at elections, and make a return thereupon, would be exposed to multiplicity of actions, vexatious suits, and unsupportable expences; and such officers would be subjected to different and independent jurisdictions, and inconsistent determinations, in the same case, without relief.

And the exercise of this power by the House of Commons, is warranted by a long, uncon-

tested possession, and confirmed by the act that passed 7 & 8 Gul. 3, cap. 7: and the House of Commons must be owned to be the only jurisdiction that can allow the elector his vote, and settle and establish the right of it; the last determination in that House being by that act of parliament, declared to be the standing rule for the right of election in each respective place. Nor can any elector suffer either injury, or damage, by the officers denying his vote; for when the elector hath named the person he would have to represent him, his vote is effectually given, both as to his own right and privilege, and as it avails the candidate in his election; and is ever allowed, when it comes in question in the House of Commons, whether the officer had any regard to it or no.

In the beginning of the parliament held 28 Eliz. Mr. Speaker acquaints the House, that he had received, by the Lord Chancellor, her majesty's pleasure, That she was sorry the House was troubled with the matter of determining the chusing and returning of knights for the county of Norfolk; that it was improper for the House to meddle in it, which was proper for the Lord Chancellor, whence the writs issued out, and whither they were returnable: that her majesty had appointed the Lord Chancellor to confer therein with the judges; and upon examining the same, to set down such course as to justice and right should appertain.

Nov. 9. A committee was appointed to examine and state the circumstances of the Return of the knights for the county of Norfolk.

And on Friday, Nov. 11, Mr. Cromwell reports the Case of the Norfolk election very largely, in which Report are these following Resolutions: 1. That the said Writ was duly executed. 2. That it was a pernicious precedent that a new writ should issue without the order of this House. 3. That the discussing, or judging of this, and such like differences, only belonged to the said House. 4. That though the Lord Chancellor and Judges are competent judges in their courts, they are not so in parliament. 5. That it should be entered in the Journal-book of the House, that the first election is good; and that the knights then chosen were received and allowed as members of the House, not out of any respect the House had, or gave to the Lord Chancellor's Judgment therein passed, but merely by reason of the Resolution of the House itself, by which the said election had been approved. 6. That there should be no message sent to the Lord Chancellor, not so much as to let him know what was done therein, because it was derogatory to the power and privilege of the said House.

It also appears, that sir Edmund Anderson, lord chief justice of the Common Pleas, was acquainted, that the explanation and ordering of the cause appertained only to the censure of the House of Commons, not to the Lord Chancellor and the Judges; and that they

should take no notice of their having done any thing in it.

Accordingly Mr. Farmer and Mr. Gresham were received into the House, and took the oaths; being admitted only upon the censure of the House, not as allowed by the Lord Chancellor, or the Judges; and so ordered to be set down and entered by the clerk.

And this right of the Commons to determine their own elections, has never been disputed since the Case of sir Francis Goodwin, 1 Jac. 1,* when the Lords would have enquired into the proceedings of the House of Commons upon his election; but the Commons then told their lordships, it did not stand with the honour of the House to give account to their lordships of any of their proceedings or doings.

And in the reasons of their proceedings in that Case, which they had laid by petition before the king, among other things, they say, They are a part of the body to make new laws; yet, for any matter of privileges of their House, they are and ever have been a court of themselves, of sufficient power to discern and determine without the Lords, as the Lords have always used to do theirs without them.

In which Reasons, as well as in their Apology afterwards to that prince, the House of Commons did, above 100 years since, so clearly, and with so much strength of reason, assert their right in the matter of the election of their members. The Commons think it their duty to resist all attempts whatsoever to invade them.

And upon this occasion, it may not be improper to cite the opinion the House of Commons had of the Judges intermeddling in matters of their elections, as they have delivered it in the aforesaid Apology, in these words, viz.

‘Neither, thought we that the Judges’ Opinions, (which yet, in due place, we greatly reverence, being delivered with the common law,) which extends only to inferior and standing courts, ought to bring any prejudice to this high court of parliament; whose power, being above the law, is not founded on the common laws, but they have their rights and privileges peculiar to themselves.’

When the earl of Shaftesbury was lord chancellor, writs were issued, during a prorogation of parliament, for electing members in the room of those that were dead: the king himself was so cautious, as to the regularity of this proceeding, and had so much regard to the privileges of the House of Commons, that at the next session of parliament, Feb. 5, 1672, he spoke to the Commons, from the throne, in these words; “One thing I forgot to mention, which happened during this prorogation; I did give orders for the issuing some Writs, for the election of members instead of those that are dead, that the House might be full at their meeting; and I am mistaken, if this be

not according to former proceedings. But I desire you will not fall to other business until you have examined that particular; and I doubt not but precedents will justify what is done; I am as careful of all your privileges as of my own prerogative.”

Feb. 6, 1672. The House of Commons took that matter into consideration; and several precedents being cited, and the matter at large debated, and the general sense and opinion of the House being, “That, during the continuance of the high court of parliament, the right and power of issuing writs for electing members to serve in this House, in such places as are vacant, is in this House, who are the proper judges also of elections, and returns of their members.”*

Thereupon it was resolved, “That all elections upon the writs issued since the last session are void, and that Mr. Speaker do issue out his warrant to the clerk of the crown, to make out new writs for those places.” Which was done accordingly.

No other court than the House of Commons, hath ever had the determination of the elections, or any cognizance of such causes, except where by acts of parliament directed; and such an action as those against the late constables of Aylesbury, to bring the right of voting in an election in question in the courts of law, is a new invention never heard of before; which (as new devices in the law are generally attended with inconveniences and absurdities) was plainly to subject the elections of all the members of the House of Commons to the determination of other courts.

This undoubted privilege and jurisdiction, the Commons think will warrant these commitments, if the late Declaration, (which is agreeable to, and cannot lessen their ancient right,) had never been made.

For it is the ancient and undoubted right of the House of Commons, to commit for breach of privilege: and the instances of their committing persons, not members of the House, for breach of privilege, and that to any of her majesty’s prisons, are so ancient, so many and so well known to your lordships, that the Commons think it needless to produce them.

And it being the privilege of the House of Commons, to have the sole examination and determination of all causes relating to their elections, as aforesaid, it follows, that any attempt to draw any such causes to the determination of any other court, is a breach of the privilege of the House of Commons; for which the person offending may be committed by the Commons.

And here we cannot but take notice of that unreasonable, as well as unnatural insinuation, whereby your lordships endeavour to separate the interest of the people from their representatives in parliament, who pretend to no privileges, but upon their account, and for their

* See Parl. Hist. vol. 1, p. 998.

* See Parl. Hist. vol. 4, p. 507.

benefit; and we are sorry to say, they are thus severely reflected on by your lordships, for no other reason, but for their interposing to preserve the rights of the people, and their liberties, from your lordships' arbitrary determinations.

Your Lordships' fourth Resolution is, 'That every Englishman who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a writ of Habeas Corpus, in order to procure his liberty by due course of law.'

The Commons do not deny that every Englishman, who is imprisoned, by any authority whatsoever, has an undoubted right to apply by his agents, or friends, in order to procure his liberty by due course of law, provided such application be made to the proper place, and in a proper manner; as, upon the commitments of the House of Commons, (which sometimes are not, as other commitments, in order to bring to trial; but are, in cases of breach of privilege and contempt, the proper punishment of the House of Commons,) the application ought to be to that House.

The Commons are so willing to allow and encourage every Englishman to apply, by his friends or agents, to obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law, that they have not censured any person merely for applying for such Writ of Habeas Corpus, even in cases where by due process of law the prisoners cannot be discharged. For the Commons must observe, that, in many cases a prisoner cannot, upon a Writ of Habeas Corpus, obtain his liberty; as in cases of commitment in execution, or for contempt to any court of record, or by virtue of mesne process, or the like: and in the act of Habeas Corpus, several cases are expressly excepted; and that no person, committed for any contempt, or breach of privilege, by the House of Commons, can be discharged upon a Writ of Habeas Corpus, or by any other authority, than that of the House, during that session of parliament, is plain from the following precedents.

May 23, 1 Jac. 1. Ordered, Jones the prisoner to be sent for hither, and to attend his discharge from the House.

That the prisoners committed by us, cannot be taken from us, and committed by any other.

In May 1675, the House of Commons having resolved, That there lay no appeal to the jurisdiction of the Lords, from courts of equity; and that no member of the House should prosecute any appeal from any court of equity, before the House of Lords; serjeant Pemberton, serjeant Peck, sir John Churchill, and Charles Porter, esq. were committed to the custody of the serjeant of the House, for a breach of privilege, in having been of counsel at the bar of the House of Lords, in the prosecution of a cause depending upon an appeal, wherein Mr.

Dalmaboy, a member of the House of Commons, was concerned.

But the serjeant having been by force prevented from keeping them in custody, the Commons did, the 4th of June, 1675, acquaint the Lords, at a Conference, as followeth, viz.

"We are further commanded to acquaint you, that the enlargement of the persons imprisoned by order of the House of Commons, by the gentleman usher of the black rod; and the prohibition with threats, to all officers, and other persons whatsoever, not to receive or detain them, is an apparent breach of the rights and privileges of the House of Commons. And they have therefore caused them to be retaken into the custody of the serjeant at arms, and have committed them to the Tower."

The said Counsel were afterwards committed to the Tower for a breach of privilege, and contempt of the authority of the House: and the House being informed, that the Lords had ordered Writs of Habeas Corpus for bringing the counsel to the bar of their House,

The Commons then passed the following Resolutions:

June 7. Resolved, *nem. con.* "That no person, committed for breach of privilege by order of this House, ought to be discharged, during the session of parliament, but by order, or warrant of this House. 2. That the lieutenant of the Tower, in receiving and detaining in custody, sir John Churchill, serj. Peck, serj. Pemberton, and Mr. Porter, performed his duty according to law; and for so doing he shall have the assistance and protection of this House. 3. That the lieutenant of the Tower, in case he hath received, or shall receive any writ, warrant, order or commandment, to remove or deliver any person or persons committed for breach of privilege, by any order or warrant of this House, shall not make any return thereof or yield any obedience thereunto, before he hath first acquainted this House, and received their order and directions how to proceed therein."

Ordered, "That these Resolutions be immediately sent to the lieutenant of the Tower."

Afterwards the lieutenant of the Tower gave the House an account, that he had refused to deliver the counsel upon the Lords' Order, signified to him by the black rod, because they were committed by this House; and that after he had received the Votes of this House, he had Writs of Habeas Corpus brought him, to bring the counsel to the House of Lords at ten o'clock the next morning, and humbly craved the direction of the House what to do.

Mr. Speaker intimated to him, he should forbear to return the writs.

And the House came to several other resolutions:

June 9. Resolved, *nem. con.* "1. That no commoner of England, committed by order or warrant of the House of Commons, for breach of privilege, or contempt of that House, ought without order of that House to be, by any Writ of Habeas Corpus, or other authority whatso-

ever, made to appear and answer, and do, and receive a determination in the House of Peers, during the session of parliament wherein such person was committed. 2. That the Order of the House of Peers, for the issuing out of Writs of Habeas Corpus concerning serjeant Peck, sir John Churchill, serjeant Pemberton and Mr. Charles Porter, is insufficient and illegal; for that it is general, and expresses no particular cause of privilege, and commands the king's great seal to be put to Writs not returnable before the said House of Peers. 3. That the Lord Keeper be acquainted with these Resolutions, to the end that the said Writ of Habeas Corpus may be superseded, as contrary to the law and the privileges of this House. 4. That a message be sent to the Lords, to acquaint them, that serjeant Peck, sir John Churchill, serjeant Pemberton, and Mr. Charles Porter, were committed by order and warrant of this House, for breach of the privilege, and contempt of the authority of this House."

March 22, 1698. Charles Duncomb,* esq. having been committed by order of this House, and afterwards discharged by order of the House of Lords, without the consent of this House,

"Resolved, That no person committed by this House can, during the same session, be discharged by any other authority whatsoever.— That the said Charles Duncomb be taken into the custody of the serjeant at arms attending this House."

These are some instances, among many others, that might be produced upon this occasion; and the last cannot but be particularly remembered by some noble lords that then sat in the House of Commons, and strenuously asserted this privilege of the Commons.

Your Lordships' Fifth Resolution, viz. Resolved, 'That for the House of Commons to censure or punish any person for assisting a prisoner to prosecute a Writ of Habeas Corpus, or by vote, or otherwise, to deter men from soliciting, prosecuting and pleading upon such Writ of Habeas Corpus, in behalf of such prisoner, is an attempt of dangerous consequence, a breach of the many good statutes provided for the liberty of the subject, and of pernicious example, by denying the necessary assistance to the prisoner, upon a commitment of the House of Commons, which has ever been allowed upon all commitments by any authority whatsoever.'

The Commons take this to be another instance of your lordships' breach of your own rule, your lordships being no judges of their privileges; though by this Resolution you seem to make a Judgment without having heard, and knowing what the Commons have to allege for them.

This attempt, therefore, of your lordships is of dangerous consequence, tending to a breach of the good understanding between the two Houses, and of most pernicious example. The Commons' late proceeding, in censuring and punishing the counsel that have pleaded upon the return of the Writs of Habeas Corpus, in behalf of the prisoners, if duly considered, is a great instance of the temper of the House of Commons: For this House did not interpose when the prisoners applied to the lord keeper, and the judges, to be bailed: and, had the lawyers shewn so much modesty, as to have acquiesced in the opinion of the lord keeper, and all the judges, that these prisoners were not bailable by the statute of Habeas Corpus, the Commons had never taken any notice of it: but they would not rest satisfied without bringing on again this case; and the privileges of the Commons were, with great licentiousness of speech, denied, and insulted in public court; not with any hope or prospect of relief of the prisoners, (who in this whole proceeding have apparently been only the tools of some ill-designing persons, that are contriving every way to disturb the freedom of the Commons' elections) but in order to vent these new doctrines against the Commons of England, and with a design to overthrow their fundamental right. And, after so much inveteracy shewn to the Commons, they could do no less than declare the abettors, promoters, countenancers, or assistants, of a prosecution so carried on, to be guilty of conspiring to make a difference between the two Houses of Parliament, to be disturbers of the peace of the kingdom; and to have endeavoured, as far as in them lay, to overthrow the rights and privileges of the Commons of England in parliament assembled.

And the Commons, in committing the lawyers, have only done that right to their body which your lordships have frequently practised, in cases of personal privilege, where any single member of your lordships' House is concerned.

Your Lordships' last Resolution, viz. 'That a Writ of Error is not a Writ of Grace, but of Right, and ought not to be denied to the subject, when duly applied for; (though at the request of either House of Parliament) the denial thereof being an obstruction of justice, contrary to Magna Charta.'

The Commons shall not enter into any consideration, whether a Writ of Error is of right, or of grace; they conceiving it not material in this Case, in which no Writ of Error lies, nor was ever any Writ of Error brought or attempted in the like case before; and the allowing it in such cases would not only subject all the privileges of the House of Commons, but the liberties of all the people of England, to the will and pleasure of the House of Lords.

And when your lordships' exercise of jurisdiction upon Writs of Error is considered, how unaccountable in its foundation; how inconsistent it is with our constitution, which,

* See his Trial, vol. 13, p. 1064.

in all other respects, is the wisest and happiest in the world, to suppose the last resort in judicature, and the legislative to be differently placed!

And, when it is considered how that usurpation, in hearing of appeals from courts of equity, so easily traced, though often denied and protested against, is still exercised, and almost every session of parliament extended, it is not to be wondered at, that, after the success your lordships have had in those great advances upon our constitution, you should now at once make an attempt upon the whole frame of it, by drawing the choice of the Commons' representatives to your determination; for that is a necessary consequence, from your lordships' encouraging the late actions, and your countenancing a Writ of Error; which, if allowed upon such a proceeding, might as well be introduced upon all acts and proceedings of courts or magistrates of justice: And though the present instance has been brought on under the specious pretence of preserving liberty, it is obvious the same will as well hold to controul the bailing and discharging prisoners in all cases.

And the Commons cannot but see how your lordships are contriving, by all methods, to bring the determination of liberty and property into the bottomless and insatiable gulph of your lordships' judicature, which would swallow up both the prerogatives of the crown, and the rights and liberties of the people; and which your lordships must give the Commons leave to say, they have the greater reason to dread, when they consider in what manner it has been exercised: The instances whereof they forbear, because they hope your lordships will reform; and they desire rather to compose the old, than to create any new differences.

Upon the whole, the Commons hope, that, upon due consideration of what they have laid before your lordships, you will be fully satisfied they have acted nothing in all these proceedings, but what they are sufficiently justified in from precedents, and the known laws and customs of parliament; and that your lordships have assumed and exercised judicature contrary to the known laws and customs of parliament, and tending to the overthrow of the rights and liberties of the people of England.

Resolved, That a conference be desired with the Lords, upon the subject matter of the last conference.

Ordered, That Mr. Aislaby do go to the Lords, and desire the said conference.

March 7, 1705.—Mr. Aislaby reported, That he having been at the Lords (according to the order yesterday) to desire a conference upon the subject matter of the last conference, the Lords return an answer,

That they do agree to a conference accordingly, and appoint the same presently in the Painted Chamber.

Ordered, That the managers who managed

the last conference, do manage the conference which is to be presently with the Lords.

And the managers went to the conference: and being returned,

Mr. Bromley reported, That they had been at the conference, and delivered to the Lords what the House had directed.

A Message from the Lords by sir Richard Holford and Mr. Pitt. Mr. Speaker, The Lords desire a free conference with this House tomorrow at one o'clock, in the Painted Chamber, upon the subject matter of the last conference.

Resolved, That this House will send to the Lords an answer by messengers of their own.

And the messengers were called in again; and Mr. Speaker acquainted them therewith.

March 8, 1705.—Resolved, That a Message be sent to the Lords, to acquaint them, That when their lordships sent yesterday in the afternoon, after three o'clock, to desire a free conference upon the subject matter of the last conference, the House was just rising; but that this House will meet their lordships at a free conference, as their lordships have desired, at such time as their lordships shall appoint, the time named yesterday by their lordships being now past.

Ordered, That sir Thomas Hanmer do carry the said message.

Ordered, That the managers who managed the last conference, do manage the said free conference: and some others were added to them.

Sir Thomas Hanmer reported, That he having been at the House of Lords, to deliver the message directed by this House, he found that the Lords were just up.

The Serjeant at Arms, attending this House, having acquainted the House, that he had received two Writs of Habeas Corpus under the great seal of England, to bring before the lord-keeper the bodies of James Mountague, esq.; and Alexander Denton, esq.; (who are committed to his custody by warrants from the Speaker of this House for a breach of privilege).

The House again assumed the consideration of that matter: and after debate,

Resolved, "That no Commoner of England, committed by the House of Commons for breach of privilege, or contempt of that House, ought to be, by any Writ of Habeas Corpus, made to appear in any other place, or before any other judicature, during that session of parliament wherein such person was so committed.

"That the Serjeant at Arms attending this House, do make no return of, or yield any obedience to the said Writ of Habeas Corpus; and, for such his refusal, that he have the protection of the House of Commons.

"That the Lord-Keeper be acquainted with the said Resolutions, to the end, that the said Writs of Habeas Corpus may be superseded, as contrary to law, and the privileges of this House."

Ordered, "That the clerk of this House do acquaint the Lord-Keeper of the great seal of England with the said Resolutions."

March 9, 1705.—The clerk acquainted the House, That he did, pursuant to their commands last night, wait upon the right hon. the lord-keeper of the great seal of England, and acquaint his lordship with the resolutions of the House yesterday, relating to the writs of Habeas Corpus; and left the resolutions with his lordship.

Sir Thomas Hanmer reported, That he having been at the Lords with the message ordered yesterday, the Lords do return answer, That they do agree to meet this House at a free conference this day, at two o'clock, in the Painted Chamber.

Then the managers went to the free conference: and, being returned,

Mr. Bromley reported, That the managers appointed had met the Lords at the free conference, which had lasted very long; and that when the managers for the Commons took notice of some invasions of the House of Lords in point of judicature, particularly as to appeals, the Lords broke up the conference.

Ordered, That the managers do draw up what had passed at the conference, and lay the same before the House with all convenient speed.

FREE CONFERENCE.

March 13, 1705.—Mr. Bromley reported, That the managers of the free conference with the Lords had (according to order) drawn up what had passed at the said free conference, which they had directed him to report to the House, which he read in his place, and afterwards delivered in at the clerk's table.

Ordered, That the said Report be entered upon the Journals, and is as followeth, viz.

That the Lords who appeared as managers, and spoke at this free Conference, were, the earl of Sunderland, the lord Ferrers, the bishop of Salisbury, the lord Halifax, the lord Wharton, and the duke of Devonshire, lord steward. That the free conference was begun by the managers for the Lords, who said, this conference was desired to maintain a good correspondence between the two Houses, which was never more necessary than at this time.

That the delivering Resolutions at their first conference was parliamentary; and instanced the Resolutions, 3 Car. 1, which produced the Petition of Right.

That the Lords look upon the Commons to be a great part of the constitution, which cannot be preserved but by doing right to both Houses.

That every part of the body politic, as well as the body natural, ought to be kept within due bounds; an excess in any member will weaken the whole.

That this constitution is the wonder of the world, and glory of this nation; it is founded upon liberty and property: and the House of Commons hath been a great fence and bulwark of liberty.

That the Lords' Resolutions are very well founded, and justified by the laws of the land, as is their judicature in this case.

That it was proper for them to receive the Petitions, and make these Resolutions thereupon.

That the Lords are the great court of judicature; and when the courts below have differed in opinion, there has been resort to the Lords for their Judgment, as in the case of kindred of half-blood claiming shares of intestate estates.

That when such a complaint comes before the Lords, they ought to give their opinion as to the law of the land; and that was the foundation of their present Resolutions.

1. That the first Resolution was, in effect, agreed to by the Commons, though they go off to foreign matters, of which the Lords take no notice.

That the law of the land can be altered only by the legislature.

2. That the second Resolution asserts the subjects' redress by action at law, &c.

That all constitutions have reckoned this their safety; that every man, from the highest to the lowest, hath the protection of the law.

That, according to our constitution, the subject may contest his right with the crown, and upon equal terms, with that respect which is due.

That this Resolution only asserts the right, does not state the respective courts where the redress is to be had: if the party mistakes the court, he is punished by costs of suit.

The term of 'privileged causes' is new, and the distinction unknown.

3. To support the third Resolution, it was urged,

That the breach of privilege was not well grounded.

That it belongs to the crown to make Declarations; the Commons did indeed make Ordinances; and when their prince was murdered, they came to Declarations.

That a law, without promulgation, cannot have force to make an offence.

The liberty of men's persons is the greatest privilege, and not to be taken away, but in known cases; the invading of it has shook the best constitutions.

That the taking away the liberty of one man person, once endangered the government of Rome.

That both Houses may commit for breach of privilege, but cannot declare any thing to be a privilege, without good grounds, nor consequently make any thing a contempt, that is not known to be so.

That commitments, or censures, have not been usual upon actions at law, though such actions have brought the proceedings or privileges of either House in question.

That, in the case of freedom of speech, which is the greatest privilege, there was a Judgment in king Charles the 1st's reign, is

the heat of those times, against some members, for Speeches in parliament: this the Commons first condemned; and then by Conference brought it before the Lords, who came to a Resolution, that it was erroneous, and desired the lord Hollia to bring his Writ of Error; and thereupon it was reversed by the Lords, in the time of Charles the 2nd; which shews the care the Lords had of the Commons' privileges.

That in Soame and Barnardiston's case, the Commons did not concern themselves, only in support of the action, when in 1678, they examined the judgment of reversals as a grievance.

That the Lords had not interposed in any suits, which concerned the proceedings of their House.

That the earl of Banbury* (as he was called) was by the Lords adjudged to be no peer: This was examined in the King's-bench, where, in abatement of an indictment of murder against him, as Charles Knowles, esq. he pleaded his title of an earl; and in avoidance of that, the Order of the Lords was replied, and was examined by the court, and disallowed, did not interpose. [See the Case, p. 447 of this Vol.]

That the late bishop of St. David's was prosecuted in the spiritual court, and deprived, though a member of that House; and the Lords

That it is the wisdom of all governments, to have the law open; and that is the difference between a legal and an arbitrary government.

That the Lords do not meddle with the Commons' right of determining their own elections; they have a settled possession of it, which is a right: But if all the rights of subjects concerned in those elections are to be determined there, that will bring all questions of Freehold, and the allowance of all Charters, and all liberty and property before them.

That a freeholder of 40s. per annum has a right of inheritance to which he is born: and if his Vote is denied, he is damnified, and loses the credit of his Vote; and if he shall only come to the House of Commons, they can neither give him damages nor costs of suit.

That a freeholder cannot be determined by any court which cannot give an oath.

That the precedents produced concern only the right of determining elections in general.

And an action by an elector, for his right of Voting, does not avoid the election.

4. To maintain the fourth Resolution, they said, that it may be lawful for a man to apply for his liberty, where he cannot have it.

That the proceedings in 1675, produced as a precedent in this case, were upon a matter contested differently in the Lords' House: Topham and the lieutenant of the Tower were both turned out; and the ferment was so high, that the parliament was prorogued, and soon after dissolved.

5. The fifth Resolution is a consequence of the fourth:

That the commitment of the lawyers was not for licentious speech, as was insinuated as the last Conference, but for pleading upon the return of the Writs of Habeas Corpus.

That it is the particular character of that odious court called the Inquisition, that nobody dares appear for, or resort to a person imprisoned there, but he is left to the mercy of that court.

The lawyers are not to be answerable for every thing they argue; they are to do their duty for their clients, and the court is to judge of it.

6. The Commons declining the last Resolution is an agreeing to it, though not so parliamentary as it would have been to have agreed it directly.

That the Lords are the only proper judges, whether the Writ of Error lies before them.

To these Arguments the managers for the Commons answered:

That they agreed the necessity of a good correspondence between the two Houses, especially at this time of common danger: and that the Commons had fully shewn their desire to maintain that good correspondence, by condescending to meet their lordships at this free Conference, although their ancient and fundamental privileges had been called in question, and denied by their lordships, and that in an extraordinary and very unparliamentary manner.

That the delivery of Resolutions is so far from being the only method of conferences, that the more usual method has been to offer reasons, without Resolutions; and it would be very difficult to give any instance (before this) of either House delivering positive Resolutions at a Conference, without the reasons, at the same time, to support them, and that induces them to make such Resolutions.

1. That the Commons' Answer to the Lords' first Resolution, is not foreign to the subject-matter of the Conference: because the Commons apprehended the subject-matter to be their lordships denying the privileges of the Commons, on the one hand, and their extending their own judicature beyond its proper limits, on the other: and therefore the Commons could not but take notice, how far their lordships had transgressed in the exercise of an unwarrantable judicature, in contradiction to that very rule they had laid down for the test of the proceedings of the Commons, and by which the Commons had strictly governed themselves.

That the Commons cannot create new privileges; yet, in Coke's 13 Reports, fo. 63, it is said, the privileges of parliament, either of the upper House, or the House of Commons, belongs to the determination or decision only of the court of parliament; for every court hath a right to adjudge their own privileges, according to the book of Ed. 4, sir John Paston's Case:

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* See his Case, vol. 12, p. 1167.

2. To their lordships' Arguments for their second Resolution your managers answered :

That every person injured, hath a right to seek redress ; but then that redress must be sought in the place where the matter is properly cognizable.

3. To what the Lords offered upon the third Resolution, your managers answered :

That matters of election do not belong to the courts below, but only to the House of Commons, which hath been in long possession of them : that there was an act of parliament made in the time of king Henry the 6th, to give an action for a false return of members to serve in parliament, because no such action lay at common-law, it relating to elections.

That double returns not being within that statute, no action lay in the courts of common-law, for making any double return, till the statute 7 and 8 William 3.

That, besides the instances given, in the Answers the Commons gave to the Lords' Resolutions, at the last conference, this distinction as to privileged cases, is fully and undeniably warranted by the statute made in the first year of king William and queen Mary, entitled, ' An Act declaring the Rights and Liberties of the subject, and settling the succession of the ' Crown ;' where, among other endeavours of the late king James, to subvert and extirpate the laws and liberties of the kingdom, these are mentioned, ' by violating the freedom of ' election of members to serve in parliament, ' and prosecutions in the court of King's-bench, ' for matters and causes only cognizable in parliament.'

Besides, that there are privileged cases as well as privileged persons appears from hence ; a prohibition, and afterwards an attachment, lies, for suing in the spiritual court for a temporal cause determinable in the temporal court. There are divers laws within this realm, of which the common-law is but one, as appears in Coke's 1 Inst. fo. 11, b. where he mentions ' Lex, et consuetudo parliamenti, et lex communis,' as distinct laws.

As there are several laws, so there are several courts and jurisdictions, and several causes proper for those several laws and several jurisdictions : of these the high court of parliament is the first : ' Lex et consuetudo parliamenti' is a great branch of the law of England : and many causes are to be determined only by that law, as appears in the Inst. fol. 23.

With such causes as are in their nature parliamentary, and to be determined by the law of parliament, the common-law, and common-law judges have nothing to do ; as further appears, 4 Inst. fol. 14, 15, where the expressions are very suitable to the present controversies.

That the persons persisting in the prosecution of such actions, after a prohibition by the Commons, for that such causes belong to their jurisdiction, the committing them for the breach of their privileges in that particular, is no more

than is done by the common-law courts for a like contempt, when persons will sue, after a prohibition, to the spiritual courts : and the Commons' usual way to defend their privileges against such invasions, has been by committing the tools and instruments thereof.

It is a fundamental maxim of the law and custom of parliament, which is the highest and noblest part of the law of England, and particularly adapted to the preservation of the liberties of this kingdom, that the two Houses are independent of one another, and sole judges of their rights and privileges : that their lordships did admit, the Commons have a privilege to judge of the rights of their own elections, to one intent, but not to another : but if the Commons have such a privilege to one intent, they must be judges of it to all intents and purposes whatsoever ; and being sole judges thereof, their judgment cannot be legally called in question, either by writs of Habeas Corpus, Writs of Error, or otherwise, in any other court ; and consequently the proceedings in Westminster-hall, and in the House of Peers, and the Judgment given there, are all null and void, ' et coram non iudice.'

The Commons' commitment for commencing these actions, is no more than what they and their predecessors have in all times practised, in cases of breach of privilege.

4. In answer to what the Lords had offered upon the fourth Resolution, your managers insisted, that application of friends for the liberty of any person imprisoned, ought to be in a proper place, and in a proper manner, which in this case ought to have been only to the House of Commons, and by the petitions of the persons they had committed.

That the proceedings in 1675, were so well grounded, that they must be precedents to the Commons to follow at all times upon the like occasions.

5. To what the Lords offered upon the fifth Resolution, your managers answered :

The licentiousness of speech used by the lawyers, was only mentioned among other particulars of the provocations they gave the House of Commons ; but they were committed for pleading upon the returns of the Writs of Habeas Corpus, in behalf of the prisoners committed by the House of Commons, which the Commons, who are the only judges of their own privileges, take to be a great breach of the privilege of their House.

6. To the last Resolution your managers insisted, That no Writ of Error lies in that case ; and that there may be cases wherein no Writ of Error lies, was their lordships' opinion in the Case of the late bishop of St. David's,* who brought his Writ of Error upon the courts not granting him a prohibition.

The Case of sir Thomas Armstrong, mention-

* See his Case in the present Volume, p. 447.

ed by their lordships, was particular, in that the Commons then apprehended he was entitled to a Writ of Error, within the meaning of the statute of Edw. 6.

Your managers further urged the novelty of the action in the Case of *Ashby and White*, of which no footsteps can be found in any book of the law, or in any record, although we have faithful reports of all memorable Cases for 400 years past; and the occasion of such an action must frequently have happened.

The Lords themselves, when they had no design upon the privileges of the Commons, were of opinion, in the Case of *sir Samuel Barnardiston*, in the first year of the reign of king William, that no such action lay; and there is no one reason can be offered to maintain this action, but held more strongly in the Case of *sir Samuel Barnardiston*, as damages, costs, &c. And it is an absurd distinction to say, that in this case the right of election cannot come in question, because the determining of the right of the electors doth generally determine the right of the elected; and almost all controverted elections depend upon the qualifications of the electors.

That the Commons had shewn such a disposition to maintain a good correspondence with their lordships, though their lordships in the case of *Ashby and White*, had, contrary to the judgment of the courts below, allowed the action, upon which the plaintiff had taken out execution, and levied the money; that the Commons took no notice of it, and were willing to let the matter fall, which might occasion any contest in this time of public danger: But when other actions of the like nature were still commenced and prosecuted, whereby all elections would be brought to the determination of the Lords, or, at least, in time so influenced, as that the Lords would in effect chuse the Commons, and thereby the independency of the two Houses would be destroyed, which is the great safety of the constitution; then it concerned the Commons, who are the representatives of the people, to oppose what would be so fatal to our constitution.

The bringing Writs of Habeas Corpus upon the commitments of the Commons, and a Writ of Error thereupon before the Lords, would bring all the privileges of the Commons to be determined by the judges, and afterwards by the Lords, upon such Writs of Error.

Nay, such Writs of Error upon every Habeas Corpus, would bring the liberty of every commoner in England, to the arbitrary disposition of the House of Lords.

And if a Writ of Error cannot be denied in any case, and the Lords alone are to judge whether the case be proper for a Writ of Error, then all the queen's revenue, all her prerogatives, and all the lives and liberties of the people of England, will be in the hands of the Lords, for every felon, burglar, and traitor, will be entitled to a Writ of Error before the Lords; and they will have even power of life and death.

And by Writs of Error and Appeals, as already exercised, they will have all our properties: by such new invented actions they will have all our elections: and by such Writs of Habeas Corpus, and Writs of Error thereupon, they will have all our privileges, liberties, and even lives, at their determination: who determine by vote, with their doors shut, and it is not certainly known who it is that hurts you.—The novelty of those things, and the infinite consequences of them, is the greatest argument in law, that they are not of right.

The Commons are not contending for a small thing, but for their all: Especially since the Lords have found out a way to distress the government, by detaining the money given by the Commons, which must come last to them, because the Money-bills must begin with the Commons; and if by that means they can extort Writs of Error where they never were heard of, the Commons must commit the persons employed in all such innovations, or else they must lose, by such contrivances, all that they have.

In the case of *Denzil Holles*, *sir John Elliot*, &c. in 1667, the Commons declared the judgment given in 5 Car. 1, to be an illegal judgment, and against the privilege of parliament; and this they did of themselves, before they acquainted the Lords therewith.

Afterwards, because it concerned the Lords as well as the Commons, they imparted their Resolutions to the Lords, who concurred with the Commons: and the Writ of Error, which was afterwards brought at the desire and instance of the Lords, and not at all by the desire of the Commons, they rested upon their own Resolution, that it was an illegal judgment.*

The Lords, by way of Reply, said further, that this is a cause of liberty and property, and judicial proceedings, which the Commons had endeavoured to stop.

That the Conference, therefore, asked by the Lords, upon the fundamental rights and liberties, was proper.

That they are the same terms the Commons used 3 Car. when their liberties were attacked.

That the true method of conference is not by way of question and answer but by Resolutions, which are not so binding; but if the Lords are convinced by arguments, they may retract them.

That the Lords, sure, may regularly take notice of this printed paper, when it contains such declaration as all persons are bound to take notice of at the peril of commitment.

That the right of the House of Commons to determine their own elections is not in question, or intended to be changed; but the two precedents produced to support them are very much mistakes.

That the case of *sir Francis Goodwin* is not fairly stated, the word 'Order' being omitted in the Commons' Answer to the Lords' Mes-

* See this Case, Vol. 2, p. 294.

sage, relating to the Commons' proceedings in this case; which refers to a particular order of the House of Commons, they having before determined that election. That it is not taken notice that the Lords went with the Commons to the king, and were mediators; and that at the last a new Writ issued for a new election.

That in the stating the precedent, 23 Eliz. the Commons have not taken notice, that the election was in that case determined by the judges.

That the Commons did not confine their resolution to Armstrong's case; but it is general and absolute, that a Writ of Error in felony or treason, is of right and not of grace.

That by the Writ of Error brought in the late bishop of St. David's case, upon the denial of a prohibition, and disallowed by the Lords, it appears, when a record comes improperly before them, they are so just as to dismiss it.

That instead of proving the law, the consequences are urged, which is not right arguing.

That the question is, whether the queen is bound to grant a Writ of Error? If she is, it will be hard for any body of men to interpose with the crown, and stop it to hinder that fiat, which, by the opinion of the judges, she ought to give.

She is obliged too, by Magna Charta: 'Nulli in gravioribus, nulli deferemus, justitiam.'

That whether a Writ of Error lies or not, will afterwards be proper for the judgment of this court, as it is of any other court where a Writ of Error is returnable.

That the Commons are very safe, and may depend the Lords will be as tender of their privileges as of their own.

That whatever privileges accrue to the Commons, will accrue to the Lords also: If the commitments of the Commons are free from the cognizance of the courts below, those of the Lords will be so too.

That 3 Car. the Commons maintained, that the measure of persons beingailable, is not from the authority which committed, but from the cause of commitment.

Your managers further observed, this subject matter was scarce ever in conference before, between the Lords and Commons, and will seem strange to posterity.

That the Lords' concern for liberty and property cannot be equal with that of the Commons; for the Lords' liberty is better fenced, and consequently their property too, than that of the Commons.

The Lords are less interested in the event of this Conference than the Commons, who are the trustees of those who sent them, and are bound in duty and interest to preserve their liberty and property; and having but a triennial duration, which is at this time near expiring, it is not to be imagined they will infringe what they are entrusted with, and so much concerned to maintain; and that so notoriously, that the Lords should complain, who are much less

concerned, but more to be feared, as their designs as well as honour may be hereditary.

At the first Conference, six Resolutions were delivered as matters of undoubted truth and law. And the proceedings of the Commons are to be tried by these rules, though they were no parties to the making them.

1. The first is not to be excepted against; only is an insinuation, as if the Commons had practised the contrary, which they are not conscious of.

2. To the second, there are many injuries for which no action at law is allowed; as if a judge gives a wrong judgment, the redress by Writ of Error is no satisfaction for the damage.

So for other acts of a judge, or court of justice, as denying a Writ of Habeas Corpus, or bail, no action lies but upon the late statute.

That their lordships, not making any distinction between matters and causes, which were exempt from the cognizance of the common law courts, as being solely cognizable in parliament, and causes which were exempt only in respect of the persons sued being entitled to privilege of parliament, seems to be the occasion of the mistakes their lordships have entertained, in relation to the proceedings of the Commons; that the House of Commons is a court of judicature in many respects; and, as such, hath as well as other courts, causes proper and peculiar to its jurisdiction.

That the law books, and particularly the lord Coke, speaks of matters of parliament which are not to be determined by the common law, but according to the law and usage of parliament.

That all matters moved or done in parliament, must be questioned and determined there, and not elsewhere, has been heretofore asserted by the House of Commons, as their ancient and undoubted right, and has been allowed both by the judges of law, and by their lordships. And when the judges in the King's bench, in the fifth year of king Charles the 1st, upon an information against sir John Elliot, Mr. Hollis, and others, held, that matters done in the House of Commons, if not done in a parliamentary way, might be questioned elsewhere; that judgment was afterwards reversed in parliament.

That their lordships allowed all matters relating to elections, ought to be determined solely by the Commons: and though their lordships attempted to make a distinction between the right of elections, and the right of electors, yet their lordships cannot find room for such a distinction, unless they would say, the right and qualification of the electors, was a matter not relating to elections.

That by the Parliament Rolls, 11 Rich. 2, it appears a petition was exhibited by parliament, and allowed by the king, that the liberties and privileges of parliament should be discussed by the parliament, and not by any other courts, nor by common or civil law; and, therefore, when the judges have been asked their opinions

in matters of parliament, they have answered, that the privileges of parliament ought to be determined there, and not by any other; as they did in the case of Thorp, Speaker of the House of Commons, 31 H. 6.

That these matters are not exempt from the determination of other courts, in respect of the persons sued; for then they might be determined there after the time of privilege was expired; whereas it is evident, that such matters and causes cannot be determined in any other courts than that of the parliament, after the expiration of the time of privilege, any more than before.

That these matters are determinable in parliament, although the persons prosecuted are not entitled to the privilege of parliament, as appears by many instances, particularly by that of the mayor of Westbury, in the 8th year of queen Eliz. who, for taking 4*l.* to get a person elected a burgess for that borough, was fined and imprisoned by the House of Commons, although he was not a person entitled to the privilege of parliament.

That it may as well be said, that an action is maintainable for refusing any of the Lords a right of precedency in parliament; yet it cannot be imagined the House of Peers would be content the same should be brought in question, in any the courts of law, and decided by a Jury of Commoners.

But the same arguments will hold for maintaining such an action, to recover damage for refusing precedency to him that hath right to it, as for maintaining an action to recover damages for refusing to take down upon the poll the vote of an elector: For it may with equal reason be said in both cases, that the plaintiff hath a right, that the defendant refused him that right, that such refusal is an injury, and consequently ought to be repaired in damages.

3. As to the third Resolution, the Commons are not accountable to the House of Lords, or any other court, for what they did in that matter.

Their privileges being rights peculiar to that House, what is their privilege, and the breach of it, is only examinable, and to be judged by themselves.

That the courts of Westminster-hall have that deference for each other's judgment, that, in commitments for contempt or misdemeanor, which are frequent every term, another court, though superior, will not redress the prisoner by Habeas Corpus, or otherwise; but he must address to the court which committed him, much less can an inferior court do it.

The House of Commons therefore expected the same deference from those courts which they pay each other; and also from the Lords' House what is due to a co-ordinate jurisdiction: The Commons taking themselves to be superior to any court in Westminster-hall, and not allowing any court in this government to be their superior, no more than their predecessors have done.

The Commons do not intend by their Declaration to make a new law, but barely declare what the law was, and prohibit any person to act contrary.

The term Declaration is not peculiar to the prince, but is a familiar term in Westminster-hall.

The commitment was not for acting contrary to the vote of the Commons, but for acting contrary to law, after the law was notified to them by that Declaration, and they thereby prohibited to proceed in that course.

To set this in a true light, if a man sues in the admiralty, or ecclesiastical court, for a matter properly cognizable at common law, the party shall not indeed be committed for commencing that suit; but if the defendant in such suit obtains a prohibition, which declares what the law is, and gives the plaintiff notice that his suit is contrary to law, and therefore prohibits him to proceed any further therein; if he does proceed, an attachment will issue to arrest him for breach of the prohibition, as it is said, though in truth, it is for acting contrary to law, after he had been admonished what the same was.

Now there is no difference between the Declaration complained of, and the prohibition mentioned, but in the name only; both declare what the law is; both admonish the person offending, and both command him not to proceed; so that there is as much reason to complain of a prohibition at law, as of the Declaration mentioned in the Resolution.

4. To the fourth Resolution, if it respects the prisoners committed by the Commons, they apprehend the application ought to be to their House.

5. For the fifth Resolution, the Commons have the same exceptions to it as they had to the third Resolution: For if counsel, attorneys, or solicitors, are prohibited, and act contrary to the order of any court, they are guilty of a contempt of that court, and for such contempt they may be taken into custody.

To their lordships' last Resolution, it is very true, that in the last reign the House of Commons did so resolve in the case of sir Thomas Armstrong, as hath been cited, which case was, that sir Thomas Armstrong was indicted for high treason, and afterwards fled beyond sea, where he was at the time of the exigent awarded against him; and afterwards, within a year after the exigent awarded, he was brought prisoner into England, and would have a Writ of Error, but it was denied him; upon which the House of Commons made the Resolution mentioned. At the common law, if a person had been guilty of a capital, or any other crime, and had been in England at the time of the indictment found against him, but was beyond sea at the time of the exigent awarded, and thereupon an outlawry was had, the person outlawed might any time afterwards have reversal that outlawry for that Error in Fact; the practice whereupon was, that per-

sons guilty of treason, would fly beyond sea, and there stay till the witnesses against them were dead, and then return into England, reverse their outlawry, and become safe. To remedy which mischief, was the statute of Edw. 6th made, which takes away that Error in Treason, unless the person outlawed rendered himself to the chief justice within a year after the outlawry. Within which exception was the case of sir Thomas Armstrong, as the Commons apprehended, which was the reason of the Resolution: and in other cases the practice since that Resolution has been otherwise; for in the case of Salisbury, who was attainted of Felony for counterfeiting the stamps, a Writ of Error was denied him, though he petitioned for the same. But if this Resolution is aimed at a Writ of Error for denying a Habeas Corpus, or denying to bail, or discharge persons committed by the House of Commons, this Resolution is very wide from the purpose; for, whether a Writ of Error be a Writ of Right, or a Writ of Grace, in all cases where a Writ of Error does lie, yet their lordships' Resolutions cannot be carried so far as to make a Writ of Error lie, in a case where there is no judgment pronounced, as there never is in the case of an Habeas Corpus, or in any thing relating thereunto: for if a Habeas Corpus is denied, or if granted, and the persons thereupon denied to be bailed or discharged, this is no such judgment, but that the same, or any other court, may grant an Habeas Corpus, and discharge or bail the person committed.

Your managers added, The Commons hoped it would be no difficulty to convince the Lords, that these Resolutions were both unreasonable and unparliamentary, and they have not been much justified; and certainly it cannot be parliamentary, or reasonable, for the Lords to condemn the Commons in the case of their own privileges, when the Lords are no judges of them: and therefore, though the Commons have now entered into this debate with their lordships, it was never meant to subject their proceedings to the Lords' examination, but only to satisfy the Lords, and all mankind, that the Commons have not done an extravagant thing. That a noble lord said, they did not intend to interrupt the Commons in the determination of their elections. The Commons are beholden to them for that; for otherwise, when they thought fit, they might as well meddle with that, as several other things they have of late taken upon them.

The Commons hope their lordships will consider what the constitution is, and think it not reasonable, that any part should exceed its due bounds: but there have been great invasions made upon it by their lordships, and some instances of that kind have been delivered at the last Conference; and it would be easy to shew, that the judicature which of late has been assumed by the Lords, is not consistent with the constitution.

A Writ of Error in this case, the Commons take to be such: and the Commons would be

blamable for admitting of it, since no such Writ does lie: and the Commons have done well in advising her majesty not to grant it, since it is against the law: the Commons find no such Writ ever brought.

It is said, their lordships will do right to the Commons upon it; but the Commons can never think it reasonable to trust the liberties of the people of England to their lordships' pleasure, for they that have power to do right, have power to do wrong; and power is so often abused, that the Commons can never suffer the Lords to assume this new power to themselves. Were we certain power could never be abused, an arbitrary, and what is called a tyrannical power, would be the best in the world, for that, not being tied to any rule, would apply the remedies proper in all cases; but since this is not to be expected, the Commons were in the right to stop this Writ of Error: they find one thing has brought on another; and therefore, for the future shall oppose any further progress of this nature.

It was further urged by the Lords, in Reply, that if such a Writ of Error wants a precedent, it is a new sort of imprisonment has occasioned this.

That the consequences urged by gentlemen cannot avail;

That if the law be so, nothing but the legislature can alter it;

That it is said, the Lords cannot judge of the privilege of the House of Commons. They do not say they can; there may be no occasion: but from precedents it appears they have done it by Writ of Error, and at the desire of the Commons;

That not only the Lords, but all mankind will judge of what is not their privileges, if they claim that which neither sense, nor reason, nor law will justify;

That if the Commons say, to bring an action at law against persons not privileged is a breach of privilege, all mankind will say it is not;

That this comes upon a Petition of five men to the Lords, setting forth, they have been imprisoned by the Commons for bringing their actions against the constables of Aylesbury, and for suing out writs of Habeas Corpus, and are at least delayed in a Writ of Error;

The question lies in a narrow compass; Whether they have a right to bring their actions at law; if so, it is injustice to imprison them for doing it;

A hardship to deny them writs of Habeas Corpus, and a greater to imprison their counsel and agents for endeavouring to procure them their liberty;

That their right is settled by a judgment of law, which will ever remain, till altered by the legislature;

That a Declaration of one House, or both Houses, cannot alter the law;

That the Lords intend not to disturb the Commons in their right of judging, only as to their own members;

That the material difference is between judging of the right of the electors, and the right of the elected;

And there may be cases, as here, where the election is not in question, and yet the electors receive great damage in being denied their vote;

That the right of freehold is a man's birth-right, and cannot be taken from him but by law;

That if any person be injured by any officer whatsoever, he may, by law, seek for reparation: otherwise, there is a right without a remedy, which is no right at all.

In answer to this, your managers said, This action is of the first impression; and it is a good argument no such action lies, because none was ever brought before, and especially, because occasions cannot be presumed to have been wanting in every new election of members to serve in parliament, nay, many more justifiable than in the late case of Ashby and White, where the plaintiff was a person likely to become chargeable to the parish, and therefore removed by the order of two justices: and this, by the way, brings in mind the printed Case of Ashby and White, from the Report of the Lords' Committees, where it is given in answer, no such action before was brought, that few had such a true English spirit as that plaintiff, though it is said he was then a cobbler, and formerly had been an ostler; and his breast, it seems, was first warmed with this true English spirit, which was rather a spirit of faction.

And it is worthy observation, that in this case, the costs and charges sustained by Ashby, or somebody for him, could not be less than 100*l.* more than the costs and damages he recovered; so that it was *infelix victoria*, and no benefit, but a loss to him. A noble lord was pleased to say further, that though he would not pretend to judge of the Commons' privileges, yet he might of what was not their privileges. That argument appears very strange, since the Commons say the matter in question is their privilege; and if the Lords saying it is not, is sufficient to divest them of it, the same method may divest the Commons of all the rest. The Commons are not going about to create new privileges, but continue the possession of those which their predecessors ever enjoyed and exercised; and which they think neither this or any other future House of Commons can ever depart from.

The Lords afterwards receded from the generality of their second and last Resolutions.

They said, the second, so far as that every one who apprehends himself injured has a right to seek redress, was general, but what followed of an action at law, was confined to the present case.

So the sixth, though it was general, was to be understood in this particular case.

As to what was said, that none but a superior court can take cognizance of what another

does, it was answered, That when the earl of Shaftesbury was committed by the House of Lords for a contempt, he was brought by a Habeas Corpus to the court of King's-bench; This was complained of to the House of Lords, but they passed it over, being of opinion a man might seek for liberty where he would.

The Lords' judicature is too sacred a thing to be touched.

Your Managers thereupon returned, They wished their lordships had said that at the beginning, it would have saved much time and shortened the debates; for the Commons think their privileges as sacred as the Lords can their Judicature. Your Managers proceeded to say,

That as nothing offered at this Conference, or the last, was meant to submit or lessen the privileges of the Commons; much less had any thing in the precedents, in the time of queen Elizabeth and James 1, produced at the last Conference, any tendency that way.

And, in answer to some objections made to those precedents, your Managers said, The Commons did not take upon them to set forth the whole proceedings, which are very long; but though they had not their books there to make out the quotations, can depend upon what they have stated to be true.

In the precedent of sir Francis Goodwin's case, cited by the Commons, there are no omissions that duly considered can make that case less to the advantage of the Commons, on this occasion; for if the word Order be omitted, and taking the answer to have been, That they did conceive it did not stand with the honour and order of the House to give account of any of their proceedings or doings, that will little alter the case, since it is plain from the entry in the Journal, the Commons in returning this answer, had regard chiefly to the precedent then quoted, 27 Eliz. when the Commons refused to give the Lords any reasons (though the Lords desired them) for the rejecting at the first reading a bill the Lords had sent down to the Commons: the Reasons for the Commons proceedings in this case were prepared by themselves, which they did communicate to the Lords; but the Lords were not to add or diminish: and though some lords were present at the Commons delivering their reasons, there is a material distinction upon the Commons' Journals, of those lords being present as lords of the counsel, and not as lords of the parliament.

And the noble lord who took notice of the Commons' omission in the stating of this case, and pretended to state it fully and truly himself, omitted, that the new writ was ordered to issue at the request of sir Francis Goodwin, by his letter; which, for the satisfaction of the House, was read and entered on the Journal, before any question for the new election was made.

In that of the 28th Eliz. the Commons did not at the last Conference omit to take notice of the judges' determination; but it is justly stated as a matter the Commons in the examination of that case were informed of, but did

not respect; the Commons then asserting themselves to have the sole determination of that case.

Your Managers further urged, Though the Commons do not submit their privileges, it may be proper to ascertain what they claim, with the reasons why they are at this time the more concerned to oppose all attempts upon them.

They do agree the right of voting may be grounded upon freehold, charter, or prescription; and they do not pretend to draw them from the courts of common-law when, as such they come there originally, immediately and directly in question.

But it is as plain, when the right of voting in an election is the thing originally, immediately and directly in question, that is solely cognizable in the House of Commons, whose determination is the standing rule for all places: and if the elections only were examinable by the Commons, and every elector's vote was examinable elsewhere, the consequence of such different determinations is fully stated, as delivered at the last Conference; which common and known difference of coming originally, or collaterally and incidentally in question, will answer the case of the earl of Banbury, where the Order of the House of Lords came only incidentally in question, upon an indictment for murder; nor is here any injury in this case that requires an action, much less damages: the elector's vote, upon every election, depends upon its own true foundation, as the elector then stands entitled by freehold, charter, or prescription, whether he was entitled, or was allowed or refused, at any former election, or not.

Nor is damage always necessary to a remedy; that which is specific and gives the right, is the most noble and complete remedy; damages being only secondary, substituted by way of recompence where the other cannot be had, as appears by many instances in the law.

The Commons had great reason to assert their ancient right, and withstand these late and new attempts upon the constitution, which in every step have been unprecedented, viz. the action, the Habeas Corpus, and the Writ of Error.

The action was never known, though the like occasions have been as frequent as elections, unless these Aylesbury men have more refined notions of their rights and privileges than others ever had.

As to the Habeas Corpus, the argument is so much stronger, as Liberty is dearer than Property.

As to the Writ of Error, though the Lords' Resolution is general, they now assert it to be of right only in this case.

As the Commons, at the last Conference, waved the point of a Writ of Error being of right or of grace, so they do now, not by way of admission, but as it is not material in this case.

But thus much may be observed, that this is

not the common case, where the question arises and falls under the determination of the Judges of the law, which is of petitions of right, and Writs of Error in the courts of Westminster, (as that of sir Thomas Armstrong was) where the queen is party: there it is in the room of a suit against the crown, and if denied, the party has no remedy.

This Petition to the queen, for a Writ of Error in parliament, is properly a parliamentary case, and is the same when the queen is party or not; and seems some remnant of our ancient constitution, where all petitions were to the king in parliament, or to the king and his great council, which was distinct from the House of Peers, and were examined by triers, whether fit for the parliament to proceed upon, or not; and to say, that upon such examination, they could not be rejected, is to say, that examination was insignificant. And, if in this case no Writ of Error lies, it cannot then be said, that the denying of it is an obstruction of justice, or contrary to Magna Charta.

That a Writ of Error lies not in any proceeding on any Habeas Corpus, has been the uniform opinion of former times, as appears in the Case of the City of London, 7 Jac. reported by the lord chief justice Coke, in his eighth Report, where one under an arrest, for the penalty in a by-law, brought his Habeas Corpus, and the judges took it for a ground, that no issue or demurrer could be joined upon the return, nor could any Writ of Error lie upon their award; and upon that, as a principle, grounded their resolution, fol. 128.

And that this never came directly in question, is, because a Writ of Error in such case was never asked, much less had, upon a bare commitment of any court whatsoever: and it is hard to imagine that there is any lawful resort or appeal for liberty left untried at this day, when so many, in all times, have had occasion to apply for it; especially considering the frequent commitments of both Houses of Parliament.

That the Commons are not surprized, to find the Lords make such a shew of submitting their privileges to the courts of Westminster, when it is in order to draw all the rights and privileges of both Houses to their own final determination, and much less when they consider how insignificant all courts of justice are rendered, while their lordships exercise the last resort in judicature.

The several attempts in the way of judicature, which have been made upon the constitution, are so many reasons for the Commons at last to make a stand.

The very form of the Writ of Error in parliament is altered in a most material part.

It is still returnable into parliament generally; and the judgment is entered, 'per Cur' Parliamenti.'

But where the ancient form, which appears in Hestall's Entries, fol. 302, was, 'Ut de com' civio et advincato dominico spiritualium et temporalium ac communitatum in parli'

'mento nostro existentium ulterius pro errore
' corrigendo fieri faciamus quod de jure, &c.'

Of late, as appears by a Writ of Error, printed in the lord chief-justice Saunders's second Report, fol. 228, (and agreeable to that are all the modern ones) that word 'communitatum' is omitted.—This is only touched for an instance, that even the highest Records, which ought to derive to us our laws and constitution pure and entire, have been corrupted.

And to proceed to instance some modern innovations upon our constitution, in point of Judicature:

In December, 18 Jac. 1. it appears by the Lords' Journal, that an Appeal to the Lords from a court of equity, was by them acknowledged to be as new and unprecedented, as any of the attempts which occasion the present Conference—

Here the Lords interrupted your Managers, affirming, That they were restrained from entering into debate of their judicature of appeals from equity, as foreign from the subject-matter of the last Conference. But it was answered, and insisted by your Managers, that this was part of the matter offered at the last Conference.

And your Managers declared, That they had more to offer, and were ready to proceed upon the subject-matter of the last Conference, in such manner as they thought their duty to the Commons of England required, if their lordships thought fit to hear them: whereupon the Lords did rise, and broke off the Conference.

Resolved, "That the proceedings of this House, in relation to the Aylesbury Men, committed by this House for a breach of privilege, and the other proceedings of this House in that matter, are in maintenance of the ancient and undoubted rights and privileges of the Commons of England."

Ordered, "That all the proceedings in relation to the Aylesbury Men, committed by this House, and the Report of the Lords' Journal, and Reports of the Conferences, and of the Free Conference, be printed."

THE PROCEEDINGS AT THE COURT OF QUEEN'S-BENCH ON THE HABEAS CORPUS.

A complaint was made to the honourable House of Commons, That since their last Resolutions in the cause of Ashby and White, several actions have been brought by J. Paty, J. Oviat, J. Paton, H. Basse, and D. Horne, and prosecuted by R. Mead, against the constables of Aylesbury, in breach of the privileges of that honourable House; whereupon they were pleased to order the matter of the said complaint to be heard at the bar of their House, and ordered the persons concerned to attend there; and appointed a day accordingly.

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The parties appeared, (all but Mead) when the witnesses were examined, and they severally called to the bar of the House, and then withdrew. And, upon full hearing, the House were pleased to order their Speaker to issue out warrants for committing them (being taken into custody) to her majesty's gaol of Newgate.

In Michaelmas vacation, 1704, they prayed a Habeas Corpus upon the statute of 31st of Cha. 2, upon the return of which, all the judges met and advised, whether they were bailable by that statute, who were unanimously of opinion that they were not; and accordingly they were remanded. And in Hilary term following, they moved the court of Queen's-bench for a Habeas Corpus by the common-law, which was granted, upon the returns whereof the judges of the Queen's-bench desired the assistance of the rest of the judges, whether they might be discharged? Who were all of opinion, except the lord chief-justice Holt, that they ought to be remanded: but it was argued in the Queen's-bench by counsel, and afterwards the judges delivered their opinion *seriatim*.

Mr. Page, Mr. Mountague, Mr. Lechmere, and Mr. Denton, were counsel for the prisoners, and after the reading of the return of the commitment, Mr. Page said, That the Writ of Habeas Corpus is a writ grounded on common law, and therefore this court can bail all persons, that by the laws of England are bailable; that he did not say, but that the House of Commons hath privileges that belong to them, and may commit for breach of such privileges; that he did now only inquire, if there be any law for the commitment of the prisoners; and therefore the first question he made, was, 'If there was a breach of privilege returned?' Adding, That there being no notice in the return, that the House of Commons has any privilege, he needed not argue, whether they have a power or not, to restrain men from suing in the queen's court. The lord chief-justice Holt told Mr. Page, that the question was, 'If they were not to take notice of their power, though not returned to that court?' Mr. Page answered, That though the court would take notice of any power of the House, yet that not appearing in the return, they could not judge of it, the commitment being by the Speaker, and not by the House. The lord chief-justice replying, That the commitment was in pursuance of the order of the House; Mr. Page subjoined, That then it should be shewn to be by the House, the Speaker being in the chair, which was not mentioned in the commitment. But this was over-ruled by the lord chief-justice, who said, that by the House, was to be understood the whole House sitting, with the Speaker in the chair.

Mr. Mountague continued the same objection to the commitment, adding, That it did not appear, that the prisoners were any ways related to the House of Commons, either as members or officers: That as to the lord Shaftesbury's case, he was a member; that he agreed every court must, and has power to

keep order among themselves, but that to take a man out of the House, who was not of the House, nor guilty of any breach of privilege, for aught appeared, by a return, he knew no law for it; that the case assigned was, because the prisoners had been guilty of bringing and prosecuting an action, which he did not take to be a crime by any known law; that in the case of the constables of Aylesbury, there was a judgment at law judicially given, which could not be got over, until some act of parliament interposed; and the law being so, that a man might bring his action, he did not know what crime a man could be guilty of that used this law; that the words of this commitment went farther, That bringing this action 'is contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges'; that they know not what this word declaration means, neither did they understand what that breach of the jurisdiction was; that as to the words, 'against the known privileges of the House,' he was at a loss what action is against the privilege of the House, because they can have no privilege against law, and he was sure it was not against law to bring any action. Then he took notice, That the commitment was during pleasure; adding, That he had known persons committed 'per Mandatum Domini Regis' bailed, and therefore by stronger reason ought they to be bailed, if committed by the House of Commons.

Mr. *Lechmere* enforced what had been alleged by the other two, adding, That one part of the commitment, which set forth the reasons of it, was for bringing an action at law, contrary to the declaration of the House of Commons, in opposition to which declaration, he must oppose the declaration of the Lords; that this commitment being also said to be for a contempt of the high jurisdiction of the Commons, the Lords, in the case of Ashby and White, had declared against it: Then he urged, That no other courts, save that of the Lords, and the courts at Westminster, and other inferior courts of England, can execute any jurisdiction, touching any actions at law, and that privileges which are against the known laws of England, are in themselves void. Another objection, or exception, was, That the continuance of the imprisonment of the prisoners was a new commitment; That the Habeas Corpus is the way the queen takes to make disquisition about the liberty of her subjects; that though both Houses of parliament are proper judges of their own privileges, yet this court has formerly judged of their privileges, to which purpose he instanced in the Lord Shaftesbury's case,* wherein notice is taken of a case, where an original was filed against a member sitting in the House; and that in the case of the lord Banbury, though the Lords temporal and spiritual had declared he was no peer, yet, in this court, when he was brought to be tried for murder, and denied the juris-

diction here, insisting upon his peerage, this court refused to try him, and allowed his plea; that the laws of parliament are the customs of parliament; that there is no precedent in parliament to oppose or commit a man for prosecuting for his freehold or franchise; but on the contrary, he believed, in the rolls of precedents there might be found a case, where bail had been allowed by this court, upon a commitment of the House of Commons.

Mr. *Denton* excepted to the return of the commitment, alleging first, That the warrant did not sufficiently describe the crime; Secondly, That it did not appear, that the party committed had notice of the vote or declaration of the House of Commons, for every man is not bound to take notice of a vote, because it is but a temporary thing; Thirdly, That it not appearing by his return, that the prisoner was a commoner, he might, notwithstanding any thing that appeared to the contrary, be a lord, and then it must be agreed, the Commons had no jurisdiction: that if it had been a general commitment, without shewing the offence particularly, and said for a breach of privilege only, perhaps it had been a good commitment; but here the cause was set forth, and it appeared by the judgment of the Lords, in the Case of Ashby and White, that was no cause at all of commitment; that bailing the prisoners in this court, did not meddle with the privileges of the House of Commons, because, if bailed yet they are answerable to the House, and are prisoners 'in Custodia Legis;' that indeed justices of the peace can commit for a riot without bail, but this power arises from an express act of parliament for that purpose; that the queen herself cannot commit so as to bind the power of the law, but this court can in such cases, and always have, upon good cause shewn, bailed, notwithstanding such commitments: concluding, upon the whole, for the release of the prisoners.

The Counsel having done pleading, the Judges proceeded to give their respective opinions.

Mr. Justice *Gould* and justice *Powys* said, They would chiefly insist upon 'Lex et Consuetudo Parliamenti', but they would first maintain the form of the warrant.

Obj. It was objected, That it is not set forth in the return, how the House of Commons have a power to commit.

Ans. We must take notice of their power without shewing it.

Obj. That this is a commitment by the Speaker only, for that the warrant does not run, Ordered by the knights, citizens, and burgesses in parliament assembled, according to the precedent in my Lord Shaftesbury's case, 1 Mod. 144.

Ans. That it is good, being according to their form, and that it must be presumed, the Speaker's warrant was by order of the House.

Obj. There is no seal to the warrant, and that every warrant ought to be under hand and seal, or else the commitment is unlawful.

* See it in Vol. 6, p. 1269.

Ans. Courts do not use to commit by warrant under seal, but a justice of peace must; but they at the quarter sessions do not commit under seal; besides, the custom of parliament justifies this warrant.

Obj. This is not like my lord Shaftesbury's case, for he was a member of the Lords House; also this commitment is for a matter done out of the House.

Ans. Then they must never commit for breaches of privileges, for most are committed by others than their own members, and for matters out of the House.

Obj. The duration of the imprisonment during pleasure, is illegal and uncertain.

Ans. This is made use of for their advantage, for they are discharged upon the parliament's rising; but also this form is according to their customs. And for contempts to this court we commit, without expressing for what time, which is by consequence during pleasure.

Obj. This commitment is for bringing their action at law, and for taking the due course of law.

Ans. What is privilege, but dispensing with the law? The generality of breaches of privilege, are for taking the due course of law. As to the case of Ashby and White, that is objected, who knows whether this is the same case? It does not appear to us to be the same, for there may be different votes, and different circumstances in this case; if you go to the scanning the words of a commitment, who knows not that most commitments that would hold for such, do express the cause but shortly, and but just give a hint? And the law does presume, that the higher courts do understand what they do, and therefore are not tied up to such strictness as inferior courts.

Obj. If this court of Queen's-bench can discharge a man committed 'per Mandatum Domini Regis;' they may upon a commitment by any member or body of people whatsoever, if not legally committed.

Ans. That commitment is not good, because the king does not act in person, but hath committed all his power judicial, some in one court, some in another, so that nobody is to be committed to gaol upon the king's special command. But what is done in court is of greater authority, and the law does adjudge it to be done by the king.

Obj. Shall the House of Commons take a despotic power to regulate how actions shall be brought, and what actions shall not be brought?

Ans. Can we suppose that high court would stop the progress of the common law of England? It is highly dishonourable to have such thoughts, and nobody dares think so, or will presume to say so; and people would laugh at one that should say, the House of Commons will take away the liberties of the people.

There is no better way to determine the jurisdiction of either House of Parliament, than by usage and custom, as the bounds of parishes

are. That there is no precedent or case, nor so much as an opinion yet cited, that the courts of Westminster-hall have a power to judge of the authority of the House of Commons, or that the orders and commitment of the House of Commons can be discharged in Westminster-hall, nor ever before attempted to be discharged here, upon such a commitment by the House of Commons; which is a good argument, according to my lord Coke's rule, that we want power to do it.

It would be impossible for us to judge of the privileges of the House of Commons, for there are no printed books of their privileges, nor is there any means by which we can attain to the knowledge of them; but their customs and privileges are kept as Arcanas in the rolls and records of their own House, and their privileges depend altogether upon precedents in parliament; they do judge it as a contempt and breach of their privileges; and who shall say nay? They are proper judges of the matter, and upon the return, it appearing they were committed by the House of Commons, our jurisdiction ceases; and cited Prynne's Animadversions, fol. 4, and the King against sir John Elliot, and others, in Cr. Ch. 181, [and in this Collection as cited above.] That upon a Writ of Error in that case, in the House of Lords, it was resolved, That this court hath no jurisdiction of a misdemeanor committed in parliament.

Mr. Justice Powell. That this is a case of the highest consequence, for it concerns the privileges of the House of Commons, the liberty of the subject, and the jurisdiction of this court; it is the first case of this nature, for the lord Shaftesbury was a member of the House, and there may be a greater jurisdiction in some cases over their own members, than over strangers: however, they had not any authority upon the return, for they are committed by another law than we proceed by: and to be committed by one law, and to judge of the commitment here by another law, would be a strange thing: for the House do not commit by the authority of the common law, but by another law, 'Legem et Consuetudinem Parliamenti;' for there are in England several other laws, besides the common law, viz. the ecclesiastical law, the admiralty law, &c. and there is the law and customs of parliament, where they have particular laws and customs for their directions.

To state judicature will help to clear this case. The House of Lords have a power to judge by the common law, but not originally, but a dernier resort upon Writs of Error and Appeals; and for that reason it is provided by the constitution, for the judges to give their assistance, which they are bound to do. But they have another law, viz. 'Lex et Consuetudo Parliamenti,' which the judges are not to assist in, or give any opinion; and I dare say, the House of Lords would take it ill, should they meddle or advise therein, for they have their privileges in their own rolls and books.

That the Commons have also a judicature, not by the common law, but do judge of breaches of privileges, and contempts to their House, 'secundum Legem et Consuetudinem Parlamenti,' 4 Inst. 23, and by this law these persons are committed, and now are brought to be discharged by the common law. The Resolution of the Commons upon the breach of privileges is a judgment, and the commitment an execution of it, which cannot be controuled; for this would be to draw it *ad aliud Examen*, and then the Commons would not be supreme judges of their own privileges.

That the Resolution in the House of Lords, in the case of Ashby and White, does not bind the House of Commons, nor determine their privileges; for they judged of the privileges of the Commons as an incident to the action, and one court may judge of a matter within the jurisdiction of another court, when without it they cannot determine the case before them; as this court may of admiralty, or ecclesiastical jurisdiction, if the question arises in an action depending in this court. But such a determination will not bind another court, which has an original cognizance of that matter, as in ejectment now depending in the Common Pleas, the general issue pleaded, and a special verdict; the question there is, If a Quaker's marriage be good? Now if it should be held in that court a void marriage, and the judgment should be affirmed in this court, and upon a Writ of Error in the House of Lords, it should be reversed, this would not bind the ecclesiastical court, but they might proceed there for incontinency; and if they should proceed there to excommunication, finding it a void marriage, and the party taken by the *Excommunicato Capiendo* should bring this Habeas Corpus upon the return of it, we could not discharge him. But this is a matter originally arising in parliament.

That this court may keep other inferior courts within their jurisdictions, but not the House of Commons; for no prohibition was ever granted to that court, though they exceeded jurisdiction: so if the House of Lords do exceed, or take cognizance of matters in the first instance, no prohibition would lie; for no inferior court can prohibit a superior: and no prohibition was moved here, nor could we have granted it; for the House of Commons is superior to all ordinary courts of law. When the House of Lords took cognizance, and proceeded upon the petition of my lord Wharton, complaining of an order of the court of Exchequer, for filing the record of a survey of the honour of Richmond, and lordship of Middleton; which the House of Commons, upon the petition of Mr. Bathurst, complaining of this proceeding, Jan. 28, 1703, resolved to be without precedent, and unwarrantable, and tending to the subjecting all the rights and properties of the Commons of England to an illegal and arbitrary power: they also resolved then, that it is the undoubted right of all the subjects of England to make use of the re-

cord; as they ought by law to have done, before the said proceeding of the House of Lords. *Vide postea.*

In 4 Inst. 50. It doth not belong to the judges to judge of any law, privileges, or customs of parliament; for the laws customs, liberties, and privileges of the parliament, are better to be learned out of the rolls of parliament, and other records, and by precedent and continual experience, than can be expressed by any one man's pen.

In 4 Inst. Every court of justice hath laws and customs for its direction; some by the common law, some by the civil and canon law, some by particular laws and customs; so the high court of parliament 'suis propriis Legibus et Consuetudinibus subsistunt.' That judges ought not to give any opinion of a matter of parliament, because it is not to be decided by the common laws, but 'secundum legem et consuetudinem parliamenti;' and Coke says, 'Ista Lex ab omnibus est quærenda, à multis ignorata, à paucis cognita.' Now who shall adjudge this no breach of privilege, when the House of Commons, who are the proper judges of their own privileges, have adjudged it to be a breach of their privilege?

That it is to no purpose to talk of the form of the commitment, if they have not jurisdiction; but there is no such thing as seals of the House of Commons, and this commitment during pleasure does not tend to villenage or slavery, as was objected by Mr. Mountague, unless there could be a perpetual parliament, which there cannot be now, so that might have been spared; and he was glad villenage and slavery were so much forgot, that counsel did not know what it was, or at least did not know how to apply it.

Obj. But it was objected, that they do no more in bringing their actions, than what is adjudged by the House of Lords they may lawfully do.

Ans. That a good correspondence is to be wished for between the two Houses by all true lovers of their country; but when they do not agree, there is no way to settle their jurisdictions, but first by conference and then by free conferences; and the Lords might have desired a free conference, when the Commons took this matter under examination, as the Commons did with the Lords in the case of Skinners, Coke Rep. 13. But it may be said, What if one House persists, and the other does so too? As to that, all free conferences are open, and the people of England may be present, and will be judges, and they will not chuse such persons again as do commit, or do insist upon pretended privileges: so if the Lords do exceed their jurisdiction, the Commons may desire a free conference; and if they do persist, the people will be judges, and will chuse such a parliament as will deal with them.

That the lord Shaftesbury's case is an authority in point, of want of jurisdiction in that

court; and though he was a member of the House, it does not alter the case here, for there are many instances that the House of Commons commit others than their own members: there have been many instances in both Houses, that they may commit persons out of the House. 4 Instit. 23, 24. Moore 57. Ferrar's case in Dyer and Plowden, is a remarkable instance, that no other punishment could be inflicted for a breach of privilege; for he did not know that indictment would lie for breach of privilege; and it would be a strange thing that the House should have power to examine into and judge of a breach of privilege, and yet have no power to punish; for what signifies the power to judge, without the power to punish?

Lord Chief Just. Holt. That this case does depend upon the vote that is recited in the Speaker's Warrant of commitment, which was to this effect:

That it did appear to that honourable House, that John Paty of Aylesbury has been guilty of commencing and prosecuting an action at common law, against W. White and others, late constables of Aylesbury, for not allowing his vote in an election of members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House.

That he owned himself to lie under two disadvantages: one, That all the rest of the judges do agree with his three brethren, from whom he had the misfortune to dissent. The other, That he opposed the votes of the House of Commons, and did begin to think he might justify himself in resigning his opinion to the rest; but that he valued more the dictates of his own conscience, than any thing he could suffer in this world, and by that and his judgment (though it were but weak) he would be guided.

That this was not such an imprisonment as the freemen of England ought to be bound by. And that it did highly concern the people of England, not to be bound by a declaration of the House of Commons in a matter that before was lawful.

That neither House of Parliament has a power separately to dispose of the liberty or property of the people, for that cannot be done but by the Queen, Lords, and Commons; and this is the security of our English constitution, which cannot be altered but by act of parliament.

That there is a crime charged by the vote for commencing an action; but sure that cannot be a breach of privilege, for an original may be filed against a member of parliament during the time of privilege, so that you do not molest him, and it is no breach of privilege; as it was resolved in sir George Binnion's case, 14 Ch. 2; for otherwise, by lapse of time in several actions, he may be barred by the statute of limitations; so that if it be not a breach of privilege to commence an action against a member of parliament, then how can

it be so to commence an action against the constable of Aylesbury?

But then the vote goes farther, and says, for commencing and prosecuting an action; but prosecuting may not be a breach of privilege neither; for entering and continuing is prosecuting, which may be done without a breach of privilege.

That it does not appear, that the constable of Aylesbury has any privilege above another person, for no man is presumed to be privileged, unless it be shewn; and he has no privilege as constable.

That the vote goes yet further, and says, for not allowing his vote in an election of members to serve in this present parliament; but this can be no crime.

That he admitted they were judges of their own privileges; but the law must also be observed. By 2 Ric. 3, fol. 9, it appears, it was no crime by the common law, to bring an action, though never so malicious, false, or groundless, where it is adjudged, that there is no punishment for it, because it was in a method of justice; but when business began to increase, costs were given against the plaintiff by 23 Hen. 8, for bringing an action causelessly. A peer cannot have an action of Scandalum Magnatum, where there is no cause for the action wherein he is charged with scandal; so much the law regarded the right of bringing actions.

That when subjects have such a right to bring actions, it cannot be stopt by privilege of parliament, for no privilege of parliament can intend so far as to destroy a man's right.

That it has been adjudged a good action by the law of the land, and that damages may be recovered for the injury, in not allowing his vote; and this action is the same as Ashby and White, which lies before us; and if we consult the Records, we shall find it to be the same.

That the latter part of this vote is, That the prosecuting this action is contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House.

That the privileges of the House of Commons are limited, for there is no privilege in case of treason, or felony, or breach of the peace; for a justice of the peace may commit a member for breach of the peace, and if he should be indicted for it, his plea of privilege would not be allowed.

That nothing can make a privilege, that was not so before, (for the breach of which a man shall lose his liberty) but an act of parliament.

That each House is judge of their own privileges, because they are more conversant with the privileges of their own House; so the judges decline it; but if they come incidently before the courts of law, they must determine it there.

That suppose the House of Commons had not meddled in this matter, but the defendants in this action had pleaded to the jurisdiction of

this court, that this was a matter examinable only in the parliament, and the plaintiff had demurred, we must then have determined it, and be judges then of their privileges.

Coke's 1 Inst. 'Lex et Consuetudo Parliamenti ab omnibus, querenda, à multis ignorata, à paucis cognita;' and the reason it is known by so few is, because they do not seek for it. We are bound to take notice of the customs of parliament, for they are part of the law of the land; and there are the same methods of knowing it, as the law in Westminster-hall.

In Clarendon's History, part 1, fol. 310. He was lord chancellor of England, a man of great probity and learning; his observations touching privileges of parliament are these:

"It is not to be believed, how many sober, well-minded men, who were real lovers of the peace of the kingdom, and had a full submission and reverence to the known laws, were imposed upon, and had their understandings confounded, and so their wills perverted by the mere mention of privilege of parliament, which, instead of the plain and intelligible notion of it, was, by the dexterity of those Beutifens, and their agents, and the sottishness of the people, rendered such a mystery as could be only explained by themselves, and intended as far as they found necessary for their occasions, and was to be acknowledged a good reason for any thing that no other reason could be given for. We are, say they, and have been always confessed, the only judges of our own privileges, and whatsoever we declare to be our privileges are such; otherwise, whosoever determines that it is not so, makes himself judge of that whereof the cognizance belongs only to us. And this sophistical riddle perplexed many, who, notwithstanding the desperate consequence they saw must result from such logic, taking the first proposition for true, which being rightly understood, is so, have not been able to wind themselves out of the labyrinth of the conclusion, I say, the proposition rightly understood, they are the only judges of their own privileges; that is, upon the breach of those privileges which the law hath declared to be their own, and what punishment is to be inflicted upon such breach; but there can be no privilege of which the law doth not take notice, and which is not pleadable by and at law."

The same part, page 312. "But that their being judges of their privileges should qualify them to make new privileges, or that their judgment should create them such, as it was a doctrine never before heard of, so it could not but produce all those monstrous effects we have seen: when they have assembled to swallow all the rights and prerogatives of the crown, the liberties and lands of the church, the power and jurisdiction of the peers; in a word, the religion, laws and liberties of England, in the bottomless and insatiable gulph of their own privileges." That he had yet a greater authority than this, the opinion of king Charles 1, in his Answer to the Nineteen

Propositions from both Houses of Parliament, in lord Clarendon's History, first part, 498, which Answer is in the king's own words in Rushworth's Collections, 3 vol. part the 1st, 725, 730, 731.

"That though the bringing this action be contrary to the declaration, it does not follow, therefore, that it must be a breach of privilege; for this vote has not obtained the authority of a law, and they have no more power to declare the law, than they have to make a law."

That if bringing an action is a breach of privilege, why was not Ashby laid hold on? He prosecuted to judgment and execution; but these persons are committed for commencing an action.

How can the bringing an action in one court be a contempt to another?

If a man that has a privilege in one court is sued in another, he shall have his privilege: but it is no contempt in the plaintiff that he sues in another court, and there is no punishment for it; much less can it be a contempt to the House of Commons, where no action can be brought.

That he admitted, the House of Commons may commit any person, and for any crime, because they may impeach any person for any crime whatsoever; but that course is seldom taken, unless where the crime requires a strict prosecution, and much concerns the public.

That the lord Shaftesbury's case is not like this; for he was a member of the House, and it was for a contempt in the House.

The House may at any time commit a man for a contempt in the face of the House; whereas the prisoners are committed not for a breach of privilege or contempt, but because they have brought their actions which are legal, and so adjudged by the Lords in the Writ of Error.

That he did not question but that the warrant was a good warrant.

That 'lex et consuetudo parliamenti' is as much the law of the land, as any other law. It is the law gives the queen her prerogative: it is the law gives jurisdiction to the House of Lords; and it is the law limits the jurisdiction of the House of Commons.

That if the ecclesiastical court exceed their jurisdiction, a prohibition will lie; and even the king's acts, if contrary to law, are void.

He insisted that the lord Banbury's case was a great authority for him.

He petitioned the House of Lords to sit, and also to have the king's leave. The Lords determined he was not a lord; yet when he was brought upon an indictment by the name of Charles Knowles, esq. he here pleaded, and insisted, that he was a peer; which plea was allowed, and he was not tried.

Though the Lord Chief Justice was so clear in his judgment, yet the other three judges being of a contrary opinion, the majority prevailed; and the prisoners were remanded to Newgate.

Mr. *Lechmere* moved, That the judgment might be entered upon record.

Lord Chief Justice *Holt* asked the clerk of the crown, How they entered the judgment in these cases? Who answered, that they never make up any roll, but only enter a Remittitur generally upon the back of the writ. L. C. J. *Holt* told him, that of right he ought to make up a roll, (and as he was informed he had the fees allowed for making up the roll), and then bid the counsel come to his chambers, and bring precedents; and afterwards the judgment was entered in this manner:

“The Judgment: *Quia Cognitione Cause Captionis et Detentionis prædictæ non pertinent ad Curiam Dominiæ Reginiæ, Ideo Remittitur.*”

REPRESENTATION AND ADDRESS OF THE LORDS, ON THE COMMITMENT OF THE FIVE AYLESBURY MEN.

March 13. Upon the commitment of these five Aylesbury men, and their being remanded to Newgate, the House of Lords drew up the following Representation and Address,* viz.

* Mr. East, in a Note to his Report of *Burdett v. Abbot* (14 East's Rep. 92), informs us, that “it appears from a MS. of Mr. Baron Price, that on the 18th and 19th of January, 1704-5, Lord Keeper Wright summoned all the judges to attend him for their opinions; having been served with two petitions for writs of Habeas Corpus, by J. Paton and another, two of the five Aylesbury men, who were committed on the 5th of December, 1704, by warrant of Mr. Speaker Harley, by virtue of an order of the House of Commons of the same date, for bringing actions against the late constables of Aylesbury, for refusing their votes in the election there for members of parliament. Application had also been made to several of the judges for writs of Habeas Corpus upon the same occasion. The MS. also contains the minutes of another conference of the judges, held on the same occasion, on the 8th of February, at Serjeants' Inn, by the desire of Lord Chief Justice Holt and the other judges of the Queen's Bench. The Habeas Corpus applied for on this occasion was not upon the statute, but at common law. The prisoners were all remanded. By the same MS. it appears, that after the decision of the court of Queen's Bench upon the Habeas Corpus sued by Paty, by which he was remanded” (as mentioned in the text), “of which a special entry was made of record, (*Quod cognitio causæ captionis et detentionis prædicti Johannis Paty non pertinet ad curiam dictæ Dominiæ Reginiæ coram ipsâ Regina, idem idem Johannes remittitur, etc.*) Paty petitioned the queen to grant him a Writ of Error returnable in parliament. The queen referred it to the attorney and solicitor general, and afterwards to all the judges, who met on the 21st of February, 1704-5, at Serjeants' Inn, whether the queen ought to grant the Writ of Error, of right, or ‘*ex debito vel merito justitiæ,*’ or ‘*ex gratiâ.*’ After de-

The Humble REPRESENTATION and ADDRESS of the Right Honourable the Lords Spiritual and Temporal, in Parliament assembled, presented to her Majesty the 14th day of March, 1705, and her Majesty's most gracious Answer therunto: with their Lordships' Thanks for the same: together with the Papers annexed to the said Address, and laid before her Majesty.*

WE your majesty's most dutiful and loyal subjects, the Lords spiritual and temporal in parliament assembled, are under an unavoidable necessity of making our humble applica-

bate of the question it appears, that of the twelve judges who met at that time, Holt C. J., Trevor C. J., Ward C. B., and Blencowe, Powis, and Tracy, justices, were of opinion, that the Writ of Error was a Writ of Right in this case, and that the queen ‘*ex debito justitiæ*’ ought to grant it; and that Nevill, Powell and Gold, justices, and Bury, Price and Smith, barons, held that the Writ of Error was of grace and favour, and not of right; but Nevill, Powell, Gold, and Bury, afterwards changed their opinion, and agreed with the first six: and on the 24th of February, 1704-5, these Certificates were returned:

‘May it please your majesty;

‘In obedience to your majesty's command, we have considered of the Petition hereunto annexed; and we are humbly of opinion that a Writ of Error in this case ought to be granted of right, and not of grace. But we give no opinion whether a Writ of Error does lie in this case; because it is proper to be determined in parliament, where the Writ of Error and record are returned and certified.

HOLT,	POWIS,
TREVOR,	BLENCOWE,
WARD,	GOLD,
NEVILL,	TRACY,
POWELL,	BURY.

‘May it please your majesty;

‘In obedience to your majesty's command, we have considered of the petition hereunto annexed; and we are humbly of opinion that your majesty is not of right and justice obliged to grant a Writ of Error in this case.

PRICE, SMITH.’

“The Judges all attended the queen at the cabinet on the 25th of February, and delivered these their several resolutions to her majesty, in the presence of the prince, and many of the principal members of the council.”

* Die Mercurii, 14 Martii. It is ordered by the Lords spiritual and temporal in parliament assembled, That the Representation and Address this day presented to her majesty, with her majesty's most gracious Answer therunto, and the Thanks of this House for the same, together with the Papers annexed to the said Representation and Address, and laid before her majesty, shall be forthwith printed and published. MATTH. JOHNSON, Cler. Parl.

tion to your majesty, upon an occasion, which, as it is very grievous to us, so we fear it may be uneasy to your majesty: but the proceedings of the House of Commons, in relation to five burgeses of the town of Aylesbury, John Paty, John Oriat, John Paton, Henry Basse, and Daniel Horne, have been so very extraordinary, that the consequences of such proceedings may prove so fatal to the properties and liberties of the people of England, and so directly tend to the interruption of the course of justice, to the eluding the judicature of parliament, and to the diminution of your royal prerogative, that we cannot answer it to your majesty, to the kingdom, and to ourselves, without setting them before you in a due light.

One Matthew Ashby, a burges of the borough of Aylesbury, brought an action upon the case at common law, against the constables of the town of Aylesbury (being the proper officers to return members to serve in parliament for that place) for having by contrivance, fraudulently and maliciously hindered him to give his vote at an election. In this action a verdict was found for him: but judgment was given against him in your majesty's court of Queen's-bench, which was reversed upon a Writ of Error brought in parliament; where he obtained judgment to recover his damages for the injury, and afterwards had execution upon that judgment.

The five persons above-named being burgeses of the same borough, and having (as they conceived) had the like wrong done them by the constables there, and supposing the law to be equally open to all Englishmen, did severally commence and prosecute actions against those officers, in order to recover their damages. And for so doing, they were sent for to the bar of the House of Commons, and committed prisoners to Newgate, the 5th day of December last, during the pleasure of the House of Commons, as having acted contrary to the declaration, in contempt of the jurisdiction, and in breach of the privileges of that House.

These proceedings are wholly new and unprecedented. It is the birthright of every Englishman who apprehends himself to be injured, to seek for redress in your majesty's courts of justice: and if there be any power can controul this right, and can prescribe when he shall, and when he shall not be allowed the benefit of the laws, he ceases to be a freeman, and his liberty and property are precarious. The crown lays claim to no such power; and we are sure the law has trusted no such authority with any subjects whatsoever. If a man mistakes his case in believing himself to have a good cause of suit, when he has not; if he mistakes his court, by applying to an incompetent jurisdiction, he will fail of relief, and be made liable to costs, but to no other punishment: he is not guilty of a crime, nor is it a contempt of the court that has the proper jurisdiction.

But these men were guilty of no mistake:

the point of law was settled by the judgment of that court, which is allowed to be the last resort; and this will continue to be the law, until it be altered by the legislative authority. They saw their neighbour quietly and unmolested reap the fruit of the judgment he had obtained; and yet, for pursuing the same remedy, they are condemned to an indefinite imprisonment during the pleasure of the House of Commons. This method does introduce an uncertainty and confusion never before known in England. The most arbitrary governments cannot shew more direct instances of partiality and oppression. The point of law is judicially settled; and yet the House of Commons take upon them to punish men by imprisonment, for endeavouring to have the benefit of what is so established for law.

We humbly observe to your majesty, that the first thing they alleged in the warrant of commitment, as the offence of these five persons, is, that those actions were brought contrary to a declaration of the House of Commons.

It was never yet heard (when there was a House of Lords in being, and a king or queen upon the throne) that the House of Commons alone claimed a power, by any declaration of theirs, to alter the law, or to restrain the people of England from taking the benefit of it; nor have their declarations any such authority, as to oblige men to submit to them at the peril of their liberty. If they have such a power in any case, they may apply it to all cases as they please; for when the law is no longer the measure, will and pleasure will be the only rule.

The certainty of our laws is that which makes the chief felicity of Englishmen: but if the House of Commons can alter the laws by their Declarations, or (which is the same thing) can deprive men of their liberty, if they go about to take the benefit of them, we shall have no longer reason to boast of that part of our constitution.

The next thing alleged in the Warrant is, that the commencing and prosecuting these actions, was a contempt of the jurisdiction of the House of Commons. Such a jurisdiction was never claimed by the House of Commons till upon this occasion; and if this novelty of a jurisdiction be founded on their new authority of declaring, they will stand and fall together.

The House of Commons have for a long time exercised a jurisdiction over their own members by allowing or disallowing their elections, as they saw cause: but they have never before entertained a notion, that they had a jurisdiction over their electors, to determine (finally and exclusively of all other courts) the particular rights of those to whom they owe their being.

Your majesty's royal writ commands, that the several electors make choice of persons to represent them in parliament, in order to do and consent to, such things as should be ordained there, relating to the state and defence of the

kingdom and the church, for which the parliament is called; and they obey the command, in proceeding to chuse members for the parliament then summoned; but neither the writ which requires them to chuse, nor the indenture by which the return is made, import any thing whereby it may be inferred, that the electors put into the power of their representatives, their several rights of election, to be finally disposed of at their pleasure.

It was an interest vested in them by law before the election, and which the law will preserve to them, to be exercised again in the like manner, when your majesty shall be pleased to call another parliament.

It was not possible for the electors to suspect that such a pretence would ever be set up by their representatives, when, in the course of so many ages, the House of Commons had never taken upon them to try or determine the right of any particular elector, unless incidently, and only in order to decide a question, of the title of some member of their own House to sit amongst them.

The right of election is a legal interest incident to the freehold, or founded upon custom, or the letters patents of your majesty's royal ancestors, or upon particular acts of parliament, and must be tried and determined like other legal interests; and this consideration does manifestly shew the absurdity of pretending, that such rights can be decided by the House of Commons, where there is neither a power of administering an oath, in order to discover the truth, nor a power of giving damages, which is the only reparation the elector is capable of receiving in such a case. Therefore, if the electors, when they are deprived of their rights, have no place to resort to but the House of Commons, the right of election would be a right without a remedy, which indeed is no right at all.

And it is put into the power of the officers, who have the return of members to serve in parliament, to reject the votes of as many electors as they please, without being liable to make any reparation in damages to the parties; which is a notion not very likely to preserve the freedom and impartiality of elections.

The third thing alleged against these men in the warrant of commitment is, that by bringing these actions they have broken the privilege of the House of Commons. A breach of the privileges of parliament is certainly a great offence; and, of all others, the House of Lords ought to be the last who should go about to lessen or excuse it, as having a like interest with the Commons in the preservation of the privileges of parliament.

But however it might seem the interest of the Lords to be silent, while the House of Commons are setting a-foot new pretences of privilege, because they may share in the advantage: yet we think it our duty and our interest, to do all we can to preserve the constitution entire, and not to sit quiet when we see innovations attempted, which tend to the dimi-

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ntion of the rights of the crown, or to the prejudice of the subject: Because the best and surest way to preserve the rightful privileges of parliament, is to abide by those that are certain and known; and it is not in the power of either, or both Houses, to create new privileges to themselves.

It never was thought a breach of the privileges of parliament, to prosecute an action against any man, who was not entitled to privilege of parliament; and therefore since the late constables of Aylesbury had no title to privilege of parliament, at the time when those actions were commenced or prosecuted, we cannot imagine, upon what foundation the pursuing these actions can be voted a breach of privilege by the House of Commons.

It seems very necessary it should be known upon what rule this pretence is grounded, that the people of England may be at a certainty, and see some limits set to the claims of privilege. To serve the turn, it has been said, there are privileged cases, as well as privileged persons; but no instance has been produced, whereby this distinction can be applied to justify these commitments.

Actions at common law have been brought upon false returns and double returns of members to serve in parliament, as in the cases of sir Samuel Barnardiston and Mr. Onslow, which proceeded to Judgment, and a Writ of Error was brought in one of them, and the plaintiffs could not prevail in either of those suits; and yet it was never pretended, that the commencing or prosecuting those actions was a breach of privilege of parliament; nor were the persons concerned in them imprisoned or censured, though there was a much greater colour for such pretence in those cases, because the question there directly concerned the right of sitting in parliament; and consequently those would have been indeed privileged cases, if any such distinction had been once thought of in those days: Whereas in the actions brought by these five men, neither the plaintiffs nor defendants were members of parliament, nor did the actions relate in any manner to the right of sitting there.

The opinion of the House of Commons at that time was very different from what it is now.

When the Judgment of the King's-bench (where sir Matthew Hale sat then Chief Justice) which passed in favour of sir Samuel Barnardiston, that the action was maintainable, was reversed in the Exchequer-chamber, the House of Commons was so far from thinking it for their advantage, to have their members deprived of the benefit of the common law, that in the year 1679, a committee was appointed to enquire touching the reversing that Judgment, and by whose procurement and solicitation, and by what ways and means the same was reversed, and the names of the particular judges that were concerned: And when afterwards that Judgment in the Exchequer-chamber was affirmed in parliament, the

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House of Commons never thought themselves secure against the corruptions of the officers who were to take the poll, and make return at elections, till they had got an act in the 7th and 8th years of the late king, which gave a remedy in Westminster-hall for false and double returns; so little contented were they, in their own cases, with the jurisdiction of the House of Commons, and the remedy to be had there, which now they so fiercely contend their electors should entirely acquiesce in: And we cannot but think it manifest partiality in those gentlemen, to go about, by such violent means, to deprive their electors of recovering of damages, when they are wronged in being deprived of giving votes, since they thought it necessary for themselves to have that advantage, when they are injured in their own elections.

The sufferings of these unfortunate men have not ended here, and the rights of the free-born subjects of England have received a farther and no less dangerous wound in their persons.

These five men having endured a long and chargeable imprisonment, and despairing of their liberty any other way, were advised to sue out Writs of Habeas Corpus, returnable in your majesty's court of Queen's-bench, hoping to obtain their discharge by the help of that court, where the Judgment ought to be given according to the laws of the land, without regard to any Votes, or Declarations, or commands to the contrary: But this endeavour proved unsuccessful, and they were remanded to Newgate by three of the judges of that court, contrary to the opinion of the Lord Chief Justice Holt.

We shall not presume to offer any opinion to your majesty, upon occasion of this Judgment, at present, because it is not regularly brought before the House; and we only mention it, because the House of Commons took such offence at the bringing these Writs of Habeas Corpus, that, on the 24th of February last, they voted, that whoever had abetted, promoted, countenanced or assisted the prosecution of those writs, were disturbers of the peace of the kingdom, and had endeavoured, as far as in them lay, to overthrow the rights and privileges of the Commons in parliament.

This is a heavy charge; and if it be so criminal a thing for a prisoner to pray a Habeas Corpus, it does not only affect those who are at present concerned, but ought to touch every commoner of England in the most sensible manner.

Liberty of person is, of all rights, the most valuable; and of which above all other things, the law of England is most tender, and has guarded with the greatest care, having provided writs of several kinds, for the relief of men restrained of their liberty, upon any pretence, or by any power whatsoever; that so in every case they may have some place to resort to, where an account may be taken of the reason and manner of the imprisonment, and the subject may find a proper relief according to his case.

No crime whatsoever does put an Englishman into so miserable a condition, that he may not endeavour, in the methods of law, to obtain his liberty; that he may not, by his friends and agents, sue out a Habeas Corpus, and have the assistance of solicitors and counsel, to plead his cause before the court where he is to be brought.

The court is bound by the law to assign him counsel, if there be occasion, and to give Judgment upon his case, as it stands upon the return of the Habeas Corpus, and to remand, discharge, or bail the prisoner, as the cause of his commitment appears there sufficient or insufficient in law; and if what is alledged as the cause of imprisonment appears to be no crime in law, it is not the authority of those who made the commitment, that can excuse that court for remanding the prisoner.

This is the law of England: But, according to these Resolutions of the House of Commons, if a man has the unhappiness (though through ignorance or mistake) to do an act which shall be voted a breach of privilege, he becomes in a worse condition than any felon or traitor; his confinement makes it impossible for him in person to solicit and procure a Habeas Corpus, and, if any have charity enough to assist him, or to plead for him, in order to show to the court the insufficiency of the commitment in matter of law, they become liable to lose their own liberty, and are involved in the same guilt of breach of privilege; So that let the imprisonment be upon the most trifling occasion imaginable, if it be by order of the House of Commons, every commoner must submit to it without redress, no friends can help them, no other authority can deliver them, till your majesty shall put an end to that session.

The Lords have as just a concern as the House of Commons can have, to maintain the authority, and keep up the awe of parliamentary commitments: and they will always do it, as far as justice and the usage of parliaments will allow.

There have been cases particularly that of the earl of Shafteshury, where persons committed by the House of Lords, even members of that House, have sued out writs of Habeas Corpus; and upon the returns of those writs, have been brought before the court of King's bench, and their counsel have been heard on their behalf; and yet no censure ever passed upon them for these endeavours to obtain their liberty, or upon their agents, solicitors or counsel.

The House of Commons formerly acted with more reserve upon so nice an occasion, as the liberty of the subject; for in the year 1680, when a writ of Habeas Corpus was served upon the serjeant at arms attending the House of Commons, in the behalf of Mr. Sheridan, who stood committed by order of that House; after the House was made acquainted, that such a writ was served upon their officer, and had entered into very long debates upon the matter, they did not think fit to interpose nor to pass any

censures upon the persons concerned in procuring the writ, or in appearing in behalf of the prisoner; but left the serjeant at arms at liberty to obey the command of the Habeas Corpus; which he did accordingly, by carrying his prisoner before the judge, where the Habeas Corpus was returnable.

The House of Commons have, in former ages, shewn a great and steady concern for the freedom of the persons of their fellow subjects; and upon their petitions many excellent laws have been made, to protect liberty against all unlawful restraints by any authority, even that of the crown: but now it is insisted that their own imprisonments are out of the reach of those laws, and their legality not to be examined.

In the 3rd year of the reign of your royal grandfather, the House of Commons made a noble stand for the English liberties, and shewed, by undeniable evidence, that the causes of the imprisonment must be expressed in all cases, that so it might appear, upon the return of the Habeas Corpus, whether they were sufficient in point of law.*

It could not then have been imagined, that the successors of those men would ever have pretended to an arbitrary and unlimited power of depriving their fellow subjects of their liberties, or to vote it to be criminal so much as to enquire into the validity of their commitments.

There is another occasion of offence, which the House of Commons have taken against John Paty and John Oviat, two of these prisoners, who thinking themselves wronged in their being remanded to Newgate, by the opinion of the major number of the judges of the court of Queen's-bench, humbly petitioned your majesty for a Writ of Error, in order to bring this judgment before your majesty in parliament: and it is certain the subject is never concluded by any judgment, till he comes to the last resort fixed by the law in this case.

The House of Commons being informed of these petitions, came to a Resolution, which they laid before your majesty, that the commitments of that House were not examinable in any other courts whatsoever; that no Writ of Error lay in this case; and that as they had expressed their duty to your majesty in giving dispatch to the supplies, so they had an entire confidence in your majesty, that you would not give leave for the bringing any Writ of Error.

The first position in this vote is very general, and the consequences of it are plain; if the commitments of the House of Commons are examinable in no other place, then no man in England, how innocent soever, is secure of his liberty longer than the House of Commons pleases; and men may be allowed at least to wish that it were not so, though they

may have a very high opinion of the justice of that House.

It has been held as an undeniable maxim, that whoever executes an illegal command, to the prejudice of his fellow subjects, must be answerable for it to the party grieved.

Let it be supposed then, that an action of false imprisonment was brought against the serjeant of the House of Commons, and that the defendant justifies his taking the plaintiff into custody, by virtue of a warrant of that House, and it appears upon the face of the warrant, that the cause of the commitment was no crime in law, and the plaintiff demurs, what must the judges do in such a case? will it be possible for them to avoid examining into the commitment, and so give judgment one way or other? Or can it be pretended, that a Writ of Error may not be brought upon such a judgment? and is not the court, before which the Writ of Error is brought, under a necessity to do justice thereupon, as the law requires?

As to the second thing they have taken upon them to assert, that no Writ of Error lies in the case, we affirm to your majesty with great assurance, that, by our constitution, the House of Commons have no right or pretence to determine whether that be so or not, the right of judgment when a Writ of Error is properly brought, is by law entrusted to that court to which the Writ of Error is directed; and therefore we shall not at present say any thing to your majesty, in an extrajudicial way, and before the proper time as to that point, whether a Writ of Error brought upon a judgment for remanding prisoners upon a Habeas Corpus, can be maintained.

Which way that question will be decided hereafter, when the Writs of Error are returned into the parliament, is not at all material, in respect to the petitions of the prisoners which now lie before your majesty: For, unless your majesty be pleased to grant the Writs of Error according to their prayer, the matter cannot come to the proper decision in parliament, and justice will be manifestly obstructed.

Whether the Writs of Error ought to be granted, and what ought to be done upon the Writs of Error afterwards, are very different things. The only matter under your majesty's consideration is, whether, in right and justice, the petitioners are not entitled to have the Writs of Error granted.

We are sure, the House of Commons, in the year 1689, was of opinion, that a Writ of Error, even in cases of felony and treason, is the right of the subject, and ought to be granted at his desire, and is not an act of grace and favour, which may be denied or granted at pleasure: So that as far as the opinion of the House of Commons ought to have weight in such a question, (whatever the present opinion of that House is) they then thought a Writ of Error was the right of the subject in capital cases (where only it had been at any time doubted of.)

* See the Case of Darnel and others, vol. 3, p. 1.

But that it is a Writ of Right in all other cases, has been affirmed in the law-books, is verified by the constant practice, and is the opinion of all your present judges, except Mr. baron Price, and Mr. baron Smith.

The law, for the better protection of property and liberty, has formed a subordination of courts that men may not be finally concluded in the first instance: But this is a very vain institution, if they be left precarious in the method of coming to the superior court.

All suits are begun, as well as carried on, by the authority of your majesty's writs, and the subject has a like legal claim to all of them.

The petition for a Writ of Error returnable in parliament, is only matter of form and respect to your majesty, (like the petition which the Speaker makes in the name of the Commons, at the beginning of every parliament, for those privileges which they do not believe to depend upon the answer to those petitions) and is no more to be refused than any other writ throughout the cause.

To affirm the contrary, is to allow an arbitrary latitude to intercept justice, and to make it depend upon private advices, and extrajudicial determinations, whether any causes at all shall be brought to judgment before the high court of parliament.

These things being considered, how extremely surprising is an address from such a body as the House of Commons, that your majesty would not give leave for such a writ?

And no less surprising is what they insinuate, as the reason of their confidence in your majesty, that you would hearken to such an address, that they have given dispatch to the supplies: They proceeded surely in the matter of the supplies, with a nobler aim, for the safety of your majesty's crown and person, and for the delivering the kingdom from the oppression of French power, employed to set an unjust Pretender upon your majesty's throne.

These are good reasons for disposing of the people's money. Their liberties, and all that is valuable to them, depend entirely upon the good success of the war; and they have used, in all ages, to part freely with their money, for the defence of their liberties and properties, and the removing of grievances and oppressions.

But this is the first time a House of Commons have made use of their having given the people's money, as an argument why the prince should deny Writs of Right to the subject, obstruct the course of justice, and deprive them of their birth-rights.

On the 26th of February, the House of Commons proceeded to carry on their resentments to greater extremities, and voted, that the gentlemen who pleaded as counsel for the five prisoners, upon the return of the Writs of Habeas Corpus, and the agents and solicitors who assisted them, were guilty of a breach of privilege, and ordered them to be taken into custody, which order has been executed.

This seems to be so great an excess, that

it is hard to find words proper for expressing it. When Cromwell committed Mr. Maynard to the Tower, for assisting one Coney as his counsel, upon a Habeas Corpus, a celebrated author expresses the detestation due to such a fact, in these words: 'It was the highest act of tyranny that ever was seen in England: 'It was shutting up the law itself close prisoner, 'that no man might have relief from, or access 'to it.' But as strange and unjustifiable as this appears, we beg leave to take notice of another thing yet more irregular (if it be possible:) While the matter was depending before your majesty, upon the petitions for Writs of Error; after the House of Commons had made an Address to your majesty, that you would not give leave for the bringing Writs of Error; after your majesty had, by your gracious answer, signified to them, 'That this matter relating to the course of judicial proceedings, 'was of the highest importance, and therefore 'your majesty thought it necessary to weigh 'and consider, very carefully, what was proper 'for you to do;' and after they had voted to take this very Answer of your majesty's into consideration: The day following, they ordered the five prisoners to be removed from Newgate, and taken into the custody of the serjeant at arms attending the House of Commons; and this Order was executed at midnight, with such circumstances of severity and terror, as has been seldom exercised towards the greatest offenders.

Your majesty is the only proper judge how highly disrespectful this action is to your royal person and authority. But it concerns us to say, that such a proceeding tends directly to the depriving the petitioners of that justice, which they were endeavouring to obtain by means of the Writs of Error.

While your majesty was deliberating how to put an end to a matter, which they only had made difficult by an unreasonable address, the House of Commons rightly apprehended, that justice would prevail with your majesty over all other considerations, and therefore (as far as possible to disappoint the prisoners of the fruit they expected from these Writs of Error, when granted, they transferred them, in the mean time, to another prison.

This practice of removing prisoners from one custody to another, has been ever complained of, as manifest oppression, and most evidently destructive of the liberty of the subject: it is a mischief provided against in express words, by the act made in the reign of your royal uncle king Charles the 2nd, For better securing the Liberty of the Subject; That if any person, being a subject of this realm, shall be committed to any prison, or in custody of any officer whatsoever, for any criminal, or supposed criminal matter, that the person shall not be removed from the said prison or custody, into the custody of any other officer (unless it be by Habeas Corpus, or some other legal Writ;) and this upon the great penalties mentioned in that act. The penalties in the act were now,

but the law of England was the same before the making it. The shifting of men from one prison to another, while they are using means in the course of law to recover their liberty, is inexcusable cruelty, and against the plain rules of natural justice; for by such artifices, imprisonments, however unlawful, might be made perpetual, and the subject, as he was at the point of being discharged from one prison, might be, without end, removed to another.

May it please your majesty, your dutiful subjects, the Lords spiritual and temporal, were so solicitous to avoid any thing which might give a pretence to interrupt the necessary and early provision for the war, in order to improve the wonderful successes God had given to your arms; that though they were sensible the imprisonment of these men, in the manner, and upon the pretences abovementioned, was a manifest attempt to elude the judicature of parliament, and of pernicious example to the liberty and property of the subject, yet they forbore to take notice of it, till they were in a manner enforced by Petitions from the prisoners, presented the 24th of February last, and by the unjustifiable proceedings of the House of Commons the same day, which we have already mentioned to your majesty.

But then the Lords found it absolutely necessary to enter into a consideration of the whole matter, as it appeared to them; and upon the 27th of February they came to the following Resolution:

“Resolved, That neither House of Parliament have power, by any vote or declaration, to create to themselves new privileges not warranted by the known law and custom of parliament.

“That every freeman of England, who apprehends himself to be injured, has a right to seek redress by action at law; and that the commencing and prosecuting an action at the common law, against any person, who is not entitled to privilege of parliament, is no breach of the privilege of parliament.

“That the House of Commons, in committing to the prison of Newgate, John Paty, John Oviat, John Paton, Henry Basse, and Daniel Horne, for commencing and prosecuting actions at the common law, against the late constables of Aylesbury, for not allowing their votes in the election of members to serve in parliament, upon pretence, that their so doing was contrary to a declaration, a contempt of the jurisdiction, and a breach of the privilege of that House, have assumed to themselves alone a legislative authority, by pretending to attribute the force of a law to their declaration, have claimed a jurisdiction not warranted by the constitution, and have assumed a new privilege, to which they can shew no title by the law and custom of parliament, and have thereby, as far as in them lies, subjected the rights of Englishmen, and the freedom of their persons, to the arbitrary votes of the House of Commons.

“That every Englishman who is imprisoned

by any authority whatsoever, has an undoubted right, by his agents or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law.

“That for the House of Commons to censure or punish any person for assisting a prisoner to procure a Writ of Habeas Corpus, or by vote or otherwise, to deter men from soliciting, prosecuting, or pleading upon such Writ of Habeas Corpus, in behalf of such prisoner, is an attempt of dangerous consequence, a breach of the many good statutes provided for the liberty of the subject, and of pernicious example, by denying the necessary assistance to the prisoner upon a commitment of the House of Commons, which has ever been allowed upon all commitments, by any authority whatsoever.

“That a Writ of Error is not a Writ of Grace, but of Right, and ought not to be denied to the subject, when duly applied for, (though at the request of either House of Parliament) the denial thereof being an obstruction of justice, contrary to Magna Charta.”

These Resolutions were delivered to the Commons at a Conference, the 28th of February, and they took time to consider of them till the 7th of March; upon which day, at their desire, a second Conference was had, and though it was too apparent by what was delivered by the Commons at that Conference (which consisted of injurious invectives against the House of Lords, and tedious recitals of precedents in no sort applicable to the present subject of debate) that their design was either to provoke the Lords to such a degree, as might necessitate them to break off all correspondence, or by engaging them in new matters, to draw things to such a length, as might prevent the bringing these debates to any issue during the session; yet the Lords immediately desired a Free Conference, which was afterwards had with the Commons.

We are so desirous that your majesty should be made fully acquainted with all the passages relating to this dispute between the two Houses, that we humbly beg leave to annex to this our Representation, what passed at the first and second Conferences; and also (as far as we have been capable of recollecting in so short a time) the substance of what was said at the Free Conference, and in our debates, in maintenance of the Resolutions of the House of Lords.

But we take it to be a duty necessarily incumbent on us, to observe to your majesty, the manner in which we have been treated by the House of Commons at these Conferences; so that from thence your majesty, according to your great wisdom, may judge to what such proceedings do naturally tend. They told us, that the judicature of the House of Lords was unaccountable in its foundation, and inconsistent with the constitution; if they mean it is so ancient, that no account can be given of its foundation, it is true; but there is reason to believe it began with the monarchy, and we are sure it has continued without interruption, un-

less during that unhappy interval, when a pretended House of Commons destroyed the Church and the Monarchy, as well as the House of Lords: as many ages as the constitution of the English government has lasted, this judicature has consisted with it, and formed a noble and necessary part of it, and therefore these gentlemen will hardly be believed against so long an experience, that it is inconsistent with the constitution.

They also charged the Lords in direct terms, with usurping the hearing appeals, with making advances upon the constitution, with contriving to bring liberty and property into the bottomless and insatiable gulf of the Lords' judicature, and with direct reproaches, as to the manner in which that judicature has been exercised, and in the most contemptuous way told us, they forbore to mention the instances, because they hoped we would reform.

We desire no other judge but your majesty, how such a treatment of us becomes these gentlemen; and we dare appeal to all your subjects, for witnesses of the irreproachable manner of administering justice in the House of Lords.

We hope the great displeasure the House of Commons has conceived against us may prove of some real service, and of useful caution to your majesty, for it has drawn them directly to own (what was too visible before) that they were aiming at more power, and a larger share of the administration, than is trusted with them by the nature of our government. They directly complained, that by the constitution, the judicature in the last resort, was not placed in the same hands with the legislature, though they cannot shew it to be so in any country where the government is not arbitrary, and the prince's will the law. They have been long endeavouring to break in upon the Lords' share in the legislature, of which we could mention too many instances to your majesty. From an ancient claim, that aids to the crown are to begin in the House of Commons, and that the Lords could not alter the sums, they have of late years pretended (but without any reason, and against the known usage of parliaments) that we could make no alterations in any parts of a money-bill, though it have no relation to the money: and, upon that foot, when they have had a mind to get any thing passed into a law, of the reasonableness of which they have despaired to convince the Lords, they have tacked it to a money-bill, in order to put the crown and the Lords under that unhappy necessity, either to agree to a law they might think prejudicial to the public, or to lose the money, which perhaps, at that time, was absolutely necessary to the saving the kingdom.

By this method they assume to themselves the whole legislative authority, taking in effect the negative voice from the crown, and depriving the Lords of the right of deliberating upon what is for the good of the kingdom; For this reason the Lords had, in a very solemn manner, resolved never to suffer such imposi-

tions for the future, let the importance of the bill be never so great. This resolution was well known, and yet in this present session (as appears by the printed Votes of the 28th of November last) a great number of the gentlemen of the House of Commons, to the manifest danger of disappointing the supplies of the year, which must have been the ruin of the whole confederacy, and delivering up of Europe into the hands of France, made an attempt to tack to the land tax a bill which had been rejected in two precedent sessions of parliament.

Thus the House of Commons have formerly set on foot several attempts, against that share in the legislature which is placed in the Lords: But this is the first time they have published their desire, to be let into the judicature of parliament.

Whatever they would insinuate upon this occasion, we desire not to meddle with the choice of the Commons' representatives, we willingly leave that matter where it is, and in what manner it is exercised there, how impartially and how steadily, is so well known by experience to most parts of the kingdom, and so universally understood, that the people will be extremely desirous their estates and properties should be subject to such determinations.

It is not strange the Free Conference ended without success, when the Commons came to it with such a temper, as appears by the Votes of the 8th of March, made after they themselves had consented to the Free Conference. If those Votes had been published soon enough, it would have fully convinced the Lords, how vain a thing it was to confer with them farther, upon the matters in debate at the former Conferences; for, not content with what they had done before, upon information that their Serjeant had been served with two Writs of Habeas Corpus, returnable before the Lord Keeper (Wright) in behalf of Mr. Mountague and Mr. Denton, two of the gentlemen who had been of counsel with the five prisoners, they came to a Resolution, That no commoner, committed by them for breach of privilege, or contempt of the House, ought to be, by Habeas Corpus, made to appear before any other judicature, and required their Serjeant to make no return, or yield any obedience to those Writs; and that for such refusal he had the protection of the House of Commons.

It has been always held the undoubted prerogative of the crown, to have an account of the reason why any subject is deprived of liberty, and it has ever been allowed, that, by the known common law, it is the right of every subject under restraint, upon demand, to have his Writ of Habeas Corpus, and thereupon to be brought before some proper court, where it may be examined, whether he be detained for a lawful cause: and the statutes made in the reign of your royal grandfather and your royal uncle, have enacted, that, in all cases, Writs of Habeas Corpus be granted and obeyed by the respective officers upon great penalties.

But these Votes import a direct repeal of those laws, as to all persons committed by the House of Commons.

It is no longer worth disputing, whether a person committed by them, though for a fact which appears to be both lawful and necessary, may be delivered by any court; for by this new law he shall never be brought thither, and the Serjeant is not only warranted, but commanded openly to condemn your majesty's royal Writs of Habeas Corpus, brought upon the act of 31 Charles 2, which is an invasion of your prerogative, never before heard of in England.

Your majesty does not claim an authority to protect any of your officers for disobeying a known law. The Habeas Corpus act, in times of imminent and visible danger, was in the late reign suspended by acts of parliament for some short time, and yet (so sacred was that law held) that those acts passed with great reluctance, and one of the arguments that prevailed most for agreeing to that temporary suspension was, that it would be an unanswerable evidence to all future times, that this act could never be suspended afterwards, by any less authority than that of the whole legislature. But we live to see a House of Commons take upon them to suspend this law by a Vote.

They ordered, that the Lord Keeper of your great seal should be acquainted with their Resolutions, to the end the writs of Habeas Corpus may be superseded, as contrary to law, and the privileges of their House. They are contrary to no law, but that of these Votes, which surely are none of the laws the Lord-Keeper was sworn to observe: but yet he is to act at his peril. They have ordered this law to be published to him by their clerk.

The Lord Keeper is a Commoner, and if he disobeys, it is a breach of privilege; and if they should carry it so far, as to order him into custody, he may seek, but is not to have relief from any Habeas Corpus.

We humbly beg pardon of your majesty for this long and melancholy Representation, which we could not avoid, without being guilty of treachery to your majesty, and to our native country. The five persons immediately concerned are but poor men; but we well know your majesty's justice and compassion extends itself to the meanest of your subjects.

The matters in dispute are of the highest consequence: Your majesty's prerogative, the reverence due to laws, and the liberties and properties of all the people of England are concerned and at stake, if these encroachments prevail.

We do not pretend to solicit your majesty to put a stop to these innovations, your own wisdom will suggest the most proper methods: We have endeavoured to do our duty, in laying the whole matter before you.

We humbly beg leave so far to resume what has been said, as to present your majesty a short view of the unhappy condition of such of your subjects, as have right of giving votes for

chusing members to serve in parliament, which has been hitherto thought a great and valuable privilege; but, by the late proceedings of the House of Commons, is likely to be made only a dangerous snare to them, in case they who may be hereafter chosen to serve in parliament, shall think fit to pursue the methods of this present House of Commons.

If they refrain from making use of their right in giving their Votes, they are wanting in their duty to their country, by not doing their parts towards the chusing such representatives as will use their trust for the good of the kingdom, and not for the oppression of their fellow-subjects.

If the officer, who has the right of taking the suffrages, refuse to admit them to give their Votes, they must either sit down by it, and submit to be wrongfully and maliciously deprived of their rights; or if they bring their actions at law, in order to assert their rights, and recover damages for the injury (as all other injured men may do in like cases), they become liable to indefinite imprisonment, by incurring the displeasure of those who are elected.

If, being thus imprisoned, they seek their liberty by Habeas Corpus, (the known remedy of all other subjects) they do not only tie their own chains faster, but bring all their friends and agents, their solicitors and counsel, into the same misfortune with themselves.

If they think themselves to have received injury by the judgment upon the Habeas Corpus, and seek relief by Writ of Error, (the known refuge of those who suffer by any wrong judgment) all that assist them in that matter are likewise to lose their liberties for it, and they themselves will be removed to new prisons, in order to avoid the justice of the law.

We humbly conclude with acquainting your majesty, that we have been informed by the petition of two of the prisoners, that they have been long delayed, though they have made their applications in due manner for Writs of Error: We are under a necessary obligation, for the sake of justice, and asserting the judicature of parliament, to make this humble Address to your majesty, that no importunity of the House of Commons, nor any other consideration whatsoever, may prevail with your majesty to suffer a stop to be put to the known course of justice, but that you will be pleased to give effectual orders for the immediate issuing of the Writs of Error.

The Queen's Answer.

To which her majesty was pleased, the same day, to return the following most gracious Answer:

"My Lords; I should have granted the Writ of Error desired in this Address: But, finding an absolute necessity of putting an immediate end to this session, I am sensible there could have been no further proceeding upon that matter."

Vote of Thanks.

Ordered, by the Lords spiritual and temporal in parliament assembled, that the humble thanks of this House be presented to her majesty, for her most gracious Answer, in which she has expressed so great a regard to the judgment of this House, so much compassion to the petitioners, and such tenderness to the rights of the subject.

The same day the Queen came to the House, and put an end to the session, and the lord-keeper prorogued the parliament to Tuesday the 1st of May, which put an end to this affair.

[The substance of what was offered by the Lords, at the first and second Conferences with the Commons, being already printed in the Proceedings of the Commons, see p. 813. 817, et seq. is the reason it is not here again inserted. Former Edition.]

Some of the Arguments that were made use of by the Lords in their Debates, and at the free Conference, to maintain their own Resolutions, and answer the Objections of the Commons.

The House of Commons made two objections to the manner in which the Lords proceeded at the first Conference: they said, they had anticipated all debates, by delivering positive resolutions, whereas this is the proper and ordinary method of proceeding between the two Houses: When one House has formed an opinion, they communicate it to the other, to the end that if it be found reasonable, it may be approved; or, if upon examination it be disliked, the causes of the disagreement may be shewn, in order to convince the other House of their mistake.

The second objection made to the manner of the Lords' proceedings was, that the Resolutions were grounded upon the petitions of criminals, who had fallen under the just displeasure of the Commons, and upon a printed paper not regularly before the House of Lords.

As to the first part of the objection, the Lords did (as just judges always do) consider the matter of the petitions, and not the persons of the petitioners. And as to the second part, the Lords said, the printed paper mentioned by the Commons, was the votes of the House of Commons, of the 24th of February, signed by the Speaker. If the Commons had disowned that paper, there had been some weight in this objection, but if they think it regular to print and publish their votes to the people, the Lords will always think it regular to take notice, and make use of those papers as they see occasion; and it seemed strange for the Commons to object to the taking notice of their votes, when the only colour they have hitherto pretended for their first displeasure at the five prisoners was, that they did not take notice of some votes of theirs, (which they call their Declaration) made during their last session. And the print-

ing their votes is the only method they have yet taken, for the promulgation of the new laws they take upon them to make.

The Lords had no occasion to say any thing in defence of their first resolution, because the Commons did not think fit to avow in words, that they had a power to create new privileges by their votes, though they have manifestly attempted it in practice, and particularly in the case of the five prisoners.

As to the unjust reflections which the Commons made upon the House of Lords, as if they had entertained original causes, and were guilty of some encroachment in hearing appeals from courts of equity;

The Lords avowed their claim of a jurisdiction, in hearing and determining appeals from Courts of Equity, and could shew a continued exercise of it, more ancient than the determination of elections in the House of Commons, which yet the Lords do not go about to call in question: but they deny their having meddled with any original causes, or that the case particularly mentioned by the Commons was at all of that nature.

The Lords did not understand what the Commons meant, by saying, The Lords had founded their second Resolution upon an extrajudicial vote. The judgment in the Case of Ashby and White was given with great deliberation, and founded upon undeniable reasons and unquestionable authorities: and the Lords condescended so far in that matter, as to direct the state of that Case, and the grounds of that judgment, to be drawn up and printed.

2. The second resolution of the Lords consists of two assertions: First, That every man who apprehends himself to be injured, has a right to seek redress by action at law.

Secondly, That the prosecuting actions at the common law, against any person, not entitled to privilege of parliament, is no breach of privilege.

What the Commons objected to the universality of the first part of that Resolution, as if it would destroy all distinctions of courts, and make a confusion of jurisdictions, did arise only upon a plain mistake. The Lords mentioned actions in general, without confining what they said to actions at common law, or affirming that actions for all sorts of injuries may be brought in any one court.

As to the insinuation, that the Lords had no other aim than to extend their own jurisdiction, by the seeming regard and tenderness they shewed for the rights and liberties of the people; the answer is, The only just way of interpreting men's meaning, is, by observing what they act.

The Lords have acted with true regard to liberty and property on this occasion, as well as in all others: they have voluntarily owned themselves to be restrained, at the same time they desire the Commons not to go about to create new privileges: the Lords claimed nothing new; and the Commons cannot with

reason desire them to give up what the law and the constitution have placed in them, the Judicature in the last resort.

The principal thing insisted upon by the House of Commons against this Resolution, was, That there are privileged cases, as well as privileged persons; but they do not think fit to give any instances of such privileged cases as were anyways applicable to the matters in dispute, that is, That were so entirely of the connuance of the House of Commons, that the bringing an action at common law in those cases was a contempt to the House of Commons; and unless that could be done, this distinction of privileged cases from privileged persons, will have no weight to justify the commitment of the five Aylesbury men: If men mistake and bring actions in Westminster-hall, for matters cognizable in parliament, so that they can have no relief in the courts below, it does not follow from thence, that they ought to be committed for breach of privilege on that account.

The determining of elections is admitted to be the business of the House of Commons, and yet it is certain, that the prosecuting actions at common law, for false or double returns, was never thought to be a contempt to the House of Commons, nor was any body punished or committed upon that account, in the cases of sir Samuel Bernardiston and Mr. Onslow.

The freedom of speech in parliament, is the most necessary and the most acknowledged privilege of the House of Commons: and yet when an information was brought in the King's-bench against sir John Elliot, and others, for words spoken in the House of Commons, and judgment was given against them in that court, the Commons did not think it sufficient to condemn that judgment by votes of their own House, but brought those votes up to the Lords, and desired their concurrence, which was given; and immediately thereupon a Writ of Error was brought in parliament, and the judgment regularly reversed there: And it cannot be denied, that upon this occasion the most valuable privilege of the House of Commons was brought under the judgment of the Lords, as well in their judicial as in their legislative capacity.

The case of Richard Strode, and the act of parliament which passed upon that account, in the fourth year of king Henry the 8th, was that which was principally insisted on by the House of Commons, in the Case of sir John Elliot, for justifying their undoubted privilege of freedom of speech, and shewing the injustice of what was done in that case by the court of King's-bench.

The Case of Strode might be used by the Lords as another instance, to shew, that this distinction of privileged cases will not serve the purpose of the House of Commons, to justify the commitments of the Aylesbury men. He was prosecuted in the Stannary courts for words spoken, and bills offered in the House of Commons, in order to be passed into laws,

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and upon that account was imprisoned and condemned to pay considerable sums, and petitioned the House of Commons to be relieved in that matter. The House of Commons did not then pretend to put a stop to those suits, or to commit the persons concerned in them, but thought the only remedy against those prosecutions, and others of like sort, was to prepare a bill, in order to be passed into a law, for making void the judgments against Strode; and took that occasion by the same bill, to declare the law in general, and to give an action to all persons who should be afterwards vexed or molested for the like causes, in which they should recover treble damages and costs of suit.

There is no case that can more properly be called a privileged case, with respect to the House of Peers, than the determining of peerage; and yet if that matter comes to be incidentally a point, in any case depending in the courts in Westminster-hall, they must proceed to determine of it, as they think the law to be; and the Lords have not gone about to hinder it, nor found fault with them upon that account.

The courts in Westminster-hall must of necessity judge of the privileges of parliament in many cases: when any person prays a writ of privilege, (which was always the way anciently when men desired the benefit of privilege, and it is often practised yet upon occasion) the court where the writ is prayed must judge, whether the party has right to privilege or not.

Suppose the serjeant of the House of Commons should kill, or be killed, in the execution of a warrant of that House; upon an indictment for murder, the court must necessarily judge of the legality of the warrant.

The Commons supposed cases of affronts to the person of the Speaker, or of reproachful words spoken of the whole House of Commons, are instances of what they called privileged cases.

There is no doubt, but either of these cases would be contempts, and such as might be punished by the House; but most certainly, these were also such offences as might be prosecuted in Westminster-hall: and if the attorney-general should bring informations upon them, it could never be pretended, that he would be guilty of a breach of privilege of the House of Commons.

It was urged, that in privileged cases, the votes of the House of Commons were like prohibitions to the ecclesiastical courts, and that when prohibitions were served upon the judges in the admiralty, or ecclesiastical courts, it was a contempt for them to proceed farther.

The answer to this is, that prohibitions to the ecclesiastical and admiralty courts, were founded upon a particular reason: the proceedings in those courts are according to the civil or canon law, and therefore it was necessary to preserve the constitution, and restrain those courts from making invasions upon the

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common law, that a guard should be set upon them, and a power fixed to restrain them; and this power is lodged in the courts of Westminster-hall, who are trusted with the issuing writs of prohibition, to the ecclesiastical and admiralty courts from time to time, upon complaints made to them: and these writs of prohibition must be served personally upon the judge of the admiralty, or the ecclesiastical judges, who will be liable to attachments if they proceed after such service, until such time as they have shewn the nature of the suit to the courts from which the prohibition issued; and if the suit be properly of ecclesiastical, or admiralty cognisance, the court must grant a consultation, whereby they are at liberty to proceed again. This is a known and settled method of legal proceedings, but the votes of the House of Commons were never yet resembled to the queen's writs: no court is bound to take notice of them; on the contrary, the judges are bound not to take notice of them, but to act according to the known law; nobody has power to prohibit the courts in Westminster-hall; the judges there are sworn to proceed to do justice, notwithstanding any command under the great seal, or privy seal, or by any other authority whatsoever: and the subjects of England have no longer an inheritance in the common law, if the judges are to take notice of the votes of either House of Parliament, and regulate their judgments accordingly.

The votes would not always be uniform in either House, and it appears by the present dispute, that the two Houses might often differ in matters of importance, and the judges would be under difficulty which of the Houses to obey: and if they yielded obedience to both, they would be obliged to act very contradictorily.

3. What was said against the third resolution of the Lords, was, first, that thereby the Lords took upon them to judge of the Commons' privileges: to this it was said, that if the House of Commons, under the name of privilege, would proceed to do things inconsistent with the known prerogatives of the crown, with the known privileges of the Lords, contrary to the laws, or destructive to the liberties of the people, the Lords were bound to tell them, these were not their privileges. If by saying, they only are judges of their own privileges, they would deprive the crown and the Lords from taking notice of manifest innovations, and objecting to them as there was occasion, the Commons might take to themselves the whole government without controul.

They were challenged to produce precedents to warrant the commitments of men, only for proceeding in suits at law against those who had done them wrong, and had no pretence of privilege.

The Lords did not dispute the power of the Commons, in examining and determining the

elections of their own members, nor of enquiring into all matters relating to the determination of that question, particularly their examining into the qualifications of electors, and agreed that what they determined would be binding, as to the right of the member to sit in the House: but that determination would not bind the right of any elector, for he was no party to that dispute of the election, he was not heard for himself, nor was his cause in agitation before the House; and the action brought by the elector has no manner of relation to the sitting of the member, but is only for recovery of damages upon account of the particular injury done him by the officer at the election.

Suppose there was a contest about two persons, which was mayor of a town; the court where that cause was tried, in order to a determination of the right, must perhaps examine into the rights of those who voted; but would it be pretended, that the electors would be bound by the opinion of the court in that case, and that they could not bring their actions to recover damages against the officers who wilfully refused their votes, however the question was decided as to the mayor? So that it was begging the question to pretend, that because the House of Commons can try the right of the member to sit, therefore they only have a power to decide finally the rights of the several electors.

There is no weight in the objection, that if these suits were allowed, the officers who are obliged to take the poll would be exposed to multiplicity of actions.

The law is so in all cases of elections of officers: he who is to take the poll, is bound to do his duty at his peril; if he acts with an honest intention, though he should be guilty of a mistake, he is in no danger, for no jury ought to find him guilty: but if an officer wilfully and maliciously refuses to admit those who have right to give their votes, every one of them may sue him in any proper court, as they see cause; and the more he wrongs, the more he ought to suffer. And which would be the greater mischief, that the officer who does injustice should be subject to actions, or that he should be at liberty to reject as many rightful votes as he thinks fit, without being liable to make any reparation? and which is the part a House of Commons ought to take? The Lords observed, that the natural order of things seemed to be quite inverted in this dispute; the House of Commons were taking part against the freedom of law, against the liberty of men's persons, and against the right of their electors.

As to the several precedents insisted upon, they conclude nothing to the present question, every one of them relating to the right the House of Commons claims of determining the elections or returns of their members, which they are in the quiet possession of; and the general expressions which are found in the relation of these precedents, can be understood

only with respect to the subject-matter of those cases.

The first precedent, in the 28th of queen Elizabeth, is of a double return for the county of Norfolk. Though the Lords do not deny, that such cases are proper to be determined by the House of Commons; yet this precedent does not go far towards asserting their right; for in that case the second writ was quashed by the chancellor and judges, before the determination made by the House of Commons: and in the citing this precedent, they have not rightly stated the words of the queen's message or of the resolutions of the House of Commons, as will appear by sir Simon D'Ewe's journal; and they could not say they had any original journal of that time.

As to the second precedent they cited, which is the case of sir Francis Goodwin, in the first year of king James the first, which they made use of to prove their own power of determining elections, and that they were not to give an account of their proceedings therein to the Lords: it appears by their own journal, that they had not stated that case fairly; and that in fact, the Lords, at the desire of the Commons themselves, were mediators between them and the king in that dispute; and that the Commons at last yielded the point; and notwithstanding their determination in favour of him, submitted, that a new writ should issue for choosing a member in the place of sir Francis Goodwin. And though there be mention in the journal of a letter wrote by sir Francis Goodwin, desiring, that this third writ should issue; yet that could make no difference in the case; for it will not be pretended, that a member could give up the right of his electors, and the judgment of the House.

But all this makes nothing to the justification of the commitment of the Aylesbury men.

The precedent cited in 1672, relates only to the right of issuing writs for the election of members during the continuance of the parliament, the ordering of which was voted to be in the House of Commons only, and is not at all disputed at this time.

The Lords never disputed the Commons' power of committing for breach of privilege, as well persons who are not of the House of Commons, as those who are: the question is only, whether a matter that has no relation to the sitting of any member in parliament, may be made a breach of privilege, by being called so in a vote, or having that name given to it in a warrant of commitment? That is, in other words, whether they have power to create to themselves new privileges by their votes? For they will never be able to prove an usage of committing men for resorting to law in such cases, and it will be hard for them to convince those whom they represent, that this arbitrary oppressing poor men, is or can be understood to be only an interposing to preserve the rights and liberties of the people of England.

4. The Commons did not deny the Lords' fourth Resolution, otherwise than by saying, that the application was to be made to the proper place, and that where the commitment is by the House of Commons, there is no place to apply to for liberty but that House.

The Lords thought this to be a position very fatal to liberty; for it places an arbitrary and absolute power of commitment in the House of Commons. Tyranny may be in many as well as in a single person: the thirty tyrants of Athens carry that name with as heavy an imputation as any single person.

The Lords never said, that every prisoner who brings his Habeas Corpus ought to be discharged, or that there are not cases excepted out of the Habeas Corpus act; what they insist upon is, that a prisoner brought before a proper court by Habeas Corpus, where it does appear that the matter he stands committed for is no crime in law, ought to be discharged, by whatsoever authority he was committed, or by whatsoever name the fact is called in that commitment.

Several precedents were mentioned by the Commons. First, the case of one Jones; but it did not appear who he was, nor what his case was, nor who would have taken him from the Commons; and therefore there can be no pretence to draw any inference from such a precedent.

The Lords wondered to find any weight laid on the votes passed in the year 1675. It is well known the kingdom was at that time generally grown weary of that parliament, which had been continued above 13 years; and there was a great number in both Houses who watched for any advantage to make their longer continuance impracticable.

And there happening a question at that time, whether there might be a proceeding in appeals before the House of Lords, in cases where members of the House of Commons were parties? This was so managed, that in about a month's time matters were grown to such a height between the two Houses, that all correspondence was in a manner broken off between them; and they proceeded to make such votes, and to do such acts from day to day on either side, as they thought would most provoke.

The Commons cited some of these votes which were passed in their House towards the height of the contest, and the Lords might as well have cited other votes of the House of Lords, in contradiction to them, which were altogether as high, and are at least of as much authority as those of the House of Commons: so that it is hard to imagine, what use there can be of citing such precedents, which did occasion two prorogations, one after the other, and must always have as bad consequences whenever they are followed.

The House of Commons took the same exception to the Lords' fifth Resolution, as they did to the third: that they therein made themselves judges of the privileges of the House of

Commons: and the Lords contented themselves with giving them the same answer.

What the House of Commons said in respect to their censuring and punishing the counsel, who pleaded at the Queen's-bench bar, upon the return of the Habeas Corpus in behalf of the prisoners, seemed very remarkable; that it was because they were not so modest as to acquiesce in the opinion of the lord-keeper and the judges, that the prisoners were not bailable by the Habeas Corpus act; and they would not have taken notice of them, but because they would not rest satisfied, but would bring on the cause again, where the privileges of the House of Commons were with great licentiousness of speech denied and insulted in public court, without any hopes or prospect of relief of the prisoners, but in order to vent new doctrines against the Commons.

This seemed to be a kind of excuse for the committing of the counsel; but it does in no sort agree with the votes relating to this matter, which passed in general terms, and may be cited for precedents hereafter, for committing counsel (with as good reason as the votes in 1675.) when these secret motives, which induced the House of Commons in this case, will not appear.

The vote of the 24th of February, ordered the committee to examine what persons had been concerned in pleading upon the Writ of Habeas Corpus, not what was said by counsel in their pleadings; and the votes against the several gentlemen of the 26th of February, are, that by pleading upon the return of the Habeas Corpus on behalf of the prisoners, they were guilty of breaking the privileges of the House of Commons. It does not appear that there was any complaint of what they said, at least there was no vote against them for their words; and indeed, if the charge against them had been for words supposed to be spoken, it would have been an unaccountable hardship to have hurried them into custody, without ever bringing them to the House to hear their accusation, or to be heard as to what they had to say for themselves.

It does not appear that these gentlemen were ever heard, or indeed were at all concerned, as to the Writs of Habeas Corpus, brought before the lord-keeper and the judges in the vacation-time: but suppose they had, and suppose they were satisfied, that as the Habeas Corpus act was drawn, these men might not be so clearly bailable by the judges in vacation-time, by virtue of these Writs, which were formed upon that statute; and yet they might be of opinion, that the prisoners had a reasonable prospect of obtaining relief upon Writs or Habeas Corpus brought at common law.

If they thought so, it was not upon slight grounds, as appeared by the consequence; for the lord-chief-justice of the court of Queen's-bench, whose learning and judgment is well known, and as universally esteemed as his integrity, was clearly of opinion, that they were entitled to the relief they prayed for their clients.

The Commons may give what hard words they please to these gentlemen's appearing to plead in behalf of the prisoners upon the Writs of Habeas Corpus; they may call it inveteracy shewn to the Commons, and a conspiring to make a difference between the two Houses, and to disturb the peace of the kingdom: but after all that can be said, the fact will only be, that four gentlemen, lawyers by profession, retained in a case of liberty upon a Habeas Corpus brought by five poor prisoners, did their duty in their profession; and for doing so, were themselves imprisoned by the House of Commons, and denied the benefit of the Habeas Corpus act: and this the House of Commons called, doing right to their body.

No lawyer has suffered for serving his client even against the crown: if the learned in that profession may safely open the laws when the prerogatives of the crown are in question, it will seem very hard they should be punished for doing it in a case of privilege. To deprive men under restraint, of the assistance of their friends, exceeds the severity of any court but that of the Inquisition, the very name of which ought to strike all Englishmen and Protestants with horror.

The last Resolution of the Lords was not contradicted by the House of Commons; and therefore the Lords took it for granted, that as it was no longer contested, but that a Writ of Error is a Writ of Right and not of Grace; consequently, that the Commons did no longer insist upon that part of their Address, that the queen would not give leave for a Writ of Error.

As to what was said by the Commons, that it was not material whether Writs of Error were of grace or not, because they did not lie in the case of the Petitioners: the Lords said, That whether the Writs of Error could be maintained or not in point of law, was not of the cognisance of the House of Commons, nor the matter in dispute between the two Houses.

According to lord Orford, (*Catalogue of Royal and Noble Authors*, art. Robert Harley earl of Oxford) the '*Vindication of the Rights of the Commons of England*,' (see p. 695.) though signed Humphry Mackworth, is said to be the composition of lord Oxford.

430. The Proceedings in the House of Peers and House of Commons, on the Case of CHARLES BATHURST, esq. (mentioned in the foregoing Proceedings): 2 ANNE, A. D. 1704.

January 20, 1704.

A PETITION of Charles Bathurst, esq. was presented to the House of Commons, and read, touching an order made by the House of Peers, the 12th of February, 1702, with relation to an order made by the court of Exchequer, the 15th of July, decimo tertio regni regis Gulielmi Tertii, concerning an inquisition and survey of the boundaries of the honour of Richmond, and lordship of Middleham, and of many other honours, manors, and lordships, bounding thereupon; and praying the consideration of the House thereof, and such relief on the subject-matter of the said petition, as shall be thought fit.

Ordered, That some members be appointed to search the Journals of the House of Peers, as to their proceedings touching the matter aforesaid, and also the offices of the court of Exchequer, touching the proceedings there, in relation to the said inquisition, and report the same to the House.

And several members were appointed accordingly.

The CASE of CHARLES BATHURST, esq. Petitioner.

To the Honourable the Knights, Citizens, and Burgesses, in Parliament assembled, in order to his relief against certain Proceedings in the House of Peers, at the instance of the Right Honourable THOMAS LORD WHARTON, Appellant, from an Order of the Court of Exchequer, bearing date the 15th day of July, 1701, against ROBERT SQUIRE, esq. Respondent.

July 15, 1701.—The court of Exchequer made an order *ex officio* for the preservation of a record of that court.

Nov. 9, 1702.—The lord Wharton, finding that the said record was made use of as evidence against him in a trial at the Queen's-bench bar, of an issue directed out of Chancery, wherein the said lord Wharton was plaintiff, and the said petitioner Mr. Bathurst, the said Mr. Squire, and others, were defendants, concerning some lead-mines, did, on the 19th of December, 1702, petition the House of Lords (by way of appeal) from the said order of the court of Exchequer, and prayed to have that order discharged, and the record taken off the file.—In which petition the lord Wharton complained, that the said record was imposed on the court (by contrivance between the said Mr. Squire and Mr. Thomson, a sworn clerk in the court of Exchequer), and therefore prayed, they the said Mr. Squire and Mr. Thomson might an-

swer the said petition (which he called an appeal;) and accordingly they were ordered to answer the same.

Jan. 7, 1703.—Mr. Squire and Mr. Thomson petitioned the House of Lords, setting forth, That no suit was ever depending in the court of Exchequer between the lord Wharton, and the said Mr. Squire and Mr. Thomson; and that therefore the lord Wharton's said petition was not an appeal, but an original complaint against them for a crime of a high nature, for which they ought to be left to be tried by the usual course of the laws of the land; and prayed their lordships to dismiss the lord Wharton's petition, and to discharge their order, by which they the said Mr. Squire and Mr. Thomson were obliged to answer the same.

Jan. 21, 1703.—The lord Wharton put in his answer to their petition, insisting on his appeal as regular, and alleging that there was a suit in Chancery, wherein the said Mr. Squire was a defendant (among others) concerning the lead-mines in question, and that the order made in this case (though in the court of Exchequer) affected the suit in Chancery; and he then obtained an order to hear one counsel on each side the very next day.

Jan. 22, 1703.—Counsel were heard, and their lordships were pleased (on debate) to dismiss the petition of the said Mr. Squire and Mr. Thomson, and to order them to answer the lord Wharton's petition (or appeal) on Monday then next following. Against which proceedings, several of the Lords entered their dissent (or protest), and gave reasons for their so doing in the words following, viz.

First, ' We conceive that by this we assume a jurisdiction in an original cause for these reasons:

1st. ' Because there has been no suit between the parties in the Exchequer; and consequently this petition cannot be called an appeal from that court.

2dly, ' Although there was a suit in the court of chancery, yet one of the persons required to answer was not a party in that suit; and therefore as to him (at least) it must be an original cause.

3dly, ' Though all had been parties in the Chancery, yet it never was heard that an appeal lay from one court that had no suit depending in it, because there was a suit depending in another court.

Secondly, ' Because no court can take any cognizance of a cause in which that court cannot make an order; but in this case the House of Lords cannot make an order (because very many are concerned

‘ in this record who are not before this House) therefore this House cannot take any cognizance of it.’

Jan. 25, 1703.—The lord Wharton acquainted the House, that he was willing to leave out Thomson, and did only expect Squire should answer his petition; and thereupon he obtained an order to that purpose.

Feb. 2, 1703.—Mr. Squire put in his answer, still insisting, as he had done in his said petition, that it was an original complaint against him, and could not be called an appeal, there being no suit depending in the court of Exchequer between the lord Wharton and him, and that the record,* (which the lord Wharton would have suppressed) not only greatly concerned her majesty, but the inheritances of several thousands of persons, who are equally concerned (if not more than he) in the preservation thereof, and that it was more immediately incumbent on the barons of the court of Exchequer to justify their own order; and therefore prayed their lordships would not proceed farther against him, till all parties concerned might be duly heard.

Feb. 8, 1703.—The city of London, who are grantees from the crown of the whole honour of Richmond, and lordship of Middleham, finding themselves interested in the preservation of the said record, petitioned the Lords to be heard by their counsel against the petition of the lord Wharton, and their lordships accordingly ordered counsel to be heard for the city, on the 12th of February, being the same day that the counsel for the said Mr. Squire were to be heard.

Feb. 12, 1703.—Their lordships heard counsel for the lord Wharton and Mr. Squire, (but refused to hear counsel for the city, notwithstanding their said order) and thereupon were pleased to order a trial at bar in the court of Common Pleas, the next Easter-term, by a jury of Middlesex, wherein this was to be the feigned issue, viz.

“ Whether the skins of parchment, directed by order of the court of Exchequer, of the 15th of July, 1701, to be filed, are the perfect, unaltered, exact, and entire commission and return first filed in the court of Exchequer, in the sixteenth year of king James the first.”

And ordered, That in the said action the said Robert Squire should be plaintiff, and take the proof of the said issue upon himself, and the said lord Wharton, defendant, and that the skins of parchment, or any copy thereof,

* Note.—The Record is a survey and boundary of the honour of Richmond, and lordship of Middleham, which together are larger than the county of Middlesex, and more than one hundred miles in circumference; whereas the boundaries contested by the lord Wharton and Mr. Bathurst, are not above two or three miles thereof.—Former Edition.

should not be given in evidence in any court whatsoever until the said trial was over; and that the said skins of parchment, (being upon the file by virtue of the said order of the fifteenth of July) should not be allowed as any evidence on the said trial for the plaintiff; and that after the said trial, the verdict given therein should be certified and returned by the court of Common Pleas into the House of Peers.

Mr. Squire did not decline the trial of the issue above directed, as being conscious of any ill practices by himself, or any others, or for that he was not able to produce sufficient evidence to prove that the said record is perfect, unaltered, exact and entire, as first filed in the court of Exchequer, in the sixteenth year of king James the first, (though Mr. Squire could not but think that it was a great hardship to make him plaintiff in the said action, to put the validity of the whole record upon the said issue, and to oblige him to take the proof thereof upon himself, and all this without his consent, or the consent of others, who are more immediately concerned in the preservation of the said record) there being better proofs, in order to find the said issue truly in the affirmative, to be given for the said record, than for any one of the most authentic records in any of the courts of Westminster (as is verily believed). For,

I. In a decree of the court of Exchequer enrolled, made in the nineteenth year of king James the first, the said record is recited and referred to, as then on record in the court of Exchequer.

II. The said record is entered and enrolled verbatim, in the book of enrollments of surveys, &c. kept in a public office at Westminster, belonging to the auditor for Yorkshire, and the said entry is near as old as the said record.

III. The said record, and particularly the boundaries of the honour of Richmond, and lordship of Middleham, (about which only the disputes are between the lord Wharton and the said Mr. Bathurst, and the other defendants) are fairly entered, and remain on record, in an old book, kept amongst the records of the city of London, and the same entry there appears to be made in the year 1628.

IV. Divers ancient office copies (and other copies) of the said record, and particularly of the boundaries of the said honour of Richmond, and lordship of Middleham, have been taken, and the same were examined with the said record, when on its proper file in the court of Exchequer, and certified to be true copies. All which said entries and copies do exactly agree with the said record, now on its proper file. And moreover, there are many other instances, evidences, and proofs of the truth, validity, and entireness of the said record.

But Mr. Squire being apprehensive that the House of Peers, in making the said order of the twelfth of February, 1703, had assumed a jurisdiction in an original cause, could not (as

he believed) comply with that order, without doing injury to the rights and privileges of the Commons of England; and, for that reason, did not think fit to try the issue as directed.

Nov. 9, 1703.—Note, That at the first trial at the Queen's-bench bar of the issue directed out of Chancery, (when the said record was given in evidence) the verdict, upon full evidence, was given and found for the said Mr. Bathurst, Mr. Squire, and the other defendants; yet the court of Chancery (as is usual where a right of inheritance is to be bound) afterwards directed a second trial to the same end as the former, which came on at the Queen's-bench bar in Michaelmas term last, Nov. 23, 1703.

That at the last mentioned trial, the counsel for the plaintiff, the lord Wharton, insisted that the said Mr. Bathurst, and the other defendants, could not give in evidence the said inquisition and survey, (though on record in the court of Exchequer) nor any copy thereof, by reason the said Mr. Squire had not tried the issue directed by the House of Peers, the said twelfth of February, 1703.

That by reason of the premisses the said Mr. Bathurst, and the other defendants, were deprived of that so necessary a part of their evidence, for the support of their title to the matters in question at the said last-mentioned trial, and so (and for that reason alone) lost their cause, which otherwise they could not have done; for that the said record (backed with the concurring testimonies of so many ancient and credible witnesses, produced on the said defendant's behalf) must necessarily have convinced the jury (as some of them have since owned and declared), that the boundaries of the manors of Helaugh in Swaledale, and of Arkle-garthdale, are as the said record mentions them to be, and consequently the issue and verdict must have been found for the said Mr. Bathurst, and the other defendants.

January 22, 1704.—Mr. Ward reported, That the members appointed to search the Journals of the House of Peers, and offices of the court of Exchequer, as to their proceedings touching the matters mentioned in the petition of Charles Bathurst, esq. presented to the House on Thursday last, had searched the journals and offices accordingly, and he read in his place what they found therein, and afterwards delivered the same in at the table, where the same was read.

Ordered, That the consideration of the said report be referred to the committee of the whole House, to whom the consideration of the report made yesterday, relating to the case of Ashby and White, is referred.

Ordered, That the same members do search the offices of the court of Chancery, for the bills and answers, and order on hearing, made in the said court, between the lord Wharton, and the said Mr. Bathurst and others, and report the same to this House.

January 25, 1704.—Mr. Benson reported, That the members appointed to search the

offices of the court of Chancery for the bills and answers, and order on hearing, made in the said court, between the lord Wharton and Mr. Bathurst, had searched the same accordingly, and had copies of the bills and answers, and order on hearing, which he presented to the House, and the titles thereof were read: And also touching their lordships' proceedings in the matter mentioned in the petition of Mr. Bathurst, in which case it was alleged, their lordships had taken upon them an original jurisdiction, in controuling an order made by the court of Exchequer, for the filing of a record that had been several years in Mr. Grange's chamber in the Temple.

Ordered, That the consideration of the said copies be referred to the committee of the whole House, to whom the report, with relation to the petition of the said Mr. Bathurst, is referred.

January 27, 1704.—The order of the day being read, for the House to resolve itself into a committee of the whole House, to consider further of the report of the Journal of the House of Lords, and also of the petition of Charles Bathurst, esq. referred to the committee:

Ordered, That the Serjeant do go with his mace in Westminster-hall, and courts there, and court of Requests, and places adjacent, and summons the members there to attend the service of the House.

And he went accordingly, and being returned,

The House (according to order) resolved itself into the said committee of the whole House, and after some time spent therein, Mr. Speaker resumed the chair, and Mr. Freeman reported from the said committee, That they had come to some Resolutions, which they had directed him to report, when the House will please to receive the same.

Ordered, That the report be made to-morrow morning.

January 28, 1704.—Mr. Freeman (according to order) reported from the committee of the whole House, to whom it was referred to consider of the report of the Journal of the House of Lords, and the petition of Charles Bathurst, esq., the Resolutions which they had directed him to report to the House, which he read in his place, and afterwards delivered in at the table, where the same were read, and (with some amendments to the first of them) agreed unto by the House, and are as follow:

Resolved, That the House of Lords taking cognizance of; and proceeding upon the petition of Thomas lord Wharton, complaining of an order of the court of Exchequer, bearing date the 15th day of July, 1701, for filing the record of a survey of the honour of Richmond, and lordship of Middleham, in the county of York, is without precedent, and unwarrantable, and tends to the subjecting the rights and properties of all the Commons of England to an illegal and arbitrary power.

Resolved, That it is the undoubted right of all the subjects of England, to make such use of the said record as they might by law have done before the said proceedings of the House of Lords.

After this, the House of Lords took into consideration the proceedings of the House of Commons, and made the following Resolution:

March 27, 1704.—It is resolved and declared by the Lords spiritual and temporal in parliament assembled, That the House of Commons taking upon them by their votes to condemn a Judgment of the House of Lords, given in a cause depending before this House in the last session of parliament, upon the petition of Tho-

mas lord Wharton, and to declare what the law is, in contradiction to the proceedings of the House of Lords, is without precedent, unwarrantable, and an usurpation of a judicature, to which they have no sort of a pretence*.

MATTH. JOHNSON, Cler' Parl'.

* March 27, 1704.—It is ordered by the Lords spiritual and temporal in parliament assembled, That the resolution and declaration made this day, with respect to the votes of the House of Commons, in relation to the judgment of this House, given upon the petition of Thomas lord Wharton, the last session of parliament, shall be forthwith printed and published.

MATTH. JOHNSON, Cler' Parl'.

431. The Trial of NATHANIEL DENEW, JOHN MERRIAM, and RICHARD BRITTON, gents. at the Queen's-Bench Bar, for an Assault and Conspiracy, with an Intent to Wound and Beat, &c. William Colepeper,* esq. before the Lord Chief Justice Holt: 2 ANNE, A. D. 1704. [Published (from the Trial taken in Short Hand) by Mr. Colepeper.]

Queen's-Bench Feb. 14, 1704.

The QUEEN, Plaintiff, against DENEW, and others, Defendants.

AFTER Proclamation made for silence, the Jury was sworn, whose names are as follow: Richard Bealing, Thomas Dodd, John Mills, Robert Rogers, John Norton, John Wiseman,

* I conjecture this Mr. William Colepeper was the chairman of the quarter sessions at Maidstone, which drew up the famous Kentish Petition, of which Kennett gives the following account:

“The nation by this time began to be in a high ferment, and the people generally disliked the proceedings of the Commons. A bold testimony of it was given in the county of Kent, where a Petition was drawn up in this form:

“The Humble PETITION of the Gentlemen, Justices of the Peace, Grand Jury, and other Freeholders, at the General Quarter Sessions of the Peace, holden at Maidstone, the 29th of April, in the 13th year of the reign of our sovereign lord William 3, over England, &c.

“We the gentlemen, justices of the peace, grand jury, and other freeholders, at the general quarter sessions at Maidstone in Kent, deeply concerned at the dangerous estate of this kingdom, and of all Europe; and considering that the fate of us and our posterity depends upon the wisdom of our representatives in parliament, think ourselves bound in duty humbly to lay before this honourable

Richard Davison, Simon Smith, Edward Bennet, Andrew Cook, John Henly, John Cleave.

Proclamation was made for all concerned in the trial to appear.—Then the indictment was read as follows:

‘Midd’ ss. The Jurors for our sovereign lady the queen present, That Nathaniel Denew, late of the parish of St. Clement

‘House the consequence, in this conjuncture, of your speedy resolution, and most sincere endeavour to answer the great trust reposed in you by your country.

“And in regard, that from the experience of all ages it is manifest, no nation can be great or happy without union; we hope, that no pretence whatsoever shall be able to create a misunderstanding among ourselves, or the least distrust of his most sacred majesty; whose great actions for this nation are writ in the hearts of his subjects, and can never without the blackest ingratitude be forgot.

“We most humbly implore this honourable House to have regard to the voice of the people, that our religion and safety may be effectually provided for; that your loyal addresses may be turned into bills of supply; and that his most sacred majesty (whose propitious and unblemished reign over us we pray God long to continue) may be enabled powerfully to assist his allies before it is too late.—And your petitioners shall ever pray, &c.”

“Signed by the Deputy Lieutenants there present, above 20 Justices of the Peace, all the Grand-Jury, and other Freeholders, then there.”

‘Danes, in the county aforesaid, gent. John Merriam, late of that parish, in the said county, gent. and Richard Britton, late of the same parish, in the same county, gent.

“ This Petition was boldly delivered to the House on May 8th, and Mr. William Colepeper, Mr. Thomas Colepeper, Mr. David Polehill, Mr. Justinian Champney, and Mr. William Hamilton, being called in, owned the Petition at the bar, and their hands to the same. Then they withdrew, and the Petition being read, the House resolved, ‘ That the said Petition was scandalous, insolent and seditious, tending to destroy the constitution of parliaments, and to subvert the established government of these realms.’ And then ordered, ‘ That all those gentlemen should be taken into custody, as guilty of promoting the said Petition.’ And on May 14, the House being informed, that Mr. Thomas Colepeper had made his escape; and that the rest of the persons committed did behave themselves disorderly; the serjeant was called in, who acquainted the House, That the said Mr. Colepeper had upon Saturday last made his escape, and that some of the others had threatened, and he was apprehensive of, force to rescue them; and prayed the direction of the House concerning them: whereupon the House ordered them to be delivered prisoners to the Gatehouse; and agreed to address his majesty to issue his proclamation for apprehending Mr. Colepeper; and for putting out of the commissions of peace and lieutenantcy such of the others as were in any of the said commissions. But Mr. Colepeper made a voluntary surrender of himself, and was confined with his neighbours.

“ This imprisonment of the Kentish petitioners did but inflame those people who were before warned against the proceedings of the Commons. And it gave occasion to a libel, entitled, ‘ A Memorial from the Gentlemen, Freeholders, and Inhabitants of the counties of ———, in behalf of themselves and many thousands of the good People of England.’ This was sent to the Speaker in a very insolent letter, charging and commanding him in the name of 200,000 Englishmen to deliver it to the House of Commons. It began with a preamble falling into this maxim, ‘ Whatever power is above law, is burthensome and tyrannical, and may be reduced by extrajudicial methods.’ Then it charged the House with illegal and unwarrantable practices in fifteen particulars; of which the three first were as followeth:

“ I. To raise funds for money, and declare by borrowing clauses, that whosoever advances money on those funds, shall be reimbursed out of the next aids, if the funds fall short; and then give subsequent funds, without transferring the deficiency of the former, is a horrible cheat on the subject who lent the money, a breach of public faith, and destructive to the honour and credit of parliaments.—

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‘ being fighters, swordsmen, and disturbers of the peace, and skilful and versed in fighting duels, on the 21st day of August, in the second year of the reign of our sovereign

II. To imprison men who are not your own members, by no proceedings but a vote of your own House, and to continue them in custody *sine die*, is illegal, a notorious breach of the liberty of the people; setting up a dispensing power in the House of Commons, which your fathers never pretended to; bidding defiance to the Habeas Corpus Act, which is the bulwark of personal liberty; destructive of the laws, and betraying the trust reposed in you. The king being at the same time obliged to ask you leave to continue in custody the horrid assassinator of his person. [See the Case of Bernardi and others, vol. 13, p. 759].— III. Committing to custody those gentlemen, who at the command of the people (whose servants you are) came in a peaceable way to put you in mind of your duty, is illegal and injurious; destructive of the subject’s liberty of petitioning for redress of grievances, which has by all parliaments before you, been acknowledged to be their undoubted right.

“ After the enumerating twelve other particulars, the Memorial proceeds to a Claim of Right, under seven heads; of which the three former run thus:

“ We do hereby claim and declare, I. That it is the undoubted right of the people of England, in case their representatives in parliament do not proceed according to their duty and the people’s interest, to inform them of their dislike, disown their actions, and to direct them to such things as they think fit, either by petition, address, proposal, memorial, or any other peaceable way. II. That the House of Commons separately, and otherwise than by bill legally passed into an act, have no legal power to suspend or dispense with the laws of the land, any more than the king has by his prerogative. III. That the House of Commons have no legal power to imprison any person, or commit them to custody of serjeants, or otherwise (their own members excepted) but ought to address the king to cause any person on good grounds to be apprehended; which person so apprehended, ought to have the benefit of the Habeas Corpus act, and be fairly brought to trial by due course of law.—After other claims, it concludes: ‘ Thus, gentlemen, you have your duty laid before you, which it is hoped you will think of: but if you continue to neglect it, you may expect to be treated according to the resentments of an injured nation; for Englishmen are no more to be slaves to parliaments, than to kings. Our name is Legion, and we are many.’

“ A number of prudent sober men, who did not approve of the wording or way of sending this Memorial, were apt to think the subject-matter of it for the most part true and reasonable: and the very court of aldermen and com-

3 M

' lady Anne, by the grace of God, of England,
' Scotland, France, and Ireland, queen, de-

' fender of the faith, &c. did, in the parish of
' Clewment Danes in the said county of Midd.,

mon council of the city of London were very near to the coming in to some public declaration of the same effect, though more modestly to be expressed. The Commons were extremely incensed at the Legion Paper, but would not descend to a particular censure of it. It was thought sufficient, that a complaint was made to the House, of endeavours to raise tumults and seditions, in order to disturb the public affairs; and a Committee was appointed to draw up an address to be presented to his majesty, humbly to lay before him the endeavours of several ill-disposed persons, to raise tumults and seditions in the kingdom; and humbly to beseech his majesty, that he will provide for the public peace and security."

Ralph says: "A dissension between the two Houses, which had been apparently bespoken, was not likely to have so quick an operation as the bespeakers of it desired: it was, therefore, thought expedient to try whether a flame might not be kindled amongst the people, by the help of some political combustibles artfully scattered amongst them: the quarter-sessions for the peace was to be held for the county of Kent at Maidstone, on the 29th of April; and proper care had been previously taken, to create such a disposition in the minds of the yeomanry, &c. of those parts, as should be sufficiently favourable to any such experiment. This appeared by an expression familiar in their mouths, to wit, that 'they had sown their corn, and the French were coming to reap it.' Mr. Colepeper, though absent, (where or on what account, is not specified) was chosen chairman; and his brethren, we are told, paid him such unusual respect, that they kept the chair empty for several hours, that it might be filled by none but him: at last, however, he arrived; and having taken his place, the plot began to open: for we may safely say, that such movements as that we are now treating of, are not spontaneous: certain freeholders came into court, and called upon the chairman to make some application to parliament, in order to set forth the apprehensions of the people: the chairman refers them to the grand jury: the grand jury adopt the motion, and call upon the chairman to induce the bench to concur: the chairman takes this office upon him: the bench agree, and desire the chairman to draw up a proper petition: what he writes they approve, as also the grand jury, who sign it, as we are left to understand, one and all: 29 justices set their hands next, and then every other man whom they could press into the service, during several days after: On the 6th of May, Mr. Colepeper, his brother Mr. Thomas Colepeper, Mr. David Polehill, Mr. Justinian Champneys, and Mr. William Hamilton, as deputies for the rest, delivered it to sir Thomas Hales, one of the knights of the shire, to be by him presented to the House: but he having consulted some other members

upon it, and finding it was likely to give great offence to the House, desired to be excused: upon which Mr. Meredith, his colleague, officiously undertook what the other had declined, and on the 7th did present it accordingly, under the following precaution, which the presenter thought fit to take, (when the House ordered, That the said petition should be brought up to the table;) namely, the signifying, that several of the gentlemen who signed it, were at the door ready to own the same: upon which, the next order was for their admission; and being admitted accordingly, they severally did own the said petition, and their hands to the same.

"They were then ordered to withdraw, and the petition was read.

"As this was manifestly a charge rather than a petition, insolently and impertinently delivered in the name of the people; and as, in orderly times, it was never known that any branch of the legislature had ever been so deliberately and formally affronted before, it could not but excite a suitable indignation in the House.

"Formerly, when parliaments were under a Whiggish direction, they had, in so many words, refused to grant the king a supply, unless they were made acquainted with his alliances: they had both censured and impeached his ministers: they had committed, without mercy, whoever had presumed to arraign their proceedings: they had even insisted on new-modelling the succession: and they would bear of no temperament, though any temperament whatsoever had from time to time been offered to them from the throne: during which whole interval, opposition seemed to constitute the sum of parliamentary merit; and any man who had recommended union, would have been branded as a traitor to his country.

"And yet the Tories who had been so branded at that time, for adhering to the prerogative, and who had now followed in all things the popular pattern set them by the Whigs, (except in clamouring for a war with France) were now to be run down by the populace for that very reason.

"But however unjustly treated, and justly provoked, they would, perhaps, have acted more prudently, in throwing the Kentish petition with contempt over the bar, and dismissing the petitioners with such a reprimand as their folly and arrogance deserved; than in proceeding against them as the hot-heads of the House resolved to do, with all the severity in their power.

"It seems, however, that some of the members did endeavour to moderate matters, by coming out to the petitioners during the debate, and persuading them to make some such submission, as might recommend them to the clemency of the House: but the vanity of being held men of consequence in the state, had taken such possession of them, that they could be brought to make no other concession than

‘unlawfully, clandestinely, devilishly, wickedly, and maliciously, under pretence of discord, strife, and contention between air

what follows, which they sent in to the House in writing, by the said members; to wit: ‘We are humbly of opinion, that it is our right to petition this honourable House, according to the statute of 13 Car. 2. And as to the matter of the petition, we declare we intend nothing offensive to this honourable House.’

“This not proving satisfactory, it was, on the issue, resolved, without a division, That the said petition was scandalous, insolent and seditious, tending to destroy the constitution of parliaments, and to subvert the established government of this realm; as also, that the said presenters of it should be taken into the custody of the serjeant at arms; which was done accordingly; and wherein behaving rudely, they were as rudely treated, till the House afterwards thought fit, on the complaint of the said serjeant, to send them to the Gate-house; which was carried on the question by 169 voices against 93.”

Burnet says: “The disposition to blame the slowness, in which the House of Commons proceeded, with relation to foreign affairs, and the heat with which private quarrels were pursued, began to spread itself through the whole nation. Those of the county of Kent sent up a petition to the House, desiring them to mind the public more, and their private heats less, and to turn their addresses to the king, to bills of supplies, to enable him both to protect the nation, and to defend our allies. This was brought up by some persons of quality, and was presented by them to the House: but it was looked on as a libel on their proceedings; and the gentlemen, who brought it up, were sent to prison; where they lay till the prorogation, but they were much visited and treated as confessors. This was highly censured; it was said, the Commons were the creatures of the people, and upon all other occasions, they used to favour and encourage petitions: this severity was condemned therefore as unnatural, and without a precedent: it was much questioned, whether they had really an authority to imprison any except their own members, or such as had violated the privilege of their House: but the party thought it was convenient, by such an unusual severity, to discourage others from following the example set them by those of Kent: for a design was laid to get addresses of the same nature, from all parts of the kingdom, chiefly from the city of London. The ministers represented to the king, what an indignity this would be to the House of Commons; and that, if he did not discourage it, he might look for unacceptable things from them. It might rather discourage, than give heart to our allies, if they should see such a disjointing, and both city and country in an opposition to the House of Commons; some went in his name, to the eminent

‘George Rook, kn.* one of her majesty’s most honourable privy council, and William Colepeper, esq. then and before moved, had, and being, consult, machinate, propose, and intend, and did among themselves, and others to the Jurors unknown, confederate and conspire, and each of them did machinate, propose, and intend to beat, wound, and evilly treat the said William Colepeper, and him the said William Colepeper, either by duel or assassination, feloniously and maliciously to kill and murder: And that afterwards, that is to say on the 21st of August, in the year aforesaid, about the hour of ten in the forenoon of the same day, in the parish and county aforesaid, the said William Colepeper being in the peace of God and the queen, came the said Nathaniel Denew, with force and arms, and lying in wait of his malice fore-thought, and assault premeditated, then and there offered himself to fight a mortal duel, in behalf (as he said) of the said sir George Rook, against the said William Colepeper; and with threatening, spiteful, and opprobrious words then and there daringly, wickedly, maliciously and vehemently urged, provoked, and stirred up the said William Colepeper to fight with him the said mortal duel; and that afterwards, that is to say, on the 22d day of the said month of August, in the year aforesaid, about nine o’clock in the morning, in the parish aforesaid, the said William Colepeper being in the peace of God and the queen, then came the said Richard Britton, with force and arms, malice fore-thought, and assault premeditated; and then and there offered himself to fight a mortal duel, in behalf (as he said) of the said sir George Rook; and with threatening words, daringly, wickedly, maliciously, and vehemently urged, provoked, and stirred up the said William Colepeper to fight with him the said mortal duel; and that the said Nathaniel Denew, and John Merriam, on the same 22d of August, in the year, and in the parish aforesaid, with force and arms, with malice fore-thought, by lying in wait, and premeditated murder, assaulted him the said William Colepeper; and with drawn swords sharply, cruelly, and with all their strength

men of the city, to divert it, yet with all this it came so near, for such an address, in a common council, that the lord mayor’s vote turned it for the negative; so that fell.”

* When Mr. Colepeper stood for knight of the shire for Kent, sir George Rook vigorously opposed him, and wrote letters to some of the Freeholders of that county, importing, “That he hoped they would not give their votes for a man who had carried up a petition (Mr. Colepeper being one of the Kentish petitioners) that had been deemed scandalous, insolent, and seditious, by an English parliament.” This was the first occasion of the quarrel between them. Former Edition.

‘ tried, and long contended to wound, kill, and murder him: and unless the said William had strenuously and with courage defended himself, and had been seasonably rescued by several of her majesty’s subjects, at that time interposing between them, they, the said Nathaniel Denew and John Merriam, had then and there feloniously, voluntarily, and maliciously killed and murdered him; and that the said Nathaniel Denew, John Merriam, and Robert Britton, committed other enormities to the said William Colepeper, to the grievous damage of the said William Colepeper, the danger of bloodshed and murder, to the great scandal and infamy of the said sir George Rook, being one of her majesty’s most honourable privy council aforesaid, in contempt of the queen and her laws, to the evil example of all others in the like case offending, and against the peace of the said queen, her crown and dignity.’

After which, Mr. Serjeant Darnell began, and opened for the queen.

Serj. Darnell. If your lordship please, I am counsel in this cause for the queen, and, my lord, it is an indictment that is brought against the defendants; it is for a very great insolence and assault, in setting upon Mr. Colepeper, and designing to take away his life: and truly, my lord, it is a very extravagant trespass as I have met with. The gentlemen pretend to shelter their ill designs against Mr. Colepeper under the name of a very great and worthy person, sir George Rook; they pretended they came upon his account to quarrel with Mr. Colepeper; truly for him they would quarrel with Mr. Colepeper. My lord, Mr. Colepeper told them, that if sir George Rook had taken any thing ill of him, he knew he was a gentleman of quality and worth, and would acquaint him with it himself, or he would speak with sir George Rook about it. The gentleman that came to him was a kind of master of defence, and upon all occasions hath his sword ready at any man’s service; one would wonder at his coming so roughly upon a groundless mistake, for he had nothing against Mr. Colepeper; and, my lord, the gentleman with some surly language left him; and, my client was jealous truly what might be the event of this kind of proceeding. Though Mr. Colepeper is known to be a man that will not be afraid of any man of honour whatsoever; and that they have had sufficient experience of upon occasion. My lord, upon that, Mr. Colepeper thought it proper however to enquire a little into this matter, and went to wait upon sir George Rook, and know if there was any thing real in it, that he had occasion to take ill from him; but he could not imagine any thing, but the groundless pretence these gentlemen had. One of them told him at Windsor, Mr. Colepeper asked how sir George Rook did, or where he was? A question which any man might ask without any offence certainly in the world; this they did pretend to allege against him;

the manner of the question, that was the thing was taken notice of, as if a man should say, how does such a man do? And he could not speak this without an affront; it is very extraordinary indeed! But Mr. Colepeper had great reason to believe there was a design upon him; and he found, that there were two or three persons that are gentlemen, that do make use of their swords upon occasion; and they are now defendants in this cause; and, my lord, Mr. Colepeper finding himself beset very plainly, and having notice by several letters from his relations, that there were several people, that were this gentleman’s acquaintance, that were hunting after him, he began then to look about him, as every prudent man would do; every prudent man, though never so brave, will take care not to be murdered; and, my lord, upon this he did, I think, walking along the street, meet with this same Mr. Denew, who began to be rough with him: Mr. Denew, says Mr. Colepeper, you know you are a man that is known to be skilful at your weapons, and if you are resolved to fight, pray lay aside your cane, says he; and if you will run me through, as you talk, pray lay aside your cane. No, says he, and takes his cane, and was going to strike Mr. Colepeper; with that Mr. Colepeper thought it time to draw, and Mr. Denew he drew, and they had about half a score passes at one another; and this gentleman of defence had not at least more skill, or more courage than Mr. Colepeper, but he thought fit to throw down his sword, and rub off in the crowd; and Mr. Merriam was with him; and for an honourable retreat, says he, Mr. Colepeper must have care how he manages his tongue, how he talks; this he would pretend to the mob as a reason of his setting upon Mr. Colepeper. My lord, we shall shew to your lordship, at several times these persons have designed and endeavoured to set upon Mr. Colepeper, they had pretended to challenge him upon their own account; at first it was upon the account of sir George Rook, as they pretended; then, my lord, they came to him again: I have spoken, says Mr. Colepeper, to sir George Rook, and you have nothing to do to meddle in this matter. How! says Denew, the affront is to me: To you! says Mr. Colepeper, how is that? Why you talked, says he, too loud for me. This man of courage, if a man does not talk to please him, he is angry at the talk, and will fight him, and Merriam was upon the same terms; and if sir George Rook was satisfied, yet however they must have satisfaction; and there were twenty more of them that were friends and dependants upon sir George Rook, that had that esteem of him, that they would make him know himself; and he must fight them all, or be insulted. My lord, this has been the behaviour of these men, and my client is forced to make this matter public, and hath made a prosecution against them; and no man as stout as Hercules will suffer himself to be murdered, or set upon by twenty men. My lord, we will make out this to be one

case, and doubt not but the gentlemen of the jury will do us right.

Mr. Colepeper sworn.

Coun. Pray, Sir, will you give my lord and the jury an account of this whole matter, and of these gentlemen the defendants, Mr. Denew, Merriam and Britton?

Colepeper. My lord, upon the 11th of July last, I think it was, I was attending at Windsor, having business before the queen and her council; there was a gentleman, who I understand is since gone to America, one colonel Seymour: I having business there, and there being an express come from the fleet, I inoffensively asked where sir George Rook was, and how he did? He could not tell; but, says he, here was sir Jacob Banks just now, he could give me a particular account: No, I told him, I asked on a public account, and I was not desirous particularly to know; so away I went. About an hour afterwards, coming back to the same place again, sir Jacob Banks comes behind me, and pulls me round about by the sleeve.

L. C. J. When was this?

Colep. This was in the beginning of July.

L. C. J. Who did so?

Colep. Sir Jacob Banks, my lord.

Coun. Begin with Mr. Denew.

Colep. If you please, my lord, to let me, I will deal fairly with the court and jury, and rip the whole matter up.

L. C. J. Go on, if you please, Sir; what said sir Jacob Banks?

Colep. Says he, I must speak with you. I dispatched my business with the door-keeper, and went to him, and asked his business with me. Says he, 'What do you say of sir George Rook?' Said I to him again, 'Nothing at all.' Says he, 'You have been talking of sir George Rook's being at the Bath,' and drew his finger cross my nose; I drew my finger cross his nose, in the same manner, and he struck me with his cane. I applied myself in a few days after to the duke of Devonshire, who is lord steward of the queen's household: He gave an account of it to the queen; and I was told the queen had ordered a prosecution against sir Jacob Banks for this offence*. After this, on the 21st day of August, near Temple Bar, Mr. Denew and Mr. Merriam came to me in the toy-shop by the Temple.

Coun. Consider, about what time of the day was this?

Colep. About 9 or 10 o'clock.

Coun. What day?

Colep. The 21st of August, Mr. Denew comes close up to me, and whispers me; says he, I desire to speak with you. I was going

with Mr. Denew into the Inner Temple Lane; and as I went out of the shop, Mr. Merriam gave me a wishful look, and says nothing, but goes his way into the Rainbow coffee-house. Says Mr. Denew, I have a message for you from sir George Rook. Pray, Sir, said I, what is it? Sir George Rook, says he, is informed that you take a freedom with his name, and demands of you a gentleman-like satisfaction. Pray, Sir, said I, who are you? for though he is my countryman, and I had seen him, I did not recollect who he was. Says he, my name is Denew. I then recollected his person and character. Said I, Mr. Denew, my circumstances are very particular; I shall wait upon sir George Rook: I have been advised to question him; but private revenge is not much my principle; and I think I have the advantage of sir George Rook in the fighting part. Says Mr. Denew, sir George has friends, and there will be a way found out for that. I from thence immediately imagined (and by the several letters my mother sent me out of the country, of Mr. Knatchbull's, sir George Rook's friend, coming often, and sending to enquire after me) that I was beset. My lord, I desired Mr. Denew to call at 11. Sir, said I, if you please to come to me at 11 of the clock to my chamber in the Temple, I will then give you a farther answer. At 11 o'clock Mr. Denew came; it struck 11 just as he came up stairs: He then told me, I had disappointed sir George Rook, and gave me several reflections, which I passed over, apprehending his design. Mr. Denew insisted that I should go down presently to sir George Rook: I said I would wait upon him at 5 o'clock, and did not doubt but I should satisfy him, for I had not injured him: But Mr. Denew was not satisfied with that answer, and would quarrel with me if I would not engage to go at 1 o'clock: So I did; but it was on condition that Mr. Denew should not be there. Said I, Mr. Denew, my business is with sir George Rook, and my friends are out of town; my business is with sir George Rook only, and not with you: so he agreed not to be there; but afterwards at parting, said he unawares, pray don't disappoint us. Now Mr. Denew having before told me there would be a way found out for that, and that sir George Rook had friends, and I thinking on my mother's letters out of the country, concluded that I should not have fair play; for these reasons, instead of going to sir George Rook, I wrote a civil letter to him, of which I have a copy in my pocket, the substance of which was, That I never injured him at Windsor, and that I would wait upon him at 5 o'clock: and I ordered my man, Be sure, said I, do you take notice whether Mr. Denew be there, and what other gentlemen are there; because, as I said before, I did apprehend myself to be beset, my lord. My man goes with this letter, and brings me word that he had seen sir George Rook, that he had delivered the letter, and that he had sent word, That if I did not come to him

* Sir Jacob Banks was indicted for this at the quarter-sessions in Berkshire. See Modern Cases argued and adjudged in the Court of Queen's Bench, in the 2d and 3d years of queen Anne, page 245, where the Case is at large reported.

by 5 o'clock, he would immediately send after me: at the same time my man saw Mr. Denew there, and some others. My lord, seeing I was used in this manner, I endeavoured to seek for friends to go down, because I was loth to go naked to sir George Rook's. To this purpose I went about, to the Sunyna coffee-house in the Pall-Mall, and to Tom's coffee house in Covent-garden. There my sister Steed sent me word by this very servant, that Mr. Denew was come back to my lodgings: I took that occasion to go to sir George Rook's house; the time appointed was five o'clock, and it was but a little turned of that time when I went. I asked, Whether sir George Rook was within? the servant answered me, no; but in such a manner that I thought he was within: said I, sir George Rook is within: says he, he is either within, or hard by: said I, tell him that I am here. The servant went immediately from me, and in my eye he went to no house; I kept my eye upon him, I think he spoke to no creature; but he returned, and said, sir George Rook was not at home. This farther convinced me, and I ordered my man to look for him; said I, Look in that room for sir George Rook; he did so, and he was not there; then I ordered him to look up stairs.

L. C. J. Where was this?

Colep. My lord, in sir George Rook's house. After I saw he was not to be found there, I took my coach and went to St. James's; I discharged my coach, and went cross the park, and from thence, by water, to my lodgings; and when I came in, my sister told me, Mr. Britton had been to see for me.

L. C. J. Did you not see sir George Rook at that time?—*Colep.* No, my lord.

L. C. J. Did you see Mr. Denew there?

Colep. No, my lord; for Mr. Denew was gone to my lodgings the mean time, and I took that time to go to sir George Rook's: my business was to miss Mr. Denew, and to speak with sir George Rook.

L. C. J. What time of the day?

Colep. At 5 o'clock, my lord, the time appointed, or a little after. My lord, my sister told me when I came home, that Mr. Britton had been there to enquire for me, and Mr. Denew too, and ordered her to send for him to a coffee-house; so accordingly she sent, and he was gone. About 10 o'clock at night in came Mr. Denew again: Sir, said he, I desire to speak with you: Sir, said I, I have no business with you; I shall receive no more messages from sir George Rook by you, nor send any more messages to sir George Rook by you. I said farther, I had been at sir George Rook's house, and I believed he was denied; but, said I, I will be there again to-morrow: but, says Mr. Denew, we will end it ourselves below: I have a friend, says he, below, and I see you have a friend with you, and we will end it. My lord, this was about 10 o'clock at night.

L. C. J. Who was with you?

Colep. My sister Steed, one Mr. Cumin, and Mrs. Harlackenden. Mr. Denew, said I, my

business is not with you, but with sir George Rook: says he, That shall not serve your turn: says I, I hear you: Sir, says he, By God, I will have you out: said I, I hear you: By God, says he, I will have you, if you are to be had above ground. He then went away that time. The next day, being Sunday, I was dressed almost as soon as it was light, and about 6 in the morning I was at sir George Rook's house. I staid near an hour; about 7 he came down to me: I went into his closet with him: Sir George Rook took notice of this challenge he had sent by Mr. Denew, and renewed it himself. Said I, Are you resolved to fight with me, right or wrong? He said he was satisfied in the wrong that was done him, and several others had injured him by making reflections on him; but he would see if he could find them out, and destroy all his enemies. Sir, said I, I have not injured you: the terms are not equal; you fight with your pardon in your pocket, I fight with the halter about my neck: Therefore, said I, Sir, if you press this unjust quarrel, you are obliged to make the terms of it equal. Said he, I am going to Holland, and I will accept of your satisfaction upon the coast of Holland: said I, if you insist upon it, I will wait upon you into Holland; you shall keep the matter secret between us, and let me have no more messages from other gentlemen, who, in case of accident, may be witnesses against me; but send a servant or porter to me, and I will immediately come to you, and the matter shall be concerted betwixt ourselves in private. I then went home; and after I had been at home about half an hour, Mr. Britton came in: there were with me in the room my sister Steed, Mrs. Harlackenden, and Mr. Bently. Mr. Britton desired the company to withdraw, for he wanted to speak with me; accordingly they withdrew: says he, Mr. Colepeper, I come to you out of friendship; you are a gentleman of quality, and sir George Rook hath thought fit to proceed with you as such, and hath sent you a challenge: Said he, I was with him yesterday, and there, says he, we consulted together how to proceed with you; and, says he, here is an affidavit of colonel Seymour's: I read the affidavit; it is pretty long; but to the best of my memory it amounts to this, that I asked where sir George Rook was, and how he did, abruptly, and in an odd manner. Now Mr. Britton having delivered me this message, says he, Mr. Colepeper, here is a paper which sir George Rook will be satisfied with if you will sign it: He read the paper to me, and shewed it to me to read: I shall know it again when I see it; it was to this purpose, that I had never spoke amiss of sir George Rook at court, or at any place whatsoever, or to sir Jacob Banks, or any person whatsoever; that if I had said any thing that could be taken as a reflexion by him or his friends, I was heartily to ask his pardon. Said I, this paper is a most unworthy thing, and I will lose the last drop of my blood before I will sign it. If you do not, said Britton to me, there are twenty of us;

the quarrel is in its own nature a public quarrel: sir George Rook is the flower of Kent; he gets offices and preferments for his friends; and there are above twenty of us will stand and fall with him; and I will stand by him for one, and I have a friend or two hard by; if you will not sign this paper, come out. Said I, Mr. Britton, you tell me this now, but have you seen sir George Rook to-day? Says he, I know his mind better than you. My lord, he then tendered me the paper again, and told me it was the last time that I should have that favour offered; and said, if you will not sign it, you will be insulted. Said I, I will sooner die than sign it; I will defend myself. With that he goes out of the door: says my sister, pray go to the door with him: No, said I, the villain hath challenged me. I then went to Mr. Bently, and told him, in confidence of secrecy, which he promised, that sir George Rook and I had agreed to meet upon the coast of Holland. Pray, Sir, said I, go along with me in the street, for they go in clusters, and I shall have no fair play: Draw not your sword, said I, and observe that I draw not mine first; I will be upon the defensive here, said I: And when I came to St. Clement's church, Mr. Denew overtook me, and came to me.

Coun. What morning?

Colep. The same Sunday morning, about two or three hours after I had been with sir George Rook: I had my eyes about me, as I thought it concerned me to have, and I often turned about to see who was coming. I saw Mr. Denew running after me: Seeing him run, I thought it not worthy of a man to run from him: I stood, he comes up to me; says he, well overtaken: Said I to him again, your business, Sir? Says he, I come to demand satisfaction of you: Said I, I have been with sir George Rook, and have satisfied him: Well but, says he, you have not satisfied me, and you are a scoundrel and a rascal; and if you will not draw, I will cane you. I thought not fit to return his ill language again; and in the next place, I would give no colour to the quarrel, being upon their own accounts. Said I, I see you are two to one, because Mr. Merriam was there. No, said Mr. Denew, you are three to two; for I had this Mr. Cumin and Mr. Bently, my friends, with me: No, said I, I will engage no man in my quarrel, but I will go with you myself. So I went with him, and as we were going, said I, Mr. Denew, what quarrel have you with me? Says he, you spread out your hands thus, and raised your voice. Said I, Mr. Britton hath been with me, and told me of your consultation; but sir George Rook will not thank you for this, for I have been with him. Says he, I know sir George Rook's mind. Said I, I have been with him this morning; have you seen him since? I know his mind better than you, said he, and you must fight with me. So I went along with him. When I came to the corner of Little-Drury-lane, I observed him to have a great cane in his hand: Said I, you have a

great cane, which is a great advantage, if you have skill to use it; you must lay down your cane: Instead of laying it down, he up with it as fast as he could to strike me; with that I stepped back and drew my sword, and he did the same; but he fumbled, having his cane in his hand, so that I believe my sword was out rather sooner than his: I walked back about the length of this court, and there I stood; Mr. Denew came to me. Though I know something of fencing, I had heard so much of Mr. Denew's skill, that I was not willing to venture my skill against his: I held my sword close to my body, with the point up, and thrust without parrying, and drew it back again to myself. This was the way of my defence; and we had, in this manner, about seven or eight passes at each other: At last, seeing the advantage he had of me with his cane, I threw first my hat at him, which missed him; afterwards I threw my peruke, which hit him upon his shoulder; I took that opportunity, and made a home pass at him: Says Mr. Denew, that is not fair, and dropt his sword; that is not fair, said he: fair—! said I? any thing to an assassin; you are a villain hired by — to assassinate me. This, my lord, was what I said.

Coun. Mr. Colepeper, you said at the first time, that Mr. Denew replied, that sir George Rook had friends, and there would be a way found out for that: What was it?

Colep. That sir George Rook had friends, and there would be a way found out for that.

Coun. For that: What did you think was the meaning?

L. C. J. Who said that?

Colep. Mr. Denew to me, my lord, in the Inner-Temple-lane.

L. C. J. What, at the first meeting?

Colep. Yes, my lord.

Coun. But your servant that you sent, did he see him there?

Colep. Yes; so he said.

Coun. That day you was at sir George Rook's, was Mr. Denew there?

Colep. I did not see him there.

Coun. Who was by when you had the scuffle at Little-Drury-lane?

Colep. Mr. Cumin, and Mr. Bently.

Coun. Was Mr. Merriam there?

Colep. Yes; he came with Mr. Denew, and was ready to make one.

L. C. J. Did Mr. Merriam draw his sword?

Colep. No, my lord, he stood by.

Coun. What did Mr. Merriam say that time in your hearing?

Colep. I did not hear him speak any thing.

Coun. I ask you this, did he say at any time, that he had taken sir George Rook's quarrel upon himself?

Colep. Yes, Saturday night.

Coun. Def. Don't lead, don't lead.

Colep. My business, said I, is with sir George Rook. Mr. Denew said, he had another below, and he would end it there; says he, By God, I will have you out.

Coun. What is this Denew?

Colep. I do not know that he is a gentleman, I believe he is not. He has, by report, no very good fortune, and is said to have fought in other people's quarrels pretty frequently.

Coun. Is he a soldier, or a fencing master, or a gentleman? What is he?

Colep. He is one that hath great skill in fencing, and I thought him culled out for that reason.

Coun. What said Mr. Britton, at the time he brought colonel Seymour's affidavit? What, did he talk of a consultation?

Colep. He told me, he was with sir George Rook the day before, and that they were consulting how they might proceed with me.

Coun. How often was Mr. Merriam with Mr. Denew?

Colep. I saw him when Mr. Denew first delivered the challenge, and at the time of the assault; and I understood he was in a coach at ten o'clock at night, when Mr. Denew challenged me out.

Coun. Did Mr. Britton use any words about saving your life or honour?

Colep. Yes; he said, It was all I had to save my life, to sign that paper.

L. C. J. Who said so?

Colep. Mr. Britton, my lord, Sunday morning, about an hour and a half after I had been with sir George Rook.

Coun. And when you refused it, what did he say then?

Colep. Says he, the quarrel is public in its nature, sir George Rook is the flower of Kent, and there are above twenty friends depending upon him; and, says he, come out, I will stand by him. I told him, it was unworthy of him to tender such a paper, and I would lose the last drop of my blood before I would sign it.

Coun. What did he say then?

Colep. Then says he, you will be insulted.

L. C. J. Then you did not hear Mr. Merriam say any thing, or do any thing?

Colep. Yes, my lord, I saw him make a motion, when Mr. Denew said, here is Mr. Merriam, and I have another friend hard by: and after the scuffle was over, I met Mr. Britton hard by.

L. C. J. How far?

Colep. It was near Temple-bar.

L. C. J. This side, or the other?

Colep. Just this side, coming through as it were. I was first overtaken by Mr. Denew near St. Clement's church.

L. C. J. What time of the day was this?

Colep. It was during the time of divine service.

L. C. J. Where were you going?

Colep. My lord, I am a man, as other men are; I thought myself most barbarously used, and since I had made this agreement with sir George Rook, to give him satisfaction upon the coast of Holland, I went to tell Mr. Britton, that if he would go over with sir George Rook, I would speak with him after I had spoke with sir George Rook.

L. C. J. I ask you where you were going then?

Colep. I was going from my lodging to beyond St. Clement's church.

L. C. J. Upon what occasion?

Colep. My lord, to speak with Mr. Britton.

L. C. J. Did he lodge thereabouts?

Colep. Yes, my lord, I think in Boswell-court. I was in so much passion, that as I went, I felt not the ground that I trod upon.

Coun. How soon after Mr. Britton was gone from you did you go out?

Colep. Immediately.

Coun. How soon after that did you see Mr. Denew?

Colep. Immediately he overtook me.

L. C. J. What need had you to go after Mr. Britton? You had seen him just before at your chambers; you say you went to speak with Mr. Britton; you say he was just before at your lodgings; why did you not tell him so then?

Colep. My lord, my passion began to rise afterwards, upon the reflection.

L. C. J. Had you not told him as much before?

Colep. Yes, my lord; but I had not bid him prepare to go, and that I would take him after sir George Rook in Holland.

L. C. J. Did you intend to tell him, that you would meet with him in Holland, and deal with him after sir George Rook?

Colep. I did so.

L. C. J. Did you go after Mr. Britton, to attack him immediately? Or only to tell him, that after you had discharged yourself of your engagement with sir George Rook, you would engage with him?

Colep. Yes, my lord: but always on the defensive part here.

Coun. Queen. How far from your lodgings did Mr. Denew stand?

Colep. I lodge in Cecil-street, and he overtook me about St. Clement's church; and he ran. Mr. Merriam was with him at that time, and he pointed at him as another; I apprehended Mr. Merriam to be one of them.

Coun. Was he there the first day Mr. Denew came to you?

Colep. Yes, the first day.

L. C. J. Did Mr. Merriam say any thing to you?—*Colep.* No, my lord.

L. C. J. Did he hear what Mr. Denew said to you?

Colep. Yes, my lord, at the time of the assault.

L. C. J. But the first time?

Colep. No, my lord; he gave me a wishful look at going into the coffee-house.

Coun. Did he lay his hand upon his sword, or any thing?

Colep. No; I believe not.

Coun. Def. That is not fair: pray, sir, be pleased to answer me a question or two. You say you was going to Mr. Britton's, was it not with a design to challenge him? You say likewise, your passion was so high, you did not

well conceive what you did, did you not design to challenge him then?

Colep. No; neither to challenge, nor to quarrel with him instantly. But I told air George Rook, at parting, that I hoped he would change his resolution; but, said I, if you persist in it, I will wait upon you; and if he would persist in the resolution, then I thought, that since Mr. Britton had used me in this manner, he was fitter than another, that was an innocent person.

Coun. I think you say you had a challenge from sir George Rook; was it in writing, or by word of mouth?

Colep. By word of mouth, by Mr. Denew.

Coun. You say, Mr. Denew overtook you by St. Clement's; do you apprehend that they came thither to meet with you?

Colep. I apprehended it wherever I went; I looked to be attacked in the street, and so I told Mr. Bently, and desired him to be with me, and take notice, that I was upon the defensive, for there will be swords drawn.

Coun. You say you lodged in Cecil-street? How could you think to meet them there? Did you think they would lie in wait?

Colep. Yes, and that they were waiting for me every where: when I arose in the morning and looked from my lodgings, I saw some persons stand at the end of Cecil-street, and bob, and run: these I apprehended were setters.

Coun. Mr. Colepeper, the 21st, you say, was the first time that you had any discourse with these people, did you not send to Mr. Denew to come to your chamber?

Colep. No.

Coun. At eleven o'clock?

Colep. No: said I, if I should out-stay my hour, come at eleven to my chamber; and accordingly he came: my reason was, I found he would make a quarrel of it, if I disappointed him but a moment.

Coun. Did you not send your servant for him?

Colep. No, I sent my servant to the coffee-house, to see whether he was there.

Coun. Did you not send for Mr. Britton?

Colep. No: I believe my sister did; she thought him to be a peace-maker, as he pretended himself to be.

Coun. Give me leave to ask you one question: you say you were in great passion, you thought yourself likely to be attacked; why then did you go out that morning to Mr. Britton's?

Colep. I have given you an account of that already; I was provoked more than human nature could bear.

L. C. J. He says, that what Mr. Britton had offered to him made him to be further enraged, and went after him to acquaint him, that after he had disengaged sir George Rook, he would engage with him.

Colep. I do not know what I should have said to him; but those, my lord, were my present thoughts.

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Coun. Def. When Mr. Denew met with you were there not some hard words that passed between you two?

Colep. No, not any on my part.

Coun. Did you not give him some abusive language?

Colep. I did not, Sir; he called me scoundrel and rascal, but I made no return to him.

Coun. But when he came to your chamber at ten o'clock at night, did you not tell him that you had been at sir George Rook's, and that he had used you like a scoundrel; and that you believed him to be like him?

Colep. No, nothing of that: I have not seen sir George Rook, I said, and I believe he denied himself.

Coun. Pray, Mr. Colepeper, the first time Mr. Denew, you said, said nothing that was uncivil to you: then he only fairly delivered to you a message.

Colep. And that sir George Rook had friends; and, that there would be a way found out for that.

Coun. What sort of reputation had Mr. Britton? Is he used to fight duels? Is he famous for duelling?

Colep. I know nothing of him: he is my country-man, but I live a great way from him.

Coun. What age is he of?

Colep. He is an able, strong man of his age: he is in court, you may see him.

Coun. I ask you, on your oath, upon the time you admit he, Mr. Denew, was civil, did he give any reflections at first?

Colep. He did not call me scoundrel and rascal the first time.

Coun. You admit the first time he was civil?

Colep. No, sir, he gave me several reflections, but did not call me scoundrel and rascal at the first.

L. C. J. Who did not?

Colep. Mr. Denew did not, at the first time.

L. C. J. Did he ever call you so?

Colep. Yes, my lord, at the time of the assault.

Coun. Def. Which call you the second time?

Colep. When he came to my chamber at 11 o'clock in the morning, that was the second time, then he would quarrel with me, because, as he said, I disappointed sir George Rook.

L. C. J. When was this?

Colep. Saturday morning, at 11 o'clock.

Coun. Def. You say he went away satisfied?

Colep. I do not say he was satisfied.

Coun. I ask you upon your oath, the third time, whether there was not angry words on both sides? You gave him reproachful language, and asked him what he had to do there at ten o'clock at night? I think this was —

Colep. There was none on my side: he said that we might end it: I said, I had been with sir George Rook, and I was of opinion that he was at home, and denied himself.

L. C. J. That was Sunday morning.

Colep. No, my lord, I had been there Saturday

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day afternoon, and they said he was not at home then: this gentleman asked, whether I did not at 10 o'clock at night, give Mr. Denew hard words? I said, no.

Coun. Def. Did he quarrel with you on his own account?

Colep. No, he declared it was upon sir George Rook's account; and said he would take the quarrel upon himself.

Coun. The third time I thought you said he quarrelled with you upon his own account?

Colep. Yes: on Sunday; then I spread my hands out, I asked him what quarrel he had with me? Said I, what is your quarrel with me? Says he, you spread your hands out thus, and spoke too loud.

Coun. Was that all?

Colep. Yes: then I asked him, said I, Sir, is this a reason you must shed my blood, or put me under the necessity of shedding yours?

L. C. J. When was that?

Colep. On Sunday morning, when he overtook me.

Coun. Def. The question I would ask you is this; you have said, Sir, that Mr. Denew overtook you by Little Drury-Lane end?

Colep. No, Sir, he overtook me behind St. Clement's church.

Coun. Then, pray, Sir, when you had some parley with him, I would ask you upon oath, who drew the first sword?

Coun. Plaintiff. He told you that before.

L. C. J. He has told you the manner of it.

Colep. I will tell you again: says I, you have skill in fencing, that is enough; you must lay down your cane: with that, he took up his cane to strike; I then stepped back to draw, and he was slower than I, because his cane hindered him.

Coun. Def. Then who made the first pass?

Colep. I cannot tell; I stood my ground, he came up at me.

Coun. I thought you said you made the first pass at Mr. Denew.

L. C. J. He told you the manner: he said he drew his sword, and went back, and Mr. Denew came up to him.

Coun. Def. I would know who made the first pass? You say you threw your hat at him?

Colep. Yes, I did afterwards.

Coun. But was it not you that made the first pass?

Colep. Indeed I cannot tell; if there was any advantage, I believe I might take it.

Coun. Where was the place proposed for your fighting with Mr. Denew?

Coun. Plaintiff. There was no place; he way-laid him.

Colep. He kept close to me, and would not let me stir a foot from him; but I did not intend to run away from him.

Coun. Def. But you said you designed to meet sir George Rook in Holland.

Colep. Yes.

Coun. Then how came it to pass you did not meet him?

Colep. Because I think sir George Rook had not used me as a gentleman; and I do not think myself obliged to observe rules of honour with him.

Coun. Plaintiff. That is not fair.

Coun. Def. Had not Mr. Denew his cane in his hand, when he fought you?

Colep. Yes; I am glad you ask me that question: he held his cane in his left hand, and I found it inconvenient in my passing; said I, Coward, lay down your cane: but he kept it in his hand; but English people love fair play, and those that stood behind him, cried out, 'lay down your cane;' and then he fumbled to lay down his cane, and I threw my parake at him, and made a pass at him: this after four or five passes.

Coun. I beg the favour of you to ask you one question, you say the place you saw Mr. Denew first was the toy-shop?—*Colep.* Yes.

Coun. Is it not an usual place where gentlemen used to stand?—*Colep.* Yes.

Coun. Plaintiff. When you were going along the back-side of St. Clement's church, I ask you in what manner did Mr. Denew come after you? Did he walk very fast, or run?

Colep. He ran.

Coun. Queen. Did Mr. Merriam run?

Colep. I did not see him till he came up to me.

Coun. Def. I ask you this; at the time you drew your sword, did he offer to strike at you first?

L. C. J. Has he not told you plainly?

Mrs. Steed sworn.

Coun. Plaintiff. Pray, madam, will you be pleased to acquaint my lord and the jury what you know concerning this matter, and what passed between your brother, Mr. Colepeper, and Mr. Denew, at his first coming to him?

Steed. On the 21st of August—

Coun. Queen. Speak as loud as you can.

Steed. On the 21st of August, my lord, I went to the Temple to my brother's chamber, to go along with me into the country, according to his own appointment, and my brother was not at all ready, at which I was mightily surprised; but my brother was reserved to me, and I could not tell the reason; I was loth to leave him in town, because he had several intimations in the country, that he was mightily enquired after: so that, at length, I did sift it out, that there was some danger in the case; and sent my coach and equipage to Mr. Steed into the country, that he might not come up to expose himself to danger too: at length, while I was at my brother's chamber about 11 o'clock, a gentleman came to the door, whom I since understood to be Mr. Denew; and though I could not hear distinctly what he said, but something about hours, punctual in hours, and precise in time; my brother answered, that he had a respect to sir George Rook, and sir Jacob Banks, on the account of the ladies they had married, and the family he had married into, and never meant him wrong.

Coun. Say that again, what your brother said to Mr. Denew in relation to sir George Rook.

Steed. I heard him say he had respect for them on the account of the ladies they had married; and never had the least intention to affront or wrong them.

Coun. What said Mr. Denew to the matter?

Steed. I do not know, I know no farther at the Temple. We went afterwards to Cecil-street, and my brother sent a letter to sir George Rook, and the message that was brought back, was, That he expected him at his house, or would send immediately after him; and quickly after, Mr. Denew came, and my brother was gone out; then I thought it would be time well spent to have Mr. Denew in my lodging: of myself I fancied, that while my brother was abroad, he would come. I knew my brother was at Tom's Coffee-house in Covent-Garden, and I sent my brother word, Mr. Denew was with me: I asked him if he wanted to speak with Mr. Steed, my husband? He said, No, it was with Mr. Colepeper, him he wanted to speak to: I said I had sent to him, and soon after Mr. Denew wanted to be gone; and I said, it will make but a Comedy of Errors to go when I had sent and expected him to return; so Mr. Denew, after some time spent, went away: he said, there was but one coffee-house in the Strand, and there he was to be spoken with. Just after he was gone, I went to seek after my brother, and just as I was taking coach with Mrs. Harlackenden, Mr. Britton came, and asked after my brother, whether he was there, or at the Temple? I promised he should know where he was; so I took coach; and when I could not find my brother I returned. My brother came to my lodgings, with Mr. Cumin, a French gentleman, who speaks English very ill, about dark; and a little while after, my brother sent to Mr. Denew, to the coffee-house where he had appointed, and Mr. Denew came in a coach, and came up into the dining-room; says he, Mr. Colepeper, I must speak with you in private: says he, you may speak here: No, says Mr. Denew, you must come out: says my brother, I have been with sir George Rook, and I could not find him; either he denied himself, or was not at home: says Mr. Denew, that shall not serve your turn; let us make an end of it now: says he, come out; God I will have you out; God I will have you out. There was a multiplicity of words, but my brother was civil and inoffensive all the while; and Mr. Denew menaced somewhat upon the stairs, and went off. The next morning my brother arose very early, and, contrary to my desire very much, he went to wait upon sir George Rook: I was full of terror at that, and thought of nothing else, but to get surgeons to heal the wounds and stabs. I knew nothing how matters went: so my brother returned, and about nine or ten Mr. Britton came again.

L. C. J. Where?—*Steed.* To my brother's and my lodgings in Cecil-street; and he

enquiring over night for my brother, and not finding him, and doubting whether he would be at the Temple, or at Cecil-street, I sent a messenger to tell him he was at Cecil-street, and I thought him to be a mediator, or else I should not have introduced him to my brother; so when he came in, he desired that Mr. Bently, and we women would withdraw.

Coun. Queen. Who desired this?

Steed. Mr. Britton desired the women to withdraw, of whom I was one. Mrs. Harlackenden and I stood at the door, to hear what we could, being very inquisitive in so horrid a case; and I heard them read something, but what that was I could not tell, but my brother told me since, it was colonel Seymour's affidavit.

L. C. J. Where was all this?

Steed. At Cecil-street, about nine o'clock a Sunday morning: I heard him pretend to be a mediator; he said he was a mediator, and that he had a paper, which if my brother would sign, all would be well; and if he would preserve himself he must sign it; I did not hear what the paper was, but my brother told him, that was unworthy of him, as a mediator, to tender to him such a paper, which he looked upon as ignominious, and would rather die than sign it: Then, says he, you will be insulted; then says my brother, I shall defend myself.

Coun. Queen. What did he say then?

Steed. He said, sir George Rook was the flower of Kent, and the quarrel was of a public nature; and for his part he would stand and fall by him, and so would twenty more.

Coun. Did he talk of any consultation he had?

Steed. He said he would stand and fall by him, and so would twenty more.

Coun. Def. I hope you will not put questions in her mouth.

Another for Def. You do not ask fair questions.

L. C. J. She has answered very fair; pray do not quarrel.

Coun. Queen. What did he say further?

Steed. Mr. Britton came to the door, he bid my brother not to be in a passion; I wondered he desired my brother not to be in a passion: Said I to my brother, Will you not go to the stairs with him? Says he, a villain, he has challenged me out.

Coun. What time of the day was this?

Steed. About 9 or 10 o'clock.

Coun. When did your brother go out?

Steed. He went out immediately after that, and told me he was going to drink a dish of coffee: I was full of concern, for Mr. Denew over night had challenged my brother out, and said he had a friend below in a hackney coach.

Coun. Who said so?

Steed. Mr. Denew said he had a man in the coach below; a friend he had too, as well as my brother.

L. C. J. Where was this?

Steed. It was at my lodging in Cecil-street.

L. C. J. Indeed I mistook, for I thought it was at Mr. Colepeper's chamber.

Steed. No, my lord; it was in Cecil-street, and when Mr. Britton was going: said I, Brother, do not you attend him to the stairs! as I thought in point of civility he ought to do: says my brother, A villain, he has just now challenged me out.

L. C. J. Who said so?

Steed. My brother said so.

L. C. J. Who did he say was a villain?

Steed. My lord, I said to my brother, Why do not you wait on Mr. Britton to the stairs? Says my brother, A villain, he has challenged me.

Coun. Queen. Pray give an account of what passed over night between you and your brother.

Steed. I have spoken to it already; if you will have it again, I will repeat it.

L. C. J. She hath said it: have you any more, madam?

Steed. I have done with that, my lord. Just after Mr. Britton had left my brother, Mr. Bently, an honest gentleman and friend of ours, went out with my brother, and quickly returned, and told me of the assault my brother had had in the Strand; and that Mr. Merriam had said, my brother had been too free in his tongue with sir George Rook.

Coun. Def. You say, your brother said, the villain challenged me; but you did not bear Mr. Britton make any challenge at all?

Steed. He said he would stand and fall by sir George Rook.

L. C. J. He said he would be insulted; that he would stand and fall with him.

Coun. Queen. And that twenty more were engaged; that they would make an end of it now.

Coun. Def. Madam, you were pleased to say, you apprehended Mr. Britton to be a mediator: Pray, what reason had you for thinking so?

Steed. Because, Sir, he had been, when I was a child, with my father very civilly entertained; and he was a man more in years, I thought, than to undertake such a bully affair.

Coun. Then pray, do you know any thing of Mr. Britton's being sent for to make up this?

Steed. I myself sent for him by my brother's servant, because he desired the night before to know where my brother was.

L. C. J. When did he come to you?

Steed. My lord, he came Saturday in the afternoon, to know whether my brother was to be spoken with at the Temple, or Cecil-street, or where: I told him he should know if he had a mind to it; and apprehending him to be a mediator, I sent to him.

Coun. Def. In whose name did you send to him?

Steed. I did not mention any name, but that my brother was now in Cecil-street.

Coun. Did you yourself send, or know of his being sent for more than once, or how?

Steed. Never, I dare say, but that one time.

Coun. Queen. I would only ask you this

question, was there any talk of making an end?

Steed. Yes.

Coun. I only ask you this, at the time he refused the paper, did he talk of making an end of it?

Steed. He said, they might make an end of it now; it was not so positive as come and fight; but that he would make an end of it now.

L. C. J. Make an end of it now, who said so?

Steed. Mr. Britton.

Coun. Def. What did you mean by that? Your brother did not understand him so; he thought that if your brother would sign that paper, that that would make a speedy end?

Steed. I cannot descant upon his meaning; his terms were high, and I believe it might be fighting, and so I took to be his meaning of his making an end of it.

Coun. Queen. Did he talk any thing of a friend, then at the time that he said he would make an end of it? Did he talk of having a friend?

Steed. No, he did not.

Mrs. Harlackenden sworn.

Coun. Queen. Madam, will you acquaint my lord, and the jury, what you know concerning this matter of Mr. Denew and Mr. Colepeper, what you know of the whole matter?

Harl. Saturday, betwixt five and six o'clock, there came a gentleman into my house in Cecil-street.

L. C. J. Pray speak out.

Harl. My lord, Saturday, betwixt five and six o'clock, there came a gentleman to my house in Cecil-street, where Mr. Colepeper and this lady lodged; I asked who he was? I was not in the room, but I saw him; she said it was one Mr. Denew; my lord, he staid and walked about about half an hour, and then went away again: after this, we thought, my lord, that Mr. Colepeper was then with sir George Rook; going about five o'clock from my house, to wait upon sir George Rook, my cousin and I being apprehensive of what might follow, we sent for a hackney coach to get a surgeon, thinking he might be engaged in a duel with sir George Rook; and just as we were going, Mr. Britton came up to the door; Mrs. Steed made a curtesy to him, and said, your servant, Mr. Britton; and he, your servant, madam: where, says he, is Mr. Colepeper? I do not know, says she: does he lodge here? Yes, said she, he is here sometimes: she said she did not know whether he was at the Temple at his chambers; immediately he went away in a hackney coach; we could not hear of Mr. Colepeper, and we came home again: about an hour after Mr. Colepeper came in.

Coun. Queen. When was this?

Harl. This was Saturday the 21st of August, Mr. Colepeper came in with a French gentleman.

Coun. What time?

Harl. About eight o'clock.

Coun. Did Mr. Denew come that night?

Harl. Yes, Sir, about an hour after that, between nine and ten, when we were going to supper.

Coun. What did he say?

Harl. Mr. Denew sent word he was there to speak with Mr. Colepeper; Mr. Colepeper sent for him up, he asked him his business; says he, I have business with you; but demurred, as if he did not care to speak before us; we still continued in the room; Mr. Colepeper asked him his business; Sir, says he, I have business with you: my cousin, I, and the gentleman, still continued in the room; says Mr. Colepeper, do you come from sir George Rook? If you do, I have been with him, he was not at home, or would not be at home, or to that effect: what says he, do you say sir George Rook denied himself? No, says Mr. Colepeper, I don't say sir George Rook denied himself, but he was not at home, or would not be at home: then, says he, you did not go at the time: yes, says he, I did, or very near it: well, Sir, said he, I have business with you, and I would have you come down stairs; Sir, says he, I have none with you, my business is with sir George Rook, and I don't question but I shall acquit myself like a man of honour, says Mr. Colepeper: says Denew, you are a man of honour, a man of honour! I don't question but you will acquit yourself like a man of honour! in a deriding way: Mr. Colepeper made answer, it is no business of yours, said he, and I have nothing to say to you: have you not, says he, you will find I have with you, come down stairs; and if that gentleman be your friend, let him come too, I have mine in the coach. Mr. Colepeper insisted upon it, he had no business with him, but with sir George Rook, and he did not question, but that he should prove himself to be a man of honour. Says he, going down, you are a man of honour! you don't know what that is, you are a little rascal. I called to the man, William Packs, Will, says I, light this gentleman to the coach: I thought that word was so base, to call him little rascal, that I did not tell it to Mr. Colepeper, when I came up.

Coun. Did Mr. Colepeper give any ill language at that time?

Harl. No, indeed, nothing at all; only said, I have nothing to say to you, I do not know your business, said he, and I shall not go down in the dark with you; and it was so dark, my lord, that we could not see cross the street when he came, and it is a very narrow street where I live.

Coun. Do you know of Mr. Britton's coming on Sunday morning?—*Harl.* Yes, I do.

Coun. Pray then give an account of it?

Harl. He came, and I did not know but he might be a man to accommodate the business, and we did send, for Mr. Colepeper lay in my house, and he arose and went to wait upon sir George Rook, and when he came back, he told us he had been with sir George. However, I believe, the reason why we sent for Mr. Brit-

ton, was, because I think sir George Rook had told him, he had sent the affidavit to him, as it proved he had, and Mr. Britton came up in a very gentleman-like manner; but we quitted the room, and went into the bed-chamber; there is a wainscot door between, and the door was not quite shut neither.

L. C. J. Who sent this affidavit?

Harl. Mr. Britton, my lord, had the paper in his pocket.

L. C. J. But who said the affidavit should be sent?

Harl. Mr. Colepeper had been told by sir George Rook, he had sent to him when the quarrel was betwixt them.

L. C. J. Now give an account what passed between Mr. Britton and Mr. Colepeper.

Harl. We left the room to them, and they sat down together, and Mr. Britton told him, that he was very sorry for this disturbance between sir George Rook and him; and would be very glad to accommodate matters between them, to do a friendly office betwixt them.

L. C. J. Who said so?

Harl. Mr. Britton, my lord.

L. C. J. That he would be glad to accommodate matters?

Harl. Yes, my lord, that he should be glad to do a friendly office betwixt them. Mr. Colepeper said he was ignorant of the offence against sir George Rook, and asked what sir George Rook alleged against him; so he pulled out the paper: we saw the paper through the door; Mr. Colepeper read it, and said, it was but of very little consequence to make such a quarrel: Mr. Britton said, it was that which was highly resented, and that he would be very glad to be serviceable on both sides, to mediate in this thing; Mr. Britton said this to Mr. Colepeper; they talked pretty low; I walked backward and forward in the room; I did not hear every word that was said, but at last I heard him say, that he had brought a paper to him from sir George Rook: we saw him through the crevices of the door read the paper; Mr. Colepeper said to Mr. Britton upon the reading of it, is this a friendly proposal? before I will oblige myself to sign this, I will lose the last drop of my blood.

Coun. Plaint. What did Mr. Britton propose he should do with that paper?

Harl. Sign to it, wherein he had said any thing against sir George Rook, to acknowledge it; but Mr. Britton got up, and said to Mr. Colepeper, says he, I find you are resolved to be hot: Mr. Colepeper said, he would lose the last drop of his blood; says he, I find you are hot, and you must expect what follows; for sir George Rook is a man of honour, and hath done his country such service, that, says he, every gentleman that is acquainted with him, must needs think himself obliged to espouse his quarrel; and I am one, says he, and he walked out; and as he was going away, says he, you must expect to be insulted.

Coun. Did he talk of any number?

Harl. I did not hear that.

Coun. Queen. Did you see Mr. Merriam there at any time?

Harl. No, I never saw him there.

Coun. You say Mr. Colepeper went to sir George Rook's house?—*Harl.* Yes.

Coun. How soon afterwards was it that Mr. Britton brought this paper?

Harl. About an hour.

Mr. Bently sworn.

Coun. Def. Call Mrs. Harlackenden again. Who was in the room Saturday night?

Harl. Mrs. Steed, myself, and Mr. Cumin.

Coun. Nobody else?

Harl. No, Sir; nobody else: It was between nine and ten, when we were going to supper.

Coun. You were saying that Mr. Colepeper went to sir George Rook's, but when he came back, he told you he had seen sir George Rook. You said so, did you not?

Harl. Yes, I did.

Coun. Was this as soon as Mr. Colepeper came home?—*Harl.* Yes, it was.

Coun. And you could hear as much of what was said by Mr. Britton as Mrs. Steed; and Mrs. Steed as much as you?

Harl. I heard what I have said.

Coun. Did you not make it your business to observe what was said at that time?

Harl. Yes, without doubt I heard what I have said, or I should not speak it: we were afraid the business would go ill, therefore we were inquisitive: and this that I have said I did hear.

Mr. Bently's Evidence.

Coun. Queen. Will you acquaint my lord and the jury, whether or no you saw the scuffle between Mr. Denew and Mr. Colepeper, at the end of Drury-lane?

Bent. Yes, I saw it.

Coun. Was Mr. Merriam there?

Bent. Yes, he was.

Coun. What did Mr. Merriam either do, or say?

Bent. He said nothing at all in the scuffle, Mr. Denew overtook us near Lyon's-inn; and as soon as he overtook us, says he to Mr. Colepeper, well overtaken! Says Mr. Colepeper, I have been with sir George Rook, and I have given him satisfaction. Says Mr. Denew, that is nothing to me, you must give me satisfaction for what you did to me last night. Says Mr. Colepeper, you are two to one: no, says Mr. Denew, you are three to two; but, says he, I will call another, and we will end it: No, says Mr. Colepeper, I will engage no gentleman in my quarrel: then, said Mr. Merriam, we will stay behind.

L. C. J. Who was the third person?

Bent. Mr. Cumin, a Frenchman.

L. C. J. Who was it said, you have three to two?

Bent. Mr. Denew said, you are three to two; I will fetch a third, said he. No, said Mr. Colepeper, I will engage no man in my

quarrel. Then, says Mr. Merriam, I will go away.

Coun. So that it is evident he came upon some design. Hark ye, do you know any expression made use of by Mr. Merriam at the time of the scuffle?

Bent. I was saying, It was pity this thing could not be made up: says Mr. Merriam, Mr. Colepeper ought to take care what he says.

Coun. What ill language did Mr. Denew say Mr. Colepeper had used towards him?

Bent. I do not know.

Coun. Was you by when Mr. Britton came?

Bent. Yes.

Coun. What was it he said?

Bent. I know not, for I retired.

Coun. Def. Was you with Mr. Colepeper then, when Mr. Denew met him by Lyon's-inn?—*Bent.* Yes.

Coun. Whither was he going?

Colep. I desired him to go along with me; for, says I, I shall have cause upon me.

Coun. Mr. Bently, where were you going then?

Bent. We were going to Boswell-court.

Coun. Did you observe who first drew, Mr. Denew, or Mr. Colepeper?

Bent. I do not know, for I was in a sort of confusion, and my eyes were upon the ground, and I do not know.

Coun. Did you see Mr. Colepeper throw his hat at Mr. Denew?

Bent. No; but I saw him throw his periuke.

Coun. Did he make a pass at him at the same time?—*Bent.* Yes, he did.

L. C. J. What, did he take his wig off?

Bent. Yes, my lord; he took his wig off with his left hand, and threw it at him.

Coun. Def. What did Mr. Denew say when they were going to draw?

Bent. I do not know, I was a great way off.

Coun. When Mr. Colepeper came to you, or sent for you, did not he tell you the reason why he sent for you?

Bent. I apprehend Mrs. Steed had sent for me.

Coun. You went along with Mr. Colepeper?

Bent. Yes, I did so.

Coun. What did he tell you he was going to do?

Bent. He said he was going to speak with Mr. Britton; he told me he designed to hire a vessel to go to Holland, to meet with sir George Rook, and said it would cost him 100*l.* and after that he had fought with sir George Rook, he would fight with Mr. Britton.

Coun. Did he not, upon your oath, say he went to challenge Britton?

Bent. No, I do not remember that.

Coun. Queen. Did you observe any cane in the hand of Denew?—*Bent.* Yes.

Coun. How did he dispose of it?

Bent. Mr. Colepeper said, after some passes, Coward, lay down your cane; and so he hid it down.

Coun. Who passed first?

Bent. I do not know.

Coun. Did Mr. Denew pass before he parted with his cane?—*Bent.* Yes, he did.

L. C. J. I ask you this question: Mr. Bently, did not Mr. Denew lift up his cane at Mr. Colepeper, before any sword was drawn? Did you see that?

Bent. No, I did not see that, I was at some distance, and in a little sort of a confusion.

L. C. J. How far was you behind?

Bent. I believe half the length of this hall.

Coun. Queen. When Mr. Colepeper drew his sword, did he make up to Mr. Denew, or retire first?—*Bent.* He retired back first.

Coun. Upon your oath, did he offer to make any pass at Mr. Denew, until Mr. Denew came up with his sword drawn?

Bent. I did not observe that.

Coun. Mr. Colepeper retired and Mr. Denew came forwards?—*Bent.* Yes.

Coun. Def. Did he not throw his hat before any pass?—*Bent.* I did not see that.

Coun. Did he not throw his wig before any pass?—*Bent.* No, the wig was last of all.

Coun. Queen. What did Mr. Colepeper do then?

Bent. Mr. Denew said it was not fair; Yes, says Mr. Colepeper, it is, and I will take all advantages against assassins, as I take you to be for sir George Rook.

Coun. What was done after the scuffle?

Bent. They run away, they one way, and we another; this was at the May-pole in the Strand. We met Mr. Britton at Temple-bar.

Coun. At the time they met at Lyon's-inn, did Mr. Colepeper decline?

Bent. He said he had been with sir George Rook, and had given him satisfaction.

Mr. Wells opening for the Defendants.

I am in this cause counsel, my lord, for the defendants, and as for Mr. Merriam, I think here is nothing that they offer can affect him, as to any challenge that he gave: he was in company, it is true; he did nothing, but only gave good advice; he did say indeed at last, Mr. Colepeper must have a care what he said; and, I think, it was good advice if it had been well taken. And as to the other two, Mr. Colepeper you have heard is the material evidence in this matter. Gentlemen, you will consider who are the witnesses; and what are the circumstances of this fact. It is, my lord, a thing we cannot possibly be provided with many witnesses in, being transacted betwixt Mr. Colepeper and these gentlemen, therefore we have the disadvantage in this case, because the law does say, I must own, that Mr. Colepeper is allowed to be a witness, but we cannot be witnesses, gentlemen, for ourselves, in the matter; and it being a private transaction, it is not to be presumed that we can make any great defence, nor have any positive witnesses; but that there was a quarrel between himself and sir George Rook, is declared by them: and I believe very provoking language hath been given by Mr. Colepeper,

which might occasion what hath happened. As for Mr. Denew, he is a gentleman of very good fashion; a gentleman of estate and quality; a justice of the peace in the country, and not such a kind of person as Mr. Colepeper would represent him to be: he is a person that sir George Rook hath an intimacy with, and has had for a great while together. Being at sir George Rook's house the 21st of August, the day that is fixed upon, then truly sir George Rook did say, Mr. Colepeper had highly offended him, and he did expect he would give him some satisfaction for what he had done; upon that we do own, that Mr. Denew, as from sir George Rook, did go in the morning to expostulate with Mr. Colepeper the reason of this usage; he met him about the Temple-gate, and acquainted him with it; says he, I cannot come to you these two hours, if you go into the Rainbow coffee-house, and stay two hours, I will come; but he did not come: and Mr. Colepeper, as much apprehension as he had from those assassins, sent for this gentleman up to his chamber in the morning; and when he came, it is true what Mr. Colepeper says, that he said, he had said nothing of sir George Rook, but that he was a very honest gentleman.

Colep. I did not say that neither.

Mr. Wells. Says he, If you will say that, I believe sir George Rook will put it up; for sir George Rook is a man that will have his honour vindicated, for it is not fit such language as you have spoken should be spoken of him. Says he, if you will go to sir George Rook, I shall be glad, because I believe there will be an end of it. No truly, Mr. Colepeper could not go then, but two hours after he would go: says Mr. Denew, you say you will come within these two hours, but will you go certainly at the two hours end? Yes, said he, I will be there within two hours; then, says he, I have nothing to say, I am very glad you design it. My lord, he afterwards, as he frequently did, dined with sir George Rook: Mr. Denew, you may think, did acquaint him with what passed between Mr. Colepeper and him, and about two o'clock, after dinner, there came a message from Mr. Colepeper to sir George Rook, to tell him, that he could not meet him then, but he would meet him at five o'clock, which is the time Mr. Colepeper is agreed he was to meet: truly Mr. Colepeper did not come according to his appointment; and Mr. Denew, says he, I have staid here at home on purpose; I wonder he should give me so much trouble, and doth not come according to his promise and appointment; and then there came a man with a letter from Mr. Colepeper, a message by his servant: it was, that he could not come then, at five o'clock; but, says he, if you would needs have me meet you, if you appoint a time and place, if you insist upon it, I will not fail: upon that, Mr. Denew being there, tell him, says sir George Rook, I will stay at home on purpose, until such time as he comes; for I have a great desire to speak with him, and know the truth

of this matter that is spread so much abroad. He went, and he was not at home, and he staid till ten o'clock at night, and then he came up into the chamber: Mr. Colepeper was in another room, but Mr. Colepeper hearing his voice, says, let him come up stairs (for he was a pair of stairs higher.) Mr. Denew comes up; Mr. Colepeper * holding the door in his hand, would not let him, at first, come in. Your business, Sir? says Mr. Colepeper. You know my business well enough, says Mr. Denew. He told him, that he came from sir George Rook; he said, that he had no business with him; he had been with sir George Rook, and he did deny himself, like a scoundrel fellow, for at home he was, but would not see him, and he believed him to be such another; he took this Mr. Denew to be a scoundrel fellow too, and he would have nothing to say to him. Mr. Denew said, my lord, he did not expect such language as that was; and whatever your quarrel, said he, may be with sir George Rook, is no matter, but you have given me provocation: says he, if you have been with sir George Rook, you have heard the matter, and shall not talk of it; but since you have given me such provoking language, you cannot expect I should take it very calmly; and away went he. The next morning, my lord, by pure chance, about Temple-gate, he saw Mr. Colepeper in his passage, and there he told him, says he, you may remember the language you gave me last night; it is not such language that one gentleman ought to give to another, and you must consider, and learn better manners. Says Mr. Colepeper, what need have you to trouble yourself with sir George Rook's business, when I have been with him? Says he, it is my business that I concern myself about; and upon that, there was some sort of a challenge upon his own account. But if this be every tittle true, it will not justify the indictment; that is, that he offered to fight the duel on sir George Rook's behalf; for this quarrel was upon the account of that gentleman himself. When he came to other witnesses, that gentleman who came last, he tells you, that it was upon his own account, and not upon the account of sir George Rook: so that so far as there were any witnesses present, so far they give you that account. My lord, as to this Mr. Britton, there is no great matter fixed upon him: in this cause, they do own, that Mr. Britton was taken for a friend, and Mr. Colepeper's sister sent for him as a mediator; she looked upon him as a friend, and did rightly think so; for indeed, he was so purely in this matter, and had no design nor enmity against Mr. Colepeper; he hearing there had been such provocation, he went purely to acquaint him, that sir George Rook was angry, and he would have him make up this matter,

* Not true, nor offered to be proved; but being not to the point, was let pass, as many other things for the same reason. Former Edition.

and sign an acknowledgment, but he would not; and thereupon he said, sir George Rook was the darling of Kent, and he would be insulted if he would not sign that paper; every one would espouse his quarrel, and he among the rest, if he would not acknowledge that rudeness. My lord, this is no challenge; Mr. Britton only told what the event would be, if he did not make acknowledgment for that offence; every gentleman would espouse sir George Rook's quarrel: this was only to shew the esteem sir George Rook had in the country; that Mr. Colepeper would be insulted, not by sir George Rook, but by the country, and he might well think so, if it were true what is reported of Mr. Colepeper, in reference to sir George Rook: but he told him what he believed the consequence would be; and he came purely as a friend, and nothing else; so that, my lord, there is nothing to be fixed, that he challenged Mr. Colepeper to fight upon sir George Rook's account; he came purely as a friend, and nothing else. Your lordship hears that they would insinuate, that these gentlemen laid in wait, and were hired on purpose to affront and assault this gentleman, and that they were men fit for such evil practices and designs; but there is nothing that hath been proved of that. These ladies talk of stories they heard in the country; and if they had a mind to assault Mr. Colepeper, he was at his chambers to be heard of; what need they so much to lie in wait? And even this very day he went abroad when this battle happened. But, my lord, how could it be possible this should be otherwise than chance? Mr. Colepeper, he lodged in Cecil-street, in the Strand, they met him at Wich-street, near St. Clement's church; it could not be presumed, that they should lie in wait there, expecting to meet with him; so that the very circumstance of the place shewed there could be no design of their meeting him in that place; for how could they suppose he should come there, since he lodged in Cecil-street? And then, my lord, it shews he had not those apprehensions of danger, that he was not so much concerned, as he would have us conceive; for he goes immediately out, took two or three with him: it was to challenge this man; but he would make you believe it was not a present challenge, but after he had fought with sir George Rook in Holland, he would fight this gentleman there; so that, my lord, this shews he was far from those apprehensions of danger as he hath pretended. We shall call two noble lords to these gentlemen's reputations, that will give an account of these gentlemen, that they are no such men as they pretend; and then we hope, though it is our misfortune not to have witnesses, the matter will be taken, as in all probability it was.

L. C. J. Mr. Wells, pray tell me the affront Mr. Colepeper gave Mr. Denew?

Mr. Wells. I did open it to your lordship.

L. C. J. It was not plain enough for me to see.

Mr. Wells. I am sorry for that, my lord, it is often my misfortune; but, with humble submission, it was at ten o'clock at night when he came; he told Mr. Denew, he had been with sir George Rook. Mr. Colepeper said, says he, I have been with sir George Rook, but like a scoundrel fellow he denied himself at home, and you are such another scoundrel.

L. C. J. Did he say that?

Mr. Wells. Yes, my lord, he did.

Coun. Queen. Have you any evidence of that?

Mr. Wells. My lord, we have nothing but Mr. Denew, and he will give his oath on it, as well as Mr. Colepeper his oath to the contrary.

L. C. J. Mr. Colepeper, you are upon your oath, Did you say sir George Rook was a scoundrel fellow for denying himself?

Colep. Never, neither then, nor in my whole life.

L. C. J. Did you say Mr. Denew was a scoundrel fellow?

Colep. No, my lord, never: I saw that Mr. Denew wanted a colour, and I was resolved not to give him one.

Another Counsel for the Defendants.

My lord, it cannot be expected, as this cause stands, that we can be able to give much evidence: If we could do it, I would not take up your lordship's time with any observations of my own; but I think it is very observable upon the indictment, that the gentlemen on the other side have scarce given us leave to make an answer to what was said, in reference to the defendants.

L. C. J. You had best to call what witnesses you have; and then if you have a mind to make observations you may.

Coun. Def. My lord, we must first beg leave to introduce another piece of evidence, the paper that I have in my hand.

Colonel Lee called.

Coun. Def. We would first beg leave to shew how Mr. Britton went to Mr. Colepeper and the gentlemen that we must bring, that he shewed the paper to first; I believe, my lord, it will appear there was nothing in the paper but what any gentleman might sign.

Coun. Defen. (Speaking to col. Lee.) Did Mr. Britton shew you that paper at any time and on what account?

Col. Lee. Mr. Britton and I was at the coffee-house upon the 21st of August, talking of the behaviour of Mr. Colepeper to sir George Rook: Considering the different* characters of these gentlemen, we thought it advisable to have an accommodation; and in order thereunto, we proposed the drawing up of a paper; Mr. Britton drew it up, and upon perusal I †

* Mr. Colepeper is glad of the different character; and hopes the reader will think it well made out. Former Edition.

† Whether this is any credit to the paper? Former Edition.

approved of it, and did think there was nothing in it but what Mr. Colepeper, or any gentleman, might set their hands to, without any reflection upon their reputation, and thought sir George Rook would accept of it; and accordingly Mr. Britton went, and said Mr. Colepeper was not at home. My lord, I believe this is the paper.

Coun. Queen. But suppose Mr. Colepeper would not sign that paper. What then?

Col. Lee. There was not a word spoken of that.

Coun. How many gentlemen were there talking over this matter?

Col. Lee. Nobody but Mr. Britton and myself that I know; in the room there were some other, but no other people knew any thing of the matter.

Serj. Darnell. But was there any thing said in case he should refuse to sign the note?

Col. Lee. No.

The Paper shewn to Mr. Colepeper.

Coun. Def. Is that the paper?

Colep. I am almost sure it is not.

L. C. J. What do you say?

Colep. Indeed, my lord, I believe it is not.

Coun. Queen. (Speaking to col. Lee.) Can you say it is the same paper?

Col. Lee. I cannot say it is the same paper.

Coun. But is that a copy of the paper that was drawn up?

Col. Lee. I do believe it is the same paper.

Coun. But he was not at the delivery of the paper to Mr. Colepeper; therefore it is not evidence.

Serj. Darnell. My lord, it cannot be read; for to read it is to make it evidence: And it does not appear by any proof that it is the paper, but on the contrary is sworn by Mr. Colepeper not to be the paper.

L. C. J. (Speaking to Mr. Colepeper.) Can you say it is not the paper?

Colep. My lord, to the best of my judgment it is not the paper, nor the bigness of it; and there is this clause left out, That I was to satisfy sir George Rook, and all his friends.

L. C. J. Was that in the paper you had?

Colep. My lord, in the paper I had, I was to ask pardon of sir George Rook and all his friends, though I had never spoke amiss of him.

Coun. Def. My lord, he does not believe it to be the same paper.

Colep. I do not believe it to be the hand.

L. C. J. It cannot be read as evidence.

Coun. Def. We do not offer it, my lord, as the paper that was actually shewn, but that the jury may see that Mr. Britton went upon an amicable design; we offer it so far.

Coun. Queen. Do you, Mr. Colepeper, say it was the same paper?

Colep. That which was tendered to me was most ignominious.

The Lord Winchelsea sworn.

Coun. Def. Pray, my lord, will you be

pleased to give an account of what you know of these gentlemen.

Lord W. When I understood they were under such an extraordinary prosecution, I could do no less right than to appear for them here: I wonder that these gentlemen, that are known to be gentlemen of good estates and great honour, should be called fencing-masters and duellers. I will speak first of all to Mr. Britton, who is a gentleman of that esteem and worth in town and country, that I need say but a very few words of him; I have long had an intimate acquaintance with him; there is nothing can be less injurious to any man than he: he is one that values himself upon his honour and reputation, and would not do a base thing for the world. And Mr. Denew is represented as a fencing-master and dueller, a master of defence; it is well known he is a gentleman of good repute.

L. C. J. He is esteemed to be one that is skillful in fencing.

Lord W. He has a commission from the queen, and hath a double commission from the prince at this time, and is now in as good circumstances as any man in the country, and is well known to be of a good family; and I am sure he would be very sorry to change^o circumstances with this gentleman that makes complaint against him; I never knew him give offence to any man.

Coun. Def. Was he a quarrelsome man?

Lord W. He is a man of honour, and will endeavour, when he is injured by any man, to do himself right: he hath a great regard to his reputation.

The Earl of Thanet sworn.

E. of Thanet. I have known Mr. Britton for near these twenty years past, and I never heard but that he acquitted himself, in all the business he transacted, like a very worthy, honest gentleman, and an understanding man; and this is the just character he hath in the world; and this did recommend him to the station he is now in to serve the queen: he hath been a very civil, honest man, and I never heard but he was ready and willing to do all kind of good offices. As to the other gentlemen, I believe Mr. Denew to be an honest gentleman; but as to Mr. Merriam, I never heard his name before.

Coun. Def. Do you think, my lord, they would be guilty of an assassination?

E. of T. No, indeed.

Coun. Is Mr. Britton in any place in the government?

E. of T. He has had a place in Dover these twenty or thirty years; and I believe, by the just and good character he hath had, is made one of the commissioners of the custom-house.

Coun. Are they taken notice of to be men of peaceable temper? or, are they quarrelsome persons?

* It is presumed his lordship might be misinformed, nor are the defendants indicted for poverty. Former Edition.

E. of T. I believe of Mr. Britton, by all that I know of him, that there is not another man in England can believe he would have any such intention of being in an assassination.

Lord W. As to Mr. Merriam, hearing his name, I should have said something of him. He is now actually employed under the prince and me: and I verily believe he cannot be concerned in a base action.

Sir Benjamin Bathurst sworn.

Bathurst. I have known Mr. Britton, my lord, these twenty-seven or twenty-eight years: I never knew a man in my life more inoffensive, or more desirous to do any good office; a man of a very good temper; never inclined to quarrel; never provoked; but is always ready to do all the good offices he can. Mr. Depew, I hear, hath been slightly spoken of, which I wonder at. He was bred a merchant, has always behaved himself very well, and is a gentleman of a good family and plentiful estate, and hath lived in great reputation, and did sometimes trade as a merchant, and, that not answering, he lives now upon his estate in the country: as far as I have heard of Mr. Britton, he hath a good character of all mankind, and is now one of the commissioners of the custom-house, and I believe is very well esteemed by all that know him.

Coun. Def. Do you think he would have been guilty of an assassination?

Bath. No, indeed, I do not.

L. C. J. (Speaking to the Queen's counsel.) I would ask you how you fix any crime upon Mr. Britton? I will suppose the words in the paper which he shewed Mr. Colepeper were too severe, and not fit for a man to sign: but does that make him guilty?

Coun. Queen. My lord, he challenged him in express terms.

Serj. Darn. My lord, Mr. Colepeper says, Mr. Britton came to him, and proposed the signing of a paper; and that now they shall bring another paper, and not the same that was first tendered to him, I think is very extraordinary, and makes against them: but then, my lord, after the paper was tendered to Mr. Colepeper, (but refused by him) immediately after that Mr. Britton gave the challenge.

L. C. J. That is a question.

Coun. Queen. Says he, sir George Rook is the flower of Kent, does friendly offices, promotes and advances his friends, and there are twenty will engage themselves in his quarrel; and I myself for one.

L. C. J. Mr. Colepeper, pray tell us the matter.

Colep. Says he, I see you have a friend here, and I have one hard by; come out, and end it.

L. C. J. I have a friend by—But this is not an assault.

Colep. Says he, I will take the quarrel upon myself, and I will stand and fall by sir George Rook.

Coun. Queen. Did you hear him say so?

Colep. Yes, my lord.

Coun. And Mrs. Steed said the same.

L. C. J. Did she say the same?

Colep. Yes, my lord.

L. C. J. Mrs. Steed, did you hear him say that he had a friend below, and therefore he would have him go down and end it; and, that he would take the quarrel upon himself?

Steed. He said he would make an end of it presently; that he would stand and fall by sir George Rook, and so would twenty more; and that if he did not sign, he would be insulted; that there were twenty engaged in the quarrel.

L. C. J. But did he say, come out, and end it now; I have a friend hard by?

Steed. I did not hear him say, come out; but I heard him say, there were twenty more would stand and fall with sir George Rook.

Serj. Darn. Did you hear him say any thing of coming out?

Steed. He said, we will end it presently.

L. C. J. Did he say, come out?

Steed. He said, we will make an end of it presently.

L. C. J. Call Mr. Bently again: was he here then?

Colep. No, my lord, Mr. Cumin was there.

L. C. J. Mr. Bently, was you by then? Did you hear any such discourse?

Bent. No, my lord, I did not.

L. C. J. Was you by when Mr. Britton was there on Sunday morning?

Bent. I was by when he first came in.

L. C. J. Did you hear any discourse?

Bent. No; I perceived they desired to be alone.

Coun. Def. My lord, I would observe, that the indictment is laid several ways: besides the confederacy, they charge us with particular offences in challenging. As to the beginning of the indictment, they take in all the defendants; there are three of them, and they say they entered into a conspiracy, to consult and contrive how they might do a mischief to Mr. Colepeper. They begin, my lord, only with Mr. Denew, and say, that Mr. Denew did offer himself to duel with Mr. Colepeper, on behalf of sir George Rook: and as to Mr. Merriam, that he did meet them, and had some discourse with Mr. Colepeper. My lord, they have endeavoured to support a conspiracy; and if they fail of the proof of it, they know their whole indictment fails: as to Mr. Britton, and Mr. Merriam, there is no evidence that can concern them; but suppose there should be some warm words between gentlemen, are those words indictable, unless there be some things premeditated, in order to bring to pass such a conspiracy? But, my lord, they have not produced any evidence whatsoever, that Mr. Britton, one of them, ever spoke to, or saw the other two, Mr. Denew and Mr. Merriam; so that, as to Mr. Britton, there can be no manner of a conspiracy. It does not appear that he is guilty of any fact directly; it has appeared indeed, that Mr. Merriam did retire; so that Mr. Merriam and Mr. Britton are out of this cause; so

that Mr. Denew is alone in the conspiracy: he conspired by himself, and there must be three to make it a conspiracy; and we must submit to your lordship's judgment how far the challenge is indictable. Supposing Mr. Britton had said, Come out, how is that indictable, unless it had been in order to an assassination? And as to Mr. Britton, unless there be a conspiracy, it will not do.

Another of the same side. They have laid it a joint assault, as an action of battery against two; but upon evidence, my lord, in the indictment, we submit it whether it must not be laid severally.

Coun. Queen. It is in the indictment; they are all several overt-acts of the conspiracy.

L. C. J. Mr. Britton is not indeed guilty of fighting; but the question is, whether or no what he said amounted to a challenge.

Then the Lord Chief-Justice read over some of the indictment.

L. C. J. This concerns Mr. Denew and Mr. Merriam; but not Mr. Britton.

Mr. Wells. My lord, here they have got writers in short-hand; and Mr. Colepeper hath bespattered sir George Rook.

Coun. Queen. We desire to know how this was, if it should come abroad.

Another of the same. There is nobody says any thing against sir George Rook.

Coun. Def. My lord, we desire to be heard for sir George Rook's honour.

L. C. J. Here is nobody questions sir George Rook's honour.

Coun. Your lordship will please to remember Mr. Colepeper did say in his evidence, that he sent his man into the room to look for sir George Rook, that he was not there; and he sent him up stairs, that he was not found there; and he concluded with this, that he did vetily believe that he was at home. We will call our witnesses to prove that he was not at home.

Col. Crawford.

Coun. Def. Will you give an account where sir George Rook was on the 21st of August, Saturday?

Col. Crawford. My lord, I came to sir George Rook's house; I believe it was that very afternoon about four o'clock: says I, Sir, you appointed me to call on you about this time; I am ready to wait upon you: No, says sir George, I cannot go with you now, because Mr. Colepeper hath writ me a letter, and hath appointed five o'clock to come and speak with me, and hath writ to me with a great deal of compliment, that he will come at five o'clock and desired me to be within. Said I, Sir, then I will stay till five o'clock, and staid till almost six. Says sir George, nobody that appoints at five will come now: says he, we will send for a coach, and go to my lady Halifax's house. We went therefore, my lord, from his house.

* This not law.—Former Edition.

and went no where else, but to see my lady Halifax's children. I staid with him, my lord, till seven: says he, when he came back, (to the porter) who has been to enquire for me? Says he, there was such and such, and there has been Mr. Colepeper: how long ago? said sir George. A little while, says the porter: this is very well, says sir George; almost seven, and he appointed five o'clock. This I have sworn to.

Coun. Queen. We do not endeavour to affect sir George Rook's reputation in any respect; his reputation is* indisputable.

Colep. My lord, I sent a letter at four o'clock.

L. C. J. You say, you sent one at one o'clock.—*Colep.* Yes, my lord.

L. C. J. And then sent another at four o'clock: why did you send it?

Colep. To excuse myself for not coming at the first appointment; for I saw myself beset.

Coun. Queen. We desire to ask Mr. Colepeper, what Mr. Britton told him of a consultation with sir George Rook?

Colep. Mr. Britton told me, he was in a consultation with sir George Rook and Mr. Denew, how to proceed with me: when my letter came, he was there, and in consult.

Coun. Def. My lord, we insist upon it, that these fellows should not go on writing.

[Ordered, That the Writers be turned out of the Court.]

And accordingly they were turned out at the repeated instance of some on the part of the defendants, who shewed themselves concerned for sir George Rook's honour, and feared the publishing a case that would ill bear the light. However, thus far the short-hand writers had proceeded with great exactness; and they are ready, by their hand-writing and notes, to justify all before mentioned in this trial, which by this time was very near ended.

What follows, William Colepeper offers to the reader from himself: Perhaps the world might be better satisfied, if the whole had been taken by the short-hand writers, who immediately committed all to paper; but William Colepeper being under a disability in the case, is to supply the rest by his memory. And if any doubt should arise, (as he hopes and believes there will not) concerning the little remainder that he undertakes to perform, he must appeal to the many persons present for the fidelity and exactness of his relation.

Mr. Colepeper made this answer to what colonel Crawford deposed.

My lord, I was telling your lordship and the jury, that Mr. Britton had threatened me with twenty on behalf of sir George Rook, if I would not subscribe the paper before-mentioned. My lord, Mr. Britton named four of the twenty. I have indeed thought it not proper to mention, after Mr. Britton, the names of gentlemen on such an occasion; but since colonel Craw-

ford comes here voluntarily, and is suffered to swear for sir George Rook's honour, (as I hear it called) out of the cause, I think I ought to tell your lordships, that colonel Crawford, who makes himself out to have been there, (I mean at sir George Rook's house) was one of the twenty particularly named to me by Mr. Britton: And, my lord, I must farther observe, colonel Crawford has sworn, that sir George Rook went to see my lady Halifax's children; but sir George Rook, on the next day morning, when I waited on him at his house, told me, when I spoke about his being denied, that he was gone to a committee of the council.

Then one of the counsel for the queen spoke to this effect:

My lord, I wonder to hear this dispute about sir George Rook's being at home when Mr. Colepeper went to his house: What colonel Crawford and Mr. Colepeper have deposed, is very consistent: Mr. Colepeper says, he was there about five, and making his man search for sir George, believed he was at home; now colonel Crawford comes and puts the matter out of all doubt, and proves that sir George was at home at the time.

Here ended the evidence; the summing up of which by the lord chief justice Holt, and his lordship's remarks to the jury, Mr. William Colepeper thinks not proper for him to give an account of; nor will he undertake, on his bare memory, to print any thing said by his lordship.

Mr. William Colepeper only notes, that his lordship was fully convinced of the case, and that the jury were so too; for, having withdrawn from the bar, and considered the matter, they brought in their verdict as follows, and is now on the Record:

John Merriam, Not Guilty.—Richard Britton, Not Guilty of the Conspiracy, nor of the Assault, but guilty of the rest of the Indictment, in manner and form as is charged against him.—Nathaniel Denew, Not Guilty of the Conspiracy, but guilty of the rest of the Indictment, in manner and form as is charged against him.

Mr. Colepeper closes his relation with the particulars with which the law closed it, viz. with the sentence that was past on the convicted, the next term after the trial.

The court being sat, and all the judges present, the three counsel for the gentlemen spoke in mitigation of the offence; and though just animadversions might be made on the matter and manner of their discourse, yet as the court was pleased to take no notice of it, Mr. William Colepeper thinks it not necessary to make any observations upon it.

Mr. William Colepeper having declined any counsel, appeared in his gown at the bar, and spoke in the case himself, and after having opened the nature of the crime, and said what he thought convenient to the matter of law, the particulars of which he troubles not the reader with, he concluded his discourse with words to this effect:

My lord, had any of these gentlemen challenged me really upon their own account, how-

* Very obliging.—Former Edition.

ever I might have acted, I should not have applied myself here for redress; but numbers are engaged against me, and yet the quarrel is another man's. My lord, it is within a few days, that a gentleman of an ancient family in our country has been hanged for killing a coachman; I am under such unhappy circumstances, that some of those now convicted before your lordships, and others indicted who have been engaged in the villainous machinations and attempts against my life, have been since advanced to places of honour and profit.

Here my Lord Chief Justice interrupted Mr. William Colepeper, supposing him to reflect upon the government.

After which, Mr. William Colepeper went on with due submission to his lordship.

My lord, I intend no reflexion upon the queen or government: Her majesty is an excellent person; but, like all sovereigns, she is forced to hear with the ears, and see with the eyes of others. The great man of malice improves the interest he has to obtain preferments for his engines. My lord, I am ready to prove, that he has employed some of these instruments upon me, as well before a demand of satisfaction, as after an agreement of giving it him in his own method on the coast of Holland. I hope your lordship, and the rest of the queen's judges, will inform her majesty of her admiral, and that he will be made a severe example of her justice: And, my lord, I desire your lord-

ship and all the court, to take notice of what I now say; sir George Rook is the first admiral of England that ever sent a gentleman a challenge, and, after it was accepted, employed others to fight for him.

Here my lord chief justice, and the other judges, took notice of Mr. William Colepeper; again for these expressions.

My lord, said Mr. William Colepeper, going on, I am the most injured gentleman of my country: the matter of my discourse is true: perhaps the manner may be more excusable, than justifiable: Mr. Denew, from a captain, is made a lieutenant-colonel, and Mr. Knatchbul has a place of 800*l.* per annum, both since their crimes. It is no wonder if the extreme sense of my wrong should extort from me expressions which your lordship thinks do not become me. As your lordship has reprehended me, I doubt not but you will also give just judgment on the assassins.

The counsel for the defendants then apprehending a great fine, put Mr. William Colepeper in mind, that he had said at the trial, Mr. Denew had but a small estate.

Mr. William Colepeper owned he had said so, and referred the fine to the pleasure of the court.

Accordingly sentence was past upon the defendants as follows:

Nathaniel Denew fined 200 marks.
Richard Britton, 100*l.*

432. Proceedings in the House of Commons and House of Lords relating to JAMES BOUCHER, gent.:* 2 ANNE, A. D. 1704.

December 17, 1703.

A MESSAGE from her majesty, by sir David Mitchell, gentleman usher of the black rod.

"Mr. Speaker; the queen commands this

* These Proceedings were published by order of the two Houses of Parliament, and shew the reasons both Houses went upon: Which, with the precedents out of the Journals of the House of Lords and House of Commons, will render them useful to posterity. Former Edition.

This and the three following articles arose out of the transactions designated by the appellation of the 'Scots Plot:' as to which see 2 Burnet's Own Times, pp. 371, et seq. Boyer's History of Queen Anne, pp. 104, et seq. 126, et seq. Somerville's History of the Reign of Queen Anne, pp. 50, et seq. 174, et seq. 4 Laing's History of Scotland, pp. 398, et seq. Lovat's Memoirs, M'Pherson's Original Papers, and Lockhart, as referred to by Mr. Laing. The following short passage I extract from Boyer, because in it the author professes to relate the substance of an information upon oath concerning this Plot; and to suggest an explanation of the hostility which afterwards prevailed between Godolphin and Harley.

honourable House to attend her majesty immediately in the House of Peers."

Accordingly Mr. Speaker, with the House, went up to attend her Majesty, and being returned, Mr. Speaker reported, that her ma-

"The truth is, whether, as some pretend, the ministry found the queen inclined to favour the friends of the court at St. Germain; or whether they themselves were shy and apprehensive of irritating the Scots, at this critical juncture; it is most certain, that even after the removal of the earl of Nottingham, the further discovery of the Plot was prosecuted with great tenderness, not to say supinity; of which I shall give a notable instance. Towards the end of June, 1704, captain Francis Lacan, late of the lord Galway's regiment of foot in Piedmont, and who, in king James's time, had been an ensign in Dumbarton's regiment, came over from Holland, and upon oath, delivered an information in writing [Captain Lacan's Information, dated June 27, 1704. N. B. I have the original or rough draught in my hands. Boyer] to Mr. Secretary Harley, importing, in substance, 'That sir George Maxwell, captain 'Levingston, captain Hayes, and several other 'Scotch officers, who came from the court of

jeaty had been pleased to give the royal assent to ' An act for granting an aid to her majesty

' St. Germain's to Holland, near a year and a half before, after having held several private consultations in divers suspicious places in the neighbourhood of the Hague; and sir George having, in vain, endeavoured to get a pass from Mr. Stanhope, the queen's envoy, they all embarked for Scotland, to the number of fifteen or sixteen gentlemen, with three ladies, the same day that captain Lacan sailed from the Briel for England, with the retinue of an envoy from the duke of Savoy.' Mr. Secretary Harley having communicated this information to the lord treasurer, orders were immediately dispatched to Scotland to seize sir George Maxwell and his followers; which was accordingly done, just upon their landing: But though, by what had already appeared before the Committee of the Lords, and other concurring evidences, it was most certain, that they came with a design to raise commotions in Scotland, yet they were soon after set at liberty; and sir George Maxwell was not only permitted to come to London, but highly caressed by some great men. As for captain Lacan, though his information proved so true and exact, that his zeal and diligence were, at first, highly extolled, both by the treasurer and the secretary; and though he did further service to the government, by seizing in St. James's Park a young Irish gentleman, lately a retainer to the court of St. Germain's; yet, after he had attended daily, at the secretary's office, for above three months, and consumed his small substance, he was sent back to Holland, without any other recompence, than empty promises. Nor was this all: For the Irish youth who, to save his life, readily discovered all he knew; and who, among other particulars, acquainted Mr. Secretary with the constant correspondence duke Hamilton held with the court of St. Germain's: This gentleman, I say, was likewise sent to Holland with Lacan, upon a sly errand; I suppose, lest he should blab, and reveal how easily he came off, and what little stress was laid on his discoveries. It is true, that both the treasurer and the secretary had, at this very time, a better and more agreeable informant; and that was one of the daughters of the late sir Theophilus Oglethorpe, who, being come from France without a pass, lay at the mercy of the government; but who by her wit and beauty, improved by the French gaiety and politeness, soon gained the favour, if not the hearts of these two ministers. Nay, some pretend, that the secretary having, by his address, gained a greater share in her confidence and secrets, this raised such a jealousy and resentment in the treasurer, as, in time, grew to an irreconcilable enmity."

In 1704 was printed " A Collection of Original Papers concerning the Scotch Plot," which is very curious: but I have judged it to be too copious for insertion here.

' by a Land-tax;' and afterwards to make a most gracious Speech to both Houses, of which he had desired, and obtained a copy, which he read to the House, and is as follows, viz.

" My Lords and Gentlemen; I think it proper, upon this occasion, to acquaint you, That I have had unquestionable informations of very ill practices and designs carried on in Scotland by emissaries from France, which might have proved extremely dangerous to the peace of these kingdoms; as you will see by the particulars, which shall be laid before you, as soon as the several examinations, relating to this matter, can be fully perfected, and made public without prejudice: In the mean time, I make no doubt, but by this seasonable discovery, I shall be able to give such directions for our security, as will effectually prevent any ill consequences from these pernicious designs.

" Gentlemen of the House of Commons; I am very sensible of your great readiness and affection for the public service, by presenting me so early in the sessions with a considerable part of your supplies: I depend entirely upon your continuing with the same zeal to dispatch the remainder of them; that so we may be prepared to give the speediest assistance to our allies, and to defeat the malicious designs of our enemies; who cannot be more industrious to contrive the ruin of this kingdom, and of the Protestant religion, than I shall always be vigilant and careful, both for their present preservation, and for their future security."

Resolved; *scm. con.* That an humble Address be presented to her majesty, returning the thanks of this House for her most gracious Speech from the throne, and for the communicating the discovery her majesty hath made of the wicked designs against her government; with assurance, that this House will stand by and support her majesty and her government against all pretenders, and all her enemies whatsoever.

Ordered, that a Committee be appointed to draw up the said Address.

Ordered, that the said Address be drawn up on the said resolution, and also upon the debate of the House.

Dec. 18. Mr. Bromley reported from the Committee, to whom it was referred to draw up an Address to be presented to her majesty, (according to the order of yesterday) That they had drawn up an Address accordingly, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the table, where the same was read.

Resolved, *scm. con.* That this House doth agree with the Committee in the said Address.

Resolved, That the said Address be presented to her majesty by the whole House.

Ordered, That such members of this House as are of her majesty's most honourable privy council, do humbly know her majesty's pleasure, when she will be attended by this House.

Ordered, That some members be appointed

to search the Lords' Journals, as to their proceedings in relation to the examination of any persons who are discovered to have a design against her majesty's government.

And they were appointed accordingly.

The Humble ADDRESS of the House of Commons to the Queen.

"Most gracious Sovereign; We your majesty's most dutiful and loyal subjects, the Commons in Parliament assembled, do return your majesty our most humble and hearty Thanks for your most gracious Speech from the throne.—We are truly sensible of your majesty's great goodness, and of the confidence you repose in us, by communicating the discovery of the ill practices and designs that have been carried on in Scotland, by emissaries from France; whereby we have an opportunity to repeat our unanimous resolution to stand by and support your majesty, and the succession in the Protestant line, as limited by law, against all pretenders, and all your majesty's enemies whatsoever.—We want words to express to your majesty the detestation we have of any conspiracies and attempts to disturb the peace and prosperity of your happy government; under which we must think our security sufficiently provided for, since your majesty has been pleased to give such directions as may prevent all ill consequences from them.—It is great satisfaction to us, to find, that the Supplies we have already given are so acceptable to your majesty: we shall go on with the same readiness and zeal to dispatch the remainder of them, that we may enable your majesty to give the speedier assistance to your allies, and to defeat the malicious designs of your enemies.—Your faithful Commons can never have the least distrust of your majesty's vigilance and care for the preservation of the Protestant interest in general, of the monarchy, and the church of England, as by law established: and we humbly beg leave to assure your majesty, that we will never be discouraged, but will continue incessant our endeavours, by all proper methods, to transmit them securely settled to posterity."

Dec. 20. Mr. St. John reported, that the members appointed to search the Lords' Journals, as to their proceedings, in relation to the examination of any persons, who are discovered to have a design against her majesty's government, had searched the Lords' Journals accordingly; and he read in his place what they had found therein, and delivered the same in at the table, where the same was again read.

A motion being made, and the question being proposed, That an humble Address be presented to her majesty, setting forth the great concern this House hath for her majesty's royal prerogative, and the resolution of this House to support the same; and that no persons accused for crimes, who are her majesty's prisoners, ought to be taken out of the custody of the crown, without her majesty's leave; and a debate arising in the House thereupon;

And a motion being made, and the question

being put, That the debate be adjourned; it passed in the negative.

Then the main question being put; Resolved, That an humble Address be presented to her majesty, setting forth the great concern this House hath for her majesty's royal prerogative, and the resolution of this House to support the same; and that no persons accused for crimes, who are her majesty's prisoners, ought to be taken out of the custody of the crown, without her majesty's leave.

Ordered, That a Committee be appointed to draw up the said Address; And a Committee was appointed accordingly.—Ordered, That it be an instruction to the said Committee, that they do draw up the said Address upon the said Resolution, and upon the debate of the House.

Dec. 21. Mr. Speaker reported, That the House did yesterday attend her majesty at St. James's, and presented to her their Address; and that her majesty was pleased to give a most gracious Answer, as followeth:

"Gentlemen; I am very well pleased with your assurances of dispatching the Supplies, and with the other parts of this Address, in which you express so much duty and readiness to support, and to trust me.—You may depend upon my willingness to join my endeavours with you, in securing to posterity the Protestant succession in the monarchy, and the church of England, as it is established by law."

Mr. St. John reported from the Committee, to whom it was referred to draw up an Address upon the Resolutions of yesterday, that they had drawn up an Address accordingly, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the table, where the same was read, and (with an amendment) agreed unto by the House.

Resolved, That the said Address be presented to her majesty by the whole House.

Ordered, That such members of this House as are of her majesty's most honourable privy council do humbly know her majesty's pleasure, when she will be attended by this House.

Dec. 22. Mr. Comptroller acquainted the House, that her majesty having been humbly waited upon to know her pleasure, when she would be attended by this House: her majesty has been pleased to appoint to-morrow at four o'clock in the afternoon, at St. James's.

December 23, 1703.

The ADDRESS of the House of Commons to the Queen.

"Most Gracious Sovereign,

"We your majesty's most dutiful and loyal subjects, the Commons of England in parliament assembled, beg leave humbly to lay before your majesty the great and just concern we are under, to see any violation of your royal prerogative. Your faithful Commons believe the administration of the government best

secured when it is left to your majesty, with whom the law has entrusted it; and have so firm a dependance upon your majesty's affection to your people, and your great wisdom, that they can never apprehend so little danger from any conspiracy, as when the examination thereof is under your majesty's directions. We are therefore surprized to find, that when several persons, suspected of treasonable practices against your majesty, were taken into custody by your messengers, in order to be examined; the Lords, in violation of the known laws of the land, have wrested them out of your majesty's hands, and without your majesty's leave or knowledge, in a most extraordinary manner, taken the examination of them solely to themselves; whereby a due enquiry into the evil practices and designs against your majesty's person and government may, in great measure, be obstructed. Your loyal Commons do therefore most earnestly desire your majesty to suffer no diminution of that prerogative, which, during your majesty's reign, they are confident will always be exerted for the good of your people. And we humbly beg leave to assure your majesty, that as we are resolved by timely and effectual supplies to enable your majesty to carry on the war, which you have so gloriously begun; so we will, to the utmost of our power, support your majesty in the exercise of your just prerogative at home, and the asserting of it against all invasions whatsoever."

Jan. 3, 1704.—Mr. Speaker reported, That he, with the House, did, before the recess, present to her majesty their humble Address of the twenty-first of December last; and that her majesty was pleased, thereupon, to give this most gracious Answer.

"Gentlemen;—I have had the satisfaction to find, that the matter which may have occasioned this Address is now at an end.—I return you many thanks for the concern you express for my prerogative; and for your repeated assurances of making the supplies effectual, which will be greatly for the honour and advantage of the kingdom.—I shall be careful not to give way to any invasion of the prerogative of the crown, or of the rights and liberties of the people."

Upon this Address of the House of Commons, the House of Lords drew up the following Representation:

The Humble REPRESENTATION of the Right Honourable the Lords Spiritual and Temporal in Parliament assembled, presented to her Majesty, on Tuesday the 18th day of January, 1704; and her Majesty's most gracious Answer thereunto.*

"May it please your most excellent majesty; We your majesty's most dutiful and

* Die Martis 18 Januarii, 1704. It is Ordered by the Lords Spiritual and Temporal in

loyal subjects, the Lords spiritual and temporal in parliament assembled, find ourselves under an unhappy necessity of making this our humble application to the throne; upon occasion of an Address presented to your majesty by the House of Commons, the 23rd day of December last, and since that time published to the whole nation in print; by which the House of Lords is charged with the violation of your royal prerogative, and of the known laws of the land; with wresting persons suspected of treasonable practices, and taken into custody by messengers, out of your majesty's hands, without your leave or knowledge, and in a most extraordinary manner taking the examination of them solely to themselves; whereby a due enquiry into the evil practices and designs against your majesty's person and government might in great measure be obstructed. And they conclude their Address by most earnestly desiring your majesty to suffer no diminution of your prerogative, and promise to support you in the asserting it against all invasions whatsoever. It is not possible for us to remain silent under this heavy charge, so unjustly, and without the least ground or colour to be fixed upon the whole body of the peers, which tending directly to create an ill opinion of us in your majesty, puts us under an inevitable necessity of vindicating both the legality, and the dutiful manner of our proceeding.

"The expressions in the Address of the House of Commons are so very harsh and undecent, that we may truly affirm, the like were never used of the House of Peers in any age; not even by that assembly, which, under the name of the House of Commons, took upon them not only to abolish the House of Lords, but to destroy the monarchy. We shall carefully avoid making returns of that kind: we consider too much what we owe to ourselves; and we know too well the profound respect due to your royal person, to let any provocation transport us so, as to use words unfit to be offered by us to our sovereign.

"The matter of this Address is no less injurious to us than the terms; there was not the least occasion for a just objection to any part of our conduct in that business to which the Address relates. The proceeding was strictly justifiable by the known laws and customs of parliament; it was carried on with the utmost respect to your majesty, and with true zeal for the safety of your person and government; all that was done was agreed to by the concurrent opinion of the House, without the least objection from any of our members, who have the honour of serving your majesty in your great offices and employments.

"We humbly represent to your majesty,

Parliament assembled, That the humble Representation of this House, presented to her majesty this day, and her majesty's most gracious Answer thereunto, shall be forthwith printed and published.

MATTH. JOHNSON, Cler' Parl.^t

that, by the known laws and customs of parliaments, the House of Peers has an undoubted right, in cases where they conceive it to be for the good and safety of your majesty and the kingdom, to take examinations of persons charged with criminal matters, whether such persons be then in custody or not, and also to order the persons so to be examined to be taken into custody of your majesty's sworn officers, attending the House during such examinations, or to commit them to any other safe custody that they shall think proper; and to restrain others, if they see cause, from having access to, or communication with them: The House of Lords has exercised this right from time to time, as occasions have required, without objection. Our records are filled with precedents which warrant our claim in every part of it; and we presume to affirm to your majesty, that the drawing this right into question, at any time, cannot but be of dangerous consequence to the liberties and safety of the people, and to the constitution of the government, as tending to avoid, or render, in great measure, ineffectual, the enquiries of parliaments, which are so absolutely necessary, especially where many and great persons are engaged in dangerous designs against the government; or where ill ministers abuse their favour towards the oppressing or enslaving of the people. Your majesty's wisdom and goodness make us secure at present against all influences of that kind, and we unanimously and heartily pray we may long enjoy the blessings of your reign. But if it happens, in future times, that ill men should gain too great a degree of favour with our princes, how easy will it be for them to stifle or defeat all parliamentary enquiries into their crimes? For if the being in prison, or in the hands of a messenger, will protect men from being examined in the House of Lords, or from being put into the custody of the proper officers of the House, during the examination, and debarred from conversing with others; it will certainly be always in the power of favourites to cause those who can be witnesses against them, as well as the accomplices of their designs, to be taken into custody. And if persons in custody are out of the reach of the House of Lords, who are the hereditary counsellors of the crown, and in whom a judicial power is lodged by the constitution; it is not to be imagined that the Commons can pretend to a greater power of the examining, committing, or restraining them.

"No House of Commons, till now, has given countenance to this dangerous opinion, which does so directly tend to the rendering ill ministers safe from the examination of parliaments: And we are persuaded, no House of Commons hereafter will assert such a notion, because they are not wont easily to part with a power they have assumed; and it is certain that they have several times taken upon them to exercise an authority like that, which they have so severely reflected on in their Address.

"This consideration gave us the greater as-

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tenishment, to find our proceedings represented in the strange terms of wresting prisoners out of your majesty's hands, and taking the examination of them solely to ourselves. We believe the ordering persons to be examined in that high court, where your majesty is always present, in consideration of law, and in that great council where you may be present in your royal person, as often as you please, will never be thought an exclusion of your majesty from the examinations, if that was intended to be insinuated by saying, we had taken the examinations solely to ourselves. Having thus laid before your majesty what it is we claim, and must insist on, as the indisputable right of the House of Peers; which was never thought, in the time of your royal ancestors, to be prejudicial to the just prerogatives of the crown, and which is manifestly necessary for the securing the liberties of your people, whereof we are assured your majesty will have an equal care; we humbly beg leave to lay before you a short state of the particular matter of fact relating to these prisoners, not doubting, but when the whole proceeding is known to your majesty, it will be approved not only as lawful, but every way respectful to your majesty.

"On Tuesday the 14th of December the House of Lords was informed, that several persons had been seized by the Custom-house officers on the coast of Sussex, as they came from France, and that amongst them there was one Boucher, who was capable of making considerable discoveries, having been in arms in the French service for many years, and gentleman of the horse and aid-de-camp to the late duke of Berwick, who stands attainted of high-treason, and who had been secretly in England several times before; that it was probable, if he was strictly examined, he might be brought to confess, since he saw his life in apparent danger; but that he was a bold man, and likely to attempt an escape on that very account, if he was not carefully looked after, and the House was also told, that there was a general remissness both in the taking, searching, and looking to such prisoners, which did afterwards appear very evidently in the examinations that were taken. Upon this information, the earl of Nottingham, your majesty's principal secretary of state, acquainted the House, that he had not heard of Boucher's name particularly, but had sent messengers to bring one Ogilby, and the other prisoners who had been apprehended by the Custom-house officers, to town, and that he believed the messengers would do their duty, but he would not be answerable for them.

"After this account of the prisoners, and of what had been done in order to secure them, the House thought themselves obliged in duty to your majesty, and for the public safety, at a time when the kingdom is engaged in an open war with France, and that there are too just grounds to apprehend the dangerous practices of French emissaries; to make an humble

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Address to your majesty, that particular care might be taken for securing the persons of Boucher and of those who were taken with him, and that none might be suffered to speak with them until they were examined.

“The next day, your majesty’s gracious Answer to this Address was reported to the House, that care had been taken to secure the prisoners, and that your majesty would give orders, that nobody should speak with them till they were examined. Thereupon, the Lords entered into a farther consideration of the importance of this matter; and conceiving nothing to be more likely to bring prisoners, who had forfeited their lives, to a full discovery of the truth, than to find themselves under the enquiry of a parliament, they thought it would be of public service for them to take the examinations of these persons; and accordingly an order was made, that no persons should speak with the prisoners, till they had appeared at the bar of the House.

“On the sixteenth day, the earl of Nottingham informing the House of Lords, that the prisoners were brought to town; the usher of the black rod was ordered to take them into his custody, in order to their examination, and to keep them separate, and in close custody (as your majesty had before directed), and it being thought most proper, from the nature of the thing, that the examination should be by a committee of Lords, rather than by the whole House, it was resolved accordingly.

“We beg leave to mention to your majesty a matter of fact which satisfied the Lords, that their resolution to take the examinations of Boucher, and the persons apprehended with him, was neither unknown or disagreeable to your majesty. On the same day when that was ordered, being the fifteenth of December, the Lords resolved to examine sir John Maclean, a very dangerous person, as was represented to the House, who then stood committed in the hands of a messenger; and for that purpose ordered him to be brought to the House the next day, having, as they then thought, very good grounds to believe it might prove of great service to your majesty. Sir John Maclean was brought to the House, according to the order; but your majesty being pleased so far to take notice of this order, as to signify to the House by the lord steward, that sir John Maclean had been in part examined already, and that your majesty thought it not proper to have that business taken out of the way of examination it was then in, but that your majesty would, in a short time, communicate it to the House; the Lords immediately acquiesced in your majesty’s opinion, and sent back sir John Maclean to the place from whence he was brought. It was with this disposition of mind the Lords acted in this whole matter; and if your majesty, who, no doubt, had the same notice of both orders, had thought any other method of the examination of Boucher, and the persons taken with him, more proper than that of the Lords; they had rea-

son to conclude your majesty would have intimated it at the same time, and most certainly the House would have had a like deference for your royal judgment in that instance also.

“The Lords Committees* appointed to examine the prisoners, proceeded with all possible dispatch, and made their report to the House on the 21st of December; upon consideration of the report, the House found it requisite to commit Boucher to the prison of Newgate for high-treason; and the Lords Committees having submitted to the judgment of the House, whether several parts of the examinations referred to in their report should be laid open to the House, or put into any other way of being farther enquired into, or prosecuted; the House, out of a full assurance they had, that, when the matter of fact should be laid before your majesty, you would certainly give such orders thereupon, as were every way suitable to your royal prudence, and tender care of the public safety, did unanimously resolve, without so much as suffering these parts of the report to be laid open to the House, that an humble Address should be made from the House to your majesty by the lord-steward and the duke of Somerset, (two of the Lords Committees, to whom the examination had been referred) laying before your majesty the whole report, with all matters relating thereto, and humbly desiring your majesty to give order, that Boucher should be prosecuted by Mr. Attorney General for high-treason; and that as to the commitment, prosecution, or discharge of the other prisoners mentioned in the report, you would be pleased to give such directions, as should seem most proper to your royal wisdom. Thus, as the whole affair was entered upon out of zeal for your majesty’s preservation, and the safety of the kingdom, and was carried on and concluded with all possible respect to you; so we had the comfort to rest assured, that our behaviour was no less graciously accepted by your majesty, from the Answer you were pleased to make the same day to our last Address on this subject, and which was reported to us on the 22d of December, by the duke of Somerset, whereby your majesty was pleased to signify to the House, with your accustomed goodness, that you would give order for every thing as the Lords had desired.

“Madam, this is a true and just account of our proceedings, which have been so strangely misrepresented, and to which no exception can possibly be taken by any persons rightly informed. For as we had your royal approbation of all that was done; so the House of Commons could have had no pretence of objec-

* The Committee of Lords mentioned in this Representation, who were appointed to examine the prisoners brought out of France, were seven, viz. the dukes of Devonshire and Somerset, the earls of Sunderland and Scarborough, the lords Townshend, Wharton, and Somers. They were chosen in the House by ballot. Former Edition.

tion, if they had taken the usual parliamentary methods of desiring to be informed of what we had done, and of the grounds of our proceedings, before they had approached your majesty with such a representation of them.

" Their carrying this unprecedented Address to your majesty, in so hasty a manner, gives us almost as great trouble as the hard usage we find in it. The ancient, known, and indeed, only effectual method of preserving a good correspondence between the two Houses of Parliament, has been by conferences. If at any time either House conceived they had a reasonable ground to object against the proceedings of the other, conferences have been desired, and the matter in debate between them fairly discussed, and thereby mistakes have been cleared for the most part, and a good understanding cultivated, and a mutual respect preserved; which is always highly requisite in the nature of our constitution, but more especially necessary in this time of war and danger.

" Had the House of Commons thought fit to have pursued this method upon this occasion, we should have been able to have given them entire satisfaction, not only of the lawfulness of all we had done, but of the just and weighty grounds upon which we took the examinations of these persons into our own hands: or, at least, if they could have convinced us of any mistake, we should have given them any reasonable satisfaction.

" But, without making any such previous step, the House of Commons have made an appeal directly to the throne against the House of Lords, and charged them, though most unjustly, with attempts of the highest nature. Nothing like this was ever done before, and out of our hearty concern for the preservation of our happy constitution, we hope the same thing will never be done again. We know your royal heart is unmoveably fixed on preserving the liberties of your people, and transmitting them entire to posterity; but if in after-times the Houses of Parliament should be appealing against one another to the crown, (for if such a course be justifiable in the House of Commons, the same method may be taken by the Lords) as your majesty is now sensible how great difficulties it necessarily brings upon a good prince; so it is easy to foresee (and we cannot think of it without terror) how fatal the consequences may be in the reign of an ill-designing prince, and what advantages may be taken from it, for utterly subverting the best ordered form of government in the world. There are examples abroad,* where proceedings of this kind have ended in the overthrow of the liberties of the people, which makes us the more apprehend the beginning of them among ourselves. Your majesty's great judgment cannot but readily discern, whether it does naturally tend, for one House of Parliament to be exciting and earnestly desiring the

sovereign to exert a real or supposed prerogative against the other House. It is not easy to imagine what the Commons could expect of your majesty from such an application; the Lords have never entertained a thought of using this dangerous method, whatever occasion may have been given within the compass of late years. And we promise your majesty we will always endeavour to preserve a good understanding with the House of Commons, and shall never think it too dear to procure that union at any rate, unless that of delivering up those rights and powers which are lodged in us by the law, and without which, the constitution cannot subsist.

" We shall never be guilty of the presumption of prescribing to your majesty when or against whom you should exert your prerogative; but we will be always ready to assist you in the support of all the just rights of the crown, as well as in maintaining the liberties of the subject, which we know are no less dear to your majesty.

" It may with modesty and truth be affirmed, that the Lords have, in all times, been the surest and most natural bulwark of the prerogatives of the crown, they being (as your royal grandfather, of ever blessed memory, was pleased to express it) an excellent screen and bank between the prince and the people, to assist each against any encroachment of the other.

" We will never contribute by any act of ours to the diminution of the rights of the crown, nor as far as we are able, will suffer it in others. We cannot act otherwise, without hurting ourselves in the highest degree; being thoroughly convinced, that the preservation of the legal prerogative is not only the surest way to secure our own privileges, but of absolute necessity, for the happy and rightful administration of the government. And we hope the House of Commons will, in all times to come, speak and act with that regard to the prerogative which they seem to have taken up lately.

" There remains one particular more, which we will only name to your majesty, because we rest satisfied it cannot have weight any where; that is, the insinuation in the Address, as if the examination of these prisoners by the Lords, was in order to obstruct the enquiry into the designs against your majesty's person and government; or at least, that it was likely to produce such an effect. Our dutiful zeal for your majesty's government, and our warm concern to discover all designs, and oppose all practices against it, are too well known to the world, that any suggestions of that sort should make the least impression to our disadvantage; and we are very sure it was no suspicion of that nature which gave the true rise to this very sharp Address. It is easy to determine, whether a hearty and forward undertaking to search into the designs of your enemies, or the seeking occasion to object to, and interrupt such endeavours, be most likely to obstruct the discovery of the pernicious practices of traitors.

* In Denmark. Former Edition.

"Most gracious sovereign; we most humbly ask pardon for presuming to give your majesty the trouble of this long Representation, which has proceeded from the passionate concern we have to stand not only acquitted, but entirely approved in the judgment of so excellent a queen, and so justly beloved of all her subjects.

"We depend upon your justice as well as your goodness, that nothing can do us prejudice (from whatsoever hands it comes) in your royal opinion, while we continue to act in that station where we are placed by the form of the English government, according to the laws and customs of parliament, with all imaginable respect and duty to yourself, and all possible zeal for the safety and happiness of your kingdom.

"Give us leave to conclude this our humble Address with this firm promise, that no dangers, no reproaches, nor any artifices whatsoever, shall deter or divert us from using our utmost endeavours, from time to time, in discovering and opposing all contrivances and attempts against your royal person and government, and the Protestant succession, as by law established."

Her Majesty's ANSWER to the Representation.

"My Lords;

"I am very sorry for any misunderstandings that happen between the two Houses of Parliament, which are so inconvenient for the public service, and so uneasy to me, that I cannot but take notice with satisfaction of the assurances you give me, that you will carefully avoid all occasions of them.

"I thank you for the concern you express for the rights of the crown, and for my prerogative; which I shall never exert so willingly as for the good of my subjects, and the protection of their liberties."

Jan. 22, 1701.—The Commons ordered, That some of their members be appointed to search the Journals of the House of Lords, touching their proceedings upon the late Address of this House to her majesty, and their representation thereupon; and also to search precedents concerning commitments by the House of Lords, in cases where the person has been in the custody of the crown, and report the same to the House; and several members were appointed accordingly.

Jan. 29 — Mr. Toke reported, That the members appointed to search the Journals of the House of Lords, touching their proceedings upon the late Address of this House to her majesty, and the Representation thereupon; and also to search precedents, concerning commitments by the House of Lords, in cases where persons have been in the custody of the crown, had searched the same accordingly; and he read in his place what they found therein, and afterwards delivered the same in at the table.—Resolved, That this House will, upon Tuesday morning next, take the said report into consideration.

Feb. 1.—Resolved, that this House will, upon Thursday morning next, take into consideration the report of the Journal of the House of Lords, with relation to the Address of this House to her Majesty, and the Lords' Representation.

Feb. 3.—The report of the Journal of the House of Lords, relating to the Address of this House, and the Representation of the House of Lords, was read.

Resolved, That an humble Address be presented to her majesty, to clear this House from the misrepresentation of the House of Lords, in their Representation presented to her majesty.

Ordered, That a committee be appointed to draw up the said Address.

And a committee was appointed accordingly.

Feb. 18.—Mr. Granville reported from the committee appointed to draw up an humble Address to be presented to her majesty, to clear this House from the misrepresentation of the House of Lords, in their Representation presented to her majesty, that they had drawn up an Address accordingly, which they had directed him to report to the House; which he read in his place, and afterwards delivered in at the table, where the same was read, and (with an amendment) agreed unto by the House.

Resolved, That the said Address be presented to her majesty by the whole House.

Ordered, That such members of this House as are of her majesty's most honourable privy-council, do humbly know her majesty's pleasure, when she will be attended by this House.

February 21.—Mr. Secretary Hedgus acquainted the House, that her majesty having been (according to order) waited upon, to know when she would be attended by this House, her majesty has been pleased to appoint this afternoon, at four of the clock, at St. James's.

The ADDRESS of the House of Commons to the Queen.

"Most Gracious Sovereign;—Your majesty having with great goodness declared from the throne to your parliament, that divers ill practices and designs had been carried on in Scotland, by emissaries from France, which might have proved extremely dangerous to the peace of these kingdoms; and that you would lay the particulars before your parliament, as soon as the several examinations could be fully perfected, and made public without prejudice: We your majesty's most dutiful and loyal Commons, resting secure and satisfied in your majesty's great wisdom and care, most thankfully acknowledged the confidence you have been pleased to repose in us.

"But finding upon the Lords' Journals, that their lordships, the very same day, made two orders, one to remove your majesty's prisoners out of your custody into their own, and the other to commit their examination solely to a committee of seven lords, chosen and appointed by themselves; by which your ma-

jesty seemed excluded from any power over the said prisoners :

“ Your loyal Commons, justly sensible of the dangerous consequences of such proceedings, thought themselves obliged to declare their concern at this violation of your royal prerogative, and the known laws of the land, in an humble Address presented to your majesty.

“ Your faithful Commons are well assured, when this matter comes to be rightly stated and understood, a zeal so well intended, and so well grounded, will rather be imputed to them as meritorious, than liable to exception ; and therefore, since their humble Address has been so artfully misrepresented by the Lords in their late Representation, presented to your majesty on Tuesday the 18th of January, and published and spread with unusual industry through all parts of the kingdom, they look upon themselves under an indispensable necessity of appearing before your majesty in their own justification.

“ Their lordships think fit to take offence at the manner and words of our Address, and accompany this exception with reflections and insinuations more harsh and more odious than the most opprobrious language ; but as we made use of no terms but what were suitable to the occasion, so it will appear by precedents, that the same have been frequently and reciprocally used by both Houses to each other ; nor could the Commons, in respect to your majesty, assert your royal prerogative in words of less force than those in which they have vindicated their own privileges.

“ Whatever expressions our zeal for your majesty, and the public, might have inspired, we could never have offered to our sovereign so ungrateful a remembrance as the destruction of the monarchy, by a detestable assembly, composed of members of both Houses, who being alike partakers in the guilt, ought equally to share the reproach.

“ With much more reason might we observe, both on behalf of your majesty and the Commons, that their lordships, not contented with preferring their own examinations to yours, not contented with excluding your majesty and the Commons, to whom parliamentary enquiries most properly belong, appropriate to their House only, even in their application to their sovereign, the name of a parliament ; an instance not to be paralleled, unless by that very assembly that subverted the monarchy.

“ It is not the question at present, as stated by the Lords, whether their lordships have a power of taking into custody, while under examination, persons accused of criminal matters, cognisable in parliament ? but that their lordships have a right to take the prisoners of the crown, and the examination of them solely into their own hands, without your majesty's consent, and in such a manner as must necessarily prove an exclusion of your majesty and this House, is the proposition your Commons deny, and for which their lordships have produced no precedent.

“ This unhappy occasion has been at the same time accompanied with the most surprising instances of contradiction, and counter-orders to your majesty, both preceding and subsequent to it ; but especially on the 29th of January last, when your majesty, with your accustomed goodness, communicated to the Lords the papers relating to the Scotch conspiracy, with an exception only of some matters, not yet proper to be made public, without preventing a further discovery of secrets of greater importance, with which your majesty assured their lordships they should also be acquainted, as soon as it could be done without prejudice. However, their lordships, upon what provocation, or for what reason, no where appears, immediately addressed to your majesty, pressing you to lay before them the whole matter, and all papers relating thereunto ; by which your majesty was put under a necessity, either to give their lordships a refusal, or to comply with their unexpected importunity, to the endangering the public service. These proceedings, so extraordinary in their nature and in their manner, could not but sensibly affect your faithful Commons, whose earnest desire it is, to see both your Houses of Parliament, and the whole body of your people, entirely agreed to pay the deference due to your majesty's wisdom, to confide in your care, and to promote and maintain your honour and dignity.

“ Their lordships, not satisfied with assuming this unprecedented power, have endeavoured, with a great deal of art, to persuade your majesty of the necessity of it, to prevent the designs of ill princes and their favourites : but as it may seem unreasonable for their lordships to begin to practise upon a good prince, such methods as are pretended only to be needful against an ill one ; so it is our humble opinion, that the danger might be much greater, admitting this precedent. Should the Lords combine to defend one another from enquiries and prosecutions, all parliamentary impeachments might be eluded, secret designs carried on, the innocent aspersed without reparation, and the guilty acquitted without trial. Nor is that instance, mentioned by the Lords, an unseasonable caution, since that revolution in a neighbouring kingdom, alluded to by their lordships, was occasioned by the encroachments of a prevailing cabal of lords, who endeavouring to enslave the people, and to betray their king and their country to a foreign power, obliged the Church and the Commons to unite in the public defence.

“ Your faithful Commons have found themselves so happy under your majesty's administration, that they please themselves with more agreeable prospects, and renouncing such examples of unseasonable jealousies and fears, most thankfully receive the blessings of your reign : nor could they have made a more grateful return for your majesty's generous protection of their liberties, than by a suitable concern for your prerogative.

“ If their lordships had consulted their own

Journals, with the same care that we always take to be rightly informed, they would hardly have affirmed, that a direct appeal to the throne, without any previous desire of conference, had been an unprecedented practice: their books are filled with variety of instances to the contrary; but without examining their books, it seems very surprising, that their lordships could so soon forget their Address presented to your majesty the last session, on behalf of the lord bishop of Worcester, and their Address to the late king, on behalf of William earl of Portland, Edward earl of Orford, John lord Somers, and Charles lord Halifax, impeached by the Commons of high crimes and misdemeanours: and when this House formerly expostulated with the House of Lords for proceeding in the very same method of which they now complain, their lordships made a most solemn declaration, in these words: That they must ever assert a liberty in their House, to apply to the throne by themselves, for the doing any thing warranted by law, &c.

"Nor can the Lords, we presume, upon second reflection, deny the Commons the same liberty, which their lordships themselves have so strongly asserted, and so frequently practised.

"Your loyal Commons sincerely concur with their lordships, in declaring, That we will never contribute, by any act of ours, to the diminution of the rights of the crown, and that we will not suffer it in others. Your majesty, their lordships, and the whole world, may judge, from the example we have now given, if their lordships do truly wish the House of Commons may, in all times to come, speak and act with that regard to the prerogative, which they allow us the honour to have now taken up; we shall be very unfortunate to continue under their displeasure, at the same time when they seem to hope, that those who succeed us will take pattern by us.

"We wish their lordships also, on their part, may continue, in all times to come, to speak with that regard to parliamentary impeachments, which they seem so lately to have taken up; since we have reason to apprehend, that the misunderstandings which have of late years arisen between the two Houses, have been principally owing to the artifices of some particular persons among themselves, whom the Commons thought it their duty, for the public safety, to bring to justice. How much more difficult will all such endeavours be rendered, should their lordships be once admitted sole examiners of accusations against each other as they are already sole judges?

"We are accused, but most unjustly, of exciting and earnestly desiring your majesty to exert your prerogative against the House of Lords: We appeal to the words of our Address, if it is possible naturally to impose any such sense upon any expression that is there. We are sorry their lordships should descend so low as to the straining and wresting of words, by which they rather discover an unfortunate inclination to make us seem culpable upon any

terms, than that they in truth believe us so. We know how vain and how fruitless an application it would be to excite your majesty to any abuse of your power, which we are convinced you will always exercise for the general good; and so far are your Commons from entertaining any such desire, that we heartily wish to see a good correspondence preserved between the two Houses; nor would we forbear to purchase it at any rate, except the giving up the rights of your majesty, by whom we are protected, and the liberties and properties of the people, by whom we are entrusted.

"These few instances, so plain, and so uncontested, we presume, will be sufficient, without trespassing much longer upon your majesty's time, to discredit whatever else has been alleged to create in your majesty, and those we represent, an ill opinion of us. We have been careful and industrious to avoid, as far as was consistent with our necessary justification, all occasion of reviving animosities; and how great soever the provocation has been, your majesty having declared how unnecessary you are under such misunderstandings, we shall make no difficulty to lay aside our resentments, who shall always be ready to sacrifice our lives and fortunes to your quiet and service: Nor can we doubt but we must stand fully acquitted to the whole world, and especially to your majesty; since the zeal that we have shown, and the reproaches that we have borne, have been owing to no other cause but the defence of an excellent queen, in whose hands God Almighty has placed the executive authority over these nations, which authority it has been the only endeavour of your faithful Commons to preserve as entire as our laws and constitution allow.

"May it please your most sacred majesty; It is with the deepest concern, and a grief not to be expressed, that your dutiful and loyal Commons have found themselves engaged in disputes of this nature, by which they have been so unseasonably interrupted in finishing the supplies, and other matters of the highest importance. How zealously they have applied themselves to the discharge of their duty, appears from their having already presented your majesty with the greatest part of their aids, with a dispatch and unanimity beyond example: Nor could the few bills yet depending have met the least obstruction or delay, but from the indispensable necessity of vindicating your majesty's royal prerogative, the privileges of our own House, and the rights and liberties of all the Commons of England, in several instances invaded almost at the same time; we wish there may have been more of mistakes than design in those who have created these unhappy differences: However, we desire the remembrance may be henceforth blotted out, and that there may remain no other impression in the hearts both of Lords and Commons, than a sincere and passionate concern for your majesty's welfare and glory: nor any other contention ever hereafter arise, but by

whom the public good shall be best advanced, the Protestant succession, and the church of England best secured, and the just rights and prerogatives of the crown best supported."

February 22.—Mr. Speaker reported, That he, with the House, did yesterday present their humble Address to her majesty, and that her majesty did thereupon give the gracious Answer following:

"Gentlemen; I return you many thanks for the great concern you express for me and my just rights. Your dispatch of the supplies is a great advantage to the public service; and I am very well pleased with the assurances you give me, of your care to avoid any occasion of difference between the two Houses, especially at this time, when there is so apparent a necessity of strengthening ourselves against the malicious designs of our enemies."

February 24.—Ordered, That some members be appointed to search the Journals of the House of Lords, what proceedings have been since the last report to this House, upon the papers communicated to the Lords by her majesty, relating to the conspiracy; and several members were appointed accordingly.

February 28.—Sir Humphrey Mackworth reported, That the members appointed had been to inspect the Journals of the House of Lords, what proceedings had been since the last report to this House, upon the papers communicated to the Lords by her majesty, relating to the conspiracy; but that they did not find any proceedings as yet entered in their Journals; but that out of the papers for making up the same, they had taken copies of the proceedings they found therein, which he read in his place, and afterwards delivered in at the table, where the same were read.

Ordered, That the consideration of the said report be referred to the committee of the whole House, who are to consider of the papers communicated by her majesty to this House, relating to the treasonable correspondence carried on with St. Germain's and the court of France.

February 29.—Mr. Freeman (according to order) reported from the committee of the whole House, to whom it was referred to consider of the papers communicated by her majesty to this House, relating to the treasonable correspondence carried on with St. Germain's and the court of France, the resolution which they had directed him to report to the House, which he read in his place, and afterwards delivered in at the table, where the same was read, and is as followeth:

Resolved, That it is the opinion of this committee, that the House be moved, that an humble Address be presented to her majesty, that she will be pleased to re-assume the just exercise of her prerogative, and take to herself the examination of the matters relating to the Conspiracy, communicated to this House by her majesty; and to give assurance, that they will defend her majesty's sacred person and

government against all persons concerned in the said Conspiracy, and all other Conspirators whatsoever: and to declare, that the establishing of a committee of seven lords, for the sole examination of the said Conspiracy, is of dangerous consequence, and may tend to the subversion of the government.

Resolved, That the House doth agree with the Committee, That an humble Address be presented to her majesty, That she will be pleased to re-assume the just exercise of her prerogative, and take to herself the examination of the matters relating to the Conspiracy, communicated to this House by her majesty; and to give assurance, that they will defend her majesty's sacred person and government, against all persons concerned in the said Conspiracy, and all other conspirators whatsoever; and to declare, That the establishing of a committee of seven lords, for the sole examination of the said Conspiracy, is of dangerous consequence, and may tend to the subversion of the government.

Resolved, That the said Resolution be presented to her majesty by the whole House.

Ordered, That such members of this House as are of her majesty's most hon. privy-council, do humbly know her majesty's pleasure, when she will be attended by this House.

March 1.—Mr. Secretary Hedges reported, That her majesty had been pleased to appoint to be attended by this House, to-morrow at four in the afternoon, at St. James's.

March 3.—Mr. Speaker reported, That he, with the House, did yesterday present their humble Address of the 29th of February last to her majesty, and that thereupon, her majesty was pleased to give the gracious Answer following:

"Gentlemen; the great marks of trust and confidence which you have given me in this Address, are very acceptable to me.—I thank you for your advice, and shall constantly exercise my just prerogative for the security and satisfaction of my subjects."

Upon these Proceedings of the House of Commons, the House of Lords, the 28th of March, drew up another Representation, which they presented to her majesty, and is as follows:

The Humble REPRESENTATION, or ADDRESS, of the Right Honourable the LORDS Spiritual and Temporal, in Parliament assembled, presented to her Majesty, on Friday the 31st day of March, 1704, and her Majesty's most Gracious Answer thereunto.*

* *March 31, 1704.* It is ordered by the Lords spiritual and temporal in parliament assembled, that the Representation, or Address, of this House, agreed to the 28th instant, and presented to her majesty this day, and her majesty's most gracious Answer thereunto, shall be forthwith printed and published.

MATTH. JOHNSON, Cler' Par'.

“ May it please your most excellent majesty:—We the Lords spiritual and temporal in parliament assembled, found ourselves obliged (though with great unwillingness) to make an humble Representation to your majesty, on the 18th of January last, of the injustice done to us by the House of Commons; and it is with the utmost reluctance we are brought to give your majesty a second trouble upon the like unhappy occasion. This appears by our silence after the Address of the House of Commons presented to your majesty the 21st of February: for though that paper be, in effect, but one continued misrepresentation of our words and our proceedings, yet we thought ourselves secure in your majesty's great judgment, which would discern where the truth lay, through all the colours made use of to disguise it. And we were willing to hope, that a moderation, which was so little deserved, could not but have a good effect upon the House of Commons; but the votes of the 29th of February, which they laid before your majesty, have convinced us of our mistake, and made it impossible for us to flatter ourselves longer with any such expectation: they continue to misrepresent our proceedings, and to solicit the throne against us, and thereby put us upon an absolute necessity of doing ourselves justice, in laying a true state of things before your majesty. When we observe, that the first Address of the House of Commons was ordered the next day after we entered upon the examination of Boucher; that on the 3rd of February, when we appointed a day for taking the papers relating to the conspiracy into consideration, the House of Commons appointed a committee to draw up the Address against us, presented to your majesty on the 21st, which was the day our committee reported Keith's examination; and that their votes of the 29th came from a committee appointed to consider of the papers communicated to them, the same day we made our Address to your majesty to issue out a proclamation for encouraging the discovery of the cypher of the gibberish letters (though they had made a compliment to your majesty on their reading those papers, and had laid aside all thoughts of them for three weeks together.) We cannot, without great concern, reflect upon the unseasonableness of these applications: what can be more likely to prevent the discovery of this dangerous conspiracy, than a disagreement among those who should unite their endeavours in assisting your majesty to search to the bottom of it? What can more encourage offenders to an obstinate silence, than the prospect of having the examinations interrupted by an unhappy breach between the two Houses? And what can give greater security to your majesty's enemies, than to see a foundation laid for such disputes, as will for ever put an end to all parliamentary enquiries into their designs? The gentlemen of the House of Commons have carried this point so far, that rather than suffer us to proceed quietly in searching into the bottom of

this dangerous conspiracy, they do not only reflect on us, but depart from their pretences of respect to your majesty, and censure your conduct in assisting our examination, as if you had thereby done an injury to your prerogative. We are therefore obliged in duty to your majesty, as well as justice to ourselves, farther to explain the grounds on which we have acted, and to produce precedents to shew, we have done nothing unwarranted by the practice of our ancestors.

“ We cannot but observe how the House of Commons have varied their stile; in their first address they directly charged the Lords with wresting prisoners out of your majesty's hands; in their second paper, they say only, *We seem to exclude your majesty from any power over the prisoners*; but the charge is alike unjust in both.

“ They continue to complain of two of our orders; one of which, they say, was to remove your majesty's prisoners out of your custody into our own; and the other, to commit their examination solely to a committee of seven lords, chosen and appointed by ourselves.

“ We know not by whom a committee of lords can be chosen but by the House of Lords; nor can there be any thing more parliamentary, and more proper for the dispatch and secrecy of an examination, than referring it to a committee.

“ This was practised by both Houses of Parliament, in the years 1678 and 1679; nor was it objected to either, that they took the examination solely to themselves: though the committee of the House of Commons was, in the stile of their own book, a committee of secrecy.

“ The Lords, the Commons, and the privy council had that plot under examination at the same time, yet there was no interfering of jurisdictions; the papers and the witnesses were conveyed to one another, as there was occasion, without any disputes; none of them stopped or delayed the enquiries of the others, but concurred in promoting them.

“ We might have expected, that when the House of Commons charged us a second time with violating your royal prerogative, and the known laws of the land, they would have specified what branch of the prerogative we had infringed, or what law, statute, or usage, we had broken: whenever they think fit to be more particular in the charge, we shall be very ready with our answers.

“ We shall always contend with the House of Commons in zeal for your majesty's honour and safety; but we shall never pretend to be meritorious, in giving up what we know to be the right of parliaments: and we are sure your majesty understands and loves the constitution of the English government too well, to approve of such a present; and therefore we must again beg leave to insist on our former Representation, as well founded in every particular.

“ We have no cause to be sorry to hear it has been so universally well received, since we

are sure it cannot but be for your majesty's service, as well as a full justification of ourselves. We were very careful that there should be no harshness in any expressions of our Representation; but if they complain of reasoning they cannot answer, or are uneasy to hear truths they cannot deny, it is not our fault.

"The House of Commons were certainly in the right, in not producing the precedents which they say they have of ill language that has passed between the two Houses, because it could not have been agreeable to your majesty.

"We must own we never searched our books for that purpose; and we believe, that if ever the Commons used the like before, our ancestors thought it unbecoming them to return it; and we think it most proper to be forgotten.

"We cannot think that any expressions (by whatsoever zeal inspired), that are not suitable to the decency which is due from one House of Parliament to another, can shew a respect to your majesty, or add any force to their arguments.

"We do not comprehend what is meant by their saying, We did appropriate to the House of Lords only the name of a parliament. There is no foundation for that charge in any word of our Representation; nor was there any occasion for such an assertion in the controversy between us; both Houses are alike interested in the point we maintain. We are sure the House of Commons have claimed and exercised such a power of examination and commitment as the Lords insist upon; and we are well assured, that on proper occasions every future House of Commons will do the like again: so that let the gentlemen of the present House of Commons be as liberal as they please in renouncing their own right, and as much displeas'd as they think fit with the House of Lords for not following their example, we have this comfort, that your majesty is too equitable to think amiss of us for defending our parliamentary rights, and we are sure of having every House of Commons that shall sit hereafter of our side, as well as every Englishman, who values the constitution of his country.

"There is no passage in our history more notorious, than that the pretended House of Commons, in the year 1648, when they could not prevail with the House of Lords, then sitting, to join with them in the intended murder of their king, took upon them first to abolish the House of Lords by a vote, and then to proceed to do that execrable fact by themselves.

"It is not therefore to be imagined what the House of Commons can mean, by saying, That assembly was composed of members of both Houses. If all other proof of the contrary was wanting, yet the testimony of that blessed, though unfortunate king, is abundantly sufficient, who made it one of his exceptions to that detestable court at his trial.

"We can never call to mind that fact without horror, and yet we are obliged by law to commemorate it every year; and surely it can never be mentioned more usefully than upon

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such an occasion, when the strange usage of one House of Parliament by another, makes it impossible not to reflect on the miserable consequences that have formerly followed from such differences.

"When the gentlemen of the House of Commons act according to the measures taken in those times, they ought not to be offended if they are remembered by the Lords. If they will take upon themselves to stop the issuing out your majesty's writs for filling up their House, and that in several places, and for a long time, whereby they make themselves an imperfect representation, which is a wound to the constitution, a wrong to the boroughs, who have a legal right to send representatives, and an injustice to your majesty, who has an undoubted title to the service and attendance of all the members; can they wonder, or ought they to complain, if we presume to tell your majesty, that very few things were less excusable in that unhappy House of Commons, than their refusing to fill up their body, and complete the representation?

"These beginnings are very dangerous: It is not easy to foresee how far such a practice may be carried, or what effects it may have upon the boroughs that suffer the present wrong, or upon others who may apprehend the like usage; and who can say, but, in after-times, an ill prince may take advantage of such precedents, and think himself justified in withholding his writs from some, by as good law as the Commons can shew for pretending to stop them from issuing to others?

"The Commons have made three addresses to your majesty upon this occasion, yet have not stated the matter in dispute fairly in any one of them. The plain matter of fact is this; Boucher, Ogilby, &c. being seized by the Custom-house officers on the coast of Sussex, as they landed from France, were sent for to be brought to town by messengers; the Lords having resolved to examine these persons themselves, ordered the messengers to bring them to the House, and committed them to the black rod, in order to their examination. The question is, whether this proceeding of the House of Lords was a breach of any law, or contrary to the custom of parliaments? We asserted it was not, and as we humbly apprehend, we proved our assertion by undeniable reasons, and we assured your majesty we could justify it by precedents.

"It appears by our records, that we have at all times, when we thought it expedient for the public good, not only taken prisoners out of the custody of the messengers (which is but a temporary confinement, in order to the examining persons, or while they are under examination), but taken them out of any other custody, and put them sometimes into the custody of your majesty's officers attending the House of Peers, sometimes removed them from one prison to another, as the House thought most safe and proper, for their examination.

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“ Persons condemned, and under sentence of death, may be most properly called the prisoners of the crown, when their lives and estates, as well as liberties, are entirely at mercy; yet the House of Lords has sent for several in those circumstances from the farthest parts of England to be examined.

“ We could produce precedents in all times, when any thing of this nature has been before the House, the most ancient records furnishing the clearest and most frequent instances of the jurisdiction of the Lords, in examining, trying, and punishing all great offenders.

“ But we shall at present confine ourselves to the proceedings in respect to the Popish plot, in the reign of your majesty's royal uncle, (except in some few instances in both Houses, as well before as after that time) not only because that was the last conspiracy that fell under a parliamentary examination; but because both Houses of Parliament entered into the enquiry with equal zeal.

“ And we beg leave to annex to this our humble Address, some extracts of the proceedings of both Houses in that enquiry, No. I. II.

“ We desire to observe, That though the king mentioned that plot in his speech at the opening of the session; yet he was so far from communicating the particulars to the parliament, or desiring them to look into it, that he directly told them, he would leave that matter to the law.

“ He was not very desirous of having the parliament meddle with that enquiry, and therefore it is reasonable to suppose, he would not have been silent, if their proceedings had been a violation of the prerogative, and the known laws of the land.

“ We beg leave to make this single remark on such of the precedents as relate to the removal of the Popish priests after sentence of condemnation, that this was taken notice of by the Commons, and several messages passed between the two Houses about them: the Commons were earnest that they should be executed, and insisted to have them sent back to the several prisons for that purpose; but they never pretended to deny that the Lords had power to send for them, or change the custody.

“ The Commons, in their second Address, pretend to have been sensibly affected and provoked to their harsh treatment of the Lords, by what passed in the Lords' House the 29th of January, which was almost six weeks after their first Address was presented.

“ It looks as if they wanted reasons to justify the ordering that Address, when they are forced to defend it by arguments drawn from facts which happened so long after.

“ If the Commons had considered our Addresses of the 29th of January, or the 15th of February, they would have found in them no contradictions, or counter-orders to your majesty, with which they charge us. We were informed of several papers that had not been communicated to us: those we desired, and we received them by your majesty's command; and

have, we hope, made use of them for your majesty's service, and the public safety. We have had the happiness that our zeal has been more than once approved by your majesty: and we leave the Commons to justify their own coldness and indifference, in a point of such high concern.

“ If we look back on the steps the Commons have made in this whole matter, they are such as will hardly be believed hereafter: And we can desire nothing more for our justification, than that our proceedings and theirs may be compared.

“ When the papers relating to this Conspiracy were laid before them, they contented themselves with reading them, and without offering any advice or assistance, gave your majesty thanks for laying the papers before them, and expressed their satisfaction in your majesty's wise conduct, and great care of your people. This was certainly justly due to your majesty's prudent administration, but was not all that might have been reasonably expected from a House of Commons, when your majesty had laid before them the account of such a dangerous Conspiracy.

“ Thus the matter rested for several weeks: and when at last the House of Commons thought fit to take up a second time the consideration of those papers, instead of doing what we hoped, and the kingdom expected from them, all they did was to find new cause of displeasure against the Lords, to complain of what your majesty had done, to solicit you to re-assume the just exercise of your prerogative, and to desire you to stop our proceeding, as of dangerous consequence, and what might tend to the subversion of the government.

“ This conduct seems very unaccountable: and when they had not thought fit to pass any judgment of the Conspiracy, it is hard that the enquiry into it should be so severely censured.

“ The Commons confine what we spoke in general terms of the fatal consequences that have happened in most countries in Europe, from the unhappy differences which have arisen between the estates of the several kingdoms, to the instance of one country: the observation was general, and the overthrow of the liberties of most of our neighbours sprung from this root.

“ But we are surprized, that the House of Commons should single out that instance of a revolution in a neighbouring country, where the Clergy and the Commons were prevailed upon by the management of the court, to carry their resentments against the Lords so far, that they delivered up the authority of the Lords, the freedom of the people, and made a total alteration of the government.

“ We cannot imagine what is meant by calling this treachery of the Commons and Clergy, in betraying the liberties of their country, their uniting in the public defence; nor can we conceive how this comes to be mentioned on this occasion: we hope there is no danger of such a union amongst us for such

purposes; and we think your majesty, and your people are equally concerned in this insinuation.

“ It is wonderful that the Commons should magnify their own care in examining our Journals, reflect on us for not looking into our own books, and at the same time cite two precedents, in which they are entirely mistaken, and which prove the direct contrary to what is inferred from them.

“ The Lords in their Representation affirm, that the Commons, by appealing directly to the throne against the House of Lords, and charging them with attempts of the highest nature, without first asking a conference, had done a thing unprecedented. The Commons, to prove the contrary, cite the Address presented to your majesty on behalf of the bishop of Worcester, and the Address of the Lords to the late king, on behalf of four lords named in the Address. We crave leave to state these two cases: the Commons had censured the bishop of Worcester, without giving him any opportunity of being heard. They had voted him unchristian, which surely is aspersing the innocent without possibility of reparation, as well as it was condemning him without a trial; and made an Address to your majesty to remove him from being almoner. This proceeding seemed very extraordinary with respect to your majesty, and very unparliamentary with respect to the House of Lords, of which the bishop was a member; and yet no notice was taken of them: upon this the Lords made an application to your majesty, on behalf of the reverend prelate, that he might not suffer in your majesty's opinion, before he had an opportunity of making his defence.

“ The case of the four lords was this: the Commons having at the bar of the House of Lords impeached them for high crimes and misdemeanours, the next day made an Address to the late king, to remove them from his presence and councils for ever: the House of Lords thought this an attempt of the highest nature upon their judicature, that while the causes were depending before them in parliament, the Commons should quit the part they had taken of accusers, and pretend to be the judges themselves, and solicit the king to put their sentence in execution immediately. But yet they proceeded to act with such a moderation as was scarce to be justified: they forbore expostulating with the Commons, much less did they appeal to the throne against them, they only desired the king not to pass any censure upon them before they were tried: they took no notice that the Commons had made any Address, and only endeavoured to prevent the injustice and oppression which might have been done to their own members, and the affront offered to their judicature, without making the least reflection on this proceeding; and they had no other way of acting, for no conference could have prevented the impression that might have been made on the king by such an application of the Commons.

“ Besides, in both these cases the Commons were the aggressors; they first applied to the throne, and made it necessary for the Lords to follow them. Thus far these instances may be of use, to shew by what steps the Commons rose to this way of addressing against the House of Lords; they began these attempts in the case of particular lords, which now they put in practice against the whole body of the peers.

“ The Lords will think themselves concerned in all times to observe and maintain the law and usage of parliaments in impeachments; and this they did with all possible exactness, upon the occasion of the impeachments of those four lords; but they could not judge it reasonable to let the accusers share with them in their judicature. And if the Commons in times to come shall so far forget themselves, as to endeavour to blast men's reputations, by exhibiting articles, when they are not able or prepared to maintain their charge, the Lords will always look upon themselves as bound to do equal justice, and discharge the innocent. Nothing can truly lessen or weaken the force and awe of impeachments, but a partial use of them: While they continue to be the equal instruments of public justice, they will have their weight in all places; but if once they are made use of to defame men only, without thoughts of bringing them to trial, impeachments will lose their terror, and the House of Commons will not increase their honour or authority: And if in that case the House of Lords could not do justice to the accused, they would be the only judicature which had the unhappy power of condemning, but not of acquitting.

“ The Lords are far from pretending to be the sole examiners of conspiracies hereafter, if the Commons will do their duty in concerning themselves for the public safety; but if they will shew so little zeal as the gentlemen of this House of Commons have done, if when they are told of conspiracies from the throne, they will concern themselves so little as to leave the enquiry to others, the Lords must of consequence be the sole enquirers, or else parliaments must be totally excluded from such examinations.

“ The Commons in their second Address complain, that they are accused most unjustly of exciting, and earnestly desiring your majesty to exert your prerogative against the House of Lords. The words of their first Address are so plain, that no other construction could be reasonably put upon them; and we are now very sure we did not mistake their meaning, since in the votes which they have laid before your majesty, they have thought fit to explain themselves, and in direct terms desire your majesty to re-assume the just exercise of your prerogative, and take to yourself the examination of the matters relating to the conspiracy.

“ There needs no wresting or straining these words to justify the interpretation we made of their first Address; and surely they had forgot what they said in the second, when they came

to pass those votes by which the sincerity of their professions, when they pretend to desire that the remembrance of those unhappy differences may be blotted out, does best appear. But we are still at a loss to know what they truly mean by your majesty's re-assuming your just prerogative.

"Your majesty was pleased to lay the papers relating to the conspiracy before us, and you had given your royal approbation to the method in which we had put the examination: And it seems a strange averseness to parliamentary inquiries, that they would not leave it possible, even with the concurrence of the crown, for either House of Parliament to enquire into conspiracies; though at the same time we must freely own, that if this power be not lodged in us by the constitution, it ought not, nor indeed cannot be given and delegated by the crown.

"Most gracious sovereign; we humbly ask pardon for having detained you so long upon a subject, which cannot but be disagreeable to your majesty.

"We beg leave to conclude, with expressing the just sense we have of that virtuous and truly royal moderation, which your majesty has shewn upon this occasion, in not suffering yourself to be prevailed upon to do any thing to the prejudice of the constitution, from whatsoever hands the invitation comes. It shall be our daily prayer to Almighty God, that he will long preserve and prosper your majesty for the good of this kingdom; and that your reign may be as glorious all the world over, as it is happy to all your people."

Her Majesty's Answer to the Representation or Address.

"My Lords; I hope none of my subjects have any desire to lessen my prerogative, since I have no thought of making use of it, but for their protection and advantage.—I look upon it as a great misfortune when any misunderstandings happen between the two Houses of Parliament, which cannot be without so much prejudice to the public, that I shall never omit any thing in my power to prevent the occasions of them."

PRECEDENTS OUT OF THE JOURNALS OF THE HOUSE OF LORDS.

No. I.

May 2, 1675.—A paper was presented to the House, being examinations taken by some justices of the peace in the county of Surry, concerning some blasphemous speeches spoken by John Taylor, now a prisoner at the gaol at Guilford, which paper being read, the House ordered as follows, viz.

Ordered, the serjeant at arms bring in safe custody to the bar of this House, on Friday next, at ten of the clock in the forenoon, the body of the said John Taylor.

Oct. 21, 1678.—His majesty acquaints the

Lords and Commons with a plot against his person in a speech, part of which speech, so far as relates to the plot, follows, *in hæc verba* :

"I now intend to acquaint you, (as I shall always do with any thing that concerns me) that I have been informed of a design against my person by the jesuits; of which I shall forbear my opinion, lest I may seem to say too much, or too little, but I will leave the matter to the law; and in the mean time, will take as much care as I can, to prevent all manner of practices by that sort of men, and of others too, who have been tampering in a high degree by foreigners, and contriving how to introduce Popery among us."

Whereupon, the House made the following Address:

"We your majesty's most dutiful and loyal subjects, the Lords spiritual and temporal in parliament assembled, having been acquainted by your majesty, that there is information given of a horrible design against your majesty's sacred life, (which God long preserve) are humble suitors to your majesty, that you would vouchsafe to communicate to us (as far as your majesty shall think fit) such papers as have any tendency to the discovery thereof, or of any other design against the Protestant religion, as it is now established in the church of England, that we may use our utmost endeavours to serve your majesty, according to our bounden duty and allegiance."

Oct. 23.—The papers concerning the plot were delivered to the deputy-clerk of the parliaments, by one of the clerks of the council.

Lords Committees were appointed to consider of the papers transmitted from the council by his majesty's directions, concerning the discovery of the horrid design against his majesty's sacred person, or of any other design against his majesty or his kingdom, by introducing Popery, whose lordships have power to send for persons, papers, and records, as they shall see cause.

Oct. 30.—Ordered, that Nathaniel Thompson, who is now in the custody of William Sorocold, for printing Popish books for James Thompson, shall stand committed to the prison of the Gatehouse at Westminster, during the pleasure of this House.

Oct. 31.—Ordered, that the lords with white staves do attend his majesty, humbly to desire him from this House, that the papers of Mr. Whitebread* and Mr. Micho, which have been read at the council-table, may be, by his majesty's command, brought before the committee to examine papers relating to the horrid design against his majesty; and also that the clerks of the council may bring the minutes taken by them upon the examination of Titus Oates, and others, before the council, concerning this matter.

Nov. 4.—Ordered, that the Lords Com-

* See his Cases, Vol. 7, pp. 19, 190, 311.

mittees appointed to examine the lords who are prisoners in the Tower of London, for treason, shall also examine such other persons who are now prisoners in the Tower for treason, as their lordships shall think fit, and also sir Ellis Leighton, now prisoner in Newgate; and that the lord chief-justice of England do assist their lordships at such times as they shall appoint; and that one of the clerks of the privy-council do attend their lordships.

Nov. 8. — Ordered, that the lords with white staves do attend his majesty, humbly to desire him from this House, that the letter of Mr. Coleman,* of the 29th of September, 1675, to Father le Chese, and another of his to Father le Chese, wherein he owns the sending the said letter, and Monsieur le Chese's letter, whereby he owns the receipt thereof, which have not been read in this House, may, by his majesty's order, be brought hither.

The lord treasurer reported his majesty's answer, "That his majesty will give order, that the said letters shall be brought to this House as soon as may be."

Nov. 18. — Ordered, that Edward Coleman, now a prisoner in Newgate for treason, be brought by the keeper of Newgate, before the Lords Committees to peruse letters and papers, to-morrow at nine of the clock in the forenoon; and that the duke of Monmouth be desired to send a sufficient guard of soldiers, to assist the keeper of Newgate, in this service of bringing and returning Edward Coleman.

Ordered, that the lords with white staves do humbly desire his majesty, that his majesty will please to give order, that the papers of Mr. Goodwin now in the hands of the clerks of the council, may be brought before the Lords Committees appointed to consider of, and prepare the evidences for the trial of Mr. Coleman.

Nov. 23. — Ordered, that the serjeant at arms attending this House, his deputy or deputies, do forthwith repair to Stratford upon Avon, in Warwickshire, and bring thence the body of Mr. John Gerard, supposed to be a priest, and one other person mentioned, but not named, (in a letter dated there the 30th of November) and subscribed Simon Cale, mayor, John Wolmer, in which it is recited, that they were in custody there, for refusing the Oath of Allegiance, and bring them in safe custody to the bar of this House.

Nov. 27. — Ordered, That Dr. Lower, and Dr. Warner be, and are hereby appointed to visit Mr. White, alias Whitebread, being sick near Weld-house, and give this House an account to-morrow morning, in what condition of health they find him.

Nov. 28. — Ordered, that the clerk of his majesty's privy-council, in whose custody the depositions lately taken at the council-board are, which concern the queen's majesty, be, and is hereby appointed to bring the said depositions before this House to-morrow at nine of the clock in the forenoon.

Nov. 29. — The House received an account, that Dr. Lower and Dr. Warner have visited Whitebread, and they find that his former distempers have left him, and he hath now only a tertian ague; and their opinion is, that he may be removed safely upon his intermitting days: it is ordered, that the serjeant at arms attending this House shall to-morrow attach the body of Mr. White, alias Whitebread, and carry him forthwith to the prison of Newgate, there to remain in safe custody, until he shall be delivered by due course of law.

Upon information given to this House, that one Daniel Maccarty, a Romish priest, is now under custody in Thetford, in the county of Norfolk: it is ordered, that the serjeant at arms attending this House, his deputy or deputies, shall forthwith repair to Thetford aforesaid, and bring thence the body of the said Daniel Maccarty, in safe custody to the bar of this House.

Dec. 20. — Whereas Daniel Maccarty, a Romish priest, was, by order of the 29th of November last, brought from the gaol at Thetford, in the county of Norfolk, by the serjeant at arms attending this House, and is now in his custody here: it is this day ordered by the Lords spiritual and temporal in parliament assembled, that the Lords Committees for examining persons and papers, for discovery of the horrid design against his majesty's person and government, shall examine the said Daniel Maccarty; and if their lordships find that he is not charged with any particulars relating to the said design, he is to be remitted and left to the law; but if otherwise, their lordships are to report to the House what they find concerning him.

Dec. 3. — Upon information given to this House, by the lord Windsor, that one Edward Whitaker stands committed in the city of Worcester, for some unbecoming words by him uttered, as is certified in a letter to his lordship, signed Jo. Tyas, mayor: it is ordered, that the said Mr. Whitaker shall give bail before the mayor of Worcester, for his appearance before the Lords in parliament, within eight days next after such bail given.

Dec. 13. — Edward Whitaker being called for to answer the charge against him sent up from the mayor of Worcester, but being not to be found: it is ordered, that if the said Edward Whitaker come not, and render himself before the House rises, he shall be attached; and he not coming, it is ordered by the Lords spiritual and temporal in parliament assembled, that the serjeant at arms attending this House, or his deputy, do forthwith attach the body of Edward Whitaker of London, gentleman, and bring him in safe custody to the bar of this House to-morrow morning, to answer to the informations put into this House upon oath against him: and this shall be a sufficient warrant on that behalf.

Dec. 14. — Whereas Edward Whitaker was this day brought to the bar by the serjeant at arms attending this House, to answer to the

* See his Case, Vol. 7, p. 1.

informations against him, which he denies, alleging, that he hath witnesses to clear himself from the matters charged on him: upon consideration had thereof, it is ordered by the Lords spiritual and temporal in parliament assembled, that the said Edward Whitaker may, and shall have order for summoning his said witnesses, to be heard *viva voce*, on the second day of the sitting of the parliament, next after Christmas, if he desires it: at which time also, the witnesses who have informed against him, shall be summoned to be heard *viva voce*; and that, in the mean time, the said serjeant at arms shall deliver the said Edward Whitaker into the prison of Newgate, there to remain in safe custody until further order: and this shall be a sufficient warrant on that behalf.

Dec. 3.—Upon information given to this House, that one — Barnesly, a Romish priest, is now under custody in the city of Worcester; it is ordered, that the serjeant at arms attending this House, his deputy and deputies, shall forthwith repair to the city of Worcester, and bring thence the body of the said — Barnesly in safe custody to the bar of this House.

Dec. 14.—Whereas Henry Barnesly, who was by order of this House sent for from the gaol in Worcester, was this day brought to the bar by the serjeant at arms attending this House, and there examined, being supposed to be a Popish priest: it is ordered by the Lords spiritual and temporal in parliament assembled, that the said Henry Barnesly shall, by the said serjeant at arms, or his deputy or deputies, be returned into the gaol in Worcester, there to remain in safe custody until he shall be thence delivered by due course of law: and this shall be a sufficient warrant on that behalf.

Dec. 23.—Upon reading the petition of Henry Barnesly, now in the custody of the serjeant at arms attending this House, shewing, that being by order of this House brought from Worcester, and by like order to be returned thither again; and that being very old and sickly, he is not able to bear the journey in this hard season of the year; and therefore praying, that he may remain here upon bail: it is ordered by the Lords spiritual and temporal in parliament assembled, that the said Henry Barnesly (being charged to be a Popish priest) shall, by the said serjeant at arms, be delivered into the prison of the King's-bench, there to remain in safe custody, until he be better able to be returned to Worcester, in order to his trial there: and this shall be a sufficient warrant on that behalf.

Dec. 6.—Upon report made by the earl of Clarendon, from the Lords Committees to examine persons and papers, &c. That their lordships think it necessary that sir Henry Titchborne, a Popish recusant, now prisoner in the gaol at Winchester, be brought up to town: it is ordered, that the serjeant at arms attending this House, his deputy and deputies,

shall forthwith repair to Winchester, and bring thence the said sir Henry Titchborne, and deliver him into his majesty's Tower of London, there to remain in safe custody till further order: and this shall be a sufficient warrant in that behalf.

To sir George Charnock, knight, serjeant at arms attending this House, and to the keeper of the gaol at Winchester, and to the constable of his Majesty's Tower of London, and their respective deputies; as also to all his Majesty's officers, civil and military, to be aiding and assisting in this service.

Dec. 20.—Upon information given to this House upon oath, that Tho. Thorn, now or late servant to Richard Tasbrough, esq. hath uttered dangerous and treasonable words, and that he is at present in the gaol at Bury in Suffolk: it is ordered, that the serjeant at arms attending this House, or his deputy or deputies, shall forthwith repair to Bury, and bring thence the body of the said Thomas Thorn, in safe custody to the bar of this House, to answer thereunto.

Dec. 21.—Whereas Richard Tasbrough, esq. was this day brought to the bar by the serjeant at arms, and denied all that was alleged against him; and whereas there is a warrant of the lord chief justice of England issued against him: it is ordered, that the serjeant at arms deliver the said Richard Tasbrough in safe custody to such person or persons as the lord chief justice of England shall direct.

March 29, 1679.—Upon information given to this House, that Richard Tasbrough, esq. who is charged to be guilty of the late horrid conspiracy, for which he was committed to the prison of the King's-bench, hath since been enlarged upon bail, and is now to be brought to his trial at the assizes at Bury, in the county of Suffolk: upon consideration had of the case of the said Richard Tasbrough, it is ordered by the Lords spiritual and temporal in parliament assembled, that the judge of assize for that county be, and is hereby directed, that his lordship proceed no further upon the trial of the said Richard Tasbrough, than to the indictment of him, and the finding thereof by the grand jury; and that the said Richard Tasbrough may be safely sent up to London, in order to his trial to be had at the bar of the court of King's-bench. And it is further ordered, that Mr. Thomas Beake, one of the messengers attending his majesty's council-board, be, and is hereby authorized and required with all speed to attend the said judge of assize for this purpose, and to take care of the execution of this order, as to the bringing up the said Richard Tasbrough in safe custody, in order to his intended trial: and for so doing this shall be a sufficient warrant.

Dec. 26, 1678.—Ordered, that it be referred to the Lords Committees for examining per-

sons and papers, to examine Richard Tasbrough and Thomas Thorn.

Upon information to the House by the lord viscount Newport, that one Valentine Harcourt, a Popish priest, is taken, and now in custody in the gaol at Shrewsbury: it is ordered, that the sheriff for the county of Salop be, and is hereby required, to take and give order for the sending of the said Valentine Harcourt in safe custody, to appear at the bar of this House, and that the charge of the said sheriff shall be allowed upon his account in the court of Exchequer; and it is ordered, that the sheriffs of the respective counties, through which the said Valentine Harcourt shall pass in his being sent up, as aforesaid, be aiding and assisting to the furtherance thereof, as occasion shall require.

March 21, 1678-9.—Upon report made from the Lords Committees, for examining matters relating to the discovery of the late horrid conspiracy, that captain Francis Spalding, deputy governor of Chepstow castle, who was by order of this House, dated the 21st day of November last, committed to the prison of the King's-bench, for matters wherewith he stands charged, hath since that time been enlarged upon bail, and being upon bail, commands still at Chepstow castle, as deputy governor, and hath misbehaved himself, as hath appeared to the said Lords Committees: it is thereupon ordered by the Lords spiritual and temporal in parliament assembled, that the serjeant at arms attending this House, or his deputy or deputies, do forthwith attach the body of the said Francis Spalding, and bring him in safe custody to the bar of this House: and this shall be a sufficient warrant on that behalf.

March 27.—Captain Francis Spalding being brought to the bar by the serjeant at arms, was asked, whether he is not under bail? which he acknowledged; and that sir Ralph Delaval and Mr. Banks are his bail, taken in the King's-bench; and being asked, why he went down to Chepstow castle, being a prisoner under bail, and by whose order? he said, he had no order for it, but went of his own head. Then the matter wherewith he was charged, and for which he was committed on the 21st of November last, was read, and also the deposition of Thomas Crowder, a soldier of that garrison, was read, &c.

Whereas captain Francis Spalding, who was on the 21st of November last committed to the prison of the King's-bench, there to remain in safe custody till further order, hath since procured his enlargement upon bail, and repaired to Chepstow castle, as deputy-governor thereof, and misbehaved himself there, as appeareth by the deposition of Thomas Crowder, and other matters, upon which he was this day examined at the bar, being now in the custody of the serjeant at arms attending this House: it is ordered by the Lords spiritual and temporal in parliament assembled, that the said Francis Spalding be re-committed to the prison of the King's-bench, there to remain in safe

custody till further order; and that the said serjeant at arms, or his deputy, take care to convey him, the said Francis Spalding, to the said prison: and this shall be a sufficient warrant on that behalf.

March 25.—Upon report made by the earl of Clarendon, from the Lords Committees, for examining matters relating to the discovery of the late horrid conspiracy, that their lordships are of opinion, that Edward Turner, a priest and jesuit, who hath been examined before them, and is now in the custody of Francis Strutt, a messenger, should be committed to prison: it is ordered, that the said Francis Strutt shall forthwith deliver the said Edward Turner into the prison of the Gate-house, at Westminster, there to remain as a prisoner, till he shall be delivered by due course of law.

To Francis Strutt, messenger, his deputy and deputies, and to the keeper of the prison of the Gate-house.

April 15.—Whereas sir William Andrews is seized on, and brought to town in custody, as an agent, in the late horrid conspiracy against the king: it is this day ordered, that the officer, in whose custody the said sir William Andrews is, shall forthwith deliver the said sir William Andrews into the prison of the Gate-house, at Westminster, there to remain a prisoner till further order.

April 28.—Upon report made from the Lords Committees, for examining matters relating to the discovery of the late horrid conspiracy, that their lordships have received information made upon oath, that sir William Andrews, now prisoner in the Gate-house, at Westminster, is engaged in the conspiracy against his majesty's person and government: it is thereupon ordered, by the Lords spiritual and temporal in parliament assembled, that the keeper of the Gate-house aforesaid be, and is hereby required to take care, that the said sir William Andrews be forthwith conveyed and safely delivered into the Tower of London, there to remain a prisoner, till he shall be discharged by due course of law; and for so doing this shall be a sufficient warrant.

April 21.—Upon report from the committee for examinations, that James Allen, who was taken into custody, being charged with encouraging Elizabeth Oxley to fire houses, hath been examined by their lordships, and devieth what is charged upon him; and in regard the examinations taken concerning a house fired in Fetter-lane, are before a committee of Commons: it is ordered, that the serjeant at arms attending this House, do forthwith carry the said James Allen to the said committee, to be examined, and disposed of as they please.

Upon report from the committee of examinations, that their lordships think it necessary, that William Sturges, now a prisoner in the gaol at Chelmsford, should be brought to town: it is ordered, that the serjeant at arms attending this House, do forthwith repair to the gaol at Chelmsford, in Essex, and bring thence

the body of the said William Sturges, and deliver him into the prison of the Gate-house at Westminster, there to remain a prisoner till further order.

April 23.—Upon report from the Lords Committees for examinations, that their lordships find it requisite, that David Lewis*, who hath been tried and condemned as a Popish priest, at the assizes held for the county of Monmouth, and is now in gaol there, may be brought to town: it is ordered, that the sheriff for the said county of Monmouth be, and is hereby required to take care, and give order for the speedy conveying of the said David Lewis in safety from the said gaol, to be delivered into the prison of Newgate, the charges of which service shall be allowed to the said sheriff upon his account in the Exchequer.

The like order for Roger Hanslip, in the gaol at Gloucester.

The like order for John Kemble, in the gaol at Hereford.

The like order for Francis Johnson, alias Webb, in the gaol at Worcester.

May 8.—The earl of Clarendon reported from the Lords Committees for examinations, that William Harcourt,† the jesuit, is taken, and now in the hands of the officer that took him: it is ordered, that the said William Harcourt be brought to the bar presently.

Eodem Die, p. m.—William Harcourt was brought to the bar, and being there charged with treason, the House made the following order:

Whereas William Harrison, alias Harcourt, was this day brought to the bar; and was there charged with high treason: it is ordered, that the gentleman usher of the black rod, attending this House, do take special care forthwith to convey the said William Harrison alias Harcourt, in safety to Newgate, there to remain a prisoner, till he shall be discharged by due course of law.

To the gentleman-usher of the black rod, attending this House, &c.

May 19.—Whereas Richard Gerrard, esq. is charged upon oath with treason: it is ordered, that the keeper of the prison of the Gate-house, at Westminster, (in whose custody the said Richard Gerrard now is) be, and is hereby required forthwith to take care for the conveying of the said Richard Gerrard to the prison of Newgate, there to remain a prisoner till he shall be discharged by a due course of law; and this shall be a sufficient warrant in that behalf.

Oct. 30, 1680. It being signified to this House, that Oliver Plunket,‡ the titular primate of Ardmagh in the kingdom of Ireland, is, by his majesty's order, brought over hither, in order to his trial here, and is now in custody in the hands of a messenger: It is ordered, that

the messenger, in whose hands the said Oliver Plunket now is, be, and is hereby authorized and required forthwith to convey and deliver the body of the said Oliver Plunket into the prison of Newgate, and that the keeper of the said prison do keep him there in safety, until he shall be discharged by due course of law; and that the said keeper and his under officers do take care, that the said Oliver Plunket be kept as a close prisoner, until the pleasure of this House be further signified; and this shall be a sufficient warrant in that behalf.

To the messenger in whose custody the said Oliver Plunket is, and also to the keeper of the prison of Newgate, his deputies and under officers, and every of them.

Jan. 4, 1680. Ordered, by the Lords spiritual and temporal in parliament assembled, that Mr. Attorney General do peruse the information read this day, and draw warrants for the commitments of sir John Fitzgerald, colonel Pierce Lacy and lieutenant colonel Bradley, as may be available in the law, and attend the judges for their assistance therein, and present the same to the House to-morrow, at ten of the clock in the forenoon.

Ordered, that sir John Fitzgerald, colonel Pierce Lacy, and lieutenant colonel Bradley, do remain in the custody of the pursuivant, as now they are, until the House gives further order.

Jan. 5. Ordered, by the Lords spiritual and temporal in parliament assembled, that sir John Fitzgerald be committed to the Gate-house for treason, in compassing the king's death, and in levying war, and practising to introduce a foreign force into the kingdom of Ireland, and to depose the king from the crown of Ireland; and that the messenger, in whose hands the said sir John Fitzgerald is, be, and is hereby authorized and required, forthwith to deliver and convey the body of the said sir John Fitzgerald into the prison of the Gate-house; and that the keeper of the said prison do receive and keep him there in safe custody, until he shall be discharged by due course of law: And this shall be a sufficient warrant in that behalf.

Ordered, by the Lords spiritual and temporal in parliament assembled, that Pierce Lacy, esq. be committed to Newgate for treason, in compassing the death of the king, and in levying war, and practising to introduce a foreign force into the kingdom of Ireland; and to depose the king from his crown of Ireland, and that the messenger, in whose hands the said Pierce Lacy now is, be, and is hereby authorized and required, forthwith to convey and deliver the body of the said Pierce Lacy into the prison of Newgate; and that the keeper of the said prison do receive and keep him there in safe custody, until he shall be discharged by due course of law: And this shall be a sufficient warrant on that behalf.

The like order for colonel William Bradley.

* See his Case, Vol. 7, p. 249.

† See his Case, Vol. 7, p. 311.

‡ See his Case, Vol. 8, p. 447.

Dec. 10, 1689. Ordered, by the Lords spiritual and temporal in parliament assembled, that Mr. Vernatti, now in custody, do stand committed to the gentleman usher of the black rod attending this House. And it is further ordered, that the said gentleman usher go to the lodging of the said Vernatti, and secure his papers, and seal them up in his presence, and set a guard on his house or lodging.

PRECEDENTS OUT OF THE JOURNALS OF THE HOUSE OF COMMONS.

No. II.

March 24, 14 Car. 2.—Upon information, that George Withers had been the author and publisher of a scandalous and seditious pamphlet, to enrage the people, and to vilify and defame the members of this House, and to blemish the honour and justice of this House, and their proceedings, and was now a prisoner in Newgate :

Resolved, that the said George Withers be brought in custody of the serjeant at arms attending this House, or his deputy, to the bar of this House, at four of the clock this afternoon, to be examined touching the matters objected against him ; and the keeper of Newgate, or his deputy, is to cause him to be brought accordingly.

Resolved, that this House do adjourn until three of the clock this afternoon.

George Withers being then brought in custody to the bar of this House, and the scandalous, seditious libel, with which he stands charged, being shewn unto him, the same being in two distinct papers; upon view of the first of them, he declared, that the same might be his hand, but that it was but parcel of what he intended ; and the other writing being shewn unto him, he confessed the same to be of his own hand writing ; and two witnesses being called in, viz. Henry Northrop, and Robert Heybourne, and testifying that they took the said papers from under Mr. Withers's hand, and that he was writing part of them just when they were taken from him ; and that he did, upon examination before Mr. Attorney General, confess the said papers to be of his own contriving and drawing ;

Resolved upon the question, That George Withers, who was this day brought from the prison of Newgate to the bar of this House, be sent prisoner, and delivered into the custody of the lieutenant of the Tower, there to be kept in close custody, and to be denied pen, ink, and paper, and debarred from having any company to come unto him. And it is referred unto Mr. Pryn, Mr. Serjeant Charleton, Mr. Solicitor-General, Serjeant Maynard, Dr. Birkenhead, Mr. Thurland, Mr. Snyth, Mr. Vaughan, and Mr. Clifford, or any three of them, to peruse the seditious, infamous libel by him contrived, and draw up an impeachment against him, and report it to the House at their next meeting.

Oct. 21, 1678.—Ordered, That a committee

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be appointed to examine concerning the murder of sir Edmundbury Godfrey, and to enquire into the manner and means how he came by his death ; and likewise to enquire into the particulars of the plot and conspiracy, mentioned in his majesty's speech, against his person and government ; which committee was impowered to send for persons, papers, and records.

Ordered, That an Address be made to his majesty by such members of this House as are of his majesty's privy-council, humbly to desire his majesty, that all papers which do relate to the plot and conspiracy, mentioned in his majesty's speech against his person and government, may be communicated to the said committee.

Oct. 23.—Resolved, &c. That the matter concerning the plot and conspiracy, mentioned in his majesty's speech, against his person and government, be heard at the bar of the House.

Ordered, That Mr. Michael Godfrey be forthwith sent for to attend with the papers and examinations, taken by sir Edmundbury Godfrey, and now remaining in his custody sealed up, touching the plot and conspiracy mentioned in his majesty's speech.

Oct. 24.—The papers of examinations taken by sir Edmundbury Godfrey, touching the plot and conspiracy, mentioned in his majesty's speech, which were delivered in by Mr. Michael Godfrey, were opened, and by Mr. Speaker read to the House.

Ordered, That the chairman of the committee appointed to examine concerning the murder of sir Edmundbury Godfrey, do take into his custody the papers of examinations, taken by sir Edmundbury Godfrey, concerning the plot, mentioned in his majesty's speech.

Ordered, That Mr. White, alias Whitebread, and Mr. Micho, be removed from the house where they are now, to Newgate, in case they be in a condition fit to be removed

Oct. 25.—Mr. Speaker acquaints the House, That in pursuance of the order of the House of yesterday, he had waited upon his majesty, and acquainted him with the informations the House had yesterday received, and that his majesty was pleased to acknowledge the great care of this House in the preservation of his person and government ; and that his majesty was informed, that Mr. White alias Whitebread, and Mr. Micho, were at present very sick, but that his majesty would send to see them ; and if they were in a condition fit to be removed, they should be forthwith sent to Newgate.

Ordered, That the members of this House, who are justices of the peace for the county of Middlesex, do repair to the lodgings of Mr. White, alias Whitebread, and Mr. Micho, and take their examinations touching the plot and conspiracy, mentioned in his majesty's speech, against his person and government ; and do issue out their warrants for searching their lodgings, and seizing all such papers and writings relating thereto, as shall be there found.

Oct. 25. p. m.—Ordered, That the Secre-
s R

taries be desired to move the king, that the keys of Mr. Langhorn's chamber may be delivered by the messengers, in whose hands the same are, to the committee appointed by the House to search Mr. Langhorn's papers and writings.

Oct. 26.—Ordered, That an humble Address be made to his majesty, by such members of this House as are of his majesty's most honourable privy-council, to desire his majesty, that Mr. Coleinan's papers, and all other papers relating to the plot and conspiracy mentioned by his majesty in his speech, may be communicated to the House.

Mr. Secretary Williamson informs the House, That in pursuance of the order of yesterday, he had attended his majesty, and acquainted him with the desires of this House, that a Committee of this House might have leave to search Mr. Langhorn's papers; and that his majesty was pleased to give leave that the same may be searched, and had appointed two of the clerks of the council to assist the committee therein: And that his majesty was pleased to deliver him some of Mr. Coleman's papers sealed up, and ordered him to deliver the same to the House; and had also commanded him to acquaint the House, that the rest of Mr. Coleman's papers were at present under examination before the House of Lords; and that so soon as the Lords had done with them, they should be communicated to this House: and the papers were accordingly, by Mr. Secretary Williamson, delivered in, sealed up.

Oct. 29.—Ordered, That his majesty be humbly desired by such members of this House as are of his majesty's most honourable privy-council, that an inventory, or list of all Mr. Coleman's papers, which have been sorted by the clerks of the council, may be communicated to this House; and that all those papers which are not sorted, may be delivered over to a committee of this House.

Ordered, That a committee be appointed to examine Mr. Coleman, touching the plot and conspiracy mentioned in his majesty's speech.

Oct. 31.—This House being informed that the clerk of the council was attending without, with Mr. Coleman's papers;

Ordered, That the papers be delivered to the clerk of the House, and by him transmitted to the committee appointed to examine the same.

Nov. 2.—Ordered, That the clerk of the council now in waiting, do forthwith attend with Mr. Harcourt's papers and writings; and that all other papers and writings relating to the plot, mentioned in his majesty's speech, either in the hands of the secretaries of state or in the hands of the clerks of the council, be forthwith communicated to this House, according to the leave graciously given by his majesty.

Nov. 22.—Resolved, That an humble Address be made to his majesty by such members of this House as are of his majesty's privy-council, to desire his majesty, that such letters

and papers which relate to the plot now under examination, as have not been perused by this House, may be communicated to them.

Nov. 29.—A message from the Lords by sir John Coel, and sir Samuel Clark:

"Mr. Speaker; the Lords have received information, That there is a faculty under the seal of cardinal Barberini, for dispensing with the taking of the oaths, and other things, in the hands of a member of this House, which their lordships desire may be communicated to them."

Sir John Knight acquaints the House, That the paper mentioned by the Lords was found among Mr. Ireland's papers, and he delivered the same in at the clerk's table; which being read by Mr. Speaker:

Ordered, That the said paper be sent to the Lords, and that Mr. Speaker do acquaint the messengers, that when their lordships have perused the same, this House does expect it should be returned again, in order to be entered in the Journal of this House; and the messengers being called in, the said paper was delivered to them, and Mr. Speaker acquainted them with the pleasure of the House.

April 26, 1679.—Resolved, That an humble Address be made to his majesty, to desire his majesty to give order for the executing of Pickering; and also to give order to the judges, to issue out their warrants for executing the several Popish priests which they have condemned in their several circuits.

May 5.—The lord Russel acquaints the House, "That his majesty had commanded him to let the House know, that his majesty is willing to comply with the request made to him by this House, concerning Pickering, and that the law shall pass upon him accordingly."

"As to the condemned priests, the House of Peers have sent for them, in order (as his majesty conceives) to some examinations."

May 9, p. m.—Mr. Hampden reports from the committee appointed to inspect the Lords' Journals, and sees, *inter alia*, upon what grounds the condemned Popish priests are sent for, that the committee had inspected the Journals, and taken out copies of their proceedings, which be reported to the House.

May 20.—Ordered, That a message be sent to the Lords, concerning the condemned Popish priests, sent for up to London from the several county gaols, by order of their lordships.

May 22. Sir William Franklyn reports from the committee appointed to draw up and prepare a message to be sent to the Lords, concerning the Popish priests condemned in the circuits, that the committee had agreed upon a message to be reported to the House, which he read in his place, and afterwards delivered the same in at the clerk's table, where the same was twice read, and upon the question, agreed, and is as followeth, (*viz.*)

"The House of Commons having made an humble Address to his majesty, that he would be pleased to give order to the judges, to issue out their warrants for the executing the several

Popish priests condemned in the several circuits; and his majesty having been graciously pleased to signify to the House of Commons, that your lordships have sent for them, in order (as he conceived) to some examination:

“And the House of Commons being also informed, that the said priests have, by order from your lordships, not only been brought out of the several counties where they were condemned, but continued yet in Newgate, and other prisons, in or about the cities of London and Westminster, by reason whereof the execution of the sentence pronounced upon them is still delayed, do desire of your lordships, that the said priests may be forthwith remanded to the several counties where they were condemned, that so they may be executed, according to the judgments passed upon them.”

Oct. 25, 1 Will. & Mary.—The House being informed, that several of the prisoners of the Tower were now bailing in the court of King's-bench, being brought thither by the governor of the Tower, by virtue of a Habeas Corpus awarded for that purpose, particularly sir Thomas Jenner, Mr. Richard Graham, and Mr. Philip Burton:

Ordered, That sir Thomas Jenner, Mr. Richard Graham, and Mr. Philip Burton, be immediately brought to this House by the governor of the Tower, to answer to such matters as shall be objected against them.

And Mr. Speaker issued his warrant accordingly, and the same was sent by the serjeant at arms attending this House.—Afterwards, the serjeant acquainted the House, that sir Thomas Jenner was bailed, and gone out of court, and that Mr. Graham was bailing in the court; and that notwithstanding, he had delivered the warrant to the governor of the Tower, and that he was coming with Mr. Graham, and Mr. Burton.

Ordered, That sir Thomas Jenner be sent for in custody of the serjeant at arms attending this House, to answer to such matters as shall be objected against him.

The House being informed, that Mr. Burton and Mr. Graham were at the door, they were severally called in to the bar of the House, and charged with the several matters mentioned in the said report, and heard what they could say touching the same.

And being withdrawn; Ordered, That Mr. Richard Graham, and Mr. Philip Burton, be committed to the custody of the serjeant at arms attending this House, for several high crimes and misdemeanours objected against them.

Resolved, That a committee be appointed to examine witnesses against Mr. Graham and Mr. Burton, and to prepare a charge against them.—And it is referred to, &c.

Jan. 4, 1697.—The House being informed, That Mr. Reginald Marriot* had sent to sever-

* Mr. Reginald Marriot was under prosecution, by order of the Lords Commissioners of the Treasury, and was under bail. Former Edition. For the Trial of Mr. Duncombe for falsely indorsing Exchequer Bills, see vol. 12, p. 1061.

ral members of this House letters, acknowledging, that he had been concerned in the irregular indorsement of Exchequer bills; and therein offering fully to relate how that notorious practice hath been projected and carried on, and in what manner he had been drawn into the same:

Ordered, That the said Mr. Reginald Marriot be summoned to attend this House immediately; and the said Mr. Marriot attending accordingly, he was brought in by the serjeant at arms attending this House to the bar, where he delivered an account of his knowledge of that matter in writing, signed by himself, which he read at the bar, and afterwards delivered in to the House.

Ordered, That the examinations taken before the Lords of the Treasury, relating to the irregular indorsement of the Exchequer bills, be laid before this House.

A motion being made, That the House will order, that all prosecutions at law against the said Mr. Marriot, be stayed during the pleasure of the House; and a debate arising thereupon: Resolved, That the debate be adjourned till to-morrow morning.

Ordered, That the said Mr. Marriot be taken into custody of the serjeant at arms attending this House; and that no person be permitted to converse with, or bring any letters to him, without leave of the House.

Jan. 5, 1697.—Mr. Lowndes, according to order, presented to the House several papers relating to the examinations taken before the Lords of the Treasury, touching the false indorsement of the Exchequer bills.

The House resumed the adjourned debate of yesterday, touching the ordering the stay of any prosecution at law against Mr. Marriot.

Ordered, *nem. con.* That all prosecutions at law against Mr. Reginald Marriot, in relation to the false indorsement of Exchequer bills, be stayed, during the pleasure of this House.

But nothing more was done in this business;* for April the 3rd, 1704, her majesty came to the House, and prorogued the parliament, and concluded her speech thus:

“My lords and gentlemen,
“At the opening of this session, I did earnestly express my desires of seeing you in perfect unity among yourselves, as the most effectual means imaginable to disappoint the ambition of our enemies, and reduce them to an honourable and lasting peace; and though this has not met with all that success which I wished and expected, yet being fully convinced, that nothing is so necessary to our common welfare, I am not discouraged from persisting in the same earnest desires, that you would go down into your several counties, so disposed to moderation and unity, as becomes all those who are joined together in the same religion and interest.”

* 2 Burnet's own Times, 373, 374.

433. Proceedings against JAMES BOUCHER,* gent. at the Queen's-Bench, for High-Treason, Hil. 2 ANNE, A. D. 1704.

February 28.†

THE Court being set, the prisoner was called, and the clerk of arraignments ordered proclamation to be made, for the under sheriff of Sussex to return the precept, and the keeper of Newgate to bring into court the body of James Boucher. Accordingly the precept was returned, and the prisoner set to the bar.

Cl. of Arr. James Boucher, hold up thy hand. (Which he did.)

Then the Grand Jury of Sussex's presentments were read.

Sussex. ss. "The Jurors for our lady the queen upon their oaths do present, That James Boucher, late of London, gent. who was a subject of the late king William the third, and now subject of queen Anne, after the 11th day of December 1688, viz. the first day of August 1689, was in the kingdom of Ireland, and after and before the third day of December 1697, viz. the first day of December 1697, the said James Boucher did voluntarily go into the kingdom of France, without licence from the late king William the third, or from the late queen Mary: And that the said James Boucher, on the said third day of December 1697, was not within the dominions of the late king William the third: And that he the said James Boucher, not having the fear of God in his heart, nor weighing the duty of his allegiance towards our said lady the queen, that now is, his supreme, true, legitimate, lawful and undoubted lady; and as a false traitor against our said lady Anne, the queen that now is, after the 14th day of January 1697, viz. the tenth day of December, in the second year of the reign of our lady Anne, the queen that now is; did traitorously return and come into the kingdom of England, viz. at East Bourne in the county of Sussex, without licence from the late king William under his privy seal, or from our said lady the queen under her privy seal, obtained; against the duty of his allegiance, and against the form of the statute in this case provided, and against the peace of our said lady the queen, her crown and dignity, &c."‡

* See Holt, 691.—See also the preceding and two following Articles.

† So the former edition; according to Boyer, on February 21st, I believe the latter to be the true date.

‡ The Latin Record is as follows:

REGINA *versus* BOUCHIER, 2 ANNE.

Sussex' ss. Jur' pro Dom' Regina super sacram' suum presentant, quod Jacobus Boucher, nuper de London', Gen', qui fuit subdit' Dom' Gulielmi tertii, nuper Regis Angl', Scot',

Cl. of Arr. What sayest thou, Art thou guilty of the said treason whereof thou art indicted, or Not guilty?—J. Boucher. Guilty.

L. C. J. Holt. What say you? Speak out. Boucher. Guilty.

Cl. of Arr. James Boucher, hold up thy hand. (Which he did.)

Then the second presentment was read.

Sussex. ss. "The Jurors of our lady the queen, upon their oaths, present, That James Boucher, late of London, gent. who was a subject of the late king William the third, and now a subject of her present majesty; after the 13th day of February, 1688, and before the 3d of February, 1697 (viz.) the first day of August 1689, was in arms in the service of the late king James, in Europe, viz. in the kingdom of Ireland; and that the said James Boucher, afterwards and before the said third day of December, 1697, (viz.) the first day of December, 1694, did voluntarily go into the kingdom of France, and the third day of December, 1697, was not within the dominions of the late king William. That the said James Boucher, not having the fear of God in his heart, and not regarding the duty of his allegiance to our lady

Franc', et Hibern', et modo existit subdit' excellentissimæ Principis Dom' Annæ, nunc Reginæ Angl', Scot', Franc', et Hibern', post 11 diem Decem', anno Dom', 1688, scil' 1 die August', anno Dom' 1689, fuit in regno Hiberniæ et postea et antea 3 diem Decemb', anno Dom' 1696, scil' 1 die Decemb' anno Dom' 1694 præd' Jacob' Bouchier voluntarie ibat in regnum Franciæ sine licentia a Dom' Willielmo tertio, nup' Rege Angliæ, vel a Dom' Maria, nup' Regina Angliæ, et quod præd' Jacob' Bouchier præd', 3 die Decemb', anno Dom' 1697, non fuit infra dominia Dom' Willielmi tertii, nuper Regis Angliæ, &c. quodq; idem Jacob' Bouchier, timorem Dei in corde suo non habens, et debet' ligenatim esse erga dictam Dom' Annam nunc Regin' Angliæ, &c. supremam, veram, legitimam, legalem, et indubitat' Dom' suam minime ponderans, et ut falsus proditor contra eand' Dom' Annam nunc Regin' Angliæ, &c. post 14 diem Januar', anno Dom' 1697, scil' 10 die Decemb', anno regni Dom' Annæ nunc Reginæ Angliæ, &c. 2, proditorie rediit et veniit in hoc regnum Angliæ, scil', apud East Bourne in com' Sussex', sine licentia a dicto Dom' Gulielmo tertio, nuper Rege Angliæ, &c. sub privato sigillo ejusdem nuper Regis vel a dicta Dom' Annæ, Regina nunc, sub privato sigillo ejusdem Dom' Reginæ nunc obtent', contra ligenatim suam debit', et contra summam statuti in hujusmodi casu nuper editi et provis', ac contra pacem, &c.

the queen, his supreme, true, lawful and undoubted lady, and as a false traitor against the said lady the queen, after the 14th day of January 1697, viz. the 10th day of December, in the second year of the reign of our said lady the queen, did traiterously return and come into this kingdom of England, viz. at East Bourne in the county of Sussex, without licence from the late king William under his privy seal, or from our said lady the queen under her privy seal, obtained; against the duty of his allegiance, and against the form of the statute in this case made and provided, and against the peace of our said lady the queen, her crown and dignity, &c."

Cl. of Arr. How sayest thou, art thou guilty of the said treason whereof thou art indicted, or not guilty?

Boucher. Guilty. My lord, I humbly beg that I may have leave to speak two or three words.

L. C. J. What would you say?

Boucher. My lord, I humbly beg leave to speak two or three words.

L. C. J. Ay, let us hear what you have to say.

Boucher. My lord, it is very well known, that I have solicited this two years for leave to come over into England. And while I have been in France, I have done all that I could to subsist the English that were brought prisoners to the French camp, and have to my power assisted them with money, and other necessaries, especially one troop of horse. I applied myself to colonel Lumly, and he promised to lay my case before the queen. But not hearing from him, I went to his son, and he told me he had no opportunity to acquaint the queen with it. Afterwards I was taken going for Holland, and then I sent to colonel Lumly, and he promised to remember me. And I continued still to solicit the service of her majesty's subjects, and have procured their horses that have been taken from them, to be restored to them. I spoke to colonel Godfrey, and he promised to speak to _____, who promised to make it their interest to procure my return. And after the camp was over, I came over into England at noon-day, with my children, and sent up a letter to my lord Nottingham to acquaint him where I was. It is true, I followed king James into Ireland, but had no commission, only served the duke of Berwick as aid de camp. And afterwards I went into France, but never served there with any commission, but as master of the horse to the duke of Berwick. And I did hope that the articles of Limerick would take off a great part of my offences. My lord, I hope you will represent my case favourably to the queen.

Dr. Sandys. My lord, I beg leave to speak a word or two on behalf of the prisoner. My lord, I solicited _____

L. C. J. What you can say to us will signify nothing; but if you have any thing to say for the prisoner, you must apply yourself elsewhere.

Att. Gen. My lord, as it is my duty, I demand judgment against the prisoner, upon his confession of the two indictments.

Cl. of Arr. James Boucher, thou hast been indicted on two indictments, and confessed thyself guilty of both. What hast thou to say why sentence of death should not be pronounced against thee?

Boucher. I hope your lordship will be pleased to intercede for me to the queen.

Cl. of Arr. My lords the queen's justices do strictly command all persons to keep silence while judgment is giving, on pain of imprisonment.

L. C. J. Mr. Boucher, you are, by your own confession, convicted of high treason, for which judgment of death is to be pronounced upon you, which you are to suffer under those circumstances which the law hath appointed.

The fact of which you were accused, and which you have now confessed, is, that since the 11th day of Dec. 1688, you went into France without licence either from the late king or queen, and have returned since the 14th of January, 1697, without any licence under the privy seal, either from the late king, or her majesty that now is; which fact is made high treason by the statute of the 9th year of the late king.

The wisdom and justice in making that law, will be very evident to any one that will but reflect upon the posture of our affairs at that time: for in the year preceding to that of the making thereof, there was an horrid conspiracy formed from among that party of men who had so left the kingdom, to assassinate the late king; to introduce a Popish and French power, for the subversion of the Protestant religion, and the liberties and properties of the people of England: which was managed with that privacy, carried on with that secrecy, that it was not discovered, nay, not so much as suspected, until it arrived to that maturity, that it was come to the very point of being put in execution.

The truth of which is very clear, as well by the proofs produced at the trials of several of the malefactors, as even by their own confessions.

In the following year the peace of Ryswick was made, whereby the intercourse was restored between England and France. From thence it was evident, that divers of that party of men would return into the realm, and thereby have an opportunity to revive and carry on that horrid design, in the success whereof they had been so disappointed; for which, no doubt, they were not a little enraged, and it could not be otherwise expected but they would make use of it: for those of the same principles will be guilty of the same practices.

Therefore it was necessary to make a returning into England by any of those who were under these circumstances, to be so very penal, unless they should first give satisfaction to the government, either of their innocence or re-

penance, and obtain a licence and approbation for their return, under the privy seal; for their returning in any other manner, is a danger to the queen's person, and her kingdom.

This treason, though it seems, and is new in the form, yet it is compounded of an old treason, known in the ancient law of the kingdom, which is, that of adhering to the king's enemies. For what can be thought of those who, in time of war, shall abandon their own country, be harboured and protected in any enemy's country, for being of an interest inconsistent with, even repugnant to, that of their own?

What your design might be in returning in this manner, whether to revive and pursue those wicked practices, your own conscience is your witness, and will be your judge; and if that shall acquit you, it will be for your advantage in the world to come. But you are an offender against the law of the land, which hath made this your offence to be high treason, and therefore that judgment appointed for one guilty thereof, must be pronounced; the court therefore doth award, 'That you be conveyed from hence to Newgate, the prison from whence you came, and from thence you are to be drawn upon a hurdle to Tyburn; where you are to be hanged by the neck, and while you are alive to be cut down, your privy members to be cut off, and your bowels to be

'cut out of your body, and burnt in your view; your head is to be cut off, and your body is to be divided into four parts, and your head and your quarters are to be disposed as her majesty shall appoint.* And the Lord have mercy upon your soul.

Cl. of Arr. Gaoler, look to your prisoner.

Boucher. My lord, I beg that my friends may have leave to come to me.

L. C. J. You shall have such as is usual, and as is fitting.

Cl. of Arr. Take away the prisoner.

Accordingly, he was carried back to Newgate, but was reprieved.†

* See East's Pl. Cr. chap. 2, s. 70, (not 78, as erroneously printed in vol. 2, p. 31, of this Collection, which see.)

† "Two days after, the Lords made an address to her majesty, 'That she would be pleased to reprieve Boucher, to encourage him to make a discovery; which if he would not do, that then the severity of the law might be executed upon him.' Boucher was reprieved accordingly; but whether he could not, or was unwilling to reveal any secrets, he died in Newgate without making any discovery, at least, that ever came to public knowledge." Boyer.

434. The Trial of DAVID LINDSAY,* at the Old-Bailey, for High-Treason: 3 ANNE, A. D. 1704.

April 19, 1704.

THE Court being set, proclamation was made.

Cl. of Arr. David Lindsay, hold up your hand. (Which he did.) Thou standest indicted by the name of David Lindsay of London, gent. for that thou being a subject of the late king William, and now a subject of her present majesty, after the 11th day of December, 1688, viz. the 26th day of March, 1689, was in the kingdom of England, viz. at the parish of St. Martin's in the fields, in the county of Middlesex; and afterwards and before the 3d day of December, 1697, viz. the 1st day of October, 1696, thou the said David Lindsay did voluntarily go into France without licence from the late king William or the late queen Mary; and that thou the said David Lindsay, on the said 3d day of December, 1697, was not within the dominions of the late king William; and that thou the said David Lindsay not having the fear of God in thy heart, nor weighing the duty of thy allegiance towards our lady the queen that now is thy supreme, true, legitimate, lawful and undoubted lady; and as a false traitor against our said lady Anne, the

queen that now is, after the 14th day of January, 1697, viz. the 10th of December, in the second year of the reign of our lady the queen, did traiterously return and come into the kingdom of England, viz. at the parish of St. Martin's in the fields, in the county of Middlesex, without licence from the late king William under his privy-seal, or from our said lady the queen under her privy-seal, obtained; against the duty of thy allegiance, and against the form of the statute, and against the peace of our lady the queen, her crown and dignity, &c.†

† The Indictment in Latin is as follows:

REGINA versus LINDSAY.

Midd' ss. Jur' pro Dom' Regina super sacram suum presentant, quod David Lindsay, nuper de London, Gen', qui fuit subdit' Dom' Willielmi tertii, nuper Regis Angl', Scot', Franc', et Hibern', et modo existit subdit' excellent' Principis Dom' Annæ, nunc Regiæ Angl', Scot', Franc', et Hibern', post 11 diem Decem', anno Dom' 1688, scil' 26 die Martii, anno Dom' 1689, fuit in regno Angliæ, scil' apud paroch' sancti Martini in campis in com' Middlesex, et postea et ante 3 diem Decem', anno Dom' 1697, scil' 1 die Octobr' anno Dom' 1696, præd' David Lindsay voluntarie ibat in

* See Holt 693. See also the two preceding articles, and that which follows.

Mr. *Lindsay* (taking a paper out of his pocket, read it to the court.) My lord, I am very sorry I am so unfortunate as to fall under the displeasure of the government; and being willing to save the court all unnecessary trouble upon my trial, I have therefore resolved to confess most of the facts charged upon me in the indictment, viz. As to my being in France, and coming into England without licence. But I am advised that there is something so singular for my benefit in this case, that I beg your lordship to hear me by counsel before my arraignment; the counsel I desire, are Mr. Williams and Mr. Raymond.

Att. Gen. (Sir Edw. Northey.) My lord, he might have had counsel assigned him before, if he had desired it.

L. C. J. Trevor. You shall have these counsel assigned you which you desire.

Sol. Gen. (Sir Simon Harcourt.) My lord, I suppose this is not desired now, with any design to delay the trial; the prisoner must first plead to his indictment.

L. C. J. Trevor. If his counsel be here, we are willing to hear what they have to say.

Cl. of Arr. Call Mr. Williams and Mr. Raymond.

L. C. J. Trevor. Mr. Raymond and Mr. Williams, the prisoner here desires you may be of counsel for him, and the court have assigned you to be of counsel for him accordingly.

Att. Gen. He has heard the indictment read to him, but he has not yet pleaded to it.

Lindsay. My lord, I desire to be heard by my counsel first.

Mr. Raymond. My lord, I apprehend Mr. Lindsay's intention is, to give the court as little trouble as may be, and therefore the facts, of which he is guilty, and that are charged upon him in this indictment, he will confess. But,

regnum Franciæ, sine licentia a Dom' Willielmo tertio, nup' Rege Angliæ, vel a Dom' Maria, nuper Regina Angliæ, et quod prædict' David Lindsay, præd' 3 die Decemb', anno Dom' 1697, non fuit infra dominia Dom' Willielmi tertii, nup' Regis Angliæ, &c. quodque idem David Lindsay, timorem Dei in corde suo non habens, et debet' ligeantiae suæ erga dictam Dom' Annam nunc Regin' Angliæ, &c. supremam, veram, legitimam, legalem, et indubitat' Dom' suam, minime ponderans, et ut falsus proditor contra eandem Dom' Annam, nunc Regin' Angliæ, &c. post 14 diem Januar', anno Dom' 1697, scil' 10 die Decemb' anno regni Dom' Annæ nunc Reginæ Angliæ, &c. 2, proditorie, rediit et veniebat in hoc regnum Angliæ, scil' apud præd' paroch' sancti Martini in campis in com' Midd', sine licentia a dicto Dom' Willielmo tertio, nup' Rege Angl', &c. sub privat' sigil' ejusd' nup' Reg', vel a dicta Dom' Anna, Reg' nunc, sub privat' sigil' ejusd' Dom' Reg' nunc obtent', contra ligan' suæ debet', et contra form' statuti in hujusmodi casu edit' et provis', ac contra pacem dicti Dom' Regiæ nunc, coron' et dignitat' suæ, &c.

my lord, he has been advised by his friends and other counsel, that his case has something particular in it, which he hopes will be for his advantage, and desires to have the benefit of what can be pleaded, besides guilty or not guilty.

L. C. J. Trevor. Is there any other plea, that he can plead specially?

Mr. Williams. My lord, not any that we know of; I desired him to advise with some other persons about it; I hope he has done so. As to the prisoner's confessing, or pleading not guilty to the indictment, it is a matter of prudence, and not of law.

L. C. J. Trevor. Let him plead then.

Cl. of Arr. David Lindsay, art thou guilty of this high treason, whereof thou art indicted, or not guilty?—*Lindsay.* Not Guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Lindsay. By God and my country.

Cl. of Arr. God send thee a good deliverance.

Lindsay. My lord, I have one favour to beg, that my wife and children may come to me.

L. C. J. Trevor. I think he may have that liberty, in the presence of the keeper, if you have nothing to object against it.

Att. Gen. My lord, we are willing they should come to him, in the presence of the keeper. We will not abridge any man of what he can reasonably and justly desire.

L. C. J. Trevor. Have you pitched upon any time to appoint for the trial?

Att. Gen. Yes, my lord, on Monday next, if it suit the court. He shall have a copy of the pannel, and all other things that are fit for him. I suppose, my lord, the prisoner is now committed to the sheriff, as is usual on these occasions.

L. C. J. Trevor. Yes; he is committed to the care of the sheriff.

Cl. of Arr. Where is the keeper of Newgate?

He appeared, and took charge of the prisoner. And then the Court adjourned, till Monday, nine of the clock.

Monday, April 24, 1704.

The Court being set, and the pannel called over, as usual, the prisoner making no exceptions; the following gentlemen were sworn upon the jury: Timothy Lenoy, Richard Brown, Joseph Jorey, Tanner Arnold, Arthur Bayly, George Ford, Tho. Ellis, Nich. Goodwin, Tho. Blackmore, jun. Will. Snelling, Peter Lekeux, Jo. Pack, esquires.

L. C. J. Holt. You gentlemen that are sworn, go within the bar.

Cl. of Arr. David Lindsay, hold up thy hand (Which he did). Gentlemen, of the jury, look upon the prisoner, and hearken to the charge. He stands indicted by the name of David Lindsay, of the city of London, gentleman, &c. as before in the indictment. Upon which indictment he hath been arraigned, and hath pleaded Not Guilty. Your charge is, to enquire whether he be guilty of the said treason whereof he stands indicted. If you find him

guilty, you are to enquire what goods and chattels he had at that time, or if he fled for it. But if you find him not guilty, you are to say so, and no more. And stand together, and bear your evidence.

Mr. Morley. May it please your lordship, and you gentlemen of the jury. This is an indictment preferred against David Lindsay, the prisoner at the bar, for high treason; for that he being a subject of the late king William, and now a subject of her present majesty, after the eleventh day of December, 1688, viz. the twenty-sixth day of March, 1689, was in this kingdom of England, viz. in St. Martin's in the fields, in the county of Middlesex, and afterwards and before the third day of December, 1697, viz. the first day of October, 1696, the prisoner did voluntarily go into France, without licence either from the late king William, or the late queen Mary; and that the prisoner on the third day of December, 1697, was not within the dominions of the late king William. But the prisoner, not weighing the duty of his allegiance towards our sovereign lady the queen, did, as a false traitor, after the 14th day of January, 1698, viz. the 10th day of December, in the second year of the reign of her now majesty, traitorously return and come into this kingdom of England, viz. in the parish of St. Martin's in the fields, in the county of Middlesex, without licence either from the late king William under his privy seal, or from her now majesty under her privy seal; and this he hath done against the duty of his allegiance, and against the form of the statute in this case made and provided. To this charge he hath pleaded Not Guilty.—If we prove him guilty, I doubt not but you will find him so.

Lindsay. I shall give your lordships, and the court, as little trouble as may be. I shall only beg leave to state my case truly before you, and then I shall submit to your judgment.

I. C. J. Holt. Mr. Lindsay, if you had a mind to confess, you should have done it before; now the jury are to enquire whether you are guilty or not.

Lindsay. My lord, I only desire to be heard as to the fact.

L. C. J. Holt. You must stay till the queen's evidence is heard, and then you may say what you can.

Mr. Williams. My lord, his intentions may be as to some things to save the time of the court; and perhaps to ease the queen's counsel of some trouble.

L. C. J. Holt. Let the queen's counsel state the evidence first, and then it may be proper for him to say what he will.

Sir T. Pavis (the queen's serjeant). You must either confess the treason wherewith you are charged, or else we must proceed to prove it.

L. C. J. Holt. If you open the evidence, then it may be he will confess; but it must be first opened.

Sir T. Pavis. My lord, there is nothing

meant by us to restrain him in any thing that he has to say; all that we design is, to put him in a proper method. It is proper that he should understand the case. He has pleaded Not Guilty, and we are under a necessity to shew what evidence we have to prove him guilty. My lord, this indictment is founded on an act of parliament made in the sixth year of the late king William. And it is grounded on very good reasons; for as it is taken notice of in this act, there had been a former act made in the third and fourth years of the reign of the late king William and queen Mary, by which it was made high treason for any to repair into France without licence; that any one that did so, should fall under the guilt of high-treason. But that act was calculated only for the time the war lasted, and was of no longer continuance; and there being a peace concluded, the preamble of this act takes notice, that thereby it would become necessary for the carrying on of trade and commerce between England and France, that there should be a freedom of going and coming out of, and into the said kingdoms respectively. And therefore the act further says, that whereas several persons who had been in arms, or had been engaged in treasonable practices against the king and government, and other disaffected persons (as all that resorted into France without licence, during the war, were supposed to have sufficiently shewed themselves disaffected to the government) therefore the act goes on, and provides against the mischiefs that might ensue; and says, If any of his majesty's subjects, who had voluntarily, since the 11th of December, 1688, gone into France without licence, and should at any time, after the 14th of January, 1698, return into England without licence, that such person so doing, should fall under the guilt and penalty of high-treason. This is the substance of the act upon which the indictment is formed. Now, that which we have to charge and prove upon the prisoner, is, that he was here, in England, after the 11th of December, 1688. We are ready to prove that he was here in the beginning of March, 1690, that he went into France in October, 1696, that he afterwards returned into England in December last. We say, he went into France without licence, and returned without licence; and it will be his part, if he can, to make it appear otherwise. If he does not admit these facts, we shall call our witnesses to prove them upon him. If they are facts that he admits, then he may regularly proceed.

Lindsay. My lord, may I speak now?

L. C. J. Holt. Yes, you may.

Lindsay. My lord, I do confess, that being a native of Scotland, and never having had any office in England, I did go into France without his late majesty's licence, after the time mentioned in the act; and I did continue beyond sea, till I was informed that her majesty did, according to her usual clemency, by her gracious proclamation in 1703, give a general pardon to all her subjects; and being desirous

to take the advantage of it, and to return to my native country, I came into Scotland, where I presented myself before the government, and had the benefit of the queen's proclamation allowed me. Whereupon, my lord, being advised by some eminent counsel there, that I was as free to come into England as any other subject; and having my wife and children here, I came to London by the way of Berwick. Therefore, my lord, humbly conceiving, in these circumstances, that I am not guilty of treason within the intent of this act, I desire to be heard by my counsel.

L. C. J. Holt. You own you went into France since the 11th of December, 1688.

Lindsay. Yea, my lord.

L. C. J. Holt. From what place did you go into France? From England or from Scotland?

Lindsay. From England.

L. C. J. Holt. Then he confesses the whole fact.

Sol. Gen. But, my lord, he was there before 1697.

L. C. J. Holt. You must agree on the fact. He says, he did go into Scotland within the time mentioned in that proclamation. And being in Scotland, he says, he did advise with some learned counsel, and they told him he might safely come into England. Now, do you admit that he did go into Scotland on that occasion of the queen's proclamation?

Att. Gen. My lord, as to that fact, we cannot admit it. There was no licence mentioned in it; the proclamation gives no licence to come into England, only a general pardon. What his counsel will make of it, I cannot tell.

L. C. J. Holt. Do you expect it should be proved?

Att. Gen. If he will shew us the proclamation, if it be the same that I have, I will allow it.

L. C. J. Holt. Produce that proclamation; look upon it, it may be you will admit it without any farther proof.

Then the Proclamation was produced, and Mr. Attorney General looked on it.

Sir T. Powis. Will they have it read?

Att. Gen. It may be read, if they desire it.

Mr. Williams. My lord, we desire it may be read.

Sir T. Powis. My lord, we would not have it looked on as a thing of right to be read, without farther proof.

L. C. J. Holt. No, that is of grace, it is a voluntary offer of yours.

Att. Gen. Then I shall not oppose the reading of it.

L. C. J. Holt. Then you do admit that to be the queen's proclamation for Scotland?

Att. Gen. Yes, my lord.

Mr. Williams. I desire to know, whether they admit the prisoner to be a native of Scotland?—*Att. Gen.* We do not know that.

L. C. J. Holt. Then you must prove it, if you think it material.

Sir T. Powis. My lord, he went from Eng-

land into France, and returned from France into England again.

L. C. J. Holt. He must be taken for a native of England, unless he can prove the contrary.*

Mr. Williams. My lord, shall we first read the proclamation, or prove him a native of Scotland?

L. C. J. Holt. Read the Proclamation first.

Then the clerk read the Proclamation.

A PROCLAMATION OF INDEMNITY.

“ ANNE R.

“ Anne by the grace of God, queen of Scotland, England, France, and Ireland, defender of the faith, &c. To all and sundry our good subjects, to whom these presents do or may concern, greeting. Forasmuch as it has been, and is, our constant resolution and design to establish the peace, and promote the welfare of our people; not only by procuring the equal and impartial administration of justice, but also by such a mixture of the benign influences of our goodness and clemency, as may best compose all distempers, and give a just assurance against all fears and jealousies: and for that effect, we being desirous to complete the indulgence that hitherto we have shewed, and to reclaim even such offenders as might justly have expected the deserved effects of our displeasure. And that, for time to come, we may by a gracious pardon and act of oblivion, establish firm peace and concord amongst all our subjects. Therefore we, of certain knowledge, and by virtue of our sovereign power and authority, pardon, remit, indemnify, and for ever acquit, all and every one of our subjects, of all crimes of perduellion, rebellion, treason, concealing of treason, harbouring, receipt, supplying, corresponding and intercommuning with rebels, and declared enemies, the impugning the dignity and the authority of the estates of parliament, and all other kinds of treason or lese-majesty, whether common or statutory, and of all crimes of lesing-making, whether to us of our subjects, or to our subjects of us, depraving or misconstruing our laws, or any of our proceedings, or misrepresenting or slandering us or our proceedings in any sort; and all breaches or abuses of, or malversations in public trusts, with all other crimes, delinquencies or transgressions of whatsoever nature or quality, committed, acted or done by any of her subjects by word or writ, or incurred by any other act either by commission or omission, preceding the date of these presents, and which directly or indirectly are, or may import the contravention of any law or act of parliament, custom or constitution of that our ancient kingdom; and that in so far as the same may infer any pain or punishment against any of our subjects, either in their lives, fortunes, estates, fame or reputation. All which we, by

* See East's Pleas of the Crown, chap. 2, s. 3, and the Case of Eneas Macdonald in this Collection, A. D. 1747, there referred to.

virtue of our royal power and authority aforesaid, will, declare, and ordain to be hereby pardoned, acquitted, and indemnified, and put in perpetual oblivion; and that this general pardon and indemnity shall be as valid and effectual to all our subjects for their exoneration and discharge of all pains and punishments, as if every particular crime, offence, delinquency, or misdemeanour, were here set down, and as if remissions, under our great seal, were past and granted for the same, wherewith we for ourselves and successors dispense for ever. Like as we hereby prohibit and discharge any of our ministers or judges to call in question, or proceed against any of our said subjects for the said crimes, and their crimes and punishments in any time coming; declaring and ordaining this our general pardon and indemnity to be interpreted and understood in the most benign, favourable and comprehensive sense the same can admit, for the security of our subjects. Excepting always forth and from this general pardon and indemnity, all fore-faultures, and sentences and dooms thereof, and all pecunial fines and unlaws already paid or transacted; and but prejudice to us, or these commissioned by us, to call all collectors and other intrumitters with public money, to give account of their intermissions, and to make payment of what shall be found due by their intermissions. And farther excepting, all manslaughters, murders, assassinations, witchcrafts, fire, raisings, depredations, robberies, rapes, spulzies, thefts, housebreakings, mutilations, adulteries, blasphemies, and delinquencies of immorality. All which crimes, and those guilty thereof, are no ways to be comprehended in, or have any benefit by this our pardon and indemnity as the said crimes excepted. And lastly, to the end all our good subjects may have notice of our royal will and pleasure, we do hereby command our Lion king at arms, and his brethren, heralds, pursivants, and messengers at arms, to make due publication hereof at the market-cross of Edinburgh; for all which these presents shall be a sufficient warrant. Given at our court at St. James's, March 16th, 1702-8, and of our reign the second year.—By her majesty's command. **QUEENSBERRY.**

“GOD save the QUEEN.”

Mr. Raymond. Look on the backside.

Att. Gen. What is that?

Mr. Raymond. A certificate from the duke of Queensberry, secretary of state of Scotland, that it is a true copy.

Att. Gen. We admit it.

Mr. Williams. Then, my lord, it is insisted on that we should prove the prisoner a native of Scotland.

Att. Gen. If you think it material you may prove it.

L. C. J. Holt. They did think it material, and therefore made it a part of their case.

Mr. Williams. Call James Grey, esq. (Who appeared and was sworn.) Sir, do you know the prisoner at the bar?—*Grey.* Yes.

Mr. Williams. What countryman is he?

Grey. Always reputed of Scotland. I have known him this 20 years, and he was always reputed so.

L. C. J. Holt. Have you known him 20 years in England?

Grey. Yes, my lord, in England; not in Scotland.

Sol. Gen. Have you had any correspondence with him?

Grey. No, Sir, no great correspondence. In king James's time he was secretary to the lord Melfort.

Mr. Williams. What countryman was he reputed then?—*Grey.* A Scotchman.

L. C. J. Holt. Did you know his family?

Grey. No, I have always been in England; I did not know his family.

Mr. Williams. We have another evidence.

L. C. J. Holt. You must bring better proof than this, or else it will not do.

Mr. Williams. Call Mr. Trumbal. (Who appeared, and was sworn.) Mr. Trumbal, do you know the prisoner at the bar?—*Trumbal.* Yes.

Mr. Williams. How long have you known him?

Trumbal. I have known him these twenty years.

Mr. Williams. What countryman did you always reckon him?

Trumbal. A Scotchman.

L. C. J. Holt. How do you know that?

Trumbal. He has always been reputed so. He dealt in wine with one that I knew, and so I came to know him.

Mr. Williams. Did you know him in Scotland?—*Trumbal.* No.

Att. Gen. Have you known him any where but in England?

Trumbal. No; but he has been reputed a Scotchman that dealt in wine. He had always the repute of an honest man.

Mr. Williams. Call Charles Canair. (Who appeared.)

Att. Gen. You should bring your witnesses into the court. What is your name, Sir?

Canair. Charles Canair.

Mr. Williams. How long have you known the prisoner?

Canair. Ever since I was a child.

Mr. Williams. Where did you know him?

Canair. In Scotland I remember him from a child.

L. C. J. Holt. And you knew him to have been a native of Scotland?

Canair. Yes, my lord, of Dundee, in Scotland.

L. C. J. Holt. Did you know any of his relations?

Canair. Yes, my lord; his father was of Dundee, in Scotland.

Mr. Williams. My lord, we have something farther to prove.

L. C. J. Holt. What is it?

Mr. Williams. That the prisoner was allowed the benefit of this proclamation in Scotland; and we beg leave to say, this fact, which is now charged against him, is already pardoned.

Att. Gen. That pardon has influence in Scotland, not in England.

L. C. J. Holt. Then you admit also that the prisoner had the benefit of this proclamation allowed him in Scotland?

Att. Gen. I know nothing of that.

L. C. J. Holt. Now go on, and state your case.

Mr. Williams. My lord, Mr. Attorney General is not pleased to admit we had the benefit of the proclamation allowed us in Scotland.

Att. Gen. They insist on what I know nothing of; if they think they can have any benefit by it they may prove it.

Mr. Raymond. We have done our endeavour to have the secretary of state of Scotland appear here, but I do not know whether he has done us the favour. We have the certificate under his hand?

L. C. J. Holt. Is it the same hand?

Att. Gen. My lord, he asserts that certificate, but we know not whether it be true.

L. C. J. Holt. Then that must be proved.

Mr. Raymond. Call Thomas Bruce, esq. (Who appeared and was sworn.) Mr. Bruce, do you know the prisoner, and whether he had benefit of the pardon in Scotland?

Bruce. I know very little of him. I know he was at Edinburgh last summer, and was under confinement there, and under examination several times: but after some days he was at liberty again. That is all that I know.

Mr. Raymond. Was he not at liberty by leave of the government?

Bruce. It was so believed.

Att. Gen. Can you tell when he came back to Scotland?

Bruce. No, Sir. He was in custody about July last.

Att. Gen. Can you be particular to the time? Was it in June or July?

Bruce. I cannot be positive; it was in the time when the parliament sate. I never was in his company.

Mr. Raymond. Call Mr. Southerland.

Att. Gen. I know not why we should trouble the court with this. What signifies the pardon?

L. C. J. Holt. Let them make what use they can of it.

Att. Gen. Sir, what is your name?

Southerland. Southerland.

Mr. Raymond. Do you know any thing of the prisoner's having any benefit allowed him of the Scotch pardon?

Southerland. I heard he had surrendered to the government.

Mr. Raymond. Was he discharged by the government?

Southerland. Yes, it was generally reported so.

Att. Gen. What time was that, Sir?

Southerland. In June or July last summer.

Att. Gen. Was he there the 27th of July, or before?

Southerland. I cannot be positive.

Mr. Raymond. Call Dr. Hutton. (Who ap-

peared.) Doctor, what do you know of the prisoner's having the benefit of the Scotch pardon, and its being allowed him by the government?

Dr. Hutton. I was, in September, at Edinburgh, and there I saw Mr. Lindsay, at the Queen's-head, with the attorney-general. He had been examined about some letters, (as I heard say) that had been directed to him. And there I heard sir John Stuart tell him, the council had set him free. And I met him afterwards at liberty, and it was done upon the proclamation of indemnity.

Mr. Williams. What religion is he reputed of?

Dr. Hutton. I know not that. But I have known him six-and-twenty years, and I heard him tell sir James Stuart (who asked him why he came away from France) because he would not be a Papist, and he said, he had rather go to the gallows than return again.

Mr. Williams. What is his temper? Is he a quiet man in relation to the government; or of a turbulent temper?

Dr. Hutton. I have always known him a fair, peaceable, friendly man.

Mr. Raymond. Doctor, I would ask you one question; whether you have any law in Scotland that prohibits going into France?

Dr. Hutton. I do not know. I know several persons that came from France to Scotland.

Att. Gen. Doctor, you give him a fair character. Can you tell in whose service he was in France?

Dr. Hutton. No, Sir; I cannot.

Att. Gen. What was his affection towards the government?

Dr. Hutton. I know nothing of that.

Sol. Gen. When did he return into Scotland? Was it before or after the 27th of July?

Dr. Hutton. I do not know.

Mr. Raymond. He came into England in September last, after he had his pardon. We say he came through Northumberland, and other places hither, and in this county he was taken.

Lindsay. I was taken no where, but surrendered myself to sir Charles Hedges.

Mr. Williams. The fact is, that he came from Scotland, through Northumberland, &c. and so into Middlesex, and surrendered himself; so that Northumberland was the first county of England that the prisoner came into, after his leaving Scotland; and so that the treason, if any, was committed there, and we insist that the arraignment and trial ought to be there.

L. C. J. Holt. If you insist upon it, that the treason committed, was in Northumberland, then you must prove it.

Mr. Williams. My lord, with submission, though the fact being that Northumberland was the first county of England that he came into, yet it may be difficult to us to prove it; but with submission, it may not be absolutely necessary for us to prove, that Northumberland was the first county, in regard that your lord-

ship will take notice that Middlesex cannot be the first county, it being impossible to come from Scotland into Middlesex without being in other counties before; and the indictment ought to have been in the first county of England he came into.

Att. Gen. My lord, we indict him where we find him.

Mr. Raymond. We can prove that he came first to Berwick, then through Northumberland, before he came into Middlesex.

L. C. J. Holt. If you can, do.

Mr. Raymond. Dr. Hutton, do you know where he came first into England, and which way he came hither?

Dr. Hutton. No, indeed; I have heard that he came through Northumberland, &c.

Mr. Raymond. Did you lend him your horse?

Dr. Hutton. No, Sir; but a friend of mine did lend him his horse.

Mr. Raymond. Where does your friend live?

Dr. Hutton. At Edinburgh.

Mr. Raymond. Did he come hither on that horse?

Dr. Hutton. That I know not. He was left there by a friend of mine, to be sent into England with the first opportunity, and so he sent him by Mr. Lindsay.

Mr. Raymond. Did he make use of that horse all the way?

Dr. Hutton. I know not that.

Mr. Williams. My lord, I am, by your lordship's permission, of counsel for the prisoner: and I hope this free and ingenuous confession, which he has now made at the bar, being the very same which he before made at his arraignment; and being the very same confession which he made before the secretary of state, and others, before whom the prisoner was examined, will be taken and weighed by the court as a good argument of the sincerity of this unfortunate gentleman; and that he designs in his trial to put your lordship to as little trouble as possible. My lord, it has been proved that he is a native of Scotland, and he always has been of the Protestant religion. He has been indeed in France, but finding he could not enjoy his religion there, he was resolved by the first opportunity to endeavour to gain a licence from the government for his return into his own country. In the mean time comes out her majesty's gracious proclamation of indemnity. That proclamation was proclaimed in a public manner, by all her majesty's heralds, at the market-cross at Edinburgh, and it has very extensive words in it, pardoning all treasons, felonies, &c. all crimes and misdemeanors whatsoever. My lord, in confidence of this her majesty's royal proclamation, we came from France to Scotland, and there claimed, and were allowed by that government, the benefit of the queen's mercy. Afterwards having been advised by the most eminent advocates and counsel of Scotland, that by this proclamation we were rendered in every respect as a free subject, and might with safety come from thence to

England; we accordingly came from thence hither; but all this while we paid all the due submission and regard that could be, as well to the law as to the government; for we came from France unto the Hague, and we there attended upon her majesty's envoy, Mr. Stanhope, and acquainted him with our intentions of returning home. Immediately upon our return into Scotland, we voluntarily came before the chief commissioner and magistrates there; who, upon our claim, were pleased, at length, to allow us the benefit of her majesty's royal proclamation and pardon; and when we were in England, on the first notice of a warrant against us, we of our own accord waited on the secretary of state, sir Charles Hedges, and he happening not to be then at leisure, we voluntarily attended upon him a second and a third time; and upon our third attendance we were committed. And now, my lords, we stand indicted before your lordship for the greatest of crimes, high-treason. My lord, as to the statute upon which we were indicted, though some part of it, without doubt, was not only very reasonable but absolutely necessary, I mean that part of it which was for the preservation of his late majesty's person and government; yet as to that part of it upon which we are indicted, it seems, with great submission, a severe law. That the bare returning into our native country, when we before were convicted of no crime, or guilty, at most, but of a bare contempt, in going out of the queen's dominions without licence; that this should be made high-treason, this, with submission, is somewhat severe: so that in respect of the severity of this law, besides the common arguments of its being a penal law, your lordship will be rather induced to admit of the most favourable and merciful construction to every part and clause of this act, that it will bear. My lord, we do humbly insist on the words of the proclamation; and we take it, that those words do amount to a licence to us to come into Scotland: and if so, then we are not guilty within this act of parliament, of coming to the queen's dominions without licence. And we likewise further insist, that one that has the queen's licence to come into Scotland, may, without any further licence, come into England—I beg your lordship's leave to read that part of the proclamation, which we chiefly insist on. The proclamation pardons all treasons, and all corresponding and intercommuning with rebels, or declared enemies of the queen. My lord, it pardons all other crimes, of what nature soever. It pardons any act, that may infer any pain or punishment, on the lives or estates of her majesty's subjects. And it is declared to be as available to all subjects, to pardon them all crimes, as if the particular crime were named, and as if remissions under the great seal were passed. And then her majesty declares, that this shall be taken in the most favourable and comprehensive sense that may be, for the security of the subject. Now, my lord, taking this proclamation in the most

favourable and extensive sense, in favour of the prisoner; which her majesty has been pleased expressly to direct it should; with submission, I take it, it will amount to a licence from her majesty, to return from France to Scotland: and we humbly take it, that if the prisoner did by licence come from France to Scotland, that he, afterwards coming from Scotland into England, is not within the act.

My lord, I would beg leave to consider what it was that hindered the prisoner from returning from France to Scotland: sure it was his going to France without licence. Then, when her majesty is graciously pleased to pardon this offence, we take it, that her majesty, by removing the obstacle, does by necessary implication give leave to the prisoner to return to Scotland again. Her majesty is pleased (with submission) plainly to give him this leave, by taking off that that hindered his coming. That parliament plainly did take it, and have been pleased to declare it an offence, to go into France without licence; and have therefore been pleased to punish that offence with a temporary banishment: But when that offence is pardoned, when that banishment is remitted, then the prisoner seems at liberty to return home: And that liberty being given by the queen's proclamation, this, with submission, amounts to a licence from the queen, for the prisoner's returning home. My lord, there are many instances, wherein the king or queen's grants or pardons shall have a double operation, for the benefit of the persons upon whom they are bestowed. But these cases, as I humbly conceive, not immediately relating to this point now before your lordship, I shall not trouble your lordship with citing them. My lord, if we, when in France, had been guilty of more than what is charged upon us in the indictment; I mean, had we corresponded, or adhered to the queen's declared enemies; still the express words of the proclamation seem plainly to extend to us, when it pardons all corresponding and intercommunicating with the queen's declared enemies, which the French then were, and now are. My lord, if this proclamation could in any part of it bear two constructions, (the one making for the prisoner, the other against him), the queen has been pleased to determine in what sense it shall be taken; in the most beneficial manner for the offending subject. But with humble submission, would this be observing of her majesty's gracious directions? Instead of allowing to the prisoner the benefit of this proclamation, to make his very coming to Scotland to claim the benefit of it, and humbly to lay hold of her majesty's mercy; to make this very act to amount to a crime; to make it the greatest of crimes, high treason? This surely would be the very reverse of her majesty's most gracious intentions: and yet this, with submission, would be the consequence, if the prisoner's coming from France into Scotland should be construed to be treason. My lord, I admit the words of this act are, if any return into England, or any other of her ma-

esty's dominions, without a licence under the privy seal, it shall be high treason.

Sir T. Powis. But this is not a licence under the privy seal.

Att. Gen. The great seal of Scotland will not vacate an English act.

Mr. Williams. Now we humbly take it, if the queen is pleased to bestow her licence by any act or in any manner equally notorious with her privy seal, it is sufficient, and within the meaning and equity of the statute. And this proclamation made by all the heralds at arms, at the most public place in Edinburgh, is as notorious, nay much more notorious and public, than a licence under the privy seal only; and therefore within the meaning of this act. Besides, the very words of the proclamation are, that it shall be in every respect as valid and effectual, as if it were under the great seal: And if under the great seal, surely it must be at least as strong, as if under the privy seal. Besides the statute does not say, that the licence must be under the privy seal of England. The words of the act are, if any return into England, or any other of her majesty's dominions, without licence under the privy seal, without saying of what kingdom. Now, with submission, it not being said what privy seal, or of what kingdom; it must be intended, according to the subject matter, the seal of that kingdom or dominion where the licence is granted; and that being Scotland, the licence under the great seal of Scotland is sufficient: For it seems improper, that the seal of one kingdom should be made use of, to licence an act in another kingdom. Now, if a licence under the great seal of Scotland be sufficient, this proclamation declares, that it shall be as valid as if it were under the great seal: And it cannot be denied, as I have said, but a licence under the great seal must be equivalent with a licence under the privy seal. Besides, the queen's proclamation does not mention what great seal, or of what kingdom; and so it may be intended, that great seal that would be most beneficial to the prisoner; taking it in its most favourable sense, as her majesty is pleased to direct it should be.

But it will be said, that taking this to be a licence, this is only a licence to come into Scotland; but the prisoner is indicted for coming into England without licence. But we take it, if we had a licence to come into any one of the queen's dominions, and we first came into that dominion with this licence; we cannot then be guilty of treason within this act. The words of the act make it treason to come into England, or any other of the queen's dominions without licence; so it is the same thing as if it said, that it should be treason to come into the queen's dominions without licence. Then if one comes into Scotland with licence, Scotland being one of the queen's dominions, the prisoner cannot be said to come into the queen's dominions without licence: So that by this licence the prisoner is wholly out of the act. This act, with submission, must operate and

take its effect upon the first step made from France into any of the queen's dominions; so that if the prisoner be guilty of high-treason within the act, it must be when he made his first step from France into Scotland: But that being made lawful, by the proclamation amounting (as we say) to a licence; it cannot be afterwards treason, for the prisoner to come into England. Take it, that the prisoner had had her majesty's licence to come from France into England; and accordingly the prisoner comes into England, and afterwards goes into Scotland; had this been treason? Surely not. Take it, that a man within this act returns from France into England without licence, and is pardoned, and he afterwards goes into Scotland; would this have been a new treason, for which the man that was before pardoned must lose his life? We humbly take it, that it would not.

Besides, with submission, this proclamation amounts to a pardon of the treason, though it be before the prisoner returned to any of the queen's dominions. And if it appears to your lordship, that the prisoner is pardoned, though we have not pleaded it, your lordship will not be pleased to suffer the greatest of punishments to be inflicted on any that your lordship perceives are entitled to her majesty's mercy, or on any that are so much as within her majesty's intentions of being pardoned. Besides, another consequence of the prisoner's being pardoned, is, that then if he be pardoned, he is a free subject, and has liberty to go any where, and into any of the queen's dominions. My lord, as to this point, whether the treason be pardoned, it is necessary, with humble submission, to consider what makes this treason. It is the going into France without licence, and returning home without licence: It is both joined together make the treason; and the one without the other does not make the treason. Had not the prisoner gone into France without licence, his returning without licence would not have amounted to treason: So that the going into France, is the foundation of the treason. And I humbly take it, that this act of parliament has made the bare going into France without licence, an offence; and has punished it as such, by banishment during the queen's pleasure: So that the prisoner, from the time he went into France without licence, was an offender, and consequently capable of a pardon. So, with submission, it is plain, there were some things on which the pardon might operate, though the pardon was before the prisoner's landing in Scotland. Then taking it, that the prisoner's going into France without licence was an offence, and the original foundation of the treason; this original offence is, with submission, pardoned by the proclamation, by the pardon of all crimes and misdemeanors, of what nature soever. And if the original offence be pardoned, all the consequences, all the dependencies upon that offence, all that ensues upon that offence are, with submission, at the same time pardoned. This, my lord,

seems to be proved by Cole's case, Plowd. 401, where, after one had feloniously wounded another, then comes a pardon of all crimes and misdemeanors; and afterwards the party wounded dies. The original misdemeanor being pardoned, all that ensues upon it is pardoned; and consequently the murder is pardoned, by the pardon only of all misdemeanors. Now in our case it is plain, the original offence is going into France without licence; and that being pardoned, all that ensues upon that offence, all the dependencies upon that offence, according to the express words of that case, are pardoned also: And therefore, the returning into the queen's dominions without licence, being only a consequent and a dependent upon the going into France without licence, is pardoned also. Besides, my lord, so favourable a construction does the law make upon acts of mercy, that when the crown pardons any crime, the pardon restores the man in such a manner, as if the offence had never been committed. And consequently, after this pardon it is the same thing as if the prisoner had never gone into France without licence; and if the prisoner had never gone into France without licence, it is plain his coming home without licence would not have been treason.

In Hob. 81. Cuddington v. Wilkins, if a man commits a theft, and is pardoned; if afterwards he is called thief, an action lies, though he is called so by one that had no notice of the pardon; for that after the pardon, it is as if he had never been guilty of theft. There is likewise another case put there, which seems much stronger than the prisoner's case; which is this: If an appeal of felony be brought against a man and the defendant prays trial by battle; the plaintiff counterpleads the battle, by saying, that the defendant, when committed to prison for his felony, broke the prison, and so escaped; which is a presumption of guilt, and so takes off the trial by battle; yet it is adjudged, that when the king pardons the breach of prison, this restores the defendant to his trial by battle, and it is then as if the defendant had not broken the prison at all. Yet in this case it might have been objected, that though the king has pardoned the breach of prison, though the prosecution or punishment for breach of prison is pardoned, yet the collateral effect of it, which is the presumption of guilt upon the party's flight, might remain; especially as to the appellant, whose suit (according to the general rule) the king's pardon cannot influence. Yet here it is adjudged, that even as to the appellant, the king's pardon of the breach of prison, makes it as if the party had never been guilty of it. Now this is stronger than the prisoner's case; for in the prisoner's case, the queen's pardon is only made use of, to prevent her own prosecution, and not the suit of any appellant. Therefore in the present case, the proclamation pardoning all misdemeanors, pardons the offence of going into France without licence: And that being pardoned, it is as if the prisoner had never gone into France without

licence; and without this, the bare return without licence will not amount to treason. So that, with submission, we take this proclamation to be a licence to the prisoner to return into the queen's dominions. Nay, we take it to be a pardon even of the treason of which he stands indicted.

Besides, I would humbly beg leave to offer to your lordship's consideration, whether a Scotchman, that was not in England at the time of the making of this act of parliament, be within the meaning of this act. The act says, if any of his majesty's subjects shall go into France without licence, if he return without licence, it is treason. I do not pretend to call in question Calvin's case, which was (at that time at least) a very convenient resolution. I do not deny, but a natural-born subject of Scotland is, as to many purposes, a natural-born subject of England. But whether (upon the construction of so very penal a law as this is) a Scotchman is within the meaning of this law, is the only question. Now, with submission, when the act says, if any of his majesty's subjects shall go into France without licence, this (according to a reasonable construction) shall be intended only of English subjects, strictly speaking, that is, those of England; it must be intended only of such of his majesty's subjects, who were represented by the parliament that made this law, and who are presumed to consent to the making of this law; it is these subjects only that may reasonably be supposed to have notice of this law, and therefore it is reasonable that they only should be bound by it; especially in the case of so severe a law, where a man's life, estate, and all that is dear to a man is at stake. There may be a great deal of difference betwixt an act of parliament that punishes a fact that was before *malum in se*, and an act which makes that an offence which was before lawful: Every one of any nation is, at his peril, to abstain from committing any act that is *malum in se*; and if he commits such an act in any country, he seems subject to be punished according to the laws of that country where the fact was committed. But going into France, or any place beyond sea, without licence, seems only *malum prohibitum* by this statute: And therefore, when the act says, if any of his majesty's subjects, who went into France without licence, shall return without licence, they shall be deemed guilty of treason; it shall be intended only of those of England; such subjects as, either by themselves or their representatives, were consenting to the making of this law. Therefore I humbly beg leave to put the case, that if one of her majesty's subjects of her remote plantations (as Barbadoes or Antigua) that was resident there at the time of the making this law, should have since the year 1688 gone into France on any private or particular account, without licence; and afterwards should come into England; would this subject (who, in all probability, knew nothing of the making of this law)

be guilty of high treason, for coming into England? Surely this would be excessive hard. Then, if one resident at Barbadoes or Antigua at the time of the making of this act, should not be within this law; much less shall a Scotchman be within it, in regard Scotland is a separate kingdom, that cannot be bound by our acts of parliament; whereas any of the foreign plantations are plainly liable to be bound by English acts of parliament.

Besides, there is another reason from the very words of the act, why a Scotchman, that was not resident in England at the time of the making this law, cannot be intended within the meaning of the act: And that is not only because the act mentions nothing of Scotland; but because the words of the act are, if any of his majesty's subjects who went into France without licence, shall return into England, or any other of his majesty's dominions, without licence, it is treason. Now the word 'return' must plainly have relation only to that country where the party was resident at the making of the law, or to the country that he left at the time of his going towards France. But it does not appear that the prisoner, who is a Scotchman, was in England at the making the act; and he having been proved to be a native of Scotland, must be intended to be then in Scotland, unless proved to be elsewhere: And therefore the prisoner's coming into England can never be within the meaning of the word returning into England, any more than a man can be said to return to a place where he was not before.

There is another objection (because I will give Mr. Attorney only one trouble) and that is, that this indictment (or trial) cannot in this case be in Middlesex, but must be in that county where the prisoner first came, after his leaving France; which really was Northumberland, as he came from Scotland; or at least your lordship will take notice, that it cannot be Middlesex. It is a known rule, that all indictments and trials for treasons and all other crimes, must be in the county where the treason was committed: and it is clear (taking the proclamation out of the case) that the treason was committed in that county which the prisoner first came into after leaving France. The treason (taking the pardon out of the case) was completed by the first step made into England. Nay, if the prisoner, immediately after his making his first step into England, had returned, still it had been a complete treason; and the party had returned with his guilt upon him. And, my lord, I do not take it, that the party commits a new treason, by his going into another county. It is true, it is said, if I steal goods in one county, and carry them into another, this is felony (though not robbery) in every county where I carry them: but even in this case, the law (as I take it) is said to be otherwise, in Fitz. Abr. Tit. Coron. Par. 194, and that the trial must be in the county where the goods were first taken. But taking this to be law, that the felon may be tried in any of the coun-

tics where he carries the goods he stole; as I must needs own, the law is now allowed so to be; yet this depends upon a different reason, no way affecting the principal case. For the reason given of this case, in Dyer 40. and 7 Coke 2, and Bulwer's case, is, that the robbery or felony does not alter the property of the goods; and therefore, into whatever county the felon carries the goods, it is a new felony. But there it is not that special reason in the principal case, and therefore the law is not the same. Supposing the prisoner had been pardoned the treason, in coming into the first county of Northumberland without licence; could he afterwards have been punished for treason, for coming into the next adjacent county? This would be a pretty strange construction of multiplying treasons. And if coming into every county would make a fresh treason, a man at that rate may be brought to suffer as a traitor, though with many pardons about him. No surely, my lord, it is the original act the law regards; and the coming into a second county does not make it a second treason; and therefore we take it, that the indictment or trial in this case cannot be in Middlesex, but must be in Northumberland, or such other county, which was the first county of England that the prisoner came into. Upon the whole matter, we, with great submission, insist, first, that her majesty's proclamation amounts in law to a licence for the prisoner to come from France into Scotland; nay, that it amounts to a pardon to him, even of his treason that he is now indicted for. But if that be against us, we, in the next place, take it, that a Scotchman not resident in England at the time of the making this act, is not within the meaning of this act. But if that also be against us, yet, in the next place, we humbly insist, that he cannot be indicted for this treason in Middlesex, but must be indicted in the county where he first entered England. And it is sufficient if any one of these points are for us; and therefore we humbly hope the prisoner shall be acquitted.

Mr. Raymond. My lord, if your lordship please, I would beg the liberty to offer a word or two on the same side for the prisoner at the bar.

I humbly apprehend, your lordship expects no apology from us, for appearing as counsel in a cause of this nature, since it is by your lordship's permission granted us in pursuance of an act of parliament, that we have this liberty; and I cannot forget what your lordship has said formerly in this place on the like occasion; that it is as lawful for the gentlemen of the bar to be counsel in such a case, and that they are as much obliged to do their duty for their client in it, as in any other case wherein by law they are allowed to plead. [See Vol. 13, p. 154.]

I shall therefore, the fact being agreed on by both sides, state it as a case, and submit the observations I shall make upon it to your lordship's opinion.

The fact is no more but this:

Mr. Lindsay, being a native of Scotland, came into England, and resided some time here; from thence he went into France, where he continued a considerable time; after he was gone into France, and whilst he was there, the act of parliament upon which he now stands indicted, was made. Afterwards the queen granted a general pardon and indemnity to her subjects in Scotland for all treasons, &c. Depending upon which, Mr. Lindsay returned into Scotland; and having had the allowance of the benefit of it there, he returned into England, coming by the way of Berwick and Northumberland to London.

My lord, I shall humbly insist upon it in behalf of the prisoner at the bar:

First, that he is not comprehended within the words of this act.

Secondly, that if he should be within the words, yet that he is not within the meaning of the act.

My lord, I shall by no means presume to arraign the wisdom or justice of the law-makers in making this act, which, doubtless, was founded on great reason, and was very necessary for the preservation of his late majesty's person and government. But let it be never so wise, never so just, or never so necessary, yet, with great submission, it is a very penal law; partly, because it has a retrospect, and makes that fact an offence, which was none at the time when it was done (for before this act, it was lawful for any one to have gone into France, between the 11th of December, 1688, and the time of the proclaiming war with France). But principally because it makes the offender against it a traitor, therefore it must be expounded according to those strict rules of construction the law has appointed for other penal statutes, and must never be extended by equity beyond the letter.

My lord, as to the meaning of this act, I must observe, there is not one word in it of Scotland, or the subjects of Scotland, in express terms.

The question then will be, what other words in it can extend to Mr. Lindsay's being a native of Scotland? The most comprehensive words seem to be these at the beginning of the enacting part; 'If any of her majesty's subjects, who have, &c.'

I must beg leave to insist upon it, that Mr. Lindsay cannot be called one of his late majesty's subjects within this act. I do agree he was the late king's subject, as king of Scotland, but not as king of England; but this act being made in England by the English parliament, and using the word subjects, must mean such subjects as that parliament were able to oblige; which are only the subjects of England, or the dominions depending on the crown of England; but not the subjects of Scotland, which is a distinct dominion from England.

The king of England has a double political capacity in him, one as king of England, the other as king of Scotland; the two nations are absolutely distinct, and so are the laws by

which they are respectively governed: if therefore the king, as king of these two kingdoms, has two several politic capacities in him; if the nations and the laws are distinct, with submission, the subjects of necessity must be considered so too.

I am very sensible, my lord, with what solemnity Calvin's Case* in 7 Rep. is said by my lord Coke to have been adjudged; it shall be therefore, with a great deal of submission to your lordship's opinion, and deference to the authority of that case, if I shall say any thing that may seem to clash with that resolution.

I confess that case has determined, that allegiance is a quality of the mind, and cannot be circumscribed by place; that it is due to the person of the king; and because his natural person cannot be divided, the allegiance owing to him is inseparable and indivisible, and therefore that there is an union of allegiance of both kingdoms; and that a man cannot be considered as a liegeman or subject, which is all one to the king, as king of Scotland, and not as king of England, and so *vice versa*.

I will beg leave to consider my lord Coke's foundation, upon which this resolution is built, and submit it entirely to your lordship, whether that is able to support it.

According to my lord Coke himself in Calvin's case, legiance is a true and faithful obedience of the subject due to the sovereign, for which the sovereign is obliged to protect his subjects. 'Protectio trahit subjectionem, subjectionis protectionem.' 7 Co. 5.

I suppose it will not be pretended that this obedience due from the subject to the sovereign, is an absolute blind obedience to every arbitrary command of the sovereign; but is only such an obedience as the law of the kingdom, or principality, or dominion, has respectively prescribed for the subject to pay to his sovereign; and the same holds as to the sovereign's part in point of protection. If therefore this obedience or legiance (which is the same) is altogether prescribed and governed by the law of the place where it is due, it must necessarily follow, that where the laws are different, the legiance or rule of obedience and subjection must be different also; and consequently the legiance due to the king as king of England, and the legiance due to him as king of Scotland, (since the laws of both nations are distinct) must be separate and distinguishable: were it not so, the same act, if so in one, must in both kingdoms be the performance of the subjects' legiance; and the same act, if so in either, must in both kingdoms be the breach of it. But that that is otherwise, is easily to be proved; as for instance, according to my lord Coke in Calvin's case, 7 Co. 7, 6. The king of England may command any subject of England to attend him in his wars beyond sea; but suppose by the law of Scotland, a subject of Scotland is not obliged to go with the king

out of the kingdom: the king commands a native of Scotland to wait on him out of Scotland beyond sea, and he refuses; now by the law of England he has broke his legiance to the king, and yet in Scotland he is as good a liege subject (notwithstanding this refusal) as any subject the king has there. In this very case of Mr. Lindsay, by his return into Scotland from France (if your lordship takes the word dominions in the act in as large a sense as I suppose the queen's counsel would have the word subjects took, that is, to all the places in subjection to the king, though not dependent on the crown of England) he was become a traitor to the queen as queen of England, which is the highest breach of allegiance that can be; and yet at the same time (laying the pardon out of the case, and supposing there was no law in Scotland to prohibit his coming thither) he was a very good subject of the queen's in Scotland, and not guilty of any breach of allegiance due to her there. Then certainly these two allegiances are not the same, but distinguishable; one owing to the king as king of Scotland, the other owing to the king as king of England; and if the allegiances may be considered separately, so may the subject (who owes those allegiances, and by owing of which he becomes a subject) be separately considered as such in respect of them; and consequently, that Mr. Lindsay being a native of Scotland, must be regarded as a subject of the king as king of Scotland, and not a subject of the king as king of England, and so not within the words of the act, for the reasons offered to your lordship before.

The second thing I begged your lordship's leave to insist upon was, that taking it, that Mr. Lindsay, though a native of Scotland, should be comprehended within the words, 'any of his majesty's subjects,' yet that this act did not design to extend to any native of Scotland, and consequently not to him. With great submission to your lordship, there are many cases in the books where statutes have received a construction contrary to the words, to comply with their intent. The statute of Gloucester, cap. 1, enacts, That the disseisee shall recover damage, in a writ of entry, founded upon the disseisin, against him who is found tenant; upon which Litt. sect. 685, puts this case, That if the disseisor makes a feoffment of the land to B. C. and D. and livery of seisin is made to B. and C.; but D. was absent, and never would agree to this feoffment, nor take the profits; B. and C. die, the disseisee brings a writ of disseisin in the *per* against D. who pleads this matter; though he is a tenant of the freehold of this land, yet no damages shall be recovered against him. So in this case, though the words of the act in their utmost extent would comprize the prisoner at the bar; yet if the parliament did not design they should, a construction shall be made accordingly.

That the parliament did not intend to concern themselves with Scotland, or the natives thereof, appears, with submission, by the pre-

* See the Case of the Postnati, vol. 2, p. 559, of this Collection.

amble (which is, as my lord Coke terms it, Co. Litt. 79, a key to find out the meaning of the law-makers.)*

The words of the preamble are, That upon the conclusion of the peace between his majesty and the French king, it was become necessary for the carrying on a trade between England and France, that the subjects of each kingdom should have, &c.—I suppose it will not be pretended, that Scotland can be comprehended under the word, England; nor Scotchmen under the word, the subjects of each kingdom, that is, of England and France. For if a Scotchman should be took to be a subject of the king of England, yet I humbly conceive he was never took to be a subject of the kingdom of England; the word kingdom is the same as realm, and is usually applied to the land of England, and not to the dominions dependent on the crown of England; as on the 35 Hen. 8, c. 2, a treason committed in Ireland was adjudged to be a treason committed out of the realm of England, and triable as a foreign treason, Orurke's case, Ander. 262, Pl. 269. But if kingdom or realm should be taken to have the same signification as dominion, that case could not be law, because Ireland was never held to be out of the dominion of the crown of England; so that, with great submission to your lordship, nothing in the preamble affects the prisoner at the bar.

The next thing to be considered, is, what the parliament meant by the words, 'if any of his majesty's subjects,' &c. And I humbly hope your lordship will think it reasonable to let that expression be explained by the word subjects used in the preamble, and so interpret them his majesty's subjects of the kingdom of England, which this prisoner is not; and rather, because to construe them to extend to Scotchmen, will be an interpretation that will make the English parliament make an offence a treason, which will not be in the power of the English government to punish, unless by acci-

* "Nota, the rehearsall or preamble of the statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof." Co. Litt. 79, a. On which passage his learned annotator, Mr. Hargrave, observes, "The authorities referred to in 4 New Abr. 645, will serve to explain by instances, what sort of influence the preamble ought to have in expounding statutes. See also Hatt. on stat. 53."

Mr. Barrington has some remarks upon the preambles of statutes, in his Obs. on stat. 3 Hen. 6, 21 Hen. 8.

See, too, in this Collection, the Case of Mr. Justice Johnson, A. D. 1805.

The statute 24 G. 2, c. 18, (to prevent challenges for want of a knight in the panel,) affords an instance of an enactment more extensive than the preamble. The provision is made in general terms, but the recital which precedes it is confined to the inconveniences of such challenges where peers are parties.

dent: for if a Scotchman returning out of France into Scotland, contrary to this act, should be a traitor, yet he could not be punished here, unless he accidentally came hither afterwards, because the English government has no coercive means to fetch him from Scotland hither to be punished. But it is otherwise in respect of the dominions depending on the crown of England, as Ireland, &c. for a man may be transmitted from England to Ireland, or *vice versa*, to be tried; as colonel Lundy was, 2 Ventr. 314, but England cannot compel the government of Scotland to send a man hither from thence to be tried. Then I humbly conceive that it cannot be imagined, that the parliament designed to make an offence a treason, which cannot be punished but by accident here, since it is below the dignity of a government to have offenders against their laws, in crimes of so high a nature, out of their power to punish. But of an English subject it would be otherwise, though he was in Scotland, or any foreign prince's dominion, because they might proceed against such a person to outlawry, and upon attainder confiscate his estate.

Another thing I must beg leave to offer to your lordship, as a proof that this parliament did not intend in this act to include Scotland, or the natives of Scotland, is, that the paragraph which makes the taking of a charter or grant from the late king James to be treason, is so far from relating to Scotland, or the Scotch, that it does not make it penal for any Englishman to take a grant of honour or estate in Scotland from the late king James; the words of the act being, to be had or enjoyed in the kingdom of England or Ireland: so that the parliament seemed industriously not to concern themselves with any thing relating to Scotland; and yet doubtless they might have made it treason for any Englishman to have took such a grant; and there had been as great reason so to have done, if they had thought fit to have meddled with any thing relating to Scotland, since the taking of such a grant in Scotland by an Englishman from the late king James, had been as great a derogation to the legiance owing to the king, as if it had been of any thing in England; the acceptance of such a grant amounting to an acknowledgment of another power besides the king's. So that for these reasons I humbly insist upon it, that the parliament did not intend to include any Scotchman within this act.

But my lord, taking it that Mr. Lindsay, though a native of Scotland, should be within both the words and meaning of this act; yet I must submit it to your lordship's judgment, whether this act could bind him, he being beyond sea, viz. in France, at the time when it was made. I do agree, that if any of the Scots have lands, &c. in England, they shall be liable to pay all duties imposed by act of parliament on those lands. I do also agree, that every Scotchman resident here, is bound by all the laws of the land; and so are all foreigners

whatsoever (be they Danes or Swedes, or of whatsoever other nation they be) who live here under the king's protection: but as soon as they are gone out of the kingdom, their allegiance, which was but local, ceases, and they are no longer obliged by the laws of England. It must be agreed, that no English act of parliament can bind Scotland, nor, as I humbly apprehend, the Scots, whilst out of England; if so, then how could this prisoner be bound by this act, being a Scotchman, and out of this kingdom at the time when the act was made? With great submission, his coming into England alone could not subject him to this law; for there seems to be a great difference between this act, and other general acts or laws of this place: for, as I said before, if a Scotchman comes into England, and inhabits here, he is liable to all the laws then in force, and shall be punished for the breach of any of them; because he was before protected by those laws, and therefore must be obedient to them. But in this case, the subjection to the law, and the offence, began at the same instant; for before his landing in England, this law had no power over him, and the very act of landing made the offence in this indictment; it will be therefore something severe to construe that act, which only makes the prisoner liable to the law, to be a breach of it. As to this matter, there will be no difference between a Scotchman or a Dane: both, when here, are bound by the laws; neither, when absent. Suppose it should be enacted, that if a Dane should land in England without licence from the king, he should be a traitor; and a Dane notwithstanding such act should come into England without such licence, would he be a traitor? With humble submission, not. Such act might amount to a prohibition of his coming, and make him be used as an alien enemy, 7 Co. 6 B. as Perkin Warbeck was in Henry the 7th's time; but could not make him a traitor, because he owed no allegiance to the king, nor subjection to the law, at the time when the act was made. As to the prisoner's having been in England, and having resided here before; that, I humbly think, will make no difference, because his subjection to the English law ceased, as soon as he stepped off from the English shore.

What I shall beg leave further to insist upon for the prisoner (supposing your lordship should be of opinion against him on the former points) is, that this evidence doth not maintain the indictment. The indictment is for returning without licence from France into England: the evidence is, that he returned out of France into Scotland, and from thence into England. The act of parliament is, That if any of his majesty's subjects, &c. return into this kingdom of England, or other his majesty's dominions: the meaning of which, we for the prisoner humbly take to be, that the first coming of any such person as is within the act, into any of his majesty's dominions, shall be the treason; and that the act did not intend to make every several coming into every distinct dominion a

new treason; as if such person should come out of France first into Scotland then into Ireland, thence into Jersey and so into England, the act, with submission, did not design to make this person liable to be indicted for four treasons; but that into what dominion he first came, for that he was a traitor and punishable: and that construction sufficiently prevents the mischief and danger the act designed to arm against. For if a man should come without licence into any one dominion, and is looked on as a dangerous person, the taking away his life will prevent any future mischiefs from him. If he has a licence to come into one, it is to be believed with a great deal of reason, he may be trusted in any other of his majesty's dominions; or else his majesty would never have granted him a licence to return into any of his dominions, where he would be equally capable of putting in execution any dangerous practices against the government. If that should be the meaning of the act, then, with submission, this indictment ought to have been for coming into Scotland, which was the place he first came into, for there was the treason, and not for coming into England. Besides, if the coming into Scotland was the first and only treason punishable by this act, then we must offer the general pardon of Scotland in the prisoner's excuse: not, my lord, that I can pretend that a pardon in Scotland can pardon a treason in England; but we must beg leave to insist upon it, as amounting to a licence to return into Scotland. I do expect that it will be objected, that the licence which this act appoints, must be under the privy-seal of England, which this Scotch pardon cannot be pretended to be. I confess, my lord, the words are, without licence from his majesty under his privy-seal, but it is not said privy-seal of England. And though generally speaking, when an English act mentions the great-seal or privy-seal, it must be took to be the great-seal or privy-seal of England; yet in this English act, if your lordship will construe the words, His majesty's subjects, not only to be his subjects as king of England, but as king of Scotland, or any other nation; if your lordship will construe the word dominions, to be not only the dominions dependent on the crown of England, but also all other dominions of which his majesty was king, as Scotland; by parity, the words, privy seal, ought to be extended to all the privy-seals the king has, as king of England, or king of Scotland. And if so, then since the queen has in her proclamation declared, that her pardon shall be took as beneficially as if it had been under the great-seal; but the great-seal includes the privy-seal, and is of greater efficacy: we humbly hope, that it will be as beneficial to the prisoner, as if it had been under the privy-seal; nay, rather more, because as to Scotland it pardons the offence; for though the return is after the pardon, yet it pardons the going into France, which is the foundation of the crime, and without which the returning into Scotland, or any of his majesty's dominions,

was no offence: this is the use the prisoner would make of this pardon. I cannot press it as a pardon of an English crime; though with great submission to your lordship, it seems something strange, that Mr. Lindsay should by virtue of this pardon be a very good subject of the queen's in Scotland, and have all the same liberties other of his countrymen have there, and yet that he should be a traitor against the queen here in England; that he should be within the queen's protection there, and out of her protection here; and yet at the same time that his allegiance to her cannot be severed, nor he considered as a subject to her, as queen of Scotland, and not as queen of England.

But admitting the pardon will not avail the prisoner in any respect, and that your lordship should be of opinion that his coming to England is a treason, notwithstanding he returned from France into Scotland first; then I must insist upon what Mr. Williams has before mentioned, that this indictment is ill, and that he ought to have been indicted in the county which he first came into, which was impossible to be Middlesex; and I must ground it on the general rule that all crimes are local, and inquirable by the grand jury of the county where they are committed. Even in batteries, which are transitory in actions; yet, with submission, indictments are local, and must be enquired of by the grand jury of the county where they are committed. My lord, I shall trespass no longer upon your lordship's patience, only just beg leave to say, that upon the whole matter, for the prisoner at the bar, I humbly insist upon it, that he, being a native of Scotland, is not within the words of this act: that if he should be within the words, yet he is not within the meaning of the act. But if both those points are against me, that, as this case is, he is not obliged by it. If I should fail in all these, then I must have recourse to the construction of the act, that it intended only to make the first entry into any of the queen's dominions treason, and consequently that this treason was upon his return to Scotland, and ought in the indictment to have been laid as such: for which reason I humbly conceive, that the indictment is not only ill, but that the pardon will amount to a licence. But if your lordship should be of opinion he is indictable for coming into England, that then the indictment ought to have been laid in that county where he first came into. If any of which points hold, with submission, the prisoner cannot be found guilty on this indictment; but your lordship will be pleased to direct the gentlemen of the jury to acquit him, which I humbly pray in his behalf.

Sir Thomas Powis. My lord, I have observed these gentlemen in the method they have gone, and will follow them in the same manner to give them an answer. What we have to say will be nothing but with respect to the law, as it now stands upon the act of parliament: whe-

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But admitting the pardon will not avail the prisoner in any respect, and that your lordship should be of opinion that his coming to England is a treason, notwithstanding he returned from France into Scotland first; then I must insist upon what Mr. Williams has before mentioned, that this indictment is ill, and that he ought to have been indicted in the county which he first came into, which was impossible to be Middlesex; and I must ground it on the general rule that all crimes are local, and inquirable by the grand jury of the county where they are committed. Even in batteries, which are transitory in actions; yet, with submission, indictments are local, and must be enquired of by the grand jury of the county where they are committed. My lord, I shall trespass no longer upon your lordship's patience, only just beg leave to say, that upon the whole matter, for the prisoner at the bar, I humbly insist upon it, that he, being a native of Scotland, is not within the words of this act: that if he should be within the words, yet he is not within the meaning of the act. But if both those points are against me, that, as this case is, he is not obliged by it. If I should fail in all these, then I must have recourse to the construction of the act, that it intended only to make the first entry into any of the queen's dominions treason, and consequently that this treason was upon his return to Scotland, and ought in the indictment to have been laid as such: for which reason I humbly conceive, that the indictment is not only ill, but that the pardon will amount to a licence. But if your lordship should be of opinion he is indictable for coming into England, that then the indictment ought to have been laid in that county where he first came into. If any of which points hold, with submission, the prisoner cannot be found guilty on this indictment; but your lordship will be pleased to direct the gentlemen of the jury to acquit him, which I humbly pray in his behalf.

Sir Thomas Powis. My lord, I have observed these gentlemen in the method they have gone, and will follow them in the same manner to give them an answer. What we have to say will be nothing but with respect to the law, as it now stands upon the act of parliament: whe-

ther the case deserves mercy or no, is not the question here, that will be considered in another place. Our part is to maintain the law as it stands with reference to this indictment; it must be owned, that a great deal of that which has been said might have carried weight with it, if it had been pleaded in Scotland, where the proclamation was made; but to make use of it here in England, as having any force in this case, is not agreeable to law or reason. First, no man can say a pardon, if it had been under the great seal of Scotland, could pardon a crime committed here in England; but it is not so, for it is not under any seal at all. But supposing it were to be taken in the extent they would have it, yet it would not be a sufficient pardon in this case. For these two things must be considered: First, it is a pardon only of crimes committed in that kingdom. Secondly, it cannot be a pardon of a crime committed since that pardon granted; for we must mind the date of that pardon, and the crime he is tried for. The Scotch pardon is dated in March 1702-3, that was March was twelvemonth. No man can say a proclamation in that kingdom can pardon a crime that was committed afterwards. Now this crime was committed in December last, for then it was he returned into England; therefore that pardon can never extend to this case. So that these two things, if considered, will be sufficient to answer all that has been insisted on by way of pardon. First, it is a pardon of another kingdom for offences committed against the crown of Scotland; whereas this indictment is for an offence committed against the crown of England. And secondly, it was granted at a time precedent to the time of this offence committed: but next, they say, the pardon in Scotland will amount to a licence from the queen to go into Scotland, and that then by consequence he was free to come into England: with submission, we think they cannot make such an inference, for the queen's pardon cannot extend to such a double purpose. Suppose the queen had expressly pardoned his going into France and returning into Scotland, that would not have amounted to a licence to come into England. So that we deny their inference, that the pardon in Scotland amounts to a licence to come into England. But in the second place, if the queen had expressly given him a licence to go into Scotland, (though I do not admit that to be the case) yet I deny that that would have been a licence to come into England. If the queen under the privy seal of Scotland, should have admitted him to come into Scotland, yet that would not have been a licence for him to come into England; for it would have been a special licence to go to one place, which can never be reckoned, in such a case as this is, a licence to go to another place in another kingdom. For the king or queen might perhaps think fit to licence one to come into Scotland, and yet not think it convenient to licence him to come so near their royal person, as he would be here in England.

So that there is no such licence in that pardon, as is insisted on; and if there had been, yet it would not have had that operation to licence him to come to England. The next thing they speak most fully to (and which is very considerable, if they make it out) is, that the words of this act of parliament, upon which the indictment is founded, or at least the meaning of them, cannot be extended to a native of Scotland. As for the words of the act, we need do no more than read them, to make it appear to be otherwise. It is observed by them very truly, that Scotland is no part of the kingdom of England; but they must admit it as a part of the dominions of the queen of England, though not part of the kingdom of England. They would do little service to the subjects of Scotland, if they should endeavour to overthrow Calvin's case, which was so solemnly determined near an hundred years ago, which enables them of Scotland to come into England, and enjoy the same privileges here, as the subjects of England do. Certainly, as they are let into all these benefits by the resolution of that case, so they are at the same time the subjects of the king or queen of England. That the words therefore of the act are against them, nothing can be plainer; 'If any of his majesty's subjects, who, since the 11th of December, 1688, have gone into France.'— This leaves them no room for dispute; it says not, if any of the subjects of the kingdom of England, but if any of his majesty's subjects; so that whoever was a subject of the late king is within the act. The words are without any restriction whatever, 'If any of his majesty's subjects' and they will not deny but that a Scotchman was a subject of his late majesty. But then they say, if the words should extend to it, the meaning of the act cannot. With submission, we think the case before you is within the words and meaning of the act, and within the mischief which the act provides against. For at the time this act was made, it being taken notice of, that upon the peace concluded, there would be a door opened for a communication between England and France, and that many persons who had resorted thither, who had been actually in arms there, and other disaffected persons, might take advantage, and be encouraged from thence to form and carry on treasonable designs and practices against his majesty's person and government; therefore, to obviate that mischief, this act was made in such general words, that if any of his majesty's subjects who had gone voluntarily into France, since the time mentioned in the act, without licence, let them be born where they would, whether they were of the one kingdom or the other, the mischief of their returning without licence was equal. And by consequence, it was the meaning of the act to exclude one as well as the other; for the design of the act was to prevent the danger that might arise by such persons coming over. But as to this present case, if what the witnesses have said be true, it would be

very mischievous indeed, if a person that had been resident here for near twenty years, as the prisoner was, by his own witnesses, and afterwards went into France without a licence, if he may be allowed to return back again without a licence, because not originally a native of England. By the same rule, all those persons that have done the like, both of Scotland and Ireland, would be at liberty to return also, because not natives of England; which was not surely the meaning of the act of parliament, nor ought the construction of the words so to be taken. It is true, we cannot here by an act bind them in Scotland; but we are not now putting in execution this act in Scotland, but putting it in execution here in England on a Scotchman that had been long an inhabitant here before. My lord, the next thing that was insisted on, is, that if he be such a subject as may be construed within this act, and if the pardon should not have the effect they contend for, yet they say, this indictment is laid in the wrong place, it ought to have been laid in the county where he first arrived. There need little to be said to this, because the prosecution is made where the party was apprehended. The objection they make, is that which would render it impracticable to prosecute any for this offence. For how is it possible to know where a man first privately arrived? That which is enough to charge him, is, that he was first found in such a place in England; for it is not said in the act, that they shall not return to this or that county, but not to England. And then wherever he is found in England, there the indictment may be laid against him. And the case of the felony comes home to this point; the man that steals goods in one county, may be indicted in any other county where he carries them. So he that returns into England contrary to the act, wherever he is apprehended, he carries the crime with him. And it does not appear, but that this is the place where he was first found. They say, it is impossible to come from Scotland into Middlesex, without first coming into some other county; but it is agreed, that this is the place where he was first apprehended. Therefore, upon the whole matter, the fact being confessed, we insist that he is within the words and the meaning of the act, and within the mischievous consequences which are intended to be prevented by it.

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very mischievous indeed, if a person that had been resident here for near twenty years, as the prisoner was, by his own witnesses, and afterwards went into France without a licence, if he may be allowed to return back again without a licence, because not originally a native of England. By the same rule, all those persons that have done the like, both of Scotland and Ireland, would be at liberty to return also, because not natives of England; which was not surely the meaning of the act of parliament, nor ought the construction of the words so to be taken. It is true, we cannot here by an act bind them in Scotland; but we are not now putting in execution this act in Scotland, but putting it in execution here in England on a Scotchman that had been long an inhabitant here before. My lord, the next thing that was insisted on, is, that if he be such a subject as may be construed within this act, and if the pardon should not have the effect they contend for, yet they say, this indictment is laid in the wrong place, it ought to have been laid in the county where he first arrived. There need little to be said to this, because the prosecution is made where the party was apprehended. The objection they make, is that which would render it impracticable to prosecute any for this offence. For how is it possible to know where a man first privately arrived? That which is enough to charge him, is, that he was first found in such a place in England; for it is not said in the act, that they shall not return to this or that county, but not to England. And then wherever he is found in England, there the indictment may be laid against him. And the case of the felony comes home to this point; the man that steals goods in one county, may be indicted in any other county where he carries them. So he that returns into England contrary to the act, wherever he is apprehended, he carries the crime with him. And it does not appear, but that this is the place where he was first found. They say, it is impossible to come from Scotland into Middlesex, without first coming into some other county; but it is agreed, that this is the place where he was first apprehended. Therefore, upon the whole matter, the fact being confessed, we insist that he is within the words and the meaning of the act, and that the mischievous consequences which the act is intended to prevent by it.

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What has been said as to the act in general, is something surprizing to me; to hear any Englishman complain of the hardship of this law, on which the prisoner is indicted, which was made for the preservation of the king's person and the government, and by the wisdom of the nation thought necessary. But as to the matters of law the prisoner's counsel have insisted on, they are reducible to two heads.

First, That the queen's proclamation in Scotland, pardoning her subjects of Scotland of all treasons, &c. amounts to a licence to return to Scotland, by pardoning the offence in going to France; and every subject of Scotland may lawfully come thence into England.

Secondly, that the prisoner ought to have been indicted in the first county into which he first returned: which is impossible to be Middlesex.

As to the first matter, it has been said, that a native of Scotland is not bound, nor can be punished by a law made in England. And the counsel, though they have not denied the authority of Calvin's case, yet they do seem to dislike the resolution of it. Now he is (according to Calvin's case) a subject of England. That case was more beneficial to the subjects of Scotland than to the subjects of England: and it has been always allowed to be law ever since. But, my lord, we are not to consider this gentleman in this case as a Scotchman absolutely, but as a Scotchman here in England. How far an act made in England would affect a Scotchman that should return into Scotland, I need not meddle with. But the question here is, whether an act of parliament made in England, will not bind every person that is resident here in England? Now the prisoner was resident here in England with his family, and went hence to France: And by the law, every Scotchman residing in England, is an Englishman, and hath right to enjoy the privileges of an Englishman. This is the resolution of Calvin's case. I will give but one instance of this. The act of navigation made 12 Car. 2, requires, in many cases of goods imported, that the master, and three fourth parts of the mariners, shall be English. The act of 14 Car. 2, chap. 11, of frauds, declares, that any of her majesty's subjects of England, Ireland, and the plantations, shall be accounted English, and no others.

Now the natives of Scotland inhabiting in England or Ireland, have always been allowed to be English or Irish within the act of frauds; and have enjoyed the privilege ever since of being masters of ships: And the same hath been allowed them on all trials in the court of

Exchequer; that is, according to Calvin's case, that to all intents and purposes, a Scotchman being in England, enjoys the privileges of an Englishman, he is a subject of the crown of England.

But give me leave, my lord, to consider how the prisoner comes to be affected by this act: Not as being her majesty's subject, living in Scotland; but he is bound by this act, as he is a subject residing here in England. For as to what they say, that his offence is going into France; that is not the matter he is charged with: That is the description of the person that falls under the disability of the act, [a man under these circumstances.] But his returning from France into England (being a person described by the act) is the offence.

My lord, his returning is the offence: Not his returning to Scotland, but returning to England, or any other her majesty's dominions, bound by the acts of parliament made in England. The act is, if any of his majesty's subjects return: And every Scotchman that resides here, is a subject of the queen. Every law that is made in England will bind every Scotchman that resides here; and this will bind him from returning into England without licence; which is all that is in this case.

It hath been objected, the act cannot bind the Scots here, because they have no representative in parliament. But that is not so: they may be freemen of corporations, and are capable of being freeholders; and as such, may be represented in parliament. The passing of the act shews, the parliament intended to include all subjects, that might in the utmost latitude be called subjects. The words are [If any of his majesty's subjects, that have gone into France, shall return into England.] So that the act says, they that were his majesty's subjects, and went into France, and did return, shall be guilty. Therefore, what hath been said, of the laws of England binding Scotland, is quite out of this case.

The counsel for the prisoner have argued, that the proclamation of indemnity in Scotland, is a licence to return into Scotland. I would fain know where they find that. If there were a pardon under the great seal of England for all offences committed, I would be glad to know whether that would be accounted a licence to return into Scotland? No, certainly. They have said, that the matter that hindered the returning to Scotland, was the offence of going to France without a licence; which offence is remitted by the pardon. That is plainly a mistake: For the act had not regard to any offence of going to France; referring to the 11th of December, 1688, when, and long after, it was not any offence to go thither without a licence: Every man, till the war was declared, might have gone thither without licence. And yet by this act, those that went between that time and the war declared, as well as those that went during the war, are prohibited to return without licence. So that the pardon which they rely on, cannot give

the prisoner: For the act did not regard crimes committed; but, as the preamble is, it was made to prevent an inconvenience which might follow by disaffected persons returning, who might form and carry on traitorous conspiracies against the late king and the government. And the parliament looked on persons to be disaffected, that left their country, and went and staid in France after the late king went thither; and therefore judged it not reasonable to have such trusted here, without the government should licence their return.

The persons mentioned in the act are characterized: So that as to the matter of the pardon (if it were an English pardon) it would not bring them from under the act. Besides, any licence or pardon in Scotland cannot indemnify them from an act made in England.—The law and the seals of each kingdom are distinct: And an express licence under the seal of Scotland to return to England, nay an act of parliament for that purpose there, would not avail; for no act of Scotland can take off a disability laid on, by any act made in England. For this act is a banishing them from England, unless the queen gives a licence to return.

My lord, it is an extraordinary thing which they argue from the preamble of the act, that mentions the carrying on the trade between England and France; and Scotland being not named, the act shall not extend to the Scotchmen. I do not see what can be gathered from that.—The Scotchmen residing here, are considered as English; and being here, are bound by the English laws; else the Scots would be in a better condition here than the English. But, my lord, that which we insist on, is, that the Scots residing here, are to all intents Englishmen; that they are subject to the laws of England, and bound by them. The going first to Scotland will not avail the prisoner; for the offence is, returning to the place from whence he went, that is, England. Whether his returning to Scotland be an offence within this act or not, is not material; nor whether an act of parliament made in England can banish a Scotchman from Scotland: But it is, that an act of parliament in England may prohibit any Scotchman, or any other person from returning out of France into England.

My lord, the next matter, which they mightily insist on, is, as to the place of trial: But if that objection should prevail, it would make the act ridiculous and useless. For then it would lie on the queen's counsel to prove, where a person (who privately returned, and got into the kingdom) first landed. But the act says (if they shall return into England.) And wherever he is found, thither he is returned. There was an extraordinary thing said indeed: that if we can make it treason wherever he is found, then he may be tried in every county he comes into, although he be pardoned, or tried, for returning into one county. Certainly that will not be so. For the returning is but one treason; and though he may go into several places, yet when he is tried in one

place, and convicted and pardoned for that, it discharges him wholly. For the returning is but one entire offence, though having been in many places: The queen may proceed against him in any one of them. It is like the common case of an escape. An escape is an escape in every county, wherever the party goes afterwards: And the party escaped, or the sheriff may be proceeded against in any county whether the party escaped goes, as well as in that whither he first escaped. And without this be so, the act can never be put in execution.

My lord, I think this is the substance of what they have said; that an act made in England, will not bind a native of Scotland. We think an act made in England will bind such a one residing in England. Now the prisoner was residing in England for twenty years; and he is both within the direct words, and within the intent and meaning of the act. There are a great many of them that are in France: And I believe the parliament never intended to leave the Scots free to return into England, any more than the English.

Lindsay. My lord, I desire to know, whether the queen's licence does not set us free, as well in England as in Scotland? And whether one that has a licence to come into Scotland, may not come into England too?

Att. Gen. One may be brought to a trial here, though he had a licence in Scotland.

Lindsay. My lord, her majesty's pardon extends further than a licence: It restores to all the privileges I had before.

L. C. J. Holt. If I take you right, you mean this pardon in Scotland secured to you all the advantages you had at the time of your birth, or at any time before your departure out of England; so that you are not to be impeached, or convicted of any crime you have committed against the laws of Scotland; but you are thereby upon the same foot, and have the same rights and privileges as any other Scotchman hath, that hath never offended: And every innocent Scotchman hath a right and liberty to come into England when he will. Which is very true, that the pardon discharges all disabilities and incapacities that you have incurred by any offence committed against the laws of Scotland, but not any committed against the laws of England. That is, supposing the pardon had been subsequent to your return into Scotland, and that your return hither had been high treason by this act.

Lindsay. My lord, I think this pardon reinstates me in all the privileges I enjoyed before.

L. C. J. Holt. I tell you no: It only restores you to the privileges that you had as a Scotchman; and which you would have lost if convicted of those offences by the law of Scotland; but exempts you not from any punishment to which you were then obnoxious by the law of England.

Att. Gen. My lord, I would say but this only; That speaking of the pardon, as a pardon, it cannot pardon a crime before it is

one knows from whence he came (*viz.* from France), and how long he staid there, and in whose service. And it would have been a better argument of his sincerity, if he had given an account of his knowledge of what passed in France while he was there; and probably would have been of more advantage to him, than saving the trouble of proving what (he knew) we were ready and able to prove.

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First, That the queen's proclamation in Scotland, pardoning her subjects of Scotland of all treasons, &c. amounts to a licence to return to Scotland, by pardoning the offence in going to France; and every subject of Scotland may lawfully come thence into England.

Secondly, that the prisoner ought to have been indicted in the first county into which he first returned: which is impossible to be Middlesex.

As to the first matter, it has been said, that a native of Scotland is not bound, nor can be punished by a law made in England. And the counsel, though they have not denied the authority of Calvin's case, yet they do seem to dislike the resolution of it. Now he is (according to Calvin's case) a subject of England. That case was more beneficial to the subjects of Scotland than to the subjects of England: and it has been always allowed to be law ever since. But, my lord, we are not to consider this gentleman in this case as a Scotchman absolutely, but as a Scotchman here in England. How far an act made in England would affect a Scotchman that should return into Scotland, I need not meddle with. But the question here is, whether an act of parliament made in England, will not bind every person that is resident here in England? Now the prisoner was resident here in England with his family, and went hence to France: And by the law, every Scotchman residing in England, is an Englishman, and hath right to enjoy the privileges of an Englishman. This is the resolution of Calvin's case. I will give but one instance of this. The act of navigation made 12 Car. 2, requires, in many cases of goods imported, that the master, and three fourth parts of the mariners, shall be English. The act of 14 Car. 2, chap. 11, of frauds, declares, that any of her majesty's subjects of England, Ireland, and the plantations, shall be accounted English, and no others.

Now the natives of Scotland inhabiting in England or Ireland, have always been allowed to be English or Irish within the act of frauds; and have enjoyed the privilege ever since of being masters of ships: And the same hath been allowed them on all trials in the court of

Exchequer; that is, according to Calvin's case, that to all intents and purposes, a Scotchman being in England, enjoys the privileges of an Englishman, he is a subject of the crown of England.

But give me leave, my lord, to consider how the prisoner comes to be affected by this act: Not as being her majesty's subject, living in Scotland; but he is bound by this act, as he is a subject residing here in England. For as to what they say, that his offence is going into France; that is not the matter he is charged with: That is the description of the person that falls under the disability of the act, [a man under these circumstances.] But his returning from France into England (being a person described by the act) is the offence.

My lord, his returning is the offence: Not his returning to Scotland, but returning to England, or any other her majesty's dominions, bound by the acts of parliament made in England. The act is, if any of his majesty's subjects return: And every Scotchman that resides here, is a subject of the queen. Every law that is made in England will bind every Scotchman that resides here; and this will bind him from returning into England without licence; which is all that is in this case.

It hath been objected, the act cannot bind the Scots here, because they have no representative in parliament. But that is not so: they may be freemen of corporations, and are capable of being freeholders; and as such, may be represented in parliament. The penning of the act shews, the parliament intended to include all subjects, that might in the utmost latitude be called subjects. The words are [If any of his majesty's subjects, that have gone into France, shall return into England.] So that the act says, they that were his majesty's subjects, and went into France, and did return, shall be guilty. Therefore, what hath been said, of the laws of England binding Scotland, is quite out of this case.

The counsel for the prisoner have argued, that the proclamation of indemnity in Scotland, is a licence to return into Scotland. I would fain know where they find that. If there were a pardon under the great seal of England for all offences committed, I would be glad to know whether that would be accounted a licence to return into Scotland? No, certainly. They have said, that the matter that hindered the returning to Scotland, was the offence of going to France without a licence; which offence is remitted by the pardon. That is plainly a mistake: For the act had not regard to any offence of going to France; referring to the 11th of December, 1688, when, and long after, it was not any offence to go thither without a licence: Every man, till the war was declared, might have gone thither without licence. And yet by this act, those that went between that time and the war declared, as well as those that went during the war, are prohibited to return without licence. So that the pardon which they rely on, cannot avail

the prisoner: For the act did not regard crimes committed; but, as the preamble is, it was made to prevent an inconvenience which might follow by disaffected persons returning, who might form and carry on traitorous conspiracies against the late king and the government. And the parliament looked on persons to be disaffected, that left their country, and went and staid in France after the late king went thither; and therefore judged it not reasonable to have such trusted here, without the government should licence their return.

The persons mentioned in the act are characterized: So that as to the matter of the pardon (if it were an English pardon) it would not bring them from under the act. Besides, any licence or pardon in Scotland cannot indemnify them from an act made in England.—The law and the seals of each kingdom are distinct: And an express licence under the seal of Scotland to return to England, nay an act of parliament for that purpose there, would not avail; for no act of Scotland can take off a disability laid on by any act made in England. For this act is a banishing them from England, unless the queen gives a licence to return.

My lord, it is an extraordinary thing which they argue from the preamble of the act, that mentions the carrying on the trade between England and France; and Scotland being not named, the act shall not extend to the Scotchmen. I do not see what can be gathered from that.—The Scotchmen residing here, are considered as English; and being here, are bound by the English laws; else the Scots would be in a better condition here than the English. But, my lord, that which we insist on, is, that the Scots residing here, are to all intents Englishmen; that they are subject to the laws of England, and bound by them. The going first to Scotland will not avail the prisoner; for the offence is, returning to the place from whence he went, that is, England. Whether his returning to Scotland be an offence within this act or not, is not material; nor whether an act of parliament made in England can banish a Scotchman from Scotland: But it is, that an act of parliament in England may prohibit any Scotchman, or any other person from returning out of France into England.

My lord, the next matter, which they mightily insist on, is, as to the place of trial: But if that objection should prevail, it would make the act ridiculous and useless. For then it would lie on the queen's counsel to prove, where a person (who privately returned, and got into the kingdom) first landed. But the act says (if they shall return into England.) And wherever he is found, thither he is returned. There was an extraordinary thing said indeed: that if we can make it treason wherever he is found, then he may be tried in every county he comes into, although he be pardoned, or tried, for returning into one county. Certainly that will not be so. For the returning is but one treason; and though he may go into several places, yet when he is tried in one

place, and convicted and pardoned for that, it discharges him wholly. For the returning is but one entire offence, though having been in many places: The queen may proceed against him in any one of them. It is like the common case of an escape. An escape is an escape in every county, wherever the party goes afterwards: And the party escaped, or the sheriff may be proceeded against in any county whether the party escaped goes, as well as in that whither he first escaped. And without this be so, the act can never be put in execution.

My lord, I think this is the substance of what they have said; that an act made in England, will not bind a native of Scotland. We think an act made in England will bind such a one residing in England. Now the prisoner was residing in England for twenty years; and he is both within the direct words, and within the intent and meaning of the act. There are a great many of them that are in France: And I believe the parliament never intended to leave the Scots free to return into England, any more than the English.

Lindsay. My lord, I desire to know, whether the queen's licence does not set us free, as well in England as in Scotland? And whether one that has a licence to come into Scotland, may not come into England too?

Att. Gen. One may be brought to a trial here, though he had a licence in Scotland.

Lindsay. My lord, her majesty's pardon extends further than a licence: It restores to all the privileges I had before.

L. C. J. Holt. If I take you right, you mean this pardon in Scotland secured to you all the advantages you had at the time of your birth, or at any time before your departure out of England; so that you are not to be impeached, or convicted of any crime you have committed against the laws of Scotland; but you are thereby upon the same foot, and have the same rights and privileges as any other Scotchman hath, that hath never offended: And every innocent Scotchman hath a right and liberty to come into England when he will. Which is very true, that the pardon discharges all disabilities and incapacities that you have incurred by any offence committed against the laws of Scotland, but not any committed against the laws of England. That is, supposing the pardon had been subsequent to your return into Scotland, and that your return hither had been high treason by this act.

Lindsay. My lord, I think this pardon reinstates me in all the privileges I enjoyed before.

L. C. J. Holt. I tell you no: It only restores you to the privileges that you had as a Scotchman; and which you would have lost if convicted of those offences by the law of Scotland; but exempts you not from any punishment to which you were then obnoxious by the law of England.

Att. Gen. My lord, I would say but this only; That speaking of the pardon, as a pardon, it cannot pardon a crime before it is

committed. If the pardon granted in Scotland, would pardon a crime committed in England; yet it would not pardon a crime committed afterwards.

L. C. J. Holt. But observe what he says. Says he, I am by this pardon made a free Scotchman: (And it is to be admitted, that the pardon of Scotland has that effect.) And if, says he, this pardon has made me as free a Scotchman as I was before, Ergo, I may come into England, as well as any other Scotchman that was under no disability.

Att. Gen. My lord, he is bound by the laws of England, as he resided here: It has been the constant practice. He does not pretend that he had king William's, or the present queen's licence to come into England; only that he had the queen's licence to come into Scotland.

L. C. J. Holt. You hear what he says.

Sol. Gen. My lord, the several facts alleged in the indictment, are admitted to be true; except that the prisoner was a subject to his late majesty; and, that his return into England since the 14th of January, 1697, was without licence.

It is objected, he was not a subject of his late majesty within the meaning of the act, because he was a Scotchman.

Whoever is born under the allegiance of the king of England is a subject of the king; and it is admitted Mr. Lindsay was so born.

It has been likewise objected, his return was not without licence.

It is not pretended he had such a licence as the act of parliament specifies, and the indictment mentions; a licence under the privy seal, to return into England.

But it is insisted on, that the general pardon in Scotland does, by construction of law, amount to such a licence.

It cannot surely, with any colour of reason, be urged, that such a pardon should be construed any farther than a licence to return into Scotland, and such a licence would not excuse the prisoner.

My lord, this pardon in Scotland can have no relation to the offence in question. A pardon in that kingdom cannot extend to any crime, which by the laws of Scotland cannot be there punished. But had that pardon, which passed in Scotland, been under the great seal of England, it could have been of no service to the prisoner. As a pardon it could not, because it is precedent to the offence, and it cannot by any implication amount to a licence.

The reason offered, why it should be so construed, is, that the offence, whereof the prisoner stands indicted, is of a complicated nature: that it consists of two parts; going out of England into France; and, returning out of France into England. That the first part of this offence (his going to France) being pardoned, he cannot be prosecuted for his return.

The supposition whereupon this argument is founded, is a mistake: for after the 11th of

December, 1688, any man might (before the war was proclaimed) have, without any offence, gone into France: and therefore his going thither after the 11th of December, 1688, is no part of the crime; but a description of the person, whose return without licence was enacted to be high treason.

Mr. Conyers. My lord, the prisoner insists on the benefit of her majesty's proclamation of pardon in Scotland; which (as has been already taken notice of) bears date in March, 1702-3, and cannot extend to pardon a treason since that time. The treason for which he stands charged was not till December last; then he came into England without licence of the queen: he voluntarily went into France without licence, since the 11th of December, 1688. He came back into England without licence, in December last; and for that he stands charged with treason, by virtue of the act of parliament in the ninth year of the late king. But the inference he makes from this pardon, by the queen's proclamation in Scotland, is, that he is thereby restored to all the privileges of a Scotch subject, and consequently may freely come into the kingdom of England, as any other of her majesty's native subjects of that kingdom may do. Now the pardon in Scotland can only extend to exempt him from punishment for any crimes committed in that kingdom; and he can have no benefit of it for a crime committed against the laws and statutes of England, which is a distinct kingdom, and governed by distinct laws. And such inference as he makes from this pardon, is both against the very words and meaning of the act of parliament, upon which he stands indicted. The words are very express and plain: any of her majesty's subjects, who have at any time since the 11th of December 1688, voluntarily gone into France without licence (as the prisoner confesses he did) and after the 14th day of January, 1697, shall return into England, or any other her majesty's dominions, without licence — shall be judged guilty of high-treason. He was residing in England after the 11th of December, 1688. He went from England into France; and is returned into England without licence, since the 14th of January, 1697, and so is within the express words of this act. And the intent of the act will appear by the preamble. The mischiefs and inconveniencies apprehended at the making of this act, were, that the freedom of going and coming out of England into France, and from France to England, by the respective subjects of each kingdom after the peace, might be an encouragement to such of the king's subjects, who had been engaged in traitorous designs and conspiracies against his majesty, who might be encouraged to form and carry on treasonable designs and practices against the king and the government, to come out of France into England. The persons from whom these dangers were apprehended, were such persons as are described in this act; and therefore, for

the safety and preservation of his majesty's person and government, the intent of this law was to prohibit their returning into England, without such licence from his majesty under his privy-seal.

L. C. J. Holt. Have you any more to say? Or have you any thing to reply?

Mr. Williams. My lord, we would save your lordship's time as much as might be; but we humbly insist, that our objections are not answered: and it being upon a new law, and in case of life, we pray that the matter may be found specially.

L. C. J. Holt. If we see any reason to doubt it, it shall be found specially. But what you have said, overthrows Calvin's case; for you urge, that you are a subject of Scotland, and so not within this act of parliament. But you ought to consider, that as you are a subject of Scotland, so also you are a subject of the crown of England by being a native of England since the accession of Scotland to England, which is by the law of England. And if the case had been, that you had only departed from Scotland into France, and from thence returned into Scotland, and stayed there without ever coming into England, the case would have been much different: for it may be, the law of England cannot oblige a Scotchman, for any act by him done in his own country (though there is no occasion to give any opinion of that); but an act of parliament in England, may subject any Scotchman to any penalty, for any act that he should do in England. Suppose a Scotchman going out of Scotland into France, since the 11th of December, 1688, that shall return into England since the 14th of January, 1697, he seems to be within the words and meaning of the act. But there is no need of determining that point now: the prisoner being a Scotchman born, and having been in England for a long time, and departing from England into France within that time, and returning into England afterwards, is to all the purposes within the letter and design of the act: for being a resident in England at that time, you are to all purposes a subject of the crown of England, as much as any native of England; and your departing into France, and remaining there for so long time, and returning without licence, is the same danger that the act of parliament intended to prevent.

Mr. Williams. My lord, I would not presume to say any thing in derogation of Calvin's case: but I say, that though a Scotchman may be as a natural-born subject of England, yet he may not be within the meaning of this so penal a law.

L. C. J. Holt. Certainly within the meaning, if within the words and reason. But there is another point that you, his counsel, have urged in his behalf; which is, that this pardon is a licence to him to return into Scotland. Which in truth is not; for it is to another purpose, viz. To pardon and discharge all treasons and crimes committed in Scot-

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land; but not give a licence to return into that realm: but suppose it to be a licence to go into Scotland, that will not be a licence to return into England. The treason is, to return into the realm of England, or any other his majesty's dominions. Another matter that you have insisted upon, is, that supposing this to be a good pardon under the great seal of Scotland, it hath pardoned the offence of going into France. The return into England cannot be high treason; because the treason consists of two facts, say you, which are, the departing into France, and, the returning into the queen's dominions. Like unto the case, when one gives another a mortal wound, of which he languishes, and before he dies the stroke is pardoned, and then the party dies: afterwards it will not be murder; because that act, which should make it so, is discharged by the pardon. To this a plain answer has been before given by the queen's counsel: that going into France since the 11th of December, 1688, is no offence originally; but only the return of such person is made high treason, and from that return doth the high treason commence. Therefore such a pardon, under the great seal of England, could not have discharged him from being guilty of high treason, if he had returned afterwards.

But, says he for himself (as I apprehend him,) that this pardon hath made him a free Scotchman, to all purposes, as if he had never offended. And though the pardon cannot have any operation to discharge him of any crime committed against the law of England; yet it hath this effect, by putting him in the same state of other Scotchmen, to enable him to come into England. It is true, this pardon puts him in the same condition, in which other Scotchmen are by the law of Scotland; but it puts him not in the same condition that other Scotchmen are by the law of England. By the law of England, Scotchmen may at any time come into England: but the law prohibits those who are subjects, and went into France without licence, to return into England.

They who were born in Scotland, may inherit lands in England: but if an alien to England and Scotland be naturalized by act of parliament in Scotland; though he is to all purposes a natural-born subject of Scotland by the law of that realm; yet not therefore inheritable to lands in England, because he is not a natural-born subject by the law of England.

There is another question hath been stirred; which is, That he should have been indicted in the first English county into which he came: for it appears, upon the evidence, that he came from Scotland. Now Middlesex cannot be the first county; but it must be Northumberland: for upon his coming there, the treason is complete; and his proceeding further into other counties, cannot make it more treasons than it was before. As to the case of felony, stealing goods in one county, and carrying them into another; it is felony in every county they are carried into. A prisoner escapes from a gaol

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in one county, and then goes into several counties; it is an escape in every county into which he comes; which is a case very apposite to this in question. Suppose a man committed for felony has escaped out of Newgate into Northumberland; may he not be indicted in Northumberland? He came voluntarily into this county of Middlesex; and certainly may be indicted, and tried here. Indeed, if he had been taken in one county, and carried into another county, that would be another case; because he came there by coercion.

Mr. *Williams*. Now, my lord, in this case, the prisoner comes into this county of Middlesex to surrender himself; and coming into Middlesex with an intention to surrender himself, when a warrant is out against him, will not be treason in Middlesex, though his first coming into England were admitted to be treason.

L. C. J. *Holt*. That does not appear: he says otherwise himself. He says, he heard there was a warrant out against him; and then he surrendered himself.

L. C. J. *Trevor*. I do not think, if he had come into this county to surrender himself, it would have altered the case. If he had surrendered himself in the first county he came into, he would have been within the law.

Mr. *Williams*. My lord, with humble submission, if he comes into England, he, by that, commits treason. But if, after his coming into England, and before he comes into Middlesex, he hears that in Middlesex there is a warrant out against him; and, purely to surrender himself upon this warrant, he comes into Middlesex, and surrenders himself in Middlesex; with humble submission, this act of surrendering himself, which the prisoner does in obedience, and in justice to the process of law, will not amount to make him guilty of high treason in Middlesex.

L. C. J. *Holt*. This is not the case. However, we are all of opinion, that alters not the case: (for I have consulted my lord and brothers.) Have you any more to say for the prisoner? Or has he any thing more to say for himself?

Lindsay. My lord, I have told you what was the motive that brought me into England; that I was come to my wife and children, believing that I might have done it without trespassing against the law, because I saw others did so before me. Now, if it be taken as a fault in me, and not in others; that will be very hard, my lord. If I have offended, it is out of ignorance.

L. C. J. *Holt*. Ignorance of the law is no excuse. But that may fall under another consideration, which doth not belong to us. Have you any more to say?

Lindsay. If I have by my ignorance offended in this point; and if you think my indemnity in Scotland will not avail me, I humbly beg your lordship will intercede for me to her majesty.

L. C. J. *Holt*. Gentlemen of the jury, this

prisoner, David Lindsay, is indicted for high treason upon the statute that was made in the 9th of king William. The offence set forth in the indictment is to this effect, That he, being a subject of the late king, did, since the 11th of December, 1688, go out of this realm into France, and that he has returned into England without licence under the privy seal, since the 14th of January, 1697; which returning, by that act is made high treason. This act was made upon the concluding the peace of Ryswick, because then (as the act recites in the preamble) the seas would be open for commerce between England and France, and that would give an opportunity to those persons to return to England, whom the wisdom of the nation thought dangerous to the government; that is, those that had been in the service of the French king, and others, that have departed the realm since the 11th of December, 1688. Therefore, to prevent all danger to the king and his government; this act was made, to make such a return to England by such persons, to be so penal as to amount to high treason.

Now, the question is, whether this prisoner be guilty. It does appear that he is a native of Scotland, and also that he was here in England for many years (I think one of his own witnesses says about 20), and did depart since the 11th of December, 1688, and he returned into Scotland since March was twelvemonth, and came into England afterwards about December last, which is also admitted. So that it appears he is in the words of the act, and had no licence under the privy seal.

But that which he insists upon by his counsel is, that he was a Scotchman by birth, and had an invitation to return into Scotland, and had the queen's pardon, whereby he was pardoned all manner of offences. It is true, he admits he was at St. Germain's, but returned into Scotland in order to take the benefit of that pardon. He was at first secured by the government there, but he had the benefit of the pardon allowed him, and was discharged. And then he says, he did desire to come into England, and would not continue longer in France, because he would not be a papist. That when he was in Scotland, he desired to come into England too, which he thought he might upon the account of his pardon in Scotland; and he advised with counsel, whether he might safely come into England, and they told him he might, as he says.

The question is, whether any of these things will be to his advantage. First, it is a law of England that he is indicted upon; no pardon under the great seal of Scotland can discharge any crime committed against the law of England, neither can a pardon under the great seal of England discharge any crime against the law of Scotland. But suppose he had had a pardon under the great seal of England before his return; that would not have pardoned him in this case: for his offence is not in going into France, and coming into England in time of

peace; but that having so gone, he returns without licence, that is the fact that is made so penal. Now a pardon given before a man commits any offence, is ineffectual; the queen cannot pardon a crime before it is committed.

But, says he, I am by this pardon, made to all purposes a free Scotchman, I am restored to all my capacities that I had lost; therefore, if I have all the capacities that I had as a Scotchman before, I may come into England. Now that is a mistake. It is true, he is restored to all the capacities of a Scotchman, which is to be had by the laws of Scotland; but a pardon in Scotland cannot give him those privileges he had by the law of England, and therefore cannot discharge him from an offence committed against the law of England. Nay, if he had been in Scotland, having escaped after he had been here, that would not have been effectual to discharge him from his offence against the law of England. Gentlemen, the matter is before you; he is a subject of the queen of England, he has departed from England since the 11th of December, 1688, and has returned hither without licence under the privy seal. And if you do believe all this, then you are to find him guilty; but if you do not believe it, you are to acquit him.

Then the Jury withdrew, and in about half an hour returned into court.

Cl. of Arr. Gentlemen, are you agreed of your verdict?—*Jury.* Yes.

Cl. of Arr. Who shall speak for you?

Jury. Our foreman.

Cl. of Arr. David Lindsay, hold up thy hand. (Which he did.) How say you? Is he guilty of the high treason whereof he stands indicted, or not guilty?—*Foreman.* Guilty.

Cl. of Arr. What goods or chattels had he at the time of this high treason committed?

Foreman. None that we know of.

Then the Court adjourned till five o'clock.

About five o'clock the Court met, and the prisoner being brought, the Court proceeded.

Att. Gen. My lord, Mr. Lindsay the prisoner hath been convicted of high treason, and I pray the judgment of the court.

Cl. of Arr. David Lindsay, thou hast been arraigned for high treason, and thereof convicted; what hast thou to say why judgment should not pass against thee?

Lindsay. My lord, I refer myself to the queen's mercy.

L. C. J. Holt. Have you any thing to plead for yourself, or by your counsel?

Mr. Williams. My lord, I did design to have insisted upon a point in relation to this statute, upon which the indictment against the prisoner is grounded; but understanding it has been already under the consideration of your lordship, and the rest of my lords the judges, and that it has received your lordship's determination, I shall choose to waive it; but this, with submission, I do insist upon: That it is not shewn in

this indictment that the prisoner was a subject of king William at the time of his going into France; or at the making of this act. Now, as I humbly conceive, the very words of the act require, that the party should be a subject at that time. The words are thus, if any of his majesty's subjects, who have after the 11th of December gone into France, if they return without licence, they shall be guilty of high-treason. Now, by the words of the act, it seems requisite that he should be a subject at the time of his going into France; or at least at the time of the making of the act. So that, with submission, the indictment does not agree with the act of parliament, unless it be shewn that the prisoner was a subject at the time of his going to France; and no indictment in any case, much less an indictment for high-treason, shall be aided by intendment.—And in this case, my lord, there is the less room for an intendment, that the prisoner was then a subject, because it is not shewn that the prisoner was a natural-born subject, or that his treason was 'contra naturalis allegiantie debitum.' And it not being shewn that he was a natural subject, it must be supposed he became a subject by naturalization, or by denization, which might be since his going into France.—My lord, I must own, it is said in the indictment that he was a subject of king William, but it is not said when he was a subject; so that it may be as well supposed he became so after he went into France, as before; and the rather in regard he is not shewn to be a natural born subject. And we take it, that by the penning of this law, which says, If any of his majesty's subjects, who have gone into France, &c.—it must be meant of a subject at that time, or at the time of his going into France; and it not being shewn that he was a subject at that time, we humbly take it, that the indictment is insufficient.

Mr. Raymond. My lord, we say with great submission, that this indictment is not good, because it does not shew that Mr. Lindsay was a subject of the late king at the time of the making the act, or any time before. If this person had become a subject of the king after the making of the act, as he might by derivation, and had returned into England, having been in France in the time mentioned in the act, he would not be within the act. Therefore, it was necessary to shew at what time he was a subject. It is not laid in the indictment, that he was a natural-born subject, nor do I pretend that it is necessary in an indictment for treason, because one that owes local allegiance may be guilty of treason. But they ought to have averred either that he was a natural-born subject, and that he shall be intended so always; or else, that he was a subject at the time of the making of the act, otherwise he will not be within the act; because the words of the act seem to tie it up to subjects at the time of the making the act, by the words which follow: *vis.* Who have gone into France, &c.

Sir T. Powis. I have looked both into the indictment and the act. One part of the objection is, that he is not a natural subject. That is not to be insisted on, for there is no such thing in the act; for the act says, If any of his majesty's subjects; and there is no need of laying any more in the indictment than the act requires; and it was not intended to be confined to such. The other part of the objection is, that it is not alleged that the prisoner at the bar was the subject of king William at the time when the act was made. Now there is no need of alleging these words in the indictment; for the act runs thus: 'Therefore be it enacted, "that if any of his majesty's subjects, who have at any time, since the 11th of December, 1683, voluntarily gone into France, without licence from his majesty king William, or from queen Mary, shall return." And the indictment does lay it, that this prisoner was a subject of the late king William, and that he is now a subject to the present queen; and that he after the 11th of December, 1688, did go into France. Now sure here is alleged in this indictment that the act refers to; that is, "that if any subject, who went into France after the 11th of December, 1688, shall return into England." And the indictment says, he was a subject of king William, and that he did go into France after that time, and did return into England after the time prohibited by the act. Here is nothing required in the act, but what is laid in the indictment. And it is a very strange objection, to say, that we should aver that he was a subject when this act was made: This ought to have been shewed on the other side, if it be otherwise. Here is that in the indictment which is conformable to the act, and there is no more necessary, than to describe the person according to the act.

Att. Gen. My lord, we have taken that method in the indictment that is proper; that is, to pursue the act of parliament: We have laid him as the act describes. Now they say, that it being not shewn that he was a subject at the time of his going into France, he is not within the act. But when a man is laid in the indictment to be a subject, it is a strange objection, to fancy we must mention the time of his beginning to be a subject. We have shewed he was a subject before the making of the act, and we have shewed he was a subject after; and he is presumed to have always been a subject, unless special matter is shewn when he was not a subject, as that he was an alien, and at a particular time naturalized or made a denizen; which without proof will not be presumed; and this objection should have before arisen from evidence. It is laid likewise to be contrary to the duty of his allegiance, being a subject of the late king William, and of the present queen.

Mr. Williams. My lord, this exception against the indictment seems, with great submission, not to be answered; I go upon the words of the act: 'If any of his majesty's subjects, who have since the 11th of December,

' 1688, gone into France.' My objection is, that it is not shewn, that at the time of going into France, nor when the act was made, that the prisoner was a subject; and it not being so shewn, to intend the prisoner then a subject, is helping the indictment by intendment, which cannot be. And I say, there is the less room for this intendment here, because this prisoner is not shewn to be a natural subject.

Mr. Raymond. My lord, every word of this indictment would have been true, if this gentleman had been an alien, and become a subject after the act was made, and before the late king died. And yet in such a case he would not have been within the act: for if he had been a stranger, and after the act had been denizen'd, and then had returned into England, having before been in France, that would not have been within the act, because the act says, if any of the king's subjects, who have gone into France, shall return: which must be meant, that were so before the act was made: and yet that is all this indictment says.

L. C. J. Holt. That is a foreign supposition. Can any man suppose, that such a man that has been in France, that he should be naturalized or indizen'd after such an act was made? And suppose it were so, that he was an alien, and happen to be naturalized by general words; the act does not say, if he shall be a subject at his departure; but if he were in France since such time, and return after this act.

He was a subject to king William, and to queen Anne; and that he went away since the 11th of December, 1688, and returned into England without licence.

This is an indictment formed suitable to the act of parliament; it pursues the words of the act of parliament. The act describes the person, and sets out what shall be the offence; that is, one that is a subject of the king, and has gone away into France, since the 11th of Dec. 1688, and shall return without licence.

Mr. Williams. It appears not he was a subject when he went away.

L. C. J. Holt. 'If any of his majesty's subjects, that have gone away since the 11th of December.' It does not say any that shall go away; but that have gone away after the 11th of December.

Just. Powell. A subject is supposed to be a natural subject, unless he be naturalized afterwards: but now he being said to be a subject according to the act, supposes him to be a subject then.

Mr. Raymond. My lord, we think, with submission, this is not an indictment according to other indictments.

Just. Powell. It is enough that he is said to be a subject.

Mr. Raymond. But, my lord, must there not be a distinction between a subject that owes natural subjection, and commits treason, and one that only owes local allegiance?

Just. Powell. You might have shewn that, when you were upon the evidence.

Mr. *Williams*. My lord, we humbly think it must be shewn that he was a subject, at least at the time of the making of the act.

Just. *Powel*. We must take him to be a natural subject, unless the contrary appear.

L. C. J. *Trevor*. We suppose that he was a subject at the time of his going out of England; and that the indictment sufficiently sets forth. If you could have shewn that he became a subject afterwards, that might have helped you; but else it signifies nothing.

L. C. J. *Holt*. Have you any more to say?

Mr. *Williams*. If we have slipt any thing on behalf of the prisoner, which might have been of service to him, we hope he shall not suffer for any omission of his counsel; and therefore humbly pray, that your lordship will favour him, and will be pleased to hear him, for himself.

Lindsay. My lord, what I have done has been out of ignorance, and being supported by what other people did. And therefore, my lord, having come into England by myself, I did not come with any design of harm, or to do any thing contrary to the law. As I am a Scotchman, it is not to be presumed I can understand the laws of England: and therefore, if I have done any thing amiss out of ignorance, I hope your lordship will make a favourable construction of it; and represent my case to the queen. And I hope, as her majesty has given me the effects of her mercy in Scotland, I shall not feel the effects of her displeasure in England.

L. C. J. *Holt*. Mr. *Lindsay*, you have been indicted, and upon the evidence of your own confession of the fact alleged against you, and after a great debate in matter of law (which by you, and your counsel, was urged on your behalf) are convicted of high-treason. That which now remains, is, to pronounce judgment of death upon you, which you are to suffer in that manner which the law hath appointed. Your crime is, returning from France without the queen's licence; having before gone thither without any licence from the late king or queen. That law which hath made such your return to be an offence of so high nature, cannot (by any considering English Protestant) be thought to be severe: for they who, in the time mentioned in the act, chose rather to run into France, than to stay in England, could have no other inducement, than an affection to an interest opposite to the Protestant religion, and the ancient constitution of this kingdom. For they were received, protected, and encouraged by that prince, who is a dangerous and professed enemy both to our religion and government. The wisdom of the nation thought it absolutely necessary to keep them out; unless they should either clear their innocence, or give satisfaction by their repentance, that they were fit to be trusted here. For he that should adventure to return, without doing either, must be presumed to come in upon the same principles, and with the same purposes, with which he went out: which must be a constant danger, even to the

foundation of our government, which is established upon the Protestant religion, and the laws of the kingdom. As to these circumstances which you have mentioned to be peculiar to your case, they fall not under consideration; since they are not sufficient to justify you in acting contrary to the law. Of what consideration they may be to obtain the queen's mercy, falls not under our cognizance; for that is a peculiar attribute, inseparable from her majesty's royal person, by whom it can only be dispensed. Our business is to put the law in execution. And you must be convinced in your own conscience, that you have been convicted on a full evidence, proving the fact, which hath proceeded from your own mouth. We have all heard, and debated that matter of law which you urged by your counsel in your own behalf; and are all of opinion, that doth not avail you; but you are an offender against an act of parliament: and nothing remains now, but to pronounce the sentence of the law upon you; which is,

'That you shall be conveyed from hence to Newgate, the prison from whence you came, and from thence to be drawn upon a hurdle to Tyburn; where you are to be banged by the neck, and while you are alive to be taken down, your privy members are to be cut off, and your bowels to be taken out of your body, and burnt in your view; your head is to be cut off, your body is to be divided into four parts, and your head and your quarters are to be disposed as her majesty shall appoint. And the Lord have mercy upon your soul.'

Lindsay. My lord, I beg that my wife and children may come to me; and that I may have a minister of the Church of England allowed me.

L. C. J. *Holt*. You shall have whom you will, according to what is usual in such cases.

Lindsay. I desire my wife and children may come to me alone, without the keeper.

L. C. J. *Holt*. That is not to be permitted, that may occasion danger.

Lindsay. I desire they may be looked up with me.

L. C. J. *Holt*. Mr. *Lindsay*, it is a charge on the keeper, that he admit them; but so as may not occasion any danger.

Lindsay. It is a trouble to the keeper to wait on me so long (two or three hours together) which was the reason I desired it. And if a minister come to me, I desire we may be private.

L. C. J. *Holt*. He will use you with all the charity that may be; but he must do what is prudent. Nothing that is reasonable, or fit, shall be denied you.

Lindsay. My lord, I should be sorry, if I desired any thing that is unreasonable. My lord, I suppose it is my time now to say any thing. I shall say only thus much; that is, I well understood what circumstances I was in; I believe no Scotchman has been called in question upon that act; and I believed in my conscience I was not guilty.

Or be desired to witness against them; or to witness any part of the plot; or their hand therein; or any correspondence thereabouts? And what else passed in the second meeting?

Ans. At what time he met with the duke the second time, he cannot remember: and what was the occasion of his meeting with the duke the second time, he cannot answer. As to that, what discourse was betwixt them the second time; he cannot recapitulate every particular that passed betwixt them just now: and if he named any persons to him? Declares, yes: and what these persons were? He will not answer that. And if he desired him to witness against any person? He will not answer that just now.

Inter. 8. How long after was the third, and then the fourth meetings? And if any thing occurred in the mean time? And what was the occasions of the said meetings? And what passed therein, either as to persons or things?

Ans. When was the third or fourth meeting he had with the duke? He did not mind: and what occasioned the third or fourth meeting with the duke? He will not tell that at this time: and what passed betwixt them at the third or fourth meeting, either as to persons, or things? He is not to answer at this time.

Inter. 9. That you answer all the above questions: as to the occasion and manner of your coming to the marquis of Anandale? And what he said to, and demanded of you? And what you answered? And what persons he named to you? And what he required of you as to those persons? And what encouragement he promised you? And for what cause?

Ans. Who brought him to the marquis of Anandale? Answered, A gentleman, whose name is Bane, as he believes: and what the marquis said, or asked of him? He will not answer at this time: and what persons the marquis named to him? Answers, he is not to name them now. And what he did require of you, as to these persons? Answers, he cannot answer that just now: and what encouragements he did promise him? Answers, he will not tell that at this time.

Inter. 10. What moved you to go to duke Hamilton, or to write to him? Who advised you to do so? Who introduced you? And what said you to him, when you gave him the writing? And if it was signed by you? And what the writing did contain? And what you remember of the contents thereof? And if you shewed it to any other person; and to whom? And what his grace said to you about it? And if you was with him oftener than once about this matter? And if you acquainted any other therewith; and who they were? And what passed betwixt you and them upon this whole subject?

Ans. He will answer no questions as to the duke of Hamilton at this time.

The Examination being over, the lords of

the council found, that his refusing to answer the Interrogatories put to him was against law, and an high contempt of the board; and deserved a severe punishment: and yet, notwithstanding of their just detestation of the man's villainy, their moderation and patience were such, that they did not proceed to censure until they had called him before them once more. Then he was told, that if he continued to refuse answering to the Interrogatories, according to law, they were obliged to inflict a punishment adequate to his crime. And the queen's advocates told him, he would prosecute him upon the statute of leasing-making, and common grounds of the law against defamation and calumny.

While Baillie stood thus mute to whatever was asked him in council, the duke of Hamilton gave in a petition to the board, representing, that he had informed the lord justice-clerk of the letter he had received from Baillie; and desired, that the letter might be read to Baillie in council; and that Baillie may either own, or deny it to be his writing.

When or by whom the preceding Narrative was first published, I do not with certainty know. The following Entries I caused to be transcribed from the Council Records at Edinburgh:

EDINBURGH, Feb. 10, 1704.

Sederunt.—Earls of Marr, Buchan, Eglington, Strathmore, Galloway, Landmark, Loudoun, Ffinlatter, Northesk, Fife, Dunmore, March, Hyndford, Roseberry, Glasgow T. D.; and Hoptoun; viscounts Garnock and Primrose. Lord Hald, Lord President of Session, Lord Advocate, Lord Justice Clerk, Lords Haloraigne, Anstruther, Rankeillor, Pheldo, and Tullcultrie; Mr. Firan, Montgouary, — Colingtoun, — Stevenson, — Caven, — Carnwath, — Prestongrange, and Provost of Edinburgh.—[In absence of the Lord High Chancellor, and Lord President off Privy Council, the Earle of Marr elected Preses.]

Warrant to the Clerks of Council to give David Baillie Doublets off his Interrogators.

The Lords of her majesties Privie Council having called befor them David Baillie prisoner, and having read over to him the Interrogators marked by the earle of Marr president for the tyme, and he being requyred to make answer therto in wrytting, refused to do the samen. And thereafter the samen being read to him each Interrogator seperatly, gave the Answers therto *ut in scriptis*, and as marked by the President of the Council for the tyme, in regard Baillie refused to signe the samen which they thought not satisfactory. Wherefore, the saids Lords ordained their messers to carry him back to closs prison. And appointed ordains the clerks of council to deliver to him

ane Double off the saids Interrogators, together with the three sheet off paper all marked with the Lord Advocate mark, and allowed the said Baillie pen and ink, that see he may make his Answers to the above Queries and Interrogators in wrytting when nixt called.

EDINBURGH, Feb. 12, 1704.

Sederunt.—Earls of Mar, Buchan, Eglington, Lauderdale, Loudoun, Ffindlatter, Northesk, Dunmore, March, Hyndfoord, Roseberrie, Glasgow T. D.; viscounts Garnock and Primrose; lord Haddo, Lord President of Session, Lord Advocat, Lord Justice Clerk, lords Halcraig, Anstruther, Rankellor, Pheudo, and Tillicultrie: lieut. gen. Ramsay, Mr. Ffra. Mqntgomery, sir Robert Sinclair, Cavers, Carnwath, Prestongrange, Lord Provost of Edinburgh.— [In absence of the Lord High Chancellor, and Lord President of Privie Council, the Earle of Marr elected Preses.]

Warrant declairing David Baillie refusing to give Answers to the wr'ine Interrogators, and high Contempt of the Councils authority.

David Baillie, brother to Mannerhill, being called to the barr, and being interrogat iff he had wrytten any answers to the Interrogators given him on Thursday last, He answered, he had not, nor would make any till he saw the Letter or Declaration formerly emitted by him; and being desired to subscribe the Answers he had made at the barr on Thursday last, and which were dictat by him and written by the clerk, he said he would not doe the same; whereupon he was removed, and after some reasoning on the matter, the Lords of her ma'ties Privie Council found and declaired, That David Baillies saying he would not give answers to the written interrogators given in on Thursday last, and his persisting still to declair he would not doe the same, and that he would not subscribe the Answers made to the Council, and written by their clerk, was ane high and insolent contempt of the authority of Privie Council.

EDINBURGH, Feb. 14, 1704.

Sederunt.—Earls of Mar, Buchan, Eglington, Loudoun, Findlater, Dunmore, March, Hyndfoord, Roseberrie, Glasgow T. D., Hoptoun, viscounts Garnock and Primrose; Lords Haddo and Polwarth; Lord President of Session, Lord Advocat, Lord Justice Clerk, Lords Halcraig, Rankellor, Pheudo, and Tillicultrie; lieut. generall Ramsay; Mr. Francis Montgomery, Cavers, Carnwath, Prestongrange. [In absence of the Lord High Chancellor, and Lord President of Privie Council, the earle of Marr elected Preses.]

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Warrant for committing David Baillie prisoner in the Tolbuith of Edinburgh dureing the Councils pleasurs.

The Lords of her ma'ties Privie Council, in respect of David Baillie, brother to Mannerhill, his high and insolent Contempt of their Authority committed and incurred befor them, doe heirby commit him prisoner to the Tolbuith of Edinburgh, and ordaines the magistrats of Edinburgh, and keeper of their Tolbuith to keep and detain him prisoner therein, during the Lords of her Majesties Privy Council there pleasurs.

EDINBURGH, Feb. 15, 1704.

Sederunt.—Earls of Mar, Buchan, Eglington, Lauderdale, Loudoun, Findlater, Northesk, Forfar, Hyndfoord, Glasgow; viscount Garnock; lord Haddo, Lord Advocat, Lord Justice Clerk, lord Pheudo, lieut. gen. Ramsay, Mr. Fra. Montgomery, sir Robert Sinclair, Cavers, Prestongrange; Lord Provost of Edinburgh. [In absence of the Lord High Chancellor, and Lord President of Privy Council, the Earle of Eglington elected Preses.]

Act in favours off David Baillie.

Anent the Petition given in and presented to the Lords of her majesties Privy Council, by David Baillie, son to the deceased George Baillie, of Mannerhall, shewing, That whereas the petitioner is conveyed befor their lordships at the instance of her Majesties Advocat, for alleadged leasing makeing, and other pretended crimes lybelled, and seeing it is necessary, that the petitioner have advocates with whom he may consult, and who may appear for him and plead his cause, and the petitioner craving made choyce of sir Patrick Home, sir David Cunyngame, Mr. David Forbes, Mr. Alexander M'Cleod, sir John Erskine, Mr. James Hamilton, and Mr. Alex. Arbuthnet, but they declyne to consult or appear for the petitioner in this matter, unless they have their Lordships' Order and Warrant for that effect: And therefore humbly craving, That their lordships might be pleased to give order and warrant to the saids advocates, and such others as the petitioner shall employ, to consult and appear for him in the said cause, as the said petition bears. The Lords of her unajestie's privy council having considered the above petition giving into them by David Baillie, son to the deccast George Baillie, of Mannerhall, and the samen being read in their presence, The saids lords doe heirby allow the petitioner to employ such advocats as he thinks fitt, and allows the advocats so to be employed by him, to compear and plead for him in the action persued at the instance of her majestie's advocat against him befor their lordships.

On the 24th of February, the indictment was brought against Baillie, in the name of James

duke of Queensbury, principal secretary of state, William marquis of Anandale, president of her majesty's council, and the queen's Advocate for her majesty's interest.

[I insert the following Entry from the Council Record, instead of the Indictment and Answers, as they were given, not with perfect exactness, in former Editions.]

EDINBURGH, Feb. 24, 1704.

Scderunt.—Marquis of Lothian; Earls of Marr, Buchan, Eglington, Lauderdale, Loudoun, Findlatter, Northak, Forfar, Roseberry, Glasgow, T. D., Hoptoun; viscounts Garnoch, Primrose; lord Haddo, Lord President of Sessione, Lord Register, Lord Advocat, Lord Justice Clerk, lords Haleraig, Anstruther, Rankellor, Phesdo, Tillicultrie; lieutenant general Ramsay, Mr. Fra. Montgomery, Collingtoun, Caverse, Carnwath, Prestongrange, Lord Provost of Edinburgh. [In absence of the Lord High Chancellor, and Lord President of Privy Council, the marquess of Lothian elected Preses.]

DECRET.—*The Duke of Queensberry and the Marquis of Anandale, against David Baillie, bro'yr to Munnerhall.*

Auent the lyble or letters of complaint, raised and persewed befor the lords of her majestie's privy counsell, at the instance of her majestie's right trusty and intirely beloved cousins and counsellors, James duke of Queensberry, principall secretary of state to her majestie, and William marques of Anandale, president of her majestie's privy counsell, and sir James Steuart her majestie's advocat for her highness intrest, mentioning, That where by the lawes of this and all other weell governed realms, the inventing, makeing, and uttering, by writ or otherwayes, of lies and slanders, to the chairging, defaming of any persons, and especially of persones of the highest quality and greatest trusts and offices in the kingdome, and in matters of the highest importance, not only touching their honours, lives and fortunnes, but tending to misrepresent them to, and raise and endanger discord betwixt her majestie and the persewars, as also to raise jealousies, and discords, and to occasions most dangerous and pernicious contentions betwixt the persewars and the other peers of the most eminent quality within the kingdome, are crimes of ane high nature, and ought to be severally punished; Lykeas, by the acts of parliament following, it is statute and ordained in manner aftermentioned, viz. By the act Ja. 1, parl. 2, cap. 43, That all leising makers, and tellers of them, which may endanger dis-

cord betwixt the king and his people, shall be challenged by them that power bes, and tye, lyfe and goods to the king; and by the act Ja. 5, parl. 6, cap. 83, the forsaid act is ratified and approven, and ordained to be put in executione in all poynts, as also the same is againe ratified by severall subsequent acts of parliament, such as, Ja. 6, parl. 14, cap. 205, and Ja. 6, parl. 20, cap. 9, and lastly, That by the lawes both of this and all other realms, to informe against or slander or accuse persones as abominable suborners and solicitors of others, to accuse or bear witness against persones of the highest and best quality, of the most wicked and horrible crimes of treason and lese majestie against her majestie and her kingdome, is a scandle and wicked crime of the highest nature, and ought to be most severally punished. Nevertheless, it is of verity, that David Baillie, brother to captain Robert Baillie, of Munnerhall, and now prisoner in the Tolbouth of Edinburgh, shaking of all regard to truth, honour, and honestie, and to her majestie's lawes and authority, and with a most pernicious and wicked designe (as the matter itself declaires) to engender discord betwixt her majestie and her best subjects, as also to raise contentiones, and inflame and incense them one against the other, by most abominable lies and slanders, did upon ane or other of the dayes of December, 1703, and more particularly upon the twenty second day of the said moneth, take upon hand to wrytt a most false, scandalous, and abominable information, by way of missive letter, directed to his grace the duke of Hamilton, wherein taking his ryse from the noyse he heard of a plot, he affirmes, that during the last session of parliament, the duke of Queensberry, then her majesties commissioner, sent for the defender, and after great profession of kyndness alleadged he had it from good hands, that there were designes in Scotland, England, and Ireland, to subvert the government, and restore the prince of Wales, of which he said, the said David was not ignorant. And therefore the duke intreated him for boeth their sakes, and for preservation of her majestie's person and government, to let him know the whole matter, upon which demand, the said David sayes, he declaired his innocence and ignorance: but the said duke still insisting, and the said David withdrawing, the duke againe sent for him, and questioned him about three letters, which when the said David still disowned as ignorant of them, the duke said, then you doe not know duke Hamilton, my lord Atholl, nor the Chancellor, and never see much as heard of my lord Drummond, Belhavine, nor my lord Turbat, Blantyre, adding, that though the said David would say nothing, yet he knew very weell who were pensioners to France and who not, and that my lord Atholl and ye chancellor are among the first of them now, though they have not been see long as the duke of Hamilton, Marshall, and Belhaven, for the duke of Queensberry said, he knew the duke of Ha-

milton had been soe these many years ; but the said David goes one affirming, that he knew nothing of all informed, but believed that the foir-named persones were the best of men, at which the said David sayes, the duke of Queensberry cryed out mightylie, and told many wicked things of the duke of Hamilton, which the said David sayes that he designes to publish with the whole conferrance, to make knowen the duke of Queensberrie's practises, to gain him to make most horrid lies and most dangerous : for David sayes, he offered him great preferments and money what he pleased, if he would but tell the queen what the duke of Queensberry would tell him, that is, if the said David would goe to the queen and tell her majestie, that duke Hamilton, Athole, the chancellor, and the other lords above named, were actually pensioners to France, and that they had a publick bank, and managers to buy up armes and other stores for warr, then he the s'd duke would boeth promise and performe, and if David would undertake, would let him see a list of all he would have brought into the plote, and the duke said, he would swear never to let any person know but that it was a reall plote, and that David had made the first discoverie, and soe he would send him to the queen, provyded that David would say after him, and swear to it ; to which David sayes he answered, that the advice was good, where there was a plote, but to a person to swear to a lie to [the] queen, upon persones altogether innocent, he could not think of but with trembling and detestation ; and this David sayes, he thought fitt to advyse the duke of Hamilton of, but that it seemed that the duke of Queensberry haveing failed in his attempt, employed the marques of Annandale on the same designe, who, he sayes, to do him justice, used him after another manner, for haveing got him into his clutches the very day befor the marques went to London, would not pairt with him, as David said, till he went to London with [him,] to lett the queen know how weell she was served by the duke of Atholl, who (said the marques) he knew had been att the said David's chamber with duke Hamilton in woman's cloaths, and that all above named came there, and the lord Drummond, Jerviswood, and severall others to the number of eighteen, and that they treated to bring home the prince of Wales, and all that was necessary for that interpryse ; to which when David answered, that there was noe such meeting, the marques said, they would understand one another better when on English ground, for he thought it was unnecessary to tell David, that he must not only say but swear the said meeting, which if David did, it might be in his power to make himself for ever, and to be ane officer off state befor he left London againe, but when the said David refused to swear, and said it was imposible to bring himself to such a thing, the marques, he sayes, flew out in a passion, and swear he would be revenged, and when that did not prevail, David sayes, the marques fell a coxing

him again, but David pairting, said he was his humble servant, which he sayes he had been never to have laid open this horrible villanie, though noething, says David, could be more provocking, then to be sent for by people he had never any converse with, nor obligation to or dependance upon, and to be flattered with great rewards to become a villan, and the most perjured of all liars, but threatned to destruction iff he retained his integritie and loyaltie ; but since, adds David, let these men pretend what they will, noething can be mor disloyall then thus to abuse the queen, and endanger the best of subjects that would abyde by her, when such as the perewars would desert boeth queen and countrie ; then David adds, that it was the noyse of a plot that made him break his patience and sillance, and that now he is ready to die with the apprehensiones of the danger that the duke of Athole and many other persones are fallen into, which he sayes perhaps he might have prevented by givinge the duke of Hamilton this trouble a little sooner, to warne them of the designes of their enemies, which he hopes duke Hamilton would doe without farder delay, and subscrieves himself his grace's most humble servant in all sincerity and truth, David Baillie, with a crose at the end of his subscription, as his usewall manuer ; whilk letter wherof the substance above rehearsed and coppie herewith given, as a pairt of this lybell, and the principall put in the clerk of councill hand, wher David may freely see, as it is a most gross, abominable and defamatorie lie, tending to raise discord and the greatest mischeiff that can be imagined. Lyke as the said David had the wicked confidence, after having wri'ne and subscriv'd this letter with his owen hand, as can be proven by comparing the same with other writs under his hand, he gave into the committee off the councill, and are lykeways in the clerks of councill's hand, where he may see them, to give or send the same to the duke of Hamilton, who received it ; and farder, when the said David acknowledged befor the committee of the councill, that he hade given a wrytten informatione to the lord justice clerk's informer, whom he knowes, as he said, to be the causer of his imprisonment, and desired the lord justice clerk to shew boeth his informer and communicat the information, as David's declaration, to the earle of Eglington (wherof a coppie is also given to him with this lyble, and the principall in the clerk's hands for him to see) bears, and the justice clerk had named the duke of Hamilton for his informer, his grace was pleased, when desired by two of the committee to exhibit and give up the said principall letter upon the clerk's receipt or ane attested double. By all which it is evident, that the forsaid David Baillie is guilty airt and pairt of most abominable leasing making, and most defamatorie lybleing in wrytting and wenting the same, as said is, and that aggravate with all the pernicious and mischeivous consequences abovementioned ; all which being found proven

before the lords of her majesties privy council; the forsaid David Baillie ought to be severally punished for the same with the pains of law, at least conforme to the fourth act of the last session of this current parliament, entituled, Anent leasing makers, in his person and goods to the example and terror of others to committ the lyke in time coming; and anent the charge given to the said David Baillie, defender, to have compeired befor the lords of her majesties privy council upon the day and date of thir presents, to have answered to the forsaid complaint, and to have heard and seen such order and course taken thereabout as appertains, as the saids lords of privy council shall think fit, under the pain of rebellion and putting of him to the horne, with certification as in the lyble or letters of complaint and executione thereof at mor length is contained; in answer whereunto, there being a complaint raised at the instance of James duke of Queensberry, and the marques of Annandale, with concurrence of her majestie's advocat, against David Baillie, befor the privy council, makeing mention, That by the laws of this and all other well-governed nations :

[Here the Libel is recited much at large; and then the Record proceeds thus:]

It is answered for Mr. Baillie, *primo*, That the subject of the complaint being a matter of great importance to him, and that the letter which is the ground thereof, makeing mention of a plot, in relation to q'ch, the declarations and affidavits of severall persones are taken at London, that may tend much to the clearing this matter, of which at present Mr. Baillie is not master, but is in hopes to recover them, or probable they will be sent down here to the council, and that it seems as yet there is not a full discovery made of the plott, therefore he humbly creaves that the council may be pleased to refer the said complaint to the parliament, or at least to delay the proceeding therein at present, that he may have time to recover the declarations and affidavits that have been taken at London, and other papers that he is to make use of for his defence, and untill the inquiry as to the plott be fully concluded, and humbly desires, that the council may take this point to their consideration in the first place.

Secundo, The complaint being principally at the instance of the duke of Queensberry and the marques of Annandale, and only with concurrence of her majestie's advocat, which goes of course when a process is raised at the instance of particular persones *at vindictam privatam*, and these noble lords not being present to insist in the action, process ought not to be sustained at their instance, it being the known and in-contraverted practice, that in all criminall actions either intended befor the privy council or lords of justiciary, process is not sustained unless the persecur be present, and the reason is evident, because if he wer present, the de-

fender might seek his oath of calumny* if he have just reason to insist in the action, and propon severall objections against the lyble, and verifie them by the persecur's oath, that might exclude the perisuit, of which benefit the defender is deprived when the persecur is absent, and her majestie's advocat hath not intreat to perisue this action by himself, because it being *actio injuriarum*, which is but *privata actio*, Leg. 7, Cod. de Injur. 'injuriarum causa non publici judicii sed privati continet querelam;' and the advocat, *ratione officii*, can only perisue actions *ad vindictam publicam*, but not *ad vindictam privatam*, adhering to the former defences.

Tertio, The complaint, in soe far as it is founded upon the laws and acts of parliament, against leasing makers and tellers of them, is noe wayes relevant to infer the conclusion lybled, because as to the 9th act, parl. 20th, Ja. 6th; it is only of such who shall by word or writ, devise, utter, or publish, any false, slanderous or reproachfull speeches, or writs of the estate, people or country of England, tending to the remembrance of the antient grudges, born in tyne of by past troubles, which does not at all concern this caise; and as to the other acts of parliament, they are only in relation to leasing makers to the king of his barons, great men, and lieges, and of those that makes any evil information of the barons, and lieges to the king, but does noe wayes concern leasing making or slandering of one subject to another, as is clear from the acts of parliament mentioned in the complaint.

Quarto, If the duke of Queensberry spoke such things to Mr. Baillie as private, in relation to the duke of Hamilton and the other noble persons, which the lyble mentions to be contained in the letter, and if such expressions spoken of subjects to a subject, would infer the crime of leasing making, then he behoves to reveall it under the pain of being guilty of leasing making himself; It being expressly provided by the 209th act, parl. 14th, Ja. 6th; anent leasing makers, and authors of slander, which ratifies the former laws anent leasing making, and further statutes, that the concealers and not reveallers shall incur the lyble pain and punishment, soe that if any such thing had been said to Mr. Baillie, he being obliged to reveall it by the law, it was no crime, and consequently he cannot be liable to any punishment, according to that rule in law, lib 100,

* The oath of calumny is an oath which a party prosecuted at a private instance, has a right to put to his prosecutor, and if he refuse to take it, the libel will be dismissed, and the diet diverted *simpliciter*. The oath ought to affirm, that the prosecutor believes that the facts he alleges in his charge, are true, and that he has good reason to insist in the prosecution. See Hume's Comm. Trial for Crimes, vol. 1, p. 205. Burnet's Treatise on the Criminal Law of Scotland, chap. 16, sect. 4, p. 322.

de leg. Tul. 'Ejus vero nulla culpa est cui pa-
' rera necesse sit.'

Quinto, As the lyble is not relivant to infer leasing making for the reasons above mentioned, soe it is not relivant to infer the crime of defamatory lybleing; because the letter was only wrytten to the duke of Hamilton for privat information *non animo injuriandi*, but only *animo informandi*, as appears from the very be- giuing of the letter, where it mentions that "the noise which is every where made of a plot, made him think it his duty to informe the duke of Hamilton of the matter of fact contained in the letter;" and the said letter was never published or spread abroad by Mr. Baillie, soe that it is evident he had noe designe to calumniate or injure these noble lords, as it is clear from the common law, and all lawyers that have wrytten upon that subject, 'Actionem in- juriarum nunquam competere nisi dolus et animus injuriandi adit, quia nec injuria ab- aequo dolo et animo injuriandi committitur:' which can never be said when a man makes discovery only for privat information, and it is a rule in law, that 'non factum sed faciendi causam inspiciendam, l. 39, ff. de furtis.'

Sexto, By the law and practise of all well governed nationes, informers of crimes (whi- ther there be ground for the information or not, for that depends upon expicacion and tryall) ought to be encouraged, especially as to things relating to the publick; soe that when any man offers to informe or make discoveries, he ought not to be punished as a leasing maker or slan- derer; albeit he cannot prove what he informes, for ordinarily the greatest of crimes such as treason, murder, theft, and the lyke, are com- mitted with the greatest privacy and secrecie, and no man commonly uses to committ these crimes publictly, because then the probation would be clear against him; as for instance, if any man were informel of a conspiracie against the queen and the government, and he should discover it, as in duty he is obleidged, and would be guilty of treason if he did it not, it wer most absurd to pretend that he ought to be punished as a leasing maker or slanderer, because he cannot prove what he informes, and the lyke in other crimes, such as if a person designed to murder or assassinate another, and if this designe were communicated to a third party, and he should acquaint the persons against whom the murder or assassination were intended, it wer against sense to think that the third person against whom the murder were intended, should be lyable as a leasing maker or slan- derer, because he could not prove the designe, for if that were allowed, noe person hereafter would ever discover any crime of which they have not clear probation, and by this means the greatest crimes should goe undiscovered and unpunished; whereas if these crimes had been tymely discovered by any informer, they might either have been prevented or the com- mitters y'rof brought to condign punishment.

Septimo, Mr. Baillie being called to be the queen's evidence, and to give information of

what he knew in relation to the plott that was soe much talked of; If when he was examined befor the committee of council, he had de- clared all that was contained in the letter upon his examination; it would have been noe crime, and he could not have been thereupon conveyed as a leasing maker or slanderer; but soe it is, that the letter wrytten to the duke of Hamilton, being produced befor the privy council by order of the committee, it was equivalent and the same upon the matter as if Mr. Baillie had omitted that declaration befor the com- mittee: and the letter to the earle of Kyling- toune mentions, he desired the information may be produced, which was not verball, but in wrytting, and that it might be presented to the council, that he might have an opportunity to own it; and therefor if he had emitted the forsaide declaration befor the committee of council, as it would have been no crime but his duty to have declared all he knew in that matter, he being called as the queen's evidence, soe by the same reason he cannot be said to be guilty of any crime, the letter being brought be- for the council and made publick by order of the committee as said is.

Octavo, That Mr. Baillie had noe designe to calumniate these noble lords, may appear not only from a letter wrytten to him by Mr. Stewart, the duke of Queensberry's secretary, ready to be produced, and from what the lord president of the session was soe just as to ac- knowledge in a committee of council, with relation to what Mr. Baillie had then signefied to them concerning the cyphered letters, men- tioned in his letter to duke Hamilton, and from such other circumstantial admicles as Mr. Baillie says he can adduce; but also from his willingness to give his oath of calumny, that he had noe designe to calumniate or injure these noble lords, which ought to be admitted accord- ing to the opinion of the most eminent lawyers that have wrytten upon that subject, and par- ticularly Carpsov. in his Practic. Nov. Criminal, pars 2, quest. 97, 'Quando et quibus casibus locus non sit actioni injuriarum, num. 5, and '6;' who is express, that 'ad probationem quod animus injurandi quis non habuerit, non re- quiruntur exacte et plene probationes, sed sufficient conjecturae et presumptiones et si reus conjecturae indicium intentionem suam sufficienter probare nequeat, nihilominus ta- men constanter perseveret se verba animo in- jurandi non protulisse, juramentum purgato- rium desuper ipsi deferendum. Et si juret, ab actione injuriarum absolvendus est,' and Gail. lib. 2, observ. 106; and many other law- yers by him cited, and he mentions it to have been so decided in the imperiall chamber; so if Mr. Baillie had been ane accuser, as he is only but a privat informer, yet seeing he is wil- ling to give his oath of calumny that he had noe designe to calumniate or injure these noble lords, it ought to liberat him from the impa- tation of a leasing maker and slanderer, accord- ing to the law and constant practice in such caices, as the saide answers bears.

To these Answers, it was replied by the Queen's Advocate, and the counsel for the duke of Queensbury, and the marquis of Anandale, as follows:*

That the first two answers are in the nature of dilators. And as to the first, it was replied, that the ordinary judicatures are competent and proper to determine all actions and suits that can arise among the subjects; and there lies no actions in the first instance, cognizable by the parliament. And even in the second instance, upon appeals, or reviews, there lies no ordinary remedy by raising process before the parliament; but parties must first apply to the parliament for a warrant to raise processes of appeal, or review. And the same thing might be alleged in all civil and criminal actions, to delay prosecutions, upon pretence of remitting them to the parliament. And in this case, there was nothing but a private process for a defamation: for Mr. Baillie had not mentioned one word of either insurrection or invasion; albeit the warrant had been obtained from the queen, under the specious notion that he was capable of making great discoveries of the ill designs, in relation to the insurrection and invasion. But his discoveries were calculated for private quarrels, and not for public use; and by the law and custom of Scotland, the privy-council is most competent to cognize, and give redress in such matters.

It was replied to the second, that no law nor fixed custom had made it necessary, that complainers should be personally present: and, in some cases, it had been found that it was not necessary. And the duke of Queensbury, and marquis of Anandale, being necessarily absent upon her majesty's call for the public service, it were unreasonable not to allow them to vindicate their honour and reputation. Although the queen's advocate cannot pursue in the name of private parties, without their consent and allowance; yet, in this case, both the duke of Queensbury, and marquis of Anandale, sent down their declarations, in relation to this matter: in which they do insist, that it may be tried and punished; which is more than sufficient to instruct their warrants and concurrence. And it is a frivolous pretence, that if they had been present, Mr. Baillie might have asked their oaths of calumny; that is, if they had reason to deny what was contained in his letter, or to insist in this process. For, besides the absurdities and improbabilities in the letter, Mr. Baillie never pretended to have their oaths of calumny; nor does the law allow any oath of calumny to be asked, in relation to a crime, as bribery and subornation of witnesses; 'Nam nemo tenetur jurare in suam turpitudinem.' So that there is not the least reason to demur upon the dilators.

As to the first and second peremptors, which are stated the third and fourth in the defence; it is replied, that the complaint is founded

upon two distinct and separate grounds, viz. Leasing-making, which is generally understood to relate to the sovereign, the estates of parliament, the great men and ministers in the government. So this complaint from the duke of Queensbury, and marquis of Anandale, is well founded on these laws: and albeit, by the act in the last session of parliament, the laws, in relation to leasing-making, being too general, were restricted from treason, or from punishments inferring the loss of life or limb: yet it is expressly declared, that the laws do stand good, and the crimes are punishable by an arbitrary punishment; that is, fine, prison, pillory, and banishment.

The other ground upon which the complaint is founded, is competent in the common law to every subject against defamation and calumny. And in this case, the quality of the persons, or the dignity of their offices, are only brought in as aggravations of the crime: and whereas it is pretended, that by the laws against slanders and leasing-making, the hearers are bound to reveal, and are punishable if they conceal; that does only relate to leasing-making and slander on the sovereign, and the estates of parliament; and while leasing-making was treason, and consequently the concealing of it was treason. But now, when it is neither treason, nor infers a capital punishment, there is no danger of the concealing, especially when it relates only to subjects and private persons. And if the law had obliged Mr. Baillie to have revealed, yet that could be only to the government; and to have revealed to a particular private person could never have excused or secured Mr. Baillie, if he had been obliged to reveal, as indeed he was not.

It is replied to the fifth, that in law and reason, an information given to a private party, containing a slander and defamation, is always taken 'in malam partem et ex animo injuriandi.' Whereas, when persons inform a government, make oaths, or declarations, being called thereto by authority, it is always taken 'in bonam partem,' and believed to be the mind and sense of the informer, who is in his duty, or by force of law, obliged to make a declaration or discovery.

It is replied to the 6th, that it is indeed the interest of the public, that persons in their duty declaring truth, revealing, or discovering crimes, should be safe, though they are not able to prove what they say; because most crimes are perpetrated privately: but this holds only when discoveries are made to the government, when they be forced to declare by interrogatories, or questions put to them by authority; in which case, every subject is bound to answer; and so it is no officious or ultra-nous act; and therefore the declaration, or discovery, is presumed to be dutiful, and to be true; and except such declarations and testimonies were re-argued in a process of perjury, and proved to be false, the parties cannot be quarrelled for what they have discovered to

* These Replies are not in the Entry in the Council Record.

a government, or declared by force of law: but where informations are given to private persons ultrionously and officiously, especially to the persons concerned, to endanger strife, there the informer is upon his hazard, either to make good what he has said, or to be liable in punishment as a calumniator; because there was neither duty, nor necessity, that obliged him to inform; and if he has done it voluntarily and petulantly, he is obliged either to make it good, or suffer for it.

It is replied to the 7th, that by the former answer it is plain, that Baillie is not in the case of the queen's evidence, as to this letter, because he had voluntarily signed and delivered the same to a private party, a month before the queen's order to apprehend him.

It was replied to the last, let Mr. Baillie say now what he pleases, that what he informed was not 'ex animo calumniandi,' but only to inform the duke of Hamilton, 'sine fraude et dolo,' cannot pass; because in private informations, 'dolus et culpa semper pre-sumitur,' if the informer cannot prove, or make good what he had said; and it is true, that calumny being a crime, cannot be committed *sine dolo*, or ill design: but the law says, 'lata culpa equiparatur dolo;' therefore, if that charity could be given to Baillie, that he had no ill design, and was only imposed upon, or befooled, yet that folly is so gross, that in law and reason it must be construed equal to an ill design; for if any body will reflect upon the letter itself, they will find it stuffed with virulence and malice.

The Lyble* at the instance of his grace the duke of Queensberry, principall secretary of state; William marquis of Annandale, lord president of privy council; and sir James Steuart, her majestie's advocat; against David Baillie, brother to captain Robert Baillie, of Mannerhall, and now prisoner in the Tolbuith of Edinburgh, being cited; and the lord advocat, with sir David Dalrymple and Mr. Wm. Carmichael, her majestie's solicitors, comparing personally at the barr, and the said David Baillie, defender, comparing also with sir Patrick Home, sir John Erskine, Mr. David Forbes, Mr. Alexander McCleod, Mr. James Hamilton, and Mr. John Fleming, his advocats; and the lyble, with answers thereto, being read, and boeth parties and their advocats heard at the barr and removed, the saids lords of her majestie's privy council have repelled, and hereby repells, the dilators proponed by the defender's pro'rs as said is, and have found and heirby finds the within lybell relevant to infer an arbitrary punishment, and proven by the defenders judiciall acknowledgement at the barr, that the two letters lybled on wer all his hand, wryt and subscriyved by him; and therefore have declared and heirby declares, That

* This account of the Judgment of the Court is given from the Council Record.

the said David Baillie to be infamous, and have banished, and heirby banishes him furth of this kingdome for ever; and have also appointed and ordained, and heirby appoints and ordains the said David Baillie to be transported* to the West Indies, and to lie in prison ay and whyll he be transported, and have appointed and ordained, and hereby appoints and ordains the said David Baillie, befor he be transported, to be set on the pillarie at the Tron,† and there

* As to the Scots judicial interpretations of banishment and transportation, see in this Collection the trials for sedition, which were had in Scotland in the year 1793 and 1794, particularly that of Joseph Gerrald.

† Barrington (Obs. on 15 Ed. 1, c. 25), adverting to the passage "Dominus rex concedit quod—de corrodio liberatione bladi aut aliorum victualium aut necessariorum in certo loco annuatim recipiendorum tolno tronagio—jaceat decetero assisa nove disseisine," says, "There is a right of *tronage* mentioned in this chapter, for which a *novel disseisin* will lie. As this right or word does not frequently occur in our law, it may not be improper to mention that Du Cange says, it is a right of weighing goods, probably at a fair, and that *trona* signifies a pair of scales; he likewise derives Troy-weight from this word: how justly, I will leave to etymologists."—[Dr. Adam Smith derives Troy-weight from the city of Troyes. See 'Wealth of Nations,' book 1, ch. 4, p. 35, ed. of 1809].—"From ignorance of this term, *tronour des laines*, which occurs in the 13th chap. of the 1st of Henry the 4th, is translated *finder* and not *weigher* of wool."

And in a Note, he adds, "There is at Edinburgh a church, which is called the Trone church, and probably from the *trona* or public scales having hung opposite to it. There is likewise, in the Rolles Gascoignes, published by Carte, a record thus entitled, "De Officio tronagii et pesagii lanarum," which agrees with Du Cange's signification of the word. In the North of England the stilyard with which butchers' meat is weighed, is still called the Trones."

Of Trone, the learned Dr. Jamieson, in his Etymological Dictionary, gives the following account: .

"Trone, an instrument, consisting of two horizontal bars crossing each other, beaked at the extremities, and supported by a wooden pillar, used for weighing heavy wares. This instrument still remains in some towns.

"It is statute, that the chalmersane shall cause big, and mak one Trone for weying of woll in all the king's burghis, and in all the portis of the realme. Stat. Dav. 2, c. 39, s. 1.

"Du Cange explains the Latin barbarous 'trona,' *statera publica, seu trutina*; supposing that it is a corruption of the latter term.

"Such a 'trona or beam, for the tronage of wool, was fixed at Leadenhall, in London.' Cowel.

to stand from eleven to twelf of the clock in the forenoon, and that upon such a day and in such a manner as the saids lords of her majestie's privie counsell shall think fitt; and the said David Baillie being called in, did hear the sentence publictly intimat to him accordingly.

Respecting this Case, the following particulars are given in the Appendix to the printed report of the Trial of Gerrald at Edinburgh, A. D. 1791. (See the Case in this Collection.)

"The case of Baillie was quoted on the same day, by the lord advocate in the House of Commons, and the solicitor general, in the court of judicary. The sentence of the privy-council was appealed to as decisive, but the case itself was brought forward by surprise, and has never been fairly stated to the public. Baillie had informed the duke of Hamilton by letter, that the duke of Queensberry and the marquis of Annandale (the former secretary of state, and the latter president of the council) had tampered with him privately, to induce him, by promises of preferment, to accuse the duke of Hamilton and other noblemen, of a correspondence with the French court, and of a conspiracy to establish the pretender on the throne. The duke of Hamilton communicated the letter to the justice clerk, by whom it was divulged to the privy-council, and on the complaint of the duke of Queensberry and marquis of Annandale, Baillie was convicted of defamation and leasing-making.

"To those acquainted with the history of the period, it will appear extremely probable, that Baillie was sacrificed to the political friendship of two powerful families. Queensberry had been baffled and defeated in the preceding parliament, where he presided as commissioner, and in which the Act of Settlement was ignominiously rejected. To remove and discredit the heads of the country party, he had actually recourse to a fictitious plot, and employed

"The term, I apprehend, is originally equivalent to the English word Crane, an instrument for raising weights. The Islandic *triona* signifies a beak: *Rostrum porrectum, quasi serpentis vel Rajæ, Gudmundus Andreas Lex. Isl.* Thus the stern or beak of a ship receives this denomination; *Landnamabok* (sc. *Libre Originum Islandicæ*," [it is a Danish book:] "p. 299. *Trana* signifies not only a beak, but a crane; *Grus, item Rostrum Longiusculum, seu resporrectum; Gudmund. Andr. p. 241.*

"Hence it appears that the name of the bird, which we call a crane, was used to denote a beak or any thing extended so as to resemble the long neck of a crane. *Cambro-Brit. trays; French trogne, also signify a beak.*"

Dr. Jamieson seems to be of opinion, that the only reason for applying this word to denote the pillory, was because, as the throne stood in a very public place, those who were to suffer the pillory might naturally be exhibited there.

Fraser of Beaufort, afterwards lord Lovat, to accuse them of a correspondence with the court of St. Germain. (Macpherson's Hist. Vol. 2, p. 224.) Whether we suppose that Baillie had been tampered with for the same purpose, or with Lockhart (Memoirs, p. 76) that he was employed by his kinsman Baillie of Jerviswood to counteract and discredit the duke of Queensberry's plots, this at least is certain, that his sentence was carried in council by Queensberry's party, in opposition to the marquis of Tweeddale's, and that the whole was a political contest and decision too infamous to constitute a precedent in a court of justice. See Lockhart.

"But their sentence was never carried into complete execution. Lord Fountainhall, who reports the case, observes, 'David conceiving himself injured; for if he had concealed it, then he might have been overtaken for imprisonment and not revealing; and now having discovered it, he is condemned as a defamer and calumniator, which makes his case hard; he resolved to apply to the parliament for reviewing and reconsidering the council's sentence as iniquitous. And, finding, that by the second act of parliament, 1695, citations, during the recess and intervals of parliament, are to be issued out by a warrant from the lords of session, he had prepared a bill to be given in to the lords, for ordering a reduction to be raised, under their signet, of the council's sentence, for citing the duke of Queensberry, &c. to appear before the parliament, when it shall meet; but when his lawyers came to consider the clause, they thought it imported a previous cognition and trial before the summons could be granted, by which the lords were summarily to hear and cognosce if there was ground for issuing out the summons demanded; and in regard the session was now rising, and there was no time for taking such a previous cognition, therefore the giving in of the bill was forborn.' Fountainhall, vol. 2, p. 228. Feb. 29, 1704.

"The appeal, as Fountainhall afterwards observes, was then relinquished, as it would not stop the execution of the sentence.* Whether it was afterwards lodged is uncertain; but in the succeeding parliament Queensberry, when dismissed from office, joined his strength with the country party, on the express condition that no enquiry should be made into the pretended Scotch plot. (Macpherson, 304.) To liberate Baillie, who, according to Lockhart, had undergone the pillory, an act was passed on his

* "We have several instances where warrants were granted by the lords to cite creditors, in order to giving protections in parliament: but as to reductions of the Privy Council's decreets, there have been none as yet applied for. Sentences of the session are tabled in parliament by protestations for remedy of law; but neither these appeals nor reductions do stop execution; they are only devolutive and not suspensive." Fountainhall.

petition to parliament," [June 21, 1704. A Petition was read in the parliament of Scotland, of David Baillie, prisoner in the castle of Stirling, by sentence of the council, for accusing the duke of Queensbury and the marquis of Anandale, of a design to suborn him against the duke of Hamilton, the duke of Athol and others, in relation to the plot, praying to be set at liberty, which was granted, upon his finding bail, to appear before the parliament when called.—Former report of Baillie's case in the State Trials.] " suppressing any notice of his offence or his sentence, but ordaining him to be released from prison on procuring bail for 1000 merks Scots, to appear when called in the high court of parliament. Unprinted acts of Parl. 1704. The execution of the sentence was therefore suspended, and he was released in consequence of a compromise with those who pronounced or obtained the sentence, and who were conscious that its excessive severity, not to say its illegality, would not bear the test of a parliamentary examination. He for whose liberation parliament thus interposed by statute, must have either been reputed innocent, or the victim of a sentence that exceeded the legal measure of punishment.

" The Act itself is as follows :

" July 21, 1704. Her majesty's high court and the estates of parliament having heard the petition of David Baillie, prisoner in the castle of Stirling, humbly shewing unto them, that whereas the petitioner has been a long time in prison in the castle of Stirling and other places, and that it is extremely prejudicial to his health to continue any longer in prison, he being reduced to that weakness and ill state of health that he is scarce able to walk : and therefore humbly praying, that his grace and the estates of parliament would ordain him to be set at liberty, he always enacting himself to appear when called, as the said petition bears: which being considered by her majesty's court and the estates foresaid, they, by their interlocutor thereon, ordained the petitioner to be set at liberty, he finding caution, when called, to appear before the parliament. In the terms of which interlocutor, and conform to the 6th act of the 9th session of king William's parliament, William lord Forrester did before extracting hereof become bound as cautioner and surety for the said David Baillie, petitioner, that he should, when called, appear before the said high court of parliament, and that under the penalty of 1000 merks Scots money. In respect whereof her majesty's high commissioner and the said estates do ordain him, the said David Baillie, to be set at liberty in manner foresaid."

THE SEVERAL LETTERS RELATING TO BAILLIE AND THE PLOT, MENTIONED IN THE FOREGOING PROCEEDING.

Letter to the Duchess of Queensbury.

" Madam, May it please your Grace; Last night I was in a place, where the company was
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talking of some letters that were fallen into his grace my lord commissioner's hands, that nobody could read almost : but a gentleman, may it please your grace, immediately replied, I am sure I know one that can. Madam, said he to me, he is a kinsman of yours. I asked him who it was? and he whispered me, Mr. David Baillie, to whom I suppose (continued he) the letters was for, for all their being directed to David Lindsay: Nay, Sir, said I, I can hardly think that, for many reasons, and particularly, because I think Mr. Baillie has more wit than to be brought into a plot: Yes, madam, said he, I agree with you, he has a great deal of wit; and that is not all, for he is very sober; he never was drunk in his lifetime; and that is a quality makes any person capable both to manage and conceal his business: and I do assure you, madam, said he to me, I do think there is no person so fit to carry on a close design, as Mr. Baillie; for though I know there has been nothing done this ten years or more, from the other side, but what he has been accessory, or privy to; yet I could never, notwithstanding of my religion and intimacy with him, discover whether he was so engaged or not, but that I knew it perfectly well from another that is concerned, that I hope to see in a week or two; then I shall know the meaning of these letters. Soon after that, may it please your grace, I went to call for Mr. Baillie, where, near his door, upon the stairs, I met, or rather found standing, a black, who I have seen in a red coat, laced; but he was then in a dark grey. I went to the door, knocked, and went in, and enquired for Mr. Baillie; the maid told me, he was not within: then, said I, I will go into his chamber, and sit down, and cool myself; and so was going, but the maid stopped me, and prayed me to walk in to her mistress; who told me, I must excuse the maid; for to tell me the truth, Mr. Baillie was within, and a gentleman with him; but had given orders to say he was out, because he was to be busy; so prayed me to sit down there a little, which I did; and after some time, what I had heard, which was a great deal more than what was fit to say here, because it mentioned the person, who I fancy the black I see upon the stairs, belongs to, gave me the curiosity to ask, if they knew who was with Mr. Baillie? they said, No. Dear me, said I, how frightened was I just now when I met the black upon the stairs! what, does he belong to the gentleman that is with Mr. Baillie? I do not know, said the mistress, but I see a black came in to Mr. Baillie this afternoon; and it is very like he came to see if he was within; for I heard Mr. Baillie say, as he went out, Give my service, and I will wait myself until he comes, and so he walked up and down the entry for above half an hour, and then the gentleman that is still with him, knocked, and Mr. Baillie let him in himself; and as soon as he had carried him in, he came out and said, I am not within to any body; this is all I know, said she: so I was obliged to go home without seeing of him.

But I could not be at ease till I see him, and so I found him this morning writing, but I know not what; yet it served to increase my suspicion, for after he had done writing, he put what he had wrote into a play-book, and rolled it up hard, and tied it with a pack-thread, and sealed it; and in less than half an hour, which was ten o'clock, there came a man who I have seen also in a red livery laced, with Good morrow, Sir, I come for Cowley, if you think fit to send him. No, answered Mr. Baillie, I cannot spare him: but there is a play will divert as well; and they may either keep it, return, or burn it as they please; so away went the man, who was in black; and I said, what man is this? but Mr. Baillie waved answering, and talked of the weather, and indifferent things; so I had no other way left to satisfy my curiosity but to call out, Nay, now I believe all I heard yesterday of you, Mr. Baillie: Pray, what was that, said he? Why, that you are a plotter; and so I told him all, and what suspicion his being shut up with him I fancied the black belonged to; and his sending away writings under the covert of that play: he only smiled, and said, I think it is certain, there will nobody that knows me, believe me a plotter; for I have not a head for that, and I know nothing of any letters at all, nor of any body that would write to me, that need to do it obscurely: but if they did, I should not trouble any body to explain them; neither, if I were capable, should I give myself the pain to unlock any other person's letters: so I do not see how it concerns me at all; for that gentleman's weakness that was pleased to give me such a good character, as he believed, I pity him for it if he designed it kindly; if otherwise, I despise the impertinency of it, as being altogether groundless, as your suspicion is, madam, said he: and no doubt, whatever is contained in those letters, is very well known before this time; for I believe it is only a trick to amuse the people with an apprehension of a Popish successor, that they may, with the more ease, bring about the design of having Hanover declared here, as in England. And this, I suppose, is Mr. Scott's plot, and his father-in-law, the queen's advocate, and the rest of our courtiers, excepting his grace the commissioner. Nay, it is well, said I, you except him. Yes, madam, said he, I except him, not because he is commissioner, but because he is the best, if not the only good man amongst them. For though I am no courtier, I go sometimes to see them sup; but the duchess looks always so hard at me, I believe I shall go no more. At first when I observed her grace looking so at me, I thought it might be because of my cloaths, or my stockings, being sometimes pink-coloured, or blue, which are too youthful for me; but that I find is not the thing: for the last time I was there, her grace still looked, though I think there was nothing remarkable, or very monstrous about me. But I am apt to imagine his grace, the commissioner, knows me again; which I wonder, considering he never saw me but once,

and that was at night, and I was in my own hair; and so had shewed me to the duchess; and she wonders I come there. Why, said I, should she wonder at that? Nay, that I cannot tell, said he; except it be, that somebody has done me the favour to let the duke of Queensbury know, or at least believe, I could do him some manner of service last winter while I was at London: and his grace was pleased to send for me by Mr. Stewart. But though I imagined what it was, yet I seemed ignorant, because I could not have done what would have been of service to his grace, without injuring others; though for what I know, I might as well have done it as not. Nay, said I, if it be so, why do you not do it still? No; that time, says he, is past: not but that I know that it would be of more service to his grace than that would have been, or any thing else that can happen to him. Pray, for God's sake, tell me what that is, said I. No, no, madam, said he, have a care of that: it is not for you, or any woman to know that, without it were the queen; nor any man, except it were the queen's commissioner. And if he knew his enemies, I think, would have a cold coal to blow at. But, madam, we have said enough of this: So, and it please your grace, I staid sometime longer; then bid adieu; and was no sooner got home, but I undertook to give your grace this trouble; which I have done with all the exactness my memory would serve me, and which I thought myself obliged from two powerful reasons: First, I have the honour to be of your grace's country; and the next, I have received many extraordinary civilities from your grace's most noble and incomparable brother, my lord of Burlington: and therefore, if your grace thinks fit to take notice of this, I hope you will order it so, that Mr. Baillie may not suspect me for having given your grace any intelligence; for that might prove of very ill consequence to me, being a stranger, if your grace should intinate this to any person but the commissioner, who, no doubt, will certainly find it turn to account, to gain Mr. Baillie. He lodges at Mrs. Arbuthnet's, in Kennedy's-close, near the Tronne.—May it please your grace, I am your grace's, &c."

About the 11th of October, the day before the marquis of Anandale left Scotland, to attend her majesty upon a special call, there was a letter directed to him, writ in the same hand with that to the duchess of Queensbury, signed Charlotte Constable, in the following words, viz.

Letter to the Marquis of Anandale.

"My lord;—The desire I have to serve your lordship, puts me upon giving your lordship this trouble; which is, in few words, to let you know, my lord, That one Mr. Baillie has it now in his power to do an extraordinary piece of service, to the advantage of the queen's affairs, and your lordship's interests, which to me seems inseparable; therefore do not slight the advice of her that loves you, and wishes

your prosperity and glory; but send for Mr. Baillie, who is truly, to do him justice, a person of great merit and clear sense, and gain him to be yours. And though I must not be particular at this time, my lord, yet I will tell you, that he is able to advise you of what will put the queen's enemies and your own into your power, and for ever defeat their designs. I think I need say no more, the queen's service and your own interest are sufficient persuasives to diligence and care; only I am to beg of you, my lord, not to say any thing of this intimation that I have given your lordship, to any person; for I suppose you need not want a pretence to send for Mr. Baillie to come to speak to you; and I have as little reason to doubt but your lordship, if he comes to you, will take all the kind and friendly ways to gain the point: To make which the more easy, you may tell him, you know very well that at this very time, there is designs carrying on both in England and Ireland, as well as in Scotland: and though you do not know all the particulars, and persons concerned, yet you know that he does; and that is not all, for your lordship may intimate that you know that my lord D——d, the night before he went out of town, came to Mr. Baillie's chamber about ten o'clock at night, and staid till eleven; at which hour came a certain duke, and a little after another titular or pretended duke in women's cloaths, and several others, to the number of eleven persons; and staid till about four o'clock in the morning. This hint is sufficient to your lordship, for you must manage all with secrecy and caution, and give no alarm by unkindness or violence. Now, my lord, I am to tell your lordship, Mr. Baillie lodges the very first close above the sign of the Sun, on the South-side of the way, at one Mr. Killies. I am, my lord, your lordship's unknown, but most loving and hearty well-wisher, and most humble servant. CHARLOTTE CONSTABLE."

The letter directed thus: 'To the right honourable the Marquis of Anandale, Lord President of her majesty's Privy Council.' And in a cover directed to Mr. Campbell, at the Marquis of Anandale's. And wrote within, 'Sir, deliver the inclosed immediately to your lord.'

Upon the 22d of December, Baillie, after he had been at the lord Belhaven's, came to the duke of Hamilton's lodgings, where he delivered a signed Declaration, by way of Letter to his grace, in the following words:

"*Edinburgh, Dec. 22d, 1705.*

"May it please your Grace;—The noise that is every where of a plot, makes me think it my duty to inform your grace what happened to me during the last session of parliament; which, in a few words, was this, The duke of Queensbury, then commissioner, sent for me, (but by whose instigation I was never able to learn) and after a great profession of

kindness, and declaration of readiness to do me service, his grace did allege, that he had it from very good hands, that there were designs carrying on in Scotland, England, and Ireland, to subvert the present government, and to restore the Prince of Wales; and as he alleged, I was not ignorant of them; so that he hoped and entreated me for his sake, as well as my own, and above all, for the preservation of her majesty's person and government, to let him know the whole matter. To which demands, I was obliged to answer, though not without surprize, and extreme confusion: Yet truth, which I hope shall ever guide me, obliged me to declare my own innocence, and my ignorance of all such wicked enterprizes. But the duke of Queensbury still insisting, I was obliged to offer to withdraw; but when I was going, he called me back from the door, and bid me consider his kindness to me, for he had now not only offered me his service, but his personal friendship; and desired me to think well what I did, for he would not leave me so; which indeed I found to my no small mortification; for a few days after, he sent Mr. Stewart, the same gentleman that he had employed to bring me to him before; and Mr. Stewart having left the room, the duke went to his cabinet, and as he was opening it, told me, He would shew me a rarity; but having searched some of the drawers of his cabinet, he seemed as if he had been surprized, and said, he believed he had left what he looked for with his wife, and had forgot; so he went to the door, called, came back again, and sat down, and would needs, whether it was reason or not, force me to do the like: And then he told me, He had a mind to shew me three letters, that were carried by the mistake of the postman to a wrong person, that it seems was of the same name; that no doubt they contained matters of dangerous consequence against the government: Just as he had said that, Mr. Brown, that is his valet de chambre, came and whispered him, and when he was gone, the duke told me, that the duchess had let the president of the sessions carry away the letters; but however, said he, I know very well you know what is in them, and more too. Which when I replied, it was impossible, having never seen them: he smiled, and said, I will warrant you do not know any thing of my lord number Three, or Seven, nor Phiarlotheus: not indeed, my lord, I answered, I know nothing of what your grace means. Then you do not know duke Hamilton, my lord of Athol, nor the chancellor; nor never so much as heard of my lord Drummond, Belhaven, nor my lord Tarbat, nor Blantyre: well, well, said he, Mr. Baillie, you will say nothing to me, but you see I am not so ignorant as you take me to be, for I know very well who are pensioners to France, and who are not; nay, I know my lord of Athol, and your convert, the chancellor, is amongst the first of them now, though may be they have not been so long as your great duke of Hamilton, Marschal, and

Belhaven, for I know the duke of Hamilton has been so these many years. But when I again and again asserted the truth, that I knew nothing of all that, and that if your grace and all the rest of the noblemen named, were as ignorant, and as innocent as I, certainly they were misrepresented to his grace, for they were generally believed to be the best men of the nation: at which he cried out mightily, and told a great many wicked things that had been done by your grace, as he pretended: but I will not now trouble your grace with a relation of them at this time, designing, if it please God I live, to publish the whole conference at large, both to satisfy my conscience, and country, of the duke of Queensbury's practices to gain me to make the most horrid of all lies, and the most dangerous, for he offered me great preferments, and money, even what I pleased, if I would but, as he termed it, tell the queen what he would tell me; for it seems, I would force him to be plain with me, because I would not understand. But if I would go to the queen and tell her majesty, that duke Hamilton, Athol, the chancellor, and the above-named lords, are actually pensioners to France, and that they had a public bank and managers for buying up arms, and other stores of war, then he would not only promise but perform. And if I could undertake this, then he would immediately let me see a list of all those he would have brought into the plot, and he would swear never to let any person know but that it was a real plot: and that I had made the discovery first to him; and that he had sent me to the queen: I say, provided I would say after him, and swear to it. Your grace may imagine, I was not a little put to it for an answer, and, as I remember, it was this: that I thought his grace's advices were certainly the best, where there was a real plot: but for a person to swear a lye to the queen, upon persons that were altogether innocent, so far as I knew, it was what I hope that I shall never think of but with trembling and detestation: but if any thing occurred to me, the discovery of which might be a service to the queen, or my country, none would be readier than myself. This, may it please your grace, I thought fit to advertise you of, being a short abridgment of what passed betwixt the duke of Queensbury and me. But it seems to me, he having failed in his attempt on my integrity, employed the marquis of Anandale on the same design; who did, to do him justice, use me after another manner. For having got me into his clutches, if I may speak so; for he sent for me the very day before he went to London, and would not part with me, he said, till I went to London with him, to let the queen know how well she was served by the duke of Athol, who, he knew, had been at my chambers with your grace in women's cloaths, and that there came there, all that I named before, and my lord Drummond, and Jerviswood, and several others, to the number of eighteen: and that there they treated of bringing home the prince of Wales, and all that was necessary

for such an enterprize. To which, when I answered, there was never any such meeting, he said, we should understand one another better when we got into English ground: for he thought it was unnecessary to tell me, that I must not only say there was such a meeting, but swear it; which if I did, I would have it in my power to make myself for ever, and might be an officer of state before I left London again. But when I replied, that I was not fond of swearing a lye, and that it was impossible for me, to bring myself to think of such a thing; and that I would not, though I had never such an inclination to go to London, to go on that score, therefore I hoped he would excuse me. But he was so far from that, he flew in a passion, and swore he would be revenged. And when he saw that did not prevail neither, he fell a coaxing me again; but I thank God, he did not succeed that way neither. Yet I told him at parting, I was his humble servant; which I really would have been, so far as never to have laid open this most abominable villainy; though sure nothing could be more provoking, than to be sent for by people I had never had converse with, nor obligation to, nor dependence upon: and there to be flattered with great rewards, if I would become a villain, the most perjured of all liars; but threatened to destruction, if I retained my integrity and loyalty. For surely, let that set of men pretend what they will, nothing can be more disloyal, than thus to abuse the best of queens, and to endanger the best of subjects, and indeed the only sound part of the nation: and who, if there were any thing to be attempted, would certainly stand by the queen and country, when such men as the duke of Queensbury, and marquis of Anandale, would desert both. May it please your grace, I was saying before, I would never have said any thing of this, had not the noise of a plot met me every where, and I confess I had no longer patience. And I never think of my silence, but am ready to die with apprehensions of the dangers, that the duke of Athol, and a great many other persons, are fallen into; which perhaps I might have in some measure prevented, if I had sooner given your grace the truth of this, that you might have warned the duke of the designs of his enemies, which I hope you will do now without further delay. May it please your grace, I am your grace's most humble servant in all sincerity and truth,

(*Sic Subscribitur.*) "DAVID BAILLIE."

The Letter to the Earl of Eglington, President of the Council, pro tempore.

"My lord;—From what my lord justice clerk said, I find that I owe my present misfortune to him; and that it was his lordship that procured my confinement, upon the information given him, by whom I know not: but he may please to know, that I gave no information to any person, in relation to that business that happened to me, from his grace the duke of

Queensbury, or my lord marquis of Anandale conditionally: for I left it to them, whom I informed, to make what use they pleased of my information. So consequently my lord justice clerk may without the least scruple, produce his informer, and he my information, which was not verbal, but in writing. Therefore, my lord if you please, this is what I think most honourable for me; because, as I understand my lord justice clerk, it was three weeks since he had notice of this business, but that he delayed apprehending me, because the person that spoke of me to him, did not think it fit to attempt it, until there was a warrant to seize me, because I was a gentleman. Now, my lord, I think what he was pleased to add, would not have given me the assurance, to have assumed that title to myself, for it is a very glorious one, and it shall be one of the chief studies of my life to maintain it. And therefore, my lord, without prejudice, or disobligation, or obligation, to either the duke of Queensbury, or the marquis of Anandale, or my lord justice clerk, I do plainly say, that whatever information I gave on this affair, was in writing, and without either caution or security for my own safety; which, I think, will by my own innocence be best secured to me, not but that I hope all justice from the board, where my lord Eglington sits, and so do most earnestly beg, that your lordship will be pleased to desire my lord justice clerk to shew the information I have already given; which, I think, will abundantly show how little I regard the ease of my person, when it comes in competition with that of my conscience, for I will always speak truth, through the assistance of God, whatever be the consequence. Now, my lord, I am really so ill, that I am scarce able to say any thing of what the earl of Glasgow seems to lay some stress upon; my not owning readily enough, (as he thinks) the signification of every word in Mr. Steel's letter: I will only say this, that Mr. Steel and I have conversed long, and very frequently, and with great freedom, but without any other design than to divert and amuse with little jests of good humour: for sometimes hours to one another would be all raillery, after

our manner; some all tenderness; some all scandal; some all gallantry; some all business; some all devotion; and some all together; and some all commendations, and services, to the Lord knows who; to the acquainted, and unacquainted. But I cannot think this, or that if Mr. Steel had named all the people of both nations that were at London, when I was there, and desired me to give his service to them all, if I see them, that there is any thing in this, to oblige me to deny it; for I think Mr. Steel may very freely own any thing he ever wrote to me in his life, and I am sure I will own any letter I ever wrote to Mr. Steel. My lord, excuse this, I am sensible I have strayed from your lordship's orders, but the reason why I did so, was, because my lord justice clerk did seem to say as much, as if it were to secure his informer from the suspicion of a false accuser, that I was taken into custody, fearing I might either deny, or go out of the way. As to the denying truth, I think no human force could induce me to do that: and as for my going out of the way, I had no inclination, for if I had, I am sure I have had time and opportunity enough these six weeks to have done that: for upon the very first breaking out of the plot, at least so as to be public here, I sent a written account of what had happened, which I am sure is truth, as to the matter of fact, which I am so far from denying, that I desire your lordship may procure my lord justice clerk to present the paper to the council, if you think fit; though I do say it was not to his lordship that I sent it; yet it is certain it has been communicated to him; and I desire to have an opportunity to own it, as well to free the person that communicated it to the justice clerk from the suspicion of a malicious or false accuser, as to satisfy your lordship. To do which, and to obtain my liberty again, I will do every thing becoming a Christian and a gentleman, a prisoner, but no plotter. My lord, I beg leave to say, that I am, my lord, your lordship's most humble and very obedient servant,

(*Sic Subscribitur,*) "DAVID BAILLIE."

"*Edinburgh, Talbooth, Feb. 8, 1704.*"

436. The Trial and Condemnation of Captain JOHN QUELCH, and others of his Company, &c. for sundry Piracies,* Robberies, and Murder, committed upon the Subjects of the King of Portugal, her Majesty's Ally, on the Coast of Brasil, &c. at the Court-House in Boston: 3 ANNE, A. D. 1704.

At a Court of Admiralty held at Boston, in her Majesty's Province of the Massachusetts-Bay in New-England, in America, the 13th day of June, A. D. 1704.—PRESENT, Joseph Dudley, esq. Captain-General and Governor in Chief of the Provinces of the Massachusetts-Bay and New Hampshire, in New-England, in America, and President of the Court, &c.—Thomas Povey, esq. Lieutenant-Governor of the Province of the Massachusetts-Bay.—John Usher, esq. Lieutenant-Governor of the Province of New-Hampshire.—Nathaniel Byfield, esq. Judge of the Vice-Admiralty, for the Provinces aforesaid.—Samuel Sewall, esq. first Judge of the Province of the Massachusetts-Bay aforesaid, and one of the Council.—Isaac Addington, esq. Secretary, and one of the Council.—Jahrael Brenton, esq. Collector, &c. of her Majesty's Customs, &c. in New-England.—Elisha Hutchinson, John Phillips, John Foster, John Wally, Joseph Lynde, John Thatcher, Eliakin Hutchinson, Penn Townsend, Edward Brumfield, Samuel Legg, Isaac Winslow, Samuel Appleton, esqrs. Members of her Majesty's Council, in the Province of the Massachusetts-Bay, &c.

The Court being sat: Proclamation was made for silence.

AND then the statute made in the 11th and 12th year of the late king William, entitled, 'An Act for the more effectual suppression of Piracy:' and also the late king William's commission under the great seal, pursuant to the act abovesaid, constituting the court, &c. were publicly read.

After which, John Valentine, gent. notary public, was sworn register of the court by the

* See the Cases for Piracy of captain Kidd and others, in this volume, p. 123; of captain Green and others, A. D. 1705; of major Bonnet, A. D. 1718, in this Collection. See, too, Vaughan's Case for Treason, vol. 13, p. 485. This Case of Quelch, is mentioned as is that of Kidd, in Hutchinson's History of Massachusetts's Bay, a work in which the dulness of style and heaviness of composition are sufficiently powerful to repel an ordinary reader from pursuit of the information and instruction accumulated by the diligent investigations of its laborious author.

president: and then the register administered the oath prescribed to the president; and then the president administered the oath to the other commissioners in open court, pursuant to the act aforesaid.

And then the Court was opened by three proclamations, as a Court of Admiralty, for trial of pirates, &c.

After which was read her majesty's Proclamation signifying her royal pleasure, that all persons being in office of authority, or government, at the decease of the late king, should so continue till her majesty's further directions: then was read two instructions from her majesty to his excellency, in the trial of pirates, to govern the same according to the abovesaid act of parliament, and commission thereupon.

A warrant having been signed by several of the commissioners to the keeper of the prison, to bring captain John Quelch before them, to answer several Articles of Piracy, Robbery, and Murder, exhibited against him and company, pursuant to the governor's order for the setting of the Court this day.

The Court adjourned to three of the clock in the afternoon.

When the Court being met, and opened, Matthew Pimer, John Clifford, and James Parrot (the first of whom had surrendered himself quickly after his arrival to his excellency the governor), were brought to the bar, and arraigned upon several Articles of Piracy, Robbery, and Murder, drawn against captain Quelch, and others his accomplices, of the tenor following, *mutatis mutandi*.

At a COURT of ADMIRALTY, held at Boston, in her Majesty's Province of the Massachusetts-Bay, in New-England, in America, the 13th June, A. D. 1704. And in the 3rd year of the reign of our sovereign lady Anne, of England, &c. Queen.

ARTICLES of PIRACY, ROBBERY, and MURDER, then and there exhibited against JOHN QUELCH, late of Boston, in the said Province, Mariner, Lieutenant of the Brigantine Charles, whereof Daniel Plowman, Mariner, deceased, was late Commander.

You stand here accused of piracy, robbery, and murder.

Imprimis. That notwithstanding the said brigantine was fitted out by several worthy merchants of Boston, good and loyal subjects

of her majesty, (against the French and Spanish kings, their vassals, subjects, and allies, the declared enemies of her most sacred majesty queen Anne) who obtained a commission for that purpose, from his excellency, Joseph Dudley, esq. her majesty's captain-general, governor, and commander in chief, in and over the said province; by force whereof, and in pursuance of the necessary instructions to your commander, the said captain Ploverman delivered (whereof you were apprized), he, with his company, sailed in the said brigantine from Boston, the 4th of August, 1703, for Newfoundland, and L'Accade; but falling violently sick, and languishing in his cabin, you, with divers others, for some time, bolted the cabin door upon him, and he, shortly afterwards, that is to say, the 6th day of the said month of August, died; you neglecting his orders, and those of your owners, to return with the said private man of war to Boston, would not set on shore Matthew Pimer, and John Clifford, two of your company, who (dreading your piratical intention) earnestly desired the same; but bore up the helm to sea, directing your course for Ferdinando island, and the coast of Brasil, whereby it is open, manifest, you intended murders, piracy, and robberies; which afterwards you perpetrated.

1. For that you, the said John Quelch, with divers others, on, or about the 15th November, 1703, in the 2nd year of her majesty's reign, at or near the latitude of 7° south latitude, on the coast of Brasil, at or near Cape St. Augustine, by force and arms, upon the high sea (within the jurisdiction of the admiralty of England) piratically and feloniously did surprize, seize, and take a small fishing vessel, (having Portuguese men on board) and belonging to the subjects of the king of Portugal, (her majesty's good ally) and out of her, then and there, within the jurisdiction aforesaid, feloniously and piratically did, by force and arms, take and carry away a quantity of fish and salt to the value of 3*l*.

2. That you, the said John Quelch, with divers others, on or about the 18th November, 1703, in the 2nd year of her said majesty's reign, in or near the latitude of 8° south, near Cape St. Augustine aforesaid, by force and arms, upon the high sea, (within the jurisdiction of the admiralty of England aforesaid) piratically and feloniously did surprize, seize, and take a small brigantine, of the burthen of about 15 tons, (having Portuguese men on board) and belonging to the subjects of the king of Portugal, (her majesty's good ally) bound for Parenebuck; and out of her, then and there, within the aforesaid jurisdiction, feloniously and piratically did, by force and arms, take and carry away five chests of Brasil sugar, to the value of 150*l*. six barrels of molasses, to the value of 6*l*.

3. That you, the said John Quelch, with divers others, on or about the 24th November,

1703, in the 2nd year of her majesty's reign, at or near the latitude of 9° south, near Cape St. Augustine aforesaid, by force and arms, upon the high sea, (within the jurisdiction of the admiralty of England aforesaid) piratically and feloniously did surprize, seize, and take a small brigantine, of the burthen of about 40 tons, (having Portuguese men on board) and belonging to the subjects of the king of Portugal, (her majesty's good ally) bound for Parenebuck; and out of her, then and there, within the jurisdiction aforesaid, feloniously and piratically did, by force and arms, take and carry away five chests of Brasil sugar, to the value of 150*l*. a quantity of molasses, rice, and farine, to the value of 10*l*.

4. That you, the said John Quelch, with divers others, on the 5th day of December, 1703, in the 2nd year of her majesty's reign, at or near the latitude of 13° south latitude, off of Mora, by force and arms, upon the high sea, (within the jurisdiction of the admiralty of England aforesaid) piratically and feloniously did surprize, seize, and take a small Portuguese shallop, navigated by, and belonging to the subjects of the king of Portugal (her majesty's good ally) and out of her, then and there, within the jurisdiction aforesaid, feloniously and piratically did, by force and arms, take and carry away a quantity of earthenware, value 5*s*. two jars of rum, value 10*s*. a quantity of linen cloth, value 10*s*.

5. That you, the said John Quelch, with divers others, on the said 5th day of December, 1703, in the 2nd year of her majesty's reign, at or near the latitude of 13° south, off or near Mora aforesaid, by force and arms, upon the high sea (within the jurisdiction of the admiralty of England) piratically and feloniously did surprize, seize, and take a Portuguese boat, navigated by and belonging to the subjects of the king of Portugal, (her majesty's good ally) and out of her, then and there, within the jurisdiction aforesaid, feloniously and piratically did by force and arms, take and carry away some pieces of cloth, value 5*s*. two pieces of silk, value 20*l*. and sunk the said boat, value of 30*l*.

6. That you, the said John Quelch, with divers others on the 9th day of December, 1703, in the 2nd year of her majesty's reign, at or near the latitude of 13° south, off of Mora aforesaid, by force and arms, upon the high sea, within the jurisdiction of the admiralty of England aforesaid) piratically and feloniously did surprize, seize, and take a Portuguese brigantine, burden about 20 tons, and an open boat navigated by and belonging to the subjects of the king of Portugal, (her majesty's good ally) and out of them, then and there, within the jurisdiction aforesaid, feloniously and piratically did, by force and arms, take about 50*l*. in Portuguese coined money, a negro boy, value 20*l*. some rice and farine, value 5*s*.

7. That you, the said John Quelch, with divers others, on the 20th day of December, 1703, in the 2nd year of her majesty's

reign, at or near the latitude of 25° 40' south, upon the coast of Brasil, near the island of Grandee, by force and arms, upon the high sea, (within the jurisdiction of the admiralty of England) piratically and feloniously did surprize, seize, and take a small Portuguese brigantine, burden about 25 tons, navigated by and belonging unto the subjects of the king of Portugal, (her majesty's good ally) and out of her, then and there, within the jurisdiction aforesaid, feloniously and piratically did, by force and arms, take and carry away five chests of Brasil sugar, value 150*l.* and a small parcel of Portuguese money, some gold and silver, value 50*l.*

8. That you the said John Quelch, with divers others, on the 15th day of January, 1703, in the 2nd year of her majesty's reign, at or near the latitude of 24° south, upon the coast of Brasil, by force and arms, upon the high sea, (within the jurisdiction of the admiralty of England) piratically and feloniously did surprize, seize and take a Portuguese brigantine, burden about 35 tons; she came from Spirito Sancto, bound for Riguener, navigated with and belonging to the subjects of the king of Portugal, (her majesty's good ally) and out of her, then and there, within the jurisdiction aforesaid, feloniously and piratically, by force and arms, did take and carry away 100 weight of gold dust, value 6,000*l.* and 900 pieces of coined gold, value 900*l.*

9. That you the said John Quelch, with divers others, on the 17th day of February, 1703, in the 2nd year of her majesty's reign, at or near the latitude of 35° 50', near the river of Plata, by force and arms, upon the high sea, (within the jurisdiction of the admiralty of England aforesaid) piratically and feloniously did surprize, seize and take a Portuguese ship, burden about 200 tons, 12 guns, loaden with hides and tallow, bound to Bayes, navigated with and belonging unto the subjects of the king of Portugal, (her majesty's good ally) and then and there, within the jurisdiction aforesaid, did feloniously kill and murder the commander thereof, and wounded several others, and out of her piratically, by force and arms, did take and carry away 12 barrels and a pipe of beef, value 10*l.*; four great guns, value 20*l.*; four pateraros, value 40*s.*; twelve small arms, value 6*l.*; 100 weight of shot, value 3*l.*; two barrels of powder, value 12*l.*; a new main-sail, fore-sail and foretop-sail, value 40*l.*; a negro boy, value 40*l.*; and about 200 pieces of eight, Spanish money, contrary to the statutes in that case made and provided.

Upon which Articles, *mutatis mutandis*, Matthew Pimer, John Clifford, and James Parrot, being arraigned, severally pleaded Guilty.

Ordered, That Matthew Pimer, John Clifford, and James Parrot, be received into the queen's mercy, and be declared witnesses in behalf of the queen, against John Quelch and company, for their several piracies, robberies, and murder.

Ordered, That Matthew Pimer, John Clifford, and James Parrot, stand within the bar, and be sworn as witnesses on her majesty's behalf.

Ordered, That captain John Quelch be brought to the bar, where being brought, he was arraigned upon the several foregoing articles of piracy, &c. to which the said John Quelch pleaded, Not Guilty, but moved for time to prepare for his trial.

Ordered, That time be given him till Friday morning next, at 9 o'clock.

The prisoner also moved, to know whether he might not have counsel allowed him, upon any matter of law that might happen upon his trial.

Curia. The Articles upon which you are arraigned, are plain matters of fact; however, that you may have no reason to complain of hardship, Mr. James Meazines, attorney at law, may assist you, and offer any matter of law in your behalf upon your trial.

Ordered, That the prisoner at the bar have a copy of the articles exhibited against him; and then he was remanded to prison.

Ordered, That a minute be made, that it is declared by Pimer, Clifford and Parrot, that James Thurbar, of Swansey, was not of the company belonging to the brigantine Charles, though named in the first articles for the voyage.

Ordered, That John Lambert, John Miller, William Wilde, Benjamin Perkins, Christopher Scindamore, James Austin, John Dorothy, Nicholas Richardson, Richard Lawrence, John Templeton, John Pitman, Charles James, William Jones, Erasmus Peterson, John King, Francis King, Charles King, Peter Beach, Dennis Carter and John Carter, be brought to the bar; who being placed at the bar, were severally arraigned upon the articles of piracy, robbery and murder, beforementioned, *mutatis mutandis*: To which they severally pleaded, Not Guilty, and then moved for counsel, and time to prepare for their trial.

Ordered, That Mr. Meazines assist the prisoners in any matters of law, and that the prisoners prepare for their trial on Friday next, at 9 o'clock in the morning: and then the Court adjourned till Friday morning.

Friday, June 16.

Proclamation being made, the Court was opened, and captain Quelch being brought to the bar, presented a Petition in behalf of himself, and the rest of the prisoners, praying for further time.

Ordered, That the prisoners be allowed time till Monday morning next at 9 o'clock, and then peremptorily to come upon their trial; a motion was also made by the prisoners' counsel, that the queen's witnesses might be kept asunder till the prisoners came upon their trials; to which it was answered by the counsel for the queen, that though in cases of high treason, and some other cases, the prisoners have been so far favoured, as that upon their

trials, approvers, or other evidences for the crown have been kept out of hearing of one another while they were giving their several evidences, yet to separate them before their trials, was without precedent; upon which the Court denied the motion of the prisoners' counsel in that matter; but directed that at their examination at the bar they should be separate. Then the Court adjourned till Monday morning, 9 o'clock.

Monday, June 19. 10 a. m.

The Court being opened, and capt. Quelch set to the bar.

Ordered, That his irons be taken off during his trial.

Mr. Newton; (of counsel for the queen.) May it please your excellency, and the honourable commissioners of this court: The prisoner at the bar stands charged, for that he, the said John Quelch, late of Boston, in the province of the Massachusetts-Bay, &c. mariner, lieutenant of the brigantine Charles, whereof Daniel Plowman, mariner, deceased, was late commander, notwithstanding the said brigantine, &c. Which articles when we have proved upon the prisoner at the bar, we doubt not but your excellency, and the rest of the honourable commissioners of this court will do him, our nation, and the world that justice, as to condemn and punish him for the same.

Paul Dudley, esq. (Attorney General, and her majesty's Advocate for the court of Admiralty.) May it please your excellency, and the rest of the honourable commissioners of this court: The prisoner at the bar stands articulated against for, and charged with several piracies, robberies and murder, committed by himself and company, upon the high sea (upon the subjects of the king of Portugal, her majesty's good ally,) the worst and most intolerable of crimes that can be committed by men. A pirate was therefore justly called by the Romans, *hostis humani generis*:* And the civil law saith of them, that neither faith nor oath is to be kept with them; and therefore if a man that is a prisoner to pirates, for the sake of his liberty promise a ransom, he is under no obligation to make good his promise; for pirates are not entitled to law, not so much as the law of arms: For which reason it is said, if piracy be committed upon the ocean, and the pirates in the attempt happen to be overcome, the captors are not obliged to bring them to any port, but may expose them immediately to punishment, by hanging them at the main-yard; a sign of its being of a very different and worse nature than any crime committed upon the land; for robbers and murderers, and even traitors themselves, may not be put to death without passing a formal trial: And if the fate of the prisoner at the bar, with his company, had allowed them to have been overcome in their piracies, &c. and immediately

hung up before the sun, it had been very just upon them. But being then suffered to live, and now brought into a court of justice, they are to be used, treated, and tried, as the laws of England, and our own country do direct. Hereupon I must observe, that until the statute of the 28th of Henry the 8th, all piracies, robberies and murder committed upon the sea, were tried before the admiral, his lieutenant, or commissary, after the course of the civil law; the nature whereof was, that before any judgment of death could be given against the offenders, either they must plainly confess their offences (which they will never do without torture,) or else their offences be so plainly and directly proved by witnesses indifferent, such as saw their offences committed, which was next to impossible to be had, therefore that statute enacted, that the said crimes should be triable in any county in England, by such and such commissioners, and the trial to be according to the course of the common law: This act continues in England in force to this day; and until very lately served for all piracies that were committed in the plantations, or any parts beyond the seas. For Kidd, the last pirate that went from this country, was tried upon that statute; but it proving very troublesome and chargeable to transport pirates and the witnesses from the several plantations, there was another act of parliament made in the 11th and 12th years of the late king William, that provides principally and particularly for the trial of all pirates that are seized in any of the plantations. It is by virtue of this act of parliament, and a commission pursuant thereto, that your excellency, and this honourable court, are now sitting in judgment upon the prisoner at the bar, and his vile accomplices; and though it may be thought by some a pretty severe thing to put an Englishman to death without a jury, yet it must be remembered, that the wisdom and justice of our nation, for very sufficient and excellent reasons, have so ordered it in the case of piracy; a crime which, as I before observed, scarce deserves any law at all: Besides, the late statute hath appointed such commissioners, as will take care to do equal justice to the prisoner on the one hand, and to the crown and allies of England on the other. The English word 'pirate,' is derived from a word that signifies 'roving;' for pirates, like beasts of prey, are seeking and hunting upon the ocean, for the estates, and sometimes the lives of the innocent merchant and mariner: His character and description is thus; a pirate is one who, to enrich himself, either by surprize, or open force, sets upon merchants and others trading by sea, to spoil them of their goods or treasure, and oftentimes making their vessels, and bereaving them of their lives: and it is no wonder if piracy be reckoned a much greater and more pernicious crime than robbery upon the land, because the consideration of the general navigation, and commerce of nations, is far beyond any man's particular property: Besides; whereas robbery upon the land is most

* See Leach's *Hawkins's Pleas of the Crown*; book 1, chap. 37, s. 1.

commonly from particular persons; piracy is from many, and oftener attended with the death of others: Thus it was in the case now to be tried; one of the captains of one of the Portuguese vessels being unfortunately, if not basely killed and murdered in the action. But before we proceed to the several articles upon which the prisoner is to be tried, I beg leave a little to set forth the aggravating circumstances of the crimes committed by these vile men: And to begin with their mutiny, their rebellious, inhuman, I wish I might not say, their murderous usage of their worthy commander, captain Plowman; God knows how far their treatment of him might hasten his end; however, that must be answered for at a higher tribunal. The next thing I would observe in this matter, is, their commission which they obtained from her majesty's government of this province, a sword to fight the open and declared enemies of her sacred majesty; but, instead of drawing it against the French and Spaniards, they have sheathed it in the bowels of some of the best friends and allies of the crown of England at this day; the Portuguese being confederate with her sacred majesty against the French and Spaniards, for the peace, rights, and liberties of Europe: This was the baseness, the treachery, and cowardice of this matter, that instead of fighting for honour with the French, or money with the Spaniards, they must go and surprize a few honest and peaceable men, and our good friends, in their lawful occasions, that neither thought, nor meant any harm: Thus a man falls before wicked men. The third thing I would observe, is the perfidious impudence of these men, for as they sailed along the coast of Brasil, they put in at one or two places, and assured the Portuguese of their friendship and kindness; that their designs were against the French and Spaniard; and yet at the very next port, a few leagues distant, they robbed and plundered some of the neighbours and friends of those they had seen the day before. The fourth and last thing that I would mention is the number of their crimes; for it was not once, twice, nor thrice, that would serve their turns, but they go on in the repetition of their wickedness, till they were glutted, and thought they had enough of it: And as to the prisoner now at the bar, as his share in just and lawful prizes would have been at least double to any other, so no doubt but the same measure will be of his guilt in all this matter: We shall now, may it please this honourable court, proceed to prove the several articles charged upon the prisoner; and our proof will be partly presumptive, partly circumstantial, and partly positive and downright: The presumptive part of the proof is the manner of their coming to this place, being in that sort as renders them suspicious to every body; but especially I would observe, their not being able to give any tolerable account from whence they came, or had their treasure. This was what induced their owners to give an information to the government of the matter;

and our own law in this country against piracies, is very plain in this point of presumption.

The second proof that we shall offer, will be what we call circumstantial; and indeed the circumstances of this matter are so many, that render it undoubted, but that the prisoner, with his company, have been guilty of the articles charged upon him.

Then in the third place, there is that which we call positive and downright proof, viz. the Confession and Evidences of their accomplices, who are now the queen's witnesses.

Mr. John Colman and Mr. William Clark were sworn to give evidence, &c. and then produced captain Daniel Plowman's commission, which was read, as also his instructions, and then his owners' orders; as also the said Plowman's letters from Marblehead to his owners; then a copy of the owners' letter was read, which they sent to the several islands, with his excellency's letter to the several governors, &c.

Mr. Colman made oath to their being true copies of their originals: after this, Mr. Clark brought into court several long spadhas, a Portuguese ensign, two skins full of sugar, upon one of which was a direction, and it being thought to be in Portuguese, Edward Lyde, esq. and Mr. Samuel Frazon, being sworn interpreters, acquainted the court, that that skin of sugar was directed to a person in Lisbon; adding withal, that if it had been Spanish, it would have been 'al Signior,' whereas it was 'Para,' &c. Whereupon the skins were opened, and full of what was adjudged to be Brasil sugar.

Mr. Lyde also making oath, that having been at Maderas, he had seen several hundreds of those seroins, or skins of sugar sent from Brasil, and that he verily believed, that what was now produced was Brasil sugar.

The ensign, or colours, were exposed also in court, and plainly seen to be Portuguese; and Mr. John Colman and Mr. William Clark made oath, that the spadhas, skins, ensign, and other things were taken out of the brigantine Charles, since her arrival here.

Mr. John Noyes, goldsmith, also was sworn, and made oath, that he had received of the prisoner at the bar, since his arrival in the brigantine Charles, a considerable quantity of coined silver money, and saw many of the pieces to be Portugal money, and judged the rest to be so too, but he cannot swear it, the prisoner at the bar being then in his shop, and melting them down himself.

After this, Mr. Treasurer, with his deputy, came in with a bag of gold and treasure brought in the brigantine Charles, which being seized, was committed to the custody of the treasurer of the province and others, by order of the governor and council.

Mr. Jeremiah Allen being sworn, deposed, that the bag he had now in court contained the treasure that was committed to the treasurer and others.

Ordered, that Mr. Colman's parcel of gold be opened, who being asked whence he had that gold? made answer, that he received that, and all the rest of the owner's shares, from the prisoner at the bar: upon viewing the coined gold, they were all found Portuguese gold, and several of the pieces were found to be coined in 1703. Upon this the president observed, that the money being coined so lately, it was very improbable it should ever have been out of Portuguese hands, inhabitants of Brasil.

After this, some prints that came in the brigantine Charles were examined, and found to be in the Portuguese language.

After this, a young negro boy, brought in by the prisoner at the bar, and company, was set up by order of the court, was examined, and the interpreters acquainted the court that he was a baptized negro, his name Joachim; that he lived with a Portuguese, his master's name Josepho Galeno; that he lived in the bay of All-Saints, in Brasil; that he was taken by an English brigantine, and that the prisoner at the bar was then on board the brigantine that took him; and that when he was taken, he was pretty near the land in an open boat, with fish and other things in it; and that there were two Portuguese men in the boat at the same time.

After this, the Court ordered the interpreters to try the negro boy by Spanish and French questions: but it was found he understood neither.

Queen's Counsel. May it please your excellency, and the rest of the honourable commissioners, we shall now proceed to an higher proof of this matter, by examining those that have been allowed to be the queen's evidence against the prisoner at the bar, and the rest of his company.—We shall begin with Matthew Pimer, a skilful mariner, who was shipped by captain Plowman himself, to go against the French, &c.

Ordered, that Pimer be sworn, the other two witnesses removed out of hearing. Upon this, Pimer's examination was read, which he swore to the truth of.

President. What reason had you to believe they were Portuguese that you robbed? Can you speak, or understand Portuguese?

Pimer. No, Sir; I do not understand the language, but believe them all to be Portuguese, because we took them upon the coast of Brasil; their lading and ensigns made me conclude they were Portuguese.

Queen's Counsel. If your excellency please, we will examine the witness upon each of the articles and matters the prisoner at the bar is charged with; but before we come to the articles, we will examine him as to the prisoner's behaviour towards captain Plowman.

Pimer. Anthony Holding was the man that bolted the door upon the captain, the prisoner was then on shore, but came on board that night, and resolved to go to sea, and after the captain's death took the command of the brigantine.

Queen's Counsel. If your excellency please, we will now read the first article of piracy, and see what the witness can say to it: which being read,

Pimer. There were five Portuguese on board that vessel.

Quest. Was the prisoner then in the command of the brigantine?—*Pimer.* The prisoner was commander of the brigantine during the whole voyage.

Quest. Did none of them you took, ask the reason why you took them?—*Ans.* No, not that I know of; our interpreter, John Twist, had a great deal of discourse with the men we had taken, and said they were Portuguese that were taken now, and so afterwards: this first vessel was a small fishing-vessel, out of which we took some fish and salt.

Art. 2. Quest. What do you know as to the second article?—*Ans.* I remember the taking of that brigantine, much in the same latitude with the other, but nearer the land; three white men, and two negroes were on board of her. This brigantine had some Brasil sugar and molasses, two white men and a negro entered themselves to go with us, our interpreter telling them we intended for the river of Plate, and to take the Spaniards; but afterwards as we took prizes, the two white men hid themselves, that their countrymen might not see them.

Art. 3. Quest. as before.—*Pimer.* I remember the taking of that vessel, the prisoner was then our commander, and went on board of her himself, she was taken in sight of land, and bound to Parnebeck.

Quest. Did not these people seem very much troubled that you should take them, you being Englishmen, and at peace with them?—*Ans.* They were told, to the best of my knowledge, that we were Frenchmen.

Art. 4. Quest. as before.—*Ans.* I remember the taking of this earthen-ware vessel within three leagues of the shore, she had three men on board her, came from Bayes, and bound to some neighbouring port; we gave the men their boat again, and they went to Bayes, the prisoner was then on board the tender that took her.

Quest. What tenders do you mean?—*Ans.* We made use of one or two of the first vessels; we took and put some of our men on board of her, and kept her the greatest part of the voyage.

Article 5, read, and Pimer being asked, saith, He remembers the taking of this boat within three leagues of the land, saw the flag of the castle at that time she was taken by the tender, Quelch and about twenty-four of our men on board her; we took two prizes this day; the boat we took at this time was staved by some of the company, as they told me, and afterwards sunk, the men we took on board the boat were all Portuguese, to the best of my knowledge.

Article 6, being read, Pimer being asked, saith, That this vessel was taken with the tender, and Quelch on board her: the negro

boy Joachim was taken out of this vessel, and about fifty pounds in money. The said negro boy being now examined, saith, there was a young man on board that had some money, and that it was in a small canvas bag.

Pimer. It was a canvas bag, to the best of my knowledge; there was some rice and farinoe, which we took out of her, and then let the men go away with their vessel after we had pilaged it.

Article 7, read.—Pimer. This vessel was taken near the tropic by Quelch in the tender; but I was then on board the brigantine Charles, the quarter-master had the money that was taken out of her, being some coined gold and some silver; this vessel was taken very near the shore, about two leagues from the place whence she came, and was bound to Raguineer. I saw her when they brought her out of the road, there was but one white man on board her, he said he was a Dutchman, and afterwards of Jutland: because the captain would not give him a share equal with the rest, he threatened he would inform against them; whereupon the major part ordered him to be sent on shore, giving him a gun, and some powder and shot; he could speak Portuguese very well: This vessel was taken near the island of Grandee.

Article 8, read.—Pimer. I was in the boat that took the gold brigantine, and commanded to do it by the captain's order; we had found some of the gold before the captain came on board; he took the gold and carried it himself on board the brigantine Charles; I saw it weighed about three days after: I saw the coined gold taken, it had a late date, some a year or two standing. The vessel came from Spirito Sancto, was taken within two miles of the land, and under sail, had on board fourteen men, all whites, two women of good fashion: There were ten hands in the boat with me when we took her; there was nobody on board her could speak any language I understood: We kept them on board our brigantine till next day, and then gave them their brigantine again.

Article 9.—Pimer. This ship was taken by our brigantine Charles, the prisoner at the bar, then our commander, being on board; the river of Plate was there six or seven leagues over: We gave her chase about two days, she fired three guns at us before she put out her colours, which were Portuguese; her ensigns was not up till within half an hour before she was taken; I was not on board her, but captain Quelch was, though many of our men had entered her before he did; she had about thirty-five men and twelve guns: When this ship fired upon us, we had English colours flying; we kept the ship for some time, and took out of her what is set forth in the ninth article. This ship came from a Portuguese castle, had been out about twenty-four hours, and was bound for Bayes.

President. Set up the negro boy who was taken in this ship; which being done, and ex-

amined by the interpreters, saith his name is Emanuel; that he was baptized; lived in the river of Plate; his master's name was Bontian; was a Portuguese, and captain of the ship that was taken by the brigantine, in the river of Plate; that he saw one of Quelch's company shoot his master with a pistol; that his master died immediately of that wound; that he heard say the words, 'kill him:' says, that there were no more men killed on board besides his master, only two wounded: Adds, that his dead master was thrown over-board immediately after his death; and says, that he saw the prisoner at the bar come on board the Portuguese ship, armed with a cutlass and five pistols.

After this, the interpreters were directed to examine both the negro boys, what their new masters bid them say of themselves when they came to New-England; to which the negro boys made answer, that their masters bid them say, they were not Portuguese, but Spanish negro boys.

Curia. Pimer, have you any thing further to offer to the Court relating to the prisoner?

Pimer. When we came about the latitude of Bermuda, the company ordered my journal to be taken from me, lest I had writ something that might do them damage; and refusing to tear out myself what captain Quelch would have had me, he tore it out himself, about five or six leaves, from October to February 20, that they committed their piracies. Captain Quelch made a speech, telling them, what they should say when they came on shore; as that we had met with some Indians, who had got great treasure out of a wreck, of whom we had our gold; and whereas we never had any gold from any Indians, it being but once that any of them were on board of us, and then we did not trade with them.

It being now late, the Court adjourned till four o'clock in the afternoon.

Monday, four o'clock in the afternoon: Clifford, the second witness, was sworn, and Parrot removed out of hearing.

Pres. You are now to acquaint her majesty's commissioners of this Court, of what you know relating to the prisoner at the bar, his being guilty of what he is charged with in those articles which you have heard read.

Clifford. Yes, Sir, I shall; and I will begin with the bolting the door upon our captain Plowman. Peter Roach, one of the company, kept the door by order of Anthony Holding, and some others that rose up to run away with the vessel. The prisoner at the bar was then on shore, but when he came on board, did not object against what was done, or what they were intended to do: Quelch then at that time had some command, but Holding was the ring-leader, and had the majority of the crew on his side. Pimer and myself offered to go to the captain, but the centinel, that guarded the door with a sword in his hand, would not let us.

Pres. Let the Articles be read, and let the evidence say what he can to each of them.

Art. 1, read.—Clifford. The first prize that we took any thing out of, was a fishing-boat, out of whom we took some fish and some salt, near Parnebuck, and that which induced me to think it was a Portuguese vessel, was, because it was taken near their own shore: but I do not understand the Portuguese language.

Art. 2, read.—Clifford. This was the second vessel we took, a brigantine that we carried with us during the voyage, Quelch was then our commander, and went on board the said vessel himself.

Art. 3, read.—Clifford. I remember well the taking of this vessel by Quelch himself; we carried a pilot along with us, who told us they were Portuguese. John Twiss, who is since dead, was the linguister's name. One of the prisoners, who was first taken, understood a little English by this time, and then asked what was the reason that we, being English, took the Portuguese. And one of our men, named Isaac Johnson, the Dutchman, was whipt, for telling them we were English.

Art. 4, read.—Clifford. I remember the taking this vessel very well, she was taken by one of the prize vessels; I saw the earthen-ware that was taken; we were all along, during the captions, in sight of the shore and near Mora.

Art. 5, read.—Clifford. I remember the taking of this boat by captain Quelch; the men that we took were Portuguese, as we were told by our interpreter. I do not remember any of the vessels we had yet taken had colours.

Art. 6, read.—Clifford. I saw the bag of moncy, but cannot tell how much there was of it. The negro boy, Cuffee, was then taken; at first he waited on the whole ship's crew, but then was sold at the mast to Benjamin Perkins: this vessel was taken by a tender, with about 50*l.* all white money.

Art. 7, read.—Clifford. I remember this vessel was taken by our tender, near the island of Grandee; I saw the sugar brought on board (the brigantine Charles) and some of the gold; there was only one Dutchman in this vessel, who entered himself with us for the voyage. But because the company voted he should not have a full share, he threatened, when he came on shore, what he would discover; upon which they voted him to be put on shore, captain Quelch being present at their vota.

Art. 8, read.—Clifford. I was not in the boat that took this brigantine: I saw the hundred pound weight of gold dust on board the brigantine Charles, which captain Quelch shared among us. There might be about fifteen or sixteen men, with two women, on board the brigantine that was taken, she came from Spirito Sancto, and was bound for Rivo de Januero, she was taken by our own pinnace, with half a score men, the prisoner not in it.

Art. 9, read.—Clifford. I was on board this ship when she was taken, and so was the pri-

soner at the bar. It was thought the captain of her was wounded before we boarded her; but there was some dispute among the men, which of them it was killed him; captain Quelch commanded the brigantine when we took her. We took ten or twelve barrels, and a pipe of beef in her, and sundry other things. I saw such an enigma as that which was shewn in court in the forenoon, on board the ship. We took also that negro boy, who was in the court in the forenoon.

Then Clifford was set by, and Parrot, the third witness for the queen, was brought in.

Pres. Parrot, You are now to give an account to her majesty's commissioners of this court, of what you know relating to the prisoner at the bar, his being guilty of what he is charged with; in those Articles which you have heard read.

Parrot. I can say nothing as to the prisoner's carriage towards capt. Plowman, but the cabin door was bolted upon him, and I believe, was a contrived thing before we went off of the land; the prisoner at the bar was not on board till night. When the captain was thrown overboard, then he took upon him the command, and ordered us to sail to sea.

Art. 1, read.—Parrot. We were not in sight of land, but believe the vessel to be Portuguese, being upon the Brasil coast.

Art. 2, read.—Parrot. I saw the captain of this vessel, which was a brigantine; she was taken by the little fishing shallop, commanded by capt. Quelch: I was afterwards on board her, and saw the sugar brought on board the brigantine Charles.

Art. 3, read.—Quest. Do you remember the caption of this vessel?—*Parrot.* I remember it very well; capt. Quelch was on board the vessel that took her; we kept her two or three days.

Art. 4, read.—Quest. What do you know concerning the taking of this vessel?—*Parrot.* I remember the vessel with earthen-ware; it was an open vessel, taken in sight of land. There was melasses in the pots; there were men and women on board her, whom we took on board the brigantine Charles. We lost the boat's rudder, so that she could not sail, wherefore we took her in tow; and taking out what we had need of, we then sunk her. Captain Quelch and I were in the brigantine that took this vessel.

Art. 5, read.—Quest. Do you remember the caption of this vessel?—*Ans.* Yes; I had some of the silk taken in this vessel; so much as would make me a pair of breeches. We took all these prizes after the first fishing boat, in sight of the shore, as near as I can remember.

Art. 6, read.—Quest. as before.—*Parrot.* I remember this caption; the prisoner at the bar was at it; they were Portuguese that were on board. I was put on board that boat that Cuffee was taken out of; and out of that boat I took about twenty or thirty pounds of Portugal money. She had rice and farins in her, which we took out of her.

Art. 7, read.—Quest. as before.—Parrot. I believe this was the brigantine we took at an anchor before the town. I went to fetch her myself; capt. Quelch went over with us; we took four or five chests of Brasil sugar; all the men had ran away, and left the brigantine, only one man, who at first said he was a Dutchman, but afterwards we found he was a Jutlander.

Art. 8, read.—Quest. as before.—Parrot. Quelch did not take this vessel; she was taken by our boat, but I was not in the boat that took her. Capt. Quelch, the quarter-master, and carpenter, shared the hundred pound weight of gold dust among us.

Art. 9, read.—Quest. as before.—Parrot. I was present at the caption of this ship: capt. Quelch was the commander of the brigantine; we saw the said ship two or three days before we took her. I saw the colours, that were in court to day, first on board our brigantine. We took beef, sails, shot, powder, four guns, and an hundred pieces of eight, and odd; and a negro boy, whom one George Norton bought. The captain was thrown over-board before I came on board; he was said to be killed by Scudamore, our cooper.

Pres. And was the prisoner at the bar captain of your brigantine during all this time that you took these several vessels you have mentioned?

Parrot. Yes; and a little before we came in, it was agreed that we should say, we took our gold out of a vessel, that ran ashore about Port Maranto, but that the Indians were first at work upon her; Anthony Holding first called us upon deck; Pimer told me, they had torn out part of his journal, and that they ordered every one to throw over-board whatever Portuguese prints they had.

Pres. Pimer, or Clifford, have you any thing further to offer?

Clifford. I saw the captain take Pimer's journal out of his hands, and order it to be torn out, and all Portuguese prints to be thrown over-board. We were all upon the deck, when it was concluded we should say, we had taken the gold out of some wreck that the Indians had acquainted us with.

Pimer. I saw the man whipt, that told them the brigantine belonged to New England. The captain and quarter master ordered him to be whipt; Anthony Holding was the man who whipt him. I was down below when the agreement was made, what we should say when we came ashore, and was abused by Peterson when I came upon deck, because I was not present.

Mr. Newton. May it please your excellency, &c. We shall now (though there be no necessity for it) prove, that long before, and at the time that these several piracies, &c. were committed, her sacred majesty and the king of Portugal were entered into a strict alliance, &c.

Upon this, two London Gazettes, dated in the months of May, and July, 1703, were

produced, and two paragraphs were read, viz.:

“Whitehall, May 21. The Treaty of Alliance, between the Emperor, her Majesty, the king of Portugal, and the States General, which has been so long talked of, was signed at Lisbon the 16th instant, N. S. and is brought hither by an express.

“Whitehall, July 14. Yesterday the ratification of the treaties, lately concluded at Lisbon with the king of Portugal, passed the great seal.”

Pres. Gentlemen of the queen's counsel, Have you now done on the queen's part?

Queen's Counsel. Yes, sir; we have gone through the course of the queen's Evidence against the Prisoner at the bar.

President. Capt. Quelch, this court is now ready to hear what you have to offer for yourself.

Quelch. My counsel informs me, that he hath sundry matters of law to offer to your excellency on my behalf.

Pres. Mr. Meinzies, if you have any matters of law to offer in behalf of the prisoner at the bar, we would hear it.

Mr. Meinzies. I have several matters of law to offer in behalf of the prisoner, &c. but before I mention them, I pray that I may not be thought any wise to justify or extenuate the horrible crimes that are charged upon the prisoner; for they are such, that all the world must needs detest and abhor: But, as it is equal justice to acquit the innocent, as to condemn the guilty, so if the evidence which has been produced against the prisoner at the bar, do not amount to make him guilty of the several articles he stands charged with, this court must needs acquit him.

The first objection I make to the evidence, is what was last produced, I mean the Gazettes.

Mr. Newton. The Gazette is published by authority, and has been often allowed as good evidence.

Pres. The stress of this matter does not lie upon the alliance. Suppose they were not in alliance with the crown of England, yet if there was no war between the two crowns, the prisoner at the bar, with his company, had been guilty of piracy. Kidd was hanged for robbing the Great Mogul.

Mr. Meinzies. But may it please your excellency, suppose we should bring proof, that the gold dust imported in the brigantine Charles, and now shewn in court, to be Spanish gold dust.

Pres. Can you prove it?

Mr. Meinzies. We have a goldsmith here, whom I desire may be sworn.

David Jess sworn, says, That he has seen a great deal of the gold dust that was brought in by these pirates, but hath not so much skill as to tell, whether it be Spanish or Portuguese dust, and believes nobody else can distinguish one from the other.

Pres. You attempt a very vain thing, for had the dust been dug in Mexico, yet if our friends have it in keeping, it is piracy to take it from them. Besides, what answer can you give to all the coined gold shewn in court, with the other things, which appear plainly to be Portuguese?

Mr. Meinzies. The next thing, in point of law, that I would offer upon the evidence against captain Quelch, is, That the several witnesses differ very much as to the places where the several vessels were taken, and as to the number of persons that were on board those vessels.

Pres. That difference is very immaterial; for it matters not what number of Portuguese there were on board, so there were any. And as to difference of place, or latitude, two artists may differ in their observations at the same time; and you have heard the reason why one of the witnesses cannot be so positive as to his latitudes, viz. because captain Quelch cut out his journal; but he, and all the rest, are positive it was done upon the coast of Brasil, in their very harbour, and in sight of their forts and castles.

Mr. Meinzies. It is plain, that none of the witnesses understand the Portuguese language; and it ought to be very positive evidence to take away a man's life.

Pres. I believe her majesty's commissioners, now present, will think they have very positive proof; however, they are the judges of that.

Mr. Meinzies. The next thing in point of law, that I would offer in behalf of captain Quelch, is, that whereas, in the last article, he is charged with the murder of the Portuguese captain; it is well known he was not the man that did the fact. Now, by the civil law, only he that gives the stroke, wound, or the like, is the murderer: so says Molloy, in his treatise De Jure Maritimo, in his chapter of piracy.

Mr. Newton. But the same book says, that if the common law have jurisdiction of the cause, all that are present, and assisting at such a murder, are principals. Now the statute 23 Hen. 8, makes all piracies, robberies and murder upon the high-seas, triable according to the rules of the common law, as if they had been committed upon the land.

Mr. Meinzies. May it please your excellency, I have yet one thing further to offer against the queen's witnesses in this matter: that is, That they are not competent witnesses, having not had her majesty's pardon.

Mr. Newton. It has never been thought convenient to give approvers their pardon, until they have actually convicted their accomplices; lest, after their having their pardon, they may refuse it; although after they have convicted those they approve, their pardon is *ex debito jure: ita*. This is the opinion of my lord Coke in his Pleas of the Crown, and so has the practice been since.

Mr. Meinzies. I have but one thing more,

may it please this honourable court, to offer in behalf of capt. Quelch, that is upon the late act of parliament made in the late reign, which appoints this honourable court, for the words of it are, "That the proceedings of this court, in examining, trying, and condemning pirates, shall be according to the civil law, and the methods and the rules of the Admiralty."

Now, by the civil law, which is founded upon the reason and custom of nations, no accomplice can be a witness, being equally guilty with those he accuses. So says Wiseman, doctor of the civil laws, in his Treatise of the Civil Law, chap. 8, page 73. And in the same book, touching examining witnesses upon oath, page 114, and 119. And the same author observes, that among the Romans, when a man was criminally accused, they were so tender of the lives and safety of their people, that to convict a man by proof, was no easy, but a very difficult thing, &c. The allowing these witnesses will be inconsistent with the act of parliament itself, whereby the persons accused have not only the benefit of cross-examining the witnesses, but also of bringing evidences for their own vindication; and it may be thought as proper to bring some of their own company for their clearing, as the other evidences for the accusing them. As to witnesses in piracy, see Coke's Institutes, part 3, page 24, 25. As to the admiral's power of jurisdiction, Coke's Institutes, part 4, page 134; and Proceedings on Piracy, page 147, 154, and part 3, page 119, 192.

Queen's Advocate. What Mr. Meinzies says, may it please your excellency, of the civil law, is so far certain, that the witnesses in cases of piracy, by the methods of the civil law, must be such as are indifferent, and saw the fact committed, but no ways concerned in the doing of it: but this method of trying of pirates, the statute of Henry 8, complains of as too strict, and tending rather to let pirates escape, than be brought to justice; and does therefore perfectly reject it, and does enact, that for the future, all piracies, &c. committed upon the high-seas, shall be tried according to the course of the common law, as if they had been committed upon the land.

Now it is very well known, that by the common law, accomplices are many times admitted to be approvers against those that were partners with them in their crimes; and, indeed, in many cases, there happens to be no other way to bring criminals to their just punishment, but by singling out some of their company, that may be the least guilty, and make use of them to convict the rest.

Mr. Meinzies. I do not take myself to be thoroughly answered by Mr. Advocate, as to what I offered in the last place; for I take the case of pirates that may be tried in England, upon the statute of Henry 8, to differ very much from the case of pirates that are tried in the plantations, by virtue of the new statute: for, admit that in the former case,

accomplices or approvers may be allowed as witnesses; since pirates that are tried upon that statute are allowed a jury, yet in the latter case, those that are tried for piracy in the plantations, being deprived of the benefit of a jury, the statute seems to design an equivalent to a jury, by directing the commissioners of such courts, to proceed according to the civil law, and method of the court of admiralty.

Queen's Advocate. As to the method of the court of admiralty, it is now above 160 years since the statute of Henry 8, was made; a term long enough to make a method of any court; for ever since that time hath the court of admiralty proceeded in cases of piracy according to the rules of the common law. And then, as to that other part of the new statute, relating to piracy, that says, this court is to proceed according to the civil law; with submission, we understand it to be of the summary way of proceeding by the commissioners, and depriving the prisoner of a jury; for it is most certain, that the late statute against piracy doth strengthen and establish the statute of Henry 8. And it would be very odd to suppose, that what the first act of parliament in these cases had rejected, and condemned, the method of the civil law, in the trial of pirates, &c. the second act of parliament should be reconciled to that method, to restore and set it up in the plantations, especially when the title of the new act is an act 'For the more effectual suppression of piracy,' &c.

Pres. Capt. Quelch, if you have any thing further to offer for yourself, or if you would cross-examine the witnesses, the court will hear you.

Quelch. I desire Pimer may be asked, whether there was any bulk upon the captain's cabin-door, when we first sailed?

Pimer. It was fastened with a marlin-spike.

Quelch. Was I then on board?

Pres. The witnesses have answered as to that already.

Quelch. I desire the witnesses may be asked, whether they know the gold dust to be Portuguese dust?

Pres. This is not material, capt. Quelch.

Quelch. I desire Pimer may be asked, how he knows the first prize was taken the 15th of November?

Pimer. I say it was on or about that day; I set down the very day in my journal, but it was torn out; I cannot now swear to a day.

Quelch. How many tun was the second vessel that was taken?

Pres. Capt. Quelch, this is not cross-examining the witness, but rather examining him over again: if you would say any thing to the purpose, you should acquaint this court, where you took those quantities of gold dust, and coined gold, those negroes, &c. that have been shewn to this court: if they were taken from the French, or Spaniards, let us see some of them here, or some evidence of their being so taken.

Queen's Advocate. Where was gonthongh

the course of the queen's evidence against capt. John Quelch, the prisoner at the bar; and besides what his accomplices have declared against him, the circumstances of this matter are so many, as put it beyond all question, but that the prisoner at the bar is guilty of what he stands charged with; for upon his trial, we have seen the king of Portugal's ensign flying, his coin current, his servants, I mean his negroes waiting, his merchandises exposed to public view, inasmuch, one would think that we were in Portugal itself. Upon the whole matter, we must leave it to her majesty's honourable commissioners of this court to consider, whether capt. John Quelch is not guilty of the several piracies, robbery, and murder, that he stands charged withal.

Ordered, That the Court be cleared immediately.

After an hour's consideration, the Court was opened again.

Pres. Capt. John Quelch, it is now six days since this Court first sat, by her majesty's special command to myself, and these gentlemen commissioners, before whom you have been indicted upon, or charged with several articles of piracies, robberies, and murder; and you have been heard thereupon. This Court hath weighed and considered the several evidences that have been produced on her majesty's behalf against you, and your own allegations for you; and upon the whole, have found, and adjudge you Guilty of the several articles of piracy, robbery, and murder, where-with you are charged, and have agreed that sentence should be pronounced against you for the same accordingly.

Register. Make proclamation of silence.

Crier. All manner of persons are commanded to keep silence while judgment is giving, upon pain of imprisonment.

And then Sentence was pronounced by the President of the Court, as the law directs in cases of piracy, &c.

Then the Court adjourned until nine o'clock the next morning.

Tuesday, June 20, 1704, a. m.

The Court being opened, and proclamation made, three negroes, belonging to captain Quelch's company, were set to the bar, viz. Caesar-Pompey, Charles, and Mingo, and arraigned upon the articles of piracy, &c. aforesaid, (*mutatis mutandis*) and severally pleaded, Not Guilty.

Queen's Advocate. May it please your excellency, and the rest of the honourable commissioners of this Court, the three prisoners now at the bar are of a different complexion, it is true, from the rest that have been arraigned upon these articles; but it is very well known, that the first and most famous pirates that have been in the world were of their colour; and negroes, though slaves, are as capable of taking away the lives and estates of mankind, as any freemen in the world;

and if we prove that these fellows have been as active in all this matter as the rest of the company, we doubt not but you will think, and adjudge them equally guilty with the others.

Pres. Pimer, look upon the prisoners now at the bar, and acquaint the court, whether they were on board the brigantine Charles during your late voyage, and how they behaved themselves while they were on board.

Pimer. (Looking on the prisoners.) These three negroes were on board during the whole voyage, but were not active, nor did they any thing but as they were commanded: Cæsar-Pompey and Charles were the cooks of the brigantine, and sounded the trumpet when they were commanded, but handled no arms; neither did Mingo.

Clifford and Parrot being examined, affirmed the same thing.

Pimer farther added, that he knew Mingo to have been capt. Plowman's slave, and that he brought him from Guinea.

Mr. John Colman informed the court, also, that the other two negroes, Cæsar-Pompey and Charles, were his brother colonel Hobby's slaves: that they did not run away from their master, but were forcibly carried away by capt. Quelch and company.

Upon this, the Court being cleared, in less than half an hour was opened again, and the three negroes aforesaid brought in.

Pres. Cæsar-Pompey, Charles, and Mingo, you have been charged with several articles of piracy, &c. to which you have pleaded, Not Guilty; this court has considered of the matter, and declare you to be Not Guilty.

Whereupon they were ordered upon their knees, &c.

After this, Mr. Meinziez moved for some farther time for the rest of the prisoners; and then the Court adjourned until three o'clock afternoon.

Tuesday, June 20, 3 p. m.

The Court was opened, and proclamation made: then Lambert, Wilde, Scudamore, Roach, Perkins, and James, were set to the bar, and after some little time spent, John Lambert, and Charles James, desired that they two might be tried by themselves; upon which the Court ordered the rest to be taken from the bar; and then the Court proceeded to examine the witnesses on behalf of the queen against the prisoners.

Pres. Pimer, What do you know as to Lambert's being concerned in confining capt. Plowman, and altering the voyage?

Pimer. I cannot say that either he or James were concerned in bolting the cabin door, but they were both on board when we came to sail; and though they declared they were unwilling to go to the southward, yet after capt. Plowman's death, there was a consultation held, and both Lambert and James were at it; and I know nothing to the contrary, but that they consented with the majority.

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Court. Please to let the Articles be read to the witnesses, and then ask, how far Lambert and James were concerned in all or any of them.

Art. 1, read.—Witnesses. Lambert and James were on board when we took that vessel, and so at the second and third, fourth and fifth.

Pres. And as active as any of the rest?

Witnesses. Yes.

Art. 6, read.—Witnesses. They were both on board our brigantine when this was done, and assisted at the seventh and eighth captions.

Art. 9, read.—Witnesses. Lambert was on board the tender, above a mile off at that time, but James was one that boarded the ship.

Pres. Lambert and James, would you ask the witnesses any questions?

Lambert. I was sick down in the gun-room when they bolted the door upon the captain, and never gave my consent to go to the southward. What I did, I was forced to.

Pres. Pimer, did you ever hear Lambert protest against any of these piratical actions, or did he desire to be set on shore?

Pimer. He did desire to be set on shore; but it was before the captain went from Nantasket. I never heard any of them manifest their dislike as to our going to Brasil, but were as forward as the rest were.

Pres. Pimer, do you know whether Lambert and James had their share of the treasure?

Witnesses. They had each of them their shares.

Pres. What say you, James?

James. I was constrained against my will to go to sea, and was deluded by false pretences.

Pres. Pimer, what say you as to James?

Pimer. I cannot say that he said any thing of what he pretends he said, but that he was unwilling to pilot the ship, which I judged was, because he was averse to the voyage.

Pres. Did you hear Lambert advise the captain to go off from the coast of Brasil against some known enemy?

Witnesses. No, we never heard him give any such advice.

Pimer. I have heard him several times declare himself against the voyage, but never express himself sorrowful for, or protest against any of the piracies, nor James neither.

Pres. You have brought in a very considerable treasure with you, whereof each of you have had your shares: whence had you it? Where are the French and Spaniards you took it from?

James. It was the commander did it; and we were not on board the vessel that took the gold dust. The reason we accepted of our shares was, because otherwise they would have killed us, or set us upon some desolate island, where we should have been starved.

Lambert. I was only at the taking of two of the vessels; and you may be sure I would never have come home in the vessel, if I had thought I had done any thing amiss, or that I should have been arraigned for.

The prisoners having nothing farther to offer,

the Court was ordered to be cleared, and in some small time after opened again, and the prisoners set to the bar.

Pres. John Lambert, and Charles James; you have here been arraigned upon several articles of piracy, &c. committed by you (with others) upon the subjects of her majesty's good ally, &c. to which you have pleaded, Not Guilty: you have been heard thereupon, what you had to say for yourselves: this Court having considered the evidence for the queen against you, and your own allegations for you, do adjudge each of you guilty of the several articles of piracy, &c. What have you to say, why sentence of death should not be pronounced against you?

Ans. We must leave it to God and your honours: we are as innocent as the child unborn of the things we are charged withal.

Pres. Hearken to the sentence of the Court against you.

Then Sentence was pronounced by the President of the Court, as the law directs in cases of piracy, &c.

After this, Benjamin Perkins, William Wille, Christopher Scudamore, and Peter Roach, were set to the bar.

Ordered, that Scudamore be tried by himself, and the rest taken from the bar.

The several Articles being read to the witnesses, they all swore, that Scudamore was with them all the voyage; that he was very active in every thing, and that he had his share of the gold.

Queen's Advocate. May it please your excellency, we shall farther prove against the prisoner at the bar, that he was the only man who gave the mortal wound to the captain of the Portuguese ship.

Pres. Pimer, what do you know as to that?

Ans. There was a controversy on board our brigantine, concerning who it was that killed the captain of the Portuguese ship, Scudamore saying, it was he, and another said, it was he that did it.

Pres. Set up the negro boy who was taken in that ship.

The negro boy being set up, was bid to look upon the prisoner, and say, whether it was he who killed his master?

And the interpreters reported to the Court, that the negro boy said, that was the man who killed his master, and that he killed him with a petard; that his master fell down immediately, and did not speak a word.

Pres. What say you, Scudamore?

Scudamore. I did not kill the captain of the Portuguese ship.

Pres. Where is your gold?

Scudamore. I cannot tell: what I said upon my first examination about it, is false.

Pres. Have you any thing farther to say?

Scudamore. No.

After this, a Petition was given into Court, signed by several of the prisoners, viz. William Wills, John Dorothy, Dennis Carter, Peter

Roach, Francis King, John Pitman, Richard Laurence, Benjamin Perkins, Erasmus Peterson, John Carter, Nicholas Richardson, John King, James Austin, William Jones, and Charles King; praying that they might withdraw their several pleas of not guilty, and be admitted to confess and plead guilty, hoping thereupon for the queen's mercy, &c.

Upon which they were each of them asked, whether they set their hands to that petition? And they all severally owned they did.

Pres. You who have here subscribed this petition, must be told, that your commander, and some others of your company, have had their trials, and are found guilty: we do not take your pleading guilty now to be any submission, nor will it of itself entitle you to mercy. This Court can make no bargain with you: if any of you can be distinguished, as being forced away, professing against the voyage, sickness, or the like, this Court will consider of it, so far as is proper for them.

Register. You must ask each of the prisoners, one by one, whether they are guilty, or not guilty, of what they are charged with?

Register. How say you, Richard Lawrence, are you guilty, or not guilty?

Richard Lawrence. Guilty.

So said Erasmus Peterson, John Carter, Francis King, Peter Roach, &c. the rest of the petitioners.

After this, John Miller was set to the bar.

And the queen's witnesses being examined about John Miller, made oath, that he was on board the brigantine Charles during the voyage, and did not protest against going upon the coast of Brasil; that he was in health, and serviceable at the time of every capture, as the rest were, and had his share of the gold, &c. that was taken.

Miller saying he was sick some part of the voyage,

Witnesses. He was so, but was well again before we made our first capture. (Article 4th read.) He was at this capture well in health, and consenting to it; so at the 5th and 6th articles, and at the taking of the prize in the 7th article. (Article 8th read.) He was then on board the tender that took the gold vessel. (9th Article read.) He boarded that ship with sword and pistol.

Pres. What have you to say for yourself? you have heard what has been proved against you.

Miller. I was at the taking of the ship and a bark; but did not know what they were, for they shewed no colours.

Pres. Pimer, did you ever hear any of your company say, as if Miller was one of Avery's crew?

Pimer. I heard some of them say, they heard him say so himself; so said Clifford.

Miller. I was none of Avery's company.

Pres. Set John Templeton to the bar, which was done; and the queen's witnesses being sworn, deposed, that John Templeton was on

board the brigantine all their late voyage, and that he did sometimes bear arms; but being not above fifteen years of age, they allowed him but half a share, which his master was also to have: that he was for two months together cook on board the tender, but being but a boy, he had no vote with the rest of the company, but was ordered as every one pleased.

Mr. *Henry Franklyn* being sworn, deposes, that the prisoner at the bar was his servant, and that he put him on board the brigantine Charles as such, upon captain Plowman's request: that he saw his boy the Sunday evening after the pirates came in, and that his share of gold was never in his own keeping, for that the company would not trust him with it, but he received it for him.

Pres. Templeton, what have you to say?

Templeton. I have nothing to say, but that my master sent me out, and I knew not whither we were going.

And after this, William Whiting was set to the bar, and charged with the same articles of piracy, &c. who thereupon pleaded Not Guilty.

And Pimer and the rest of the witnesses being examined concerning him, informed the Court, that from the first time of their coming upon the coast of Brasil, until their coming home, Whiting was sick, and never bore arms, being utterly incapable of doing any thing.

Pres. Had he any share?

Witnesses. He had sixteen ounces allowed him by the company; but they told him it was not for his deserts, but out of their generosity that they gave it him.

Pres. Did he express any dissatisfaction at what was done?

Witnesses. No, not that I heard; but he was taken sick on the beginning of November, and came very sick ashore.

S. Sewall, esq. Whiting, upon his examination, told me, that he had been acquainted with captain Plowman at New York, and that it was out of respect that he had for him that he came hither, and went the voyage.

Mr. *William Clark* sworn, deposed, That captain Plowman sent for Mr. Colman and himself, and recommended the prisoner to them as a person fit to be clerk, or secretary on board the ship, and to take an account of all their affairs; and that captain Plowman's letters to them were written by the prisoner; and when he came ashore, he was in a very low condition; but said, when he was able, he would do them all the service he could.

Pimer. I know of his writing letters from captain Plowman.

Pres. Would you say any thing yourself, Whiting?

Whiting. I never was in any action, being sick all the while we were on the coast of Brasil, and did not discover their piracy when I came on shore, because I was then very sick, and like to die.

The Court was ordered to be cleared, and then adjourned till nine o'clock next morning.

Wednesday, June 21, a. m.

The Court being opened, and proclamation made, John Templeton and William Whiting were set to the bar.

Pres. John Templeton, this Court has considered your case, and have been very indulgent to you in regard of your youth, and have adjudged you to be Not Guilty — And you also, William Whiting, the Court has considered of your case, and have adjudged you also to be Not Guilty.

Upon which each of them upon their knees thanked the Court, &c.

After which, Christopher Scudamore and John Miller were set to the bar.

Pres. Scudamore and Miller, upon hearing the queen's evidences against you, and your own allegations for yourselves; this court doth adjudge you both to be Guilty of what you have been charged with. What have you to say, why sentence of death should not pass against you?

Scudamore. I had no hand in altering the voyage, nor killing the Portuguese captain.

Miller. I was never active after the voyage was altered.

Pres. Attend to the sentence of this Court against you.

Then sentence was pronounced by the President of the Court, as the law directs in cases of piracy, &c. against the said Scudamore and Miller.

Ordered, That all the rest of the prisoners that pleaded guilty, be brought to the bar.

Pres. Set seven of them to the bar.

Then William Wilde, John Dorothy, Dennis Carter, Peter Roach, Francis King, John Pitman, and Richard Lawrence, were set to the bar.

Pres. You, and each of you, have been arraigned upon several articles of piracy, &c. to which you have severally pleaded guilty. What have you to say, why sentence of death should not pass upon you?

Ans. Nothing.

Pres. Then attend to the sentence.

Then sentence was pronounced by the President of the Court, as the law directs in cases of piracy, &c. against the said seven persons last named.

Pres. Set the rest to the bar.

Benjamin Perkins, Erasmus Peterson, John Carter, Nicholas Richardson, John King, James Austin, William Jones, and Charles King, were set to the bar.

Pres. You, and every of you, have been arraigned upon several articles of piracy, robbery, and murder, unto which you, and each of you, did plead guilty. What have you to say, why sentence of death should not pass against you for the same?

Ans. We leave ourselves to God Almighty.

Pres. Attend then to the sentence.

Then Sentence was pronounced by the President of the Court, as the law directs in cases

of piracy, &c. against the eight persons last named.

And then the prisoners were all remanded to prison, and the officer charged to take great care of them.

On Friday, June 30, 1704, John Quelch, John Lambert, Christopher Scudamore, John Miller, Erasmus Peterson, and Peter Roach, were executed in Charles River, between Broughton's warehouse and the Point.

AN ACCOUNT OF THE BEHAVIOUR, and LAST DYING SPEECHES, of the six Pirates that were executed on Charles River, Boston Side, on Friday, June 30, 1704, viz. Captain John Quelch, John Lambert, Christopher Scudamore, John Miller, Erasmus Peterson, and Peter Roach.

On Friday, the 30th of June, 1704, pursuant to orders in the deal warrant, the aforesaid pirates were guarded from the prison in Boston, by forty musketeers, constables of the town, the provost-marshal, and his officers, &c. with two ministers, who took great pains to prepare them for the last article of their lives. Being allowed to walk on foot through the town, to Scarlet's wharf, where the silver oar being carried before them, they went by water to the place of execution, being crowded and thronged on all sides with multitudes of spectators.

At the place of execution, they then severally spoke as follows, viz.

1. Captain *John Quelch*. The last words he spoke to one of the ministers at his going up the stage, were, "I am not afraid of death; I am not afraid of the gallows; but I am afraid of what follows: I am afraid of a great God, and a judgment to come." But he afterwards seemed to brave it out too much against that fear: also when on the stage, first he pulled off his hat, and bowed to the spectators, and not concerned, nor behaving himself so much like a dying man as some would have done. The

ministers had, in the way to his execution, much desired him to glorify God at his death, by bearing a due testimony against the sins that had ruined him, and for the ways of religion which he had much neglected. Yet now being called upon to speak what he had to say, it was but thus much: "Gentlemen, it is but little I have to speak: what I have to say is this, I desire to be informed for what I am here; I am condemned only upon circumstances: I forgive all the world: so the Lord be merciful to my soul." When Lambert was warning the spectators to beware of bad company, Quelch joining, "They should also take care how they brought money into New-England, to be hanged for it."

2. *John Lambert*. He appeared much hardened, and pleaded much on his innocency; he desired all men to beware of bad company; he seemed in a great agony near his execution: he called much and frequently on Christ for pardon of sin; that God Almighty would save his innocent soul: he desired to forgive all the world: his last words were, "Lord forgive my soul! Oh, receive me into eternity! Blessed name of Christ! Receive my soul."

3. *Christopher Scudamore*. He appeared very penitent since his condemnation; was very diligent to improve his time going to, and at the place of execution.

4. *John Miller*. He seemed much concerned, and complained of a great burden of sins to answer for; expressing often, "Lord! What shall I do to be saved?"

5. *Erasmus Peterson*. He cried of injustice done him; and said, "It is very hard for so many men's lives to be taken away for a little gold." He often said, "His peace was made with God; and his soul would be with God;" yet extreme hard to forgive those, he said, wronged him: he told the executioner, "He was a strong man, and prayed to be put out of misery as soon as possible."

6. *Peter Roach*. He seemed little concerned, and said but little, or nothing at all.

Francis King was also brought to the place of execution, but reprieved.

437. The Trial of JOHN TUTCHIN, at the Guildhall of London, for a Libel,* entitled, 'The Observator:' 3 ANNE, A. D. 1704.

Nov. 4, 1704.

The QUEEN against JOHN TUTCHIN.

London, ss. THE Information sets forth, "That the defendant being a seditious person, and a daily inventor and publisher of false news, and horrible and false lies and seditious

* See 1 Salk. 51. Ld. Raym. 1061. Holt, 424. 6 Mod. 268. See, too, the modern trials for libels (particularly that of the dean of St. Asaph, A. D. 1784,) and the stat, 32 G. 3, c. 60; also a Note to vol. 8, p. 34.

libels, and a perpetual disturber of the peace of this kingdom; and wickedly and maliciously devising the government, and administration of justice under our lady the queen, to traduce, scandalize and vilify; and our said lady the queen, her ministers and officers, to bring into suspicion, and the ill opinion of her subjects; the 30th day of May, in the first year of her majesty's reign, at London, &c. did falsely, seditiously and scandalously, write, compose and publish, and cause to be written, composed and published, a certain false, malicious, seditious and scandalous libel, entitled, *The Observator*.

In which libel (of and concerning this kingdom, and the officers and ministers of the queen) are contained (*inter alia*) as follows:

“ ‘ No. 11. *Saturday, the 30th of May, 1702.*”

“ ‘ At the same time we’ [the subjects of this kingdom meaning] ‘ consider the French king’s success in his bribery and corruption, we ought to lament the sad state of our own country’ [the kingdom of England meaning] ‘ which affords so many instances of treachery. If we may judge by our national miscarriages, perhaps no nation in Europe has felt the influences of French gold more than England: and worthy it is our greatest lamentation, that our dear country’ [meaning this kingdom] ‘ should be thus weakened by men of mercenary principles; when countries inferior to us in strength and riches, are secured from attempts of this nature only by the fidelity of their people. What is the reason that French gold has not affected Holland as well as England; but that their ministry is such as is entirely in the interest of their country, and altogether incorruptible? They prefer men that are knowing in their posts, and are active in business: when, in England, we find out offices for men, not men for offices. And a title of honour gives a man a title to a great employment he is altogether ignorant of. By this, and by preferring of men by interest and favour, has the excise, the customs, and other branches of the revenue intolerably sunk: and by this means has the navy of England, our chief support, been hitherto perfectly bewitched. And can Lewis spend his money better, than in getting men into offices in England, who are either false, or ignorant in the business, or are his friends?’

“ ‘ No. 23. *Saturday, the 11th of July, 1702.*”

“ ‘ That the defendant afterwards, the 11th of July following, another false, malicious, seditious, and pernicious libel, entitled, *The Observer*, falsely, maliciously and seditiously, did write, compose and publish, and caused to be written and published: in which libel (of and concerning the government of this kingdom, and the power of the people of this kingdom) are contained (*inter alia*) as follows:

“ ‘ And this is a prerogative of singular advantage to the people of England; in that their representatives are the judges of the mal-administration of their governors; that they can call them in question for the same, and can appoint such to wear the crown’ [meaning the crown of this kingdom] ‘ who are fittest for government: which they have often done, and indeed which is the privilege of all free people, who are authorized by the laws of God and nature, to chuse their own governors.’

“ ‘ No. 19. *Saturday, the 12th of June, 1703.*”

“ ‘ That the defendant afterwards, the 12th of June, in the 2nd year of the queen, did write and publish, and caused to be written and pub-

lished, another false, scandalous, and seditious libel, entitled, *The Observer*. In which said libel (of and concerning the royal navy of this kingdom, and the government of the said navy) are contained (*inter alia*) as follows: ‘ Take one time with another, the mismanagements of the navy’ [meaning the royal navy of this kingdom] ‘ have been a greater tax on the merchants, than the duties raised by parliament: we never had a better navy, but the wisdom of the managers thereof is like a bottomless pit, past fiddling out.’

“ ‘ No. 20. *Wednesday, the 16th of June, 1703.*”

“ ‘ That the defendant afterwards, the 16th day of the said June, did write and publish, and caused to be written and published, another false, scandalous and seditious libel, entitled, *The Observer*. In which was contained (*inter alia*, of the said royal navy, and the officers of the said navy) as follows: ‘ What avails it a man of learning and parts, to qualify himself for the service of his country on the ocean? If he has knowledge enough to advise Neptune himself, if he has no interest, he shall have no preferment. How much does it look to our nation’s disadvantage, to have men in eminent stations in the navy, who have not so much as an idea, a notion, a thought of naval affairs? To have men to superintend the building of our floating castles, who know not the nature of any part of the management? To have men employed in the victualling, who qualify themselves for that post by learning to write their names, which is indeed a post for a philosopher bred to the sea?’

“ ‘ No. 27. *Saturday, the 10th of July, 1703.*”

“ ‘ That the defendant afterwards, the 10th of July following, did write and publish, and cause to be written and published, another false, scandalous and defamatory libel, entitled, *The Observer*. In which are contained (*inter alia*, of one Daniel de Foe, who was indicted the 24th of February, in the first year of the queen, before the justices of Oyer and Terminer at the Old Bailey, London: and in July following, was convicted upon his own confession, for composing and publishing a seditious libel, entitled, *The Shortest Way with the Dissenters, or Proposals for the Establishment of the Church*, and of the judgment against him to pay a fine of 200 marks, and to stand three times in the pillory, and to find security for his good behaviour for seven years) as follows: ‘ *Countryman*. Truly, master *Observer*, I have no very good news for you: Mr. Daniel de Foe has pleaded guilty to the indictment against him, for writing and publishing, *The Shortest Way with the Dissenters*; and he is sentenced to stand three times in the pillory, to pay a fine of 200 marks, and to find security for his good behaviour for seven years.—*Observ.* The Court could do no otherwise than convict him, upon his pleading guilty; *habemus confitentem*

' *reum*, is very often the voice of courts of judicature, it is the case of judges and juries: if Daniel de Foe was in expectation of Coleman's black box, he has found a pillory instead of it. I do not trouble my head about the custom of giving the pillory to authors, which is the punishment of bakers.* You talked just now of turning author, have a care of your caudle; you see which is the Shortest Way with Authors; you must all enter yourselves into the regiment of colonel Foe: the law of England directs, that no man shall be fined *ultra tenementum*; and I make no question, but the justice of the court has fined Mr. Foe answerable to his estate: his security for his good behaviour for seven years, without doubt, was rationally considered, as to the legality thereof. For my part, I am only acquainted with old laws of England, the ancient birthrights and immunities of Englishmen: this I take to be the foundation of new laws.'

" 'No. 17. Saturday, the 20th of May, 1704.'

" That the defendant afterwards, the 20th of May last, did write and publish, and cause to be written and published, another false, scandalous and seditious libel, entitled, The Observer. In which are contained (of and concerning the defendant, and a prosecution to be had against him for divers seditious libels by him, before that time, composed and published) as follows: ' *Countrym.* Master Observer, there is another plot against you, [meaning the defendant.] ' *Observ.* Prithce, man, there is a plot against the queen, and the whole nation; is it any wonder then, that there are plots against me? The high-fliers are now plotting against every honest man in England. I will tell you more of it, the next time we meet. *Countrym.* I fancy some sort of people plot against you, because you endeavour to countermince their plots against the queen and nation. *Observ.* You are right enough; but that shall not hinder me from detecting their designs, and from opening the people's eyes: but prithce, what plot is this? *Countrym.* Why, Sir, it is a plot preparatory to your trial; and if they cannot effect this plot, I suppose you will never be tried. They insinuate into the citizens of London, that you have lately written very scandalously, maliciously and treasonably, and I do not know how many other lies, against them the said citizens; and by this means they are minded to set your jurors against you. *Observ.* This is likely enough; they will leave no stone unturned, to suppress the truth. I understand, I should have been prosecuted by bill the last sessions, but that the high-fliers did not like the jury; nay, they say they do not like the two sheriffs, because they will not pack juries to find innocent men guilty.' To

the disturbance of the peace of this kingdom, to the great scandal of the queen and her government, and against the peace of the queen, her crown and dignity, &c."

Proclamation was made for all persons to attend.—Then the Jury was called.—Jobb Cooper, Thomas Briccoe, Alexander Pollington.

Edward Pinfold being called, desired to be excused.

Pinfold. My lord, I desire I may be excused. I do not know Mr. Tutchin, for I never saw him in my life; but I have read his Observators, and have several times publicly disallowed them; and therefore some may think I am prejudiced against him.

Att. Gen. (Sir E. Northey.) The question is only, whether he was the author of these papers? For that is the matter to be tried.

Pinfold. I do not know that.

Mr. Mountague. But, my lord, there may be something more in it, for he publicly disallowed his papers.

L. C. J. Holt. You must not be excused unless the queen's counsel will.

Mr. Mountague. My lord, we challenge him on behalf of the defendant.

Att. Gen. Shew your cause.

Mr. Mountague. My lord, our cause is, that he himself looks upon himself as not indifferent.

L. C. J. He says, he has read some of his papers and has publicly condemned them, that he did not approve of the matter contained in them, but he does not know the author.

Mr. Whitaker. But he said he did not doubt but he was the author of them.

Serj. Darnel. He is the fitter man for a jury.

Sir T. Pows. He does not say he has disapproved all the papers he has read, and it may be those were not the papers now in question.

Mr. Mountague. My lord, the matter we are contending for, is, that one that is not altogether an indifferent person should not be on the jury.

Att. Gen. The question is not whether the papers are criminal, but whether the defendant is the author of the papers; and if this gentleman knows him to be the author of them, he is proper to be on the jury: For the jury are by law to be of the neighbourhood of the place where the fact is alleged to be done, because they are presumed to know what is done there. And if this be a cause of challenge, you may challenge all people, and so there could be no trial.

L. C. J. He cannot be challenged, unless he had given his verdict before.

Sol. Gen. (Sir S. Harcourt.) My lord, we can have no jury in this way they are going. A jurymen is not to be asked what his opinion of the cause is; what he will voluntarily say, he may; and if upon what he says voluntarily he is liable to exception, he may be set aside.

L. C. J. It is not a challenge.

* See stat. 51 H. 3, *Assisa Panis et Cerevisiæ*; and Mr. Barrington's Observations thereon.

Mr. Mountague. Surely, my lord, he is not so indifferent as he ought to be. He says he has already declared his opinion publicly concerning Mr. Tutchin's papers.

Pinfold. My lord, I know not well what he is indicted for, but it may be they are those papers that I have given my opinion of.

Att. Gen. I believe no man that has read them, but has given his opinion of them one way or other; but that is not a sufficient cause of challenge.

Mr. Whitaker. Mr. Attorney, I hope you will not contend for one jurymen.

Att. Gen. He says, he knows not what papers he was indicted for; he says only that he has read some of his papers, and has declared his dislike of them.

L. C. J. Draw up your challenge in form, and it shall be considered.

Att. Gen. If these gentlemen think there is nothing in it, what need they put us to this trouble?

Mr. Mountague. Indeed I believe there is something more than ordinary in it, for I object only to what he himself has said.

L. C. J. I will have it done, that it may remain a decision in perpetuam rei memoriam. But if you that are for the defendant will waive it, you may.

Mr. Mountague. My lord, we must insist on it; they have jurymen enough.

Sol. Gen. We cannot tell whether we have or no, for you may challenge them all, as well as this man.

Mr. Mountague. No, I will challenge nobody besides; and I challenged him, only because he mentioned himself as not an indifferent person.

Sol. Gen. Is it a principal challenge, or to the favour?

L. C. J. A principal challenge, if any.

Sol. Gen. He cannot challenge to the favour in case of the crown.

L. C. J. He makes it as a principal challenge; which must be determined, and you shall have my judgment when drawn up; it must be a principal challenge or nothing; for there can be no challenge to favour in the case of the crown.*

Att. Gen. My lord, we are not willing to put you to this trouble, we will leave it to Mr. Pinfold himself.

L. C. J. Then ask Mr. Pinfold.
Att. Gen. Mr. Pinfold, do you know who is the author of the papers?

Pinfold. I know nothing of it but what is commonly reported. I know not Mr. Tutchin if I see him; I have read his writings.

Att. Gen. My lord, we leave it to the jurymen himself.

Pinfold. My lord, I desire to be excused.
Att. Gen. Then we excuse you.

Then the persons following were sworn on the jury; John Cooper, Thomas Briscoe, Alex-

ander Pollington, James Dod, Isaac Bennet, Robert Fotherby, Mark Proctor, William Grub, James Lund, Jobu Baker, Thomas Allen, Jasper Waters.

Then Proclamation for Information being made, the Court proceeded.

Serj. Weld. This is an Information against John Tutchin: The Information sets forth, That he being a seditious person, and a daily inventor and publisher of lies, and maliciously designing to asperse the government, and the administration of it, has composed and published several malicious and scandalous libels; some of them are relating to the government, some to the parliament, some to the courts of justice, other of them to the ministry. I shall not now take up your time in opening the words at large, because they are very long, and for that you will have them read to you, when the witnesses come to prove them. He hath pleaded, Not Guilty.

Att. Gen. You must recite the words of the charge.

Serj. Weld. The charge is very long. The information sets forth, that he did write, and compose, and publish a false and scandalous libel, called The Observer, of and concerning the government. This is laid to be on Saturday the 30th of May, 1702. And the words therein charged against him are these: 'At the same time, we, the subjects of England considering the success of the French king, in his bribery and corruption, ought to lament the sad state of our own country, which affords so many instances of treachery. If we may judge by our national miscarriages, perhaps no nation in Europe has felt the influences of French gold, more than England; and worthy it is our greatest lamentation, that our dear country should be thus weakened by men of mercenary principles, when countries inferior to us in strength and riches are secured from attempts of this nature, only by the fidelity of their people. What is the reason that French gold has not affected Holland, as well as England; but that their ministry is such, as is entirely in the interest of their country, and altogether incorruptible? They prefer men that are knowing in their posts, and are active in business. When in England we find offices for men, not men for offices; and a title of honour gives a man a title to a great employment he is altogether ignorant of. By this, and by preferring of men by interest and favour, has the excise, the customs, and other branches of the revenue, intolerably sunk; and by this means has the navy of England, our chief support, been hitherto perfectly bewitched: And can Lewis spend his money better, than in getting men into offices in England, who are either false or ignorant in the business, or are his friends?' And the Information further sets forth, that on Saturday the 11th of July, 1702, he published another libel, called The Observer; in which are these words: 'And this

* See Leach's/Hawk, Pl. Cr. book 2, c. 43, s. 37.

‘ is a prerogative of singular advantage to the
 ‘ people of England, in that their represen-
 ‘ tatives are the judges of the male-adminis-
 ‘ tration of their governors ; that they can call
 ‘ them in question for the same, and can ap-
 ‘ point such to wear the crown, who are fittest
 ‘ for government : Which they have often done,
 ‘ and indeed which is the privilege of all free
 ‘ people, who are authorized by the laws of
 ‘ God and nature to chuse their own governors.’
 It further sets forth, that June 12, 1703, he
 published another libel, called *The Observer* ;
 in which are these words, ‘ Take one time with
 ‘ another, the mismanagements of the navy
 ‘ have been a greater tax on the merchants,
 ‘ than the duties raised by parliament. We
 ‘ never had a better navy ; but the wisdom of
 ‘ the managers thereof is like a bottomless pit,
 ‘ past finding out.’ The Information further
 chargeth, that on the 16th of June, 1703, he
 published another libel, called *The Observer* ;
 in which were these words : ‘ What avails it a
 ‘ man of learning and parts, to qualify himself
 ‘ for the service of his country on the ocean ?
 ‘ If he has knowledge enough to advise Nep-
 ‘ tune himself, if he has no interest, he shall
 ‘ have no preferment. How much does it
 ‘ look to our nation’s disadvantage, to have
 ‘ men in eminent stations in the navy, who
 ‘ have not so much as an idea, a notion, a
 ‘ thought of naval affairs ? To have men to
 ‘ superintend the building of our floating
 ‘ castles, who know not the nature of any one
 ‘ part of the management ? To have men em-
 ‘ ployed in the victualling, to qualify them-
 ‘ selves for that post by learning to write their
 ‘ names, which is indeed a post for a philosopher
 ‘ bred to the sea ?’ It is farther set forth in
 the Information, that on the 10th of July, 1703,
 he published another libel, wherein, among
 other things, are these words relating to Daniel
 De Foe. ‘ *Countrym.* Truly, master Obser-
 ‘ vator, I have no very good news for you.
 ‘ Mr. Daniel De Foe has pleaded guilty to the
 ‘ indictment against him, for writing and pub-
 ‘ lishing the *Shortest Way* with the Dissenters ;
 ‘ and he is sentenced to stand three times in the
 ‘ pillory, to pay a fine of 300 marks, and to
 ‘ find security for his good behaviour for seven
 ‘ years. *Observ.* The court could do no other-
 ‘ wise than convict him, upon his pleading
 ‘ Guilty ; *habemus confitentem reum* is very
 ‘ often the voice of courts of judicature ; it is
 ‘ the ease of the judges and juries : If Daniel
 ‘ De Foe was in expectation of Coleman’s
 ‘ black box, he has found a pillory instead of it.
 ‘ I don’t trouble my head about the custom of
 ‘ giving the pillory to authors, which is the
 ‘ punishment of bakers. You talked just now
 ‘ of turning author, have a care of your candle ;
 ‘ you see which is the shortest way with au-
 ‘ thors : You must all enter yourselves into the
 ‘ regiment of colonel De Foe. The law of Eng-
 ‘ land directs, that no man shall be fined *ultra*
 ‘ *tenementum* ; and I make no question, but the
 ‘ justice of the court has fined Mr. Foe unswear-
 ‘ able to his estate : His security for his good be-

‘ haviour for seven years, without doubt, was
 ‘ rationally considered, as to the legality thereof.
 ‘ For my part, I am only acquainted with old
 ‘ laws of England, the ancient birthrights and
 ‘ immunities of Englishmen : This I take to
 ‘ be the foundation of new laws.’ And that on
 Saturday, May 20, 1704, he published an-
 other libel, called *The Observer* ; wherein,
 among other things, are these words : ‘ *Country-*
 ‘ *man.* Master *Observer*, there is another
 ‘ plot against you. *Obs.* Prithce, man, there is
 ‘ a plot against the queen and the whole nation ;
 ‘ is it any wonder that there are plots against
 ‘ me ? The high-flyers are now plotting against
 ‘ every honest man in England. I will tell
 ‘ you more of it the next time we meet. *Country-*
 ‘ *trym.* I fancy some sort of people plot against
 ‘ you, because you endeavour to countermince
 ‘ their plots against the queen and nation.
 ‘ *Obs.* You are right enough ; but that shall
 ‘ not hinder me from detecting their designs, and
 ‘ from opening the people’s eyes : But, prithce,
 ‘ what plot is this ? *Countrym.* Why, Sir, it is
 ‘ a plot preparatory to your trial ; and if they
 ‘ cannot effect this plot, I suppose you will
 ‘ never be tried. They insinuate into the citizens
 ‘ of London, that you have lately written very
 ‘ scandalously, maliciously and treasonably,
 ‘ and I do not know how many other lies
 ‘ against them the said citizens ; and by this
 ‘ means, they are minded to set your jurors
 ‘ against you. *Obs.* This is likely enough :
 ‘ They will leave no stone unturned, to suppress
 ‘ the truth. I understand, I should have been
 ‘ prosecuted by the bill the last sessions, but
 ‘ that the high flyers did not like the jury.
 ‘ Nay, they say they don’t like the two sheriffs,
 ‘ because they won’t pack juries, to find inno-
 ‘ cent men guilty.’ The Defendant has
 pleaded, Not Guilty : But if we prove the
 Charge, I doubt not but you will find him
 Guilty.

Sir T. Powis. My lord, I am of counsel with
 her majesty. This Information is brought on
 the behalf of the queen, against Mr. Tutchin.
 I shall not long entertain you about it, because
 the matter is short. The charge is, that he
 has published several libels, scandalous and
 seditious, reflecting on the government, and
 the administration of it, in many instances
 given at large. I think the papers are six in
 number ; and by and by you will have them
 more particularly before you. I presume,
 there ought to be made a difference between
 a just liberty and licentiousness. This infor-
 mation is brought, that men may be warned.
 The plea he has made is, that he is Not Guilty.
 The matter we are to prove is, that he was the
 person that did write and compose these papers,
 and did publish them, or cause them to be
 done. My lord, we shall call our witnesses :
 and notwithstanding what you have heard of
 late from the defendant, relating to this trial,
 I do not doubt but there will be all justice
 done. I am sure, on our side, nothing else
 is intended. And I doubt not, but if we pro-

that he did publish these papers, the jury will find him Guilty.

Att. Gen. My lord, the information is laid against Mr. Tutchin, for a few of his Observators of the many he has writ; sometimes two, sometimes three in a week. It is a great while that he has done it; and it has been the great indulgence of the government, that he has not been prosecuted before. He has been taken notice of by the House of Commons, and been before the secretary of state; where he has been admonished to take care of what he should write: but he would not take warning. And now he is to be tried for some of his papers; wherein it will appear, that he has taken the greatest liberty, I believe, that ever man took. Libels used to come out by stealth, and in the dark; but these have been published openly, with all the defiance imaginable. You may see how mild the prosecution hath been, by what he has done since the beginning of it: he has been writing in such a manner, to prepare for the trial, as I think was never done before. A prosecution of this nature is of the greatest consequence: and it may be, I may be blamed, being in the office wherein I am, that there have not been more such made. Here is the highest reflection on the government imaginable. There can be no reflection on them that are in office under her majesty, but it must cast some reflection on the queen who employs them. I believe there is hardly one in any considerable post under the government, but has been criminated by him: nothing escapes him. He censures all mankind; writes magisterially, and defies all authority, and casts the vilest reflections on the government: as if we, who are in the queen's service, made it our business to corrupt juries. And makes reflections both on sheriffs and juries. These are of the greatest consequence in the world to the government, and to every body. For if such mercenary writers may have the liberty to reflect on whom they please, no man's reputation can be safe.—Gentlemen of the jury, the matter you are to enquire into is, whether the defendant be the author or publisher of these libels: that is the matter you are to try. What the punishment must be, if you find him Guilty, is in the judgment of the Court. We will produce our witnesses; and doubt not but you will do the queen justice.

Sol. Gen. Call John How. [He appeared, and was sworn.] Shew him those Observators. [Which was done; and he looked them over.] Have you looked over them?

How. Yes.

Sol. Gen. Then pray acquaint my lord and the jury, whether you know who composed and brought them to the press?

How. I do suppose them to be Mr. Tutchin's. I dealt with no other man for them.

Att. Gen. Acquaint my lord and the jury, how they came to be printed.

How. About the latter end of March, 1702, I treated with Mr. Tutchin about writing an Observator, to be published weekly: the first

of which was published in April, 1702. And all that have been printed since, I had from him, to this year.

Att. Gen. You looked on these papers here: were these printed by the direction of Mr. Tutchin?

How. To the best of my knowledge, they were. They were always brought from him to me.

Att. Gen. Was there any agreement made between you about the writing of it?

How. Yes, it was agreed at first to write once a week; and I was to give him half a guinea for it. I have printed in all about 266.

Att. Gen. Have you had frequent discourse with him about them since? You said, you printed in all, about 266: have you paid him for all?—*How.* Yes.

Sol. Gen. Have you had any discourse with him, wherein he has owned them all to be his?

How. He has owned them from time to time, till within this week.

Sol. Gen. Has he owned himself to be the author of them?

How. He always owned himself to be the author.

Sol. Gen. Have you had any discourse with him, lest you should come into danger for it?

How. Yes, I have had discourse with him about the danger: and he has said to me, I own myself to be the author: and do not fear; if any danger happen, you are a rogue to yourself and family, if you do not discover me.

Sir T. Powis. Look on these papers, and see if he delivered these very Observators to you: were these the very same?—*How.* Yes.

Sir T. Powis. And was he paid for them by you?—*How.* Yes.

Mr. Mountague. I desire to see them.

Att. Gen. Deliver them to Mr. Mountague.

Mr. Mountague. Take that Observator, and look on it: it is that which they are about to read. [Then Mr. How looked on it:] How long ago is it that you had that paper in your custody?

How. I suppose this was delivered out of my shop, to be sent to Mr. Borret.

Mr. Mountague. Do you know you sent that paper?

How. Yes, I delivered it, and put my mark upon it.

Mr. Mountague. How long ago?

How. I do not justly remember it.

Mr. Mountague. If you do not remember that, do you remember the printing of it?

How. It was done at my house.

Mr. Mountague. When a copy is brought to you to be printed, do you print that copy always exactly?—*How.* As near as I can, I do.

Mr. Mountague. The question I would ask you, is; do you, when you have a copy, strictly keep to the letter of the copy? Or do you, as you think convenient, alter it?

How. I have altered it oftentimes to make it safe.

Mr. Mountague. Then you do take it on you to alter?

How. To strike out a line, never to alter his sense.

Mr. Mountague. Do you not insert any thing?—How. Yes, frequently a word.

Mr. Mountague. Do you not take upon you to insert several words, and leave out several?—How. Yes.

Mr. Mountague. You do. Then I ask you, are you sure that that paper is printed without alteration?

How. I do not remember any thing of that.

Mr. Mountague. I ask you, whether that paper were not altered from what was sent you?—How. I cannot swear it.

Att. Gen. Can you say that paper was altered?—How. Not that I know of.

Mr. Whitaker. Look on the title; whose putting down is that?

How. He agreed to the title.

Mr. Mountague. Does the paper come to you, entitled 'The Observator,' or not?

How. I cannot tell whether he ever put it in.

Mr. Mountague. Who put it in then?

How. It was agreed between us to call it The Observator.

Mr. Mountague. Does he write 'The Observator,' or did you?

How. There is no occasion for the title that I know of.

Mr. Mountague. But who writ the title to it?

L. C. J. They ask you this question: who was it that put this title to this paper?

How. I do not know but I might write it in the paper at first, and so it was inserted afterwards.

L. C. J. Who was it first writ that title?

How. I do not know who did write that, he or I. I did first propose the title to him.

L. C. J. Was that title writ by him or you?

How. I do not know, my lord.

L. C. J. Was there an agreement made between you, that this paper should be writ once a week with that title?

How. Yes, my lord.

L. C. J. Did he agree to that title? And was he privy to it?

How. Yes, my lord, it was agreed upon between us; and he agreed to write such a paper, with such a title.

Mr. Whitaker. Where did you come to this agreement?—How. I cannot tell.

Mr. Whitaker. Was it in London, or Middlesex, or Surrey?—How. I cannot tell.

Mr. Whitaker. Where were they printed?

How. I printed some of them in Fanchurch-street, about eighteen; the rest in Gracechurch-street.

Mr. Harris. Was that paper altered by you, or not?

How. I cannot remember whether I altered that or no.

L. C. J. You say you altered sometimes: did you acquaint him with the alterations you made?

How. Sometimes they have been sent to me; I knew not where to find him; and then I have altered them myself, rather than be disappointed. At other times, I have been in his company; and then I complained, and he has altered them. And sometimes he said, you have the pen; do you alter them.

Sol. Gen. Can you say, you altered a syllable in these papers?—How. I cannot say so.

Sol. Gen. Since the first publishing of them, have you not published them in volumes?

How. Yes.

Sol. Gen. And who gave order for it?

How. Mr. Tutchin.

Att. Gen. What direction had you about this volume? [A volume bound up being in Court.]

How. That volume was ordered by Mr. Tutchin. He ordered me to bind up three volumes: one of which he ordered to be delivered to Mr. Borret; which I did not deliver, by reason of a prosecution at the Old-Bailey.

Att. Gen. Did he order any other man's works to be bound up, or his own?

How. He ordered me to bind his own, with the Preface.

Att. Gen. Where is that Preface?

How. Before the book: and he owned that, and put his hand to it.

Att. Gen. Had you paid for these?

How. Yes; he ordered me to bind up these together, and to deliver one of them to Mr. Borret.

Sir T. Powis. Did you pay him for the Preface?—How. Yes, and for the Index.

L. C. J. Who made the Index?

How. He did.

L. C. J. Did he write his name to the Preface, after it was brought to you?

How. It was delivered to me with his hand to it; and he owned it.

Sol. Gen. Then he owned all the Observators to be his, by setting his name to the volume?

Mr. Mountague. Where was this book delivered to you to be bound up?

How. I do not know, whether in London, or Middlesex, or Surrey.

Mr. Mountague. Recollect where it was that you had this discourse about a book.

How. I do not remember the exact time.

Mr. Mountague. But you remember the discourse: and cannot you say where it was?

How. No, indeed.

Mr. Mountague. The Preface they talk of, was it brought in writing?

How. It was brought, or sent in writing; and I printed it from a manuscript copy.

Mr. Mountague. How do you know he sent it?

L. C. J. What did you give him for that Preface and Index?

How. I think it was ten shillings.

Mr. Mountague. My lord, with submission, they cannot read this paper: For if it be read, it must be read as the paper of Mr. Tutchin.

Now as to this paper that they produce, we do insist upon it, that is Mr. How's paper, and not Mr. Tutchin's. For he tells you, That whatever papers he had, or whatever directions were given him from Mr. Tutchin, were in writing. Now if Mr. Tutchin is to be charged with a libel in writing, they must produce that very writing, or a true copy thereof. And another man's taking a copy of my writing, cannot be said to make it my writing; especially when it is not proved to be a true copy. So that this paper, which is printed by Mr. How, cannot be charged on Mr. Tutchin. If one single penman had taken a copy of it, if he could not be sure it was an exact copy, it could not be read; much less such a paper, which goes through so many hands as this has done. And Mr. How says, He did often alter it, according to the best of his understanding; and therefore that makes it his paper. For, by a very small alteration, a thing may be made a libel, that was not so before. And besides, it appears by Mr. How's own evidence, that Mr. How makes an advantage by the printing and publishing of it: And perhaps he makes alterations, to make it sell the better. That makes it nothing like to Mr. Tutchin's paper; and therefore they ought to produce that very paper that was brought from Mr. Tutchin: And this paper ought not to be read against him.

Mr. Harris. My lord, he does not swear it is a true copy; and therefore we cannot allow it to be read.

Mr. Whitaker. He has added the very title: It is called An Observer; and he has put that title to it. And he gives you no account when, or where there was any agreement made with Mr. Tutchin about it.

L. C. J. Where was the agreement made for printing the papers?

How. I am not positive where it was; whether in London or Middlesex. I did think it was in Fanchurch-street; but he says it was in the Strand.

Mr. Mountague. Can you be positive it was in Fanchurch street.

How. I cannot be positive.

Att. Gen. Where were they printed?

How. In Fanchurch street.

Att. Gen. Where did you bind the book, and put the preface?

How. That book was sent out of my house to be bound; and when it was done, it was sent from my house again.

Mr. Conyers. Did he come to Fanchurch street, to direct the printing at any time?

How. Yes, several times.

Mr. Weid. Did he agree with you to have them printed and published?—How. Yes.

L. C. J. Have you the original papers of these Observators?

How. I have very few of them now.

L. C. J. How came you to part with them?

How. I thought there would be no use made of them, and so I did not keep them: But I have most of the third volume by me.

Sir T. Powis. My lord, in answer to this ob-

jection, I must say, if this shall prevail in that strictness, I take it for granted, that instead of restraining libels, it will be the best and most effectual way to publish them. For the author then hath nothing to do, but when a copy is printed, to destroy the same; and then no evidence can be against him: Because the printer will be called on, to know if that which is printed agree with the written copy to a letter. If that be so, it will be impossible to come at the author. It is not an answer, to say, You may go to the printer: For though he is punishable; yet it is more reasonable to come at the author. We have given a fair evidence, that this is the same that was brought to this man: And they do not make it appear, that he did add to, or diminish any of these papers. The printer says, The defendant has avowed and justified all that he did for him since the beginning. That by his order he collected all those Observators we insist on, in this volume; which he has owned, and published sufficiently: For here is his Index and Preface. And that he did publish this volume there is no room to question. We have given as good evidence of this as the matter will bear.

Att. Gen. My lord, we have given as good evidence as can be expected, of a matter of this nature. We are prosecuting the author, and have brought the printer to give his evidence; which is all we are able to get: For it is not in our power to prove, where the defendant did actually write them. The printer had no reason to take care of the original papers, because when they were printed, they were of no use. He tells you, the whole volume was printed, and owned by Mr. Tutchin continually, and by him directed to be made up into a book, and he paid Mr. Tutchin for writing them from time to time. If this be not a sufficient evidence of his publishing of them, it would be impossible to give any evidence; for the author would always take away his copy, and then he is safe. These were printed and published in London; and wherever the agreement was made, we may charge the defendant, where the papers were printed, pursuant to an agreement made between him and Mr. How; which makes the composing and printing his act.

Serj. Darnel. My lord, if this be not evidence that this man is the maker or publisher of these papers, his agreement to have it done, his owning after it is done, and his own confession, and his being paid for it; if this be not evidence, nothing is.

L. C. J. His agreement to publish that book, is sufficient to prove that he owned it.

Mr. Conyers. My lord, there is one thing very considerable; the discourse he had with this man. Says he, "If you are questioned about it, I am the author, I gave you the copy, and directed the printing of it; and you are unjust to yourself and your family, if you do not discover me." My lord, they make this objection: We did contract with Mr. How to make an Observer, but he made alterations

as he thought fit; and sometimes he shewed them to him, and sometimes not. Now it is clear, Mr. Tutchin did give him that liberty; and he cannot say, that there was any one of these papers that was altered.

Sol. Gen. And, my lord, after there were an hundred composed, he directs Mr. How to bind them in a volume, and puts a Preface and Index to them, and sets his name to it. Now that is certainly a publication and owning of them.

Mr. Weld. So far as in that book goes, there is evidence that he is the author and publisher; and they have objected nothing to it: So that the only question is concerning the other Observators. Now he says he had leave from the Observator to make those alterations.

L. C. J. No, he does not say so. Hark you, Sir, did you ever add any thing?

H. w. Not that I know of, but a word sometimes to make it sense.

Mr. Weld. Did he ever allow you to do it?

How. He has often said, that printer was a blockhead that did not.

Mr. Mountague. My lord, my objection was singly, as to the reading the papers, not of the book. The thing they offered as evidence, was the papers; and we say they ought to produce the originals, which they have not done.

L. C. J. They offer the book in proof.

Mr. Mountague. Then, my lord, I must beg leave to oppose that likewise. For this book is proved to be his, no otherwise, than by the printer's swearing, that Mr. Tutchin ordered him to bind up three volumes of his Observators; and the printer himself has put together these papers, and Mr. Tutchin has writ a preface before them; but whether the papers thus put together were ever examined, *non constat*; or whether the bookbinder has made no alterations, *non constat*. And it does not appear that Mr. Tutchin looked over any of the papers that are here bound up. So that the most the queen's counsel can make of this evidence, is this: here is a book Mr. Tutchin took to be his book, upon the outward view of it, or at least upon the credit of his printer; and therefore every thing in it must be read against him as his. Surely, my lord, that ought not to be allowed of. When Dr. Drake was here tried for being the author of a scandalous book, it was sworn against him, that upon shewing him one of the books he was charged with, he owned himself to be the author of it. But a question being asked, whether the book that was offered to be read in evidence against him, was that very book that had been shewn him, when he owned himself to be the author? It was answered, No: but it was a book of the same impression, and therefore ought as much to be read against him, as the book he owned. But, as I take it, that evidence was disallowed.

Att. Gen. Mr. Mountague, you state it wrong, for that book was read.

L. C. J. That book was read, though it was not proved as that very book that was delivered.

It was the bookseller that said the book was printed by Dr. Drake; but he would not say it was that very book that was given in evidence. He took a book with such a title; but was this the book? But he could say, the other book was never taken away. Now this book is owned by Mr. Tutchin, by making the preface and index to it.

Mr. Mountague. It was a book of the same impression with that which Dr. Drake had owned himself to be the author of, that was offered in evidence.

L. C. J. He took the book from the shop that was read, the other book was in the shop.

Att. Gen. The bookseller said, he knew who writ the book, but not who writ the preface.

Mr. Mountague. But, my lord, be the case one way or the other: the thing we insist on is, that they cannot read the first papers produced, because Mr. Tutchin has not owned that paper in particular for his, that is inserted in the book.

L. C. J. If the first paper was printed by his order, according to the bargain made between them, it is reasonable it should be read. "I do not know," says he, "that I made any alteration here; sometimes I did alter, and sometimes strike out, and made the expression lower; but I know not that I made any, and when I did, I oftentimes acquainted him with it; but that I made any alteration here, I know not: I printed it by the copy, and the copy is lost." Now, Mr. Tutchin would have him make up a volume; and, says he, this volume I bound up by his order.

Mr. Mountague. My lord, here is a paper offered, which they cannot prove to be a true copy; and will you let them read it, because they produce another paper like it, bound up in a volume; which, by the way, is proved as otherwise to be his, than by his bespeaking a set of Observators to be bound up for him?

L. C. J. It is the same.

Mr. Mountague. My lord, I think, with submission, they may not read any of the papers, if they have not examined the first copy sent to the printer.

L. C. J. A man sends a copy to print, which is a libel, and the print is produced that is said to be according to the copy: There is another print produced, that agrees with the first, which he hath owned.

Mr. Mountague. My lord, I did hope that the queen's counsel would have given an answer to that part of my objection, that these printed papers are no more than copies.

L. C. J. It is more than a copy. Every copy of a libel is a libel; and every printer of a libel is guilty of a libel.

Mr. Mountague. My lord, it is true, every copy of a libel is a libel; but whose libel is it?

Mr. Harris. My lord, it is not proved, that he ever perused that copy.

Mr. Mountague. Pray, Mr. How, was it his direction to put these very sheets together, or to make up a volume of Observators? I do ask you, whether your direction was to make up a

book of Observators, or to bind up these very sheets?

How. He gave me direction to make up a set of Observators.

Mr. Mountague. Then you say, it was only to bind up a set of Observators; and so, on your own head, you bound up these Observators? But can you say, he has looked over all the papers in that book, and owned them?

Serj. Weld. My lord, here is a man says, he ordered him to deliver them to my lord Nottingham.

Mr. Mountague. How long is it since he gave you these directions?

How. I believe it was about a week after the volume was published.

Mr. Mountague. How long since is it that the volume was published?

How. It was about April, 1703.

Mr. Mountague. How long after did you deliver them?

How. I delivered them within a week after.

Att. Gen. There are but two of the Observators we charge the defendant with in that book; and therefore we humbly insist on reading of the printed papers, on the evidence we have given, which we take to be sufficient to read them without the book: These papers being printed after this agreement was made between them, and bound up by his directions, he is answerable for them.

Mr. Mountague. My lord, I do, with submission, say, It ought not to be read, though it be in that book; for no man has proved that paper that is in it to be his. But if they lay any weight on the owning the book, the publishing the book is a new crime, for which he may be punished afterwards, and he is not charged with it in this information.

Att. Gen. If a man be indicted for being the author of a book; being indicted once, he is indicted once for the whole book.

Mr. Whitaker. My lord, we are indicted for a single paper; and that book is not the matter of the indictment.

Queen's Counsel. My lord, we have done now. We desire the papers may be read.

L. C. J. Read them both.

Then the first Observer was read.

“Observer, May 30, 1702. ‘At the same time we consider the French king’s success in his bribery and corruption, we ought to lament the sad state of our own country, which affords so many instances of treachery. If we may judge by our national miscarriages, perhaps no nation in Europe has felt the influences of French gold more than England; and worthy it is our greatest lamentation, that our dear country should be weakened by men of mercenary principles, when countries inferior to us in strength and riches are secured from attempts of this nature, only by the fidelity of their people. What is the reason that French gold has not affected Holland, as well as England? but that their ministry is such, as is entirely in the interest of

‘their country, and altogether incorruptible: they prefer men that are knowing in their posts, and are active in business. When in England, we find offices for men, not men for offices; and a title of honour gives a man a title to a great employment he is altogether ignorant of. By this, and by preferring of men by interest and favour, has the excise, the customs, and other branches of the revenue, intolerably sunk; and by this means has the navy of England, our chief support, been hitherto perfectly bewitched: and can Lewis spend his money better, than in getting men into offices in England, who are either false or ignorant in the business, or are his friends.’”

Sol. Gen. The next is No. 23. Saturday, July 11, 1702.

“‘And this is a prerogative of singular advantage to the people of England, in that their representatives are the judges of the administration of their governors, that they can call them in question for the same, and can appoint such to wear the crown who are fittest for government; which they have often done, and indeed which is the privilege of all free people, who are authorised by the laws of God and nature to choose their own governors.’”

Att. Gen. Now we will show these papers to Mr. How, for these are all that are in the book. [They were shewn him.] Mr. How, pray tell us who was the author of these papers?

How. Mr. Tutchin.

L. C. J. How do you know that?

How. I had them of him.

Att. Gen. Did you pay him for them?

How. I paid him for these very papers.

Mr. Mountague. What, these papers that are now produced? You never shewed them to him, did you?

How. No; but I shewed him the same number.

Mr. Mountague. Have you read them to him.

How. He has owned them all; he has owned them an hundred and an hundred times, all of them.

Mr. Mountague. Have you the copy of these papers by you?—*How.* No.

Mr. Mountague. Did you search for them?

How. No, I have not.

Mr. Harris. My lord, if we had seen these papers, then we might have seen what alterations were made in them.

How. I believe he had them back again.

Mr. Mountague. I believe he has not been asked to search for them.

Att. Gen. Did not Mr. Borret send to you about the original papers?—*How.* Yes.

Att. Gen. Did you look out what you had?

How. Those that I had were looked out.

Att. Gen. What became of them?

How. I know not, but he might have them back again.

Att. Gen. Those that you did find, what did you do with them?

How. Those that I have now, are but two or three.

Att. Gen. Did you carry all the original papers you had to Mr. Borret?

How. Yes, all that I know of.

Mr. Mountague. Have you no copies? Did you not say you were not desired to look for these Observators?

How. I said, I did not know whether I was ordered to search for these particular Observators.

Mr. Mountague. Did Mr. Borret desire you to look after these original Observators?

How. I am not positive.

L. C. J. Did you deliver all those that you had to Mr. Borret?

How. Yes, my lord, all that I had at that time; but I have had some since.

Att. Gen. He told you before, that till there was like to be a prosecution, he did not keep them, but since he did; and now he looked for what he had, and delivered them to Mr. Borret.

L. C. J. Then Mr. Borret must be sworn. [And he was sworn accordingly.]

Sir T. Powis. Mr. Borret, acquaint my lord, and the jury, whether you desired Mr. How to look out the copies of the Observators.

Borret. I sent to desire Mr. How to look out all the written copies of the Observators which he had received from Mr. Tutchin; and he afterwards brought me a considerable number of them, and said, they were all he could find; and I have very carefully looked them all over, but cannot find any one amongst them that relates to any of those Observators mentioned in the information, except one, which is in May last, the which I have here in Court.

Mr. Mountague. Did you send to Mr. How, to ask for the original of these papers here named?—*Borret.* I did.

Mr. Mountague. Will you produce the papers you have? My lord, they have taken those original papers; and if they were produced, you would see how they are mangled.

Att. Gen. If they were nothing to the matter, what did they signify? Only this is a popular thing, and they must say a great deal.

Mr. Conyers. Read the *Observer* of the 12th of June, 1703, which contains these words. [Which the clerk read, as follows.]

‘Take one time with another, the mis-managements of the navy have been a greater tax on the merchants, than the duties raised by parliament. We never had a better navy; but the wisdom of the managers thereof is like a bottomless-pit, past finding out.’

Mr. Conyers. Now go on to No. 20, the 16th of June, 1703. [Which the clerk read, as follows.]

‘What avails it a man of learning and parts, to qualify himself for the service of his country on the ocean? If he has knowledge enough to advise Neptune himself, if he has no interest, he shall have no preferment. How much does it look to our nation’s disadvantage, to have men in eminent stations in the

‘navy, who have not so much as an idea, a notion, a thought of naval affairs? To have men to superintend the building of our floating castles, who know not the nature of any part of the management? To have men employed in the victualling, who qualify themselves for that post by learning to write their names, which is indeed a post for a philosopher bred to the sea.’”

Then Mr. Tanner was sworn, as to an original record, which he produced about Daniel De Foe’s trial, to be compared with the passage to be next read.

Mr. Conyers. Now read the *Observer*, No. 27, Saturday the 10th of July, 1703. [Which was read, as follows.]

‘Countrymen. Truly, master Observer, I have no very good news for you. Mr. Daniel De Foe has pleaded guilty to the indictment against him, for writing and publishing ‘The Shortest Way with the Dissenters;’ and he is sentenced to stand three times in the pillory, to pay a fine of 200 marks, and to find security for his good behaviour for seven years.—*Observe* The Court could do no otherwise than convict him, upon his pleading guilty; ‘hæmus confidentem reum’ is very often the voice of courts of judicature: it is the ease of judges and juries. If Daniel De Foe was in expectation of Coleman’s black-box, he has found a pillory instead of it. I do not trouble my head about the custom of giving the pillory to authors, which is the punishment of hakers. You talked just now of turning author, have a care of your candle; you see which is the shortest way with authors: you must all enter yourselves into the regiment of colonel Foe. The law of England directs, that no man shall be fined *ultra tenementum*; and I make no question, but the justice of the Court has fined Mr. Foe answerable to his estate: his security for his good behaviour for seven years, without doubt, was rationally considered, as to the legality thereof. For my part, I am only acquainted with old laws of England, the ancient birthrights and immunities of Englishmen: this I take to be the foundation of new laws.’”

Sir T. Powis. The last is of the 20th of May last; Mr. Borret, is the original of that here?

Borret. Yes.

Sir T. Powis. Who had you this of?

Borret. I had it from Mr. How.

Sir T. Powis. Shew it to Mr. How. [Which was done.]

L. C. J. Whose hand is that?

How. To the best of my knowledge, it is Mr. Tutchin’s.

L. C. J. Who had you it from?

How. From Mr. Tutchin, or his order.

L. C. J. Did you pay him for it?

How. Yes, my lord.

Att. Gen. Then that likewise was printed under the title of the *Observer*?

How. Yes, Sir.

Then the Paragraph was read.

“ ‘*Countrym.* Master *Observer*, there is another plot against you. *Observ.* Prithce, man, there is a plot against the queen, and the whole nation; is it any wonder then that there are plots against me? The high-flyers are now plotting against every honest man in England. I will tell you more of it the next time we meet. *Countrym.* I fancy some sort of people plot against you, because you endeavour to countermine their plots against the queen and nation. *Observ.* You are right enough; but that shall not hinder me from detecting their designs, and from opening the people's eyes. But, prithce, what plot is this? *Countrym.* Why, Sir, it is a plot preparatory to your trial; and if they cannot effect this plot, I suppose you will never be tried. They insinuate into the citizens of London, that you have lately written very scandalously, maliciously, and treasonably, and I do not know how many other lies, against them the said citizens; and by this means they are minded to set your jurors against you. *Observ.* This is likely enough; they will leave no stone unturned, to suppress the truth. I understand, I should have been prosecuted by bill the last sessions, but that the high-flyers did not like the jury; nay, they say they do not like the two sheriffs, because they will not pack juries to find innocent men guilty.”

Mr. Mountague. Now, my lord, we take it, there is a variation between this paper, and the information. In the copy, it is only ‘C.’; in the information, it is ‘Countryman.’ Now when they describe any paper, it must be as it is writ; and they cannot say ‘Countryman,’ when it is but ‘C.’

L. C. J. He writes a dialogue between the Countryman and the *Observer*; but now he makes ‘C.’ for ‘Countryman.’

Mr. Mountague. My lord, if they go upon the libel, they must give it as it is under his own hand.

Sir T. Powis. That letter is to be understood ‘Countryman.’

L. C. J. When he used to write ‘C.’ were you not to write ‘Countryman’ at large?

How. At first we were; afterwards as it might be intelligible.

Mr. Mountague. Still we think they have not done enough: they have not proved this thing sufficiently, by the witnesses they have called. For, my lord, we take it, that they must positively shew it was writ within the city. In the Trial of the Bishops, it was proved to be all under their hands: yet it was required then, that they might make it appear, that that paper was writ in the county of Middlesex.

Att. Gen. Mr. How, where do you live now?—*How.* In Gracechurch-street.

Att. Gen. Let that agreement be made where it will, the publishing was in London; and we may lay the information here.

L. C. J. Where did you receive these papers?

How. Most commonly they were sent to my house, in Talbot-court. Gracechurch-street.

Mr. Whitaker. Have you not fetched some of them from Lambeth?

How. Yes, some of them.

L. C. J. Suppose a man draws up a libel in Middlesex, and there agrees with a printer who lives in London to print it: he takes it away, and prints it in London, and there publishes it. Now the question is, Whether he that drew it, is not guilty of composing and publishing of it in London? * Every libel is a copy of itself.

Mr. Mountague. Every copy is a libel; and the taking a copy of a libel, may be a publication: but that is not the thing laid to his charge; it is *scripsit et composuit*. Now the writing is in the county of Surrey; there he writes, and there he composes.

L. C. J. He is charged with writing, composing, and publishing a libel in London. Though he be not guilty of writing there, yet he may be guilty of composing it there.

Mr. Mountague. Now, my lord, as to the publishing, the printing is not the defendant's publishing: that affects another man. Therefore we think they should give some evidence of his writing these papers in London.

Sir T. Powis. My lord, as to that, the word *composuit* is proper to relate to the printing of it; (for the printers have such a term as composing). And that is fully proved to be in London. And for writing (whether that be a material thing between us) I take it, that he that does write a libel, and sends it to London; and there, by his authority and directions, it is composed again in another paper, and printed; that paper is still his writing, wherever it goes. However, the other words come up to the case fully; because if that which he writes is so published, it may be said to be writ by him, wherever it is so published.

Att. Gen. We have proved his owning himself to be the author, and his causing it to be printed in London.

L. C. J. That is not an evidence of his writing it.

Att. Gen. My lord, it is a proof of his causing it to be printed.

L. C. J. If he be guilty of a fact in one county, you cannot charge it in another. But if he caused it to be printed in London; no question it will be a publication here.

Att. Gen. The composing and printing is a publication; † and that we have proved to be done in London, pursuant to his agreement. And we also charged him with writing the same; and as a proof of that, we have proved his owning himself to be the author. If that be not an evidence of his writing it, we can hardly ever prove that part of the charge of

* As to this, see in the Case of the Seven Bishops (vol. 12, pp. 316, et seq.) much Mitigation concerning the proof of composing and publishing in Middlesex the alleged libel. See: too, Bull. N. P. 6. Rex v. Middleton.

† See 6 East, 589, 590.

writing: for he that writes a libel, will do it alone; and proving the copies to be received in London, is an evidence they were writ there first, if the defendant did not prove the contrary.

Mr. Whitaker. Mr. How swears, he had the copy from Lambeth.

Att. Gen. Where was it composed?

How. At my house.

Att. Gen. Was he there at your house?

How. Yes; and I had them from him there.

L. C. J. Did he write any of them there?

How. Not that I know of.

Att. Gen. Is Mr. Tutchin in the court?

Mr. Mountague. I believe not.

L. C. J. Why is he not here?

Mr. Mountague. May it please your lordship, and you gentlemen of the jury, to spare me a few words in behalf of the defendant. I can hardly say I am of counsel with Mr. Tutchin, because I have never seen him, but upon recording his appearance in open court; and he has not thought fit to send us any instructions till this morning, when we were just going down to Westminster. But I do suppose, this remissness in his temper does proceed from his innocency of the accusation against him: and he has a mind to let the world see, how easy it is to make his defence; since he has pitched upon me for his advocate, and given me so little time to prepare myself for it. But as short notice as I have had of this information against him, thus much I will beg leave to say to it in general; that it does by no means come up to what the gentlemen on the other side call it, 'a charge of writing and publishing a false and scandalous libel.' My lord Coke has given us a definition, or rather a description of a libel: says he, 'Famosus Libellus, seu infamatoria Scriptura, is made either against a private man, or a magistrate. If it be against a private man, it does deserve to be punished; because it is likely to incite all the family or kindred of such person, to revenge the injury; which tends to the breach of the public peace. If it be against a public person, as a magistrate, it is a greater offence: because it concerns not only the breach of the peace, but it is a scandal to the government. And it matters not whether such private man, or magistrate, be dead or alive at the making of such libel; because the friends and relations of such persons, are incited thereby to disturb the peace of the kingdom.' By all which sayings of my lord Coke, I do humbly suppose, that there can be no libel, where no person certain is reflected upon, or scandalized. A libel that points at nobody in particular, is like a shot at random, that seldom does any mischief. And therefore I do take it, with great submission, that in this case, Mr. Attorney should have shewed us what person (either public or private) these Observators have aspersed. My lord Coke, in another place, does liken libelling to poison, which secretly destroys a man's reputation, as the other does

his life. But certainly it would be thought a strange sort of indictment, to charge a man with being guilty of murder; and not mention some one in particular, that has lost his life through the defendant's means or procurement. Now pray, my lord, how much does this information differ from such an indictment? Here it is said, that the defendant Tutchin has wrote and published a false and scandalous libel, of and concerning this kingdom of England, and the officers and ministers of the queen. But a national reflection, that equally concerns every individual person in the kingdom with the reflector himself, cannot excite and stir up the people to quarrel one with the other. And to tell me, the ministers and officers of the queen are particularly concerned, does but give me occasion to ask, what officers and ministers Mr. Attorney is taking care of? For I do not find any minister of state, or other great officer, so much as mentioned throughout this record. A bailiff, or constable, is one of the queen's officers; and yet very few will think, a man ought to be punished for scandal, that shall say of such officers and ministers, they commit frequent misdemeanours, and are of mercenary principles. Would it not have been easy for Mr. Attorney to have assigned the particulars, if he knows of any body that has been defamed by these Observators? But since the information sets forth no particulars, I hope the jury will take it for granted, that nothing in these papers can be affixed to any man's door: but whatever has been writ, is spent in the air; and I hope this accusation will vanish there likewise.

In the next place, my lord, I would beg leave to take notice of the particular papers, which have been severally read in evidence. And the first that has been produced, is one of the printed Observators, agreed on all hands to have been published so long ago as the 30th of May, which was in the first year of her present majesty's reign. And as to this, the charge is, that the defendant has written, composed and published it. But how many of these three particulars have been made out, must be next observed. And as to writing of it, Mr. How has sworn, that there was an agreement made betwixt him and the defendant, (but where, he cannot say) that Mr. Tutchin should write a paper, sometimes once, sometimes twice a week, of the public transactions; and such a paper has been writ by Mr. Tutchin; but where this paper was wrote by Mr. Tutchin, or delivered, Mr. How cannot swear. However, so far he goes, that from these papers of Mr. Tutchin he has printed at his house in London, these papers are now produced. But on this evidence, I must, with your lordship's favour, observe, that there are two different sorts of libels spoken of: the one is in writing, supposed to be written by Mr. Tutchin, but God knows where: the other in print, owned by Mr. How to be printed and published from the written paper; which does not appear, and of which no true copy has been proved. Now

we hope, therefore, my lord, that the gentlemen of the jury will rightly distinguish betwixt this first and second libel, and make a difference betwixt the act of Mr. How and that of Mr. Tutchin. The printed papers here produced are stiled the *Observer*; so was not the written ones, if Mr. How be to be believed. The printed *Observers* are sold about for the sole benefit of Mr. How; and Mr. Tutchin receives only a small premium for the writing once or twice in a week. Mr. Tutchin only earns his weekly subsistence by making observations in the country; and it does not appear, that he concerns himself further about the printing or publishing of them. If he gets his money, Mr. How may do with his papers as he thinks fit. So that I must humbly insist upon it, that what Mr. How has done within this city of London, can never reach Mr. Tutchin into *Surry* or *Essex*. It has been said indeed, and I shall not contradict it, that the bare transcribing of a libel, will make a man guilty of libelling: but for this reason I do say, that Mr. How only has been guilty of making and publishing these printed *Observers* in London; and Mr. Tutchin, if he be guilty, must be convicted of the making and publishing that, which can be sworn to be his written observations; especially since it has plainly appeared that the papers written by Mr. Tutchin, have been frequently altered by Mr. How, before they were printed off.

And if we consider the passages that have been produced, the gentlemen of the jury will perceive a very little alteration will make these papers quite different from what they are. However, as they be, I hope there is no great matter in any of them. The first *Observer* says: 'At the same time, if we consider the French king's success, in his bribery and corruption, we ought to lament the sad state of our own country, which affords so many instances of treachery,' &c. Now, pray who is 'We' in this case? Says Mr. Attorney, in his innuendo, the people of England. But I hope an innuendo shall not make a man guilty of a crime, which otherwise cannot be affixed upon him. But supposing this same paper were in truth written with relation to England, will any one say, that (no times whatsoever) this country has afforded not any instances of treachery? And what part of this information does so much as fix the time to which the *Observer* alludes? If all that is here set forth were written of a former ministry, I do suppose there would not be so much blame laid on the author, as if he comes nearer the present times: so the time to which these papers do refer, must certainly be material, and fit to be considered of, before any one can rightly judge of this case. And for want of its being ascertained and determined whether these reflections may extend, I hope the jury will not very much regard them.

The next charge does set forth a wicked assertion to have been made, 'de et concernen potestat. populi Anglicani.' But we must be

in your lordship's judgment, whether the paper that is produced, does make out that assertion to be just as it is laid. I take it, with submission, that there is a manifest variance betwixt the charge and the libel. The charge makes him speak of the power of the people at large; when the paper comes to be read, that speaks of our representatives in parliament. And surely there is a difference to say, the people at large can do so and so; and to say, our representatives in parliament can do it. For instance, the making of laws is not in the people dispersed over England, but in their representatives in parliament, in concurrence with the House of Lords, when the royal assent does likewise concur with them; therefore, I think, this charge cannot affect us upon account of this variance. The next article then to be taken notice of, is that concerning the navy.—

Sol. Gen. But Mr. Mountague says nothing of the prerogative the people have, that the representatives are the judges of the mal-administration of their governors; that they can call them in question for the same, and can appoint such to wear the crown, who are fittest for government, which they have often done. He passes by all this scandalous matter.

Mr. Mountague. I did so, Mr. Solicitor, and I did it on purpose, because I looked upon it as a matter not proper for you and me to talk of as advocates in this place. And I am apt to think my discretion in passing it by will be more easily justified, than theirs that shall bring such points as these upon the stage to be talked on before this assembly. I must declare, for my own part, that I think the rights of princes and the power of the people too high topics for me to meddle with; let others do as they think best. I shall pass over to the next article concerning the navy. 'Take one time with another, the mismanagements of the navy have been a greater tax on the merchants, than the duties raised by parliament.' Now, how does this relate only to the navy-royal? It is no where said, the mismanagement of the king's navy, or the queen's navy. And the word navy does, in my poor understanding, signify no more than a number of ships got together; and therefore I do humbly conceive, there may be a navy of merchant ships as well as a navy of men of war, it is altogether uncertain what navy the author does allude to.

L. C. J. Surely the navy must be the navy royal.

Mr. Mountague. If it must, my lord, yet nobody can say that we never had any mismanagements in the royal navy, and whenever that has happened, the merchants of England, in all probability, have suffered for it.

Att. Gen. My lord, I think all this discourse is such as is not to be allowed.

Sol. Gen. When a man complains of the mismanagement of the government, and then comes after this, and says, that the people have a power inherent in them to call their governors to an account: what is this? Does it

want an exposition, thus to possess the people with an opinion of the power they have to call the king or queen to an account? What does such things tend to, but to raise in the people an indignation against the government?

Mr. Mountague. My lord, the thing I was insisting upon was, that whatever is here set forth, is not brought within any compass of time, and there is no particular reflection upon any person whatsoever. Though mention is made of divers mismanagements, and of several miscarriages; yet all these things may be said of other times long since. And therefore, since this exception goes to all the rest of the charges in the information, I shall pass by the other particulars. And since I have taken up a great deal of your lordship's time already, I shall leave the rest to these gentlemen that are to speak after me.

Serj. Darnel. Will you say they are true?

Mr. Whitaker. My lord, here is an accusation that we did write, and compose, and publish, these papers; now it appears, that the first author was often out of London, and that the copy was often fetched from Lambeth, and other places; and the witness did apply the title of *Observer* to every one of these papers. Now that which they call libellous is not in the writing which we did write; and if we did not write it in London, I hope you will not find us guilty of writing and publishing a libel.

Mr. Mountague. My lord, we have not done any thing as to the printing at all; we had nothing to do with it.

L. C. J. Were not you concerned in printing it? I cannot imagine how *Mr. How* came to pay for it else. *Mr. How*, what were you to give for every *Observer*?

How. For about 60 of the last, I paid 20s. a time.

L. C. J. What did you give for them before?

How. Half a guinea a time.

L. C. J. Was it the same thing to him whether you printed it or not?

How. Yes; but I would not have given it him, if it had not been to be published.

Mr. Whitaker. My lord, we are in your judgment as to this matter, whether they can find us guilty of a libel in London?

Sol. Gen. It was in London.

L. C. J. Where was the agreement made?

How. I did think at first that it was in the city, and I do think so; but he says it was in *Surry*. The papers were delivered sometimes at my own house, and sometimes in the country.

Att. Gen. Were they delivered to you to be printed?—*How.* Yes.

Att. Gen. You said you and he have mended the papers; has that been done at your house in London, or in the country?

How. I do not know which.

Mr. Mountague. Let me ask you one question: can you swear to any particular paper, that he delivered that paper in London.

How. I do not know where they were delivered.

Mr. Weld. It need not be insisted on to find him guilty of all; if they find him guilty of the publication, that will be enough; and that they cannot deny but he is guilty of that. When it is delivered to be printed, it is as much a publication as the composing of it.

Mr. Mountague. But it does not appear that it was delivered in London.

Mr. Weld. But he owned it in London.

Sir T. Powis. He did cause these papers to be printed in London.

L. C. J. He delivered them to be printed in London: How agrees to give him half a guinea a paper at first, and 20s. afterwards; and surely then he designed to have them printed.

Mr. Mountague. He cares not what he does with the papers, he was only to have so much money for them.

Att. Gen. My lord, here they are setting up a doctrine that will make libelling safe, so that no man shall ever be punished for it. We have charged him with writing, composing and publishing a libel: we have proved the agreement made with the printer, be it in London, or out of London, is not very material. Now if there be an agreement made out of London for printing and publishing a libel, wherever that libel is printed and published, he is guilty; for whatever is done by his agreement, he is guilty of it. As to the next thing, I am much concerned to hear them say, that which I never before heard urged in any court, that a libel is not a libel unless they assign some particular person; but I look upon it as the highest kind of libels to reflect on public officers in general; on the administration of justice in general. I believe every one knows a libel is a libel, though particular persons are not named: if it reflect on officers in general, as ministers of state, or judges, or the like. *Mr. Mountague* would have it, that reflections on the ministers of the crown is not a reflection on the queen; and he would have it, that we should have averred who these ministers are that were meant in the libels. As to the first, certainly they that reflect on the public administration of justice by the queen's officers, do reflect on her majesty, who places and continues them in their offices. And to the second reflection, being in general on the ministry, we ought not, nor could aver, who in particular he meant in these libels; the whole administration under the queen is reflected on, in placing in officers in general; in the management of the navy, and placing in the officers thereof; and in the administration of justice in the courts of justice; and what can be more scandalous? There needs no averment to explain these, in themselves they appear to be libels; and I hope such discourses as have been made on this occasion for the defendant will not meet with any countenance; but I am surprized to hear it justified here by a counsel, That the people have power to call their governors to account.

Mr. Mountague. I did not say so.

Att. Gen. Certainly, what you did say, viz. That you shewed more discretion in passing it

by than we did in questioning the defendant for it, and that we wanted discretion in bringing this matter on the stage, could have no other meaning, but that the matter was justifiable, but you would not in prudence do it; which, I must say, is the greatest liberty I have known taken by a counsel.

L. C. J. I did not hear him say so.

Mr. Mountague. I did not say so; I said it was more discreet to pass it by than take notice of it.

Att. Gen. I will always prosecute any man that shall assert such doctrine. My lord, I think myself obliged in duty, being in the station I am, always to take notice of such discourses as these, which no counsel ought to presume to make.

L. C. J. Gentlemen of the jury, this is an information that is preferred by the queen's Attorney General against Mr. Tutchin, for writing and composing, and publishing, or causing to be writ, composed or published, several libels against the queen and her government; and all these that are set forth as libels, are entitled, *The Observer*, and they are in number six. The first is said to be made and published May 30, 1702, and in which Mr. Tutchin is charged with having this libellous, scandalous paragraph against the government, and the administration of it. The words are these, 'If we consider the French king's success, in his bribery and corruption, we ought to lament the sad state of our own country, which affords so many instances of treachery. If we may judge by our national miscarriages, perhaps no nation in Europe has felt the influences of French gold, more than England; and worthy it is our greatest lamentation, that our dear country should be thus weakened by men of mercenary principles, when countries inferior to ours in strength and riches are secured from attempts of this nature, only by the fidelity of their people. What is the reason that French gold has not affected Holland, as well as England? But that their ministry is such as is entirely in the interest of their country, and altogether incorruptible: they prefer men that are knowing in their posts, and are active in business. When in England we find out offices for men, and not men for offices; and a title of honour gives a man a title to a great employment he is altogether ignorant of. By this, and by preferring of men by interest and favour, has the excise, the customs, and other branches of the revenue intolerably sunk; and by this means has the navy of England, our chief support, been hitherto perfectly bewitched: and can Lewis spend his money better than in getting men into offices in England, who are either false or ignorant in the business, or are his friends?' This now is charged on him as a defaming the government, in employing corrupted officers, or ignorant officers, when they are not fit for their places. There is another that has been produced, which is the second, that hath these

words: 'And this is a prerogative of singular advantage to the people of England, in that their representatives are the judges of the male-administration of their governors; that they can call them in question for the same, and can appoint such to wear the crown, who are fittest for government: which they have often done, and indeed which is the privilege of all free people, who are authorized by the laws of God and nature, to chuse their own governors.' This is to possess the people, that they may at their will and pleasure, when they take a fancy thereto, disseise the queen, and set up what governor they please. These two, and the rest which I shall mention by and by, are given in evidence. And it seems at first Mr. Tutchin came to Mr. How, the printer, and there is a contract made between them two, to print a weekly paper, and it was to be entitled, *The Observer*, and he was to have half a guinea a time. Mr. Tutchin was to write, and the other was to print; his printing-house was here in London: accordingly he enters into this contract, and from time to time has received copies, and prints them, and has paid Mr. Tutchin for them, and has printed all his *Observers*, even to this very day: afterwards there came two out in a week. Now it is most plain, that a contract was made between Mr. Tutchin and Mr. How, for Mr. Tutchin to write and frame, and Mr. How to print. And nobody can imagine that Mr. How the printer, would give him money, unless that written copy were to be printed: but now, say they, was there no alteration made; but were they printed exactly pursuant to the copy of Mr. Tutchin? Yes, but these two were not; not but that sometimes I made some alterations; for, says he, when I thought his expressions were too passionate and severe, I apprehended danger, and made some literal alterations. But after this, these two were read, and Mr. Tutchin owned them, and divers others, and ordered him to bind them in a volume; and he does so, and Mr. Tutchin makes a Preface, and binds it to this volume. It appears that his own hand is to it, to the Preface, and was paid money for them, and Mr. Tutchin owned this number; so that there is a full proof that these were composed by Mr. Tutchin, in order to be printed, and they were printed afterwards, and he has received money for them.

Now there are four more which are charged in the information, of the same nature. One is thus: 'Take one time with another, the mismanagements of the navy have been a greater tax on the merchants, than the duties raised by parliament: we never had a better navy; but the wisdom of the managers thereof is like a bottomless-pit, past finding out.' A fourth paper hath these expressions. 'What avails it a man of learning and parts, to qualify himself for the service of his country on the ocean? If he has knowledge enough to advise Neptune himself, if he has no interest he shall have no preferment. How much does

'it look to our nation's disadvantage, to have men
 'in eminent stations in the navy, who have not
 'so much as an idea, a notion, a thought of
 'naval affairs? to have men to superintend the
 'building of our floating castles, who know not
 'the nature of any one part of the management?
 'To have men employed in the victualling,
 'who qualify themselves for that post by learn-
 'ing to write their names, which is indeed a
 'post for a philosopher bred to the sea?' This
 also charges the government for employing
 unfit ministers in the navy. There is a fifth,
 and that hath these words. "*Countryman*.
 'Truly, master Observer, I have no very
 'good news for you. Mr. Daniel De Foe has
 'pleaded guilty to the indictment against him,
 'for writing and publishing *The Shortest Way*
 'with the Dissenters; and he is sentenced to
 'stand three times in the pillory, to pay a fine
 'of 200 marks, and to find security for his
 'good behaviour for seven years. *Observ.*
 'The court could do no otherwise than convict
 'him, upon his pleading guilty; *habemus con-*
 '*fitentem reum*, is very often the voice of
 'courts of judicature, it is the case of judges
 'and juries: If Daniel De Foe was in expect-
 'tation of Coleman's black-box, he has found
 'a pillory instead of it. I do not trouble my
 'head about the custom of giving the pillory
 'to authors, which is the punishment of bakers.
 'You talked just now of turning author, have
 'a care of your caudle; you see which is the
 'shortest way with authors; you must all
 'enter yourselves in the regiment of colonel
 'Foe. The law of England directs, that no
 'man shall be fined *ultra tenementum*; and I
 'make no question, but the justice of the court
 'has fined Mr. Foe answerable to his estate.
 'His security for his good behaviour for seven
 'years, without doubt, was rationally con-
 'sidered, as to the legality thereof. For my
 'part, I am only acquainted with old laws of
 'England, the ancient birthrights and immu-
 'nities of Englishmen: this I take to be the
 'foundation of new laws." And then here is
 the last, which hath these words: "*Countryman*.
 'Master Observer, there is another plot
 'against you. *Observer*. Prithee, man,
 'there is a plot against the queen, and the
 'whole nation; is it any wonder then, that
 'there are plots against me? The high-flyers
 'are now plotting against every honest man in
 'England. I will tell you more of it, the next
 'time we meet. *Countryman*. I fancy some sort
 'of people plot against you, because you
 'endeavour to countermine their plots against
 'the queen and nation. *Observer*. You are
 'right enough; but that shall not hinder me
 'from detecting their designs, and from open-
 'ing the people's eyes: but prithee, what plot
 'is this? *Countryman*. Why, Sir, it is a plot
 'preparatory to your trial; and if they cannot
 'effect this plot, I suppose you will never be
 'tried. They insinuate into the citizens of
 'London, that you have lately written very
 'scandalously, maliciously, and treasonably,
 'and I do not know how many other lies,

'against them the said citizens; and by this
 'means they are minded to set your jurors
 'against you. *Observer*. This is likely
 'enough; they will leave no stone unturned,
 'to suppress the truth. I understand, I should
 'have been prosecuted by bill the last sessions,
 'but that the high-flyers did not like the
 'jury: nay, they say, they do not like the two
 'sheriffs, because they will not pack juries to
 'find innocent men guilty."

This is the last of the libels. Now whatever
 you admit concerning these, the same is proved
 concerning the other two, except that of the
 volume. These he did receive from Mr.
 Tutchin, or by his agent. He also paid Mr.
 Tutchin upon the same account that he paid
 for the rest, and they were printed here in
 London, and published. Now Mr. Tutchin did
 not at any time complain that they were not
 printed according to the copies sent. As to the
 copies, they are lost all of them but one of
 these four. There are divers others, but they
 concern not this information, but one, and that
 is Mr. Tutchin's hand, the same hand as the
 other papers, and by that copy the paper was
 printed, and Mr. Tutchin also received the
 money for it. So that now you have heard this
 evidence, you are to consider whether you are
 satisfied that Mr. Tutchin is guilty of writing,
 composing, and publishing these libels. They
 say they are innocent papers, and no libels, and
 they say nothing is a libel but what reflects
 upon some particular person. But this is a
 very strange doctrine, to say, it is not a libel
 reflecting on the government, endeavouring to
 possess the people that the government is mis-
 administered by corrupt persons, that are em-
 ployed in such or such stations either in the
 navy or army.

To say that corrupt officers are appointed to
 administer affairs, is certainly a reflection on
 the government. If people should not be
 called to account for possessing the people with
 an ill opinion of the government, no govern-
 ment can subsist. For it is very necessary for
 all governments that the people should have a
 good opinion of it. And nothing can be worse
 to any government, than to endeavour to
 procure animosities, as to the management of
 it; this has been always looked upon as a
 crime, and no government can be safe without
 it be punished.

Now you are to consider, whether these
 words I have read to you, do not tend to beget
 an ill opinion of the administration of the go-
 vernment? To tell us, that those that are em-
 ployed know nothing of the matter, and those
 that do know are not employed. Men are not
 adapted to offices, but offices to men, out of a
 particular regard to their interest, and not to
 their fitness for the places; this is the purport
 of these papers.

Now they on his behalf insist on these
 things: First, they say you do not prove any
 crime against him in London. Indeed it is not
 proved that he writ them in London; but the
 question is, whether there is not proof of the

composing and publication in London? There is proof that they were sent to Mr. How, in order to print them in London. Now, whether he received them from him in London or no (but suppose out of London,) yet if he received them to print them in London, that is a publication in London. If they scruple that matter, it shall be specially found. If they were delivered to be printed at London, I must leave it to your consideration, whether you will not find him guilty of publishing them in London. They were some of them printed in Fanchurch-street, and others in Gracechurch-street. He knew where the printer lived, the contract was made, and he was paid for them. Gentlemen, I must leave it to you; if you are satisfied that he is guilty of composing and publishing these papers at London, you are to find him guilty.

Then the Jury withdrew, and about a quarter of an hour after returned into Court.

Clerk. Answer to your names, &c. How say you, is John Tutchin guilty of the charge laid against him, or Not Guilty?

Foreman. Guilty of composing and publishing.

L. C. J. They appeal from my opinion; they do not find the writing in London, but they find him guilty of composing and publishing in London, that is, supposing he did write them out of London, and deliver them in order to be printed in London.

Sol. Gen. Do you find that the papers, the several copies of these six Observators, were delivered to be printed in London?

Foreman. Yes, guilty of composing and publishing, but not of writing.

Sol. Gen. Do you find him guilty of the whole charge, except the writing?

Foreman. Yes.

Clerk. Gentlemen, hearken to your verdict, you say John Tutchin is guilty of the whole information, except the writing?

Foreman. Yes.

Clerk. And so you say all?—*Jury.* Yes.

November 13.

Att. Gen. My lord, Mr. Tutchin has given me notice that he will bring an appeal in arrest of judgment; and indeed he has given public notice of it, for it is put into the news-papers.

L. C. J. Is he here?

Mr. Mountague. Yes, my lord, he is about the court.

Att. Gen. Call him.

Crier. John Tutchin, gentleman. [Then he came into court.]

Mr. Mountague. May it please your lordship to favour me a few words in behalf of the defendant, John Tutchin. He was tried before your lordship at the Guildhall, London, on Saturday was seven-night, for being the author, composer and publisher of some papers entitled, The Observator; and there is a verdict entered against him, and now he appears to submit to the judgment of the court; which he humbly hopes shall not be given against him. For,

my lord, in the first place, I beg leave to take notice, that we think there is cause why your lordship should set aside the trial that has been had; for we look on all the proceedings upon the writ of Distringas, on which the verdict is taken, as null and void. This is an information against Mr. Tutchin for a libel; and the facts laid in the information are said to have been transacted within the city and county of London. To this information he pleaded the last Trinity term, and the Venire Facias was awarded the last day of that term, 'Return. Die Lunæ proxima post tres septimanas Sancti Michaelis,' which your lordship knows was October 23, the first day of the term, and the Distringas should have issued the very same day; but it so happens, that the Distringas in this case, does appear to have been sued forth October 24, which is a day after the return of the Venire; and therefore we say the Distringas is naught, and all the proceedings thereupon are null, because there is no award of the court to warrant this Distringas. In the next place, we say, that the return, neither of the Venire, or the Distringas, are as by law they ought to be; for the return of the Venire is 'die Lunæ proxima post tres septimanas Sancti Michaelis,' and the jury are to be brought 'coram Domina Regina apud Westm. die Jovis prox. post;' and the return of the Distringas is 'Crast. Anni.' with an 'Hab. Coram coram Regina apud Westm.' For both which reasons we think it naught, because when any proceedings in criminal matters are laid in a foreign county, the process must be made returnable at a day certain. Day might be given 'coram Regina ubicunque.'

L. C. J. You mean at a common day; and it is so, whenever indictments are removed hither by Certiorari out of foreign counties.

Mr. Mountague. My lord, we think there is no difference to be made between the proceedings in London, and other counties more remote from Westminster.

L. C. J. In informations exhibited by Mr. Attorney General in this court for crimes done in foreign counties, it is usual to return the process upon day certain.

Att. Gen. My lord, informations are of the nature of a bill.

L. C. J. Process on an indictment may be made returnable on a certain day, if it be found in this court; but if it be removed hither by Certiorari, it is otherwise.

Mr. Mountague. My lord, we take it, that the process that has been hitherto taken out upon all informations that charge crimes on defendants as done out of the county of Middlesex, has been made returnable on some common return day, and not at a day certain.

Att. Gen. It has always been allowed to be upon a day certain, as well as upon a general return-day; and it is settled and declared so by the court.

L. C. J. I am apt to think the clerks have gone both ways.

Att. Gen. A man takes a long day, if he will:

Mr. *Mountague*. We have looked over many informations, and the practice does not appear to have been so. But what does Mr. Attorney say to the first exception we have taken? Here is a discontinuance after the return of the Venire, which was upon October 23, and the Distringas bears 'teste vicesimo quarto die Octobris.'

L. C. J. Ay, what can you say to that, Mr. Attorney? That very day the writ is entered, there must be a Distringas.

Att. Gen. My lord, I know not how it came to pass. I believe somebody has done it on purpose. I desire the clerk may give an account of it. I never saw the writ. I desire time to know how this has been managed.

L. C. J. There must be a continuance to that day; if there be no continuance, all is fallen.

Att. Gen. If they come again, we will see how this has past.

L. C. J. If it be so, the plea is discontinued, and you must plead *de novo*.

Mr. *Mountague*. My lord, seeing it is in court, I desire it may be read now.

L. C. J. What need you make that reflection? Do you think we will make any alteration in it?

Mr. *Mountague*. I hope I may ask that without making any reflection: I am sure I did not intend it so.

Then the Record was read.

Att. Gen. Come again to-morrow.

Mr. *Mountague*. Mr. Tutchin, then you may go for to day; but be here again to-morrow.

L. C. J. Is the Venire made returnable Die Lunæ?

Mr. *Mountague*. Yes, my lord, it is; I looked upon it.

Att. Gen. I will see if it cannot be found out.

November 20.

L. C. J. Mr. Attorney, will you go on?

Att. Gen. My lord, we are ready, if they will maintain their exceptions.

Mr. *Mountague*. My lord, we think, we have no occasion to cite many authorities and precedents to maintain the exception, when it is apparent that there is a discontinuance; the reading of it makes it appear, that the Distringas was sued out a day after the Venire, so that here is a *Nisi Prius* that has been issued out erroneously. The statute says, the day and place for taking inquisitions must be 'in presentia partium.' And, it is plain, the day and place mentioned in this writ, was appointed when the defendant was not in court, and therefore is null and void.

L. C. J. 'In presentia partium,' where is that required?

Mr. *Mountague*. By the statute of *Nisi Prius*, which says, 'nec alterminetur hujusmodi inquisitiones coram aliquibus Justiciariis de Banco nisi statuatur certus dies et locus in comitatu in presentia partium.'

L. C. J. Which statute do you mean?

Mr. *Mountague*. The statute of Westminster the Second, cap. 30.

L. C. J. Call for that statute.

Att. Gen. My lord, I desire that they will maintain their exception, for I am in the dark about it, and that they maintain it by the authority of the law, and not only by an *ipse dixit*, and a noise in the town.

L. C. J. They say the exception maintain itself.

Att. Gen. My lord, let them go on first, and then we will answer them. If they will rely upon this exception without authority, then we must pray the judgment of the court; but if they will bring authority for it, we do desire to hear them, and shall give them an answer.

Sir T. Powis. My lord, if they have any other exception to make, I desire they may make it now.

Justice Powel. Mr. *Mountague*, you have made one exception; that is, of the discontinuance of the process; now, if you have any other exceptions to make, you may make them now.

Mr. *Mountague*. My lord, the exceptions I have hitherto taken, have been to the trial. I mentioned this, and I mentioned another, which I do not insist on; since I understand it has been otherwise settled, that is, about the return of these writs upon a day certain; which, my lord, I did look upon to have been wrong; because I did not think Mr. Attorney could shew any precedents of any such returns to warrant this; for I can find none, and I have searched in the time of king Charles 1, and in king Charles 2, and king James.

L. C. J. If a suit be commenced in the Common Pleas by bill, as if an attorney shall file a bill there, the process is made returnable at a day certain, and here our proceedings by bill are always at a day certain. Now an information which is originally filed here, is in nature of a bill, and the proceedings therefore may be confined to a day certain; but if any indictment be brought hither by *Certiorari*, the process must be returned at a common day and not a day certain. We had this matter under consideration before, upon another occasion, and we thought it very reasonable the proceedings on informations here should be the same as the proceedings by bill, which are returnable on days certain from any county of England.

Mr. *Mountague*. My lord, if that be your opinion, I have nothing to say to it. I have some records here in my hand, some in king Charles's reign, and some in king James's time; and all these are made returnable on the common return, and one of these records was settled by sir William Jones. As to what the officers say, they are divided, I find; for some of them have told me, it is quite contrary to what Mr. Harcourt reports the course of the court to be.

Att. Gen. My lord, I dare appeal to you, whether this has not been argued twenty times!

Mr. *Mountague*. My lord, let Mr. Attorney shew precedents.

Att. Gen. You must shew precedents.

Justice *Powel*. It is otherwise when there is an original proceeding.

L. C. J. Have you any more exceptions?

Mr. *Mountague*. I rely on the first exception. It lies on Mr. Attorney to answer this exception.

Att. Gen. My lord, I desire they may shew any case or resolution of law, that the *Distringas* should bear *Teste* the same day the *Venire* is returned upon. The *Distringas* is awarded on the roll upon the first day of term: and the *Venire* is returned the first day of term: And at the same time it is awarded, that there shall be a *Distringas*, day is given to the party; that is the warrant: For the *Distringas* and the *Teste* never appear upon the roll. If they have any authority, I desire they may shew it. My lord, I think we can satisfy you, that it is right; or that it is amendable. This is a maxim of the law, there must be authority.

L. C. J. It may be, the thing is so plain, as to need no authority.

Sir *T. Powis*. I desire to know, whether the award of the *Distringas* is right on the roll. I take it, that the *Venire* is returned the first day of the term; and that there is thereupon a *Distringas* awarded returnable 'Die Jovis prox. post Crast. Anim.' I beg to know whether it be so or no?

L. C. J. I have it in my hand; and I was apprized of that before; and was going to state it. For the continuance of the roll is right. The *Venire Facias* is returned, 'Die Lunæ prox. post tres. Mich.' On which day, the Attorney appears on the queen's behalf; and the defendant appears likewise. What is then done? 'Ideo præceptum est vicecomitibus London, quod distringant eos; itaque habeant corpora eorum coram domina regina, Die Jovis prox. post Crast. Anim.' Now, on what day must this award be said to be? That must be that day whereon the *Venire* is said to be returned, which, is, 'Dies Lunæ prox. post tres. Mich.' The award of the *Distringas* therefore, by the roll, is that very day, the 23d: But the *Distringas* bears date, not the 23d, but the 24th.

Sir *T. Powis*. Now do they rely on it, that notwithstanding the roll has awarded it *Die Lunæ*, yet because the *Distringas* is dated *Die Martis*, do they rely on it, that this is to prevail, without any more to be said to it?

L. C. J. This is the true state of the matter. Now there is no discontinuance on the roll; for it appears on the roll, that the *Distringas* was awarded the 23d.

Mr. *Broderick*. The objection is, that the *Distringas* has been sued out without warrant. They ask for authorities. I believe, we might shew twenty.

Att. Gen. My lord, I desire they would cite some authorities of the twenty they speak of. I can shew them cases, where the *Distringas*'s have been tested out of term, or upon

the Sunday: These are to be set right. I would be glad to see any authority, wherein it appears the *Distringas* must be the same day. I would be glad they would do more than say it.

Mr. *Mountague*. My lord, before I answer this, I would ask, Whether that roll be the *Nisi Prius* roll, or the *Plea* roll?

L. C. J. It is the *Nisi Prius* roll.

Mr. *Mountague*. My lord, the *Plea* Roll has been made right since I took my *Exceptions*. The *Nisi Prius* Roll ought to be a transcript of the *Plea* Roll.

Justice *Powel*. The *Nisi Prius* Roll is made out of the other: If the *Nisi Prius* Roll be good, it is well enough.

Mr. *Mountague*. My lord, to have a transcript of a roll that has been made up since, is not right.

Att. Gen. My lord, he strikes at the root of the court.

Mr. *Broderick*. My lord, I would take notice, that it is the course of the court, that the *Distringas* shall bear date the day of the return of the *Venire*. The clerks tell me, they never knew it otherwise.

Justice *Powel*. The award is right; but you have not taken out a writ according to the award of the court: Whether that will be warranted?

Att. Gen. They have no authority, but the reason of the thing; and then I think we may give this short answer: We do affirm, That it is right as it is: But if it were not right, we say it is amendable.

L. C. J. All the matter will be to prove that it is amendable.

Sir *T. Powis*. If need be, we may put the matter into the right way: For if the *Distringas* be not the same day with the award, we pray that it may be amended.

L. C. J. By what law must it be amended? You are in the affirmative: If you acknowledge it wants amendment, by what law must it be amended?

Sir *T. Powis*. It is amendable by the common law.

Justice *Powel*. You say it is no fault; and if it be, it is amendable by the common law.

L. C. J. First let us know whether it needs amendment? And then next, whether it can be amended?

Sir *T. Powis*. My lord, let them shew that it needs amendment: For if they make exceptions, and say no more, and we proceed to answer them, then they may come upon us again with new matter, and so there will be no end.

Mr. *Mountague*. When we were in the affirmative in our exception, we did give some reasons why we said it is not right.

Justice *Powel*. The party was in court the 23d. Then they awarded the *Distringas* in his presence; so that the *Nisi Prius* was awarded in the presence of the party: The award of it is *Die Lunæ*. But here is the fault: They did not make a right *Teste* that day; so that the fault is, the *Distringas* that is sued out.

Mr. *Mountague*. On Monday there is an award of the *Nisi Prius*; but on Tuesday it is taken forth. Now we say, that it is not according to the writ awarded: For the writ bears *Teste* the day after; and upon that account we say, the proceedings are null. My lord, Mr. Attorney asks for precedents for this: But, with submission, we take it to be plain, that the motion made for the amending this thing, supposes it not to be right.

L. C. J. The first question to be debated, is, Whether this be a right trial? or if not, Whether it be a discontinuance of the whole? The *Distringas* bears date the 24th of October; the roll is the 23d of October; and there is no such writ then taken out, but the day after; so that the *Teste* is not according to the roll. When a writ is not awarded according to the roll, what the consequence will be, is another matter.

Att. Gen. I beg your lordship's direction in this matter. It deserves a great deal of care; for there has been a great noise in the town about it. However, we will go your way. Whether they begin first, or we, I am very easy.

L. C. J. It is not warranted by award of the Court. This is a matter of the greatest consequence to the government.

Mr. *Broderick*. Mr. Attorney speaks of a noise about the town: I concern not myself about that, nor any further in this case, than as it may be the case of every subject of England.

L. C. J. He is found to be the author of the *Observators*.

Att. Gen. I do not speak it now upon the business of this prosecution; for he is so inconsiderable, that it matters not much how it goes. But if this be not amendable, it will blow up all proceedings. Every man must have justice; and God forbid but he should.

Mr. *T. Poxis*. My lord, if it be thought proper, we will go on. Your lordship observes, what warrant there was for a *Distringas*; and that it is rightly awarded on the roll, which is a warrant to the clerk for a *Distringas*; and by consequence if the *Distringas* be not made according to that award, it is the misprision of the clerk. Now if we do admit this to be out of all the statutes of amendment (though it is fit to be considered, whether some statutes do not warrant it) but suppose it should be out of all the statutes of amendments; yet by the common law it may be amended.

There were amendments at the common law before any statute, both in civil and criminal matters; and these amendments chiefly regarded the process of the Court, and such errors as were occasioned by the inadvertencies or neglects of the officers: but especially in the same term, during which time the judges have the records of the court in *scrinio pectoris*.

My lord Coke says so expressly: and so was the opinion of the Court in *Blackmore's* case, in the eighth Report, fol. 156, 157, which is the great Case of Amendments.

That book says, fol. 156, b. Without ques-

tion, at common law, the default of entry of a continuance, or of an *essoign* (which was the misprision of the Court itself in the form of the entry) was amendable by the Court. And the objection here is, that there is a discontinuance: and the instance there given from the case in 5 Ed. 3, fol. 25, is very considerable; where, after a *Venire Facias* issued, and an award 'Quod jurat ponitur in respectum,' in the entry whereof there was a great mistake of the parties, which made a discontinuance, and yet amended at the common law.

The instances of amendments at common law, out of the old books, are many: 22 Ed. 3, fol. 7, b, and 10, a, where a discontinuance was amended, 29 Ed. 3, fol. 32, b a *Habeas Corp Jurator*, amended, 7 Hen. 6. 29 *Broke*, Tit. Amendment, 32. 4 Hen. 6, 16. b. By which book it appears, that the judges had power to amend in many cases at the common law, in the case of a common person. And if in the case of a subject, much more in the case of the king: for, by the common law, the king had many privileges and advantages in legal proceedings, which a subject had not: and the king, in his suits, hath many great prerogatives. The king may plead one title, and afterwards waive it, and plead another. He may waive a demurrer, and afterwards take issue. And many other privileges belong to the crown, of this nature, which a subject hath not.

And particularly in the matter of amendment by the common law, the king had a privilege, which a subject had not.

An original writ was not amendable for a subject at the common law, but in the case of the king it was.

Therefore in *Blackmore's* case, fol. 156, b. it is said, that if a 'Quare impedit' be sued forth on the behalf of the king, and the writ is 'presentere' instead of 'presentare'; it may be amended in the case of the king, after exception taken; but not so in the case of a subject.

And so in *Fitz. Amendment*, 12, 19, 62, several amendments at common law, especially in the case of the king.

Another advantage which we have in this case is, that we are in the same term wherein the *Distringas* was awarded and made forth.

And in the same case of *Blackmore*, fol. 156, b. 157, a. it is said, that at the common law, the judges may amend as well their judgment, as any other part of the record, in the same term. For during the term, the record is in the heart or breast of the Court, or of the judges, and not in the roll: but in another term, by the common law, misprisions of clerks in process were not amendable by the Court; for in another term, the roll is the record. So says that book.

But here we are in the same term: and it is the misprision of the clerk in process, and is the making out a judicial writ, which is in the power of this Court, as issuing out from hence, whereas original writs issue out of Chancery:

and judicial writs are often amended, where originals are not. Vide Brook's Amendments, 20, 22. Owen 62.

But if this were not amendable by the common law, it is amendable by statute.

The first statutes for amendments were 14 Edw. 3, cap. 6, 9 H. 5, cap. 4, and 4 H. 6, cap. 3, which extends to the amendment of a letter or a syllable; but the judges were wondered at in parliament for their great nicety, when they asked the question there, Whether they might not amend a whole word; as appears in 39 Edw. 3, f. 21. And 40 Edw. 3, f. 34, b. they were told that undoubtedly they might.

Now here is nothing to be amended but a figure: and this statute being general, seems to extend to our case.

The statutes most to our purpose are 8 H. 6, c. 12, whereby it is enacted, that the judges may reform and amend all defects in any record, process, plea, warrant, writ, pannel or return (except appeals, indictments of murder, and outlawries for the same; and additions left out in original writs, exigents, and other writs of proclamation, contrary to the statute of H. 5,) so that by such misprision of clerks, no judgment shall be reversed or annulled. And again, the statute of 8 H. 6, cap. 15, ordains, that the king's justices, before whom any misprision or default shall be found, be it in any records and processes depending before them, as well by way of error as otherwise, or in the returns of the same, by misprision of the clerks, or other officers or ministers whatsoever, in minute matters (such as this is) they shall have power to amend such misprision, upon examination thereof, according to their discretion; except the processes and records of felonies and treasons, and the dependancies thereof.

Now by reason of the particular exceptions in these statutes, and by reason that the following statutes of Jeofail, in 32 H. 8, 18 Eliz. 21 Jac. 1, &c. do not extend to criminal cases, an opinion hath been taken up among some persons, that no amendment can be made in criminal matters by any statute; which is a strange mistake.

For these two statutes of 8 H. 6, cap. 12, and cap. 15, being general laws, and in general words, they, in cases not excepted, extend to amendments to be made by the judges in criminal prosecutions, as well as in civil causes, without distinction: and the special exceptions, after the general words, are the highest proofs imaginable. For nothing could be more absurd and vain, than carefully to except, what the words precedent, without such exception, would not have reached or extended to; and that would highly reflect on the wisdom of parliament.

This will appear more fully by the following series of authorities, whereby the judges have amended discontinuances of this nature; in criminal prosecutions at the suit of the crown. 2 Cro. fol. 502. Harris's case. An indictment for a nuisance was prosecuted against

Harris; and a trial was had, and a verdict against him. Afterwards it was removed by Certiorari; and upon view of the record, it was found, that no issue was joined: for the clerk of assize had omitted to enter the issue, and so the verdict was without an issue. And upon motion, the court of King's-bench ordered it to be amended; for it was the default of the clerk. And this was done divers years afterwards, and in the time of another clerk of assize. And it was ordered, that the clerk of assize which then was (for the former was removed) should amend it; which was done by inserting these words, 'Et Richardus 'Warer' (who was the former clerk of assize) 'qui pro Dom. Rege sequitur similiter,' &c. And it was there said by the Court, that if such faults should not be mended, many trials upon indictments should be overthrown.

There is another case in the same book: it is in 2 Cro. fol. 529. Parker vers. air John Curson et Ux. It was an information against air John Curson and his wife for recusancy; and the issue was, 'Quod præd. Magdalena 'dicit, quod ipsa non est inde culpabilis; et de 'hoc ponit se super Patriam, et Attornatus 'Domini Regis similiter.' Upon a trial at bar, a verdict was given against the defendants. It was afterwards moved in arrest of judgment, that there was no issue joined; for it was only the plea of the feme covert, and no issue joined, or plea pleaded for the husband. And yet in Regnard, the docket was right, which was the warrant for the roll; and the omission of the husband was the misprision of the clerk: therefore it was amended in so material a part, even in another term.

Another case is in Cro. Car. fol. 144. Sir Humphry Tufton's case. A Quo Warranto was brought against the corporation of Maidstone, for claiming divers liberties. Judgment was entered by disclaimer; and it was intended to have been only a special disclaimer of all privileges, by pretence of a charter bearing date 17 Jac. Regis: but the clerk in entering the judgment had omitted those words, 'Virtute vel Prætextu Literar. Patent: 'geren. dat. Anno decimo sept. Jac. Regis: ' but upon examination, the Court finding that it was merely the misprision of the clerk, the Court was of opinion that it was amendable by the common law, as well in the king's case, as in the case of a common person; and in another term too; for so it was, and it was amended accordingly.

There is a case in 1 Siderfin, fol. 243, 244. The king v. Percival, Godfrey, et al.

Upon an indictment for a riot and a battery, and Not Guilty pleaded, a Venire Facias was awarded Vicecomitibus of the city of Canterbury; and upon a trial at bar, a verdict was given against the defendants: and it was moved in arrest of judgment, that the Venire Facias and other process was directed Vicecomitibus of Canterbury, and the return was made by one sheriff only; but the Court amended it, by endorsing upon the writ, that

there was but one sheriff of Canterbury. And this amendment was made by the common law, and not by the statutes of Jeofails; although it was said at the bar, that it was amendable within the statute, because it was not a case within any of the exceptions; it being an information at the common law. And the case of Sherington and Talbot was cited, and the book of 39 Henry 6, 40, for the same purpose. And with this case in Siderfin agrees our present case; for it is not an indictment or information upon any penal statute, but an information at common law.

Now, if this opinion, as reported by Siderfin, be law, then this discontinuance is plainly made good by the statutes of Jeofail.

So in the case of Dolphin and Clark, 2 Cro. fol. 64, 65. The appearance and issue were in Hilary Term, 1 Jac. the Venire awarded did bear Teste 23 Jan. 1, Jac. so the Venire awarded before the issue or appearance; but yet amended, for the roll is the warrant of the Venire, which was right. So where the Teste was upon a Sunday, it was amended; for it was the default of the clerk, in the mis-awarding of process. So if Teste out of term. So if it be Vicecom. and says not of what county: or if the king's reign be mistaken; 2 Cro. fol. 78, *Lea v. Lacon*; the roll being right, and a judicial process, it may be amended.

So *Yelvert. fol. 64, Nevill v. Bates*. The Venire Fac. was made returnable Quind. Hil. and yet bore Teste 12 Feb. which is the last day of the term: and yet, per Cur. it shall be amended in the date of the Teste, for it is but the default of the clerk. And other like instances there put.

The like in Cro. Car. f. 38, *Aysleworth v. Chadwell*.

So in Cro. Car. fol. 90, 91, *Moor v. Hodges*. The issue was in Trinity term; and the Venire and Distringas were of days in Easter term before; and yet amended: for the roll of awarding the Venire Facias was well enough; and the mistaking the Venire Fac. which is a judicial process, shall also be set right.

So in later cases, Trin. 2 Jac. 2, the king *v. Edes*. The defendant was convicted of a misdemeanor, upon an information exhibited 'per Robertum Sawyer,' &c. The continuance was, 'Ideo dies datus est prefat. Sam. Astrey;' resolved it might be amended.

And Hil. 3 and 4 Jac. 2, the king *v. Holmes*. Upon an information for a riot, and the defendant convicted: the mistake of 'Octabis Martini,' instead of 'Octabis Hil.' amended.

We are here in a much stronger case. The defendant hath been found guilty upon a fair trial: and the preamble of the statute of 32 Hen. 8, takes notice, that the setting aside of verdicts, for discontinuances and other misprisions, is a great slander to the common law and judges. The Venire and Distringas are duly awarded upon the roll; and the making the Teste of the Distringas 24 Oct. instead of

25 Oct. is a plain misprision: it is in a judicial process, and it is in the same term. And we humbly insist upon it, That it is amendable, both by the common and the statute law. For according to my lord Coke, in *Blackmore's case*, f. 156, b. 157 a. it is hard to say, what the Court cannot amend in the same term. For, says he, at common law, the judges might as well amend their judgment, as any other part of the record in the same term. For during the term, the record is in the breast of the Court, and of the judges, and not in the roll. And therefore we pray this misprision may be amended, if it stand in need thereof.

Att. Gen. My lord, because this matter has been pressed with so much warmth, I must beg leave to observe some few things in answer to what has been said. This is a thing, that not only concerns this single prosecution, but it concerns all the prosecutions for the crown; and in all cases, not only criminal, but civil; and, my lord, if the statutes of amendments extend not to any other cases but what they urge, the case of the crown is worse than that of the subject. It is worthy of consideration, what things are amendable by common law; for if the crown be left to the mercy of the clerks, it cannot but be of very ill consequence. Therefore I hope we may take the benefit of the common law.

My lord, I would beg leave to recite some few precedents to shew how the common law formerly stood. And the first I shall take notice of is the preamble of the statute 32 Hen. 8, cap. 30. There it is said, the staying of judgment after the verdict, is a great scandal to the common law, and the misprision of the same. And, my lord, there is another thing to be considered; that, admitting the common law as it stood before, there is a great difference between the proceedings of the crown at the common law, and civil cases. The crown had many privileges at common law, which the subject had not. And it will sound very harsh, that the crown shall be left without those helps by the statute of amendments, when so many of the inferior subjects did not want the help of them. For it is impossible this should not be thought of in parliament, that some care should be taken for the crown in those matters where it needed.

Now there is, in all our books, notice taken of a greater privilege that belongs to the crown than to the subject. There shall not be a demurrer to the evidence in the case of the queen, without her counsel's assent; yet in the case of a subject, there may be a demurrer to the evidence. So the crown may either insist on a demurrer, or waive it, and take issue at pleasure.

There is this likewise: before judgment, in a criminal case, the queen may amend, but the subject not.

Also by *Hardress Reports*, fol. 504, before judgment, no discontinuance may be in the queen's case, although the issue was tried.

The attorney takes issue to one part; and it is pleaded that this is a discontinuance to the other. Now there can be no discontinuance before the verdict. And that book goes further, and says, that the want of continuance in that case, cannot be objected before judgment, &c. And in 2 Buls. 35, an indictment is said to be amended even after verdict.

Now there is great reason, that such misprisions in writs at the queen's suit shall be amended by the common law. And in Fitzherbert's Abridgment, Tit. Amendment, Placita 22, if the king bring any writ, which wants form, &c. it shall be amended. But it is otherwise in the case of the subject. So says 8 Coke expressly, fol. 156. An original writ is not amendable in the case of a common person, but it is amendable in the case of the king.

Now it has been the constant practice, that these privileges have been preserved to the crown. The queen may at any time amend her information after trial, but a subject cannot.

These privileges have been preserved to the crown even at the day of trial: and many mistakes of clerks, in informations and indictments, have been so amended. This is a right of the crown by the common law.

In the next place, my lord, I would observe what is the matter we are going to amend. It is not what alters the party's defence. It alters not the issue, or trial; nor is it any thing that tends to his prejudice: and by the common law, that may be amended, which is not a prejudice to the party.

The defendant has a day given by the roll; and the same day the Distringas is awarded, he appeared: Every one must own, there was no prejudice to him, whether the Distringas be of one Tests or another. It is true, there is the Year Book, 20 Hen. 6, fol. 18, which is also in Brook's Abridgment, Tit. Amendment, Placit. 4. There was a Misnomer in the Capias and subsequent process, and in the Exigent: And the Court held that the Capias, &c. might be amended, but not the Exigent; because of the prejudice, if one might be outlawed on such process, to which he never appeared; and therefore it might not be amended for that reason. But this case stands clear of all objections of that kind. He had a day to appear, and make his defence: He came in, and did appear accordingly, and no prejudice happened to him.

Now, my lord, as to the exception they make, I must beg leave to say, it can be of no weight. I agree, the award of the Distringas must be according to the writ of Venire: But, with submission, I observe not the necessity that the Distringas should be tested the same day. No authority of law requires it, and by reason it should be otherwise. For suppose the award is made by the Court the first of January, the clerk has all that day at least to make it. For after the Court has made the award, the award is to be drawn up and delivered to the clerk to make the writ, and it cannot

be supposed to be made at the same time as the award is. The Court awards one day, and the Distringas is made the next day, which is as proper and convenient a time as can be; I see nothing in the reason of the thing against it.

My lord, the authorities they cite, that where process issues another day, and not the same it is awarded, do not prove it a discontinuance; and many cases are otherwise; as an award to give notice of trial, &c. Also there is a book of Fitzherbert's Natura Brevium 20 G. and Brook, Title Discontinuance, 59, which says, if the plaintiff does not assign error the same term, then it is a discontinuance. Now though a Writ of Error is returnable at a day certain, yet he has all that term to assign error; but if he omits it a whole term, it is a discontinuance.

My lord, I do not see but this is a regular prosecution on a writ not liable to exception. There is another book, 21 Ed. 4, that says, There shall be the same day given to the jury by the Distringas: but I see not the necessity that the Tests should be that day, Brook, Discontinuance, 53. At the return of the Venire Facias the defendant was esoined, and the Essoin adjourned: Now the Habeas Corpus, shall have the same day as the Essoin had by adjournment, and so not the same day with the return of the Venire; for, says the book, you shall continue the Venire to the same day of adjournment; but that does not shew that the process shall be issued that day, but rather the contrary. Now, in this case, there is all done that is necessary; the process is continued, the jury is adjourned to that day that it is by the roll, the parties are continued to that day. I know no case that shews a necessity of the writ bearing date the same day, but one, and that I think is against them: It is the case of Bradley and Banks, in Yelverton 204, and that was in an appeal, and that it was so, there was a discontinuance in an appeal, if there be any time between the return and the Capias, though the defendant hath appeared, yet all the process is discontinued; for in that case, the Tests ought to be the same day as the process was. Now if that were a general rule, it would be against us; but that was founded on a special reason, and does them no service. For all appeals are to be without intermission, and if they are intermitted any time, the appeal is lost; for the common law is not altered by the statute of Gloucester; therefore there can be no imparlance after an appeal; for if an imparlance be thereon, it is a discontinuance, and therefore that case will be of no authority to them.

But there is a case in Crook, Eliz. (N. B. The case intended seems that of Rogers ver. Bird. Cro. Eliz. 572, sed vide ib. 433, contra.) where this process is taken notice of as good, and that is, that the process is the very next day. There a Venire Facias was awarded Crast. Trin. the Distringas was issued the day after, and by that it ought to be so; and the return was amended, and the process was the next day after the return. Now that being so

particularly stated, seems to be an authority that it may be so.

L. C. J. *Holt*. How does it appear to be a day after?

Att. Gen. The Venire Facias was Crast. Trin. the Distringas was Die Veneris, &c. which was the day after. (Quære Cro. El. 433.)

Mr. *Broderick*. In a criminal case it is not allowed.

Att. Gen. I do not tell you whether it was a criminal or a civil case, but the exception was taken notice of, and it was amended; but this I only premise. Now, my lord, with great submission, I do not know that there is any necessity (it being a process at the suit of the crown) to have it tested on any day certain; for it seems to be well on any day. If it be in the same term, and notice having been given to the jury, and they and the party appearing thereon, I cannot see why it may not be well. In criminal cases the course of the Court is to amend errors (of form) in indictments and informations the very day of the trial, and that has always had its weight in criminal prosecutions; but, with submission, if it be not right, it is to be made right; if it be a mistake of the clerk, it may be amended. If you award a writ, it is the clerk's duty to make it out; and if he mistakes in form, or varies from his instructions, &c. all these matters are amendable by the common law, and therefore need not the aid of any statute. But I cannot give up that neither; for the crown has certainly the benefit of the statutes of amendments, and I think Coke is of that opinion too, on the statute of 14 E. 3. That statute is general, and to say it comes only to causes between party and party, and not to causes of the crown, I cannot understand, for there is nothing in it that leads that way. And yet because it speaks of causes between party and party, this rule has been laid down, that it extends not to the crown; this rule has indeed prevailed: but where a statute is in general, and the end of it is to suppress fraud, according to all the rules laid down for expounding statutes, the crown ought to have the benefit of it. It is to take off the scandal of the law, and the ministers thereof, as the statute 32 H. 8, says. Now the stat. of 14 E. 3, is general, that by the misprision of a clerk, no process shall be annulled or discontinued by mistaking a letter or syllable, but as soon as it is perceived it shall be amended. Now I think there is no reason to be given why it should not extend to processes of the crown as well as of the subject, unless they thought the subject only wanted it. I do not understand why a general law may not extend to the king, as well as the subject. Now as this statute is general, I mean the statute of E. 3, so there is the statute 16, 17 Car. 2. cap. 8, which is likewise general, and yet it has been always taken to concern the crown, as well as the subject. And why not one statute as well as the other I cannot conceive. Now, my lord, we

are not without good opinion that the benefit of the statute 16 and 17 Car. 2, does belong to the crown. It was the opinion of the lord chief justice Hales, in the case of the lord Fitzwater, there the Venire was directed to one place, when it should have been to two; and the question was, whether this could be helped by the statute of 14 Car. 2. He adhered to that opinion, and the jury thereupon gave their verdict. It was indeed set aside; but judge Hales always abode by that opinion. And so is 1 Syderlin, 148, The king against Wright. There it is said the statute of Jeofails does extend to it; and even by the rule in Blackmore's case the statute does extend to it; for there, says my lord Coke, that statute does not extend to appeals, or indictments, pleas of the crown or any proceedings thereon, for they are excepted. That is his opinion, where they are excepted, it does not extend to them. Now all pleas of the crown are not excepted, but only appeals, indictments, &c. and therefore informations on particular statutes are not excepted. Now on the reading of the act, no pleas of the crown are excepted, but only appeals and indictments; therefore my lord Coke's opinion must be, that that act extends to all things that are not excepted therein, and consequently to this Case. In Dyer, f. 153, there is indeed another question, whether it be a discontinuance in the king's case on the statute of 32 H. 8. (Vide Dyer 353).

Now if he make a query on that statute, I cannot imagine why he should not have doubted in other like cases. But when he came after to fol. 346, 347, in an information on the statute of usury, the book says the misconveying of process and the misjoining of issues, are amendable by the statute of Jeofails, and accordingly judgment was given against the defendant, notwithstanding divers errors in the proceedings; so that the judges were of opinion in that case, that the statute did extend to cases of the crown.

L. C. J. The judges there did not directly consider the statute of Jeofails, it was but an opinion *obiter*.

Att. Gen. These are the words of the book, 'Tandem propter Statutum de Jeofails que parle de misconveying de Process,' &c. Judgment was given against the defendant. But I shall have occasion afterwards to take notice that a great deal of the practice of the Court goes on the amending of the returns. That statute is for amending of returns, and I think we are within the statute, or if not, that the common law will help us: but be that as it will, we are now on the first point; and I think it is amendable by the common law; and I think I can give you an account of much greater amendments made by the Court at common law, than this which we now ask. Now for Blackmore's case, if we had left it there, we might have done it by that case; for it appears by the 8th Rep. 156, b. without doubt there were amendments by common

law; and my lord Coke gives instances of it. Now I yield it was there in a civil case; but I think no man can pretend that at the common law there were any rules to distinguish between cases of the crown and cases of the subject, unless the crown had a much greater power to amend than the subject had; and that so it was, appears by many of our ancient books. And there are authorities in the statute law likewise, that the crown could amend further than the subject. For Coke in Blackmore's case says, That variance of the writ from the original was amendable by the common law, and any part of the record in the same term; for that during the term it is in the breast of the judge, but misprisions of clerks in another term in processes were not amendable by the Court. But I shall plainly shew, that misprisions of clerks were amendable at common law in cases of the crown; and this is proved by all the old authorities. The old books say, they shall be amendable in the same term, and we are now within the same term, and so hope we shall be delivered from that question. Now that rule of my lord Coke, and the reason of it, extends to criminal cases as well as civil, and both cases are within the power of the Court to amend. For if a fine be set within the term, the Court may in the same term amend it or discharge it. This is allowed to be in the power of the Court by the common law in the case of the crown. In Trinity term, vide 4 Mod. 395, between the king and Walcot, there was an error in the writ of attainder, and an exception was taken, and it was amended in the same term. For the Court finding the form of entry to be erroneous, they did the same term order the record to be razed, and made a rule for the next term; and this was done by the power of the Court at common law. For while the process and the record is in the breast of the Court, they have a power by the common law to make a new judgment.

My lord, the next matter I would observe is, that all misprisions of clerks, or their assistants, in the caption of the judgment, may be amended in the same term. For that there is Saunders's Reports, f. 209, Faulkner's case. If an indictment be mistaken in the stile of the Court, &c. the Court may amend any thing to make the caption right, first Syderfin, 259, King against Glover, and this was to amend a material point. There is the like case in 2nd Croke. These are criminal cases. It was an inquisition taken 'apud ———,' it was not said 'in portibus Londini.' The clerk of the peace was ordered to amend it. And in Jones's Rep. Stafford's case, first Abridgment 196, there was an error in the reversion of an attainder. The certificate was, that he was arraigned the 18th of March, and convicted the 20th of ———; in that case judge Barclay was of opinion it might be amended by common law, and the lord Coke agreed; but judge Jones was of another opinion, and he gave it for a reason, especially where the king had signified his pleasure of desiring it; and after-

wards it was not amended: but two judges were of opinion it might be amended. In Palmer's Rep. 480, in Plum's case, there was an indictment in Essex, and it is 'exactus est ad comitatum,' without 'meum,' and a Certiorari was awarded to the coroners, to certify whether it was exact 'ad com. meum,' and amended accordingly. So 7 E. 4, 15. The Nisi Prius was 'Mens. Mich.' and the roll was 'Quinden. Mich.' and that was amended. Now this seems likewise to be warranted by the statute of E. 3, and whether that statute extend to it or not, yet the other statutes extend to all.

For the old books, I would only trouble you with some cases that were before the statutes of amendments; and there it is plain, both as to civil and criminal actions, it was the same thing. For in both cases it was frequently amended; so in 5 E. 3, 25, an entry of a continuance was mistaken, and it was amended by the Court: so in the case of Chambers against Barrow — 430, there was a Scire Facias obtained, and it was returnable 'sexto,' and the entry is 'septimo.' This upon a demurrer was objected, and that all was thereby discontinued; it was answered, the Court might do it at all times by the common law, and this may be amended by the common law.

My lord, this is an express authority for us, that the process is amendable at any time before the end of the term, and the judgment is in the same term. In the book 9 Ed. 3, Placita 3. The default in process may be amended at any time before judgment; wherever the roll is contrary to the writ, it shall be amended by it. After issue joined, the Distringas was awarded, where no Tales was awarded the clerk found the award of the Venire Facias; and there it is said it is amendable, being in the breast of the Court.

Sir Bro. Title Amendm. Placita, 62. The original was in Sussex, and the prosecution in Essex; yet it was held amendable, and no discontinuance. These are all by common law. So 40 E. 3, Placita 13, and Brook's Amend. Placita 17. There was a writ issued against three: two appeared, and one made default; against whom process issued, and the next day he appeared; and this was amended because it was amendable by common law. Likewise Fitzherbert's Amend. 6. There was a variance by the default of the defendant, and it was amended, and it was after a default. So 30 E. 3. In the record it was ———, and in the Nisi Prius it was ———, and it was amended. Now there is a modern case, Croke Eliz. 222, 256, &c. in the Venire one of the jurors was called Samuel Sutton, and in the Distringas, Saul: but it appearing to be the misprision of the clerk, and that the writ was right, they held it was amendable by common law. And Brook's Amend. Placita 27, the count or declaration was *ad damnum* 100*l.*, the Nisi Prius was to the damage only of 100*s.* and the Court ordered the Nisi Prius to be amended, as being only the misprision of the clerk. Now that

goes a great way, for the Teste there had no writ to try it; but yet that is adjudged to be amendable. And so in that book Placita 24, and in divers other places. So that it hath been always observed in common practice as amendable, as being Vitium Clerici, Brook's Placita 26 and 29. Fitzherbert 16, 17 and 29. These are all cases at common law, and so far will justify the amendment in our case. And in Fi.x. Amend. 43, there is a case to shew, that where there is a prejudice of the party an error may be amended, a Distringas is returned, where there was a default in the Teste and the jurors' names. The Teste, &c. was amended, for they took it before the roll was made up. There is another case, the 40th of E. 3, the process was discontinued after the appearance of the defendant; and it was amended. There is likewise 44 E. 3. (For I meddle not with those since the statutes of amendments.) There was a writ awarded against M. and G. the process was against M. only; and afterwards it was amended; and there it is said both the roll and the writ may afterwards be amended, and they were amended accordingly.

My lord, I cite these cases to shew that amendments were made by the common law, and the statutes cannot make any alteration, though they should not extend to the crown. I believe there are not in the old books many instances of proceedings by information; but that seems a great argument to me, that this nicety that hath crept into these proceedings are not by common law; in our old books they are very little taken notice of; but it seems these exceptions were not taken then, if they had, we should have found them; but the books are quite otherwise. Now if the amendments were allowed at common law, I believe none can distinguish and say, that it shall not be amended in our case, for I think they cannot be distinguished.

There are some other moderna cases wherein greater things have been done. First, the case of sir John Ashly, that has been cited (*ante* 677,) that it is an amendment of a judgment that was entered by disclaimer. In the Nisi Prius it was right, but all was left out in the judgment. And it was objected that it was not amendable, because it was not in the same term, and that none of the statutes of amendments extended to such cases; yet upon examination it was amended, because it was only a misprision of the clerk by mistaking his book, there it was thought to be in the power of the Court by common law to do right. Then in the reversal of the attainder of the lord Stafford, there were proceedings in court 14 or 15 years; but by neglect of the clerk there were no foot-steps of any thing appeared, and yet there was a rule for a record to be made, whereby there was a judgment of reversal entered. Now this court did think they had a power to set the records right, and they gave them leave to make a record, in order to make a reversal of that attainder: and if it may be done against the

crown, no doubt it may be done for the crown, for that it is but setting things right. There have been other cases cited, as Harris's case in Cro. Jac. 502, post. 704, and that was a very extraordinary amendment. It was an indictment for a nuisance. Not guilty was pleaded indeed, but the clerk who entered it joined an issue, and the verdict was against the defendant, and no issue joined; that was omitted; but the return was allowed. Now, if we had done so, we should have had a great noise about it. But here the Court allowed amendment to be made; and it was amended, as being done by the clerk's negligence, and this in the time of another clerk: and these words were inserted for it.

And it was said, if such faults should not be amended, many courts would be deprived of their jurisdiction. And I am sure, if the courts will not amend these matters, it will overturn many trials.

There is another case: it is in Crooke, James, 599. Parker *ver.* sir John Curson of Ux. And that was a trial at bar. The issue was entered, 'Et predicti Johannes Curson et Magdalena veniunt, et predicta Magdalena dicit, quod non est inde culpabilis; et de hoc ponit se super Patriam, et Attornatus Domini Regis similiter.' After the trial at bar, it was amended by the docket; and there it was only, 'Quod J. Curson, Mil. et Magdalena Ux. ejus, placent non Cul.' which was only a short Memorandum: which, I think, goes a great way further than what we labour for.

There is that case too, 1 Siderfin, 243, between the king and Godfrey. There the award was Vicecomitibus, when it should have been Vicecomiti; for there was but one sheriff: but upon examination, they found it was the misprision of the clerk; and they set it right.

L. C. J. They indeed set it right; but how? Not by amendment: but it was inserted as a Memorandum on the Roll, and there was but one sheriff.

Att. Gen. My lord, with submission, that is as well: for we do not do so much; for that was done after the trial.

L. C. J. There was no altering the writ.

Att. Gen. If we should ask the Court to alter what we did before the trial, it would be said, we should have moved it before, and not after. Now to enter that after the trial, was much more than we ask.—There is another case which had the opinion of the Court, the case of the warden of the Fleet; where you were of opinion to amend, &c.

L. C. J. It is not amended yet.

Att. Gen. My lord, I cite it as an authority, that you would have amended it, if you had any thing to amend it by.

L. C. J. I did not tell you what I would have done.

Att. Gen. My lord, I was not in court, but I heard it was so. If it was not, I was misinformed. There was a commission taken out against him, as being guilty of several culp-

tary escapes, and a day was given to appear at the King's-bench the 8th of January. The appearance was the 20th of January; but the Record was not entered itself till the 3d of February following; so that there was a perfect discontinuance.

This was not seen at first; but on consideration of the Court, they found it out; and the counsel moved the Court to set it right. The Court made a doubt of their power; but they enquired when it came in; whether in time or not; and what minutes were for it. It seems the proper minutes were not to be found. Now that being so, it would be strange for the Court to make any amendments, without any copy to amend by. If the clerk's man had come in, and produced the minutes, I take it, the sense of the Court was, that they would amend it; though that was agreed to be a discontinuance.

Now I cite that case, not that you did amend it; but would have done it, if you had any thing to amend it by: and there was a discontinuance of the party. Now if they could have amended that, this may be done here for a much better reason. There was a discontinuance both before and after the trial. I think, we have much stronger reason for amendment, than was in that case: though I must say, as to that case, the bar were of opinion, that the clerk might have entered it as on that day, and ought to have done it; and therefore they thought it was amendable. And if that were true, no question, it was amendable. But bowever the opinion of that case was, it is an argument to me, that the Court would have amended it, had they any thing to amend it by: for it was the opinion of this Court, it is amendable. But I think that case is no authority for them: and whether that be done by the help of the statute or no, is not material: and the Court would have amended it, if it had been the first day of the term.

This I take to be the opinion of the Court; and that they did not amend it, because they had no authority to amend it by.

There is one matter more, which is, that this slip is the fault of the clerk: for that the mistaking of the writ is the plain act of the clerk; and in all the cases, it has been held acts of the clerk to be amendable by the common law: and for that there are a thousand cases. This is in point of law.

I would beg leave to cite a few authorities in Crooke's Eliz. It was agreed, a Venire tested out of term, is a misprision of the clerk.

L. C. J. There are abundance of the like cases.

Att. Gen. I believe a thousand, therefore I will not cite them.

We submit to your lordship, whether it be right, and wants no amendment; or if it be not right, whether it be not amendable by statute or common law. And I hope we shall have the benefit of the verdict.

Serj. Darnel. My lord, there has been so much said already, that I shall say very little. I shall only cite two or three cases. The ques-

tion is only this: Whether a misprision of the clerk is not amendable in the same term? For that we have 10 Ed. 3, 20, there was an error amended of 63 for 59. I think, all the other cases have been mentioned already. The 5th of Ed. 3, has been cited, and it is strong. I have thought it always sufficient, without any statute of amendments; and those that have been amended by common law, will be authorities in this case. Now that the Court have always taken on them as their duty to amend the faults of the clerks in any entry, or process, or continuance, the books are full in it; and I hope it will be amended here.

Mr. Broderick. I pray your lordship's favour to spare me a few words on the other side. I see so much warmth in this case, that I must beg leave to preface something, before I speak to the point of law.

Att. Gen. You might have waved that.

Mr. Broderick. The occasion of my saying that, was, that Mr. Attorney said, there had been a noise about the town concerning this exception. And that a whole Party—

Att. Gen. There has been so—

Mr. Broderick. I would not be believed to concern myself any otherwise for this man, more or less, than for any other client. Nay, what I am concerned in, and have to say at present, doth concern every subject in England, as well as Mr. Tutchin. But when it was said, that there was a discontinuance in the case of the warden of the Fleet, which, after the long transaction of that cause, was not observed by the counsel for him; and that they were clear-sighted for the Observator; I could not take that otherwise, than as meant to myself, who was counsel for the warden of the Fleet, and am now for this defendant. I confess, I did not observe that fault in the case of the warden of the Fleet, (nor ever had a perfect copy of that record, to enable me to do it) and I must own at the same time, that I had not the fortune to make the discovery in the present case. The exception was taken before I was any ways concerned in the cause; and when it was made, I thought it a good exception; and made no difficulty of accepting my fee to speak to it.

Att. Gen. I had another meaning in it. I knew not that Mr. Broderick was counsel for the Warden of the Fleet.

Mr. Mountague. My lord, I believe Mr. Broderick is afraid of my fate in this case: I have been very much reflected upon for being counsel in this case: and it has been spread about all the counties in England, by Dyer the news-writer, That I broached seditious principles at the trial, and was reprimanded by your lordship for it: And I believe Mr. Broderick is afraid of the like scandal.

L. C. J. You must not be afraid of scandals. Dyer is very familiar with me too sometimes: But you need not fear such a little scandalous paper of such a scandalous author.

Mr. Mountague. My lord, I am not much concerned at it, seeing it comes from him.

Mr. Broderick. I must agree, That this is a point of great concern to the crown; because all prosecutions for the crown may be affected by it, as Mr. Attorney General said: But on the other side, I beg leave to say, That (whatever the person now before the Court may be) it is of great concern to the subject too: For the rule in this case will be a rule in the case of every other subject of England; so that the concern is great on both sides.

I must beg pardon of the Court, if, in answering off-hand to very learned and elaborate arguments, from the short notes which I have been able to take of them, I happen to be disordered in method: I must take leave to offer such short observations upon them, and give such answers to them, as I can at present; as my memory suggests the objections to me, though not in the same order in which they were delivered. But I will use my endeavour, not to omit the taking some short notice of the general heads, under which I apprehend all the objections will fall.

I would observe (which I think would be an answer to a great deal that has been said on the other side), That our law-books make a very great difference between the king's prosecutions in his own name, as a civil right, and prosecutions wholly in his capacity of king, as he is head of the commonwealth; and in the exercise of his royal office, to affect the subject with, or punish him for crimes thereby charged upon him. I agree the cases cited by sir Thomas Powis and Mr. Attorney General, of amendment of the king's writ of *Qu. Impedit*, and some others; and that the common law gave greater indulgences to the crown in the prosecution of its civil rights, than to any subject. The king was known to be employed in the concerns of the whole kingdom; to have the care of all his people upon him: whereas the subject had only his personal and private affairs to look after. And it is no wonder that the law should adjudge, that great allowances were to be made to the crown, as to its own particular rights; That it should not be tied up to so strict rules as the subject, who was supposed to attend his own affairs only. This is the reason generally given, why the crown had such a prerogative, that greater and more favourable allowances should be made in its suits, than in those of its subject.

But it has hitherto (as far as I have been able to observe) been taken, That the law was very nice and tender in all prosecutions that aim at the charging the subject with crimes and penalties. It seems to be a new light, sprung up of late, which has discovered, that there is a greater necessity for that privilege in criminal prosecutions, than in civil. The opinion of the successive ages, which have made favourable acts for amending and curing of particular defects in legal proceedings, seems to have been much otherwise. In many of these, all criminal prosecutions, of all kinds, are expressly excepted: And where they are not, I say, I have not heard yet quoted; nor

can find any case of authority where those statutes were interpreted to extend to prosecutions for crimes. I perceive, the counsel for her majesty in this cause, have in their arguments relied very much upon amendments made by the common law. I cannot pretend to be now prepared to run through each particular case: In general, it cannot be denied, that several amendments were made by a power that the Court had at common law; but we think there never was any which came up to this case. And indeed, if all the amendments in the multitude of cases that have been cited in these elaborate arguments, are allowed as good at common law, it would make one wonder, where the necessity was of making an express statute, for the amendment of a letter or syllable (and of the nice doubts upon that) or of the other subsequent statutes of *Jeofails* and amendments. The Court, to me, by these authorities, would seem to be armed with a sufficient power to have done the business, without the help of any statute.

Though her majesty's counsel rely principally upon the statute of 8 Hen. 6, yet in regard they do not wave, or give up the aid of the statute 32 Hen. 8. (For Mr. Attorney takes notice, that there is a *Quere* in my lord Dyer (Dyer 353) Whether the king, in an information of Intrusion, should not have the advantage of that act? and he has cited lord Dyer, 346, of an Information *Qui tam*, &c. to be within the act: And that lord Halea, in lord Fitzwater's Case, held, That it was reasonable that criminal prosecutions should be aided) I think it will be very proper to consider how the law has been taken upon that statute: And to see whether the reason of those cases will not go as far backwards as to the statute 8 Hen. 6. The words of the statute, 32 Hen. 8, c. 30, are not expressly restrained to actions or suits between party and party; though the word party be mentioned in the statute, both as to the plaintiffs or demandants as to the tenants or defendants. And the enacting clause is, 'That from thenceforth, after issue tried for the party plaintiff or demandant, or for the party tenant or defendant in any manner of action or suit at the common law; the judges should proceed to give judgment in the same, notwithstanding any of the mistakes therein mentioned, in like form as if no such default or negligence had been.' It is true, as Mr. Attorney has cited it, that it is left a *Quere*, as it stands printed in my lord Dyer, which was in the 18th year of queen Elizabeth: But even in that very case, it was held, 29 Eliz. that the statute did not extend to it: As appears in 1 Rolls Reports, fol. 447, as well as by Blackmore's case, 8 Cro. 163, where it is expressly said, That the statute 32 Hen. 8, extends not to pleas of the crown. And this point is expressly agreed by the whole court, in Sherington Talbot's Case, 1 Cro. 312.

A *Venire Facias* bearing *Teste* out of the term and an issue tried upon it, is misconveyance of process, salv'd after verdict, by those words in

the statute of 3 H. 8.—So a Venire awarded, which bears Teste on a Sunday, is adjudged to be aided within those words.

Yet in Theobald and Newton's case, Style 307, there was a suit upon the Statute of Inmates; and the Distringas bore Teste on a Sunday, and out of term. Exception was taken to this after verdict, and held not to be aided by the Statutes of Jeofails. I thought it necessary, by mentioning the two former cases, to state which of the statutes it was which would have remedied the fault, if the statute had extended to the suit itself; because the reporter (which is no wonder in him) so far mistook the sense of the Court, as to omit the material statute, and to mention the 18th of Eliz. and 21 Jac. in neither of which laws there are any words which reach the case; though in this act of 32 H. 8. there are.

And in lord Fitzwater's case, cited by Mr. Attorney, though my lord Hales does say, 'The case of the king will often stand in need of the amendment of a wrong Venire;' and therefore he was of opinion to bring him within the statute of 16 and 17 Car. 2. which has very extensive words; yet he allows the distinction between his criminal prosecution, and civil action; as appears in 3 Keb. 485, 519.

In Percy's case, 21 Car. 2, 1 Vent. 17, 35, an information of forgery at common law, laid the forging to be of a release at Sherborn; and the giving it in evidence to be at Dorchester. The defendant was convicted by a jury de Vicineto of Dorchester only: It was adjudged to be a mis-trial; and a new Venire was awarded. For the king, it was laboured to support the trial by the word suit: For, say they, the information is 'Secta Domini Regis;' so that the word is extensive enough to reach this prosecution: And it is plainly out of the exception, which excepts no informations but those upon penal statutes. But the Court held, any information, though at common law, was not remedied by the words or intent of the act.

In the principal case of Sherington Talbot, 1 Cro. 311, Jones 320. 2 Ro. Ab. 619, information, in nature of a Quo Warranto, for claiming liberty of free warren in three vill's, in the forest of D. defendant disclaims in the forest, and in all but one vill; and says, That that vill is parcel of the manor of S. and prescribes for free warren in his manor; issue on that prescription, and the visne is from the vill, not from the manor; held to be mis-tried, and not aided by any of the statutes of Jeofails: Though not within the exception; because the statutes do not extend to the king's case: he not being named. The then judges thought this a reason; which will equally extend to the king's case, upon the former statutes of amendments. And Mr. Noy, a very learned predecessor of Mr. Attorney General's, did not venture to carry the point further for his master, than to a peradventure he might have the advantage of those acts, in case of a Quare Impedit, or the civil right, where the suit is in the king's proper name, and not by his stile of king only.

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Nothing is more plain than the difference which the law makes between cases where the king prosecutes his right in his own name, as for a civil right, and where the prosecution is in his capacity of king, and in the exercise of the royal authority. If the king (Henricus Rex) brings a Quare Impedit, and dies before judgment, the very writ abates; because Henricus Rex, who was named by his proper name, ceases to be. But if the prosecution be 'pro Domino Rege,' though the king in *individuo* be dead, yet 'Dominus Rex in genere' not being dead, the information or indictment shall stand, to be prosecuted by the successor. Yet all process upon them, wherein his own name is used, and not his name of kingly office only, shall fall; because the particular person is dead.

According to this distinction, I do agree, that where the king sues in his own name for a civil right, his suit has more favour allowed to it than that of a common person. And so far goes the case in Blackmore's case, 8 Cro. 156, before-mentioned, cited by sir Thomas Powis; that a writ of Quare Impedit, which was 'presentere' for 'presentare,' was amended; being the king's case. Though, had it been the case of a common person, it could not have been amended: for no original writ was at common law amendable in the case of a common person. But that an information or indictment ever found favour beyond, or equal with a civil action, I never heard before; nor find any authority quoted to warrant it now. I would take leave to mention the case, 13 Car. 2, in Scan. Hardress, 217, (9.) Pitoher and Jones: It was an information upon the act of Navigation for importing spices, being the growth of Asia, Africa, or America, from Holland beyond the seas, not being the place where such goods were first and most usually shipped for transportation, 'contra formam statuti.' The defendant pleaded, he did not import them 'contra formam statuti,' and issue upon it; and verdict against the defendant. He moved in arrest of judgment, that it was not laid that these commodities were not of the growth of Holland. To this it was said, that the verdict would help that, it necessarily implying it: for that they were laid to be of the growth of Asia, Africa, or America, and imported from Holland; which shews those were distinct places: and the defendant could not else have been found guilty, 'contra formam statuti.' Yet, after long debate the exception was held to be a good one, and the judgment was arrested.

I must observe, that the counsel for the informer in this case, had not the courage so much as to hope for aid from, or mention the statutes of Jeofails in this case. They cite there Johnson's case, 2 Cro. 609, and Cholmley's, P. 1, Cro. 464, where in criminal prosecutions reasonable intendments after a verdict, are allowed at common law. But though nothing was wanting in this case, but an averment that Holland was not within Asia, Africa, or America (which must necessarily be proved

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at the trial, else the defendant could not have been convicted) they either did not know that want of an averment of a thing necessary to be averred, if issue be taken upon another point, is aided as a misleading, by the statute 32 Henry 8, (though the cases of it are numberless); or they did not think there was any colour for offering to extend that statute to a penal law, with regard to the interest the king has in the prosecution, though a common person was the informer; and though there is no exception of informatious on penal laws.

As to the cases cited on the other side, of amendments at the common law by the king's prerogative; I must rely upon the difference I have already taken between criminal and civil cases; and that there are not any instances of amendments in criminal prosecutions. As to several other cases, which have been cited by the other side, of amendments upon returns to Certioraris, returns upon Writs of Error, &c. those, with submission, will not come up at all to the present case. When a record is certified upon a Certiorari, &c. the parchment annexed to the writ is supposed to be the real original record; and that remains in the Court here, and is become by the return a record of this Court. Where, by the course of the Court, it is entered upon a roll here, if in the entry it varies from that that is the true record, it is the duty of the Court to take care, that the mis-entry be rectified; and the record, which is transcribed here, made agreeable to the original. The rectifying such mis-entries, or mis-copyings, are not amendments of faults in a record (for that faulty mistaken entry is not really the record) but making true entries of the record. And upon the like reason was the mistake rectified in sir H. Tufton's case, 1 Cro. 144, where there was a consent of the parties for entering a judgment by disclaimer, by virtue or pretence of Letters Patents, bearing date 7 Jac. which words were inserted in the paper-book, by the Attorney General's own hand; yet omitted by the clerk, in the entering it upon the roll: there, upon great examination and consideration of the circumstances, all parties consenting, that mis-entry was corrected; being as the book says, no more than when a special verdict is mis-entered; which is rectified by the notes of the clerk of the assize. But it is very much insisted on, that the statute 8 H. 6, c. 12, shall extend to this case, because there are particular criminal prosecutions excepted therein, of which this is not one. I do not find that there has been one authority cited, when it was ever held, that that law extended to any pleas of the crown. And I take the uniform opinion of near three centuries, since that statute, to be against it.

Mr. Attorney relies much upon the case of the king against Percival and Godfrey and others, Sid. 244, where the Venire for the trying the defendants, upon an indictment for a riot, was directed 'Vicecomitibus de Cantebury,' and returned by 'R. S. Vicecomes;'

the city having in truth but one sheriff: there, upon examination of the sheriff himself upon oath, in court (who swore that city had but one sheriff) there was an amendment. But what was that? Not of any thing that was the act of the Court: but the sheriff adds to his indorsement upon the writ (when he had answered single) that there was not any other sheriff; as it appears in the same book, and in 1 Keb. 900 (17) 901 (75): and this the Court held to be well, upon the authority of the book of 30 H. 6, f. 40, where a writ was directed 'Coronatoribus,' and returned by one coroner only, yet held to be well: for, say the Court, we will not take notice there are more coroners than one. And so Just. Wyndham said, in this case, we shall intend but one sheriff, unless more appear; 1 Keb. 901.

A good part of Mr. Attorney's argument seems to tend to the making it not necessary, or at least disputable, whether it be necessary, that the Distringas should be tested on the same day that the Award is. Will not that argument turn another way than it is intended? If it be a doubtful thing, whether it be right or not; I doubt it will be an error in judgment, like the making out an improper writ in the Debt and Detinet, where it should be in the Detinet only; and then, though it is a default of the clerk, it will not be such a default as will be within the aid of the statute, if that should be held to extend to the case. If it were a doubtful thing, it cannot be said he had a certain rule to walk by: but he ventured upon his own judgment, in which if he has chanced to mistake, it is not amendable as a thing of course. But in truth, if it were to be enquired into, I believe, it would be found not to be an error in judgment in the clerk, but a mistake of a matter of fact, in taking Sunday to be the first day of the term.

Att. Gen. That will not alter it.

Mr. Broderick. There has been another case cited; the king and Walcot; where a reversal of an Attainder was pronounced, and the judgment of reversal actually entered up; yet, being done by surprize, the entry of the reversal was set aside, and razed out of the record. Surely that cannot be an authority for any. There the entry was wholly irregular, contrary to the rules of the Court: for the judgment of the Court is not complete till the end of the term.

L. C. J. It is in the breast of the Court during the whole term.

Mr. Broderick. And if any one within the term, without the direction of the Court, will enter a thing as the act of the Court; shall not the Court have a power to reform that irregularity, and do themselves right? This is not an amendment of a record, but a reforming of an ill practice; a preventing of an attempt to make that an act and record of the Court, which really is not so. Neither does my lord Maclesfield's case bear any proportion to this.

There is no question but that a court, which is intrusted with the custody and preservation

of the Records wherein other persons are concerned, may take care upon any mischance; and that they have a power to put things into their right state: as in case of fire, or any inevitable accidents, the Court, incident to their trust of the custody of the records, and by the authority they have to do right and justice to all persons, must have a power to supply such losses.

As to the case of the warden of the Fleet, there was no amendment made: but if there had, it would not have come up to this case. I may, I am sure, safely affirm, that the Court did declare, that was not to be esteemed a criminal prosecution; in regard there was not to be a judgment to punish the party, but the proceeding was only to transfer the estate to the crown by way of forfeiture.

The counsel who have argued for the queen have not cited any one authority of an amendment in a criminal case, within the statute of 14 E. 3, or 8 H. 6, c. 12, or proving, that those statutes extend to cases of that kind: but they call upon us, since the words seem to be large enough to reach both (especially those of 8 H. 6, where there are some particular criminal prosecutions mentioned and excepted) to produce some authority, to establish the distinction between criminal and civil cases. We think the daily practice in civil cases, and the want of a single instance in a criminal one, carries a strong argument, if we could go no further: but I think we do not want an express authority in this point too. Orde and Morton, Trin. 11 Jac. 1, Ro. Ab. 201. There a writ of Venire Facias out of the B. R. was 'Venire Fac. duodecim, &c. coram Nobis apud Westmonasterium, ubicunque fuerimus in Anglia;' but the roll was well, omitting the words 'apud Westmonasterium.' It was adjudged the writ might be amended by the roll; for it is but matter of form. This was a default in the body of the writ, and amended by the statute of 8 H. 6, as a default of the clerk.

Yet Brigs and Thompson's, &c. Yel. 60, 111. In an information upon the statute 21 H. 8, against spiritual persons taking farms, the award of the Venire Facias upon the roll was right, returnable 'ubicunque,' but the writ itself was returnable 'coram nobis,' omitting 'ubicunque,' and so it did not answer the award upon the roll. This certainly had been amendable in a civil plea, but the report tells us, that judgment was staid upon it. And, my lord, I will beg the liberty to make this observation upon the case of the king against Percival and Godfry (which is so much relied on). There are some cases of so odious a nature, and move such indignation, that there is a danger of things being passed over unobserved, which would not have been admitted in another case. That was the case of one of the king's messengers, employed in his majesty's immediate service, barbarously insulted and abused in his inn at Canterbury, by the defendants and a great rabble of people: as the offence was very flaming, the resentment of the

Court ran high: and they thought it reasonable to do in that case, what perhaps in an ordinary one they might not easily have done: yet what was then done, is now to be cited for a precedent in every criminal case whatsoever. I must say the same in this case; whatever my client is charged with, the rule given in his case may affect every man in England, who shall hereafter be charged criminally: and therefore I doubt not your lordship will very well consider of it.

I hope, my lord, I have given some answer to most of the things that have been insisted on; and that upon the whole matter, this mistake will not be accounted a thing amendable by law.

Mr. Mountague. My lord, in answer to what has been said, I shall not preface what I have to say with any apology for being of counsel with Mr. Tutchin, though I have been egregiously misrepresented in what I did, as counsel for him at Guild-hall. I know your lordship is no respecter of persons, but will have the same regard to one defendant as another.

Att. Gen. I am not concerned at any thing that has been written or printed about that trial.

L. C. J. We will take no notice of that.

Mr. Mountague. My lord, as to what Mr. Attorney-general and sir Thomas Powis have said, I beg leave in the first place to take notice wherein it is we agree, and in what we shall differ. First, we agree that this cause is a cause of the greatest consequence. Mr. Attorney tells your lordship it concerns all the proceedings of the crown; and I hope I may be pardoned if I say, it is of no less concern to the defendant and the subjects of England. I would therefore pay that respect to the Court, not hastily to speak to a point of this moment, but shall desire to have time to look on those cases that have been mentioned.

L. C. J. If you will do this, you may consider the statute of H. 6, for those words are general, and not relative either to civil or criminal cases in particular. It remedies the mischief between plaintiff and defendant generally.

Just. Powel. Mr. Broderick has not taken notice of that objection that my lord Coke takes notice of, because they are not excepted, therefore they are included.

L. C. J. I would have you consider why it is not within the words of the statute. It is as plain that it is the fault of the clerk as can be; he had the roll before him, therefore it must be the mistake of the clerk. The award of the writ is the act of the Court, and that was the 23d; now this writ did bear date the 24th, and I believe we did not award the writ the 24th, therefore it is to be judged they mistook the time of the Teste. For the record says the 23d, and this writ says not till the 24th. Now why should not this be within the statute of H. 6, for it is the misprision of the clerk, and then the question is, whether that statute does not extend to this matter.

Just. Powel. I do indeed question whether

any statute of Jeofails extends to it; but this statute does not, as appears by 8 Coke, because they are excepted. There are indictments of felony and treason that are excepted. Now that this is a misprision of the clerk is plain, because he had the award of the Court.

Sir T. Powis. I think all agree it was perfectly a mistake, and that makes it a disputable case; I do not stand on it as if it were right, but grant it was a perfect mistake, and then that objection is clear, that criminal matters are not within the statutes of Jeofails, and it is certain most of them are excepted, viz. indictments, in this statute of H. 6, where it is said what are excepted, &c. It is true, you cannot amend what are excepted, where the party was in danger of life; but it leaves out in inferior matters; therefore it seems, that whatever was said of criminal matters, was intended of the greater criminal matters, and so was the opinion in the case of—

L. C. J. That was a civil cause, but we thought we could not amend it: for it would be contrary to our duty as judges to alter a record. And therefore we refused even in point of scandal in that case; also on examination we found that we could not amend it, contrary to truth.

Sir T. Powis. My lord, we had not in that case any thing to amend by; but here we have a roll to direct us.

Att. Gen. If your lordship indulge them from time to time to put it off, we shall never have done.

Mr. Mountague. My lord, I am not prepared to answer what has been said, for I did not expect this motion would have been made.

Att. Gen. That we may be once at an end, I would fain hear what they have to say, and whether they have any more exceptions.

L. C. J. Have you any more exceptions to make?

Mr. Mountague. My lord, we have no more exceptions to the matter we are now upon, which is setting aside the trial. You know, Mr. Attorney, there are two things incumbent on a defendant's counsel. One is, to set aside the trial if he can, and that is the thing we are now upon: the other is to move in arrest of judgment. Now Mr. Attorney well knows it will be a waiver of our motion for a new trial, to stir any thing in arrest of judgment.

Att. Gen. He that makes exceptions should be prepared to give all his exceptions together.

Just. Powell. This is not a motion to set aside the trial.

Mr. Mountague. Yes, my lord, it is to set aside the trial; not to arrest judgment being given upon the verdict.

Sir T. Powis. My lord, if they have any more exceptions to offer, I desire they may let us have them now.

Just. Powell. If there be an error in the writ, there must be a 'Distringas de novo,' there must be a new Distringas only issued, you cannot make it a discontinuance of the whole proceedings; but there must be a new award of a

Distringas, the error wherein is the cause of exception; if we should give our opinion that it is not amendable, we should try him next week.

Att. Gen. My lord, they should lay down all their exceptions together.

Mr. Mountague. My lord, I know you do not expect in this case any thing should be done otherwise than what is usual in all other cases. Now I appeal to Mr. Attorney, if it be not the constant course here, to move first for a new trial; and if you object any thing in arrest of judgment, it is generally said you have waived your motion for a new trial.

L. C. J. No, that is not so.

Mr. Mountague. My lord, we are now in your judgment, whether this man shall be tried again, or not? And if we shall happen to prevail for a new trial, then it will be a disadvantage to our client to have told our exceptions to the information, for then Mr. Attorney will pray to amend.

L. C. J. You are so far in the right, if indeed here were a verdict—that is unquestionable, that is your proper time to move in arrest of judgment; but if this verdict be not right, it is too soon to make exceptions to the information. Then we shall tell you what we have to do.

Att. Gen. I am content they should keep their learning to themselves; but, my lord, if they will not do that, I hope you will not give them further time.

L. C. J. We shall give them but till to-morrow.

Just. Powell. Mr. Mountague, it is a strange thing that you shall make an exception, and not be ready to maintain it; at this rate any prosecution whatever may be bung up and delayed. If this be the way, we must give you the less time.

Mr. Mountague. My lord, I shall entirely submit to what the Court shall think fit to order; but it is now pretty late in the day, and your lordship knows it is a sitting this afternoon in Muddlessex, and to-morrow is another sitting in London, where I am already retained to be, and I know not how late your lordship may keep us in both places. Your lordship seldom discharges us till late at night, and it will be impossible for me to look into the authorities, which have been quoted, much less to consider of any thing that will be fit to offer in answer to both these learned arguments, in a matter which I must profess is altogether new to me.

Just. Powell. There are amendments made every day.

Mr. Mountague. My lord, I hope I shall shew you it has not been done yet, in any such case as this; neither can it be done, with submission.

L. C. J. You should have prepared for it. I will tell you a case at Hicks's hall, where I myself took the like exception, but it was over-ruled by sir William Smith, the then chairman of the sessions. In an indictment

against —, for a wrongful entry, &c. there was a mistake in the time of the entry alleged, &c. And they amended the fault by the statute of E. 6.

Att. Gen. My lord, I hope you will give them but till to-morrow.

Mr. Mountague. I hope you will not press that, Mr. Attorney, who have been so lately a *Nisi Prius* practis'er.

Just. Powel. You are not pressed in it; none can imagine you came here in this case, and that you were not provided to defend it. I hope you are as ready as Mr. Broderick; he is but your assistant, and yet he was ready.

Mr. Mountague. It will be impossible for me to be more ready to-morrow. I will rather go on with it now than do it to-morrow. This is a new motion, and I did not in the least expect it.

Att. Gen. This is no new motion, I believe none would believe but it would be made.

Just. Powel. Why cannot you be as ready as Mr. Broderick is?

Mr. Mountague. I do not pretend to set myself upon the same level with Mr. Broderick: though he be ready to give an answer *extempore* to the arguments that have been made, I hope your lordship will indulge me with a day or two more to consider of what has been said, since the question now before the Court is of that concern to all the subjects of England. My lord, I desire we may have but till Thursday next, and by that time I will undertake to be ready.

Just. Powel. When you make an exception, you ought to be ready to defend it.

Mr. Mountague. It was impossible for me to foresee what course the Attorney General would take to obviate the objections I have made. I must own, I did not expect this motion for an amendment; I thought of that the least of any thing, because I never knew the like attempt in a criminal prosecution. And since Mr. Attorney General has been pleased to countenance the exception I have taken, with a week's consideration of it; I ought in civility to pay as much respect to the arguments he has made in answer to it. And therefore I must beg a little time of your lordship, as well to shew my respect to Mr. Attorney General, as to discharge my duty to my client.

Att. Gen. I desire none of your respect.

Mr. Mountague. I hope, Mr. Attorney, you are not angry because I would pay respect to you.

Cur'. Well, take time till Thursday.

November 23, 1704.

L. C. J. Mr. Attorney, have you any thing to move?

Att. Gen. My lord, I attend here only upon the account of Mr. Tutchin.

L. C. J. Who is for Mr. Tutchin?

Mr. Mountague. My lord, I am of counsel for Mr. Tutchin, and I am to day, to shew your lordship cause why the motion made the

other day by the counsel for the queen, to amend the *Teste* of the writ of *Distringas*, cannot be allowed. And since the Court hath been pleased to indulge me with a little time to think of the learned arguments that have been made both by sir Thomas Powis and Mr. Attorney General; and to look into the authorities which have been cited, I hope I shall take up less of your lordship's time than if I had been put to answer *extempore* to the several matters that have been insisted upon. For I must beg leave to say, that upon consideration of what was then offered, I do find that a great many things that were then said, do not carry that weight along with them as I did then apprehend. And though I do not question but every thing that can be thought of has been said for the obtaining such an amendment, yet I have the satisfaction at last to find that there is but one case, and that is what your lordship was pleased to mention, of the judgment of sir William Smith, that looks like a precedent for this amendment. My lord, in speaking to this matter, I shall not trouble the Court with many new citations out of Fitzherbert and Brook's *Abridgment*, title *Ameudment*; for I perceive the gentlemen on the other side have looked over the *bed-roll* of cases which are to be met with there, and find that they have taken notice of every thing that will make to their purpose; my business therefore shall be closely to apply myself to the consideration of what they on the other side did insist on; and I hope I shall be able to shew to your lordship that nothing they have said will warrant this amendment.

But before I enter upon the argumentative part, I must beg leave shortly to state the case itself, and shew how it now stands before the Court; and if I mistake in giving an account of the least matter of fact, I desire Mr. Attorney General would interrupt me so far as to set me right; for if we do not agree in the state of the case, our arguing will be to very little purpose.

Att. Gen. It is the record that is in dispute; it is not matter of fact.

Mr. Mountague. Mr. Attorney, there is something of fact besides the record, which is now before the Court. This information was exhibited in Easter term last, and the defendant pleaded to it in Trinity term; and issue being then joined, a *Venire Facias* was awarded, and made returnable the first day of this Michaelmas term. On that day (the roll says) all the parties did appear; but none of the jury came, and thereupon the Court did order, that a *Distringas* should issue, and be returned hither, '*Die Jovis proximo post Crast. Animarum*;' on the return of the writ of *Distringas*, which is now before the Court, the defendant appeared in court, and by his counsel took exception to the *Teste* of this writ, because it was not issued as the Roll hath awarded, on the day he was present in court, which was the 23rd of October, but on the next day,

which was the 24th of October, when he is supposed to be out of court; so that the award has plainly not been complied with, and therefore the writ which is now before the Court was taken without any authority from the Court, and the trial cannot be supported, because the day and place mentioned in the Distringas was not appointed 'per formam statuti,' in the presence of the parties. For these and other reasons, it was prayed in his behalf, that all the proceedings upon this Distringas should be vacated.

Att. Gen. The day is right when the persons are to appear, and the award of the Nisi Prius is as it should be.

Mr. Mountague. The return is 'Die Jovis prox. post Crastin. Animarum,' as it is in the roll, but the Teste of the writ is the day after it was awarded.

L. C. J. The award is right.

Mr. Mountague. My lord, we own the award is right on the roll.

L. C. J. But the question is, whether the Teste of the writ be as it should be?

Mr. Mountague. My lord, the writ that is now before you being tested on the 24th of October, cannot be said to be taken out upon any other day than the 24th of October; and in that it is not pursuant to the roll. Upon the taking of this exception, Mr. Attorney was surprized, and could not then say much to it; but desired time to enquire how it came to be so.

Att. Gen. I could have said as much to it then, as after four days; it became you to have been as ready.

Mr. Mountague. My lord, Mr. Attorney is a little too hasty for me in this matter. I intend to do him right, if he will have patience to hear me out.

L. C. J. Come to the point.

Att. Gen. This is a popular argument, and spoken 'ad captandum populum.'

Mr. Mountague. Mr. Attorney did ask some time to have this matter enquired into, and that request was agreed to: and, upon examination, it appears that this writ was actually taken out after the first day of the term; and the clerk being doubtful with himself how to make the Teste, asked the master how to Teste it; and he directed it to be Tested the 24th of October; and upon this arises this motion. The gentlemen that are of the queen's counsel pry that it may be amended; and the question is, whether it can be set right? and, with submission, I think it cannot; and that no such obliteration ought to be made, though the defendant were found guilty of six times as many crimes as he stands now charged with. I must agree with Mr. Attorney, in what he says with relation to the consequence of the determination of this point, that it will be a precedent that will affect all the proceedings of the crown in all such cases. And this it is that makes it to be a matter of wonderful consequence to the people, as well as to the crown; for though under the present administration of affairs, innocent

men may think themselves very safe, yet nobody can be sure in after-ages that they shall not fall under violent prosecutions; and then slips and mistakes may be of service. My lord, hitherto I may say, all advantages of this kind have been allowed to defendants in criminal cases; and upon this occasion it may be observed, that even actions *qui tam* upon penal statutes, have always been excepted out of the statutes of Jeofails; and from hence, I think, arises an argument *à fortiori*, that the Jeofails of clerks, in prosecutions more penal, are not to be amended. Sir Thomas Powis, in his argument, did, as I remember, insist upon these two propositions; and as I take it, he was seconded in them by Mr. Attorney; first, that the Teste of this writ is amendable by the common law; and if not that, secondly, it is to be amended by the statutes of amendments, either by that of 14 E. 3, or that of 8 H. 6. And two reasons were given for this opinion; first, because it appears to be a plain mistake in the clerk; and, secondly, because they come to move for the amendment in the same term wherein the writ was sued forth and returned.

Now, my lord, in answer to both these reasons and assertions, I hope I shall make it appear in the first place, that this Teste cannot be altered, either by the common law, or by the statute law: and in the next place, I hope to shew your lordship, that the making the Teste of this writ to be upon October 24, is not purely a slip in the clerk, but does proceed from the negligence of him that was advised with about it. And although this motion for an amendment be made the same term the error has been committed in; yet it is not in the power of the Court to set it right.

As to the first of these particulars, I shall readily agree with sir Thomas Powis and Mr. Attorney General, that by the common law many things were to be amended without the help of any act of parliament; but the thing that I deny, and which, with submission, hath not yet been proved by any authority that has been quoted, is, that no error in the Teste of any process that does issue out of the Court and is returned back again by the sheriff, can be altered by the rules of the common law, and I hope by and bye to make it appear, not by any act of parliament neither. My lord Coke, in Blackmore's case, lib. 8, fol. 156, b. 152, a. docs say, as has been observed, that the judges by the common law may amend the entry of their own judgment, or any other part of the record, the same term; but he does not there say, that they may amend any writ made out and returned by any officer or minister of the Court. And the reason given why they may amend their own judgments and the continuance entered upon the roll is, because such things as they themselves do, are said to remain in their own breasts till the end of the term: but surely the actions of another person, his disobedience to the order of the Court, can never be looked upon as an act of the judges. And I cannot see how a writ taken

out *in pais*, which is never in court till it be brought thither by the hands of the sheriff, can be said to remain in the breasts of the judges. The instances of amendments by the common law which are given by my lord Coke, are in the entries of *essoigns* and *continuances*, and such like misprisions '*del Court mesme*:' as for instance in 5 E. 3, fol. 25, W. brought a *Præcipe* against B. who vouches C. to warranty, and he enters into the warranty and pleads to issue, and a *Venire Facias* is awarded, and the jury is afterward put in respite, and the cutry of that upon the roll was in this manner, '*jurata inter B. and C.*' that is, between the tenant and the vouchee, '*poniter in respectum*,' and so it appears on the roll, whereas it should have been *inter W. the demandant, and C. 'quem. B. vocavit ad warrantum.*' Now this was looked on as the clerk's mistake in the entry of the order of the Court, and so it was amended, Coke's 8th Report, f. 157, b.

Now, my lord, with submission, this case and all the rest of the cases that have been mentioned for amendments at the common law, will only justify an amendment of the roll. And indeed had there been an error in the entry of the award of the *Distringas*, I should rather think that amendable than this; for it is certainly more reasonable that the Court should intermeddle with their own acts than with the acts of another. Till this writ was returned annexed to the *Nisi Prius* roll, the Court had nothing to do with it. And now this writ is before the Court, your lordship is only to judge whether it be pursuant to your award or not; if it be not made right, it must be imputed to the fault of the person that made it out; and the Court can never be said to be in fault, if the clerk employed makes out a writ contrary to direction; and if the party concerned suffer by such mistake, he may thank himself for employing such an agent. But sir Thomas Powis says, that this amendment is prayed on behalf of the queen, whose prerogative it is to have many advantages in pleading, which the subject shall not have. My lord, with submission to better judgments, I conceive that for this very reason the queen's counsel have the less reason to pray an amendment. For since they have other prerogatives to have recourse to, they ought not to ask this besides. Your lordships will often hearken to us when we move for new trials in actions of debt upon a bond where the verdict and judgment are conclusive: when you will not give ear to such a motion in ejectment, where the losing side may have fresh actions if they will. But, my lord, not to rely altogether on this answer, I shall add this one word further, that according to my small observation, these advantages in pleading do not belong to the throne in the pleas of the crown, but in such actions as *quare impedit*, and the like. As to the particular instances that have been mentioned, I conceive they do not come up to the case in the question. The first case which I have taken down as cited by sir Thomas Powis, is *Brouk's*

Abridgments, Title Amendments, f. 32, and that is, that if judgment be entered otherwise than the truth is, it shall be amended in the same term, because the record is, '*in les Cores des Justices mesme le term et nemy in le Roll.*' This case is one of the authorities taken notice of in the 8th Report, to warrant the amendments of the acts of the Court, but does not in the least relate to the amendment of writs and process which are sued out and executed *in pais*.

The next case was 4 H. 6, f. 16, which is only, whether he that casts an *essoign* for a tenant in a *Formedon*, shall be permitted to take exception to the writ which appears to be vicious. The demandant there was the ward of the crown; and he that cast the *essoign* for the tenant, took exception to the writ. The exception was this; that in the stile of the king he is said to be '*Dux Hiberniæ*' instead of '*Dominus*,' and he would have had the writ for that reason to be quashed. And there Martin demands whether the writ shall not be amended '*sicome le Roy mesme soit parte*,' and the case concludes with '*quære Legem.*'

As to the case of Fitzherbert, Title Amendment, f. 19, that is what my lord Coke takes notice of in Blackmore's case, when he says, that in a *Quare Impedit* brought for the king, the word '*presentere*' was put instead of '*presentare*,' and it was held that it should be amended; but how does the book say it was amended? Why the writ itself was brought into Chancery, '*et la fuit Amend.*' Now I take that to be tantamount to the issuing of a new writ. Most of the other cases mentioned out of the old year books, are relating to amendments in civil cases, and therefore I shall spend no more time in taking notice of them particularly.

My lord, the next thing to be considered is, whether any statutes do direct such an amendment as this; and I hold they do not. Indeed the first of these, which is 14 E. 3, chap. 6, is pretty home; the words are, that by the misprision of a clerk, in any place wheresoever it be, no process shall be annulled, or discontinued, by mistake in writing one letter, or one syllable, too much, or too little; but as soon as it shall be perceived by challenge of the party, or in any other manner, it shall instantly be amended in due form. Now here are as large words to fit the purpose, as Mr. Attorney can desire, and if he were now to frame an act of parliament, I do not know how Mr. Attorney could make it fuller; and I must confess, if I were to argue this point within a year after the making of such an act of parliament, I should reckon myself to have a difficult province to maintain, that this misprision does not come within the purview of such an act: all therefore that I shall say to it is, that it is now a great many years since this and all statutes of amendments have been made, and no one adjudged case as I know of, does say, that criminal proceedings are within the purview of this statute. Mr. Attorney General, as I re-

member, did in his argument admit that this statute of 14 E. 3, chap. 6, did not extend to criminal cases.

Att. Gen. I deny that; I did enforce it.

L. C. J. I do not remember he did admit that.

Mr. Mountague. Then I acquit him of it, and to shew him that I meant him no wrong by supposing he said so, I will mention some authorities that are express in this point.

Att. Gen. I did enforce that statute by subsequent statutes, particularly by the statute of 8 Hen. 6, chap. 12, for there the word process is included.

Mr. Mountague. Perhaps Mr. Attorney General did so; but if he had admitted it, he would not have been in the wrong, if my lord Coke be in the right in what he says. For in the same case of Blackmore, fol. 157, speaking of the extent of the word Process, he says, "This statute must be understood to mean process in all actions, real, personal, and mixed; and not process in pleas of the crown." And my lord Coke does not here assign it for a reason, because they are excepted; for in this statute of 14 E. 3, c. 6, there is no exception: and therefore speaking of this statute, he could not say, pleas of the crown are there excepted; yet he is positive this statute does not extend to any other process, than what issues in actions real, personal, and mixed. Now what can be the reason, that process in all criminal cases should be excepted out of this statute, by the interpretation of the judges in all ages; when the words are so full, that no process whatsoever shall be annulled by any misprision, whosoever it be? Truly, I cannot conceive otherwise, but that the judges in all ages have thought it reasonable, all advantages should be allowed to people under such prosecutions.

Mr. Attorney General did seem to give another reason, that the crown not being named, was a great argument that it did not want the aid of such an act of parliament; but that the king had a right by the common law to make amendments. And for this he cited Hardress, fol. 504. That before judgment, there can be no discontinuance in the case of the king; and 2 Cro. fol. 211, Beecher's case. Now if this be so, as he would have it, that all process in the king's case is amendable by the common law, and all other process by this statute; how comes there to be any occasion for my lord Coke to caution us about the extent of this act of parliament, by saying, it extends to process in pleas real, personal, and mixed; but not in pleas of the crown? What does it signify, whether this process be amendable at common law, or by the statute, if it be amendable? But on the other side, one may strongly infer, that if no process were amendable before the statute 14 E. 3, and that statute says, all process hereafter shall be amended; it was then fit for my lord Coke to tell us, that though these words in the statute seem very extensive, yet it has been the opinion of all ages since, that no process, but what issues in actions real, personal, and mixed, are meant by it.

I do take it therefore, with great submission to Mr. Attorney, that the right inference to be made from this *notandum* of my lord Coke, is to caution the reader not to conclude over-hastily, from the comprehensiveness of the words of the statute, that process may be amended in criminal cases. That way his admonition may be of service: but the other way, with great respect to his memory I speak it, it will signify little. As to the case of Beecher, and the other quotation out of Hardress, nothing more can be inferred from them than what already has been taken notice of; that after the term they may enter continuances before judgments. This appears by the case in 3d Levin. 430, where all the cases cited by Mr. Attorney to this purpose are taken notice of.

Now we come to the next act of 8 H. 6. The words of which statute, as I apprehend, Mr. Attorney did strongly rely on: for there, says he, are exceptions of appeals, indictments of treason, and of felonies, and of outlawries for the same; and nothing is said of informations; and the king's judges have thereby power to amend all that they think the misprision of any clerk in any writ warrant of attorney, or passed in affirmance of judgments. Now the answer that I would offer to this statute is, that the words in the enacting part are not larger than the words are in the 14th of Edw. 3, that is, they are not larger as to this purpose. The words indeed of this act are, that all misprisions of clerks, in all writs, shall be amended. The words in the act of Edw. 3, are, that all misprisions, in all processes whatsoever, shall be amended. And I take the words, 'all process whatsoever,' to be as extensive to the present case, as to say, all writs shall be amended. Therefore I cannot see, from the enacting part, why one act, to wit, that of Hen. 6, should include criminal proceedings, when that of Edw. 3, does not include them. Thus much for the enacting part.

Now I shall take notice of the exceptions. There are indeed some things mentioned to be excepted out of the purview of this act of Henry 6, which are not excepted out of the former in Edward 3d's time; as appeals and indictments: but I think they were put in 'ex abundanti cautela,' to shew, that the law-makers did not intend to include criminal proceedings. And though some particulars are only mentioned; yet I hope the rule of 'expressio unius,' shall not hold in the exposition of acts of parliament, to exclude every thing else that is not named.

By Littleton, sect. 21, it appears, there are many Estate Tails, besides those that are particularly mentioned by the statute of West. 2, de Donn Conditionalibus. And there are many offices not within the purview of the statute of 5 and 6 Edw. 6, c. 16, that are of more consideration than the park-keeper's place, which are not mentioned in the exceptions of that statute, against the buying and selling offices. And therefore I cannot think any great weight is to be laid upon the statutes mentioning ap-

peals and indictments; especially since the opinion of all ages, since the making the statutes of amendments, seems to concur against extending the power of amending to criminal cases.

My lord, it would be an endless thing to enumerate the several indictments and informations, that have been quashed within the compass of my memory, by reason of clerks' mistakes. I shall instance but in one, and that is the case of the queen and Frankling; where no longer ago than the beginning of this term, your lordship and the whole Court quashed an indictment, because the clerk had writ in the caption 'presentant existit,' instead of 'praesentat existit.' Here was but a letter to amend: and this must plainly be the clerk's mistake, not his fault in wanting skill in such case. But I take it, the case now before the court is of a different nature. The testing of this writ the 24th of October, cannot be accounted a slip of the clerk, but did proceed from wrong advice. And this is the third thing I proposed to speak to: if this writ with the teste had been entered upon the roll, and transcribed only thence to deliver to the sheriff; perhaps the varying from the day mentioned in the roll, might be accounted a slip of the clerk: but when this writ was made out, it was certainly a day after the time it ought to have issued; and upon advice asked; it was directed so to be tested. So this is not a slip.

If it be insisted upon, that this mistake happened through forgetfulness of the day the term did begin on; to that I must answer, that all knowledge is said to be nothing but 'remissio.' If a man forget any thing that he has read or heard of, he may be said to be as ignorant of that, as if he had never known it. Now it plainly appears, that they who were advised with about the teste of this writ, did not then know on what day the term did begin, and therefore tested the writ the 24th, instead of the 23d. I must therefore, in behalf of my client, insist upon it, that this error proceeds from the negligence of the adviser, and not from the slip of the writer. And this point will set us clear of all the statutes of amendments, if they did extend to criminal cases.

As to the grand case of Harris, reported in Crooke James, fol. 502, that has been so very much relied on, I hope, upon consideration, it will not appear to be so great a Goliath as it was represented to be. There was an indictment for a nuisance removed hither by Certiorari; and the record that was transmitted, was found imperfect, in a point which was inconsistent with the verdict: For in truth the plea of Not Guilty was omitted. And what did the Court do hereupon? Why, they sent for the clerk of assize, in whose time the record was filed below; and he was ordered to amend that which was come hither by the Certiorari, and set it right: I suppose, by making it agree with the original proceedings, which remained upon the file below. Now, does Mr. Attorney think this is like the amendment he would

make, supposing all in Harris's case were rightly done? Does Mr. Attorney think, that this will justify the amendment now proposed? Which is, indeed, making this writ to be another writ than it is: For a writ that is tested on the Monday, does as much differ from a writ tested on a Tuesday, as one day differs from another. And I take it, with submission, that the amendment now prayed, will alter this writ, as much as the amendment that is so much taken notice of by justice Ingham, 2 Rich. 3, fol. 10, did the amendment in that case. There was an amercement recorded of 13s. 4d.; and because it was a poor man's case, it was afterwards agreed to make it 6s. 8d. There was a diminution in the sum. And here Mr. Attorney would have a diminution of a day.

L. C. J. Was that done judicially, or clandestinely?

Mr. Mountague. My lord, how it was done, does not appear: But it is said to have been done out of pity and commiseration to the poverty of the defendant. And yet that amendment was looked upon to be illegal.

Just. Powell. That was not done by the Court.

Mr. Mountague. It comes to be mentioned in king Richard 3's days, upon a question that was put to the judges by the king, when they were together in the Star chamber: "What if a justice of peace shall procure an indictment, not found by the jury, to be filed among other indictments, as if it really had been found by the grand jury; what punishment ought to be inflicted upon him hereupon?" They take notice of that obliteration that had been made in a record by justice Ingham, and of the punishment he underwent for it.

But to come to the present case. Suppose it were tested the 14th day of October, instead of the 4th; would Mr. Attorney then say it were to be amended? Suppose the return was out before the Teste of this Distringas, that would come nearer to Gage's case in the fifth report. There was a writ of covenant, Teste the 24th of April, and made returnable the 15th of April. The lord Coke indeed says in his Reports, it is a misprision in the clerk, that is amendable. But your lordship knows, in his own book of Entries, fol. 250, part 9, the contrary to that appears; and that it was not permitted to be amended.

Another thing they have said, is, That this writ shall be amended by the award of the roll in Court. But, with submission, there is nothing there to amend the Teste by. We know there is a right order of a Distringas on the roll; but that will not help an error in the Teste of the writ issued forth: And for that I will cite a case out of Crooke's Eliz. fol. 895, Carew v. Marler; and another case was tried before your lordship in Michaelmas term, in the 11th of king William, between Child and Harvey. There the Distringas was made returnable 'die Jovis prox. post tres septimanas Sanctus Trin,' instead of 'Sancti Michaelis.'

So the day of the return happened to be the same day that the cause was to be tried upon, before your lordship, at the Nisi Prius.

L. C. J. It was actually tried at another day.

Mr. Mountague. We came afterwards to the Court, and prayed the Distringas might be amended by the award on the roll, which was right 'die Jovis prox. post tres septimanas Sancti Michaelis.' But the Court denied our motion; and we were forced to take out a new Venire Facias, and try the cause again.

The next great case is that of Curson, which is in Crooke James's Reports, fol. 529. There is an information upon the statute of Recusancy, against baron and feme; and the declaration demands 220*l.* for ten months recusancy. But the wife was charged for being absent thirteen months from church. There the wife only pleaded Not Guilty; and after a verdict, this mis-joining of the issue was amended by the docket. How agreeable to law this case is, must be left to your lordship's consideration. There less is demanded, than (of the plaintiff's own shewing) appears to be due: For it is laid, that she had been absent thirteen months, yet 220*l.* is only demanded; so it does not appear how the rest was satisfied. And besides this, it may be observed, that Mr. Hughes, who has abridged the three Crookes in his abridgment of this case, has not thought this resolution worthy his taking notice of.

L. C. J. A good authority indeed! Did you know him?

Mr. Mountague. I did not know him; but I have heard him accounted a learned man: and he did not, belike, think this point worth his remembering. Whether he had any scruple in the case, I know not; but he omits it.

Then there is the case of sir Humph. Tuston, in Crooke Charles, 144. There was a Quo Warranto brought by sir Humph. Tuston against the corporation of Maidstone; and there a judgment is entered by disclaimer, with consent of parties, says the book. And that disclaimer is afterwards amended, and made of less consequence than it was before. But how was that amendment made? Why, upon the certificate of the Attorney General, that he with his own hands had inserted in the paper-book from which the record was transcribed, the words which the clerk had omitted. Now upon this case I may observe, that the judgment had been entered by consent, though the amendment prayed was to the disadvantage of the crown: though that amendment was prayed in the case of a Quo Warranto, which is in nature of a civil action; though Mr. Attorney General did consent, yet a difficulty was made in doing it. For all which reasons, I do humbly conceive, that that case is for me, rather than against me: especially since so great a man as Mr. Noy does there assert, that none of the statutes of amendments extend to cases of Quo Warranto, or suits where the king is party. Now, though this saying of Mr. Noy's were only as he was of counsel for those that

opposed the amendment; yet this must have been looked upon as a strange assertion by the judges at that time, if they had been as clear of opinion as Mr. Attorney is, that the statute of Hen. 6, did extend to criminal prosecutions. And the learned judge that reports that saying of Mr. Noy, would hardly have let it pass, without taking some notice that the law was otherwise, if he had thought so.

As to the case of 1 Siderfin, fol. 244, it was answered by your lordship the other day: for though the writ is Vicecomitibus, where there was but one sheriff: yet the return is helped by a suggestion that was entered, that there is but one sheriff.

The cases out of Dyer, 353, 346, have been taken notice of by Mr. Brod-ricke; and the query is, whether any discontinuance 'in causa reginae' be aided by any of the statutes of Jeofails? Now I cannot but think, that the makers of those laws would have taken as much care to except criminal informations, as well as actions *qui tam*, if there had been occasion. And to shew your lordship that none of these statutes do extend to informations at the common law, I would mention a case out of 1 Vent. f. 17. It is Perry's case. There in an information for a forgery: there happened a mis-trial; and it was adjudged that it could not be helped by any of those statutes. The error was, that the defendant is charged to have forged a lease in Sherborn, and to have given it in evidence at Dorset: and the Venire was awarded only to Dorset. And this case puts me in mind of the late case of Paul Tracey; where the trial was set aside, because the defendant himself had sued out a wrong Venire: though the prosecutor there, at the same time, had sued out a right one, in order to have tried him thereupon, if he had not put in his wrong writ?

L. C. J. How was that writ?

Mr. Mountague. The Venire was to the parish of St. Clement's Danes only; whereas it should have been to the parish of St. Giles's in the Fields as well.

L. C. J. Was it tried on that writ?

Mr. Mountague. The trial was had upon the writ the defendant had taken out, and for that reason set aside.

As to the other case, in 1 Siderfin, fol. 259, the case of the king against Glover, an amendment was made of an inquisition *post mortem*; but that is of no consequence. For in all these cases, that inquisition is to be traversed afterwards: and the jury, when they deliver such inquisitions in, are asked, whether the clerk shall not have leave to amend any defect in form, or false Latin; and it is always allowed, provided nothing in substance be altered. And in this case of Glover, the amendment was of a matter of form: for the inquisition said, the deceased 'seipsum submersus fuit;' but did not say, he threw himself into the water.

The case of Sampson, in 1 Jones 480, though it has been cited on the other side, yet I take it to be a strong case on our side. That case plainly shews, that it was the opinion of the

judges, that there was no such thing as an amendment of indictments by common law. Both Jones and Keeling, who (I suppose) was clerk of the crown, do affirm, no precedent can be shewn of any such amendment made. And therefore I may question the authority of Harris's case, which is said to be adjudged Mich. 16, of king James; and this case of Sampson was in the 14th of king Charles 1. And there Jones says expressly, that if a record be certified by the clerk of assize that is faulty, it cannot be amended, either by the common law, or by the statute-law.

My lord, I doubt I have taken up too much of your time. There are other cases that have been mentioned out of Brook and Fitzherbert; but I hope none of them will any ways affect the present case. I have taken notice of those which I think the most material; and I hope I have made it appear, that the error in the Teste of this writ can neither be amended by common law, nor by the statute law. And that this mistake of a day is not only a slip of the clerk, but an error in judgment: and I humbly pray, there may be no rule made for an amendment.

Mr. Parker. My lord, Mr. Mountague has spoken fully to the particular cases that have been offered on the other side: therefore I will not go through them again: but I beg leave to take notice of some general heads, from which they have argued, and to which most of their cases are reducible; and to distinguish them shortly from the present case.

1. In the first place, I take it, that the cases of captions of indictments, removed hither by Certiorari, and amended the same term they are brought in, come not up to the present case. For the Certiorari commands the return, not of a copy of the indictment, but the very record itself; and the indictment returned, is, in judgment of law, the individual parchment that was in the court below. And so it is in writs of error: except writs of error to the court of King's-bench in Ireland; and in that case, the books take notice that only a transcript is to be sent, by reason of the hazard of losing the original by the danger of the seas: and in case the transcript arrived here safe, it is then said to become, in consideration of law, the very record. And though it be found expedient for the convenience of keeping the records, and is now become the general practice in other cases, to make a transcript in another parchment, and file that: yet, if in transcribing there be a mistake made, your lordship will amend it, if it be discovered in the same term: for, in truth, that is not amending the real indictment, but only amending the return of the justices to whom the Certiorari was directed; and providing that a false indictment be not foisted in amongst the records, instead of the true. Which cannot justify the mending the very writ itself; the thing prayed in the present case.

2. Their cases of amendments of judgments in the same term they are given, and so of

other inrolments of what is done in court, will not make any thing in this case. The reasons given in those cases, are, that the whole term is, in judgment of law, but one day: and the judgments and determinations of the Court are, that whole day, in the breast of the Court. And these being only amendments of what themselves do in court, which is not complete till the term be ended; they are not so tied up by the clerk's hasty entry of it, but that the thing may be altered as they see cause. But this is not applicable to a writ which has passed the seal of the Court, and thereby received all the sanction it can have, and has then issued out to a proper officer, and is by him returned back to the Court. The term is, in the judgment of law, but one day, with respect of what is the act of the Court, and passes perfectly in the Court. But it is impossible to say, without manifest absurdity, that the term is to be considered as but one day, in respect of a writ that is issued out one day in the term, to command jurors to appear at another; or that the day when the officer comes into court, to give an account of his obedience to a writ, is the very day of issuing it. And therefore a distinction is to be made between things done in court, which are incomplete during the term, and the Court's giving directions to an officer out of court by writ, which is perfect, and gone out from them in order to be obeyed.

3. I should think likewise, that the cases they have mentioned, of the favour allowed the crown, do not come up to this case; because, though in suits for the recovery of right there be great favour allowed to the crown; and by the statutes of amendments and Jeofails, much indulgence is given to the subject for the recovery of right; yet it is not so in prosecution of criminals, which is a matter *stricti juris*: and no argument can be drawn from the favour shewn in one case, to infer, that the like favour is to be allowed in the other; for they stand on quite different grounds.

4. I think, with submission, in the next place, that the instances of amendments of process, where nothing is done upon it, but barely to entitle the party to some process farther; as of a Capias, in order to an Exigent, &c. will not come up to this case where the writ is executed and returned, and the trial had upon it.

In the case of Rogers and Bird, that was cited on the other side, 3 Cro. 572, there was a Venire Facias returnable Die Sab. prox. post Octab. Trin. but on the roll it was awarded returnable Cro. Trin. And because that was the authority for making it out, it was amended in the return; because the trial was not had upon it, only it was returned in order to the Distringas. But Popham there expressly says, that if the trial had been upon the Venire Facias, it were erroneous, and would not have been amendable.

Just. Powell. Where is that, Sir?

Mr. Parker. 3 Cro. 572. There is likewise the Case of 24 H. 6. 20 Brook's Amendments, Pleit. 10. There were twenty-four

jurors returned upon the Venire Facias, and in the Habeas Corpus one of them omitted: and there the opinion of the Court was, that they should make out a new Habeas Corpus. And though there it was plainly the mistake of the clerk, that mentioned only twenty-three, instead of twenty-four; yet the Court was of opinion that it could not be amended, but they must begin again where the fault was made. 19 H. 6, 39. a juror was returned upon the Venire Facias, by the name of J. Hod; and in the Distringas he is named J. Hord; and upon him the sheriffs returned Nihil, &c. And there was a new Habeas Corpus awarded. Which cases seem to prove, that where there is something done upon the process, more than a mere formal return, that it is not amendable within the statutes of Edw. 3, and Hen. 6, which were both of them made before these cases.

5. In the next place, I beg leave to observe, that there is a difference between such cases as have been cited, where the thing was really done right, but by mistake entered wrong; and this case, where really it was not done right. As where upon a Distringas a right jurymen is really sworn, but set down by a wrong name, the name shall there be amended; because the thing done was really right, only the mention of it wrong. But in this case it cannot be said that the Distringas was really taken out right. The writ was awarded the 23d of October, on which day they would have it bear Teste: but it is not pretended that it was really taken out till the next day, when it now bears Teste.— And as to what has already been offered, that the Nisi Prius ought to be awarded 'in presentia partium;' and therefore not upon any other day than the 23d, when the Venire Facias was returnable, and the parties in court; I might here, I hope not improperly, add this farther: that that must be understood, that the making of the writ should be in the presence of the parties: for the entry upon the roll, though commonly called an award of the writ, is really an entry of a writ, supposed to be then actually made; it is not so properly a direction to the clerk to make a writ, as an entry or memorandum upon the roll, or a recording that there is a command to the sheriff, to distrain the jurors to appear at a certain day, &c. And therefore if the Nisi Prius is to be awarded in the presence of the parties, the writ is to be made in their presence.

Just. *Powel*. Do you mean, that they should be in the crown office?

Mr. *Parker*. The writ is in judgment of law issued in court, though actually wrote and sealed in the office; and if Tested of that day, is understood to be made in court that day; which is in presence of the parties; that being the day given them in court, and their appearance then entered. And we apprehend, that the Court does not command by the entry of the *preceptum est* in the roll, but by the writ. The sheriff, who is absent, cannot be commanded

by the rolls, but by the writ which is sent to him: therefore the Court then commands, when the writ is made: and therefore the entry upon the roll, '*preceptum est Vic.*' is an entry that there is such a command, which this writ, on which this trial was had, cannot be, because it bears Teste after. But this is only by the way: for however taking the entry as an award of the writ, yet the writ must be taken out as the Court awards it, and when the Court awards it; or else it is without warrant, and void. Indeed if it should in fact be made at a subsequent day, and not actually wrote and sealed the same day it is awarded, yet if it bear Teste upon that day, your lordship will not enquire into that matter: but finding such a writ was awarded, and that it appears by the Teste to issue the same day; will presume it did really issue that day, and that it is right. But the writ being here awarded the 23d, and bearing Teste the 24th: if it did not issue the 23d day, to alter the Teste, so as to make it appear to issue that day, were to make it contrary to the truth.

This we take to have some resemblance to the late case of the warden of the Fleet; where your lordship was against altering the day of bringing in the record, when the alteration would have been against the truth of the fact. And to make the amendment here desired, would be to make the writ appear to have issued the 23d of October; when the writ itself imports it was the 24th; and this was the truth of the fact.

Mr. *Whitaker*. My lord, I beg the favour of a word or two on the same side: after so much has been said for the defendant, I shall only mention a case or two, to shew that such an amendment as this has not been allowed by the statute of 8 Henry 6, cap. 12, in any civil action between party and party.

28 Hen. 6, 3. There was an action of debt, and the parties were at issue. The Venire was returned; upon which the plaintiff had a Habeas Corpora with a Nisi Prius: and instead of saying in the Habeas Corpora, 'in Placito Debiti,' it was made 'in Placito Computi,' &c. on motion in arrest of judgment. The counsel for the plaintiff desired to amend this, after verdict for the plaintiff: the Court did indeed not give any rule, as appears by that book, only that they would consider of it; but nothing was done further as appears by that book just after.

In the case 34 Hen. 6, 20. In an action of debt brought by the prior of St. Bartholomew's, the parties were at issue, and a Venire returned; and on the return of the Venire, there were twenty-four persons returned: but in making out the Habeas Corpora, the clerk omits one of the names of the twenty-four. This appeared to be the misprision of the clerk. He had the Venire and the return before him; as the clerk had here in the case now before your lordship. He had the roll and the Venire; but this was held not to be amendable: and this was in few years after the statute of Henry 6.

I shall mention another case in *2 Riderfin*, 7, 12. A writ of 'Capias ad faciend.' for a debt, was made returnable a day after the term. It appeared to the Court, that the attorney for the plaintiff had given the clerk that made the writ, true and right directions to make it returnable the last day of the term; but though it was his misprision, yet the Court would not amend it: so it is adjudged in that case.

I shall not mention any more cases; but answer the case of *Piume*, in *Palmer* 480, cited by the queen's counsel. I have had particular occasion to look into that case this term, in a cause which hath been in the paper this term. We did search for that rule expressed in *Palmer's* reports, in order to amend an outlawry after judgment, in an action of debt in the *Common Pleas*; but on producing that rule the court of *Common Pleas* did not take it as an authority to amend our outlawry, which wanted an amendment in the return of the exigent.

L. C. J. Holt. What was that amendment?

Mr. Whitaker. 'Ad. Com. meum,' the book says: "And upon this" says the book, "they did grant a rule to award a *Certiorari* to the coroner." The rule mentioned in *Palmer* was searched for; and, as I am informed, my client did produce it in the *Common Pleas*; and yet they would not let us amend our outlawry: and my client, for want of the amendment of the return of the exigent, is likely to lose an honest debt by the reversal thereof.

The counsel for the queen have relied on the statute of the 8th of *Henry 6*, that this fault of the clerk is amendable within that statute. By the books I have cited, the misprisions of the clerks, though in civil actions, have not been allowed to be amendable. Above 200 years are past, before any thing of this kind was done, to amend such a misprision of a clerk as this is, in criminal cases.

How far the queen's counsel would go on with amendments, I cannot tell: but in the case cited by the queen's counsel, *Sampson's* case, 1 *Rolls* 196, there was the same mistake of a want of continuance as in this case. No man can believe the clerk of assize knew not what days the commissioners of *Oyer and Terminer* and *gaol-delivery* did sit, and continue their sessions on such commissions. And yet, on a *Writ of Error* to reverse that judgment (in *Sampson's* case) being brought, the Court of *King's-bench* would not amend this apparent misprision of the clerk of assize's want of adjournment from day to day.

This matter of amending in criminal proceedings such a misprision of a clerk as this is that is now desired, has not been thought of since the time of the 8th of *Henry 6*, until now. And if the queen's counsel can shew no precedent in all this time, wherein such an amendment, even in a civil cause, by virtue of the 8th of *Hen. 6*, hath been, much less in a criminal case, I humbly hope, your lordships will not let them amend this writ of *Distingas*.

Sir T. Powis. My lord, having heard what has been said on the other side, I beg leave to trouble you a little by way of reply.

Mr. Broderick and *Mr. Mounstague* make a distinction which they think will govern this case. They say, that the crown has a great many privileges, beyond what the subject hath, where the case concerns civil rights: but they will not allow the same privileges to the crown, where there is a criminal prosecution. I know of no such distinction. For if this privilege belongs to the crown, in the case of the revenue; surely the restraining of crimes is much more for the public benefit: and by consequence, the same reason that gives the crown a privilege in a lesser matter, ought to carry it further in a greater thing.

In the next place, they do admit, that all the acts of the Court may be amended; as being in the breast of the Court, during the same term. And they deny not, but that the judgment of the Court, which is the highest act of the Court, may be reversed, or any way altered or changed in the same term, without any danger of building clock-houses. And can any one say, that if these highest acts of the Court may be altered, that the acts of their clerks may not be altered? That the greater things may be done, but not the inferior, when there is a pure mistake?

No man can but think it strange, that a mistake of a clerk may not be altered; but a mistake even in judgment of the Court may.

We come next to another distinction. They say, an original writ may be amended in the case of the crown; as in the *Quare impedit*, in *Blackmore's* case. For which they assign two reasons; first, it was a writ of the crown, for recovery of a civil right; for it was a *Quare impedit*: and secondly, the judges observing the fault in the writ, did (as it seems) carry it to the court of *Chancery*, and there it was amended. From whence they would infer, as if it were a new writ. But that cannot be supposed; for it was agreed, that it was the same writ amended, and not a new writ.

Now see if that will not come to our case. For if the court of *Chancery* could amend a *Quare impedit*, as coming from thence; cannot this court amend a writ that comes from hence? Here we are in the case of a judicial writ that comes from hence; and therefore it may be amended here, as well as that could be amended in the court of *Chancery*.

But the great matters endeavoured to be avoided, are the two acts of parliament of *Edw. 3*, and *Hen. 6*, for the cases cited: I will not go over them again. And I do believe it is very true what these gentlemen insist on: that it has been the common opinion, that these acts, or other acts of amendments, do not extend to cases of the crown. And, generally speaking, it is right; because all the later acts of amendments except prosecutions on penal laws: and the statute of *Henry 6*, has so many exceptions in criminal matters, that a

Jurors returned upon the *Venire Facias*, and in the *Habeas Corpus* one of them omitted: and there the opinion of the Court was, that they should make out a new *Habeas Corpus*. And though there it was plainly the mistake of the clerk, that mentioned only twenty-three, instead of twenty-four; yet the Court was of opinion that it could not be amended, but they must begin again where the fault was made. 19 H. 6, 30. a juror was returned upon the *Venire Facias*, by the name of J. Hod; and in the *Distringas* he is named J. Hord; and upon him the sheriff returned *Nihil, &c.* And there was a new *Habeas Corpus* awarded. Which cases seem to prove, that where there is something done upon the process, more than a mere formal return, that it is not amendable within the statutes of Edw. 3, and Hen. 6, which were both of them made before these cases.

5. In the next place, I beg leave to observe, that there is a difference between such cases as have been cited, where the thing was really done right, but by mistake entered wrong; and this case, where really it was not done right. As where upon a *Distringas* a right jurymen is really sworn, but set down by a wrong name, the name shall there be amended; because the thing done was really right, only the mention of it wrong. But in this case it cannot be said that the *Distringas* was really taken out right. The writ was awarded the 23d of October, on which day they would have it bear *Teste*: but it is not pretended that it was really taken out till the next day, when it now bears *Teste*.— And as to what has already been offered, that the *Nisi Prius* ought to be awarded ‘in *pre-sentia partium*’; and therefore not upon any other day than the 23d, when the *Venire Facias* was returnable, and the parties in court: I might here, I hope not improperly, add this farther: that that must be understood, that the making of the writ should be in the presence of the parties: for the entry upon the roll, though commonly called an award of the writ, is really an entry of a writ, supposed to be then actually made; it is not so properly a direction to the clerk to make a writ, as an entry or memorandum upon the roll, or a recording that there is a command to the sheriff, to distrain the jurors to appear at a certain day, &c. And therefore if the *Nisi Prius* is to be awarded in the presence of the parties, the writ is to be made in their presence.

Just. Powel. Do you mean, that they should be in the crown office?

Mr. Parker. The writ is in judgment of law issued in court, though actually wrote and sealed in the office; and if Tested of that day, is understood to be made in court that day; which is in presence of the parties; that being the day given them in court, and their appearance then entered. And we apprehend, that the Court does not command by the entry of the *preceptum est* in the roll, but by the writ. The sheriff, who is absent, cannot be commanded

by the rolls, but by the writ which is sent to him: therefore the Court then commands, when the writ is made: and therefore the entry upon the roll, ‘*preceptum est Vic.*’ is an entry that there is such a command, which the writ, on which this trial was had, cannot be, because it bears *Teste* after. But this is only by the by: for however taking the entry as an award of the writ, yet the writ must be taken out as the Court awards it, and when the Court awards it; or else it is without warrant, and void. Indeed if it should in fact be made at a subsequent day, and not actually wrote and sealed the same day it is awarded, yet if it bear *Teste* upon that day, your lordship will not enquire into that matter: but finding such a writ was awarded, and that it appears by the *Teste* to issue the same day; will presume it did really issue that day, and that it is right. But the writ being here awarded the 23d, and bearing *Teste* the 24th: if it did not issue the 23d day, to alter the *Teste*, so as to make it appear to issue that day, were to make it contrary to the truth.

This we take to have some resemblance to the late case of the warden of the Fleet; when your lordship was against altering the day of bringing in the record, when the alteration would have been against the truth of the fact. And to make the amendment here desired, would be to make the writ appear to have issued the 23d of October; when the writ itself imports it was the 24th; and this was the truth of the fact.

Mr. Whitaker. My lord, I beg the favour of a word or two on the same side: after so much has been said for the defendant, I shall only mention a case or two, to shew that such an amendment as this has not been allowed by the statute of 8 Henry 6, cap. 19, in any civil action between party and party.

28 Hen. 6, 3. There was an action of debt, and the parties were at issue. The *Venire* was returned; upon which the plaintiff had a *Habeas Corpus* with a *Nisi Prius*: and instead of saying in the *Habeas Corpus*, ‘in *Placito Dediti*,’ it was made ‘in *Placito Computi*,’ &c. on motion in arrest of judgment. The counsel for the plaintiff desired to amend this, after verdict for the plaintiff: the Court did indeed not give any rule, as appears by that book, only that they would consider of it; but nothing was done further as appears by that book just cited.

In the case 34 Hen. 6, 20. In an action of debt brought by the prior of St. Bartholomew's, the parties were at issue, and a *Venire* returned; and on the return of the *Venire*, there were twenty-four persons returned: but in making out the *Habeas Corpus*, the clerk omits one of the names of the twenty-four. This appeared to be the misprision of the clerk. He had the *Venire* and the return *indubiting* as the clerk had here in the case now before your lordship. He had the roll and the *Venire*; but this was held not to be amendable: and this was in few years after the statute of Henry 6.

I shall mention another case in 2 *Siderfin*, 7, 12. A writ of 'Capias ad faciend.' for a debt, was made returnable a day after the term. It appeared to the Court, that the attorney for the plaintiff had given the clerk that made the writ, true and right directions to make it returnable the last day of the term; but though it was his misprision, yet the Court would not amend it: so it is adjudged in that case.

I shall not mention any more cases; but answer the case of *Paine*, in *Palmer* 480, cited by the queen's counsel. I have had particular occasion to look into that case this term, in a cause which hath been in the paper this term. We did search for that rule expressed in *Palmer's* reports, in order to amend our outlawry after judgment, in an action of debt in the Common Pleas; but on producing that rule the court of Common Pleas did not take it as an authority to amend our outlawry, which wanted an amendment in the return of the exigent.

L. C. J. Holt. What was that amendment?

Mr. Whitaker. 'Ad. Com. meum,' the book says: "And upon this" says the book, "they did grant a rule to award a Certiorari to the coroner." The rule mentioned in *Palmer* was searched for; and, as I am informed, my client did produce it in the Common Pleas; and yet they would not let us amend our outlawry: and my client, for want of the amendment of the return of the exigent, is likely to lose an honest debt by the reversal thereof.

The counsel for the queen have relied on the statute of the 8th of Henry 6, that this fault of the clerk is amendable within that statute. By the books I have cited, the misprisions of the clerks, though in civil actions, have not been allowed to be amendable. Above 800 years are past, before any thing of this kind was done, to amend such a misprision of a clerk as this is, in criminal cases.

How far the queen's counsel would go on with amendments, I cannot tell; but in the case cited by the queen's counsel, *Sampson's* case, 1 *Rolls* 196, there was the same mistake of a want of continuance as in this case. No man can believe the clerk of assize knew not what days the commissioners of Oyer and Terminer and gaol-delivery did sit, and continue their sessions on such commissions. And yet, on a Writ of Error to reverse that judgment (in *Sampson's* case) being brought, the Court of King's-bench would not amend this apparent misprision of the clerk of assize's want of adjournment from day to day.

This matter of amending in criminal proceedings such a misprision of a clerk as this is that is now desired, has not been thought of since the time of the 8th of Henry 6, until now. And if the queen's counsel can show no precedent in all this time, wherein such an amendment, even in a civil cause, by virtue of the 8th of Hen. 6, hath been, much less in a criminal case, I humbly hope, your lordships will not let them amend this writ of *Distingas*.

Sir T. Powis. My lord, having heard what has been said on the other side, I beg leave to trouble you a little by way of reply.

Mr. Broderick and *Mr. Mountague* make a distinction which they think will govern this case. They say, that the crown has a great many privileges, beyond what the subject hath, where the case concerns civil rights; but they will not allow the same privileges to the crown, where there is a criminal prosecution. I know of no such distinction. For if this privilege belongs to the crown, in the case of the revenue; surely the restraining of crimes is much more for the public benefit: and by consequence, the same reason that gives the crown a privilege in a lesser matter, ought to carry it further in a greater thing.

In the next place, they do admit, that all the acts of the Court may be amended; as being in the breast of the Court, during the same term. And they deny not, but that the judgment of the Court, which is the highest act of the Court, may be reversed, or any way altered or changed in the same term, without any danger of building clock-houses. And can any one say, that if these highest acts of the Court may be altered, that the acts of their clerks may not be altered? That the greater things may be done, but not the inferior, when there is a pure mistake?

No man can but think it strange, that a mistake of a clerk may not be altered; but a mistake even in judgment of the Court may.

We come next to another distinction. They say, an original writ may be amended in the case of the crown; as in the *Quare impedit*, in *Blackmore's* case. For which they assign two reasons; first, it was a writ of the crown, for recovery of a civil right; for it was a *Quare impedit*: and secondly, the judges observing the fault in the writ, did (as it seems) carry it to the court of Chancery, and there it was amended. From whence they would infer, as if it were a new writ. But that cannot be supposed; for it was agreed, that it was the same writ amended, and not a new writ.

Now see if that will not come to our case. For if the court of Chancery could amend a *Quare impedit*, as coming from thence; cannot this court amend a writ that comes from hence? Here we are in the case of a judicial writ that comes from hence; and therefore it may be amended here, as well as that could be amended in the court of Chancery.

But the great matters endeavoured to be avoided, are the two acts of parliament of *Edw. 3*, and *Hen. 6*, for the cases cited: I will not go over them again. And I do believe it is very true what these gentlemen insist on: that it has been the common opinion, that these acts, or other acts of amendments, do not extend to cases of the crown. And, generally speaking, it is right; because all the later acts of amendments except prosecutions on penal laws: and the statute of Henry 6, has so many exceptions in criminal matters, that a

mistake might from thence arise, that all are excepted.

It is certainly true what my lord chief justice Vaughan says, fol. 169, 170, 419. That upon doubtful words of an act of parliament, that are dark and dubious, an ancient interpretation, submitted to for a long time, is fit and reasonable to be relied on in a doubtful case. But a thousand resolutions, against a plain act of parliament, cannot prevail. Though it would be good reason, well to consider such a law, and to weigh it well; but no such resolutions can alter the act.

Here are two acts of parliament: that of Edw. 3, is in general words of all: and how can any one say then, that it shall mean and extend only to some?

As to the act in the 8th of Henry 6, to say that the words shall not go to every thing that is not excepted, is to overthrow all rules of construction. They have offered nothing against that statute; but that it has been thought it did not extend to these cases.

The case of Siderfin shows, that we do not advance a mere new notion, with respect to that act. Therefore, I say, we have the acts of parliament on our side; we have the privilege of the crown on our side: the award of the roll is right, and with us; and the error was purely the mistake of the clerk: for no man can think it otherwise.

We have this likewise on our side, that we desire it may be amended in the same term. For as the Court can set right their own judgment in the same term, much more what is the act and mistake of the clerk.

Therefore we insist upon it, that our cases we have cited, are of good authority for us; and we hope we shall have an amendment, if it be necessary.

Att. Gen. My lord, we humbly hope, that notwithstanding what these learned gentlemen have urged, our assertions by law and authority will prevail; and that this mistake is amendable.

What has been said before by Mr. Broderick and Mr. Mountague, they have laid it down for a rule, that there is a great difference between the privileges belonging to the crown in matters of a civil nature upon the statute, and criminal prosecutions: and that all these favours for the crown, were only for matters relating to the right of the crown in civil cases, and not what belongs to the crown in its politic capacity. Though Mr. Broderick did not consider: for sure, by the common law, there was a greater latitude for the crown in criminal prosecutions, than for the subject.

In cases of treason, they had no benefit of counsel; and that was far more to their disadvantage, than in civil cases. It is true, that inconvenience has been regulated by the late statute, that in the cases of treason, the party may have a copy of the panel and indictment. But you see what the difficulties were formerly in criminal prosecutions for the

people: all they had to do, was merely to plead Guilty or Not Guilty. I think that answers their objection as to that.

Now there is in the next place to be considered, what Mr. Mountague says, that no error in process was amendable by common law; and cites lord Coke for it. He should have gone on with that citation; for it is certainly otherwise. 8 Coke 156, says, their own acts are amendable by the common law, in the same term; but at the common law, the misprisions of clerks in another term, were not amendable. But we are in the same term; and sure they are amendable before judgment. And lord Coke tells you, they are amendable in the same term.

Now Mr. Mountague has gone a great way. He agrees, if it were a misaward of the roll, you would amend it, but not the writ. Now for that, the law is contrary: if you are wrong in the roll, you cannot set it right; but if it be in the writ or process, you may amend it by the roll. Now here the roll is right; and we desire the writ may be amended by it.

If it had been in the roll, I cannot tell whether we should have applied to amend that. For if you have any thing amiss, you cannot amend it, but by something to amend it by. But it may be amended in case of the crown, better than in that of the subject. And though Mr. Mountague says, you may make use of them in civil cases, but not in criminal; yet we make use of this argument, that the crown has a privilege more than the people. We rely on that; though Mr. Mountague says, that is not to be relied on.

In the next place, Mr. Mountague says, this is within none of the statutes of amendments, either of Edward 3, or of Henry 6. And that my lord Coke says, fol. 157, b. That the statute of Edw. 3, does not extend to the pleas of the crown. And therefore Mr. Mountague's opinion is, to go quite through, and exclude this case from all the statutes of amendments.

Now I can give an argument why it should not be amended by the statute of Hen. 6, though by the statute of Edw. 3, it is amendable. But why is it not amendable by the statute of Henry 6, cap. 12, and 15, which go further than the statute of 14 Edw. 3, does?

I do agree, there is an objection against the statute of Edw. 3. For there is the word Party, which seems to imply civil cases only. But even by that statute, so soon as the slip appears by challenge, or any other way, it shall be amended. The lord Coke might well, on these words, make a doubt, whether the 14th of Edw. 3, did extend to amend cases relating to the crown: but the opinion of Coke in the statute of 14 Edw. 3, is absolute; but the other of 8 Hen. 6, is with a reason. And why is it? Because it is excepted. Now they should have shewn us some reason why the statute of Henry 6, cap. 12, should not extend to amendments in cases of the crown.

And there is not that objection to the statute of Hen. 6, cap. 15. For it follows the

words of the statute of Edw. 3, and says, 'That no man shall have,' &c.

Now Mr. Mountague says, the exception was put in *ex abundanti*; and it may be intended they were but instances of like cases. Now I have hardly ever heard, that instances of treason and felony should extend to other cases of an inferior nature: there is no reason to carry it further than what is expressed. So that we think these statutes stand for us; and are applicable to all records, as well for the crown, as any else.

Mr. Mountague says, they have the opinion of all ages against it. But, my lord, I deny that; because there were exceptions in many statutes before and after the statutes of Jeofails, that were not considered: but when they come to be considered, this must be determined by considering the words of the statute; and not by general opinions, taken up without consideration.

There was in Cro. Car. 25, a case on the statute 32 Hen. 8, where the question was, if assignees of copyhold lands were within that statute? and till a little before the Revolution, it was a received opinion, that the assignee of a copyholder was not within the statute of Henry 8. And there is a case in Yelverton, 225, wherein it was so resolved: but when that statute came afterwards to be considered, it was settled here, and has prevailed ever since, that the statute did extend to it; though before it was the prevailing opinion that it did not. And accordingly the practice has since been. So that opinions that pass *sub silentio*, that is, without consideration, may be altered when they come to be stated and considered. And therefore I hope this point will not prevail.

My lord, I agree that this thing is of very great consequence: for if their plea be allowed, it will follow, that criminals will escape for little slips in all cases. And I know that even in perjury, and other crimes, few that have been convicted, but have got off, by reason of errors in the proceedings, though I have seen a great many convicted thereof. This is a great inconvenience and mischief: and sure criminals are not to be the favourites of the law.

But as to these prosecutions, there is another consideration: that it is more for the honour of justice to have the advantage to lay aside this slip, than to suffer a criminal to escape. But however, every one must have justice: and if we rely on the statute of Henry 6, no construction can avoid it.

Then Mr. Broderick cites the case of—— where it is said, that the statutes of Jeofails do not extend to cases of the crown. Now sure that is not a reason: it is contrary to all the reasons of statutes. Where statutes are to promote justice, the crown is bound as well as the subject; it is for the public good. Now Mr. Broderick has cited a case against that; and that is in Styles, fol. 107, (Vid. Fol. 307,) the case of Theobalds and Newton. There that case was on the statutes of 18 Eliz. and of 21

Jac. Now it is plain they had no consideration of any thing else: and why? Because in prosecutions on penal statutes, the Court often rely on exceptions: but however the authority goes no farther, but they rely on the exceptions. Now if they had said it was excepted by the statute of Henry 6, and that all the books go on it as excepted by that statute; if they say it is excepted by the statute of Hen. 6, would that be taken as an objection to the statutes of 18 Eliz. and 21 Jac.? No; it is a mistake.

He has also cited Yelverton, fol. 60, Brigg'd and Thompson's case. Now there was an information on the statute of 21 Hen. 8, against a clergyman, for farming lauds; and a Venire was awarded returnable *ubicunque*: but the Venire itself, and the Distringas were made returnable *coram nobis*, &c. which was said to be erroneous. An exception was taken, and *per Cur'* let it stay. But it appears not that it was considered.

These authorities are no authorities. The first is not within either of those statutes we are now upon: and the other was never determined by any thing, as appears in the case. And there is a great difference between the statutes on which they were founded, and our case.

Mr. Mountague has gone a new way. He would have this to be not a misprision of the clerk; because he is afraid that a misprision is amendable: for the clerk had enquired, whether the writ should be Tested the 24th of October; so that he says it is a forgetfulness, or negligence, but not a misprision.

Now I would fain know what he means by that? Whether all forgetfulness of the clerks is not a misprision of the clerk? That is, any negligence, whatever it be, it is the misprision of the clerk. Coke says, it is a misprision of the clerk, under the word negligence: and negligence and misprision are by him frequently put for the same thing. See 8 Co. 159, b. 160, b.

So upon one part of it: that is, suppose the clerk steal it away; he says, that it is under the word misprision; and an involuntary negligence of the clerk is a misprision. So this clerk's negligence is a misprision, because he did not look on the almanack and the roll. These are misprisions by the statute of Henry 6.

As to the cases that have been cited, Mr. Mountague has answered but some of them.

As to that of Percival and Godfrey, Siderin, fol. 43, he says that was not such an amendment, but a suggestion of the roll. But if the roll could amend that which is a stronger amendment, to present a verdict; the rectifying of that makes it stronger for us, than it would be otherwise.

He says, as to Harvey's case, he denies it to be law: but I believe the authority of the judges is to be preferred before his opinion.

And then for the next case, Parker and Carson, he questions that opinion, because not taken notice of by Hughes. Now, I believe, the judges that reported it, did understand it

better than he that abridged it. But whether he understood it or no, it alters not the case.

And then for Tufson's case, he says it is a civil case. But, my lord, it is a criminal case. A Quo Warranto is brought: they must plead Not Guilty to the usurpation. So that these cases are under the same consideration as this is.

Then there is the case of King and Glover: that was, where a coroner was to amend an indictment of murder: but it was not proved that he did murder himself, &c.

Mr. Mountague admits, the jury may amend matters of form: but in that case, when it is brought into court, it is not the same verdict as before.

He cited the case of — and Harvey: but your lordship gave him another reason for that case.

And for the case of Paul Tracey, that point was never determined.

L. C. J. The Venire Facias never mentions the time of, &c.

Att. Gen. Now that is not within the statute of Henry 6. So that we have nothing to do with it.

And as to the case of Dyer, fol. — that does not concern the statutes of Jenfalls. And in Fitzherbert's case, the Court was of opinion, they could not amend, by reason of the exception. Whereby they shew plainly, they thought the statutes would have extended to that case, had it not been particularly excepted.

I do not observe any other matter, but that of the Nisi Prius. If the writ must be made out in the presence of the parties; they say, that immediately when the persons appear, the writ is to be issued. But that is impossible, and contrary to reason and authority.

We think, on these reasons we have troubled you with, we have the law on our side. Only one thing I must beg leave to answer to what Mr. Broderick says as to Percival's case: It was a crying thing, and it might be an extraordinary judgment. Where judgments are given, they are to go according to the course of law: Justice is to be done to all. And as no extraordinary method is to be made use of against a criminal, so none is to be used to save him.

My lord, we think the statute of Henry 6, does allow such an amendment as we desire; and that no statute does restrain it: And therefore, I hope we shall be allowed to amend this error.

There is one matter more. Lord Coke, in his 8th Report, 163, a. says, The statutes of Henry 8, and that of 41 Eliz. do not extend to pleas of the crown; because they are excepted in the act Eliz. and that of Henry 8, does not extend to them.

We agree with the lord Coke in every thing, that the king cannot amend by that of Henry 8, though there is no exception: And the reason is, because it speaks only of suits between party and party. And the other statute of 41 Eliz. is not large enough, extending

only to treason or felony, because they only are excepted.

My lord, we think we have my lord Coke's authority with us, and even the very words of the act of 8 Hen. 6. And though this case has not been so fully considered before; yet we hope it will be considered now; and that we shall be allowed their amendment.

Mr. Broderick. I thought not to have said any thing more: But because I have been named two or three times by Mr. Attorney, I desire —

Att. Gen. The reply is ours.

Mr. Broderick. My lord, I beg leave to explain myself in something that has been misunderstood. I think I did not say what I am charged with. Mr. Attorney tells you I said, that none of the queen's prerogatives extend to criminal prosecutions.

Att. Gen. I say, you said, There is great difference between civil and criminal cases: And that the queen's prerogative is intended only of amendments in civil cases, but not applicable to criminal prosecutions.

L. C. J. Mr. Broderick said, It did extend to amendments in civil cases, but not in criminal.

Mr. Broderick. And I do make a difference between them. For in criminal prosecutions by the crown, an amendment cannot be: But in the case of a Quare Impedit, which is a civil case, there it might.

Att. Gen. The reply is ours; and they ought not to break in upon us.

L. C. J. If you will say any thing as to what has been mistaken, you may. The case of Sherret and Talbot is not to the point: That was an amendment, not in behalf of the crown, but of the subject; and in a civil case. It was in a Quo Warranto; wherein if the subject take a limited disclaimer, and the officer on the roll enter a general disclaimer without limitation, God forbid but that should be amended. But then, even on the king's side, if the original indictment be right, and the plea roll be mistaken; sure the plea roll shall be rectified by the indictment; and the plea is to be made according to that.

The cases of Tufson and Harris are strong cases. In that of Harris there was an actual trial; and yet no issue joined. He was indeed indicted as criminal, and the issue was entered; 'et de hoc ponit se super patriam,' but without any joinder thereupon, and so no complete issue. It is true, in capital cases, they are free to join issue or not: But in other criminal cases it is otherwise; there must be a joinder. And as to the case of Tufson, that was an amendment that went very far. That was an information for recusancy against the husband and wife for recusancy of the wife. The wife comes in, and she alone (whereas it should have been the husband and wife) pleads Not Guilty; and issue joined thereon: And it was amended by the docket: for that was right. It has been held,

that the statute of Hen. 6, did not extend to criminal matters; as lord Coke (in Blackmore's case) is expressly.

Att. Gen. But, my lord, he gives the reason of that exception.

L. C. J. Now the 8th of Henry 6, has this exception: And in Stiles, 304, no mention is made of the statute of Hen. 6, but that was by reason they thought it would not help them. And then the query is, Whether this case be within that exception, and (as in civil cases) may be amended? But this is a case of a different nature; and I will not say any thing now in the point of this case, because of the consequence: Though I suppose it is not excepted by the statutes: And I believe you do not desire our present opinion.

Att. Gen. Yes, my lord, I desire the opinion of the Court in this case, and I think it is of great consequence to us to have it now.

L. C. J. If you insist on it, I must see if I can form an opinion; but I would willingly defer it,

Att. Gen. My lord, I lay it before you with submission.

Justice Powel. It is a new thing; and taken up against the current opinion. Perhaps they might take it on lord Coke's opinion; and did not examine it, as they should have done.

Att. Gen. My lord Coke does not say so himself.

Justice Powel. No: But because he says it is excepted, they gave credit to his words, and did not examine into the business: And I believe that was the foundation of this opinion. But if you think it is amendable in the same term, because the Court may amend their own judgments the same term; you must speak to that point.

I do not know that they can amend their own judgment in this term: Though indeed, if it be amendable at all, it is amendable this term. Besides, I should make no difficulty but that it is a misprision of the clerk; and it was his negligence not to do it by the warrant. And if this were in a civil process, I believe it might be amended in any other term: But this being in a criminal matter; and the current opinion being that none of the statutes did extend to criminal matters, it ought to be well considered; for the current opinion is a great thing.

Att. Gen. There is no doubt of it, it ought to be considered; but it is fit for me to desire your opinion.

Just. Powis. I believe these statutes were never so scanned before; and I believe this matter has been more searched into now, than ever it has been before. But it has been the general opinion, that none of the statutes of Jeofails did extend to criminal cases: That may arise, because all the statutes take in so large a compass. All indictments and informations, and no doubt the latter statutes, do not extend to such cases. And the opinion might arise from that

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But now this statute of the 8th of Hen. 6, has exception of felonies and treasons, and none else; and you cannot extend the exception further. It is a case of difficulty, but it arises from the common opinion; otherwise we might give our opinion now without difficulty: For the words are as clear as may be; and it is against reason, to except things that that statute did not except. But being a thing that is not so particularly confined to this term (for the statute mentions nothing of terms) if it be amendable, it may be amended in another term.

But indeed, for matter of judgment, because the judgment must be in the same term, in the case of the amendment, we may as well do it in this term: And we may take some time to consider of it, and tell you what our opinion is.

Just. Gould. I shall not now say any thing in this case, but reserve myself entirely till the Court give their opinion.

But as to that case you were citing; Perry's case: (The case was Perry and Munday; for I was of counsel in the case.) There was an information against Perry and Munday for forging a bond: They laid their forgery at Sherborn. The publication was at Dorchester; and the Venire was Dorchester. The verdict was for the king. They brought an arrest of judgment afterwards; and the question was debated, on the statute of 16 and 17 of king Charles 2. Whether this were not within the statute? Now they are agreed, that that information, because at common law, was without the purview of the statute.

L. C. J. That was an information upon a penal law. They questioned whether it was within the purview of the statute; and they thought it was not helped by any statute. That shews the opinion of the lawyers: They thought it not within any of the statutes of Jeofails: and the verdict was set aside.

Mr. Broderick. Yes, my lord; and the Court awarded a new Venire Facias.

L. C. J. There is a great regard to be had to practice. There were great men at the bar at that time; and they did not think at that time that it was within the statute.

As to what you say of copyholds, it has indeed been held, that the statute did not extend to an assignee of copyhold lands, or to a covenant on the alienation of the copyhold by lease.

Att. Gen. It was here argued that —

L. C. J. It was my opinion, that all statutes extend to copyholds, if it be for the benefit of the copyholder, and not one jot to the prejudice of the owner: And therefore the resolution of Jobbin's case was that we went on. You must stay till the last day of the term.

Att. Gen. My lord, I think we have shewn that it is amendable by the statutes; and if not so, by the common law. And we have all points with us.

Sir T. Powis. My lord, I doubt it will be insisted on, that in another term it cannot be amended.

4 G

L. C. J. Move us the last day of the term. It is certainly the misprision of the clerk.

Nov. 28. i. e. The last day of Michaelmas term.

Sir T. Powis. My lord, we come in the case of the queen and Mr. Tutchin, if your lordship be ready to give your opinion.

Att. Gen. Call Mr. Tutchin. [Who appeared.]

L. C. J. I must desire you to stay in this matter till the first day of the next term.

Att. Gen. My lord, we did expect your lordship would have given your opinion now.

L. C. J. For my part, I should rather desire time till the next term: But if you are not willing to stay till then, you must take such an opinion as we can give.

Att. Gen. I submit to what your lordship shall determine.

L. C. J. It may be, I may be then of the same opinion I am now; but then I may defend my opinion better. I would only put it off to the first day of the next term.

Att. Gen. My lord, I have laid the matter before you; and I acquiesce in what you shall think fit.

Sir T. Powis. Upon the observation of Blackmore's case, where lord Coke says, the Court cannot amend misprisions of clerks in process in another term; if we have not judgment this term, we shall lose that advantage.

Att. Gen. There are two points in this case: One is, that it is amendable by common law; the other, that it is not excepted by the statute of Henry 6—Now my lord Coke says, error in process is amendable in another term. But we submit to the Court; I press nothing.

Just. Powel. Coke say so! But I believe no man will say, that ever a mistaken writ was amended in another term. Therefore he must intend the subsequent proceedings, or process: It may be the proceedings of the original entry on their award, that may be amended in another term; and Coke must mean that. There have been entries of awards amended in another term; but the mistake of a writ was never amended in another term that I can find.

L. C. J. If we put it off to the next term, and our opinion should be against the amendment, he can be tried in that term.

Att. Gen. My lord, I submit it to you.

Just. Powel. We cannot now give so full reasons; yet I have entered my opinion in the case.

Just. Gould. I was sometime of opinion, that it was amendable by the statute; but really looking on the cases that have been cited, that is, the cases that are in pleas of the crown, it is not amendable by the statute of Henry 6. I say, I formerly thought it might be amended by virtue of the statute: But upon perusal of Blackmore's case, &c. it seems to alter my judgment. But notwithstanding, I hold, that at common law it may be amended. For what means all the cases that are now extant; the cases of informations, as the case of sir Humphry Bond, &c.?

The case cited by Yelverton, in 2 Bulstrode 35, is very strong. There were two indicted for felony, and found guilty. The judge saw that it was in the singular number, and stayed judgment: And they moved afterwards in another term; and there, by the judgment of nine or ten judges, it was amended; and the men were both hanged.

Why now, it must be by the statute law, or by the common law, that it was amended in that case. By the common law, I say, it is amendable.

There is a case in Raymond's reports, 440. It is an indictment on a certificate of a justice of peace, that Inglesfield, being a reputed Papist, had refused to take the oath of supremacy, &c. Upon Not Guilty pleaded, the jury found the commission in *hec verba*, &c.

It was objected, that the certificate was not found under seal of the justices, but only in *hec verba*: And they did amend it.

This is the same case. And I take it, that such a fault, as does not alter the issue, nor the trial, or crime, is a thing that is amendable.

Now there is sir John Curson's case, in 2 Cro. It is a strong case. There is an information against him and his wife for recusancy. The wife only pleaded not guilty. The question was, whether this were right? And whether they should amend it? And it was resolved, that it should be amended.

The case in Siderfin, that is (1 Siderfin, 243) the case of Percival and Godfrey, I do not doubt, for my part, but it is amendable; and take it as strong as this is. They were indicted for a riot: a *Venire Facias* issued *Viccomitibus Canturburiæ*; and it was returned by one sheriff. They examined into the truth of the case, and they found there was but one sheriff: and the question was, whether this was amendable? And it was resolved it should be amended; and also that it was amendable at common law.

I must confess, I do not see that there is any reason in the world against it. There is but only one case that seems to be against it; that is the case of Theobald and Newton, Styles 307. There indeed, by Roll's opinion, it was not amendable, &c. But that is only a single opinion.

And as to the case between the king, and Read and Dawson (it should have been two cases) there it was held, that the statute of Jeofails does not extend to informations of intrusions; and yet it was ruled, that it should be amended.

Indeed, my lord Hale, in Keble, 191, 215. [He means Twisden; vid. Keble, 191, 198, 215,] did hold, that it was amendable within the statute; and that the amendment would stand in need of it: but it was ruled *contra*; and that it needed not the help of the statute of Jeofails. And I must needs say, if the case of Bradley and Banks, in 2 Cro. 283, and in Yelverton, 204, were not in the way, I think the writ had been good enough; for it is a conti-

nance from day to day, though the Teste is the 24th, and the award the 23rd.

Now, in my mind, an award the 23rd, of a writ, the 24th, is a perfect continuance. And the case of Bradley, &c. as it is in 2 Croke, 283, does not contradict this; though indeed that case of Bradley, as it is in Yelverton, is contrary; but that seems mistaken. So that I do think, on the whole matter, it is amendable at common law.

Note, Powis accorded with Gould, that it was amendable; but Powel argued *contra*, that it was not.

L. C. J. Holt. I should have been glad to have had time till next term, to consider of this matter: for though I am satisfied in my opinion, yet perhaps I may not give others that satisfaction concerning it, as I might have done if I had had a longer time.

I am of opinion, that this is not amendable neither by the common law, nor by the statutes.

First, It must be admitted, that this is a fault in the writ, in a point that is material: that is, the Teste, which should have been Die Lunae, the 23rd of October, and it is the 24th: for the 23rd is the day that the defendant has in court on the return: and that being the day he has in court, the Teste of the writ to continue the process should have been that very day.

Now I do not understand what my brother Powis says, That there is no interval between one day and another. I would fain know, if a day be appointed for a man to appear on; and then he has another day given him, when he appears not: as, if a man appears the 23rd of October, and there is a day given, the 24th; will not this be a discontinuance? No question but it is: because he being in court the 23rd, and having no direction the 23rd when to come again, he is out of court. Then shall you give another day behind his back? That cannot be in reason. His day in court is the 23rd of October; and that day he should have another day appointed. He has a day in the roll, but not in the writ: that is issued behind his back, the 24th; at which time he is not in court. Then if this be so, here is a writ issued behind the defendant's back, and without any award of the court: for the award is, 'Die Lunae prox. post. tres Septimanas Sancti Michaelis,' which is the 23rd of October; then there is a 'præceptum est' that day. Now when this writ issues the 24th; is this writ warranted by the roll? No, it is not; but another sort of writ, different from that which the court awarded: therefore being another writ than what was awarded; where is there any authority for it? Or how can the jury be distressed upon it?

The writ that issued the 24th, is another writ: for there is a material varying between the writ that issues, and the award of the roll; one is the 23rd, the other is the 24th.

The day of the writ is material: and when it bears Teste, it is in the judgment of the law a

writ of that very day; as it was adjudged in the case of Owen v. Baillie, 17 Ch. 2, in a trover and conversion.

A defendant, that is condemned in debt and damages, sells his goods *bona fide*, between the last day of Trinity term and the first of August. After he had sold his goods, the plaintiff takes out a Fieri Facias, Tested the first day of Trinity term; which was before the sale, though taken out after; setting forth that the 4th or 5th of July, he had seized these goods in the hand of the vendee; though the writ was not taken out actually in Trinity term, yet bearing date then, and the first of August the goods were sold; yet the writ being Tested the first day of Trinity term, it was held not amendable; and that the hands of the vendee were bound by it.

Now this writ here is, in the judgment of the law, issuing out of this court the 24th of October. If we should amend this, what alteration should we make? We must make it another writ: for a writ that issues out of this court the 24th, cannot be a writ that issues out the 23rd; and if we amend it, we make it as different as possibly can be.

Now why should we amend it? As we now take it, by the statute of Henry 6, the writ is good in itself; but it is not, as the Court awarded it. The meaning of the statute was not to amend mistaken writs, but mistakes in writs: the statutes meant nothing but that. Not that you should amend a writ that was good in itself, and fit it to your particular purpose.

Now here is a writ executed in the same term: yet to make this trial to be good, what must you do by this amendment? You must make it to be another writ: for you must make the writ, even contrary to truth, to be the 23rd, which was the 24th: and therefore it cannot be made good; nor can the trial be made good. You would make it the 23rd, where it is indeed the 24th; and so you would change the nature and substance of the writ. Is not this a material variance, and different from the award of the Court?

Before the statute of Jeofails, if it had been in a civil case, it is helped by the statute of the 8th of Henry 6; because a discontinuance of process it is helped by that statute; but that statute extends not to this case. I would fain know, whether there has been any amendment, in any case of this nature, since the statute of Henry the 6th? It is true, Testes of writs have been often amended; but that was, where it was a void Teste; as on a Sunday, or out of term; or where it is impossible, as after the return, &c. That is a void Teste, if it bear date on a Sunday, or in the vacation.

In civil cases it is amendable; because it is the fault of the clerk by mistaking a day; as in making it on a Sunday, or in a vacation-time: there may be reason for it; and it may be amended by the statute of Henry 6, because plainly a mistake of the clerk. And on this reason is that case in Yelverton, 64, and the case of Bradley and Banks, 204. There was

a Venire returnable one day; and the Teste of the Distringas was of the same date, and the same day with the Teste of the Venire; and that was held amendable, because it is impossible you shall distrain before the return of the Venire; and the Distringas bore Teste the same day with the Venire: so that the Teste was repugnant to the writ itself; and therefore the writ is naught in itself, because it was to distrain a jury that was not summoned. But the law has always been, that if upon the return of one writ, there is to be another writ awarded; that other writ must be Tested on the very day upon which it was awarded, and the return of the former.

And that case of Bradley and Banks, in 2 Cro. and Yelv. is very strong to this purpose. There the person came in on the exigent, and prayed Oyer of the writ and all meane process: and therein appeared a gap, the first process being returnable Decimo sexto Octobris, and the appeal being returnable Quindena Sancti Michaelis, that is, the 16th of October, were well. But the Alias Capias goes out Tested the 23rd of October, which being seven days after the return of the former, that was wrong; for it should have borne Teste the 16th of October, then it had been right; but being the 23rd, there was a gap; and therefore it was held a discontinuance.

And this is the practice of the Common Pleas, though not so much observed here in this court, in writs of enquiry of damages: but enquire of them in the Common Pleas, and they will tell you, the subsequent process ought always to bear Teste the day of the return of the former writ. If you go to a Capias, either in outlawry, or to distrain a man; the second Distringas is always Tested the day of the return of the first; and the third is always Tested the day of the return of the second: and if it bear Teste the next day, all process is discontinued.

Ay, but you say, it is a mistake of the clerk. It is so: but we are to judge of the thing itself, whether it is by way of negligence, or for want of skill. For aught I know, it may be for want of skill, that it is Tested another day: but every clerk does not know this. Nay, some have pretended to know that it need not bear date the day of the precedent writ's return. Why then might it not be an error in skill? If he thinks it a right writ, and says it must be Tested the 24th, this is want of skill; and then it is not amendable. And then this being a wrong writ, the Teste is material; and its being Tested the 24th, is a mistake so material, that if it had been a civil case, I should have been against the amendment; and therefore much more in this case, I think, it ought to be quashed, and a new Venire awarded.*

* As to the doctrine of amendments, see in this Collection, Barnardiston's Case, vol. 9, p. 1366. and Wilkes's Case, A. D. 1764. Leach's Hawk. Pl. Cr. book 2, c. 23, s. 129. c. 25, s. 97, and the authorities there cited.

Att. Gen. If the Court decide it, I cannot tell what to say.

Just. Powis. What have you to say?

Att. Gen. The Court is divided, and there it hangs.

L. C. J. I would not be understood otherwise than thus: I do not say, this case is within the statute; but I look on it to be so material a variance, that it is not amendable.

Att. Gen. The Court being divided in their opinion, I know not any rule to stop judgment.

Just. Powis. I know not how far it may go in criminal cases. That which swayed with me, was, to see so many bold amendments in many cases; that went with me very far; and which were said to be done by common law.

What I said as to coming the next day, I did not rely on it: though it did seem to alleviate the thing. But I was so tender in the case, that I did think it might be better to have a new trial. I have held in my opinion, with my lord chief justice Holt and Mr. Justice Powel a great deal. I was tender before in the point: and I do join with my lord chief justice Holt and Mr. Justice Powel, that there ought to be a new trial, and a new Distringas.

Att. Gen. With a rule, I submit; but without a rule, I would have signed judgment.

Mr. Mountague. My lord, we move to set aside this trial, because it is irregular.

Att. Gen. If you make a rule, we need not dispute it.

Just. Powel. Judgment goes of course, unless you stop it.

Att. Gen. There is no rule to stop it: and then I can sign my judgment.

Mr. Mountague. My lord, though the Court can make no rule for an amendment, because the judges are divided about that point; yet I humbly conceive, your lordship, and the rest of the judges do agree, that the writ, as it now is, is naught; and therefore I hope you will let us have a rule to stay judgment.

L. C. J. Mr. Attorney, they have been moving to have a new trial.

Att. Gen. It would be a breach of duty in me, not to sign my judgment, if you do not make a rule while it is under consideration.

L. C. J. Here was leave given to move in arrest of judgment; and there is no rule for signing judgment.

Att. Gen. There is no rule to stop it.

Mr. Mountague. What is the rule that was made upon my first motion?

Clerk reads. 'Die Martis proximo, &c.'

Mr. Mountague. We take it, that though the Court be divided about the amendment; yet since there can be no amendment, the writ being naught, we ought to go to a new trial.

Just. Powel. By all means, go to a new trial.

Just. Powis. It is in a case that was never so much looked into before.

Att. Gen. If we must have a new trial in this case, we are in a worse case than I thought

we were; for we are to begin process again. But if a rule be made, we must submit.

Mr. Mountague. There was a rule made at the side bar, upon my motion there, that all things should stay.

Att. Gen. That was not a place to move for a rule.

L. C. J. That is to stay *in statu quo* they were then. There is no rule for judgment to stay.

Att. Gen. If on motion to arrest judgment, the judges of the Court are divided, I have heard it said, that judgment may be entered.

Just. Powis. I said at the beginning, I was inclinable to have a new trial.

L. C. J. I know not what you mean. You said, you were inclinable to have it amended: I would have it amended, if I had followed my fancy.

Just. Powel. If my brother has changed his opinion, he may: for we have been arguing, that we may change our judgments.

L. C. J. You have any time to-day to move it again. Put us in mind of it: I may change my mind too, it may be.

Just. Powis. I judge not how it may go in criminal matters: but all are of opinion, that it should not stand as it does.

L. C. J. The Court is divided that it should be amended; but not that it is well as it is: and that is Mr. Attorney's motion, to alter what is to be amended.

Just. Powel. Mr. Attorney makes no motion for a rule; but would have it stay as it does.

L. C. J. That it may remain *in statu quo*.

Att. Gen. If you cannot agree in your judgment, I submit it to you, whether I may not enter judgment for the queen, though it be not amended.

Mr. Mountague. We hope Mr. Attorney shall not be permitted to sign judgment in this case: for though it is true, that there can be no amendment, because the Court is divided; yet I do not apprehend that it is right as it is.

Att. Gen. If the Court be divided, no rule can be made.

Just. Powis. Let there be a new trial.

Mr. Mountague. Mr. Attorney, the Court would have a new trial: and I think you had better do so.

Att. Gen. I want none of your directions.

Mr. Mountague. I may take notice of what the judges say.

L. C. J. And he will make use of what we say, as far as is convenient for him.

Att. Gen. But Mr. Mountague must not pretend to give directions what I am to do.

Mr. Mountague. I do not give you directions; but I hope I may take notice of what the Court says.

L. C. J. Mr. Attorney, we believe you do not want their advice.

Att. Gen. But they are very ready to give it.

Mr. Mountague. I only took notice to Mr. Attorney, how far the Court was agreed: and only moved that the rule, which I did conceive was pronounced by the Court, might be taken.

Att. Gen. You moved to no purpose.

Mr. Mountague. I take it, that Mr. Justice Powis is for a new trial.

Just. Powis. Yes, I am so. It is a nice case, and has never been considered fully before.

Mr. Mountague. I hope now we have done.

Att. Gen. If I hear what rule the Court makes, I shall submit.

Mr. Mountague. I hear the pleasure of the Court is, that the rule shall be for a new trial.

L. C. J. You must have a new Venire Facias.

Att. Gen. That cannot be, with submission: a new Venire we cannot have.

L. C. J. You must have a new trial. The jury have given their verdict; whereas they appeared to a wrong writ, and so the former trial is not warranted.

Att. Gen. I think they are warranted to appear by the return of the Venire; and that we must go back but where the fault is, which is only but where the Distringas is made out: so that a Distringas *de novo* is to be for the same jury. But I will meddle no more in it, without particular order.

L. C. J. Do what you will; we will give you no direction. We quash this trial.

Sir T. Powis. My lord, if you quash this trial, then we are to begin again.

Att. Gen. If the Court is of opinion that there ought only to be a new Distringas issued, and we can go back no further, I am afraid we shall never come right.

Just. Powel. The difficulty is in right awarding the Distringas, because it does not bear date with the return of the Venire. But then consider where you are: if you bring him on a new trial, he can challenge any one that has given a verdict before.

L. C. J. It is a Distringas to summon that jury, but it is without Teste: and that jury having given their verdict, they are not to serve again.

Att. Gen. I am sure, according to authorities, they must begin where the fault was.

L. C. J. I should have thought the Venire *de novo* had been proper: for this Distringas bearing Teste out of time, and that being erroneously executed, there ought to be a new Distringas, which is to be founded on a new Venire.

Att. Gen. If you do quash this trial, I suppose your lordship will make some award for a new one.

L. C. J. We leave it to you.

Att. Gen. I cannot enter it.

Just. Powel. We must grant a Venire *de novo*; which we cannot do without quashing this verdict; and that is the way to try him again.

Att. Gen. My lord, I am far from thinking I can alter your rule; but I cannot tell how to follow it.

L. C. J. What we do is *ex abundanti*, more than we are bound to. We can leave you to do what you can: the taking out the Venire and Distringas are things of course.

Att. Gen. I think there is a necessity to explain my meaning. I do not pretend to direct what you must do; but you must direct what is to be done: I cannot award a Venire.

L. C. J. It is taken out of course. You may award that as well as the first, if it may be done.

Att. Gen. How can that be done, seeing you quash the Distringas?

Just. Powell. That is the award of the Court, and does not hinder you from taking out a new Venire.

Att. Gen. I cannot do it without the Court. When you quash this, you must award another.

L. C. J. We do award it.

Att. Gen. I remember in the case of Fitzwalter, when they quashed the trial, they ordered a new one should be had, &c.

L. C. J. If we make an award, and you do not like it, you will not comply with it: therefore we leave you to take it out as you will.

Att. Gen. You must order a new Venire; I cannot award a new one else.

L. C. J. You must have a Venire Facias.

Att. Gen. That must be the judgment of the Court then. For if I award it, it must be by order of Court.

Just. Gould. You had better declare *de novo*.

Att. Gen. I am fearful of what I do. I hope the Court will discharge me.

L. C. J. When a trial is quashed and set aside for any irregularity of the trial, that jury is discharged: all the pannel is discharged, and there must be a new pannel.

Att. Gen. How will that appear?

L. C. J. If it appear that the Distringas did not issue as it ought, every thing shall be entered at large on the rule: that the Distringas did not issue till the 24th of October; therefore they will consider, that the verdict shall be set aside.

Att. Gen. And that we shall have leave to go to a new trial.

L. C. J. *Presumptum est.*

Att. Gen. If you please to make the rule then, I submit.

L. C. J. We will advise how to make the rule.

It was never afterwards thought proper to try him again.

In "The Western Martyrology, or, The Bloody Assizes," are reported "the Case, Trial and Sentence of Mr. John Tutchin, a young gentleman of Hampshire," as follows:—

THE CASE, TRIAL, and SENTENCE, of MR. JOHN TUTCHIN, and several others, in Dorchester, in the county of Dorset.

"We must put Mr. John Tutchin, a young gentleman of Hampshire, in the front of the persons sentenced to be whipped, for perhaps no history can parallel the sentence given against him.

"This young gentleman had the misfortune,

with many others of his acquaintance, to be in the interest of the duke of Monmouth, but had a better fortune than many of them, by concealing his name: For when he was taken a prisoner by the country guard, he was committed to prison under the borrowed name of Thomas Pitta, and his real name was not discovered till after he was acquitted of the rebellion, no person appearing as evidence against him.

"But Jeffreys having discovered his true name before Mr. Tutchin was gone from the prison, was resolved upon revenge, and said, he was never so far outwitted, by an old or young rogue in his life; and after he had examined Mr. Tutchin to many particulars, by which Mr. Tutchin knew that Jeffreys had a true account of him; for he told him the time when he was in Holland, the very place where he lodged there, the manner of his coming over, and the name he went by at that time; and finding Mr. Tutchin would not answer to some questions he asked him, concerning some gentlemen in Hampshire, who were concerned with Mr. Tutchin in raising some men at Lymington, for the service of the duke of Monmouth, I say, after this, he was resolved to try Mr. Tutchin again.

"But Mr. Tutchin still pretended ignorance in these matters to his prison-keeper, who was set upon Mr. Tutchin by Jeffreys, to bring him to a confession; but the gaol-keeper, whose name was Knapton, though he seemed an enemy to the duke's men, coloured many things that might have taken away the lives of several, and did what he could to allay the heat of the implacable judge.

"Having given no ill character of this gaoler, Mr. Knapton, it may be a pardonable digression, to tell the reader something of another, which I had from the mouth of Mr. Tutchin: When Richardson, the keeper of Newgate, brought down the Hewlings, and some other gentlemen, to Dorchester against the assizes, the said Richardson drinking with another gaoler, said, Come brother, here is to our good health; this is our time to make our fortunes, and now we must lay aside all humanity, for no compassion is to be shewn to these dogs.

"But to return to Mr. Tutchin, he was brought up again to the hall; but Jeffreys not caring to indict him for rebellion, pretended that the crime of changing his name deserved a severe sentence; and thereupon passed sentence as follows: That he should remain in prison during the space of seven years; that once every year he should be whipt through all the market towns in Dorsetshire; that he should pay a fine of one hundred marks to the king, and find security for his good behaviour during life. This, you will say, was a whipping-sentence indeed.

"It was observable, when this sentence was past upon Mr. Tutchin, that the ladies in the court, of which there were a great many, all burst out a crying; but Jeffreys turning to—

wards them, said, Ladies, if you did but know what a villain this is, as well as I do, you would say, this sentence is not half bad enough for him.

“ Upon passing the sentence, the Clerk of the Arraigns stood up, and said, My lord, there are a great many market towns in this county, the sentence reaches to a whipping about once a fortnight, and he is a very young man. Aye, says Jeffreys, he is a young man, but he is an old rogue; and all the interest in England shall not reverse the sentence I have past upon him.

“ But certainly no devil incarnate could rage, nor no Billingsgate woman could scold worse than this judge did at this young gentleman whilst he was at the bar; he called him a thousand rogues and villains, told him that he was a rebel from Adam, that never any of his family had the least loyalty; and, said he, I understand you are a wit and poet, pray, Sir, let you and I cap verses. Mr. Tutchin smiled in his face, and told him, he knew upon what ground he stood, and when he was over-matched.

“ Lying under this barbarous sentence, Mr. Tutchin's friends endeavoured to persuade him to sue for a pardon; but he utterly refused it, and drew up a Petition with his own hand, which was presented to the king at Winchester, and was as follows:

“ To the KING'S MAJESTY.

“ The humble PETITION of JOHN TUTCHIN of Lymington in the County of Southampton, gent. now a Prisoner in the County Gaol of Dorset.

“ Sheweth, That your Petitioner now lies in this prison under sentence of the Lord Chief Justice Jeffreys, to remain in the said prison during the space of seven years, that once every year he shall be whipt through all the market towns in Dorsetshire, that he shall pay a fine of one hundred marks to the king, and find security for his good behaviour during life.

“ That this sentence was past upon your petitioner under pretence of his having changed his name, and no matter of treason or rebellion being proved upon him.

“ That your petitioner has always demeaned himself according to his duty required by law, and that he is ready to venture his life in defence of a lawful king, that shall govern according to law, in preservation of the liberties of Englishmen.

“ That he humbly conceives, the sentence passed upon him by the said Jeffreys is worse than death; and therefore humbly prays your majesty will be mercifully pleased to grant him the favour of being hanged with those of his fellow-prisoners, that are condemned to die; and till then your Petitioner shall ever pray, &c.

JOHN TUTCHIN.”

“ And underneath his name were written these words: ‘ Malim mori quam vapulari.’

“ You may see by this Petition, that Mr.

Tutchin was a young man when he wrote it; for many exceptions were made against it: To the king's majesty, instead of the king's most excellent majesty; and you may be sure, the Western hangman did not overlook his calling of him plain Jeffreys in the body of the petition.

“ But the court esteemed it a barbarous sentence; and it is said, the king esteemed it no less. But all the answer could be got, was from the lord Sunderland, that Mr. Tutchin must wait with patience.

“ Mr. Tutchin hereupon endeavoured to get a pardon from the people who had grants of lives, many of them 500, some 1000, more or less, according as they had interest in the king; but Jeffreys would not so much as hear his name mentioned, and the sentence was ordered to be executed.

“ Four or five days before the execution of the sentence, a brother in law of Mr. Tutchin, a physician, persuaded him to take a dose of physic to make himself sick, by which means the execution might be put off, and perhaps in that time some means might be found for his enlargement: He took the dose, and in three or four days the small-pox came out very thick upon him, no man ever had them to a higher degree; and in that condition he lay by himself in prison, nobody to look after him but his fellow-prisoners, for there being a pestilential distemper in the prison, of which some scores died every week, the magistrates of the town would not suffer any communication with the prisoners.

“ Mr. Tutchin lying in this miserable condition, and his life being despaired of, his friends worked the easier with Jeffreys to get the sentence reversed, which some people would have believed a sign of repentance in Jeffreys, had he not taken the money himself. After Mrs. Tutchin had done this last kind office for her son, she sickened of the small pox and died, his brother and two sisters fell sick of the same distemper; so that when Mr. Tutchin had friends allowed to come to him, like Job's comforters, they brought him the tidings that his mother was dead, and all the relations he had in the world were a dying, and that they had contracted for a pardon for more money than he was worth, for a life which he never valued. So he was popt into a parlon amongst others; for it was usual at that time for one courtier to get a pardon of the king for half a score, and then by the assistance of Jeffreys to augment the sum to fourscore or an hundred, and so this unfortunate gentleman fortunately got out of his broil.

“ But we must not leave Mr. Tutchin here, though what afterwards we shall say of him, does not relate to what was transacted in the West, yet it may not be amiss to show how the providence of God does often change the face of things, and alter the circumstances and conditions of men, so that those who boast of their power, and exercise their authority with the greatest severity, many times become the scorn and contempt of those they have triumphed

over: Who could have thought, when Jeffreys past that sentence on Mr. Tutchin in the West, that ever Mr. Tutchin should see that wicked judge a prisoner, apprehended by the injured people, and committed by a tool of his own party? Yet it so happened.

"For Jeffreys endeavouring to make his escape beyond sea in a sailor's habit, was discovered by one, to whom he had done some acts of injustice, and was taken in Anchor-and-Hope-alley in Wapping, and by the mob carried before the instrument of Popery, sir J—C—, then lord mayor of the city of London, and by him committed to the Tower.

"Mr. Tutchin hearing of this, went to give his lordship a visit; who did not know Mr. Tutchin at first, he being much altered with the small pox; but Jeffreys, understanding who he was, told him, he was glad to see him; Mr. Tutchin answered, he was glad to see him in that place. Jeffreys returned, that time and place happened to all men, and that when a man was born, he knew not what death he should die, nor what his circumstances should be in this life, and abundance of such cant; but added, that he had served his master very faithfully, according to his conscience. Mr. Tutobin asked him, where his conscience was when he past that sentence on him in the West? Jeffreys said, you are a young man, and an

enemy to the government, and might live to do abundance of mischief; and it was part of my instructions, to spare no man of courage, parts, or estate; but withal added, that his instructions were much more severe than the execution of them, and that at his return he was snubbed at court for being too merciful. So after he had treated Mr. Tutchin with a glass of wine, Mr. Tutchin went away.

"Soon after this, Jeffreys had a barrel of oysters sent him to the Tower, which he caused to be opened, saying, he thanked God he had some friends left. But when the oysters were tumbled out on the table, a halter came out with them, which made him change his countenance, and so palled his stomach, that he could eat none of them. This was confidently reported to be done by Mr. Tutchin; but I having heard him protest that he was not in the least concerned therein, we must believe it to be done by another hand."

As the author of the *Observer* he had the honour to be noticed by Swift, who treats him, it must be admitted, with sufficient severity. His offensive writings were however ultimately resented with more destructive weapons than those which issue from the press: he was assaulted in the night and cruelly beaten, in consequence of which he lost his life.

438. The Trial of Captain THOMAS GREEN,* and his Crew, at the High Court of Admiralty of Scotland, for Piracy: 4 ANNE, A. D. 1705. [From the Trial published by Authority, 1705.]

March 14.

THE Lords of her majesty's Privy Council having taken pre-cognition of the grounds of the information against Thomas Green, and others of his crew, they thought fit, and order-

* See in this Volume, p. 1067, Quelch's Trial for Piracy, and the other cases there mentioned.

The following account of Green's Case and of its origin, is extracted from the History of Edinburgh by Arnot, a very prejudiced and intemperate writer:

"A company for trading to Africa and the Indies, was established, and favoured with considerable privileges, by an act of parliament in the year 1695. The Scottish nation universally flattered themselves with the most eager and unbounded prospects of extended trade and empire from the establishment of this company. But their sanguine expectations tended only to make them feel the more bitterly their cruel disappointment and mortification; a disappointment that not only ruined many families, but excited a dangerous ferment in the nation, which well nigh terminated in open rebellion.

ed, That the said captain Thomas, &c. should be put to a Trial upon the crimes informed, before the Judge of the High Court of Admiralty. As also, the Lords of the Privy Council thought fit at the same time to appoint assistants to the Procurator Fiscal of the High Court

England was jealous that this company would rival its trade. William, like a severe and partial father, used every means to crush it both at home and abroad; and the English, Dutch, and Spaniards, from inclination, as well as direction, were alert ministers of his vengeance.

"The company being established, 400,000 L. sterling were subscribed by Scotsmen residing in Scotland. Six ships of considerable force and burthen, laden with various commodities, sailed from the Frith of Forth. The news of their settlement on the Isthmus of Darien arrived at Edinburgh on the 25th March, 1699, and was celebrated with the most extravagant rejoicings. Thanks were publicly offered up to God in all the churches of the city. At a public graduation of students, at which the magistrates, in their formalities, attended, the professor of philosophy pronounced a harangue in favour of their settlement, the legality of which, against all other pretenders, was

of Admiralty, for the better ordering and carrying on of the said Trial, according to the tenor of their Act following :

maintained in their printed theses; and it seems even to have been a common subject of declamation from the pulpit.

“The company felt severely the influence of its powerful opponents. The petitions and complaints of the company and the parliament, and the murmurs of the people, were equally disregarded. Upon news being received of the defeat of the Spaniards who attacked our settlement, a mob rose, obliged the inhabitants to illuminate their windows, committed outrages upon the houses of those who did not humour them by compliance, secured the avenues of the city, and proceeded to the tolbooth, the doors of which they burnt, and set at liberty two printers, who had been confined for printing pamphlets reflecting on the government. But, when it was understood that they were driven from their settlement, their capital lost, and their hopes utterly extinguished; they were seized with a transport of fury. Violent addresses were presented to the king; and the mob were so outrageous, that the commissioner, and officers of state, found it prudent to retire for a few days, lest they should have fallen sacrifices to popular fury.

“The discontent which the Scots felt at the loss of their settlement in Darien, which they imputed, in a good measure, to the ill offices of the English, produced an event, which, although not important in itself, inflamed their national animosity. A ship belonging to the African company was seized in the Thames. They solicited restitution in vain from the English ministry; but, upon making application at home, they obtained authority from the government to seize by way of reprisal, a vessel (captain Green commander,) belonging to the English East India company, which put into the Forth. The unguarded speeches of the crew, in their cups, or their quarrels, made them be suspected, accused, and, after a full, and legal trial, convicted of piracy, aggravated by murder, and that committed upon the master and crew of a Scots vessel in the East Indies. Still, however, the evidence upon which they were condemned, was by many thought slight, and intercessions for royal mercy were used in their behalf. But the populace were enraged that the blood of a Scotsman should be spilt unrevenged. On the day of the execution, a vast mob surrounded the prison, and the Parliament-square, where the privy council, assisted by the magistrates of Edinburgh, then sat deliberating whether the sentence should be executed. The furious intentions of the populace were well known; and the magistrates assured them, that three of the convicts were ordered for execution.

“The Lord Chancellor passing from the Privy Council in his coach, some one called aloud, “That the magistrates had but cheated them;” and relieved the criminals.” Their

VOL. XIV.

At Edinburgh, the 13th day of February, 1705 years. Committee anent captain Green and his crew, sederunt Lord Chancellor, mar-

fury instantly kindled into action. The Chancellor's coach was stopped at the Tron-church, the glasses were broken, and himself dragged out of it. Happily some friends of his lordship rescued him. But it became absolutely necessary to appease the enraged multitude by the blood of the criminals.”

Arnot, in his Collection of Criminal Trials in Scotland, gives an abridgment of this Trial, to which he subjoins :

“As the factions into which Scotland was then divided about the depending treaty of Union, did each of them take up this cause as a matter of party, the faction which favoured the Union maintained the prisoners' innocence, and on this ground solicited a pardon for them. The party, again, that opposed the Union, which was much more numerous, and more violent, held the evidence of the prisoners' guilt as equal to demonstration, and resented the attempt to obtain a pardon for the prisoners with the highest indignation. Three of the convicts, captain Green, Madder his first mate, and Simpson the gunner, suffered on the day appointed. The rest were reprieved from time to time, and finally pardoned. Green and Madder, some days before their execution, published a paper which they called their last speech. In this they maintained their innocence, a circumstance which makes no impression upon me, when I consider, that not only the queen could pardon, but the Scottish Privy Council could reprieve them, and that they entertained hopes of pardon till the last hour of their lives.—On the other hand, three of the convicts, Linstead, Haines, and Bruckly, emitted, after sentence of death had passed upon them, judicial confessions and declarations, acknowledging that captain Green and his crew were guilty of the piracy and murder libelled. And I must acknowledge, that I look upon this confession as entitled almost to as little credit as captain Green's denial of guilt: for, as the latter built his hopes of pardon from the English faction, upon the declaration of his innocence, so the former might ground their expectations of mercy from the Scottish faction, upon flattering them, by confirming the guilt of captain Green and his crew.”

As to the animosities which were produced by the rivalry between the English and Scots commercial companies, see the latter part of the fourth Volume of Mr. Laing's History of Scotland.

In the third volume of the Collection of State Tracts, published in the reign of William 3d, are, 1. ‘A Defence of the Scots Settlement at Darien; with an Answer to the Spanish Memorial against it; and Arguments to prove that it is the interest of England to join with the Scots to protect it: to which is added a

4 H

quis of Anandale, earls of Haddington, Leven, Raglen, lords Yester, Belhaven, Advocate, The-

saurer-Deput. Anstruther, sir John Home, and Ormistoun, younger. It is the opinion of the

Description of the Country, and a particular Account of the Scots Colony.' 2. 'An Inquiry into the Causes of the Miscarriage of the Scots Colony at Darien; or an Answer to a Label entitled, 'A Defence of the Scots abdicating Darien.' Submitted to the Consideration of the good People of England.' 3. 'Scotland's Grievances relating to Darien, &c.; humbly submitted to the Parliament.'

Connected with the mercantile jealousies and squabbles by which at this period the two kingdoms were inflamed and exasperated, is the Case (A. D. 1701), of Mr. John Thomson and Charles Auchmouty, servants to the African Company, for Treason and Leasing-making, by designing and causing to be engraved a Political Print; which Case is thus exhibited by Arnot:

" This Trial, with the facts which gave rise to it, presents us with a remarkable picture of liberty and fortitude in parliament, of expiring struggles for tyranny in the sovereign, and of the final victory of secret influence over parliamentary independence.

" In the year 1695, an Indian and African Company was established in Scotland: 400,000*l.* sterling were subscribed by such proprietors as were natives and residents. The Company fitted out six ships of force and burthen,* laden with various commodities, which sailed from the Forth. They planted, by the name of Caledonia, a colony on the Isthmus of Darien; and, from the establishment of this Company, and its colony, the nation universally flattered itself with the eager and unbounded prospect of extended trade and empire. From the jealousy the English, Dutch, and Spaniards, entertained of this colony, it may be presumed that the prospects which this nation derived from it, were at least plausible.

" But, besides the opposition of rival powers, Caledonia experienced that of her sovereign, whose political views, or personal attachments, led him to embrace the hostile spirit of his other dominions. The colony was attacked, was abandoned; the vessels were captured, the adventurers were killed in battle, were executed as pirates, or died of famine; and the Company was ruined. When the fatal tidings were received at Edinburgh, the sense of injury and disappointment was so strong as to burst forth with a fury which threatened immediate rebellion; and the great officers of state had to retire for a time to screen themselves from popular resentment.

" When the parliament met, the first symptoms of their displeasure, at the enemies of the African Company, was to pass an order for

* " Act of Scottish Parl. 26th June 1695; Lockhart's Mem. p. 99; De Foe's Hist. of the Union; Scot's Hist. p. 710; Edinburgh Gazette, N^o 8, N^o 36."

burning, by the hands of the hangman, a pamphlet, entitled, 'A Defence of the Scots abdicating Darien,' and requiring the Lords of the Treasury to pay a reward of 6,000*l.* Scots^o to any person who would apprehend William Herreis, the alleged author, and bring him before a magistrats. Soon after, they passed a resolution, declaring, that the votes and address of the parliament of England in December 1695, and the address of the House of Lords in February last, were undue intermeddlings † in the affairs of this kingdom, and an invasion of the sovereignty and independence of our king and parliament. They next resolved, 'That the memorial presented in his majesty's name, as king of Great Britain, to the senate of Hamburgh, 7th April 1697, by sir Paul Rycaut, then resident in that city, and Mr. Grosset, his majesty's envoy extraordinary at the court of Lunenburgh, was most unwarrantable, containing manifest falsehoods, and contrary to the law of nations, injurious to his majesty, an open encroachment upon the sovereignty of this crown and kingdom, the occasion of great losses and disappointments to the said Company, and of most dangerous consequence to the trade of this nation.' Moved, 'That, whoever advised his majesty's answer to the address of the parliament of England against our Indian and African Company, are enemies to this kingdom, and, if subjects thereof, are traitors to their king and country, and be prosecuted accordingly.' After a debate, the motion was withdrawn.

" They also resolved, that the proclamations issued by the English plantations against the African Company, particularly that against furnishing any provisions or necessaries whatever to their colony, directly or indirectly, and even debarring them wood, water, and anchor-

* " £. 500 sterling. Rec. of Scottish Parl. 16th Nov. 1700: 9th, 10th, 13th, 14th, 15th, 17th Jan. 1701."

† " The intermeddlings complained of were, that both houses of parliament had addressed the king, representing, That the act to which he had given the royal assent in Scotland, for erecting a Company trading to Africa and the Indies, granting them an exemption from public burdens for 21 years, would make Scotland a free port for East-India commodities, enable her to undersell England at foreign markets, and be of great prejudice to the trade and revenue of the latter kingdom; especially when Scotland shall have settled plantations in America. The king returned the following answer: 'I have been ill-served in Scotland; but I hope some remedies may be found to prevent the inconveniencies which may arise from this act.' Journal of House of Lords, 13th Dec. 1695; 8th Feb. 1699. House of Commons, 14th, 18th Dec. 1695."

Committee, That my Lord Chancellor should write to court for remissions to Charles May,

chirurgion; Antonio Ferdinando, cook's mate; Antonio Francisco, captain's man;

age, were injurious to the Company, barbarous to the adventurers, contrary to the law of nations, and a great occasion of the loss of the colony. Resolved, That this colony was a legal and rightful settlement holding of the crown of Scotland; and moved, That the conduct of the Spaniards to the said colony was an open hostility against the crown of Britain, and that satisfaction ought to be demanded. All the resolutions were passed *scm. con.* and the motion was delayed.

"These formidable resolutions, however, by the dexterity of William's ministers, vanished in smoke; for the court party moved an Address to the king on the resolution, asserting the Company's right to the colony; while the country party contended, that, in the present circumstances, an act of parliament was requisite for securing the Company's rights, as well as for regulating the conduct of the persons engaged in the prosecution of them. A debate and division on this question taking place, it was carried for an Address by a hundred and eight against eighty-four.* And the whole of the minority entered a formal dissent.

"This Address recapitulates the grievances of the African Company, and the resolutions of parliament mentioned above, omitting entirely however that for demanding satisfaction of the Spaniards; it concludes with praying his majesty's protection and countenance against the violence of Spaniards, and of English ministers abroad.

"It was the parliamentary division upon this Address, which was the subject of the political print that gave occasion to this Trial.

"The print represented Scotland in the figure of a woman wearing a crown, having the name of Scotia over her head, and supported by the 84 dissentient members. These were entitled, 'Caledonia's supporters.' They were distinguished with the following motto, encircled with wreaths of laurel, 'patris fautoribus;' and the woman addressed them† in

* "The Peers and Commons of Scotland formed but one House. Those who voted for an Address, were,

Peers	- - - - -	41
Commissioners for Barons, i. e.		
Knights of the Shire	- - - - -	82
Commissioners for Boroughs	- - - - -	35

—108

"It is perhaps superfluous in me to add, that all the officers of state were in this list." Arnot.

"Those who voted for an Act of Parliament, were,

Peers	- - - - -	20
Knights of the Shire	- - - - -	43
Representatives of Boroughs	- - - - -	21

—84

† "Rec. of Just. 14th, 21st April; 23d, 24th May, 1701."

these words: 'Take courage, and act as men that hold their liberty, as well as their glory, dear.' Below, an angel spoke thus to a multitude of little figures which he was driving with thunderbolts to hell, 'Procul, o procul esto profani.' (These figures were charged in the indictment as representing the majority in parliament.) And in the midst of the flames, lay a person who was tormented by a fiend, that addressed him in these words: 'Vendidit hic auro patriam.'

"His majesty's advocate produced before the court of justiciary an act of the privy council, authorising him to prosecute the prisoners on account of this engraving, 'for such crimes, and upon such laws, as his lordship shall think fit to libel.'

"Thus authorised, his lordship mustered up against the prisoners seven pages folio of indictment, charging them with the breach of sundry acts of parliament* against leasing-makers, and those who presume 'publicly to declaim, or privately to speak or write any purpose of reproach or slander of his majesty's person, estate, or government, or to deprave his laws, or misconstrue his proceedings, whereby any dislike may be moved betwixt his highness and his nobility and loving subjects, in time coming, under the pain of death.' Also, charging the prisoners as transgressing the acts against those who dispute the authority of the estates of parliament; and, likewise, as transgressing the statutes against those who conspire to levy war against the king. Nevertheless, (the indictment concludes,) the prisoners, by designing the said print, are guilty of the said crimes.—A description of the print, and an application of it to the laws, then follow. Turgidity of stile, and strained conceit, are substituted in the vacant places of law and reason. And the conclusion of the libel, which is worthy of the premises, is, that these crimes being found proved, the prisoners are thereby guilty of leasing-making and treason, and subject to the pain of death.

"The prisoners were heard by counsel, and informations‡ were lodged on either side. The information for his majesty's advocate is one of the most prolix and inconclusive pieces of composition that I recollect in judicial procedure. The information for the prisoners maintains, 1mo, That the statutes against leasing-making, &c. are obsolete, and are specially declared to be so in the claim of rights,

* "The acts libelled against the prisoner were, James 1, parl. 2, c. 43, James 5, parl. 6, c. 83, James 6, parl. 8, c. 130, and 134, and parl. 10, c. 10, Charles 2, parl. 1, sess. 2, c. 2."

† "So law papers, in Scotland, which contain a state of the fact and argument, are some times called."

George Haines, steward; George Glen, quarter master; Alexander Taylor, fore-mast-man:

as being in the number of those upon which the earl of Argyle was convicted. *2do*, That, to extend criminal laws, and capital punishments, by parity of reasoning;—to infer leasing-making, and sedition, and treason, from a hieroglyphic, a print, especially the print libelled on, is contrary to those general principles of law which have been established by the wisdom of the learned, as requisite for the security of the governed.—In opposition to these, it was maintained by his majesty's advocate, that, although the forfeiting the earl of Argyle upon stretches of obsolete laws, was declared contrary to law, it did not thence follow that those against leasing-making were obsolete, because the earl was indicted upon acts not founded on against the prisoners; and it was not declared in the claim of rights, that all the acts upon which the earl was indicted were obsolete. *2do*, With regard to the print, it was argued, if the intention of leasing-making and misconstruing was plainly discernible in it, this 'subtle manner of conveying the poison doth render it rather more wicked and dangerous than the most direct and blunt calumny.'—The other parts of these voluminous informations require no notice.

"The Lords pronounced the following interlocutor: Find the indictment, and qualifications thereof, do not infer the crime of treason, or the pain of death, but sustain the same relevant to infer an arbitrary punishment.

"THE PROOF.

"Alexander Kennedy of Glenure deposed, that the prisoner, Thomson, came to his house one evening, in company with the other prisoner, Auchmouty, and brought with him the copper-plate now produced in court, desiring the deponent to cast off impressions of it, which he refused, unless a warrant from authority was produced, as he suspected it might relate to affairs of state. Next day, he observed the prisoner, Auchmouty, go up to his printing-house; and the deponent following him, saw the copper-plate in the press, and one of his servants casting off copies. He snatched up one of them, and carried it straight to the lord advocate. One of the macers of council then came to the deponent's house, and required him to bring the copper-plate, and all the copies, before the lords of privy council, then met, which was done accordingly; and Auchmouty was present when they were seized.

"George Burgon, servant to the preceding witness, deposed, that the two prisoners, and Robert Wood engraver, brought the said copper-plate to him, and came once and again requesting the deponent to cast off impressions of it, which he as often refused till they should obtain his master's order. At length, his mis-

and that the Trial against captain Green and his crew, should be pursued before the Admiral

tress sent for him, and the two prisoners were then with her, and she desired him to cast off the impressions required, and now produced in court, which he did accordingly. The prisoners at this time engaged to stand between him and all hazard that he might incur through casting off the impressions.—Deposed, that Auchmouty furnished him with the paper.

"Robert Wood, engraver, swore, that the two prisoners brought the drawing to him from which the copper-plate was done, and desired him to engrave it. This he did accordingly, and was paid by them for it, at the agreed price of 6*l.* 10*s.* Scots: [10*s.* 10*d.* English.] Deposed, that the prisoner Thomson said the drawing was done by him. The deponent heard both prisoners desire Burgon, the printer's servant, to cast off the impressions.

"THE VERDICT.

"The assize, by the mouth of sir James Dick of Priestfield, their chancellor, all in one voice found the indictment and qualifications—not proved.

"I presume the reader will agree with me, that the proof of the fact, I mean, of the prisoner's having caused the engraving to be executed, is complete. It must, therefore, have proceeded from their conviction of the prisoners having done nothing declared criminal by law, that the jury found not proved. They had no other way of acquitting the prisoners; for juries had not then recovered their privilege of finding guilty or not guilty."

This alludes to a practice of which, in a subsequent case, Arnot writes thus:

"At the period of the Restoration our courts of law became highly tyrannical; and those which possessed a criminal jurisdiction displayed what, indeed, was no novelty in this country, a very sanguinary spirit. A celebrated lawyer,* who scrupled not to sacrifice abilities and principle at the shrine of despotism, has left a specimen of his attempt entirely to set aside trial† by jury. The mode of proceedings in our criminal courts, in the tyrannical and turbulent reign of Charles 2, by the address of the king's counsel, underwent a material innovation. In our records previous to this era, juries are found to have returned a general verdict of Guilty, or Not Guilty; the words of stile were, 'fyllit culpable and convict,' or, 'clean and acquit.' But, after the Restoration, prosecutions became so frequent against rebels, covenanters, and attendants upon conventicles, that it was matter of difficulty to get a jury to find a verdict against a state criminal, particularly

* "Sir George Mackenzie. Arnot's Hist. of Edinburgh, p. 149."

† "Mackenzie's Criminals, tit. Assizers."

Court; and that Assessors* should be named to the Judges, and assistants to the Procurator Fiscal.

Sic Subscribitur,

TWEEDALE, Cancell. J. P. C.

The above Report of the Committee, anent captain Green, commander of the ship the Worcester, being upon the day and date of thir presents, read in presence of the Lords of her majesty's Privy Council, and the samen was voted and approven. And the said Lords did thereby nominat and appoint sir James Stuart, her majesty's advocat, sir David Dalrimple, and Mr. William Carmichael, her majesty's sollicitors; sir Patrick Home, sir Gilbert Eliot, Mr. Alexander Mackleod, and Mr. Francis Grant, to be assistants to Mr. Alexander Higgins, Procurator Fiscal to the High Court of Admiralty, in prosecuting the libel and indictment to be given at his instance, against the

an attendant upon conventicles. His majesty's advocate, to evade this reluctance, fell upon a device which almost totally annihilated the powers and purposes of a jury. It was, to introduce a doctrine, that, in no case whatever, the jury had a right to exercise their judgment upon any point, except the evidence relating to the different facts charged in the indictment: that, in every case, they were to decide merely upon the fact; and that it was the province of the judges to determine the import of their verdict, in the scale of guilt, from a capital crime down to pure innocence: that, therefore, it was the business of the jury not to find Guilty, or Not Guilty, but proved, or not proved; and to apply such findings to the different charges, trifling or important, exhibited in the indictment.

"The lawyers for the crown devised another expedient which degraded jurymen from the palladium of liberty, to a senseless instrument of tyranny; an expedient which vested the power of convicting in the judges, when the jury doubted not only of the criminality of the fact, but even of the fact itself. For this purpose they drew up their indictments very circumstantially, not only stating the crime, but also the minute facts, trifling or important, from which they inferred the prisoner's guilt; and, upon these indictments, the Court used to pronounce an interlocutor, finding either the crime in general, or the facts and circumstances specially libelled, relevant to infer the pains of law. When it was suspected that a jury would scruple to find a crime in general proved, they were required to return a special verdict. Accordingly, they were often weak enough to return a verdict finding proved a long chain of circumstances specified in the indictment, leaving it entirely in the breast of the judges to determine whether these circumstances did establish the fact libelled." See more as to this in the Case of James Stewart, A. D. 1752.

* See vol. 11, p. 178.

said captain Green and his crew, before the said Court, to the final end and decision thereof. And the said Lords declared, That they would next council-day name five of their own number, to be Assessors to the Judges of Admiralty, during the dependence of the aforesaid process: and recommended to the lords of thesaurry, to pay the lawyers that are employed to be assistants accordingly.—Extracted by me, GILB. ELIOT, Cls. Sti. Concilii.

Whereupon the Judge of the High Court of Admiralty did present to the Lords of Council a Petition; "That since the Trial was ordered to be made before him, of the foresaid crimes informed against captain Green and his crew; and that the matter appeared to be of great importance; he might have, according to custom in the like cases, Assessors appointed and joined with him, by the authority of council, for his assistance in the said Trial." Whereupon the Lords of her majesty's most honourable Privy Council did nominate and appoint the earl of Loudoun, lord Belhaven, lord Arnistoun, sir John Home of Blackadder, and John Cockburn, younger, of Ormistoun, to be Assessors to the foresaid Judge; and assist and vote with him in the Trial, at the Procurator Fiscal's instance, against captain Thomas Green, commander of the ship the Worcester, and others of his ship's crew, before the said High Court of Admiralty; for their being guilty of Piracy, and other crimes; and that to the final end and decision thereof; as an Act extracted and signed by the clerk of council, extant in the records of the said High Court, bears.

Follows the Court of Justiciary of the High Court of Admiralty, with the whole Trial as it proceeded before the Judge of Admiralty, and the Assessors above appointed.

CURIA JUSTICIARIA supremæ Curie Admiralitatis tenta in Prætorio, vel nova Sessionis Domo Burgi de Edinburgh, quinto die mensis Martii, 1705, per Judicem dictæ Curie, et per honoratissimos viros, Joannem comitem de Loudoun, Joannem dominum de Belhaven, dominos Robertum Dundas de Arnistoun, Joannem Home de Blackadder, et Joannem Cockburn de Ormistoun, Assessores.

Curia legitime affirmata.

The said day, the said earl of Loudoun, lord Belhaven, &c. produced the Act of her majesty's Privy Council above-mentioned, appointing them to be the Assessors to the said Judge.

Thereafter the said Assessors took the oath of allegiance and signed the same, with the assurance, and took the oath *de fidei administratione*, and was thereupon admitted and received.

Intran'

Captain Thomas Green, commander of the ship called the Worcester, now in Brantland harbour.

Capt. John Madder, chief mate of the said ship.

John Reynolds, second mate of the said ship.

Thomas Linstead, assistant to the deceased supercargo of the said ship.

James Burn, boatswain of the said ship the Worcester.

James Sympson, gunner.

Andrew Robertson, gunner's mate.

John Brucklie, seaman.

George Kitchen, seaman.

Henry Keigle, carpenter.

Samuel Urlinez, his mate.

George Haines, steward of the said ship.

Daniel Stringman, cook.

Samuel Wilcocks, chirurgeon's mate.

George Glen, seaman there.

Henry Barnes, seaman there.

Alexander Taylor, seaman there.

And John Bannentyne, seaman there.

All of them indicted and accused at the instance of Mr. Alexander Higgins, Advocate Procurator Fiscal to the High Court of Admiralty, for the crimes of Piracy, Robbery and Murder, in manner mentioned in the two several indictments raised against them thereon, and whereof the tenor follows: Captain Thomas Green, commander of the ship called the Worcester, now in Bruntisland harbour, captain John Madder chief mate of the said ship, John Reynolds second mate of the said ship, Thomas Linstead assistant to the deceased supercargo of the said ship, James Burn boatswain of the said ship, James Sympson gunner of the said ship, Andrew Robertson gunner's mate, John Brucklie seaman there, and George Kitchen seaman there, all prisoners; you, and ilk one of you, are accused and indicted at the instance of Mr. Alexander Higgins, Advocate Procurator Fiscal to the High Court of Admiralty, of the crimes of Piracy, Robbery, and Murder, in manner after-mentioned, viz. That by the law of God, the laws of nations, of this, and of all well-governed realms, the crimes of Piracy, Robbery, and Murder, are prohibited, under all highest pains; and that by the laws of this realm, the said crimes are prohibit under pain of death, and escheat of moveables. Nevertheless it is of verity, that captain Thomas Green, commander of the ship called the Worcester, now in Bruntisland harbour, and his crew, are guilty, art and part of the said crimes, or one or other of the same, in so far as the said captain Thomas, or his said crew, having sailed from England in the said vessel the Worcester, upon pretence of merchandizing towards the East Indies; the foresaid captain and his said crew, belonging to the said vessel, did, upon one or other of the days of the months of February, March, April, or May, in the year 1708, encounter, or meet with another ship or vessel, sailed by its own men or crew, upon the coast of Malabar, near Calecut, and the said vessel bearing a red flag, and having on board, at least one English or Scots aboard, at least one who speaks the English language; the said

captain Thomas Green and his crew, after some intercommuning with them, did, without any lawful warrant or a just cause, attack the said other vessel, or ship, while expecting no such treatment; and invading her first by their sloop, which they had manned with guns and other arms for that purpose, they fell upon the said other vessel in an hostile manner, by shooting of guns and otherways; and after some time spent in fighting against her by their sloop, and partly by the approaching of the said Thomas Green's ship the Worcester, they overcame, and boarded the said other vessel, and having seized their men, they killed them, and threw them overboard, and then carried, or caused to carry away the goods that were aboard the said other vessel, to their said ship the Worcester; and then disposed upon the said ship, by selling her ashore on the said coast. Which crime, being a wicked piracy committed by surprise in parts so remote, and probably with all the caution the committers could use for concealing thereof, and for preventing discoveries, comes now to be discovered in the several parts and circumstances of the action, and by such as were present thereat; which being all conjoyned, does make up and infer the foresaid crime objected, and are as follows, viz. That the foresaid rencounter and fight betwixt captain Green and his crew, and the said vessel the Worcester, and the foresaid other vessel taken by her, happened on the said coast as above: Likewise, at the same time, one or more of the said ship the Worcester her crew being on shore, and at some distance from the sea, heard the said shooting, which brought the said persons to the shore, where they, at least the chirurgeon of the said ship the Worcester, one of them, saw her riding at a good distance from the shore upon her birth (as they speak) and having the other ship at the stern, as it were tied or towed to her, as being the vessel they had mastered or overcome, as said is. Likewise, the said chirurgeon did see the boat belonging to the said ship the Worcester coming ashore from her, and the chirurgeon demanding at such of the crew as were in her, what had brought them ashore: They answered, that they had been busking (a sea term used for fitting and trimming a ship for fighting) and they had drunk, spilt, or staved all their water, and they were come for a new supply: And when a little time thereafter the said chirurgeon went aboard the said ship the Worcester, he perceived the deck thereof lumbered and covered, and in a confused manner, with balls, boxes, and goods; whereof when he asked the reason, John Madder, one of the pannels, and a principal actor in the engagement, answered, "Damn you, what have you to do to enquire? Meddle with your plaster-box." And when the chirurgeon went down to his station and chest, he called for one of the blacks Antonio Ferdinando, and one Duncan Mokay now dead, and another, in order to dress them; but when he asked what way they came by their wounds, they declined to answer;

whereupon the chirurgeon refusing to dress them, if they would not tell him how they got their wounds, the said John Madder came to the chirurgeon in a passion, and asked what was his business to ask so many questions, when he did see the wounds so plain before him, calling him a blockhead for not dressing them; and at length the contest was so warm betwixt the said Madder and chirurgeon, that Madder charged him to ask no more questions, and he charged the men wounded not to answer a word: And further ordered him back to the shore, which the chirurgeon was forced to comply with; where the chirurgeon meeting with Francisco de Olivera the linguister, asked him, whether he saw any of the Worcester's men, that had carried the foresaid ship so taken into Keilon river? And the linguister answered, that he had not, but that they were some of the Worcester's company, who, as soon as they had brought her in and made her fast, took their boat, and went directly on board: The ship being taken and carried into Keilon river as said is, where she was left with her yards and topmasts down, all unrigged: And the said linguister told the chirurgeon further, that one Cogo Commodo complained he had bought the said ship taken too dear; whereby it appears that the said ship taken by violence, was sold in manner aforesaid. Likeas, for further evidence of the said piracy, since the time that John Reynolds, one of the pannels, was seized with the rest, for his accession thereto, there was found a letter wrote to him by one Sarah Newlands, bearing date January the 6th, wherein she tells him, "That though he had been basely wicked, yet she should be sorry to hear he were guilty of any thing that might bring him to the gallows; and therefore advises him to confess; adding, that in his own letter, which she had seen, he says, that some of their men had basely confessed, which (says he) implies that they were guilty." And when Reynolds was questioned upon his letter, he acknowledged that he had wrote a letter to his wife, the said Sarah's sister, which had occasioned her writing the said letter to him; and thereupon he produced the copy of the said letter to his wife, which agrees with what Sarah says, as the said copy and Sarah's letter, both put in the clerk of the admiralty's hands, to be seen by the pannels, bear. And further, George Haines, one of the crew of the said Worcester, since his coming to Scotland, and when at Bruntisland, being asked by one James Wilkie, taylor, burgess of Edinburgh, some day in October last, about his brother, Andrew Wilkie, who went chirurgeon in captain Drummond's ship, if ever the said Haines had seen the said Andrew Wilkie in his voyage, he flew in a passion, and said, "What devil was his concern with captain Drummond?" Upon which James Wilkie forbearing a little till he should be calmer, asked the said Haines, whether he had heard or seen any Scots ship coming to or from the East Indies during their voyage? Haines answered, that when they

were upon the coast of Malabar, a Dutch ship informed them, that one captain Drummond, commanding a Scots ship, and having a sloop in company, was turned pirate. Upon which Haines and they manned their ship to be in readiness, but saw him not; only a little thereafter Haines added, that he had in his custody, the time the said ship the Worcester was seized, which he would not have fallen into the seizer's hands for twice the value of the ship, but that he had thrown it over-board; adding further, that there was still in the ship what would never be found by the seizers, unless they pulled her board from board, though he knew where the thing lay. Likeas, when after the said James Wilkie departed, one Anna Seaton in Bruntisland, did at his desire further enquire at Haines about captain Drummond's ship; he answered, that he saw they had a design to pump him, but that they should not be the wiser of him: At all which passages, Kenneth Mackenzie, indweller in Cannongate, was a present witness. And the said Anna Seaton did further tell the said Kenneth Mackenzie, that when she expostulate with Haines for his being in passion, as said is; he answered, that he knew more of captain Drummond than he would tell at that time; and that if the said Andrew Wilkie was with captain Drummond, he would not be seen again. And further, the said Anna Seaton heard the said Haines own and declare their said wickedness; and she and William Wood, one of the gunners of her majesty's artillery, with one John Henderson, writer in Ediuburgh, being in September last, in Anna Seaton's mother's house, after having drunk one health or two, the said Haines, who was there present, fell in a melancholy fit, and expressed himself, "That it is a wonder, that since we did not sink at sea, God doth not make the ground to swallow us up for the wickedness that has been committed during the last voyage, on board of that old bitch Bess," pointing to captain Green's ship. And further, the said Haines said, that if what the said John Madder had done in the said voyage were well known, he deserved as much as his uncle Madder met with at Amsterdam, who was there burnt in oil, for attempting to burn their ships. And when at another time, the said Anna Seaton told Haines, that she had an old sweetheart, who went away with captain Drummond, and would gladly hear some tidings, whether he was dead or alive; the said Haines, who was then a suitor to Anna Seaton, assured her she would never see him again, if he was in Drummond's ship, and for a further confirmation of the truth of the said Piracy, when a committee of council was sent to Bruntisland, to cause search and unload the said vessel, it was found by the skippers and seamen employed, that the goods aboard her were not stowed as merchant goods used to be, but were found in the hold in such confusion, as if taken by piracy, and no otherways. Likeas, When the said ship the Worcester was seized, the said John Madder being questioned

about captain Drummond's ship, he took out of his pocket, or at least shewed in his hand, the seal of the African company, which he could never lawfully have got. By all which, they being joined and connected together (as a discovery of such a wickedness, practised in such remote parts, and so industriously and obstinately endeavoured to be concealed, deserves to be) the same in all the points and circumstances thereof, at least such, and so many of them as are relevant, and are offered to be proven by a cumulative probation, do plainly amount to such a plenary evidence, as may fully convince all impartial men, that the foresaid captain Green and his said crew, are all and each of them guilty, art and part, of the foresaid crimes of Piracy, Robbery, and Murder, or one or other of them above charged; which being found by a verdict of an assize before the Judge of the Admiralty, and the Lords Assessors appointed by the Lords of the Privy Council, the forenamed persons, and each of them, ought to be punished by sentence of the said court with the pain of death, and confiscation of their moveables, to the example and terror of others, to do or commit the like in time coming.

ADDITIONAL CONCLUSION to the Indictment, at the Instance of Mr. Alexander Higgins, Procurator Fiscal to the Court of Admiralty, against Captain Green, &c. viz.

That the Conclusion of the said Indictment given on Saturday the 17th instant, bearing the pain of death, and of escheat and confiscation of moveables, should extend to the escheat and confiscation of the said ship and cargo, by reason of the foresaid crime and piracy: and that the said captain Thomas Green, &c. should answer to the foresaid Conclusion, as thus explained, and extended to the confiscation of the said ship and cargo, as in case of piracy, the 5th of March, which is the day of appearance assigned to the said pannels, or at least upon the 6, 7, 8, or 9th days of March thereafter, as the true import, or at least a clear consequent of the foresaid crime and indictment given thereupon: the list of witnesses and assizers remaining the same, as subjoined to the foresaid principal indictment.

Sic Subscritur, ALEXANDER HIGGINS.

Henry Keigle, carpenter in the ship called Worcester, now in Bruntisland harbour, Samuel Urlines his mate, George Haines steward of the said ship, Daniel Stringman cook of the said ship; Samuel Wilcocks chirurgion's mate, George Glenn seaman there, Henry Barnes seaman there, Alex. Taylor seaman there, and John Bannantine seaman there; all of captain Thomas Green commander of the said ship his crew: you, and ilk one of you are accused and indicted at the instance of Mr. Alex. Higgins Advocate, Procurator Fiscal to the High Court of Admiralty, of the crimes of Piracy, Robbery and Murder, in manner after-mentioned, viz. That by the law of God, the laws of na-

tions, of this, and of all other well-governed realms, the crimes of Piracy, Robbery, and Murder, are prohibite under all highest pains: and that by the laws of this realm, the said crimes are prohibite, under pain of death, and escheat of moveables. Nevertheless, it is of verity, that captain Thomas Green commander of the ship called the Worcester, now in Bruntisland harbour, and his crew, are guilty, art and part, of the said crimes, or one or other of the samen, in so far as the said captain Thomas, or his said crew, having sailed from England in the said vessel the Worcester, upon pretence of merchandizing towards the East Indies, the foresaid captain and his said crew belonging to the said vessel, did upon one or other of the days of the months of February, March, April or May, in the year 1703, rencounter and meet with another ship or vessel, sailed by its own men or crew, upon the coast of Malabar near Calecute; and the said vessel bearing a red flag, and having English or Scots aboard, at least such as spuke the English language, the said captain Thomas Green and his crew, after some inter-communing with them, did without any lawful warrant, or just cause, attack the said other vessel or ship, while expecting no such treatment; and invading her first by their sloop, which they had manned, and furnished with guns and other arms for that purpose, they fell upon the said other vessel in an hostile manner, by shooting of guns and otherways; and after some time spent in fighting against her by their sloop, and partly by the approaching of the said Thomas Green's ship the Worcester, they overcame, and boarded the said other vessel, and having seized their men, they killed them, and threw them over-board, and then carried, or caused to carry away the goods that were aboard of the said other vessel to their said ship the Worcester, and then disposed upon the said ship, by selling her ashore on the said coast. Which crime being a wicked piracy, committed by surprize in parts so remote, and probably with all the caution the committers could use for concealing thereof, and for preventing discoveries, comes now to be discovered in the several parts and circumstances of the action, and by such as were present thereat: which being all conjoined, does make up and infer the foresaid crime objected, and are as follows, viz. That the foresaid rencounter and fight between captain Green and his crew, and the said vessel the Worcester, and the foresaid other vessel taken by her, happened on the said coast as above: Likewise, at the same time, one or more of the said ship the Worcester her crew being on shore, and at some distance from the sea, heard the said shooting, which brought the said persons to the shore, where they, at least the chirurgion of the said ship the Worcester one of them, saw her riding at a good distance from the shore upon her birth (as they speak) and having the other ship at her stern, as it were tied or towed to her, as being the vessel they had mastered or overcame, as said is. Likewise, the said chi-

chirurgion did see the boat belonging to the said ship the Worcester coming ashore from her, and the chirurgion demanding, at such of the crew as were in her, what had brought them ashore? They answered, that they had been basking (a sea term, used for sitting and trimming a ship for fighting) and that they had drunk, spilt, or staved all their water, and they were come for a new supply; and when a little time thereafter the said chirurgion went aboard the said ship the Worcester, he perceived the deck thereof lumbered and covered, and in a confused manner, with balls, boxes and goods; whereof when he asked the reason, John Madder, one of the pannels, and a principal actor in the engagement, answered "Damn you, what have you to do to enquire? Meddle with your plaister-box." And when the chirurgion went down to his station and chest, he called for one of the blacks Antonio Ferdinando, and one Duncan Mackay now dead, and another, in order to dress them; but when he asked what way they came by their wounds, they declined to answer: whereupon the chirurgion refusing to dress them, if they would not tell him how they got their wounds, the said John Madder came to the chirurgion in a passion, and asked what was his business to ask so many questions, when he did see the wounds so plain before him? Calling him a blockhead for not dressing them. And at length the content was so warm betwixt the said Madder and chirurgion, that Madder charged him to ask no more questions, and he charged the men wounded not to answer a word: and further, ordered him back to the shore, which the chirurgion was forced to comply with. Where the chirurgion meeting with Francisco de Olivera their linguister, asked him, whether he saw any of the Worcester's men, that had carried the foresaid ship so taken, into Keilon river? And the linguister answered, that he had not; but that they were some of the Worcester's company, who, as soon as they had brought her in, and made her fast, took their boat, and went directly on board: the ship taken being carried into Keilon river, as said is, where she was left, with her yards and top-masts down, all unrigged. And the said linguister told the chirurgion further, that one Cogo Commodo complained he had bought the said taken ship too dear; whereby it appears, that the said ship taken by violence, was sold in manner foresaid.

Likeas, for further evidence of the said Piracy, since the time that John Reynolds, one of the pannels, was seized with the rest, for his accession thereto; there was found a letter wrote to him by one Sarah Newlands, bearing date the 6th of January; wherein she tells him, that though he had been basely wicked, yet she should be sorry to hear he were guilty of any thing that might bring him to the gallows: and therefore advises him to confess; adding, that in his own letter, which he had seen, he says, that some of their men had basely confessed; which, says she, implies, that they

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were guilty. And when Reynolds was questioned upon his letter, he acknowledged that he had wrote a letter to his wife, the said Sarah's sister, which had occasioned her writing the said letter to him: and thereupon he produced the copy of the said letter to his wife, which agrees with what Sarah says; as the said copy, and Sarah's letter (both put in the clerk of the Admiralty's hands, to be seen by the pannels) bear.

And further: George Haines, one of the crew of the said Worcester, since his coming to Scotland, and when at Bruntisland, being asked by one James Wilkie, taylor, burges of Edinburgh, some day in October last, about his brother Andrew Wilkie, who went chirurgion in captain Drummond's ship; if ever the said Haines had seen the said Andrew Wilkie in his voyage? He flew in a passion, and said, "What devil was his concern with captain Drummond?" Upon which, James Wilkie forbearing a little, till he should be calmer, asked the said Haines again, whether he had heard or seen any Scots ships, coming to or from the East-Indies, during their voyage? Haines answered, that when they were upon the coast of Malabar, a Dutch ship informed them, that one captain Drummond, commanding a Scots ship, and having a sloop in company, was turned pirate: upon which Haines said, they manned their sloop to be in readiness, but saw him not: only a little thereafter, Haines added, that he had in his custody the time the said ship the Worcester was seized, which he would not have fallen into the seizer's hands for twice the value of the ship; but that he had thrown it overboard: adding further, that there was still in the ship what would never be found by the seizers, unless they pulled her board from board, though he knew where the thing lay.

Likeas, when after the said James Wilkie's departure, one Anna Seaton did, at his desire further enquire at Haines about captain Drummond's ship; he answered, that they had a design to pump him, but that they should not be the wiser of him. At all which passages, Kenneth Mackenzie, an indweller in Cannon-gate, was a present witness. And the said Anna Seaton did further tell the said Kenneth Mackenzie, That when she expostulated with Haines for his being in a passion, as said is; he answered, that he knew more of captain Drummond than he would tell at that time; and that if the said Andrew Wilkie was with captain Drummond, he would not be seen again.

And further, The said Anna Seaton heard the said Haines own and declare their said wickedness. And she, and William Wood, one of the gunners of her majesty's artillery, with one John Henderson writer in Edinburgh, being in September last at Anna Seaton's mother's house, after having drank a health or two, the said Haines, who was there present, fell in a melancholy fit; and expressed himself, "That it is a wonder that since we did not sink at sea, God doth not walk the ground

to swallow us up, for the wickedness that has been committed during the last voyage on board of that old bitch *Bess*, pointing to captain Green's ship. And further, the said Haines said, that if what the said John Madder had done in the said voyage were well known, he deserved as much as his uncle Madder met with at Amsterdam; who was there burnt in oil, for attempting to burn their ships. And when, at another time, the said Anna Seaton told Haines, that she had an old sweetheart who went away with captain Drummond, and would gladly hear some tidings whether he was dead or alive; the said Haines, who was then a suitor of Anna Seaton's, assured her, she would never see him again, if he was in Drummond's ship.

And for a further confirmation of the truth of the said piracy, when a committee of council was sent to Bruntisland, to cause search and unload the said vessel; it was found, by the skippers and seamen employed, that the goods aboard her were not stowed as merchant goods need to be; but were found in the hold in such confusion, as if taken by piracy, and no otherways. Likewise, when the said ship the *Worcester* was seized, the said John Madder being questioned about captain Drummond's ship; he took out of his pocket, or at least shewed in his hand the seal of the African company; which he could never have lawfully got.

By all which, they being joined and connected together (as a discovery of such a wickedness practised in such remote parts, and so industriously and obstinately endeavoured to be concealed, deserves to be) the same, in all the points and circumstances thereof; at least such, and so many of them as are relevant, and are offered to be proven by a cumulative probation; do plainly amount to such a plenary evidence, as may fully convince all impartial men, that the foresaid captain Green and his said crew, are all and each of them guilty, art and part, of the foresaid crimes of Piracy, Robbery, and Murder, or one or other of them above charged. Which being found by a verdict of an assize before the Judge of the Admiralty, and the Lords Assessors appointed by the Lords of Privy Council; the forenamed persons, and each of them, ought to be punished by sentence of the said Court, with the pain of death, and confiscation of their moveables; to the examples and terror of others, to do or commit the like in time coming.

ADDITIONAL CONCLUSION of the Indictment, at the instance of Mr. Alexander Higgins, Procurator Fiscal to the Court of Admiralty, against Captain Thomas Green, &c. viz.

That the conclusion of the said indictment given on Saturday, the 17th instant, bearing the pain of death, and of escheat and confiscation of moveables, should extend to the escheat and confiscation of the said ship and cargo, by reason of the foresaid crime of piracy: and that the said captain Thomas Green, &c. should answer to the foresaid conclusion, as thus ex-

plained, and extended to the confiscation of the said ship and cargo, as in the case of piracy, the foresaid 5th of March, which is the day of comparance assigned to the said pannels, or at least upon the 6th, 7th, 8th, or 9th days of March thereafter; as the true import, or at least a clear consequent of the foresaid crime and indictment given thereupon: the list of witnesses and assizers remaining the same, as subjoined to the foresaid principal indictment.

Sic Subscribitur, ALEXANDER HIGGINS.

PURSUERS.—Mr. Alexander Higgins, Procurator Fiscal, sir James Stuart, her Majesty's Advocate, sir David Dalrymple, and Mr. William Carmichael, her Majesty's Solicitors.—Sir Patrick Home, sir Gilbert Eliot, Mr. Francis Grant, Advocats.

PROCURATORS IN DEFENCE.—Sir David Cunningham, sir David Thoires, sir Walter Pringle, Mr. David Forbes, Mr. George Alexander, Mr. John Spotswood, Mr. John Elphinston, Advocats.

The Procurator Fiscal declared judicially, he passed from Samuel Urlinea, carpenter's mate of the ship the *Worcester*, Henry Barnes seaman, and Daniel Stringman cook of the said ship; whereupon they were dismissed from the bar. ALEXANDER HIGGINS.

Her Majesty's Advocate for the pursuers craved, that the dyet against captain Thomas Green and others, contained in that indictment with him, might be continued.

It was objected by the pannel's procurators, that the dyet could not be continued against them; being contrair to the act of parliament 'for preventing wrongus imprisonment,' and contrair to an express clause therein.

It was replied for the pursuers, that the act of parliament is opposed; which only requires the dyet of the trial to be fixed within sixty days after intimation, which was done; but then allows to the pursuers to insist, and to the judge to determine by a final sentence, within forty days, if before the Lords of Justiciary, and thirty days, if before any other judge.

Which Objection, with the Answers and Replies made thereto, being considered by the Judge and Assessors, they repelled the objection, and continued the dyet against the said captain Green and others, contained in the indictment against him, till Wednesday next at nine of the clock; and ordained the pannels to be carried back to prison.

JAMES GRAHAM, I. P. A.

It was alledged by the procurators for the pannels, that the crime libelled being alledged to be committed upon the coast of Malabar, and by Englishmen; they ought to be remitted to be tried in England; and cannot be judged by the Judge of the High Court of Admiralty and Assessors, who are not judges competent.

The Procurator Fiscal and Pursuers Procurators answered, that they opposed the act of parliament, 1681, which founds the admiral's

jurisdiction in the case libelled: declaring expressly, "That the high admiral hath the sole privilege and jurisdiction in all maritime and sea-faring causes, foreign and domestic, whether civil or criminal whatsoever, within this realm; and over all persons, as they are concerned in the same: and that he is his majesty's lieutenant and justice general upon the seas," &c.

Which Alledgeance and Answer, with the other Replies and Duplices, being considered by the judge and assessors; they repelled the Alledgeance in respect of the Answer; and found that the judge admiral and assessors are competent and proper judges, to cognosce and determine in the case and crimes libelled.

JAMES GRAHAM, I. P. A.

The grounds of the indictment, at the instance of the Procurator Fiscal, against Henry Keigle, George Haines, Samuel Wylcocks, George Glen, Alexander Taylor, and John Bannantyne here present, being fully debated *vidé voce*: the Judge of the High Court of Admiralty and assessors continue the dyet, at the said Mr. Alexander Higgins's instance, against the said Henry Keigle, and other pannels abovenamed, till Tuesday the 13th instant at nine a-clock in the forenoon; and ordain both parties to give in their informations betwixt and that time; the pursuer to give in his betwixt and Thursday next at twelve a-clock of the day; and the pannels to give in theirs betwixt and Saturday next, at twelve afternoon thereafter; in order to be recorded in the court-books: and ordains the assizes and witnesses to attend then, and at the other dyet upon Wednesday next, against captain Green and others, ilk person under the pain of one hundred merks; and the pannels to be carried back to their respective prisons.

JAMES GRAHAM, I. P. A.

CURIE JUSTICIARIE, Supremæ Curie Admiralitatis tenta in Prætorio, vel nova Domo Sessionis Burgi de Edinburgh, septimo Die Mensis Martii, 1705, per Judicem dictæ Curie, et per Honoratissimos Viros, Joannem Comitem de Loudoun, Joannem Dominum de Belhaven, Dominos Robertum Dundas de Arnestoun, Joannem Home de Blackadder, et Joannem Cockburn de Ormistoun, Assessores.

Curia legitimè affirmata.

Intran'

Captain Thomas Green, commander of the ship called the Worcester, now in Bruntisland harbour.

Captain John Madder, chief mate of the said ship.

John Reynolds, second mate of the said ship.

Thomas Linstead, assistant to the deceased supercargo of the said ship.

James Burn, boatswain of the said ship.

James Simpson, gunner.

Andrew Robertson, gunner's mate.

John Bruckley, seaman.

George Kitchen, seaman.

All of them indicted and accused at the instance of Mr. Alexander Higgins, Advocat, Procurator Fiscal to the High Court of Admiralty; for the crimes of Piracy, Robbery and Murler, in manner mentioned in the indictment raised against them thereasent, before insert in the Court holden the 6th of March instant.

PURSUERS.—Mr. Alexander Higgins, Procurator Fiscal, sir James Stuart, her Majesty's Advocat, sir David Dalrymple, and Mr. William Carmichael, her Majesty's Solicitors.—Sir Patrick Home, sir Gilbert Eliot, Mr. Alexander Mackleod, Mr. Francis Grant, Advocats.

PROCURATORS IN DEFENCE.—Sir David Thoirs, sir Walter Pringle, Mr. David Forbes, Mr. George Alexander, Mr. John Elphinston, Mr. John Spotswood, Advocats.

The grounds of the Indictment at the instance of the Procurator Fiscal, against captain Green and other pannels here present, and the reasons why John Reynolds, one of the pannels, who is a witness cited in the exculpation, at the instance of the other pannels, should be tried first upon the libel, to the effect, that if assoilized, he may be adduced as a witness for the said other pannels in the foresaid exculpation, being debated *vidé voce*; the Judge of the High Court of Admiralty, and Assessors, continue the dyet at the said Mr. Alexander Higgins's instance against the saids hail pannels, till Tuesday the thirteenth instant, at nine a-clock in the forenoon: and ordains both parties to give in their informations betwixt and that time; the pursuer to give in his betwixt and tomorrow; and the pannels to give in theirs betwixt and Saturday thereafter, in order to be recorded in the court-books: and ordains the assizers and witnesses to attend with ilk person, under the pain of two hundred merks; and the pannels to be carried back to prison.

JA. GRAHAM, I. P. A.

INFORMATION for Mr. Alexander Higgins, Procurator Fiscal of the High Court of Admiralty: against Captain Thomas Green, Commander of the Worcester, and his Crew and Complices.

There being two libels raised before the High Court of Admiralty, and the Lords Assessors appointed by the Lords of Privy Council, both at the instance of the said Mr. Alexander Higgins; but the first against Henry Keigle, carpenter in the ship called the Worcester, now in Bruntisland harbour; Samuel Urline, his mate; George Haines, steward of the said ship; Daniel Stringman, cook in the said ship; Samuel Wilcocks, chirurgion's mate; George Glen, seaman there; Henry Barnea, seaman there; Alexander Taylor, seaman there; and John Ballantyne, seaman there: And the second against the said captain Thomas Green, commander of the said ship the Worcester; captain John Madder, chief mate of the said ship; John Reynolds,

second mate of the said ship; Thomas Linstead, assistant to the deceased supercargo of the said ship; James Burn, boatswain of the said ship; James Simpson, gunner of the said ship; Andrew Robertson, gunner's mate; John Brucklie, seaman there; and George Kitchen, seaman there; all prisoners.

Both the libels being the same, the tenor thereof prefix to the information is *verbatim* conform to the indictments on the preceding pages, in the court holden the fifth of March, 1705, and whereto this refers.

When the hail forsaids pannels were brought to the bar, and the said libels read against them; the Procurator Fiscal declared, That he insisted first upon the first libel, viz. against the saids Henry Keigle, carpenter; Samuel Urlane, George Haines, Daniel Stringman, Samuel Wilcocks, George Glen, Henry Barnes, Alexander Taylor, and John Ballantyne; and after some debate moved by the pannels procurators, that the pannels having used the method prescribed by the act of parliament, to bring themselves to a trial within sixty days, they ought now all of them to be insisted against; and it being answered, that all that the act of parliament required was, That a day should be fixed for the trial within sixty days after the charge given for that effect; the same was done, and also the whole pannels so far insisted against, that their libels were read, which fully satisfies that part of the act; and that as to further insisting, prosecuting and concluding, the act of parliament allowed forty days further before the commission of justiciary, and thirty days before any other inferior judicature: So that the Procurator Fiscal might very well proceed against these contained in the first libel this day, and continue these contained in the second libel till the next court day. The Lord High Admiral repelled the foresaid alledgeance made for all the pannels, and allowed the Procurator Fiscal to insist against these in the first libel, the foresaid 5th of March, and continued the dyet against these in the second libel, till the 7th of the said month.

It was then alledged for these in the first libel, No process, in regard the crimes charged were libelled to have been done in the East Indies in Malabar, far without the Scottish seas, nor was there any accuser either of the owners of the ship and goods, or of the nearest of kin of the persons alledged, murdered: so that the admiral was incompetent to this trial; For the *competentia fori* (competency of the Court) in crimina's, being founded either in the *locus delicti* (the place where the crime was committed) or in the *locus domicilii* (the place of habitation of the pannels) or in the *locus originis* (place of birth) neither of these could be supposed upon in this case: The pannels Englishmen and strangers, and the crimes libelled to have been committed in the East Indies, as said is. And *esto*, that the crime of piracy may be tried any where, where the pirates are found, yet that is only where the

accused are notoriously such. And farther, though the pannels could be accused here in Scotland, yet they could be only accused before the commission of justiciary, and not before the high admiral, whose jurisdiction extends no further than the seas within the compass of her majesty's sovereignty.

To all which it is answered by the pursuer. 1. That though the competency of the judge in criminals be ordinarily said, to be found either *in loco delicti* (the place where crime was committed) or *in loco domicilii* (place of habitation of the delinquents) or *in loco originis* (the place of their birth) yet there is a superior consideration, and that is the *locus deprehensionis* (place where they were taken) where the criminal is found and deprehended, which doth so over-rule in this matter, that neither the *locus domicilii* (place of habitation) nor the *locus originis* (place of birth) doth found the judges competency, nisi *ibi reus deprehendatur* (except the criminal be apprehended there). And so it is that here the pannels were and are deprehended, which happening in the cause of piracy, a crime against the law of nations, and which all mankind have an interest to pursue, wherever the pirates can be found; the Procurator Fiscal's interest to pursue is thereby manifest, and the pannels being here deprehended, cannot decline the admiral's jurisdiction as incompetent. 2. As to what is alledged, that the pannels are not libelled to be habitual and notorious pirates, but on the contrary, had and do produce a commission, which frees them of that suspicion.

It is answered, That piracy being libelled, as to the particular charged, even habitual piracy is thence presumed; but a single act of piracy libelled, doth both give the pursuer a sufficient title and interest, and likewise founds the admiral's jurisdiction, in respect the pannels charged for piracy are here found. And 3, the lord high admiral is most proper for this cognition and trial, because by the act of parliament, 1681, he is declared to be justice general upon the seas, which albeit it be limited inwardly towards the land, yet outwardly is not limited; so that the lord high admiral is there declared to have the sole jurisdiction in all maritime and sea-faring causes, foreign and domestic, whether civil or criminal, within this realm, and over all persons, as they are concerned in the same, which as to the seas and all maritime crimes whatsoever, makes the high admiral justice general, as said is, without limitation; and therefore it is in vain for the pannels to pretend, that if their cause be cognoscible here, it must at least be tried before the commission of justiciary, since the lord high admiral is in this case fully vested with the justice general's power; and as for what may be the custom of England, it doth not concern, nor can be any rule for us.

And the Lord High Admiral and Assessors having advised the debates, they repelled the declinator, and found the Court competent.

Thereafter it was alleged for these in the first libel, That they were conveyed, as having been of captain Green's crew, and his accomplices in the crimes libelled; so that he being their commander and captain, they could not be put to answer, unless the captain himself was insisted against; seeing first, it was obvious, that he being their commander and captain, ought first to be answerable. And second, That they being under his command, could not be charged for any thing alleged done by them as his crew, unless he were first tried, seeing that he might have defences both for himself and them, which probably they could not make for themselves.

To which it was answered by the pursuer, That the captain and his crew were not conveyed for any thing alleged acted by him as their captain, and by them as his crew, but were all conveyed as accomplices and *socii*, (i. e. fellow-criminals) and partakers of the foresaid wicked crimes of piracy, robbery, and murder; which crimes as they could be warranted by no commission or character the captain did or could pretend, so could they be as little warranted by their condition of being subject to him as his crew; for here the saying holds, That they were all *hic socii et facinus quas inquinat aequat*, (i. e. they were fellows in this case, and being defiled with the said crime, were in that respect equal.) As also the other maxim, That wrong has no warrant; and therefore, seeing that neither the captain's character, nor their condition as his crew, could be pretended as a defence either to him or them; and that the libel of the foresaid crimes did charge them all, as being *socii*, and together involved therein; and that without question, in the case of such an accusation for such horrid crimes, every one must answer for himself; the alledgeance could not be respected. Besides that it was evident, that if captain Green, and these in the second libel, were all confessing and pardoned; yet the first libel against these of his crew therein contained, would still lawfully proceed; and captain Green himself, and those joined with him in his libel, might be made use of as witnesses against these contained in the first libel. By all which it was evident, that the trial ought to proceed against these in the first libel, without respect to the foresaid dilatory defence. This being the dilatory defence objected against the first libel, and answered above; and the peremptory defences against both libels being common and coincident, for the more clear method; the dilatory defence proposed also for these contained in the second libel, with the answers thereto, are hereunto subjoined.

The dilatory then proposed for captain Green, and others (in the second libel) was, The foresaid John Reynolds was conveyed and impeached with him; whereas it was acknowledged by the pursuer, that Reynolds was ashore the time of the piracy, and other crimes libelled to have been committed by captain Green, and the rest of his accomplices; where-

by Reynolds appeared, even by the pursuer's acknowledgment, to be innocent. Like as captain Green and the other pannels, had raised an exculpation, and therein had cited Reynolds for a witness: so that according to the method practised in criminals, captain Green and the other pannels had good ground to demand, that Reynolds might be first tried, and so purged from being *socius criminis*, (a fellow-criminal) and put in case to be a witness, for the captain and the other pannels, to prove their grounds of exculpation. For there could be nothing more reasonable, as it was also ordinary, than that when a pursuer did raise a libel against several persons (whereof some were innocent, and might be witnesses for the other criminals and pannels,) these other pannels might justly crave, that such as they alleged to be innocent might be first tried and purged, and so made capable to be witnesses; since otherways any malicious pursuer might include both the defenders and all their witnesses in one libel; and thus by making the witnesses *socii criminis* (fellow-criminals) in the libel, prejudge the defenders of all their evidences and defences.

To which it was answered for the pursuer, That he acknowledged, that when such a course was taken, to include both actors and witnesses in one libel, with a design to make the witnesses which the actors were to use, *socii criminis*, (fellow-criminals) and so to deprive the actors of their defence, and the probation thereof; these actors might, and were allowed to condescend upon those whom they intended to use as witnesses, and at the same time to propose a ground of exculpation for them; and so crave that they might be first tried upon the foresaid ground, to the effect that if thereupon acquit, they might be in case to be witnesses. But this could never be pretended to by any of the pannels: for an antecedent trial of such of their *socii* as they alleged were innocent, and to be their witnesses, unless at the same time the pannels did condescend upon the ground of their innocence, or upon the ground of their exculpation, whereupon they desired them to be first tried: for otherways there could be nothing more groundless, and (in effect) manifestly tending to elude all criminal proceeding against accomplices of the same crime, than to allow any of them at random to crave others to be first tried; and so the trial to proceed of one single person after another, until all should be absolved. Whereas the true and plain method was, and is, that the pursuer insist against such as he pleases, either singly or jointly; and unless some speciality be alleged, why the trial of one should proceed before the trial of another, it never was, nor could be left to the arbitrament of the pannels. And thus it was practised in all the instances alleged by the pannels, of trying such as were impeached for *socii criminis* (fellow-criminals) to be first purged, in order to be witnesses, viz. That the same was never allowed, unless some ground of exculpation was positively alleged for clearing of their innocence. And therefore, unless

Captain Green, and the other pannels, will positively offer to prove, that Reynolds (whom they would have first tried) was *alibi* (elsewhere) and not present in the action; their arbitrary demand of having him tried in the first place, without any reason assigned, cannot be regarded.

Which debate being heard, the Lord High Admiral and Assessors superseded to give answer, until the defenders should give in their other defences, and all should be informed upon together.

These being the preliminary defences, separately proponed by the persons convened in the first and second libels; the following defences were proponed in common by the defenders in both libels.

And 1. That the libel was informal and insufficient, as being too general and indefinit. And 2. That it did not condescend upon day and place. And 3. That the qualifications whereupon the relevancy appeared to be founded, were wholly irrelevant. And 4. That the additional conclusion was groundless and unwarantable.

And as to the first of these defences, it was alleged, That the libel was informal and insufficient, as being too general and indefinit; not condescending upon the name and designation of the ship wrongously attacked, nor upon the persons and designations of these alleged to be murdered, nor upon the quantity and quality of the goods alleged to be robbed and spoiled: all which ought to be done, seeing that criminal libels ought to be certain, and not general and indefinit; whereby also the defenders might be prejudged of defences, that might arise to them upon a particular condescendance. As for example; if the name and designation of the ship were condescended on, they might prove the same ship to be yet existing: and so of the persons alleged murdered, they might prove them to be yet alive: as also, that the goods alleged robbed, were yet extant, and lawfully disposed on by their owner.

To which it was answered by the pursner, That he opponed his libel, which was libelled as definitely as the thing would allow: for it being libelled, that the pannels did, without any lawful cause or warrant, attacque a ship sailed by her own crew, and having her own cargo aboard, and that they over-mastered the said ship in hostile manner, and murdered the men, and robbed their goods. These were certainly crimes manifest in themselves; and if the pannels had acted them in such manner, as to destroy the ship and the men, and embezzled the cargo, so as no farther knowledge could be had thereof, it was only an aggravation of their villany and wickedness, but could never hinder the accusation to proceed; seeing that what-over the ship, or men, or goods were, it was certainly piracy, robbery and murder, to attacque a ship hostilely, and to destroy the men, and rob the goods. And further, a condescendance was not at all in this case necessary, seeing that any such condescendance could be no

ground of exculpation. For whether the ship was of such a name and designation, or of another; or whatever the men and the goods were, yet the crime was still the same; viz. To attack and invade a free ship, without any cause or warrant, and to kill her men, and rob her goods.

And further; it is very well known in our criminal practice, that robberies and depredations are sustained, albeit neither the quality of the goods nor their owners be condescended on: and, in effect, the pannels their defence of indefinitness upon the ground foresaid is such, that if even in the road of Leith, before hundreds of spectators from both coasts, one ship should attack another, and hostilely invading her, should destroy her men, seize her goods, and sink the vessel, without suffering either vessel, men, or goods to be known; there could be no criminal libel upon it; because, forsooth, though hundreds see the whole action, yet it could not be more definitely libelled; save that the commander and crew of the one ship attacked the other hostilely, and destroyed her men, and seized her goods, and sunk her without further condescendance; which were most absurd. And therefore the libel, as it is libelled, both as to ship, men, and goods, attacked, murdered, and robbed, without any just cause or provocation, is both sufficiently definit and most relevant.

And whereas the defenders alledged, this indefinit libelled should the rather be rejected, because that the pannels were clothed with commission; which though they did not plead to exculpate the particular charge brought against them, yet was always a ground of presumption that they acted lawfully; unless the contrair were made appear, by a particular condescendance.

It was answered, that nothing did charge the pannels more home than the pleading of this commission, in so far as first, they neither could nor durst plead it, to exculpate the piracy, murder, and robbery charged. 2. It did not so much as make any presumption for the pannels; because the very tenor of the commission obliged them to keep a particular journal of whatsoever vessel they should attack hostilely; and their journals were produced by themselves, and no such thing appeared in their journals. And therefore it was manifest, that their pretence of a commission is only the more wickedly to cover their villany; since they can alledge nothing acted suitably to their commission, but that their own journals redargues them.

The second defence alledged by the pannels in both libels, was, that the libel was still defective and imperfect, wanting day and place; in so far as the place was generally designed the coast of Malabar, which is of a long and vast tract, and the day was one or other of the days of February, March, April, May, which is indefinit, and as good as no day. And day and place were not only required to be condescended on by our old law, 'Quon. attack.'

but the condescendance is also necessary for the defender's exculpation; seeing that if day and place were condescended on, he might then prove himself *alibi* (elsewhere) and so elude the libel, which now he cannot do.

To which it was answered, that the condescendance in the libel, as to day and place is sufficient; because the facts objected are thereby declared.

2. Day and place are never essential to a libel, except where either the nature of the crime, or its particular specification requires it; for then indeed, it must be distinctly and positively libelled. As if a man either charge another, or aggravate his crime, by its being a breach of the Lord's day; then the Lord's day must be condescended on. Or if a man libel another for beating, or drawing his sword within the king's-palace, where the place is also essential. But as to other crimes, which of their own nature are crimes at all times; for what can the mention of day or place signify in such crimes, as at all times, and in every place, are crimes without exception. And such are the crimes libelled. But,

3. If it be said, that the condescending on day and place is necessary to afford the defender his just exculpation of *alibi* (being elsewhere): it is answered, that in that case, the defender may put the pursuer to condescend on day and place for proving his exception of *alibi* (being elsewhere) as said is. But then, in common sense and law, it must be upon this condition; that the defender acknowledge the crime charged to have been committed; and only endeavours to exculpate himself, by offering to prove *alibi* (being elsewhere), and that more pregnantly than the pursuer offers to prove his indictment. For what sense or reason is there, that the pursuer should be put to condescend positively on day and place, in crimes that are crimes at all times, and every where; unless it be for this very reason, that the defender acknowledging the crime offers to purge himself by the exception of *alibi* (being elsewhere)? And therefore, since day and place are libelled in such a just latitude, as may declare the facts and crimes charged; and that the defender, on the other hand, doth not acknowledge the facts and crimes themselves, and offer to clear themselves by the exception of *alibi* (being elsewhere), there needs no farther condescendance. And this is the constant opinion of lawyers, and the perpetual custom of our practice.

The third defence proposed for the pannels, was, as to the qualifications of the libel, that they were no ways relevant, nor could be regarded to infer the conclusion of the libel, in as much as, 1. There was here no 'corpus delicti,' visible effect or subject of the crime, offered to be proven, which is always necessary, and principally where the crime is offered to be proven 'per presumptiones et indicia,' by presumptions and tokens: for there 'cum constat de corpore delicti,' when the subject of the crime is visible, this sustains the pre-

sumptions, and gives the 'indicia,' tokens or signs, their just weight.

To which it was answered, that the pannels procurators appear to be in a mistake, either as to what is a 'corpus delicti,' the subject of the crime, or as to what is meant by it: and for clearing of this point it is to be considered, the crimes are of two natures, some 'cum effectu permanente,' with permanent effects, as the killing of a man or the burning of a house; in which cases the dead body, and the rubbish, are permanent effects: but other crimes have no such permanent effects, as treasonable plottings, falsehoods, blasphemies, and the like, where indeed there is no such 'corpus delicti,' subject of the crime, as in the former crimes; but here all the crime consists 'in facto et animo,' in the fact and way of doing it; and the fact, though transient, yet if *dolose*, unjustly done, makes the crime. And therefore, according to this distinction, the 'corpus delicti,' subject of the crime, is never requisite to be proven, but in the aforesaid crimes that leave permanent effects; and neither then also, unless the crimes be libelled with these effects: for, if it should be libelled, for example, that a murderer not only killed, but burned the body to ashes, or drowned it in the sea, there would be no farther need to prove this 'corpus delicti,' subject of the crime, but only to prove the fact of killing, and killing *dolose*, unjustly, in which indeed the essence of the crime consists. And thus in confessions, as well as in libels; if a man confess a murder, and yet the body murdered no where appears; then the confession is not rashly to be laid hold upon, because it may proceed from design or melancholy: but yet, even in this case, that the confession should bear not only the murder but the destroying of the body murdered, by fire or water, as said is, then all the enquiry would be, whether the fact of murder be proven or not? Which things, if applied to our present case, where it is expressly libelled, not only that the pannels invaded the ship by piracy, but that they threw the men murdered over-board into the sea, and also sold the ship; all the enquiry that remains is, whether this fact was so done or not? And the libel is most relevant, though neither ship or men appear. And yet farther, if the pannels procurators will still be so grassier [unreasonable] as to require a 'corpus delicti,' subject of the crime, when it is expressly libelled, that the effect of the delict, was destroyed and put out of the way, they may satisfy themselves, that the goods robbed are still extant, and were found on board of captain Green's ship: and therefore it is plain, that in this case, and to sustain the 'indicia,' tokens and qualifications libelled on, there needs no farther either condescendance or proof, of the 'corpus delicti,' subject of the crime, which was industriously destroyed.

But, secondly, it was objected, that all the qualifications are insufficient and remote, and at best but probable: whereas the known rule

is, that crimes must be proven either 'per testes,' by witnesses above exception, or 'per documenta clarissima,' very clear proofs, or 'per indicia indubitata,' undoubted tokens: none of which hold in this case; for as for the 'indicia,' tokens, there is not one of them but take the same singly, as the hearing of shooting on the shore, the seeing the ship Worcester having another lying at her stern, the boats coming ashore for water, and the crew saying, 'they had been a boating,' of *sic de ceteris*, and so of the rest; but take them singly, and they may all have a good and innocent construction. Nor can it be said, that jointly they become stronger and fortify one another, as single arrows easily broken when apart, yet cannot be broken in a sheaf, because that all the qualifications, and 'indicia' tokens, in the libel, with the foresaid constructions, may be put upon them; the constructions will still take off the force; besides that, it is well known, that there are some 'indicia' only 'probabilia,' some tokens only probable, and that the law requires 'indicia indubitata,' undoubted signs, it being still the safer side to spare doubtful innocents, than to condemn only presumed and probable guilt. To all which is to be added, that is the common opinion of doctors, that presumptions can scarce ever conclude 'ad penam ordinariam,' to ordinary punishment, but at the most only 'ad penam arbitrariam,' to punishment at pleasure of the judge: and Mackenzie, in his *Criminals*, says, 'Presumptions are only founded on 'may be's, which may not be; and to allow crimes to be proven by presumptions, would leave judges to be arbitrary.' So that the common opinion runs against presumptions. But,

To all this it is answered, that yet it is clear law, that crimes may be proven 'per indicia indubitata,' by undoubted tokens, which in law are no more than violent presumptions, 'quæ fidem extorquent,' that force a belief: But the truth is, that in this case, the pursuer hath not only 'indicia indubitata,' undoubted tokens, but likewise positive witnesses, and also documents in writing; which, all being conjoined, do make a satisfying evidence, and fix a clear conviction; which is the utmost design of probation. But, secondly, it is most certain, both in law and practice, that many crimes are only discovered and proven 'per presumptiones et indicia,' by presumptions and tokens; and that the doctors in several crimes, especially these more atrocious, as treason, piracy, forgery, and the like, where wickedness endeavours most industriously to hide itself, do allow and approve probation 'per indicia,' by tokens, as most necessary for the punishing of these crimes. It were needless to multiply the citations, both from the law and doctors, that might be adduced in this case, as l. 3, s. 2, D. de Testib. where the rescript bears, "Quæ argumenta ad quem modum probanda cuique rei sufficienti nullo certo modo satis definiti potest;" 'The arguments to be used, and the

manner of proving every thing sufficiently, cannot certainly be defined,' and so forth: and so concludes, "Non utiq; ad usam probationis speciem cognitionem statim alligari debere, sed ex sententia animi tui, te æstimare oportere, quid aut credas aut parum probatum tibi spinaris." Item. l. 22. cod. ad legem Cornelianam de falsis, "ubi falsi examen inciderit, tunc acerrima fiat iudago, argumentis, testibus, scripturarum collatione, aliisque vestigiis veritatis, &c." 'You are not to be tied in taking cognizance of a matter to one method of probation, but you must act according to your own judgment, and consider what you are to believe, and what you think not fully proved. Item, &c. when the falsehood of a thing is to be enquired into, then a most strict search is to be made, by arguments, witnesses, comparing of hands, and other signs of truth, &c.' By which law, it is plain, that 'indicia et presumptiones,' tokens and presumptions, have place, and may make full faith; and how can it be otherwise, since first, it is certainly the interest of mankind that crimes be punished. 2. It is no less certain, that crimes endeavour to cover themselves. 3. That proof or probation is only to make an evidence for discovery. 4. That the end and standard of this discovery, and of all probation, is the satisfying conviction of the judge that has power to punish. Now if most crimes be committed without witnesses, and yet do otherwise appear certainly to be committed; and if this certainty arise from presumptions, and be without satisfying, it is just the same as if the crime was proven by many witnesses. And thus Matheus de Criminibus, Tit. de Probationib. cap. 6. per totum, and Gail. lib. 2. Obs. 149. Numb. 9. where he reasons most justly upon probation by presumptions, where there is a difficulty by reason of the want of witnesses; and still brings the matter to this true period, that whatever way faith be fully made to the judge, either 'per testes,' or per 'indicia' or 'per presumptiones,' either by witnesses, tokens, or presumptions, the end of probation is attained, and so the evidence sufficient.

The procurators for the pannels alledged, that this were to make judges too arbitrary: but though it hath indeed been the care of all lawyers to prevent arbitrariness, yet it is most certain, that where evidence doth only rise as providence offers, and circumstances concur, the arbitrament of the judge must take place, and the safety of mankind doth precisely lie here in the integrity and discretion of the judge, helped indeed by some rules of law, but no ways bounded or fixed to precise rules, which the matter will not bear. And therefore we see, that even in the most certain manner of probation, viz by witnesses, and the highest law of it, that in the mouth of two or three witnesses shall every thing be established, there is still an arbitrament inanimate as to the discretion of the judge, or otherwise the law would not have said, two or three, but would have fixed the number precisely; whereas it is most

certain, that in all probation there is an arbitrament of discretion, and though this arbitrament may be bounded by some rules, yet the ultimate and true standard of all probation, is the satisfying conviction of the judge, according to his best discerning.

These things then premised, viz. That a proof may be sufficient, 'per indicia et presumptiones,' by tokens and presumptions, the application to the present case is plain; for where the procurators for the pannels would take off the qualifications, as separately inconcludent, and at best probable, it is clearly captious; it being certain that many 'indicia,' tokens, conjoined and connected, as in this case, may make a sufficient evidence, and that here 'quæ non prosunt singula multa juvant,' i. e. 'Those things which taken singly, are of no effect, yet many of them together are.' And thus, if first the probation that shall be offered, of the hostile invading the other ship by the pannels, be laid down, and thereto added the surgeon's declaration of other circumstances, with all the other qualifications in the libel, they will certainly force a faith and full persuasion upon all rational men, though separately they cannot have that weight; one witness proves not, yet two prove, and in some cases two are scarce sufficient, but three are beyond exception. If then even in witnesses there be a mutual and fortifying concurrence, the same must also be admitted in presumptions 'et indicia.' So that upon the whole, the pursuer craves no more, than that every man that hears this libel, and shall hear its proof, lay himself fairly open without any prejudice to the light arising naturally from the matter itself, and its circumstances, and the proofs and confirmations thereof, as they are set down in the libel; and if he do not wilfully resist, he will certainly be satisfied to a full conviction. There are indeed hidden crimes, and such as are said to be of difficil probation, and the most atrocious, as treason, assassinations, piracy, forgery, are ordinarily most hid; and doctors say with reason, that their presumptions ought to be examined, 'acerrima indagine,' with the strictest scrutiny; but all this should be far from impressing any with the prejudice, as if a satisfying evidence may not be found in these cases. And therefore since all pleaded by the pursuer, is, that first his complex probation 'per testes et indicia,' by witnesses and tokens, may be fairly received. 2. That concurring and coming together, they may be allowed their just weight. And 3. That if that just weight, and the evidence that attends it, be satisfying, it may be held as concludent. It is clear as the sun light, that no stretch is intended, but justice fairly prosecuted: and though in this case of such an extraordinary crime, and where so much evidence appears, the pursuer might even, according to the claim of right, press the supplement of torture, yet he contents himself to inauate, that though this may be both just and necessary, yet he is

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hopeful, the force of his evidence may otherways prevail.

The fourth particular is the additional conclusion; but as to that conclusion, it is so natural in itself, and so well fortified by the authority of doctors, and so certain, not only in the case of counterband, but even of other forbidden goods, that nothing needs be added; for since every pirate is presumed to have the ship and all in it at his command, as his own; and since the ship is certainly the instrument, as well as the goods are presumed to be the effect of piracy, it follows naturally, that the confiscation of both ship and goods should be a part of the pains concluded. In respect whereof, &c.

[Here follows the Laws, and some other quotations used in the debate, where they are also Englished in their proper places.]

L. 2. § 2. "Ejusdem quoq; Principis extat rescriptum ad Valerium verum de excutienda fide testium, in hæc verba: Quæ argumenta ad quem modum probandæ cuique rei sufficient, nullo certo modo satis definiri potest, sicut non semper, ita sæpe sine publicis monumentis cuiusque rei veritas deprehenditur, alias numerus testium, alias dignitas et auctoritas, alias veluti consentiens fama confirmat rei, de qua quæritur, fidem. Hoc ergo solum tibi rescribere possum summam, non utique ad unam probationis speciem cognitionem statim alligari debere, sed ex sententia animi tui, te æstimare oportere, quid aut credas aut parum probatum tibi opinaris.—The true rescript of that prince to Valerius, about enquiring into the credibility of witnesses, is also extant, as follows: What arguments are sufficient to prove any thing, cannot certainly be determined; for though not always, yet it many times happens, that the truth of a matter is found out without public monuments. Sometimes the number, sometimes the dignity and authority of the witnesses, and at other times common fame confirms the truth of the thing in question. I can only therefore enjoin you, in short, that in your enquiry, or examination into a matter, you are not to be tied to any one sort of proof; but you must judge according to your own conscience, what you think to be proved, or not proved to you."

L. 22. C. ad Legem Corneliam de falsis. "Ubi falsi examen inciderit, tunc acerrima fiat indago argumentis, testibus, scripturarum collatione, aliisque vestigiis veritatis: nec accusatori tantum questio incumbat, nec probationis ei tota necessitas imponatur; sed inter utramque personam sit Judex medius: nec ulla interlocutione divulget quæsentiat; sed tanquam ad imitationem relationis, quæ solum audiendi mandat officium, præbeat notionem: Postrema sententia quid sibi liqueat proditurus.—When you are to enquire into the falshood of evidence, you must make the strictest inquisition that is possible, by arguments, witnesses, comparing of hands, and other signs of truth. Neither must the accuser only be questioned,

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or the whole charge of the proof be laid upon him: but the judge must act an indifferent part betwixt the plaintiff and defendant: and by no means divulge his opinion, but give both parties the hearing, and at last pronounce according to his own judgment."

Mathæus de Criminibus, Lib. 48. Dig. Tit. 15. de Probationibus, pag. 675. "Itaque si cum uno illo teste nulla concurrant argumenta, nequaquam audiendus erit: sed cum Paulo dicendum in lege duo 30 d. de Testam. tut. non Jus deficit, sed Probatio. At si argumenta alia concurrant, audiendus: Non enim necesse est unum crimen, uno et eo probationis, genere ostendi, veluti testibus tantum vel tabulis, vel argumentis. Possunt et diversa genera ita conjungi, ut quæ singula non nocerent, ea universa tanquam grando reum opprimant. [L. Sect. 3. ejusdem de Testib.] Hoc est, quod aliis verbis dicitur plures probationes imperfectas posse conjungi.—Therefore if with that one witness there be no concurring arguments, he is not at all to be regarded: but we must say with Paulus, in *Lego duo 30 d. de Testam. tut.* The law is not defective, but the proof. But if other arguments concur, he is to be regarded: for it is not necessary that one crime be made evident by one manner of proof only; as by witnesses, by writing, or by arguments only: For several sorts of proof may be so conjoined, that those which taken alone, would not affect the criminal, yet being put all together, come upon him, and overwhelm him like a storm of hail. [L. 3, Sect. 3, of the same D. concerning witnesses;] That is, as it is expressed in other words, several imperfect proofs may be joined together."

Gail. Obs. 66, Num. 12, p. 416. "Et regulariter testes singulares plenam fidem faciunt, quando aliquid in genere probandum est: puta Titium esse infamem aut furiosum, quo licet singulares sint respectu actuum, tamen si ratione finis convenient, integrè probant.—And regularly single witnesses make full proof, when any thing is to be proven in general; for instance, that Titius is an infamous person, or a madman: for though the witnesses be single in respect of the acts, yet if they agree in the end, the proof is full."

It may be easily granted, that 'regulariter indicia debent esse indubitata, ad condemnandum reum:' That regularly presumptions ought to be uncontrovertible, when a criminal is to be condemned upon them. But at that same time it must always be owned, that there are crimes excepted from the rule, by the general opinion of the doctors; such as 'crimen læsæ majestatis, et crimen assassinii,' treason and assassination; of which last sort, the crime of piracy is the most atrocious. And therefore Giurba, in *Concil. 22, num. 5,* saith, 'Sed assassinii qualitas homicidii adjecta, novam constituit delicti speciem:' The quality of assassination added to murder, forms a new sort of crime. Num. 17, 'In assassinio omnia procedant quæ in criminibus exceptis:' In assassination, all things are to proceed as in

excepted crimes. And num. 18. 'Assassinii crimen, ob illius atrocitatem equiparatur crimini læsæ majestatis:' The crime of assassination, because of its atrociousness and enormity, is made equal to treason. And then num. 22, he concludes, that 'in probatione assassinii, probabilia sufficiunt argumenta:' In the proof of assassination, probable arguments are sufficient. And Mascard, de Probationibus, *Conclus. 1228, num. 77.* 'In crimine assassinii probabilibus argumentis probari potest:' Assassination may be proved by probable arguments. And num. 78, 79, 80, and 83, he names the other atrocious crimes, where the like probation is sufficient; and in that same conclusion, num. 51. 'Quod ex multis judiciis simul junctis, resultat plena probatio etiam ad quem criminaliter condemnandum:' Many presumptions joined together, make full proof to condemn any man in a criminal case. And *Quest. 8, num. 8.* 'Probatio per evidentiæ omnibus est potentior, et inter omnes ejus generis major est illa, quæ sit per testes de visu:' Proof by evidence is the strongest of all proof, and especially by eye-witnesses. And *Conclus. 831, num. 4.* 'Probatio per conjecturas et indicia, in his quæ difficilia sunt probatu, et clandestine committuntur, habentur pro evidenti et clara probatione:' Probation by conjectures and presumptions, in things hard to be proven, and clandestinely committed, are held to be good and evident proof.

Carpzovius, *Quest. 223, num. 57.* 'Secus tamen res se habet, si plura indicia concurrant et conjunctim reum aggravent, quorum unumquodque per testem singularem probatur; nam una presumptio aliam juvat, pluraque indicia conjuncta fidem faciunt:' But the matter is otherwise, if many presumptions concur, and load the defendant; of which any one may be proved by a single witness: For one presumption strengthens another; and many of them joined together, make proof.

And in the trial of John Swintown for murdering of his wife, there was no direct proof by witnesses; but the libel being qualified, the proof was by a young girl of 14 or 15 years, who left John Swintown and his wife alone in the house, and went to the smith's shop to enquire for letters; but returning, found the door shut, and therefore went away for a little space; and then coming back and knocking, her master opened, and she perceived some red, like blood, upon his shoes. And when she came in, she found her mistress dead in the spence [buttery]; which was all she could say. And then another man declared, that he saw John Swintown go from his house to a stank, [ditch] and there wash his shoes. Which 'indicia,' presumptions, being joined with the proofs of their ill agreement, and frequent quarrellings before, did determine the assize. And though it was strictly objected, that in the mouth of two or three witnesses, every thing should be established; and that in the aforesaid case there was no direct witness at all, far less

two or three; and that even the aforesaid circumstances were only proven by single witnesses; yet the assize found that evidence in the presumptions and 'indicia' laid together, that they brought in their verdict proven; and Swintown thereafter confessed and was executed.

And in effect, unless that 'indicia' and presumptions be sustained, and even single witnesses for proving these several presumptions and 'indicia;' which is called a 'cumulative probation,' when all the witnesses and testimonies concur 'in idem crimen et ad eundem finem,' in the same crime, and to the same end, crimes, and these the most atrocious, would escape unpunished.

And therefore, upon the whole, it is most certain, when presumptions, qualifications, and 'indicia' concur, and make a full persuasive evidence; the probation should be held for as fully sufficient, as the most direct witnesses; since all that the witnesses can do, is only to make full faith in the matter, which may be otherwise supplied, as said is.

As to the additional conclusion, it may be noticed, that Molloy, de Jure Maritimo, lib. 1, cap. 3, sect. 19, pag. 60, saith, That when a merchant procures letters of mart or reprice, and then delivers the commission to persons to endeavour a satisfaction; if such persons commit piracy, the vessel is forfeited without controversy.

INFORMATION for Captain Thomas Green, commander of the Worcester, Captain John Madder, his chief mate, and others; against Mr. Alexander Higgins, Advocate, Procurator Fiscal of the High Court of Admiralty.

The said captain Thomas Green, captain John Madder, and others belonging to the ship called the Worcester, being pursued at the instance of the said Mr. Higgins, Procurator Fiscal, before the High Court of Admiralty, and the Lords Assessors appointed by the Privy Council; for the crimes of Piracy, Robbery, and Murder, conform to two criminal indictments, raised at the instance of the Fiscal. The case being fully pleaded before the honourable judges of Admiralty, and the lords assessors; both the accuser and accused were ordained severally to inform, as use is in such cases.

The criminal indictments being holden as repeated, which coincide both as to the conclusion, and 'media concludendi,' way of concluding, and denied; it is needless to repeat some preliminary defences that were proposed, seeing it seemed just to the honourable court to repel the same: and therefore the pannels proceed to their defences, whereupon they were ordained to inform. These are of two sorts; first, dilator; and secondly, peremptor.

And first, it was proposed for Henry Keigle, carpenter, and others of the pannels in the same indictment with him, that they could not be put to answer, unless the captain himself were

first insisted against; because they being his crew, and under his command, they could not be charged with any thing done by them, unless he were first tried.

It was answered for the pursuer, that they were not convened for any thing alleged acted by their captain, and by them as his crew; but that they were convened as *socii*, fellow-criminals, and partakers of the crimes libelled: which could be warranted by no commission nor character the captain did, or could pretend to: And that they were all charged as being *socii*, fellows, and involved together in one crime; and so every one must answer for himself.

It was replied for the said Henry Keigle, and the other pannels with him, that the pannels are libelled against as the crew of the Worcester, under the command of captain Thomas Green; and that under his command they did attack a ship, &c. So that they are here libelled only as complices and accessories to the crime alleged; and therefore, according to the principles of law, the principal delinquent ought to be first tried; especially where the captain was in custody, and might be brought to his trial; and that by the commission produced under the great seal of England, superscribed by king William, the said Thomas Green was clothed with a power authorizing him to attack and suppress pirates, which is a military power, and consequently implies an authority and command over the crew of the ship, to give ready obedience in all these matters: So that the poor pannels, who are of the crew, have all reason in the world to contend, that the captain, whose actings in these matters they could hardly well debate, should first pass the trial upon the crimes alleged; who might, by virtue of his commission, and otherways, exculpate and defend himself against the crime libelled; and consequently, all the crew that were in subjection under him.

This defence the pannel might perhaps plead to a further extent to absolve them entirely; but at present they conceive, it can hardly be denied, the captain should first undergo the trial. And there is a great difference betwixt *socii criminis*, fellow criminals, which are either independent upon one another, or if associate under one head, as banditti and pirates usually are (which is illegal and unwarrantable authority taken up) and persons accused as *socii criminis*, fellow-criminals, who by legal authority are subjected to the command of others: In which case, if the person trusted with the authority, has transgressed or abused it; if it does not plead an absolute exemption from the punishment of the transgression, at least it should have this effect, That the head and chieftain should be obliged first to his defence; which it is hoped the honourable judges will find just and reasonable.

The other dilatory defence, proposed for the captain and others, in the second libel, was, That whereas John Reynolds, second mate,

was convened and pannelled with him, as also some others, as *socii criminis*, fellow criminals, whom the captain and other pannels had cited as witnesses in their exculpation; it was both ordinary and absolutely necessary, that these persons so cited for exculpation, should be first tried; to the end, that being purged of the imputation of any crimes, they might be capable to be witnesses, for proving the defences of exculpation, that the captain and other pannels did propose and insist upon, for the vindication of their innocence.

It was answered for the Fiscal, That he owned, when both actors and witnesses were included in one libel, of design to deprive the actors of their defences; the actors might, and were allowed to condescend upon those whom they intended to use as witnesses: But then at the same time, they were obliged to propose a ground of exculpation for them, and so crave that they might be first tried upon the foresaid ground; otherways they could not, without such a special condescendance, intervert the form of trial. And there could be nothing more groundless, tending to elude all criminal proceedings against complices of the same crimes, than to allow any of them at random to crave others to be first tried; and so the trial to proceed of one single person after another: Whereas the true and plain method were, that the pursuer insist against such as he pleases, either singly or jointly. And unless some specialty be alledged why the trial of one should proceed before the trial of another; it never was, nor could be left to the arbitrament of the pannels. And therefore unless the captain will offer to prove, that Reynolds, and others whom they would have first tried, were *alibi*, elsewhere; their arbitrary demand of having them tried in the first place, without any reason, cannot be regarded.

It was answered for the captain, and the other pannels, That their demand upon this point was most consonant to reason, law, and form, in criminal procedures: That exculpation, which tends to the proof of innocence, and freedom from guilt, was most favourable; because it is still presumed, till the crime be proved. And therefore it is, that witnesses who are not regularly admitted for proving of a crime, because of some exception, will be allowed to prove the defender's innocence. And upon this account it is, that several things in form are remitted in exculpation: and there is nothing more material for defence of persons accused, against the prosecutor (who ordinarily is prejudged and prepossessed) to guard them against all the indirect methods that may be taken by the pursuer: to preclude the accused from the usual means of proving of their defences, than what is now demanded. And since none can be more proper witnesses for proving a pannel's defence (as for instance, '*moderamen inculpatae tutelae*,' i. e. the rule of blameless self-defence, as persons said to be present) therefore a violent pursuer, might in such a case of design to preclude the pannel

from his defence, cite those present as necessary. Upon which account it is, that both reason and law provides, that if the pannel does offer to prove a relevant defence, by the *socii criminis*, partakers of the crime accused with him; the pursuer must necessarily first proceed to the trial of these *socii*, partakers, who otherways would have been led as *habile* witnesses; to the end that being purged, they may be yet *habile*. This is so plain in reason, and has been looked upon as the constant practice in all criminal procedures in the judiciary courts of Scotland, that it is admired the Fiscal should make any opposition to it.

He so far owns in his pleading, that it is form and just upon the matter; but would shift it in this particular case, unless the pannels would alledge and found upon a particular ground of exculpation, and offer to prove and instruct the same, as that their *socii*, companions, cited as witnesses, were *alibi*, elsewhere; but this is altogether without foundation. For in all criminal prosecutions, the accused are not put to prove their defences, because the denying of the libel is a defence sufficient of itself; and if the libel be not proved, the pannel goes free by the rule '*actore non probante absolvitur reus*,' the plaintiff failing in his proof, the defendant is absolved; so that when there are persons accused as *socii criminis*, fellow-criminals, who might be very *habile* witnesses for exculpating the rest, if they did not lie under the imputation, when their trial is first required, that they may be purged of the imputation, there is no necessity to propose for them any special defence, eliding the libel? seeing the very denial of the libel is enough, and their innocence is presumed, except guilt be proved. And if the Fiscal will have the captain, and the other pannels, to condescend upon what ground their other *socii*, companions cited as witnesses, should be acquit; they need say no more, but that they ought to be acquit, because the libel is not true. And is there not the same reason to acquit pannels, because the libel is not proved; and consequently, to render them *habile* witnesses for other persons accused, as if the said persons were acquit upon a defence proposed, eliding the libel; whereby it plainly appears, the answer given is strained, and does mightily increase the suspicion against the Fiscal, that he has indicted the witnesses cited by the captain, and the other persons, in their exculpation, of purpose to preclude them from their means of defence; and the rather, that the pannels appeal to the honourable judges, if it was not owned by the pursuer in the debate, that Mr. Reynolds was ashore at the time of the pretended attack; besides that, the libel bears the chirurgion, and others of the crew, were ashore the time of the pretended action, which frees the pannels of all calumny. There can be innumerable instances given before the High Court of Justiciary in criminal matters, that where there are several complices indicted, if any of them have grounds of exculpation,

which they can prove by others of the pannels, their trial proceeds first. This is plainly asserted as uncontested by sir George Mackenzie, in his book of the law and customs of Scotland, in matters criminal, Tit. Excul. Par. 9, nor does he make any distinction, or requires that any special defence should be condescended upon for purging *socii criminis*, the fellow-criminals, to render them habile witnesses. The rule is plain in the prosecution of delicts, before civil courts, in order to repair damages, that if more persons be cited, as *co-rei ejusdem delicti*, guilty of the same crime, and that some of them are necessary witnesses for proving the defences proponed for others; the proof must first proceed against these. And so it was found by the Lords of Session the 24th of February, 1669. Mackartney against Irving, much more ought it to be in criminal cases, as lately in the case of Ross, of Auchnacloch, against captain Monre, before the Lords Justiciary. Nor is there any inconvenience from what is alledged, that this should tend to elide all criminal proceeding against complices, and occasion the lengthning out of the trial, to proceed to one single person after another; for as no time is to be grudged in the enquiry of such matters, which concern the life of man, so the pannels do not propone this preliminary defence to protract or delay the trial, and therefore are satisfied, that not only Reynolds, but their other *socii*, companions, indicted, who are likewise cited in their exculpation, go to the trial at one and the same time. The captain, and other pannels with him, do plainly argue thus; either Reynolds, and the other persons cited in the exculpation, are guilty or not; if they be guilty, it ought to be found so, for till that be, they are presumed innocent; if not guilty, what law or reason is there to preclude them from being witnesses for the captain and the other pannels defence? or what law is there that can oblige them to condescend upon, and propone a particular defence elideing the libel, when the libel is not ownel to be true, and that the pannels have all denied the same? So it is hoped the honourable judges, and the Lords Assessors, will not preclude them from the ordinary privilege, which, hitherto, has not been denied to any pannel.

For if this was allowed, a violent pursuer might prevent probation, and render it impracticable. For, suppose one man kill another in self-defence, two gentlemen walking can testify this; but to prevent the probation of *inculpata tutela*, unblameable self-defence, they are cited as parties; and they can prove by other two persons, at a greater distance, their *alibi*, being elsewhere, which when the pursuer gets notice of, they are made parties also; and so in *infinitem*. So that the said violent pursuer might prevent all probation, if the defender were obliged to alledge *alibi*, being elsewhere, for the witnesses of his exculpation.

The Peremptory DEFENCES proponed for the whole Pannels in both Libels, as totally excluding the same as Irrelevant, are as follows.

That the libel was irrelevant, as being general and indefinite, not condescending upon the name, designation, or any other sign or evidence, by which the ship alledged to be seized might be particularly distinguished, nor yet the persons names alledged to be murdered, or to whom the ship and goods robbed did belong; which seemed to be absolutely necessary in all such criminal indictments, not only as a requisite in form, but in equity and reason; without which, persons accused should be in great hazard from general and indefinite libels, and precluded from their means of defence, which otherways are obvious, when the accusation is certain, special, and pointed.

It was answered by the pursuer, That he had libelled as definitely and closely, as the thing would allow; for it being libelled, that the pannels did, without any lawful cause of warrant, attack a ship, sailed by her own crew, and having her own cargo aboard, and that they over-mastered the ship, in a hostile manner, and robbed the goods: these were certain crimes manifest in themselves, and if the pannels acted them in such a manner, as to destroy the ship and the men, and embezzled the cargo, so as no further knowledge could be had thereof; it was only an aggravation of the crime, and could not hinder the accusation to proceed; nor was any condescendance here necessary for exculpation; for of whatever designation the ship was, and whatever the men and goods were, yet the crime was still the same; and that it was known in our practice, robberies and depredations are sustained, albeit neither the quality of the goods nor owners be condescended upon; and in effect, the pannels' defence of indefinitness is such, that if in the road of Leith, before hundreds of spectators, one ship should invade another, destroy her men, seize her goods, and sink the vessel, whereby none of all these could be condescended upon, there could be no criminal libel upon it, because of the defence of indefinitness; which were most absurd.

It was replied for the pannels, That what was said, did not take off the objection of the indefinitness of the libel, which by our form and law can be the ground of no criminal accusation; for in all such procedures, 'debet constare de corpore delicti,' the visible effect or matter of the crime ought to appear; that is, that such a ship is taken by piracy, such men murdered, and the like. It is inconsistent with the nature of a criminal accusation, that men should be alledged to be murdered, ships seized, and these not condescended upon, and by our constant practice it is so required: nor can it be instanced, that ever any such indefinite libel was sustained. There are no questions whatsoever that are more nice than these concerning the life of man, and therefore the Eng-

lishman Coke, 7 Rep. Calvin's Case, observes, that an indictment should be most curiously and certainly penned; and the Old Books of the Majesty, requires several things to be specially expressed, as the name of the parties, day, year, place, cause of complaint, and damage; and as it is necessary in form, so this form has been founded upon just reason, for otherways these inconveniencies should plainly follow from general and indefinit libels.

First, A person indefinitely accused of a crime, as for example of murder, without expressing the person alleged to be murdered, can never be safe from an absolution or acquittments in courts; for how can he oppose his sentence absolutive to a special accusation that afterwards may be raised, seeing he cannot make the one meet the other. And if captain Green, and the other pannels, shall be now assoilized, this should not be a good defence to them, neither in Scotland nor England, if they should be afterwards criminally pursued, for attacking a ship, and murdering of men, specially condescended upon, because it is not clear, that the present indictment, as drawn, did concern these special accusations; and therefore accusations of that nature should be so special, as that afterwards the accused be not brought to any further disturbance. 2. The reason why such accusations should be special and definit, is, that the pannels be not precluded from the obvious defences, that tend to elide the libel; as here in this case, if the libel were special and circumstantiate, and some designation given of the ship and crew, it might be in their power to prove the obvious defence, that such a ship was, at the time libelled, in such another part of the world; that such a ship was either cast away by storm, or taken by pirates in such a place; or that the ship is yet extant, and the crew alive: from all which, the pannels are precluded by a general and indefinit libel; and therefore law has fixed the forms in these cases, that such accusations be not vagrant and loose.

It will not be denied, but that the time and place must be expressed: the same parity of reason obliges to a special condescendance of the party injured, damage sustained, as relating to such particular persons. And the above-cited sir George Mackenzie, in his title of libels, and the forms thereof, does set down, that if the defender crave the pursuer to express the day, because he offers to prove *alibi*, being elsewhere; then the judge should force the pursuer to express the day, or else the defender would be precluded from proving his innocence. The same reason is, that the pursuer here should be particular, as to the ship alleged to be seized, &c. because the pannel might offer to prove that that ship was *alibi*, elsewhere, at the time: and many more defences arise from the condescending upon the *corpus delicti*, the visible effect of the crime, than from the circumstance of either time or place. And this is set down conditionally, that these are not parts of a criminal indictment; except

first the accused propone their defence, *verbi gratia, alibi*, for instance, elsewhere: but it is laid down as a rule, that these are the requisites of all criminal libels; and the reason given is, that the pannels be not precluded from their defences: so that it is not more noticed, whether in this or that particular case this defect is prejudicial, because necessity has first induced the form; and then this form turns to be a law in all such cases. And the forecited sir George Mackenzie, in the same paragraph, thinks it so far a requisite of a criminal libel that the crime should be particular subsumed, that he brings it as an argument why it should be so, that it is declared by the 148th act, parl. 12, king James 6. That a libel bearing common regrating, or forestalling, in the general, shall be relevant, without condescending on the time or way of committing the same; and therefore concludes, that seeing this was an act dispensing with the regular way; 'exceptio firmat regulam in non exceptis,' an exception confirms the rule in things not excepted. And hence it is not a good argument, that the pursuer has libelled as definitely and closely as he could in the present matter: for better an inconvenience should be suffered in a particular case, than that a dangerous preparative be laid down, of admitting indefinite and general criminal libels, whereby poor pannels may be precluded from their means of defence. And this will serve to obviate the argument drawn from a very infeasible chance, supposed to fall out in the road of Leith; which as proposed, will likewise be otherwise circumstantiate as to a positive probation, and not founded upon conjectures and presumptions, as this case is.

Nor can the Fiscal altogether excuse his indefinite libel, seeing the means was not wanting of his coming to the knowledge of the ship, if it be true what is libelled; seeing the ship was not sunk, but sold to a particular person; and by some evidence of the ship, the crew might likewise have been known.

3. As law and form require such libels to be definite and special, so more especially in this case; because captain Green was clothed with a commission under the broad seal of England, which empowered him to act in hostility against all pirates: and therefore a general and indefinite libel, upon attacking and seizing a ship in his case, would seem very improper: for the presumption must run in his favours, that if any acts of hostility were done by him, they must be presumed in prosecution of his commission. This is not pleaded as a separate defence to elide the libel; nor is it pleaded to have given him full liberty to have ranged *impune*, with impunity, but as a speciality in this case; that as it is a defect in all criminal libels to be general and indefinite, so much more in this libel, he being clothed with a commission, and having power to assail. And therefore the presumption runs in his favours; except the particular ship were condescended upon, known to be a merchant and trading ship, and consequently be out of his duty in

attacking the same. And therefore it is frivolous to object, that the commission obliged him to keep a particular journal of whatsoever vessel he should attack hostilely; seeing the attacking of any vessel whatsoever is denied, that the argument from the commission only pressed to this end, that no indefinite libel of attacking ships, is relevant against a person clothed with a power to attack in certain cases; and which the accuser was so far convinced of, that for supplying that defect in his libel, he in his pleading and information, is pleased to condescend upon this special qualification, and mark of the ship attacked, that she was a free ship; which therefore he is obliged to prove.

The pursuer was at the pains to defend his libel from an objection, as if they had wanted time and place. The pannels did indeed conjoin this with the other; that as the determining the time and place seem to be absolutely requisite; so likewise the condescendance upon the particular names, and designations of the ship and person, both being equally and necessarily required, that pannels be not precluded from their just defences. And the time libelled comprehending the space of four months, being too indefinite; it is likewise reasonable in such a case, that the accuser should be more special; which the pannels humbly remit to the honourable admirals, and lords assessors.

The second peremptory defence proposed for the pannels was, that this being a libel founded upon several qualifications and presumptions, the same was no way relevant, to infer the conclusion of the libel. A proof of crimes from presumptions, is very hazardous: and hence it is, that some foreign nations do not condemn to death upon 'indicia,' tokens, but make them only ground to put to the question. And many lawyers are of opinion, that the ordinary pain of death is not to be inflicted upon a proof arising from 'indicia,' tokens, though never so pregnant. Of this opinion is Pharinacius, a great criminalist, and many others; and so is Brunemanus, ad L. ult. Cod. de Prob.

But in the next place, whatever the diversities of opinions and practices of nations may be in this point, yet it is certain, where 'indicia,' tokens, are taken as a proof, in order to punishment by death, they must be such as amount to a full proof, and leave no room for any scruple or doubt. This cannot be better expressed, than in the words of that excellent constitution of Theodosius the emperor, L. ult. Cod. de Prob. "Sciunt cuncti accusatores eam se rem deferre in publicam notitiam debere, quæ munita sibi idoneis testibus, vel instructa apertissimis documentis, vel iudiciis ad probationem indubitatis, et luce clarioribus expedita: Let all pursuers take notice, that when they bring a matter into public judgment, it ought to be supported by proper witnesses, or plain proofs, or undoubted signs and tokens, as clear as the sun at noon." And it will plainly

appear from the libel, that the qualifications therein narrated, are not such 'indicia,' tokens, as that excellent constitution requires; 'indubitata,' undoubted, 'apertissima luce clariora,' most evident, clearer than sunshine. There must always difference be made: some have a probable shew, and incline the mind of the judge; and yet cannot go the length of a full proof. L. 5, in Principio Pand. de Pœnis — "Sed nec de suspicionibus debere aliquem damnare; satius enim est impunitum relinquere facinus nocentis, quam innocentem damnari." Nor ought any man to be condemned upon suspicion; for it is better that a guilty man pass unpunished, than that an innocent man should be condemned. 'Indicia et presumptiones,' tokens and presumptions, have much easier place, where 'constat de corpore delicti,' where the subject of the crime is visible; because this helps to sustain the presumption, and gives indeed the 'indicia,' tokens, their just weight. But these, in such a case as this, 'ubi non constat de corpore delicti,' where the subject of the crime is not certain, are hardly receivable, seeing they want to be applied to a particular crime.

This so necessary a qualification of a criminal libel, 'ut constat de corpore delicti,' that the subject of the crime should be visible, the pursuer endeavoured to evade, by distinguishing betwixt crimes that are 'cum effecta permanente,' have permanent effects, and such as have no permanent effects. In the first, the 'corpus delicti,' visible effect of the crime, was necessary, not in the latter; and therefore subsumes that in the cases libelled, there could be no permanent effects; because all are libelled to be destroyed, and put out of reach: but plainly this distinction is against the pursuer; because certainly piracy, robbery, and murder, are such crimes as have permanent effects.

By the 'corpus delicti,' subject of the crime, is not meant, that the subject of the crime must be so extent, as to fall under the senses; but that the loss sustained is felt and known. As for example: in the crime of murder, though the body cannot be reached, yet the particular loss is known: it is notorious the queen wants a subject; friends want a relation, whom they can point out: in piracy and robbery, merchants want their ships and goods: so that the loss is felt and known, though (*de facto*) the subject cannot be pointed out. Whereas in this case, no such particular evidences can be given: none can complain of any particular loss, either queen or subject. And this is the true meaning of what is 'corpus delicti,' a subject of the crime. And whatever be the import of the objection against the libel, yet it is certain, to alledge qualifications as the proof of a crime, 'ubi non constat de corpore delicti,' where the subject of the crime does not appear, is most incongruous. And granting, as the pursuer does further contend, that he has libelled a 'corpus delicti,' a subject of the crime; in so far as he has libelled

a criminal fact, and deed of piracy, robbery and murder; which still being general, is not that 'corpus delicti,' subject of the crime, that law requires. Yet it was never heard, nor can there be any lawyer whatsoever adduced, that owns the 'corpus delicti,' subject of the crime, can be made out of presumptions and qualifications. When once it is known that a crime is committed, it may be owned that 'indicia indubitata,' undoubted tokens, such as law requires, may be a ground to fix the guilt upon particular persons; because there the certainty of a crime committed, does negatively enforce and give weight to the presumptions adduced: but when it is not known that a crime is committed, and that this is first to be made out; it is positively contended, this cannot be but by a positive probation of concurring habile witnesses; for presumptions may be apt to fix a guilt, 'quando constat de corpore delicti,' when the subject of the crime appears, or that the fact was done, but not before.

In the third place, the presumptions libelled are very far from being of that nature, as to be concluding to a conviction; and of that certainty and clearness as law requires. All probations in criminal cases should be infallible and certain; and if there be any meaning put upon presumptions founded upon for proving a crime, other than to infer a crime; that is to be laid hold upon, according to the manifest principles of law and humanity.

Now the qualifications libelled, are either such as not only can bear an obvious sense, different from what is imposed, but even a probable one; or are such as are vagrant expressions and hear-says, importing little or nothing, and cannot be applied to the crimes libelled.

1. The chirurgion his having heard shooting at a distance, while in the mean time he saw no engagement; can easily be applied either to shooting from other ships, or shooting upon salutation, &c.

2. That he did see the Worcester riding in her birth, and another ship (as it were) towed to her stern. 1. It is only conjecture being at such a distance. 2. It is improbable, because it is not the ordinary way; and hazards the ship falling foul of one another, in such common roads; which might be a ground to the chirurgion's mistake at such a distance.

3. That he did see the goods lying lumbered upon the deck when he came aboard. 1. It is usual in coast-trading, that the goods are brought by sloops, and so laid upon the deck till they be stowed. 2. This might be occasioned by the ship's drawing water. And to what concerns the word busking, and bringing water from the shore, it is taken notice of in the exculpation.

4. That when the doctor enquired what was the occasion of the goods lying in confusion, captain Madder should have answered, "Damn you, &c." might proceed from the said captain Madder's being in a passion, and concerned

for the goods being damaged, and a tarpauling-temper, very usual among seamen.

5. That the chirurgion did dress two wounded men; first, one is dead, another is not named in the libel; and the black, as the two other also, might have got their wounds by fighting among themselves, which is not unusual; and the rather, that they appeared unwilling to tell the chirurgion, of purpose to conceal their quarrel from the captain.

6. As to what is alledged to have occurred betwixt the doctor and the linguister, first, It is only hear-say; in the second place, there might be a ship sold to Coge Cominuda, but not taken by captain Green, and it is improbable he would have bought any ship taken by piracy upon that coast.

7. What is libelled about Reynolds and his sister, their missive letters, is far from being any qualification: for, first, Reynolds's letter is only a double. It is strained to put such a gloss upon the expression 'basely confess' to imply a guilt, and a guilt confessed; seeing the words may easily bear the meaning of a false accusation, and is explained by a subsequent expression, that he would rather die innocent, than accuse any man falsely; and in the beginning of the letter, declares, he knew nothing of the matter.

8. What relates to Haines his intercourse with Anna Seaton, and others, are nothing but general and ambiguous expressions, from which nothing can be gathered of the crimes libelled, and infers no more, than that he was using some stratagems to gain his mistress.

And as to the expression of the wickedness committed aboard their ship, it may easily relate to other crimes, which are but too frequent in such voyages; as also, as to what was done aboard after the ship was in the harbour; and as to the libelled expression used by Haines against captain Madder, as the same is general and indefinite, relating to no particular crime, so this might arise from some particular pique and prejudice against captain Madder: as to what follows anent the condition of the cargo, when the committee of the council unloaded the ship, it is sufficiently taken off in the exculpation.

Lastly, As to what is libelled anent the African Company's seal: First, It will not be pretended, that the Company were in use to give their seal to any ship whatsoever trading by their commission. 2. If any had casually gotteu the seal, there are a hundred ways whereby the same might have come to the Worcester's crew without piracy. And 3. The seal found aboard, and which is lying in the clerk's hand, which has a ship for its crest, might have given occasion to this mistake.

It being plain, that the qualifications libelled, are not of that import to give a full conviction; the pursuer's argument adduced from the end of probation, which is to find out the guilt, and convince of the truth, may be plainly taken off; that there is no such convincing proof, as can fully and certainly determine any judge, but

at most resolves in a conjectural proof, never to be admitted to take away the life of man.

The pursuer allows, that if every one of the circumstances should be taken separately, they would not be sufficient; but being taken jointly, and according to the series of the thing, they amount to a full proof and conviction; and this is the nature of all cumulative probation; which is not to be disjoined, 'Quæ non prouant singula multa iurant:' the pursuer does likewise adduce arguments and authorities for a cumulative probation to be of this nature, that there needs not two concurring witnesses for every circumstance. In answer to which the pannels do still plead, there is a great difference to be made betwixt cases where previously, 'constat de corpore delicti,' the subject of the crime appears, and that presumptions are only fixed upon to find out the guilty; and these cases, where in general a crime is libelled, although presumptions may be admitted in the first yet never in the other, as is already observed. 2. In all cases presumptions must be such as leave no room to doubt, and must not only have a probability with them, but a concluding certainty, which does not give ground to suspicion, but plainly and firmly convinces; which certainly cannot be inferred from the qualifications libelled; all which either can bear a different construction, or are such vagrant hear-says, and indefinite expressions, as amount to no certain and special crime. 3. Such presumptions cannot be conjoined, which particularly taken, are either of small weight or amount to very little, or that they can probably bear another sense and meaning, as has been demonstrated. And, 4. As to the conjunction of a cumulative probation, there is a difference to be made betwixt crimes that are continued, and where the proof may be had from the reiteration of the acts, and those other crimes which consist only in fact or deed.

In the first a cumulative probation may be admitted; as in a libel of bribery, one witness may be admitted for one fact, another for another, and so a third which may conjoin, although there be not two concurring for every particular fact, if there be other concurring evidences and arguments: but where there is one positive fact libelled, this does not so easily admit of a cumulative probation, especially which is always to be taken along, where the crime is not specified and determined, as in this case, and that the 'ipsam corpus delicti,' the subject of the crime itself, is still to be made out: so that the texts of the law, and authorities made use of by the pursuer, may be easily cleared, that either they relate to civil cases, as l. 3, par. 2, digest. *de Testibus*, where there must be a preference of a civil right of the one to the other: or if the texts and authorities relate to crime, the 'indicia,' tokens, allowed by them, must be 'indubitata et luce clariora' undoubted, and clearer than sunshine; and pre-supposes a crime committed, 'et corpus delicti,' the subject of the crime, and tends only

to fix the guilt. And it is positively denied, that there is any law, or lawyers, allowing any cumulative probation to prove a crime in general, 'ubi non constat de corpore delicti,' where the subject of the crime does not appear; and this is a speciality in the case of the present pannels; and the honourable Judges, and Lords Assessors, are earnestly intreated to consider it; which does really distinguish them from the other case mentioned by lawyers; all which relates to delicts actually committed, and that the presumptions deduced, tend only to fix the guilt; but when a crime is alleged in general to be committed, and no special condescendance upon what subject, upon whom, and against whom, presumptions there are not sufficient, without concurring habile testimonies; even supposing such a general indefinite libel could be relevant, against which there are abundance of arguments already given; for unless a fact be proved, even confession is not sufficient to fix a guilt, as must be acknowledged by all; much less presumptions, except the fact be once known.

The grounds of Exculpation.

As the pannels are confident, the Lords Judges will not find the libels so general and so qualified, relevant to infer the pains of death; so for further clearing their innocence, they offer the grounds of exculpation following, which are either instantly instructed, or offered to be proved.

And this may be laid down, which cannot be denied, that 'presumptio non delicti excludit presumptionis delicti,' the presumption of a crime not committed excludes the presumption of a crime; to which purpose, *Carpz. Part 3, Q. 123, Num. 69*, and in the same place, 'in dubio semper in mitiorem partem est presumendum.' In a doubtful case we must always take the more charitable side; where he cites multitudes of lawyers.

1. There is no reason to suspect the pannels of the crimes libelled, being persons of entire fame, without any imputation as to their antecedent life.

2. That they were under a charter-party, commissioned to a trading voyage, and insurance made upon ship and cargo, which does remove all suspicion of piracy, seeing such do ordinarily associate, and out-rig themselves for that end.

3. A strong argument of the pannels innocence as to piracy, is, that they were upon their voyage homeward, to make account to their freighters and owners of their outward cargo and returns; of all which they have exact journals and accounts, and upon their coming to Frazenburgh gave advice to their owners of their arrival, which was inserted in the public prints from London, as is usual, and likewise sent a packet over land from Frazenburgh to the African company in Scotland, from Mr. Innes, their correspondent in the East Indies, which is not to be supposed a pirate would be intrusted with: whereas, when such

turn pirates, it is usually for their own profit, and so not only rob others, but begin first with their owners, and are not found to return to make any such accounts; which is a stronger proof of the pannels innocence, than any circumstance libelled to the contrary.

4. *Menocheus de Presumptionibus*, lib. 5, *Pris.* 59, treating of the presumptions of innocence, lays down two very pregnant. First, that if the guilty person could flee and did not, that very presumption washes away the guilt; and gives account of a case out of *Lucian de Amicitia*, that *Antiphilus* and *Demetrius* being accused of sacrilege, were dismissed by the prætor, because when they could have fled, they did not. A second, when the accused party offers himself to the judge, it is a strong presumption of his innocence, since the innocent fear nothing, and the guilty have always the punishment before their eyes: both these favour the present pannels; for the rumour was spread, and came to their ears some weeks before they were imprisoned, and yet none of them offered to flee; and one *Ballantine*, being at full liberty amongst his friends the time of the incarceration of the rest, did of his own accord offer himself to prison.

5. That the alleged confession made by the chirurgeon must certainly labour under some mistake, because, although he mentions the attack to have been at *Calecut*, and that he heard the ship was sold at *Keilon*, which are at least 50 leagues distant: and although he was aboard all the time, yet he makes no mention how the ship was brought along, or any thing relating to it.

6. It is offered to be proven, that the black who is alleged to be wounded in the action, was not aboard 48 hours before the *Worcester* sailed from the coast of *Malabar*. And further, that the black declared when he came aboard, that he got the wound in his arm by the bite of a snake. And further it can be instructed by chirurgeons, that the wound, as it well appears, is more probable to have been got that way than by gun-shot.

7. Whereas it is libelled, That the ship was attacked by the *Worcester's* sloop upon the one side, and her coming up upon the other:

It is impossible a piracy of that nature could have been committed upon the coast of *Malabar*, and not certainly known in *England* long before the arrival of the ship, such is the exact correspondence, especially as to such matters; nor could the captain either have traded upon the coast, or been received by the factories and governors there, if he had committed any such piracy; whereas it is offered to be proven, that after the time libelled, he was ashore kindly entertained, exchanging letters with the governor of *Anjango*, and had instructions, and recommendation from thence to the governor of *Fort William* upon the coast of *Bengal*, whither he was obliged to go for refitting his ship, and stopping the leak, which he could not conveniently do at *Malabar*, because of the want of timber, cordage and money to be taken up upon bottomary.

8. It was asserted by the *Fiscal* in the time of the trial, that the action lasted two days and a half, which is a most improbable story; for either the night would have separated them, or the ship attacked might rather have run ashore, than fall into the hands of the pirates.

9. That the word 'busking,' libelled as a term signifying a ship preparing to fight, has a quite different construction in the ordinary acceptance among seamen, and signifies bearing close upon the wind by a press sail.

10. It is offered to be proven, that their water was staved on the coast of *Malabar* in a storm, and not by 'busking,' as it is libelled.

11. And to redargue the circumstance libelled, that the goods were not right stowed; it is acknowledged that the ship was 6 months in a harbour at *Bengal*, after the libelled engagement, and there loaded and unloaded: so that they had all opportunity to stow the goods as they thought fit, and certainly they were stowed as such goods usually are, which cannot be pressed without damage.

12. That the whole inward loading does not amount to a value beyond what might be reasonably expected from the outward cargo in a trading-voyage to these places.

And lastly, That in *January* preceding the time of the alleged action, there was a protest taken by the pannels against the governor of *Cochin*, for not allowing the ship *Worcester* to be refitted there, which she extremely needed before she could return to *Europe*, and so was in no capacity, either to fight or take a ship, as is libelled, in the months of *February*, *March*, *April* or *May* thereafter; and was a ship sheathed with lead, and therefore altogether unfit for such action; as also a slow sailer, and has not the least mark of any gun-shot upon her.

So that upon the whole matter, the qualifications libelled being so weak and conjectural, and the presumptions of innocency so strong upon the other hand; it is confidently expected that the honourable Judges and Lords Assessors, will reject the libel, and let the pannels go free; which they expect from the justice of the nation, and the humanity with which they are in use to treat all strangers.

An ANSWER to the *Fiscal's* Citations. With the Counter-Citations for the Pannels.

Though the doctors differ about the force of presumptions, and the effect of probation, 'ab indicibus et argumentis,' from presumptions and arguments; yet they all agree, that parallels drawn from civil causes to criminal ones, are not universally to be admitted. Now the *Fiscal* cites l. 3, sect. 2, de *Testibus*, for evincing that presumptions, 'indicia et argumenta,' tokens and arguments are to be received.

This law is taken out of the fourth book de *Cognitionibus*, written by *Callistratus*; the which book only treats of civil cases, as is manifest from the title of that book, dispersed in the ff. and commented by *Labittus*, to which I refer. Wherefore this being a receipt of the

emperor Hadrian in a civil cause, can never be applied in a criminal one.

The next citation is l. 22, C. ad l. Cor. de falsis, which is a rescript of the emperor Constantine to the governor of Rome, about a forged writ. Now as the law says, such forgeries can only be discovered by collation of writs, arguments inferred from thence, and witnesses. And it is well known, that in our law we have two ways of improbation; the direct, and the indirect. Now to apply that to the crime of robbery or murder, which must be proven *liquidissime*, and not by writs, seems very anomalous. Besides, crimes, according to their different nature, must be diversely proven; some by ear witnesses, as blasphemy, heresy, cursing of parents, &c.; others by eye-witnesses, as robbery, murder, &c. And the witnesses competent for proving the one crime, are not so in the other.

The third citation is out of Antonius Mathæus de Criminibus, ad lib. ff. 48, tit. 15, c. 3, n. 4. The Fiscal cites the latter end of this section; but omits to set down what the author refers to in the c. 6, of that title; the doing whereof will serve for an answer. The position is, "Unus testis non est audiendus; at si argumenta alia concurrant, audiendus est:" one witness is not to be regarded; but if other arguments concur, he is to be regarded. Now these 'argumenta' must be taken out of the c. 6, of that title. "Argumentum nihil est aliud, quam ratio quæ rei dubiæ facit fidem; et est vel necessarium, vel contingens. Necessarium, cujus consequentia necessaria est; veluti coivisse eam quæ peperit, furtum fecisse, qui rem furtivam efferens deprehensus est. Contingens, cujus consequentia probabilis est; veluti, cædem facisse, qui cruentatus est:—An argument is only a reason which proves a doubtful thing; and is either necessary, or contingent. That is a necessary argument, whose consequence is necessary: as for instance, that she who has brought forth a child, has certainly known a man; or that he who is taken in the fact carrying off stolen goods, has certainly committed theft. A contingent argument is that whose consequence is only probable: as for instance, that the man who is bloody has committed slaughter." The necessary argument obtains in criminal as well as in civil cases; but the contingent one, which the lawyers call a presumption, is not of such force. However, our author is of opinion, that "Contingentia argumenta quanquam singula fidem non faciunt, plura tamen conjuncta crimen manifestare possunt. Rem uno atque altero exemplo declarabimus. Occisus est calendaris Mævius: Titius perempti inimicus fuit; eidem sæpius non solum interminatus, sed et insidiatus est: cum deprehenderetur iisdem calendaris in loco cædis, cruentatus, cum gladio expalluit; interrogatus, nihil respondit, trepide fugit. Hic singula quidem argumenta infirmiora sunt, universa tamen cædis auctorem Titium evidenter designant. Simile est aliud,

Clodius cum Pompeia: nudus cum nuda reperti sunt in eodem cubili; preterit id momentum quo turpitude perfici potuit. Jam olim ille mulierem deperibat, ad stuprum per literas sollicitaverat. Quis dubitet utrumque adulterii damnare?—Though contingent arguments singly by themselves make no proof; yet several of them joined together may make the crime evident. We shall make it plain by an instance or two. Mævius was killed on the first day of the month: Titius was an enemy to the person killed, and not only frequently threatened him, but waylaid him. And when he was found on that same day of the month in the place of slaughter, bloody, with a bloody sword, answerable to the dimensions of the wound, he looked as pale as death: being examined, gave no answer, but ran away in a fright. In this case, indeed, the arguments singly considered do not say much; but taken all together, they plainly prove Titius to have been the author of the murder. What follows is such another instance. Clodius and Pompeia were found naked in the same bed, but not in the act; the time for that was past: but he had long courted the woman, and solicited her to lewdness by letters: then who can make any doubt to charge them both with adultery?" Now there being in the present case no such presumptions as these are; the rules laid down by this lawyer Mathæus, shew the circumstances libelled are not relevant.

The fourth citation is from Gail. l. 2, obs. 66, n. 12. The setting down of the title of the observation, which is "Jus vendendi a servitute sit realis vel personalis," Whether hunting be a real or personal service; and also the apostle of the section, which is, "in materia decimarum, testes singulares probant;" in matter of tythes, single witnesses are good; does shew, that the matter there treated is civil and not criminal. And many things are allowed in civil cases, which are not in criminal. A. Mathæus ad lib. ff. 48, tit. 15, de probationibus, cap. 2, num. 1. "Quicumque testes in causis civilibus esse non possunt, iis nec in criminalibus testimonii dictio est. At non contra; quicumque in causis civilibus audiuntur, ii etiam in criminalibus audiendi sunt. Graviora enim criminalia judicia civilibus sunt, ideoque et testium major delectus adhibendus est.—Whosoever cannot be witnesses in civil causes, are not to be admitted in criminal causes. But the contrary does not hold, viz. That whoever may be witnesses in civil causes, may also be admitted in criminal causes: For criminal causes are of more weight than civil causes; and therefore in criminal causes we ought to be more nice in the choice of witnesses." And the author illustrates this doctrine, by examples set down in that chapter.

What has been said will serve to answer what is cited out of Giurba and Mascardus.

The citation from Carpvovius's Criminal Practica, q. 123, n. 57, is imperfectly excepted: For I shall give no other answer than what is in the same place, from n. 55, to n. 59. "Pro-

bantur etiam indicia ad torturam per unicium testem, in casu quo plura indicia simul concurrunt, super quibus testes examinati diversimode deponunt; ac unus de uno, alter de alio tertius etiam de alio testificatur: Tum enim omnium testificatio simul juncta, verisimiliter facit de reo, qui propterea sub tormentis interrogari potest. Etsi enim hac de re non omni ex parte interpp. conveniant, nec desint qui assertionem hanc simpliciter rejiciant: Testesque hosce, ut singulares conjungendos non esse autument, eo quod singuli testes haudquaquam fidem faciant. Verissimum tamen est, plures imperfectas probationes in causis capitalibus conjungendas esse ad plenam probationem faciendam, quoad effectum tormenti: Quod communiter dicitur placuisse, licet namque unicium indicium ab uno teste probatum, semiplenam probationem et fidem, ad questionem de reo habendam non faciat: Secus tamen res se habet, si plura indicia concurrant, et conjunctim reum aggravent, quorum unumquodque per testem singularem probatur. Nam una presumptio aliam adjuvat; plurimaeque indicia conjuncta fidem faciunt. Quod ipsum tamen non aliter accipi velim, quam hisce, tribus concurrentibus. Primo, ut testes sint omni exceptione majores et idonei, ac vitae probatae. Secundo, ut deponant super indicis proximis delicto, non etiam super valde remotis indicis. Tertio, indicia super quibus isti singulares deponunt sunt plura, et talia quae reddant animum iudicis quasi certum quod reus deliquerit: Quorum alterutrum si deficiat, nullum in jure habeant effectum.—Presumptions make torture lawful, when there is but one witness, in a case where several presumptions concur, upon which witnesses being examined, swear in a different manner, and one witness as to one presumption, another as to another, and a third concerning a third. Then all their evidence being joined together, makes the charge against the person probable, who therefore may be examined by torture. For though interpreters do not all agree in this point, and that some of them do absolutely reject this opinion, and think these testimonies are not to be joined, because single witnesses do not make proof; yet it is a certain truth, that in capital cases several imperfect proofs are to be joined together, in order to make a full proof as to the effect of torture. This is the common opinion of the doctors; for though one presumption proved by one witness, does not make half proof in order to examine the prisoner by torture; yet the matter is otherwise, if several presumptions concur jointly to charge the prisoner, of which any one may be proved by a single witness; for one presumption strengthens another, and many of them joined together make up a proof. But I would not have this to be understood to be so, except when those three things concur: 1. That the witnesses be above all exception, proper in the case, and of a good life. 2. That they swear as to circumstances immediately relating to the crime, and not as to those which are very remote. 3. That the presumptions

upon which those single witnesses swear, be several and such as in a manner may satisfy the judge, that the prisoner is guilty of the crime. But if any of those things be wanting, they can have no effect in law."

The presumptions in Swintown's case were not in the indictment, but in the probation, and seem to have been very pregnant and near, whereas these libelled against captain Green are most remote.

But to put this matter in its true light, the honourable judge and assessors are desired to remember, that presumptions never respect the delict, or the 'corpus delicti,' but the delinquent, and the person of the accused: For as Menoch. de Presumpt. l. 1, q. 8, n. 2, very well says, "Presumptio versatur circa id quod gestum est, sed ignoratur qualiter gestum;" a presumption relates to the thing done, but not to the manner of doing it. Now, in the opinion of all lawyers, "delictum debet esse manifestum," a crime ought to be manifest. Julius Clarus, Sententiarum lib. 5, q. 4, "Sciendum est autem quod in omni casu nunquam debet iudex procedere ad aliquem actum, nisi prius illi constet delictum ipsum fuisse commissum.—But you must know, that a judge in no case ought to proceed to any act of court, except it appear to him before hand that the crime was committed." And in that place, illustrates this doctrine by examples, and the authority of other lawyers, to which I refer. His sentiment in the end of that question being, "Et ubi constet scelus non intervenisse, silebit processus:" And where it appears that no crime has been committed, proceedings must stop.

So that 'ubi constat de delicto,' where the crime is certain, the doubt and controversy arises about the delinquent, so as it is uncertain who is the person guilty, or the committer of this crime, whether it be robbery, piracy, or murder. Those who admit of probation, 'per indicia et argumenta,' by presumptions and arguments, distinguish these into 'proxima et remota,' near and remote; and to each of them give a different effect in law. Capr. Q. 120, N. 6. "Indicium definitur argumentum delicti perpetrati demonstrativum, seu indicativum. Idem, Q. 121, N. 1. Indicia propinqua ac certa, quorum unumquodque per se sufficit ad torturam. Hujus generis indicia non verisimilia ac probabilia sed certa, non levia aut perfunctoria sed urgentia; non dubia aut aequivoca, quae multipliciter interpretari queunt, sed conclusentia, et ad delictum inferentia, sunt; et crimini quasi inhaerent, ita ut iis apparentibus, nihil nisi rei confessio deesse videatur. And N. 14, et seqq. ut indicium semiplenam probationis per se solum sufficiens et idoneum sit ad torturam, tria requiruntur. 1. Ut testis ille unicus sit omni exceptione major. 2. Ut hic testis deponat de actu immediato, quod fieri intelligitur, si testis suae assertionis rationem per sensum corporeum rei convenientem reddat, quod nempe ipemet delictum ab accusato perpetrari viderit vel pressens interfuerit. Quare, si testis non de ipso crimine deponat, sed de ali-

quo actu ad delictum proxime accedente, indicium sufficiens non facit. Sicuti nec illius testimonium idoneum ac sufficiens est, qui deponit de delicto quod in oculos cadit, et rationem reddit de alio sensu. 3. Ut testis verbis dilucidis et indubitatis de crimine testificetur.—A presumption is defined to be a demonstrative or declarative argument of a crime committed. Q. 121, N. 1. Near and certain presumptions, of which every one is sufficient of itself to justify torture. Presumptions of this kind, ought not to be likely or probable, but certain; not slight or trifling, but urgent; not doubtful or equivocal, that may admit of many interpretations, but concluding, really inferring the crime, and so inseparable from it, that those presumptions appearing, there seems to be nothing wanting but the confession of the criminal, & N. 14, and following. To make the presumption of half-full proof sufficient to justify torture, there are three things required. 1. That that one witness be beyond all exception. 2. That the witness swear as to the immediate act, which must be understood, that the witness give for the reason of his assertion, some bodily sense proper to the thing, as for instance, that he saw the crime committed by the prisoner, or was present at the time: therefore if the witness do not swear concerning the crime itself, but concerning some act that comes next the crime, it is not a sufficient presumption. So neither is his evidence proper and sufficient, who swears concerning a crime that is the object of sight, and gives an account of it from some other sense. 3. That the evidence concerning the crime be in clear, and not doubtful expressions." After which our author gives examples; and it is to be observed, that these 'indicia,' presumptions, are required in order to torture; for they are not, in this author's opinion, sufficient to condemn, unless they be "certissima, indubitatissima, et luce meridiana clariora," most certain, undoubted, and as clear as the sun at noon, in which case they have the effect of a complete probation.

The 'indicia remota,' remote presumptions, which are also termed, "Dubitata, semiplena, quæ rem veram esse arguunt, non semper sed plerumque tantum, unde etiam non dicuntur simpliciter certa indicia, sed verisimilia et probabilia, seu veluti certa indicia.—Doubtful, half full, which do not always argue the matter to be true, but almost always; whence it comes, that they are not simply called certain presumptions, but likely, probable, or almost certain presumptions." And these cumulatively and in great number concurring, may bring a person to torture, but never to condemnation.

Now, by applying this general doctrine to the indictment, it is 'juris in controversi,' uncontrovertible law, that the 'delictum,' crime itself, cannot be proven 'per indicia et presumptiones,' by tokens and presumptions. And as to the pannels, though a delict crime were proven 'per testes omni exceptione majores,' by unexceptionable witnesses, yet it will

appear, that the circumstances libelled, do not deserve the name of 'indicia,' presumptions; and though they should be allowed that compellation, yet they are 'remotissima,' very remote, and by consequence can have no effect as to condemnation.

As to the additional conclusion, that the ship and cargo should be escheated, the Fiscal cites a wrong place, and supposes the case to be what it is not: but seeing he values Mr. Molley's authority so much, his opinion in this matter, as expressed in the same treatise, C. 4, §. 21, 22, is thus: By the law marine, if goods are taken by a pirate, and afterwards the pirate attacks another ship, but in the attempt is conquered, the prize becomes absolutely the captors, saving the account to be rendered to the admiral; and it is accounted in law a just captation of whatsoever may be got or taken from such beasts of prey, be the same in their own or in their successor's possession. But then an account ought to be rendered to the admiral, who may (if they happen to be the goods of the fellow subject of the captors, or of nations in amity with his own sovereign) make restitution to the owner; the costs and charges, and what other things in equity shall be decreed to the captor, first considered and deducted.

§. 22. By the statute 27 Edward 3, cap. 13. If a merchant lose his goods at sea, by piracy or tempest (not being wrecked) and they afterwards come to land, if he can make proof they are his goods, they shall be restored to him, in places guildable, by the king's officers and six men of the country.

This law hath a very near relation with that of the Romans, called 'de Usucapione,' or the Atinian law; for Atinius enacted, that the plea of prescription or long possession, should not avail in things that had been stolen, but the interest that the right owner had, should remain perpetual: the words of the law are these, "Quod surreptum est, ejus rei æterna auctoritas esset." Where by 'auctoritas,' authority, is meant 'jus domini;' the right of the proprietor remains perpetual, though a thing be stole.

CURIA JUSTICIARIA SUPREME CURIE ADMIRALITATIS tenta in Prætorio, vel nova Domo Sessionis Burgi de Edinburgo, decimo tertio Die Mensis Martii, 1705, per Judicem dictæ Curie, et per Honoratissimos Viros, Joannem Comitem de Loudoun, Joannem Dominum de Belhaven, Dominos Robertum Dundas de Arnistoun, Joannem Home de Blackadder, et Joannem Cockburn de Orms-toun, Assessores.

Curia legitime affirmata.

Intran'

Captain Thomas Green, commander of the ship called the Worcester, now in Bruntisland harbour.

Capt. John Medder, chief mate of the said ship.

John Reynolds, second mate of the said ship.

Thomas Linstead, assistant to the deceased supercargo of the said ship.

James Burn, boatswain of the said ship.

James Simpson, gunner.

Andrew Robertson, gunner's mate.

John Bruckley, seaman.

George Kitchen, seaman.

Henry Keigle, carpenter of the said ship.

George Haines, steward of the said ship.

Samuel Wilcocks, chirurgion's mate.

George Glen, seaman.

Alexander Taylor, seaman.

And *John Bannantyne*, seaman in the said ship.

All of them indicted and accused at the instance of Mr. Alexander Higgins, Procurator-Fiscal to the High Court of Admiralty, for the crimes of Piracy, Robbery and Murder, in manner mentioned in the two several indictments raised against them thereanent, before insert in the Court holden the 5th of March instant.

PURSUERS.—Mr. Alexander Higgins, Procurator-Fiscal, sir James Stuart, her Majesty's Advocat, sir David Dalrymple, and Mr. William Carmichael, her Majesty's Solicitors, sir Patrick Home, sir Gilbert Eliot, Mr. Alexander Mackleod, Mr. Francis Grant, Advocats.

PROCURATORS IN DEFENCE.—Sir David Thoirs, sir Walter Pringle, Mr. David Forbes, Mr. George Alexander, Mr. John Elphinston, Mr. John Spotswood, Advocats.

The libels and informations for both parties being read over in presence of the said judge and assessors, and in presence of the pannels and assizers.

The Judge and Assessors having advised both the indictments pursued by Mr. Alexander Higgins, procurator-fiscal of the High Court of Admiralty, against capt. Thomas Green, and the hail pannels in both indictments, with the foregoing debate thereupon; they find, that Keigle, and the other pannels in the first indictment, cannot be delayed in their trial, on pretence that capt Green, as their commander, ought to be first discussed; and therefore repel the first dilatory defence: And find that Reynolds being libelled against as *socius criminis*, a fellow-criminal; and there being no speciality, or particular ground of exculpation proponed, why he should be previously tried; therefore repel the second dilatory defence proponed for capt. Green, and these in the indictment with him; and repel the objection again the generality of the indictments, in regard of the nature of the crimes; and find the crimes of piracy, or robbery, or murder, as libelled, being proven by clear and plain evidence, relevant to infer the pains of death, and confiscation of moveable: reserving the consideration of the additional conclusion of the libels, until the verdict of the assize be returned; and repel the other defences proponed for the pannels; and remit the whole to the knowledge of an assize.

ROB. FORBES, I. P. A.

The Judge of the High Court of Admiralty and Assessors, continue the dyet at the said Mr. Alexander Higgins's instance, against the foresaid hail pannels, till to-morrow, being the 14th instant, at eight o'clock in the morning; and ordains the assizers and witnesses to attend then, ilk person under the pain of 200 marks; and the pannels to be carried back to prison.

CURIA JUSTICIARIA Supremæ Curie Admiraltatis tenta in Prætorio, vel nova Domo Sessionis Burgi de Edinburgo, decimo quarto Die Mensis Martii, 1705, per Judicem dictæ Curie, et per Honoratissimos Viros, Joannem Comitem de Loudoun, Joannem Dominum de Belhaven, Dominos Robertum Dundas de Arnistoun, Joannem Home de Blackadder, et Joannem Cockburu de Ormistoun, Assessores.

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ASSIZE.

Archibald Drummond, skipper in Leith.

John Findlayson, skipper in Borrostonness.

Mark Stark, skipper there.

James Jenison, skipper in Queensferry.

John Mathie, skipper in Prestounpans.

James Majoribanks, merchant in Edinburgh.

Edward Majoribanks of Halyards.

Sir James Fleeming of Rathobyres.

James Gordon, senior.

Robert Forrest.

Robert Innes.

Robert Walwood.
William Blockwood.
George Clark, and
William Neilson, merchants in Edinburgh.

The Assize lawfully sworn, and no objection of the law in the contrary.

Mr. Alexander Higgins the Pursuer, for Probation, adduced the witnesses after deponing, viz.

Compeared *Antonio Ferdinando*, cook's mate of the ship the Worcester, which was commanded by captain Thomas Green, aged twenty-four years, or thereby, unmarried: with captain George Yeaman, merchant in Dundee, sworn interpreter: And the said Antonio Ferdinando being solemnly sworn, * purged of partial counsel, examined and interrogate upon the libels, or indictments. And being interrogate if he believed in God, and if he was a Christian: depones, That he believes in God, and that he was born of Christian parents, and is a Christian himself. And being interrogate upon the indictment, depones, That at Callicoilan, upon the coast of Malabar, the deponent did come aboard the sloop belonging to captain Green's ship called the Worcester; at which time the deponent did enter to the service of Mr. Loveday, purser of the said ship; and the deponent cannot be positive of the time of his coming aboard, but believes it was about two years and a half since; and went in the said sloop from Callicoilan to Keilon, from thence to Cocheene, and from Cocheene to Callicut, and from that to Tillicherry: And depones, That upon the coast of Malabar thereafter, he did see an engagement betwixt the said sloop, the ship the Worcester, and another ship sailed by white-men, speaking English, and the said ship did bear English colours. And being interrogate by the pannels, what were the colours the said ship did bear: depones, That they were of white, red and black, like to these that the said captain Green's ship did bear; and that first the said captain Green, the merchant, and Mr. Loveday, went aboard the said stranger's ship, and stayed for about the space of a glass, and then returned aboard the Worcester, and then did man the sloop of the said ship the Worcester, with about 20 men, whereof were captain Green himself, Mr. Loveday, and the supercargo, the carpenter and gunner, and that the gunner's name was James Simpson, whom the deponent knows, and points to at the bar; and that there were four guns and two pattereroes aboard the said sloop; and thereafter captain Madder came aboard of the sloop, and that they did engage

* "I. e. Solemnly sworn, that he would tell the truth, and nothing but the truth; that he had no prejudice or ill will against any of the prisoners at the bar; that he got no good deed, or promise of good deed, for giving evidence against them; nor was suborned, or advised, or directed how to swear, or what he shall say in this trial." Former Edition.

the said other ship for the first and second days, and upon the third day the said ship was boarded by those in the sloop, who when they came aboard, did take up those of the crew of the said ship from under deck, killed them with hatchets, and threw them overboard, and that captain Green, captain Madder, and James Simpson the gunner, were three of these who went aboard and killed the men. And depones, that the ship the Worcester came up during the said engagement, and did fire at the said ship, but these in the Worcester did not board her: And the deponent believes, that the men who were killed and thrown overboard, as said is, were about ten in number; and depones, That there were but few goods aboard the said taken ship, which were carried aboard the Worcester, and amongst the rest he minds of some China root: and depones, that the said ship which was taken, was sailed by some of the crew of the Worcester, and carried to Callicoilan, and there sold, and that the said ship was not tied with a tow to the ship Worcester: And the deponent knows not what men were killed aboard the sloop or Worcester, or if any were killed, but the deponent himself was wounded in the arm, and which wound he now shews to the view of all; depones, that captain Madder told the deponent, that if ever he did tell any person, either white or black, of the said engagement, that he the said captain would kill the deponent, and heave him overboard; depones, that the upper coat which the deponent presently wears, was found aboard of the said taken ship, and which the deponent has kept since that time; depones, that during the said engagements, Haines, Bannantyne, Bruckley, Wilcocks, Burn, Robertson, Glen and Taylor, eight of the pannels, were aboard the ship the Worcester; and that Keigle, Kitchen and Linstead were aboard the sloop with captain Green, Madder and Simpson; and believes that Reynolds was then ashore at Callicoilan: And depones, that the said ship was sold to a king in Malabar, and that the man who bought the said ship bears a Malabar name, whose servant is called Coge Commodo: and depones that the said engagement happened between Tillicherry and Callicut upon the coast of Malabar; and depones, that he cannot positively tell how many guns the taken ship did bear, but thinks they were about twenty, small and great: and the deponent believes, that the engagement happened about a month after the deponent went aboard of captain Green's sloop; and cannot be positive when the ship the Worcester, did engage the said taken ship, whether first, second or third day; depones, that the engagement was by way of a running fight; depones, that he knows not who did sail in the said taken ship to Callicoilan. *Causa scientia*, the way how he came to know this, the deponent was aboard the said sloop during the time of the said engagement, and saw and heard, as he has deponed; and this is the truth as he shall answer to God. Depones, he can write after the Malabar character; and this

bantur etiam indicia ad torturam per unicum testem, in casu quo plura indicia simul concurrunt, super quibus testes examinati diversimode deponunt; ac unus de uno, alter de alio tertius etiam de alio testificatur: Tum enim omnium testimonio simul juncta, verisimiliter facit de reo, qui propterea sub tormentis interrogari potest. Etsi enim hac de re non omni ex parte interpp. convenient, nec desint qui assertionem hanc simpliciter rejiciant: Testesque hosce, ut singulares conjungendos non esse autumant, eo quod singuli testes haudquaquam fidem faciant. Verissimum tamen est, plures imperfectas probationes in causis capitalibus conjungendas esse ad plenam probationem faciendam, quoad effectum torquenti: Quod communiter dl. placuisse, licet namque unicum indicium ab uno teste probatum, semiplenam probationem et fidem, ad questionem de reo habendam non faciat: Secus tamen res se habet, si plura indicia concurrant, et conjunctim reum aggravent, quorum unumquodque per testem singularem probatur. Nam una presumpcio aliam adjuvat; plurimaque indicia conjuncta fidem faciunt. Quod ipsum tamen non aliter accipi velim, quam hiæce, tribus concurrentibus. Primo, ut testes sint omni exceptione majores et idonei, ac vitæ probatae. Secundo, ut deponant super indicis proximis delicto, non etiam super valde remotis indicis. Tertio, indicia super quibus isti singulares deponunt sunt plura, et talia quæ reddant animum iudicis quasi certum quod reus deliquerit: Quorum alterutrum si deficiat, nullum in jure habeant effectum.—Presumptions make torture lawful, when there is but one witness, in a case where several presumptions concur, upon which witnesses being examined, swear in a different manner, and one witness as to one presumption, another as to another, and a third concerning a third. Then all their evidence being joined together, makes the charge against the person probable, who therefore may be examined by torture. For though interpreters do not all agree in this point, and that some of them do absolutely reject this opinion, and think these testimonies are not to be joined, because single witnesses do not make proof; yet it is a certain truth, that in capital cases several imperfect proofs are to be joined together, in order to make a full proof as to the effect of torture. This is the common opinion of the doctors; for though one presumption proved by one witness, does not make half proof in order to examine the prisoner by torture; yet the matter is otherwise, if several presumptions concur jointly to charge the prisoner, of which any one may be proved by a single witness; for one presumption strengthens another, and many of them joined together make up a proof. But I would not have this to be understood to be so, except when those three things concur: 1. That the witnesses be above all exception, proper in the case, and of a good life. 2. That they swear as to circumstances immediately relating to the crime, and not as to those which are very remote. 3. That the presumptions

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But to put this matter in its true light, the honourable judge and assessors are desired to remember, that presumptions never respect the delict, or the 'corpus delicti,' but the delinquent, and the person of the accused: For as Menoch. de Presumpt. l. 1, q. 8, n. 2, very well says, "Præsumptio versatur circa id quod gestum est, sed ignoratur qualiter gestum;" a presumption relates to the thing done, but not to the manner of doing it. Now, in the opinion of all lawyers, "delictum debet esse manifestum," a crime ought to be manifest. Julius Clarus, Sententiarum lib. 5, q. 4, "Sciendum est autem quod in omni casu nunquam debet judex procedere ad aliquem actum, nisi prius illi constet delictum ipsum fuisse commissum. —But you must know, that a judge in no case ought to proceed to any act of court, except it appear to him before hand that the crime was committed." And in that place, illustrates this doctrine by examples, and the authority of other lawyers, to which I refer. His sentiment in the end of that question being, "Et ubi constat scelus non intervenire, silebit processus." And where it appears that no crime has been committed, proceedings must stop.

So that 'ubi constat de delicto,' where the crime is certain, the doubt and controversy arises about the delinquent, so as it is uncertain who is the person guilty, or the committer of this crime, whether it be robbery, piracy, or murder. Those who admit of probation, 'per indicia et argumenta,' by presumptions and arguments, distinguish these into 'proxima et remota,' near and remote; and to each of them give a different effect in law. Capr. Q. 120, N. 6. "Indicium deficiat argumentum delicti perpetrati demonstrativum, seu indicativum. Idem, Q. 121, N. 1. Indicia propinqua ac certa, quorum unumquodque per se sufficit ad torturam. Hujus generis indicia non verisimilia ac probabilia sed certa, non levia aut perfunctoria sed urgentia; non dubia aut æquivoca, quæ multipliciter interpretari queunt, sed conclusiva, et ad delictum inferentia, sunt; et crimini quasi inherent, ita ut iis apparentibus, nihil nisi rei confessio deesse videatur. And N. 14, et seqq. ut indicium semiplenam probationis per se solum sufficiens et idoneum sit ad torturam, tria requiruntur, 1. Ut testis ille unicus sit omni exceptione major. 2. Ut hic testis deponat de actu immediato, quod fieri intelligitur, si testis sui assertionem rationem per sensum corporeum rei convenientem reddat, quod nempe ipsum delictum ab accusato perpetrari viderit vel præsens interfuerit. Quare, si testis non de ipso crimine deponat, sed de ali-

quo actu ad delictum proxime accedente, indicium sufficiens non facit. Sicuti nec illius testimonium idoneum ac sufficiens est, qui deponit de delicto quod in oculos cadit, et rationem reddit de alio sensu. 3. Ut testis verbis dilucidis et indubitatis de crimine testificetur.—A presumption is defined to be a demonstrative or declarative argument of a crime committed. Q. 121, N. 1. Near and certain presumptions, of which every one is sufficient of itself to justify torture. Presumptions of this kind, ought not to be likely or probable, but certain; not slight or trifling, but urgent; not doubtful or equivocal, that may admit of many interpretations, but concluding, really inferring the crime, and so inseparable from it, that those presumptions appearing, there seems to be nothing wanting but the confession of the criminal, & N. 14, and following. To make the presumption of half-full proof sufficient to justify torture, there are three things required. 1. That that one witness be beyond all exception. 2. That the witness swear as to the immediate act, which must be understood, that the witness give for the reason of his assertion, some bodily sense proper to the thing, as for instance, that he saw the crime committed by the prisoner, or was present at the time: therefore if the witness do not swear concerning the crime itself, but concerning some act that comes next the crime, it is not a sufficient presumption. So neither is his evidence proper and sufficient, who swears concerning a crime that is the object of sight, and gives an account of it from some other sense. 3. That the evidence concerning the crime be in clear, and not doubtful expressions." After which our author gives examples; and it is to be observed, that these 'indicia,' presumptions, are required in order to torture; for they are not, in this author's opinion, sufficient to condemn, unless they be "certissima, indubitissima, et luce meridiana clariora," most certain, undoubted, and as clear as the sun at noon, in which case they have the effect of a complete probation.

The 'indicia remota,' remote presumptions, which are also termed, "Dubitata, semiplena, quæ rem veram esse arguunt, non semper sed plerumque tantum, unde etiam non dicuntur simpliciter certa indicia, sed verisimilia et probabilia, seu veluti certa indicia.—Doubtful, half full, which do not always argue the matter to be true, but almost always; whence it comes, that they are not simply called certain presumptions, but likely, probable, or almost certain presumptions." And these cumulatively and in great number concurring, may bring a person to torture, but never to condemnation.

Now, by applying this general doctrine to the indictment, it is 'juris incontroverti,' uncontroversible law, that the 'delictum,' crime itself, cannot be proven 'per indicia et presumptiones,' by tokens and presumptions. And as to the pannels, though a delict crime were proven 'per testes omni exceptione majores,' by unexceptionable witnesses, yet it will

appear, that the circumstances libelled, do not deserve the name of 'indicia,' presumptions; and though they should be allowed that compellation, yet they are 'remotissima,' very remote, and by consequence can have no effect as to condemnation.

As to the additional conclusion, that the ship and cargo should be escheated, the Fiscal cites a wrong place, and supposes the case to be what it is not: but seeing he values Mr. Molley's authority so much, his opinion in this matter, as expressed in the same treatise, C. 4, §. 21, 22, is thus: By the law marine, if goods are taken by a pirate, and afterwards the pirate attacks another ship, but in the attempt is conquered, the prize becomes absolutely the captors, saving the account to be rendered to the admiral; and it is accounted in law a just capture of whatsoever may be got or taken from such beasts of prey, be the same in their own or in their successor's possession. But then an account ought to be rendered to the admiral, who may (if they happen to be the goods of the fellow subject of the captors, or of nations in amity with his own sovereign) make restitution to the owner; the costs and charges, and what other things in equity shall be decreed to the captor, first considered and deducted.

§. 22. By the statute 27 Edward 3, cap. 13. If a merchant lose his goods at sea, by piracy or tempest (not being wrecked) and they afterwards come to land, if he can make proof they are his goods, they shall be restored to him, in places guildable, by the king's officers and six men of the country.

This law hath a very near relation with that of the Romans, called 'de Usucapione,' or the Atinian law; for Atinius enacted, that the plea of prescription or long possession, should not avail in things that had been stolen, but the interest that the right owner had, should remain perpetual: the words of the law are these, "Quod surreptum est, ejus rei æterna auctoritas esset." Where by 'auctoritas,' authority, is meant 'jus domini;' the right of the proprietor remains perpetual, though a thing be stole.

CURIA JUSTICIARIA SUPREME CURIE ADMIRALITATIS TENTA IN PRÆTORIO, VEL NOVA DOMO SESSIONIS BURGI DE EDINBURGO, decimo tertio Die Mensis Martii, 1705, per Judicem dictæ Curie, et per Honoratissimos Viros, Joannem Comitum de Loudoun, Joannem Dominum de Belhaven, Dominum Robertum Dundas de Arnistoun, Joannem Home de Blackadder, et Joannem Cockburn de Ormistoun, Assessores.

Curia legitime affirmata.

Intran'

Captain Thomas Green, commander of the ship called the Worcester, now in Bruntisland harbour.

Capt. John Madder, chief mate of the said ship.

John Reynolds, second mate of the said ship.

a bad humour, forbore for some time to speak about his brother, or captain Drummond: but after that they had taken some cups about, and that the deponent thought Haines in a better mood, the deponent asked the said Haines, if he had not heard of, or seen any Scots ship coming to or from the East Indies? depones, that Haines then said, "That while their ship was upon the coast of Malabar, (where they had taken in a black, whom Haines pointed to, and had by him at the time) a Dutch ship informed them, that one captain Drummond, commanding a Scots ship, was turned pirate; and that thereupon they manned their sloop, and made themselves ready, in case they should have been attacked." But Haines added, "That they did not see the said captain Drummond." Depones, that the said Haines did likewise say, "That he had in his custody, at the time the ship the Worcester was seized in the road of Leith, that which he would not have fallen in the seizers hands for twice the value of the ship." And depones, that the said Haines likewise added, "That he threw it overboard after the ship was seized;" saying, "Let them seek it now in the bottom of the sea." Depones, that while the deponent was discoursing with the said Haines about the worth of the ship, the said Haines said to the deponent, that it would not be found to be so rich as it was expected: but that there was still in the ship that which would never be found by the seizers, unless they pulled her board from board: and that the said Haines said, he knew very well where that thing lay. Depones, that his mother having gone to the other room to Mrs. Seaton, the mistress of the house; she desired the said Mrs. Seaton to enquire of Haines concerning her son, the deponent's brother; and that Mrs. Seaton said, that Haines was a suitor of Anna Seaton, her daughter, who would be more proper to enquire that of Haines: and that the next morning Anne Seaton declared, in presence of Kenneth Mackenzie, that Haines had said to her, "He found they had a design to pump him; but that they should not be the wiser of him: though what he had said, he had said;" but would say no more at that time. *Causa scientie patet.* And this is the truth, as he shall answer to God.

ROBERT FORBES.

JAMES WILKIE.

Compeared *Kenneth Mackenzie*, indweller in Cannongate, aged 27 years, or thereby; married: who being solemnly sworn, purged of partial counsel, examined and interrogat *ut supra*; depones, that in the month of October last, when the ship the Worcester was lying in Bruntisland harbour, the deponent was in widow Seaton's house with George Haines (whom he now points to in the pannel) and James Wilkie, and heard the said James Wilkie ask the said Haines about captain Thomas Drummond's ship; at which the said Haines fell in a passion; but the deponent

going out of the room, heard no more what passed. And depones, that the same night the deponent heard Mrs. Wilkie intreat the said widow Seaton, to endeavour to get an account from any of captain Green's crew, of her son, who had gone doctor aboard of the said captain Drummond's ship: and having returned next morning, the deponent heard Anne Seaton, daughter to the said widow Seaton, tell, that Haines had said to her, that they had a design to pump him; but what he had said, he had said. And that he the said Haines told the said Anne Seaton, when asked by her, why he fell in a passion at the mentioning of captain Drummond? That he answered, that he knew more of the said captain Drummond than he would tell. *Causa scientie patet.* And this is the truth, as he shall answer to God.

ROBERT FORBES. KENNETH MACKENZIE.

Compeared *William Wood*, one of the gunners of her majesty's artillery, aged 53 years, or thereby; married: who being solemnly sworn, purged of partial counsel, examined and interrogat *ut supra*; depones, that the deponent was in company with George Haines, at Bruntisland; and that one John Henderson, writer, in Edinburgh, was likewise present; depones, that the said George Haines, and the rest in company with the deponent, having drunk pretty warmly, the said George Haines fell in a melancholy fit; and John Henderson having asked the reason, the said Haines expressed himself thus: "It is a wonder that since we did not sink at sea, that God does not make the ground open and swallow us up when we are come ashore, for the wickedness that has been committed during this last voyage, on board of that old bitch Bess;" pointing to captain Green's ship. And depones, that thereafter he went a walking with the said George Haines in the links of Bruntisland; and the deponent happening to tell the said Haines, that captain Madder's uncle was burnt in oil, for attempting to burn the Dutch ships at Amsterdam; the said George Haines did thereupon tell the deponent, "That if what captain Madder had done, during his last voyage, were as well known, he deserved as much as his uncle had met with." *Causa scientie patet.* And this is the truth, as he shall answer to God.

ROBERT FORBES.

WILLIAM WOOD.

Compeared *John Henderson*, writer in Edinburgh, aged 20 years, or thereby; unmarried: who being solemnly sworn, purged of partial counsel, examined and interrogat *ut supra*; depones, *conformis precedenti*, (viz. *William Wood*) in *omnibus*; except as to what happened betwixt the said William Wood and George Haines in the links of Bruntisland, in relation to captain Madder and his uncle. *Causa scientie patet.* And this is the truth, as he shall answer to God.

ROBERT FORBES. JOHN HENDERSON.

Compeared *Anne Seaton*, indweller in Brunt-

island, aged 19 years, or thereby; unmarried: who being solemnly sworn, purged of partial counsel, examined and interrogate *ut supra*; depones, that she was present with George Haines, one of captain Green's crew (whom she points at the bar) in Bruntisland, at the time when Mrs. Wilkie and her son were there: that Mrs. Wilkie desired the deponent to endeavour to learn if George Haines knew any thing of captain Drummond, because the said Mrs. Wilkie had a son that went along with him. Depones, that she the deponent did accordingly enquire at Haines's, but he denied that ever he saw the said ship, or knew any thing of her. Depones, that she was likewise present with George Haines, when William Wood, one of her majesty's artillery, and John Henderson, were in company with him, and that at that time, George Haines, in a melancholy fit, expressed himself thus: "It is a wonder, that since we did not sink at sea, that we are not swallowed up with the ground ashore, for the sins committed on board of captain Green's ship." And depones, that he likewise added, "during the last voyage." And depones, that Haines said to the deponent, "That he knew more of captain Drummond than what he would express at that time:" depones, that the said George Haines told the deponent, "That when the ship was seized in Leith road, he had aboard with him that which he would not have had to fall in the seizer's hands for twice the value of the ship, but that he threw the same overboard." Depones, that she never talked with Haines about an old sweetheart that she had aboard of captain Drummond's ship, nor did the said Haines say to the deponent, "That she would never see him again." And depones, that she never heard Haines say, "That there was yet aboard of the said ship what would not be found unless she were pulled board from board." And depones, that when the deponent was enquiring of Haines about Mrs. Wilkie's son, that he said, "That she designed to pump him as Mr. Mackenzie had done before." *Causa scientia patet.* And this is the truth, as she shall answer to God.

ROBERT FORBES.

ANNE SEATON.

Compeared captain *John Brown*, skipper, in Leith, aged 40 years, or thereby, married: who being solemnly sworn, purged of partial counsel, examined and interrogate *ut supra*; depones, That he went aboard the ship the Worcester when the goods were unloaded, by order of the lords of the committee of privy-council, and saw the hatches, which were fast and sealed, opened; depones, that on the larboard-side of the ship, the goods were much damaged, and that few or none of the packed goods were numbered or marked, which is customary; and the deponent himself never received any goods but what were marked, that he might know to whom they belonged; depones, that the goods aboard the said ship, were regularly enough stowed: and being in-

terrogate for the prisoners, whether or not it be customary that goods be marked or numbered where there is a supercargo aboard; depones, that it is always customary, whether they belong to ten, or one man: and being interrogate for the pannels, whether or not the reason why the goods wanted mark or number, might be, because that the goods were much damaged, and the pepper spoiled and heated; depones, that where the goods or pepper were spoiled, the bales were all rotten to pieces, but where the pepper and other goods were intire, there were bales and packs which wanted both numbers and marks: and being likewise interrogate by the pannels, whether or not there were some packs and bales that had a common ship-mark, and some who had only the vestige thereof, being near worn out; depones, that there were a great many who had a common mark, and that it was plain and obvious, and that there were others who had no mark at all, and that the most part wanted marks altogether, and that there were two or three bales which had the vestige of a mark. *Causa scientia*, the deponent witnessed the unloading of the said ship, at the desire of the lords of the committee of privy-council, and saw, and knows as he has deponed. And this is the truth, as he shall answer to God.

ROBERT FORBES.

JOHN BROWN.

Compeared *Archibald Hodge*, skipper, in Leith, aged 40 years, or thereby, married; who being solemnly sworn, purged of partial counsel, examined and interrogate *ut supra*; depones, that he was aboard the ship the Worcester in Bruntisland harbour, when the committee of privy-council came to rummage her, and saw goods unloaded from aboard; depones, that the most part of the goods wanted both number and marks, which is no wise common or regular in any ship that ever the deponent has seen: but the deponent did never see any East-India ship unloaded before. *Causa scientia patet.* And this is the truth, as he shall answer to God.

ROB. FORBES.

ARCHIBALD HODGE.

Compeared *John Glen*, goldsmith, indweller in Leith, aged 43 years, or thereby, married: who being solemnly sworn, purged of partial counsel, examined and interrogate *ut supra*; depones, that the second day after the ship the Worcester came to Leith road in summer last, the deponent went aboard the said ship, and about twelve o'clock of the day, the deponent was in the cabin with captain Madder and one Hammond, now in England, as the deponent is informed; at which time the said captain John Madder took a seal out of his pocket, and asked the deponent, what he thought of the Scots African and Indian companies arms, and at the same time gave the deponent the said seal in his hand, to which the deponent did look, and found thereon the St. Andrew's cross, a drummedary, a camel with a castle on the back of it, and a ship with a rising-sun above the helm, and two wild men as supporters; and that

the said seal, to the best of the deponent's memory, was near the bigness of an English half-crown, and had an handle of *Lignum vitæ*. And being interrogate if aboard the said ship he did see the impression of the said seal upon any paper; depones negative. And further depones, that the seal now exhibited in court was not the same which captain Madder did shew to the deponent; and whereupon he has deponed as above, *causa scientia patet*. And this is the truth, as he shall answer to God.

ROBERT FORBES.

JOHN GLEN.

The Probation being ended as above, and the assize ordained to enclose, some of the assizers moved, that that part of the judges and assessors interloquitor, whereby they find the crimes of piracy, or robbery, or murder, as libelled, being proven by clear and plain evidence, relevant, &c. to be explained as to these words, 'being proven clear and plain by evidence,' if the same did require, that the said crimes of piracy, or robbery, or murder, should be proven by two or three witnesses, directly proving the foresaid crimes: or, if it were only required, that the crimes of piracy, or robbery, or murder, as libelled, being proven by a clear and plain evidence, as to the cumulative and concurring presumptions, whereby the same were alleged to be inferred, although two concurring witnesses should not be found as to every several presumption, were sufficient: the said judge and assessors declared their meaning to be in the terms of law, viz. That though there were not a direct probation of the crimes libelled, 'per idoneos testes, vel instructa aperi-tissimis documentis,' by proper witnesses, or made good by plain proofs; yet if the crimes did appear by the qualifications and circumstances, as they were libelled, to be made out 'per indicia ad probationem indubitata et luce clariora,' by undoubted presumptions as clear as sun-shine, albeit every circumstance and qualification were not proven by two direct witnesses, the same should be held for a clear and plain evidence.

Thereafter, according to the custom observed in criminal courts and processes, that the advocates for the pursuer, and for the pannels are allowed *hinc inde* to speech the assize, and resume and lay before the assizers, the libel, with the interloquitor past thereon, and apply the probation led for proving thereof on the one part, and on the other to resume the defences for the pannels, and to take off as much as possible, the weight of the probation for their defence and exculpation;

Sir *David Dalrymple*, her majesty's solicitor, one of the assistants to the Procurator-Fiscal in this criminal pursuit, spoke to the assize in manner following:

Gentlemen of the inquest; you have before you indictments against the pannels upon very atrocious crimes, and these indictments have been sustained relevant, as libelled by honourable judge-admiral, to be proven by clear and plain evidence. But for your fur-

ther satisfaction, at the desire of some of your own number, made openly in court, the judges have declared, that by these words, 'plain and clear evidence,' they do not confine the assize to two concurring witnesses, but have left to you what evidence is necessary to make faith, according to the nature of the crime, to your conviction.

Your business then, gentlemen, is to apply or compare the probation with the indictment, and to return your verdict distinct, concerning what you think proven or not.

It is a happiness that this trust is in the hands of persons so discerning and faithful, and therefore the less needs be said, either for clearing the nature of the crime, the manner of the discovery, or for summing up the evidences: But to comply with the custom of such trials in this kingdom, and for preventing the mistakes into which the lawyers on the other part seem to lead you: Forgive me if after a sederunt of twelve hours spent in leading of the probation, I detain you a little longer in recapitulating what has past, with some few observations, I hope not improper, before ye enclose.

As to the crimes contained in the indictment, it is obvious how heinous they are, and how hateful they render the persons who are truly guilty in the eye of the law: A pirate is in a perpetual war with every individual, and every state, christian or infidel. Pirates properly have no country, but by the nature of their guilt, separate themselves, and renounce on this matter, the benefit of all lawful societies: They are worse than ravenous beasts, in as far as their fatal reason gives them a greater faculty and skill to do evil: And whereas such creatures follow the bent of their natures, and that promiscuously pirates extinguish humanity in themselves, and prey upon men only, especially upon traders, who are the most innocent. The crime of piracy is complex, and is made up of oppression, robbery, and murder, committed in places far remote and solitary. And indeed if God had not, in a most wonderful way, brought the crimes whereof the pannels stand accused, to light, they might have escaped unpunished in this world, to their own eternal destruction, and to the great loss of such who may be amended, or prevented by the example of their punishment. But although the abuses now complained of, happened in the vast ocean, and at no less distance than the East-Indies, and that the actors were tied by obvious reason to secrecy on their own account, and were bound by a regulous command, not to reveal or answer questions: And besides all these, it is most probable there was a most impious oath interposed, as uses to be in such cases, and which has more force to restrain men of such desperate principles and practices, than all the ties of religion or nature: Yet God, in his providence, has let in light upon these dark and cruel crimes, as it were by mere accident: For I presume, you are not ignorant, that the first notices of this matter proceeded from words

which were dropt in passion, or expressed by the weight of guilt, concerning the wickednesses which have been done aboard the Worcester during the last voyage. These, and some other grounds of suspicion which appeared upon better enquiry, were the occasion of the information given to the government, and how cautious the lords of her majesty's most honourable privy-council, have been in examining the matter before any prosecution was appointed, I persuade myself that you and the whole nation know, and are satisfied. And now that the probation has been solemnly led in presence of the court, and of the great number of all qualities who have been present; I doubt not it will appear to you and all men, who will suffer their reason to act freely, that these informations have been too well founded.

The indictment, as it concerns the facts libelled, consists chiefly of two parts. The first concerns a murder and piracy happening upon the coast of Malabar. The second concerns circumstances which help to give light to that piracy, and which circumstances have happened since the arriving of the Worcester into this country.

As to the first, gentlemen, you have a testimony of the first witness Antonio Ferdinando, who depones, He came aboard of the Worcester upon the coast of Malabar, and that about a month after, he saw an engagement betwixt a sloop belonging to the Worcester, and another ship sailed by white men, speaking English, and bearing such colours as captain Green's ship did bear; and that the captain and some others of the Worcester's crew, went aboard the stranger's ship, and staid about the space of a glass; that upon their return to the Worcester, the sloop was manned out with twenty men, of which number were the captain himself, with Madder, Simpson, Keigle, Kitchen, and others; that the sloop was mounted with 4 guns and 2 patteraroes; that the sloop engaged the stranger's ship, and that there was a running fight for 3 days, during which time the Worcester came up and fired at the said ship, and that upon the third day, the said unfortunate ship was taken (and what is fearful even to repeat) the crew being about ten, were murdered and thrown over-board; that the goods were brought aboard of the Worcester, and the taken ship was sailed with a part of the Worcester's crew to Callicoilan, and there sold to Coge Commodo; that the deponent himself was wounded, the scar of which wound was shewn to you, gentlemen, and the court; and that he was commanded to keep secrecy under the highest peril, and that the very upper-coat which he wears (and in my judgment, appears to be Scots rugg) was a part of the spoil.

As to this testimony, gentlemen, there are several things very observable, such as the stayedness, simplicity and constancy of this witness, who, in many examinations before the council, and committee of council, has uni-

formly given the same account which he has now deponed before this honourable court; not in the same form of conceived words, but materially the same, though the interrogators have been changed: And I think, it adds to the weight of his testimony, that ye are witnesses how it was emitted, while he was under heavy sickness, and forced to lie down at the end of the table.

2. It is observable, that this witness Antonio Ferdinando had no accession to the discovering of this matter, nor was at all an informer: But the matter being enquired into, he did plainly and honestly acknowledge from the beginning, as he has now deponed: Neither was the story first told at Leith, nor since the pannels' arriving in our harbours: But it appears by the testimony of Antonio Francisco the other black (who shews a great inclination to favour captain Green and the pannels) that Ferdinando gave him the same account in substance upon the coast of Malabar: And this is further confirmed by Stringman the cook, who told in several examinations before the council, that shortly after the said Stringman came aboard on the coast of Bengal, Ferdinando who was his mate, gave him the like account of the story: So that it is morally evident, that this account of the crime was not invented with any view of a trial against the captain and his crew.

3. It is worthy your notice, that captain Green had been aboard of the unfortunate ship taken, as a friend, and had opportunity to spy, that the crew being but about ten, were too weak to man or defend a ship of 20 guns, which, no doubt, emboldened him to undertake the wickedness complained of.

It is observable, that the several parts of Ferdinando's testimony are fortified by concurring proofs. As first, by the books found aboard, it appears, that the sloop was furnished with arms in the month of February libelled, and that the arms were such as the testimony mentions. 2. He shews you the scar of his wound upon his arm; and as he depones, that he got it in the engagement, so the chirurgeon depones, "That he not only saw it, but that shortly after the hearing of the shooting, he had taken the dressing from off the wound, and found it a fracture, and that it looked like a gun-shot, and that the black came to his chest a few days thereafter to have it drest aboard." 3. The testimony of Ferdinando is also confirmed by the depositions of Francisco and Mr. May, as to two very notable articles, viz. The bringing of the goods aboard about that time: And by the testimony of the said Mr. May, as to the ship taken, riding at the stern of the Worcester. 4. Captain Madder's severe commands for observing of secrecy, is not only deponed upon by Ferdinando the first witness, but also by May the chirurgeon, very circumstantially: When Mr. May asked an innocent question, as one should think, upon seeing the deck lumbered with goods, Mr. Madder answers, cursing him, and bids him mind his

plaster-box. When May goes to his chest, there came three men to be dressed of their wounds, of which the black was one. May asks them how they came to be wounded, but Madder had followed, and commands silence on their peril; but Mr. May persisting in his enquiry, Madder goes to the commander, and brings a positive order to answer no questions: Thus Ferdinando and May concur as to the command of silence. Now, I put it to your consciences, gentlemen, if ye think this mystery was used to cover a common accident; or if, rather you are not satisfied, that joining the testimony of Ferdinando with the wounds, and the silence so rigorously imposed, the goods brought aboard, the riding of the taken ship at the stern of the Worcester, they do not evince the certainty of the piracy and murder libelled, as far as the nature of the thing can admit.

To these, gentlemen, ye would be pleased to join in your observation, that it is owned and demonstrated, from the books taken aboard of the Worcester, that there sprung a leak in the said ship on the coast of Malabar; and that it had been most natural for the pannels to have carried their ship to Goa, or to Surat, which was within ten degrees sailing, or thereabouts; yet the pannels did chuse, rather than continue on that coast, to run along in a leaky vessel, a dangerous course, round the peninsula, and the island Keilon, to the bottom of the bay of Bengal, a course of about 7 or 800 leagues. But that fatigue and risk was small, when compared with the danger of repairing their ship on a coast, where their crimes might be more easily discovered. 2. It is remarkable, that the books found aboard, and now lying before you, contain the full instructions given to captain Green and his company, from their alleged owners, which have something mysterious from the very beginning. I have had little occasion to peruse them, having seen them this morning for the first time. But one thing I could not but notice, that in the instructions, one article contains a cypher, in which the captain or supercargo was to correspond with their owners. And although the cypher seems to be nice, and well enough devised at first to cover the correspondence from any ordinary curiosity; yet so great anxiety has been shewn concerning this cypher, that the freighters send a letter after the ship; adding an instruction, that besides the character to be used, there should be this further disguise added, that the last letter of the preceding word should be always repeated before the first letter of the next word; of which, for illustration, the letter contains an example, giving direction how letters should be addressed to the writer himself. But neither was this caution sufficient: For next day another letter is written, relating still to the cypher; and wherein the writer expressly advises, that the letters from the ship should not be directed to himself, but to a scrivener living in ——— street, London; and that they should not be subscribed. Why all this mystery? The correspondence must be

in cypher; and this cypher exquisite and refined: And yet the letters to be addressed to a third person, obscure, for what I know. They were not to contain any address or subscription, which should either discover the writer, or the person to whom he writes. Fair trading requires no such affectation.

But further, you will be pleased to take notice, that the outward cargo for a ship of 200 tons, and 20 guns mounted, sailed with 36 men, was in value but 990*l.* 17*s.* 2*d.* sterling; which appears by the document produced by themselves, for instructing their entry at the Custom-house; and that too, for the most part, arms. I have not so much experience in matters of trade; but to me it seems very strange, that a voyage so exceedingly hazardous and expensive, should have been undertaken with so small means. And these things, in the very undertaking of the voyage being joined with the shrewd evidences of the crimes, whereof these pannels stand accused, seem to be of very great weight: And where such fineness occurs in the entry, and the effects are so tragical, in such an enquiry; I hope I shall be forgiven by every body, having laid them before you with as much tenderness to the freighters (with whom I have nothing to do) as possible.

As to the second part of the libel, I mean these circumstances which concur to give light to the crimes chiefly libelled; there is also sufficient evidence. The first of these circumstances is what concerns Mr. Reynolds, one of the pannels. The indictment bears, that there was a letter found, writ to him by his wife's sister, in return to one of his writ to his wife; wherein his said sister advises him to confess; adding, that in his own letter, which she had seen, he says, That some of their men had basely confessed; which implied, that they were guilty. And Reynolds being questioned upon this letter, produced the copy of his letter to his wife, which occasioned his sister's writing to him, agreeing with this letter. These you have before you.

I am not ignorant, that Ferdinando (the first witness) says, He believes Reynolds was ashore: but the testimony as to that is not positive; neither is it, in my judgment, sufficient to take off the accession of the crime, or art and part libelled; since the said Reynolds was of the same crew, and did not separate himself from them; and it is most presumable, had his own share of the booty. Besides, it is plain from the letters, he was conscious to the truth, which (he says) 'was basely confessed:' and it is of little weight, what has been offered as a gloss; viz. 'basely confessed,' is as much as if he had said, 'falsely told stories.' For in the ordinary way of speaking, to 'confess,' is to 'tell true;' and the adverb 'basely' implies no more than if he had said, that they had ungenerously confessed; though it be indeed rather a duty, whatever Mr. Reynolds thinks.

The next observable circumstance is what concerns George Haines: as to whom, by lay.

ing together the testimonies of James Wilkie, Kenneth Mackenzie, William Wood, John Henderson, and Anne Seaton, you will find it proven, That upon asking a question about Drummond's ship, Haines fell in passion; by the depositions of Wilkie and Kenneth Mackenzie. 2. That Haines said, "That when the ship the Worcester was seized in the road of Leith, he had that in his custody, which he would not have fallen in the seizer's hands for twice the value of the ship; and that he threw it overboard;" is proven by the testimonies of James Wilkie and Anne Seaton. 3. That James Wilkie's mother employed Anne Seaton to enquire of Haines concerning her son, who had gone doctor to Drummond's ship, is proven by the testimonies of Wilkie and Seaton. And Kenneth Mackenzie depones, That he was present when the said Anne Seaton gave an account of what had passed betwixt her and Haines; and that she told, that Haines said, They had a design to pump him: and that being asked why he fell in a passion at the mentioning of captain Drummond? He answered, That he knew more of captain Drummond than he would tell. And Anne Seaton concurs with Mackenzie as to these particulars. 4. That Haines, in a melancholy fit, burst forth in these, or like words, "It is a wonder that since we did not sink at sea, God does not open the earth, to swallow us up at shore, for the wickedness committed during the last voyage, in that old bitch Bess." (pointing to captain Green's ship) is proven by the concurring testimonies of William Wood, John Henderson, and Anne Seaton. And, 5. That Haines said, "If what captain Madder did during the last voyage, were as well known as what his uncle undertook at Amsterdam, he deserved as much as his uncle met with; which was, to be boiled in oil;" is only attested by William Wood. Nor does every minute circumstance need a concurring probation.

Having thus laid before you the indictment and probation, conjoining these proofs, which I am confident, to all impartial men, will appear clear and plain evidence of the crimes of which these pannels are accused; I shall take liberty in the next place, to precaution you against certain insinuations, which the pannels' lawyers have discovered when the probation was a leading.

I need be at little pains to convince you, that the first witness, though a black, is a legal witness; seeing that, upon full debate, has been already determined by the honourable judges. And indeed, besides that he is not only a man, but a Christian, and adduced for proving a crime covered, committed at sea, which is more solitary than any desert at land. His testimony had such a distinguishable air of truth and sincerity, as made him not only a legal witness, but a very material and probative one. But the pannels' lawyers would fain have observed some inconsistency in his testimony, and betwixt it and that of Mr. May's: for, say they, Ferdinando depones, That he

came aboard two years and a half ago; and that the action happened about a month after he came aboard; so that it must have been in the month of November, 1702, and not in the months of February, March, &c. 1703. But ye were witnesses, that the black did not depon positively as to the time of his coming aboard, but said it was about two years and a half ago; and that the engagement was about a month after. Both these designations of the time admit a latitude: and he was so cautious, that he stopt again before he signed his oath; until it was told him, that it could not be otherways understood.

But then they urge, that he depones, That the engagement happened betwixt Tillichery and Callicut, upon the coast of Malabar; yet Mr. May depones, That he heard the shooting at Callicoilan; which, say they, being at such a vast distance from Tillichery, was impossible.

But these gentlemen do not observe, that the engagement continued for three days; and that it is expressly deponed, there was a running fight during that time: so that though the beginning of the attack might have been betwixt Tillichery and Callicut, yet it might have continued along the coast.

Neither is it of more moment what these gentlemen observe, that the stranger's ship attacked might have in three days got off: because it appears, she was attacked and pursued by the sloop, which was a light vessel; and the ship itself attacked was weakly manned, having but about ten men aboard, and a ship of 20 guns.

But it may possibly be further urged, That the black deponed, that Mr. Loveday and Mr. Linstead were aboard the sloop; whereas Mr. May depones, That Mr. Linstead was left at Keilon; and that he heard him ordered to go shore before, and saw him taken into the ship some time afterwards.

But neither is there any inconsistency in this particular, betwixt these two oaths: for Mr. May depones, that when the ship came upon the coast of Malabar, he himself was put ashore: and although before he was put ashore he heard Linstead and Hammond ordered ashore, yet he did not see them go; so that Linstead might have continued in the ship notwithstanding. Or, in the next place, let us suppose that Linstead had once gone ashore; does it from thence necessarily follow, that he did not come aboard again, till the doctor saw him taken up? Certainly it does not; for Mr. May continued a very long time ashore. But now granting what these gentlemen so earnestly desire, that Ferdinando had been mistaken as to some such circumstance; can that overturn his testimony? The thing happening upwards of two years ago: the subject was an engagement at sea; perhaps the first fighting ever he was witness to: and the confusion which, for the most part, is incident to the firmest spirits in their first adventures, might excuse this witness, if in a minute circumstance

he had mistaken; seeing his oath, as to what is material and essential, is most pregnantly instructed, as has been already said.

It may be likewise observed, That it was very much urged for the pannels, that Ferdinando came aboard the ship at Anjango only two days before the ship parted from the coast of Malabar: but though that were true, it would be little to the purpose: for it is evident by his own deposition, that at first he entered to the service of Mr. Loveday the purser; and that he came aboard of the sloop at Callicoulan with Loveday; and the sloop was the chief instrument made use of in the piracy libelled.

It is not unlikely, that the lawyers on the other side will amuse you with observes upon Mr. May's testimony; as that he is but a witness *de auditu*, not having been present at the action: but in this they are again mistaken; for, as I take it, a witness *de auditu* is such an one, who repeats at second-hand: as if Mr. May had deponed, That another person had told him he had heard shooting. But since our hearing is as much to be depended on as our seeing, in what concerns the proper object of the ear, Mr. May's testimony, which chiefly consists of what he heard and saw himself, is not in the sense of law *de auditu*. Mr. May depones he heard the shooting; and the next day that he came down, he saw the Worcester riding, with another ship at her stern; and that he saw some of the crew come ashore in a boat; and that they told him that they had brought in a ship; and that Coge Commodo, or the linguister, told him he had bought the ship. He saw and handled the black's wounds: he was eye and ear-witness to Madder's threatening, and imposing a rigorous silence. In all this there is nothing properly *de auditu*; for that the seamen told him they had brought in a ship, did not depend barely upon their telling, but upon these circumstances, that they were the persons brought it in; and that the ship was riding under his eye at the stern of the Worcester. And just so what he heard from Coge Commodo, and the linguister, being upon the place, and seeing the ship under his eye, is not to depon only *de auditu*, but has as much evidence as is necessary to create a full certainty in the mind of any reasonable and indifferent person.

As for the other circumstances, I beg liberty to forewarn you, gentlemen, that every thing material is proven; and that even as to the least circumstance, there is some evidence. That the goods were not regularly marked, as is ordinary in fair trade, is proven by the oaths of skippers: That the seal of the African Company was seen in the hand of captain Madder; is deponed by Glen, a seal-cutter, who could not well be mistaken in a matter of that kind. And in like manner, that there was something aboard of the Worcester, which would not be found, though they should tear her board from board, is deponed by James Wilkie. None of these circumstances are absolutely without evidence: And the rest of the libel, both what

is essential, and even as to lesser circumstances, is distinctly and plainly proven.

To conclude, gentlemen, As, on the one hand you are to be very tender of admitting that for a proof, in a case of life and death, which ought not to be admitted; so you must be careful not to reject such evidence, as must convince the whole world, that these unhappy criminals are guilty of the cruel and atrocious crimes libelled. Take the matter in its whole series: The affected darkness in the entry to the undertaking, a correspondence in cypher, wherein the parties were neither to be mentioned on the cover, nor in the letters, nor were they to subscribe. That the cargo was inconsiderable, and chiefly composed of arms, not to the value of a thousand pounds sterling. And it seems almost ridiculous, that a ship of 900 tons, with 80 guns mounted, sailed by 36 men, should be sent to the East Indies upon an ordinary adventure, with so invaluable a cargo: And join with that the evidence of the murder and robberies, mentioned in the indictment. Consider how much light the providence of God has discovered in so dark a crime committed in a place so distant and solitary; and I am confident, you will conclude with me, That the murder and piracy is proven.

The Advocates for the pannels did also on their part speech the assize, by resuming the defences for the pannels, and for taking off the weight of the probation led against them, and by alledging what could be further said for their exculpation and defence. But these speeches having been made 'extempore, et viva voce,' albeit the advocates for the pannels were desired at the printing of this process, to give in to be printed a full copy of what they had said in defence to the assize; yet they declined to do the same.

The Judge of the High Court of Admiralty and Assessors ordain the Assize presently to inclose, and to return their verdict upon Friday next, being the sixteenth of March instant, at ten o'clock in the forenoon; and the hail fifteen assizers to be present, each under the pain of three hundred merks, and continue the dyet till that time: and ordain the pannels to be carried back to the respective prisons.

ROBERT FORBES, J. P. A.

CURIA JUSTICIARIA supreme Curie Admiraltatis tenta in Prætorio, vel novæ Domo Sessiones Burgi de Edinburgo, decimo sexto die Mensis, Martii, 1705, per Judicem dictæ Curie, et per honoratissimos Viros, Joannem Comitum de Loudoun, Joannem Dominum de Belhaven, Dominos Robertum Dundas de Arnistoun, Joannem Home de Blackadder, et Joannem Cockburn de Ormistoun, Assessores.

Curia legitime affirmata.

The said day, the persons who passed upon the assize of captain Thomas Green, com-

mander of the ship the Worcester; captain John Madder, chief mate of the said ship; John Reynolds, second mate; Thomas Linsteed, assistant supercargo; James Burn, boatswain; James Simpson, gunner; Andrew Robertson, gunner's mate; John Bruckley, seaman; George Kitchen, seaman; Henry Keigle, carpenter; George Haines, steward; Samuel Wilcocks, chirurgeon's mate; George Glen and Alexander Taylor, seamen; John Bannantyne, seaman; returned their Verdict in presence of the said Judge and Assessors; whereof the tenor follows:

Edinburgh, The 14th of March, 1705, the assize having inclosed, did chuse sir James Fleming, of Rathbyres, to be their chancellor; and William Neilson, merchant in Edinburgh, to be their clerk: and having considered the two indictments pursued at the instance of Mr. Alexander Higgins, Procurator Fiscal of the High Court of Admiralty, against captain Thomas Green, commander of the ship the Worcester; captain John Madder, chief mate of the said ship; John Reynolds, second mate; Thomas Linsteed, assistant supercargo; James Burne, boatswain there; James Simpson, gunner; Andrew Robertson, gunner's mate; John Bruckley, seaman; George Kitchen, seaman; Henry Keigle, carpenter; George Haines, steward; Samuel Wilcocks, chirurgeon's mate; George Glen, and Alexander Taylor, seamen; John Bannantyne, seaman; with the debate upon the said indictments; and the Judge of Admiralty and Assessors, their interloquitor, and explanation thereupon, with the deposition of witnesses adduced by the pursuer thereintil: They by plurality of votes, find that there is one clear witness as to the piracy, robbery, and murder libelled; and that there are accumulative and concurring presumptions proven, for the piracy and robbery so libelled: But find, that John Reynolds, second mate of the said ship, was ashore at the time of the action libelled:

Sic Subscritur, JA. FLEMING, Chancellor,
WILL. NEILSON, Clerk.

Thereafter Mr. David Forbes, advocate, produced a Procuratory from the company of Scotland trading to Africa and the Indies to him the said Mr. David Forbes. In the terms whereof the said Mr. David Forbes protested, and took instruments. The tenor of both Procuratory and Protest is as follows, viz.

The Court of Directors of the Company of Scotland, trading to Africa and the Indies, considering, that the ship Worcester and her cargo is by sentence of the High Court of Admiralty, found liable by way of reprisal to the said company, for reparation of the damages sustained by them, through the wrongous seizure of the ship Annandale, and the delay and denial of justice in England concerning the same, conform to the same company's process of declarator of reprisal, bearing a conclusion of roup and sale of the said ship the Worcester and her cargo for reparation of the company's

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said damages, as the Judge Admiral's said sentence, dated the third of March instant, bears. And considering likewise, that the additional conclusion of the criminal indictment, raised at the instance of Mr. Alexander Higgins, Procurator-Fiscal of the said High Court of Admiralty, against captain Thomas Green, late commander of the said ship the Worcester and his crew, for piracy, robbery and murder, bears over and above the confiscation of their eacheat, moveables in general, that the said ship and cargo in special should be likewise confiscated to her majesty's use: The said Court of Directors do therefore by these presents, give full power, warrant and authority to Mr. David Forbes, advocate, to appear for them, and in their name and behalf, and in behalf likewise of Mr. Roderick Mackenzie, their factor in the said process of reprisal to the behoof of the said company, to protest against the said additional conclusion of the said criminal indictment, with all that has followed, or may follow thereupon, that the same may not in the least prejudice the said company of the benefit of their right and interest in the said ship the Worcester, and her cargo, as should accord. In testimony whereof these presents are by warrant of the said Court of Directors, signed by their president for the time, and counter-signed by the said company's secretary at Edinburgh, the 12th day of March 1705 years.

Sic Subscritur, FRANCIS SCOTT, P. C. D.

By order of the said Court,

ROD. MACKENZIE,
Secretary to the said Company.

Follows the PROTEST.

Edinburgh, March 16, 1705.

I the above Mr. David Forbes, do hereby protest in the terms of the above mandate, and thereupon I take judicial instruments in the hands of Mr. Daniel Hamilton, clerk of court, and require the members of court as witnesses.

Sic Subscritur, DAVID FORBES.

Her Majesty's Advocate protested in the contrair.

Which protestations, the Judge of the High Court of Admiralty, &c. admitted, and allowed them to be recorded.

The Judge of the High Court of Admiralty and Assessors continues the dyet till Wednesday the 21st of March instant, at ten o'clock in the forenoon: and ordains the pannels to be carried back to their respective prisons.

CURIA JUSTICIARIA, Supremæ Curie Admiralitatis tenta in Prætorio, vel nova Domo Sessionis, Burgi de Edinburgo, vigesimo primo Die Mensis Martii, 1705, per Judicem dictæ Curie, et per Honoratissimos Viros, Joannem Comitem de Loudoun, Joannem Dominum de Belhaven, Dominos Robertum Dundas de Arnistoun, Joannem Home de Blackadder, et Joannem Cookburn de Ormistoun, Assessores.

Curia legitimè affirmata.

Intran'

Captain *Thomas Green*, commander of the ship called the *Worcester*.

Captain *John Madder*, chief mate of the said ship.

John Reynolds, second mate of the said ship.

Thomas Linstead, assistant to the deceased supercargo of the said ship.

James Burn, boatswain of the said ship.

James Simpson, gunner.

Andrew Robertson, gunner's mate.

John Bruckley, seaman.

George Kitchen, seaman.

Henry Keigle, carpenter of the said ship.

George Haines, steward of the said ship.

Samuel Wilcocks, chirurgeon's mate.

George Glenn, seaman.

Alexander Taylor, seaman: and

John Bannantyne, seaman in the said ship.

The Judge of the High Court of Admiralty, and Assessors, having considered the Verdict of assize returned against captain *Thomas Green*, commander of the ship called the *Worcester*, now in Bruntisland harbour; captain *John Madder*, chief mate of the said ship; *John Reynolds*, second mate of the said ship; *Thomas Linstead*, assistant to the deceased supercargo of the said ship; *James Burn*, boatswain of the said ship; *James Simpson*, gunner; *Andrew Robertson*, gunner's mate; *John Bruckley*, seaman; *George Kitchen*, seaman; *Henry Keigle*, carpenter of the said ship; *George Haines*, steward of the said ship; *Samuel Wilcocks*, chirurgeon's mate; *George Glen*, seaman; *Alexander Taylor*, seaman; and *John Bannantyne* seaman in the said ship; upon the 16th day of March instant; whereby it is found proven, that there is one clear witness as to the piracy, robbery and murder libelled; and that there are accumulative and concurring presumptions proven from the piracy, and robbery so libelled: and that *John Reynolds*, second mate of the said ship, was ashore at the time of the action libelled; they, in respect thereof, by the mouth of *John Park* dempster, decern and adjudge the said captain *Thomas Green*, *John Madder*, *James Simpson*, *Henry Keigle*, and *George Haines*, to be taken to the sands of *Leith*, within the flood-mark, upon the first Wednesday in April next, being the fourth day of the said month, betwixt the hours of eleven o'clock in the forenoon and four o'clock in the afternoon, and there to be hanged upon a gibbet till they be dead. And sicklike, decern and adjudge the said *George Glen*, *Alexander Taylor*, *Andrew Robertson*, and *George Kitchen*, to be taken to the sands of *Leith*, within the flood-mark, upon the second Wednesday of April next being the 11th day of the said month, betwixt the hours of seven and twelve o'clock in the forenoon, and there to be hanged upon a gibbet till they be dead. And also decern and adjudge the said *James Burn*, *John Bruckley*, *Samuel Wilcocks*, *John Bannantyne*, and *Thomas Linstead*, to be taken to the sands of *Leith*, within the flood-

mark, upon the third Wednesday of April next, being the 13th day of the said month, betwixt the hours of eleven o'clock in the forenoon and four o'clock in the afternoon, and there to be hanged upon a gibbet till they be dead: and ordain all their moveables, goods and geer, and particularly the ship *Worcester* and cargo to be escheat, and in-brought to her majesty's use; reserving to all persons pretending right to the said cargo, or any part thereof, their respective claims and pretensions to be insisted in and discussed before the High Court of Admiralty as accords, which is pronounced for doom, and assolicz the said *John Reynolds*.

JAMES GRAHAM, J. P. A.

The Judge of the High Court of Admiralty and Assessors recommend to the Lords of her Majesty's Privy Council, to give a reprieve to *Thomas Linstead* assistant supercargo of the ship *Worcester*; and desire that their lordships would recommend him to her Majesty for her gracious pardon.

JAMES GRAHAM.

In Presentia Assessorum.
In presence of the Assessors.

Captain *Green* was afterwards executed according to his sentence.

[Here follow some Confessions and Declarations emitted by some of Captain *Green*'s crew, which are here set down according to their dates, and as they were freely made in the presence of the persons therein mentioned, and are only here subjoined, not as any part of the process, but for the further satisfaction of all that shall be pleased to read the premises.]

EDINBURGH, 16th March, 1705.

DECLARATION by *THOMAS LINSTED*, emitted in presence of *air James Stewart*, her Majesty's Advocate, hereto subscribing with the said *Linstead*.

Thomas Linstead declares, that being in the ship the *Worcester* as assistant to the supercargo, when the vessel came to *Callicoilan*, upon the coast of *Malabar*, which was about the beginning of the year 1703, *Mr. Hammond* and he were sent ashore to look after the goods they had sold, and the returns they expected at *Callicoilan* and *Keilon*; that the ship the *Worcester* left *Callicoilan* with her sloop, in January 1703, for to go to *Calicut*, and other places up that coast; but within five or six days after the ships parting, there came in fisher-boats to *Callicoilan*, who told them that their ship the *Worcester* had had an engagement at sea, and that it was the sloop that first attacked the vessel, and that they fought until they were out of sight of the fishermen, who could give no further account of it. But thereupon the declarant and *Mr. Hammond* wrote, and sent a messenger either to *Cochin* or *Calicut*, to know what was become of the *Worcester*, and that they got a return after

some days, that they should mind their business, and not concern themselves with any thing that Callant the supercargo did aboard. That some days thereafter, the declarant met with Coge Commodo in the Ibeck of Keilon, who told him that he had bought a ship, and he took the declarant aboard; that the vessel was about 100 tons, and did bear about twelve or thirteen guns, and that she appeared to be of the country build. And Coge Commodo said, he had bought her from the pirates of Cota or Burgara, which are two little pirating towns on either side of a river on the coast of Malabar; but when the declarant came to Keilon, the Dutch and Portuguese there told him, that that vessel which Coge Commodo had bought was brought in in the night season by some of the crew of the Worcester, and that her topmast was taken down, and her sails taken off, and the yards lowered; and that the Dutch and Portuguese made no more reckoning of it, because it is what is ordinary on that coast. That the declarant, and Mr. Hammond stayed, for two or three months after their parting from the ship, at Callicoilan and thereabouts, until the ship the Worcester came back to the road of Callicoilan, and that there he went aboard: that when he went aboard, he told them what he had heard, but they gave him no account of the action; nor could he learn more of it. That the doctor was ashore at Ibeck, while the ship was at anchor at Callicoilan, and that at that time the declarant was gone up to Callicoilan; and knows no more of the doctor's being ashore: that the sloop with Mr. Loveday and others aboard did first come back to Callicoilan, and advertised the declarant and Mr. Hammond to be in readiness, for the ship was coming back; and that when she came back, they went aboard, and the declarant went aboard at Anjango, from whence they sailed to Bengal. And this the declarant declares to be a truth.—*Causa scientia patet.*

T. LINSTEED.

JA. STEWART.

EDINBURGH, 27 March, 1705.

In the presence of Mr. James Graham, Judge of the High Court of Admiralty, George Haines, one of the crew of the Worcester, being desirous to make a confession of what he knew in relation to the crimes for which he and the rest of the crew are pursued; declared, that when the ship the Worcester was in the Downs, the declarant received a letter from a friend in London, telling him, that it was surmised in London, that their ship was going out upon some ill design; and that he had likewise another letter from his father to the same purpose, and heard the gunner, James Simpson, say, he had also another of the same nature. The declarant declares, that thereafter he used all his endeavours to get ashore, and accordingly he having got leave to see some friends aboard the Fleet frigate that was then riding in the Downs, he got into her long boat that was then going ashore, but some of the frigate's crew having got notice where the de-

clarant was, after he went ashore, they came to him, and having drunk with him to some pitch, persuaded him to go aboard of his own ship again; and the declarant was accordingly carried aboard, in one of the boats belonging to the town of Deal. And some time thereafter the declarant designed likewise to have got into a man of war, riding hard by their ship; but Mr. Callant, the supercargo, came after him, and brought him back: and the declarant believes the name of the man of war was the Salisbury. That the ship Worcester sailed from the Downs the 8th of March, 1702, in the morning. That in the month of June or July thereafter, the ship arrived at Delagoa, where their sloop was built of timber, and other materials which they had brought from England aboard the ship. That having sailed from Delagoa, some few days before they came upon the coast of Malabar, he heard some of the crew, and particularly John Brockley, the cooper, talk of turning pirates, and persuading others of the crew to go in with them. That when they came upon the coast of Malabar, and had been there about a month, they endeavoured to take a large country boat; and for that end, the sloop endeavoured to get betwixt the said boat and the shore, that so the ship might come up with the said boat; but there being several hands aboard, and the boat having fifty oars, out-sailed both ship and sloop, and got off; declares, that Coge Commodo was aboard the ship the time of the aforesaid chase; and that he drew his sabre, and encouraged the crew of the Worcester; declares, that hereafter the ship and sloop sailed for Cochin, with a design to have cleaned both at that place; (the sloop being much spoiled with worms) but the governor would not allow them to be cleaned there; and therefore they went up to Calicut, where the sloop was cleaned and refitted, and manned with about eight men and two guns, two patteringoes, and other small arms and ammunition put aboard; and then the sloop alone sailed up towards Tillicherry, and stayed away from the ship about eight days; declares, that the sloop took no goods along with her when she went out; but when she returned, she had aboard eight hogsheads of rack, and knows not how she came by them. But John Roberts, one of the crew who had been with the sloop at that time, was very melancholy after his return; and the declarant having a coco-nut full of rack in his hand, desired Roberts to take a part; but he would not, and went down to his hammock mightily concerned: and afterwards told the declarant, that the reason of his concern and melancholy was, that he was accessory to the cutting off of some mens heads at Sacrifice rock, betwixt Tillicherry and Calicut; declares, that the sloop did sail by herself from Calicut thereafter; and the ship followed down to Callicoilan, and did there meet with the sloop; and having discovered a ship coming as from the southward, the sloop was under sail, and

made to get in betwixt the said ship and the sailing, that so she might not get to sea: and the ship coming nearer to the Worcester, in which the declarant was at the time; the Worcester slipt her anchors, and made towards the foresaid ship, and at length came up with her, and fired a sharp shot, to cause her to come to; which she did accordingly, by breaking her head-sails back to the masts; and that thereafter she was boarded; declares, that the ship was about seventy tons burden, and square-sterned, and painted in the quarters with red and yellow; and that she had a main deck, and quarter deck, and a little fore-castle, and was of the Indian build: and that there was in the ship, when boarded, about twelve or fourteen men, all white and sickly, as the declarant clearly perceived before the ship was boarded. But when the declarant was endeavouring to know of what country the men were, Edward Carry, one of the Worcester's crew, knocked him down with a handspike into the midship hatch: but he afterwards heard amongst the crew, that the men of the taken ship were Britons; declares, that he knew not what became of the men which were aboard of the taken ship, not having been able to come above deck, with the stroke which he received from Edward Carry, and whereof he yet bears the mark: but declares that the sloop went off before he came above deck, and stayed away for three or four days; and that the declarant thereafter heard the men were put into the sloop. And what was done with the said men of the taken ship, he cannot tell; but doubts not they were murdered and made away, because they could not be put ashore at any place at hand on that coast; there being English and Dutch factories all along the coast, very near each other; declares, that these of the crew who went with the sloop from the ship at that time, were Mr. Loveday, Thomas Calcate, Andrew Robertson, gunner of the sloop, John Roberts, Edward Carry, Duncan Mackay, Alexander Taylor, and Antonio Ferdinando, the black; but cannot be positive who besides were there; declares, that the next evening after the action, the ship which was taken the day before, was carried in by some of the crew to Callicoilan and sold to Coge Commodo for 1500 rupies: and that the goods of the said taken ship were some bales and mats of China roots, and four chests of copper; which chests were sold afterwards at Bengal, to a Bannion merchant named Tagodas; declares, that some days after the action, the declarant was sent ashore with a letter to the supercargo; and that he then heard that Coge Commodo to whom the ship was sold, was a great assister of all pirates, and was very serviceable to Kidd and Avery when upon that coast, and bought off their goods, as the declarant was credibly informed of the people on that coast. And declares, that the time the declarant was on shore, the supercargo, Mr. Linstead, Reynolds, Hammond, and the doctor were ashore. And the declarant did likewise see Antonio Ferdi-

nando, the black, at the Ibeck of Callicoilan, who complained of a wound in his arm; declares, that after the action, and before the declarant went ashore, the doctor, Charles May, came aboard from the Ibeck of Callicoilan; and seeing the chests which had come out of the taken ship upon the deck, he asked captain Madder, what did all that lumber upon the deck? And that Madder answered him with a curse, and told him to mind his plaster-box, and ask no questions; declares, that while the ship was upon the coast of Malabar, she sprung a leak in the strake next the keel, which made the crew to pump constantly: however they went not into any place upon the coast of Malabar to refit her, but sailed to Bengal, which was about five weeks sailing; and there the ship was refitted, not only of the leak, but of an hurt which the ship got in the action, in the plank, betwixt the midship's crupper and the chestree, and a new plank put in, in the larboard side, where the hurt was; declares, that the declarant did keep a note, by way of journal, during the voyage, which contained the substance of what he now declares in relation to the above particulars; and that when the ship was seized in the road of Leith, he heaved the same over board, lest it should have fallen in the seizer's hands; declares, that he would have emitted this declaration and confession sooner, but that he was always made believe by captain Green's agents, that the defences made for the crew would certainly bring them off: and if they did all agree in one mind, and keep close mouths, there would be no fear; for nothing could be otherways proven that could do them harm. And declares, that Wilcocks, the chirurgeman's mate, told the declarant, that he saw a letter from the owners of the Worcester, in London, to captain Green; which bore, that although the crew were condemned in Scotland, they had pardons ready to send down for them. And this the declarant was likewise informed of from the carpenter's wife.

JA. GRAHAM.

GEORGE HAINES.

EDINBURGH, March 28, 1705.

In presence of sir Robert Forbes, Judge of the High Court of Admiralty, compared George Haines, one of the crew of the ship the Worcester, and declared that he now adds to his former declaration; that after the ship therein mentioned was seized, he saw the men which were therein, killed and murdered with pole-axes and cutlasses, and saw their dead bodies put into the sloop, and thereafter thrown over-board: And to the best of the declarant's knowledge, the said men so killed were Scotsmen; the declarant having heard them speak the Scots language. And further declares, that the said ship then seized, was understood by the crew of the Worcester to have been captain Drummond his ship; and particularly, he heard captain Madder, John Bruckley, and the deceased Edward Carry say so. And further adds, that he would have omitted what

is above, before this time, but was afraid lest his mentioning the ship so seized to belong to captain Drummond, and the men aboard of the same to have been murdered, might have rendered the government offended, and obliged them to deal hardly with the declarant. And this he declares to be truth, as he shall answer to God.

ROBT. FORBES.

GEORGE HAINES.

EDINBURGH, *March 31, 1705.*

In presence of Mr. James Graham, Judge Admiral, John Bruckley, cooper of the ship Worcester, being desirous to make a confession of the crimes whereupon he and the rest of the crew were pursued; declares, That some time after the ship the Worcester came upon the coast of Malabar, that she and the sloop gave chase to a country boat, which escaped by reason of her oars. That afterwards the ship and sloop sailed in company to Cochin, where they were denied access to clean; and therefore they thereafter sailed to Calicut, where the sloop (which had been spoiled by the worms) was haled upon the shore, and cleaned, and thereafter was manned with about 10 men, and 2 guns, 2 patteringoes, with other small arms put aboard. From Calicut, the sloop was ordered to sail towards Tillicherry, but there was no goods sent along; and in about six or eight days thereafter, the sloop came back in chase of another ship; declares, that when the ship the Worcester saw the sloop in chase of the other ship, she slipt her anchors, and made out to sea to meet them; declares, that he saw the sloop board the said ship towards night; and that the long boat was after ordered to be manned, and captain Madder went along in the long boat; declares, he does not know what became of the men who were on board the taken ship; but that the declarant did see they were white men. And the reason why he knows not what became of the men, is, that the declarant was never on board the taken ship; and that the sloop which had boarded the ship, was ordered away next morning; and he doubts not but the men were amongst which were taken out of the prize-ship; declares, that the ship which was taken, was manned with some of the Worcester's crew, and sailed along with the Worcester till they came to Callicoiloan, where they found the sloop; declares, that whilst the Worcester, with the other ship, came in sight of the sloop, the sloop weighed anchor, and stood to the offing; so that the taken ship came into Callicoiloan betwixt the sloop and the Worcester; and all three came to an anchor together; declares, that after they came to an anchor, the taken ship rode under the stern of the Worcester, and was thereafter sent into Callicoiloan river, and sold to Cogo Commodo, as the declarant supposes; declares, that thereafter the declarant was sent ashore for water to the Ibeck of Callicoiloan, where he met with doctor May; and that he sent on board a pinguetta with water, accord-

ing to his orders; declares, that some time after, they came to an anchor before Callicoiloan; and before the declarant was sent ashore for water, as above, they saw a ship at sea, coming from the southward; that the sloop was under sail at that time, being a cruising about: That she sailed towards the sea, and bore down the ship towards the Worcester. That the Worcester, when the ship came near, slipt from her anchors, and made towards the ship which thereafter was boarded, first by the sloop, and then by the Worcester, about ten or eleven o'clock in the forenoon; declares, that there was both whites and blacks on board that ship, and most part whites; but the declarant did not know what became of them; but that the sloop went off in a few hours after the engagement, and did not return till after two or three days. That the declarant does not know what became of that ship; but declares, that he was in a Moorish king's house, with about six of the crew: and that that king was Cogo Commodo's master, who had bargained for one of the taken ships; the declarant cannot be positive which: And that at the same time, the supercargo, who was along with them, presented the king with a small fowling piece; declares, that the declarant stayed ashore trimming the casks, for about six weeks thereafter; And does not remember at present any more of the affair. And declares, he cannot sign but by this mark.

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JAMES GRAHAM.

EDINBURGH, *April 3, 1705.*

In presence of sir Robert Forbes, Judge of the High Court of Admiralty, compared John Bruckley, one of the crew of the ship the Worcester; and declares, that he adheres to his former declaration, emitted before Mr. James Graham, Judge Admiral, the 31st of March. And now adds, that the men which were aboard the ship, which was seized before Callicoiloan, were for the most part white men; and the declarant heard them speak the English tongue, being in number about twelve or fourteen. And declares, that captain Madder was in the sloop, and one of those that boarded the said ship; and that the men were put into the sloop, and carried away to the northward in the sea; and the declarant never heard any more of them. And that the goods aboard the taken ship were brought into the ship the Worcester, and consisted of China root, and four chests of copper; which chests were sold at Bengal to a Bannian merchant. And further adds, that the men seized in the taken ship were killed after they were put into the sloop, and before they were carried to the sea northward. And further adds, that immediately after the action was over, the declarant did hear the supercargo, Callant, captain Madder, John Roberts, and Edward Carry say, That the seized ship was captain Drummond's ship, belonging to the Scots African company. And adds, that when the Worcester sailed from the Downs, the declarant did not know where the ship was bound:

but heard it frequently said, they were going upon a discovery. And declares this is the truth, as he shall answer to God. And declares he cannot write, but by this mark. †

ROBERT FORBES.

The foregoing Account of the Trial of captain Green and his Crew, being taken closely from the Records of Court; and the usual form of the Court being to hear and discuss objections against the witnesses, before they be examined, *viva voce*, without any written debate; it is therefore thought fit here to add the objections that were made against the witnesses, and the answers given thereto, with the interloquitors passed thereon; that there may be nothing wanting to the readers' full information.

And first, it was objected against Antonio Ferdinando, the cook's mate, that he could not be a witness, because of his poverty; he not being worth (as the stile of the Court is) the queen's unlaw, that is, ten pounds Scots, in case he should transgress: and so, according to the law of this kingdom, was to be rejected. 2. That he was not a Christian, and therefore could not be received as a witness against Christians, specially in a pursuit that reached their lives and fortunes. Nor could he indeed be supposed to have the just knowledge of the religion of an oath.

To which it was answered, 1. That though the standard of ten pounds Scots, settled by the law and custom of this kingdom, as to the quality of witnesses, might well be refused in a trial of crimes of this nature against the law of nations, and which were to be tried accordingly; yet the matter of fact was false; Antonio Ferdinando being worth more than ten pounds Scots, by the very wages due to him; and which, by the pannels' own books, were attested to be fifteen shillings per mensem, whereof, to this hour, he hath got no payment. 2. Antonio Ferdinando was a Christian, as he himself owned from the beginning; and that he was born of Christian parents: like as it is known, that such names are only given to Christians. Besides, though his not being a Christian might be a prejudice against him, yet it could be no just exception against his testimony as a witness; since he both professed the knowledge of God, and the conscience of an oath, as he had often declared.

The Judge and Assessors having considered the foresaid objections and answers, they repel the objections in respect to the answers, and allow the witness to be admitted.

3. It was objected against Antonio Francisco that he was not worth ten pounds Scots; and had indeed nothing; besides, that he was no Christian, but a servant or slave to captain Green; and also had no religion.

To which it was answered, 1. That though ten pounds Scots be the rate of witnesses in our Scots law; yet, as hath been said, this rule cannot vie in the case of the crimes libelled, committed against the law of nations in remote

parts, *et in alto mari*, in the deep sea; which made the crimes to be crimes excepted. And it is known to be the rule and privilege, as to crimes atrocious and occult; and therefore excepted to exempt even the witnesses from the ordinary qualifications. Nor was Antonio Francisco to be reckoned no Christian; since, 1. He bears a Christian name; and next declares, that a Christian mistress he had in Pegu, who gave him to captain Green, did first procure him to be baptised and christened. And 3. He professes the knowledge of the true God. Nor, being a Christian, can he be reckoned any longer a slave.

But upon the whole, as to these two, and the whole other witnesses; the nature of the atrocious crime against the law of nations, with the manner of their having been committed, and the endeavours used for their concealment, ought principally to be remembered; since thereby in the opinion of all lawyers, they become crimes excepted: and that it is the known privilege of crimes excepted, to relax from the ordinary rules, and to proceed on such evidence as the matter doth afford, the substance of the probation being only observed.

The Judge and Assessors having considered the foresaid objections, and answers, they repel the objections, in respect of the answers, and allow the witness to be admitted.

3. It was objected against Anne Senton, that she could not be a witness, because a woman.

To which it was answered, that in crimes where the probation proceeds not upon the *testes requisiti*, but such as Providence offers, even women are admitted. But 2. It is the general opinion and practice over all, that crimes atrocious, occult and excepted, a woman is never refused.

The Judge and Assessors having considered the foresaid objection and answer, they repel the objection in respect of the answer, and allow the witnesses to be admitted.

EXCERPTS out of the Instructions and Letters found in Captain Green's Books, to which Sir David Dalrymple's Speech to the Jury relates.

In the instructions or orders given by the freighters of the Worcester, captain Thomas Green commander, to Mr. Robert Callant supercargo, there occurs one article in these words,

"We would have you write us by all opportunities, especially from Suede, by any ships bound from thence to Persia; and for the greater secrecy, especially of the letter to be sent to Mauritius for us, here under is an alphabet for you to write us by; your subscription must be in common English, directing all such letters to captain Thomas Bowrey in Well-close-square, London."

(Nota, at this place the whole alphabet is insert distinctly, and above each letter a different character is set down, to be used in place of the letters of the alphabet.)

"When your cargo for England is provided, or near completed, then we would have you

sell the sloop for what you can get, and invest the produce in goods for England.”

And lower amongst the same orders in another article are these words,

“ You must engage the master of the sloop not to let any letter from himself or any other be sent to England, but only our letter, in which you may insert the names of any dead ; and for the care and secrecy of those who go in the sloop, in case no letter or news comes to England, but our letter concerning our business, then we will on the return of the ship give the master and crew one month’s pay gratis, and they shall also have their shares of the benefit promised the ship’s company for the whale fishing.”

By a letter dated London, 3 February, 1701-2, from captain T. B—y to Mr. Callant, the said captain advises him in these words,

“ For the greater security of our affairs, when you write by the alphabet in your instructions, I would have you carry the last letter of each word to be in the room of the first letter to the next word, as for example :

Captain Thomas Bowrey, Sir, we are all well.
Captai nthoma sbowre ysi rwe ear eal llwell.

“ Make no title (as is usual) to begin your letter, nor no date, nor compliment, no name at last ; But let all be comprehended in the lines of your letter, so as to make no distinction, and make but one paragraph of all your letter, and if any men dead, set their names immediately after your own name subscribed to the letter, all in characters before directed, and please to keep this as directions therein.”

By another letter from the said captain T. B—y to the said Mr. Callant, dated London, 16 February, 1701-2, he adds concerning the foresaid cypher in these words,

“ On further consideration, I think, I have committed an error in my letter to you yesterday, it being wrote in it as, viz.

Captai nthoma sbowre ysi rwe ear eal llwell.
That is,

Captain Thomas Bowrey, Sir, we are all well.

“ Now, I doubt the naming any name in the beginning, or making any compliment there, may be a means to find the key of the alphabet, therefore pray strike out of the letter I sent you yesterday, as above done, and begin directly with your business, following the directions given you. And whereas you are ordered to direct your said letter to me, I would not have you mention my name in the subscription, but direct the said letter to Mr. Nicholas Pope scrivener, in Nicholas lane, London, to pay 5*l.* to the bearer as in your instructions.”

THE CASE

OF CAPT. THO. GREEN, COMMANDER OF THE SHIP WORCESTER, AND HIS CREW, TRIED AND CONDEMNED FOR PIRACY AND MURTHUR IN THE HIGH COURT OF ADMIRALTY OF SCOTLAND.—LONDON: PRINTED IN THE YEAR 1705.*

ABSTRACT of the ship Worcester’s Proceedings on the Coast of Mallabar, in East India, where the Crimes charged are said to be committed.

November 15, 1702. The said ship arrived at Anjango, a fort of the English East-India-Company on the coast of Mallabar, from whence she proceeded to the several ports following. All which are on the said coast.

Nov. 17, 1703. Arrived at Calloquilon ; 21, at Quilon ; Dec. 22, at Calloquilon ; January 10, 1704, at Cochin ; 24, at Calicut ; Feb. 27, at Cochin ; March 8, at Calloquilon.

April 10. About this day the sloop was drove ashoar and lost near Carnepola, where the ship is now ordered to.

April 24. Endeavoured to get to Quilon, but anchored between Quilon and Anjango.

April 26. Saw a ship which was advised to be the Aureng-Zeb, captain Blewett : the weather being stormy, drove nearer to the Aureng-Zeb. Captain Blewett seeing by a signal that the Worcester was in distress, sent his chief mate, (now captain of the said ship) with his long boat on board capt. Green, who found the ship very leaky, and a cable parted ; after which, at capt. Green’s request, capt. Blewett and his chief mate came on board the Worcester and surveyed the ship, and acquainted the supra-cargo that the said ship the Worcester was not in a condition to return to England, without repairing.

May 4.—Mr. Robert Callant the supra-cargo and capt. Green went ashoar at Anjango, to advise with Mr. Braburn governour of the said fort, where to go to refit the ship ; he gave his advice in writing signed by himself and counsel, for the ship to go to Bangal.

May 5.—Departed from Anjango for Bangal, many of the ship’s crew being sick with feavours and fluxes, and several dead.

AN ABSTRACT of the DEPOSITIONS of the Witnesses to prove capt. Green and his Crew guilty of Piracy and Murthur, with the Proofs and Circumstances which are to be had at present to invalidate their Testimony.

[Here follows the Deposition of Antonio Ferdinando.]

* The spelling of the original is retained.

An ANSWER to the Depositions of Antonio Ferdinando, an Indian Black.

That he did not sail in the Worcester (or her sloop) 'till the said ship departed from Anjango bound to Bangal, as is confirmed by the deposition of Ant. Francisco one of the evidences, who deposes, that this deponent did not come aboard the Worcester till they were going to Bangal, which was in the beginning of May, 1703.

That the Worcester's crew, when arrived on the Mallabar coast, was no more than 35 men and boys, one whereof died soon after; that five of that number, viz. the surgeon, Reynolds, Linstead, Ockley and Hammond were ashore, as is owned by the witnesses against the prisoners; who deposes, that to engage that ship the sloop was manned with one and twenty men, that capt. Green, capt. Madder, the chief mate, Mr. Loveday, the purser, the supra-cargo, the carpenter and gunner were on board the sloop, so that by his depositions, there remained but nine men on board the Worcester for an engagement of three days; and amongst those nine men neither captain nor supra-cargo, nor purser, nor chief or second mate, gunner nor carpenter, which seems very improbable, that the captain and all the principal officers of the ship should leave their own ship with only nine men on board, to engage another ship with their sloop; and that for three days together, especially when their own ship was so near the stranger's ship as for capt. Green and others to go on board her before the engagement, as this deponent saith.

This deponent says, the taken ship was sailed by some of the Worcester's crew to Callequilon: whereas Charles May, one of the witnesses against capt. Green, says, she was carried to Quilon, which is contradictory.

That the said ship the Worcester never went to the northward of Callicut, during her being on the Mallabar coast; so was impossible to take any ship between Callicut and Tillecherry, being about thirty miles to the northward of Callicut.

That he deposes the taken ship to have about twenty guns, and the said ships crew killed to be about ten men, which seems very inconsistent.*

[Here follows the Deposition of Charles May.]

ANSWERS to the Depositions of Charles May.

After his being ashore at Callequilon, about 14 days, says he heard guns as at sea, and in the latter part of his Deposition says, that it was in the Worcester, going up the Mallabar coast, that he heard the shooting, which is contradictory.

* This witness died suddenly the same day capt. Green, &c. received their sentence of death.

That the next morning he came to the side, where he saw the Worcester rising her birth as before, with another vessel at her stern, that the long-boat came on for water, that they had been busking all night that he went aboard the Worcester, that he turned ashore again. All which is in a great measure cleared by comparing the following particulars.

April 10, 1703. The Worcester departs from Callequilon to Carnipole, leaving the surgeon ashore at Callequilon.

April 29, 1703. The Worcester was driven by stress of weather from near the mouth of Quilon near to Anjango, where coming to the Aureng-Zeb capt. Blewitt, the Worcester saluted her with five guns, which seems to be the same guns heard by the surgeon, he being 19 days from his being left ashore at Callequilon to the firing of those guns, whereas he says he had been ashore 14 days, when he heard the guns.

As he deposes that he saw a ship at the Worcester's stern, the Aureng-Zeb did not lie astern of the Worcester, and not parted from her.

The Worcester supplied the Aureng-Zeb with fresh water, which occasioned her sending for more fresh water from the shore.

By busking all night was meant, as the Worcester was bound from Carnipole to Quilon, but the wind blowing hard and contrary, could not fetch Quilon, and had been busking to windward. For as his deponent says busking all night, without meaning any further time, it cannot be supposed that he busked only one night, could be in search of any ship much less the taken ship, which Antonio Ferdinando deposes was chased three days.

This deponent says, the taken ship was carried to Quilon; whereas Antonio Ferdinando says she was carried to Callequilon, which is 21 miles distant from Quilon, and is contradictory.

This deponent owns, that after what is passed as aforesaid, he did never hear any of the Worcester's crew talk of taking any ship, which it is very probable he would have heard something of, if it had been so, he being on the Worcester about 18 months after the pretended fact.

He deposes, that the Worcester went no further up than Callicut while he was aboard, which agrees with the Captain's journal of the voyage, and gives some reason to confirm the journal that the ship never went no further up than Callicut, and if so makes it impossible for the Worcester to take a ship between Callicut and Tellecherry, as Antonio Ferdinando has deposed.

This deponent says, he was at Callequilon when he heard the guns, and Antonio Ferdinando deposes, the engagement was between Tellecherry and Callicut, which could not be less than 140 miles distant from Callequilon, so impossible for both depositions to be true.

This deponent says, that Mr. Thomas La

stead was left at Quilon, when the Worcester went up the coast of Mallabar, and gives several reasons for it; whereas Antonio Ferdinando says, Mr. Linstead was on board the sloop in the engagement, which engagement, if ever happened, where Antonio Ferdinando says it did, must be when the Worcester went up the Mallabar coast to Callicut, (which she did but once) therefore impossible for Mr. Linstead to be ashore at Quilon, and on board the sloop in the engagement.

AFFIDAVIT of Capt. STEPHEN GRANDALL, commander of the Aureng-Zeb, and Mr. HENRY WALTER.

Stephen Grandall of London, mariner, commander of the Aureng-Zeb; and Henry Walter of London, mariner, second mate of the said ship, maketh oath, that on the 22nd day of April, 1703, these deponents arrived in the said ship on the coast of Mallabar, near the port of Anjango, and that on the 29th day of the said April, the ship Worcester, Thomas Green commander, by stress of weather, was drove from the road of Quilon, near to the road of Anjango, where the said ship Aureng-Zeb then was, and that the said ship Worcester did then fire five guns as a salute to the Aureng-Zeb, who returned the salute. That the said ships lay three days at the said place, in company with each other, in which time the captains, super-cargoes, officers, and others of the said ship's companies, were several times on board each others ships, particularly these deponents were on board the said ship Worcester, during the said time, and Mr. Madder, the chief mate of the said ship, was then sick in the cabin, and that the said ships were supplied from each other with water, and other necessaries, and that the said ships saluted each other several times, with several guns, during the said space of three days, and likewise at their departure, which was on the 3rd day of May then following, the Aureng-Zeb being bound to Surat, and the Worcester to Anjango: that these deponents in the said ship Aureng-Zeb, proceeded to Carwarr, from thence to Bombay and Surat, and returned to Bombay, Carwarr, Onor, Mangalor, thence to Callicut, and Anjango aforesaid, on the Mallabar coast, from which last place they departed the 14th of February, 1703-4, bound for England, and that at all the aforesaid places these deponents were ashore, and had conversation with the chiefs and factors of the English factories and natives there, where they did never hear of any robbery, piracy, or murder committed by any of the said ship Worcester's company, and do verily believe, that if any such crime had been committed, these deponents should have heard thereof; and that the governor of the English fort at Anjango did declare to these deponents, that he was concerned for the said ship Worcester (she having sprung a leak) least she should not get safe to Bengall, where she was bound to refit for her voyage to England: and the said Henry Walter maketh

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oath, that during the time of his being on board the ship Worcester, when she lay near the road of Anjango, Charles May, the surgeon of the ship Worcester, came on board her from the shoar.

STEPH. GRANDALL.

HENRY WALTER.

Jurat vicesimo sexto die Martii,
1705, coram me, Jo. SMITH.

[Here follows the Deposition of Antonio Fransisco.]

ANSWER to the Deposition of Antonio Fransisco.

He deposes he heard no shooting from any other ship, which seems inconsistent with the deposition of Antonio Ferdinando, who deposes, that the taken ship was of about 20 guns, and manned with white men, who spoke English; and that the engagement lasted three days. If so, 'tis reasonable to conclude, that some guns must be fired from the other ship.

He deposes, that he did neither hear of, or see any other wounded men, save Antonio Ferdinando, who he deposes, came aboard the Worcester when they were going to Bengall, so could not be in the pretended engagement as he the said Antonio Ferdinando deposes.

[Here follows an Abridgment of the depositions of James Wilkie, Kenneth Mackenzie, William Wood, John Henderson, and Anna Seaton.*]

ANSWER to the DEPOSITIONS of James Wilkie, &c.

By the depositions are endeavoured to be proved, that George Haines had some knowledge of capt. Drummond's ship, which ship not being heard of since her departure from Scotland, has given cause of suspicion there, that the ship said to be taken by the Worcester, must be capt. Drummond's ship.

In the Edinburgh Gazette, dated March 29, 1705, is the following paragraph:

"We hear that George Haines, one of capt. Green's crew condemned for piracy, formerly mentioned, has made a farther acknowledgment of the crimes for which he and the said crew are condemned; and particularly, that the vessel taken by them on the coast of Mallabar, (condescended on by the witnesses) was a ship belonging to our Indian and African company, commanded by capt. Drummond; and that they murdered all the men on board her, by chopping off some of their heads with a hatchet, and tying others back to back and throwing them into the sea. He has likewise given information of several other things, which gives a great deal of light to the whole matter. It is said, several others of the crew have dropt some words which do insinuate the guilt, but

* The deposition of John Glen is not particularly noticed.

seem to scruple the making of a plain confession, in regard of an oath of secrecy, which was made amongst them."

For the clearing of the matter charged in relation to captain Drummond's ship, refer to the following Affidavit:

"*Burrough of Portsmouth.*—Be it known unto all men by these presents, That upon the 31st day of March, A. D. 1705, before John Vincing, esq. mayor of the said burrough, and George Huish, gent. notary and tabelian public, dwelling in Portsmouth, personally came and appeared Israel Phippany and Peter Freeland, now belonging to the Raper galley, lately arrived there from the East Indies, and did solemnly declare upon the Holy Evangelist, That they the said appearers did both formerly belong to a ship called the *Speedy Return*, belonging to the Scotch company, trading to Africa and the East Indies, (of which capt. Robert Drummond was commander) and that on or about the 26th day of May, which was in the year 1701, the said ship the *Speedy Return* sailed from Newport Glasgow in Scotland, in company with the Content brigantia, capt. Stewart commander, and afterwards arrived at Bangole in Guinea, from thence sailed to the Cape of Good Hope, and from thence to the island of St. Mary's in Madagascar, where the said ship the *Speedy Return* and the said brigantia took on board negroes, which were transported to Don Mascarenhas; from thence they sailed to the port of Maritan in Madagascar aforesaid, where the said captain Drummond went on shoar, and about 9 or 10 hours after his going on shoar, five several persons, who afterwards appeared to be pirates, armed with pistols, swords, and other weapons, came on board the said *Speedy Return*, with a pretence to buy something, and taking the advantage of the said captain Drummond, Andrew Wilky his surgeon, and several of the said ship's company being on shoar, and others working in the hold, the said five persons by force of arms took possession of the said ship, and immediately made a signal, upon which about 40 or 50 other pirates came on board the said ship, and then took the said brigantia (which was afterwards burnt) and the said pirates forced these appearers and the other persons on board the said ship the *Speedy Return*, to sail in her till such time as she arrived at Rajapore, a place so called, where the said ship the *Speedy Return* was also burnt, and then these appearers, and the other men that did belong to the said *Speedy Return*, went on board a Moca ship called the *Defiance*, which some time after touched at the island Mauritius, where the appearers made their escape; and the said Raper galley soon after arriving there, the said appearers went on board her, and are since arrived at the port of Portsmouth.

"And the said appearers did farther declare, that at, or after the time of taking the said ship *Speedy Return*, neither the said capt. Drummond, nor any other persons belonging to her

were killed or wounded, neither was she ever attacked by a ship called the *Worcester*, capt. Green commander, or any other ship, sloop, or vessel whatsoever. In testimony whereof the said mayor hath hereunto set his hand, and caused his seal of the office of mayorahy of the said burrough, to be hereunto affixed the day and year first written. (Signed)

"ISRAELL PHIPPANY,
"PETER FREELAND."

"Quod attestor rogatus et requisitus sub manu et sigillo meo, GEORGE HUISE, Notar."

[Here follows an Abridgement of the Depositions of John Browne and Archibald Hodge.]

AFFIDAVITS of JOHN OCKLEY and THOMAS WHITEHEAD.

April 5, 1705.

Which day appeared John Ockley of Caterham, in the county of Surrey, in the kingdom of England, mariner, and Thomas Whitehead of the parish of St. Bartholomew, the Exchange, London, mariner; and by virtue of their corporal oaths deposed, That he the said John Ockley served as midshipman, and he the said Thomas Whitehead as captain's servant on board the ship *Worcester*; whereof Thomas Green is, or late was, master or commander, in her late voyage from the port of London to the East Indies, and during all the time she continued there, and from thence to her arrival in Leith Road in Scotland, which was in or about the month of July last past, and these deponents well know what ships the said ship *Worcester* was in company of, and what ports and places she traded at during her aforesaid voyage, and well knows that neither the said ship *Worcester*, nor her sloop, fought or had an engagement with any ship, sloop, or vessel whatsoever during the aforesaid voyage; and none of the company of the said ship *Worcester* received any wounds during the said voyage, saving that George Haines, steward of the said ship (as these deponents were informed and believe) received a cut in his foot as he was cutting of wood at Delagoa, on the coast of Africa, by the ax with which he was cutting the said wood, and saving that John Norman a Dutchman, a mariner on board the said ship, received (as these deponents were informed and believe) a wound in his arm, which was given him by playing at sneker-snee by John Cline a Dutchman, also a mariner on board the said ship; and saving that Keneth Cowen the boatswain's boy on board the said ship, was (as these deponents were informed and believe) bit in the calf of the leg by a dog on the shoar at Ibeck near Callequilon, on the coast of Malabar; and the said deponent Thomas Whitehead received a wound in his head by a fall from the ship's deck into her hold; and these deponents also severally depose, that they saw no person killed during the said voyage, and do not know, believe, or have heard, that there was any ship or vessel whatsoever taken by the

said ship Worcester or her sloop during the said voyage, or that there were any goods, stores or provisions whatsoever, taken by the company of the said ship Worcester, or her sloop out of any other ship or vessel whatsoever by piracy, or that the said ship Worcester or her sloop, had at any time during the said voyage, any goods, stores or provisions on board, saving what were fairly purchased or given as presents to the captain and others of the said ship's company: and these deponents do not know, believe, or have heard, that they saw, or were in company with the ship Speedy Return, or any Scotch ship whatsoever, till her return to the north of Scotland; and these deponents never heard any thing of or concerning the said ship Speedy Return, captain Drummond commander, or any other Scotch ship whatsoever during the said voyage, saving that these deponents were informed by one Robert Innes a Scotchman at Calcutta on Hugley River, that he the said Innes was supracargo of a Scotch ship, which was cast away some time before; but these deponents do not remember what name the said Innes said the said ship was called by, nor the place where he said she was cast away. JOHN GCKLEY,
THO. WHITEHEAD.

Jurat quinto die April 1705, coram me,
ROBERT CLAYTON.

AFFIDAVITS of Mr. GEORGE MADDER, and Mr. SALATHIEL ROLPH.

George Madder and Salathiel Rolph of London, mariners, make oath, That the ship Worcester, Thomas Green commander, arrived at Anjango, on the coast of Malabar, about the middle of November, 1702, at which time these deponents were then there. That on the 27th of the said month, these deponents being bound for Surat, left the said ship riding at Quilon. That the Happy Hour, capt. Hambleton commander, arrived at Surat about the middle of March following. That the said capt. Hambleton told these deponents, that he left the said ship Worcester at Callicut, on the aforesaid coast, about the middle of February then last past. That these deponents arrived at Cochin on the said coast in the ship Albemarle, William Beawes commander, bound for England, on the 20th day of April, 1703, where several persons came from the shoar to the said ship, of whom these deponents enquired after the ship Worcester, and were told that she sailed from thence about ten days before. And that these deponents did never hear at any place in the East Indies, of any robbery, piracy, or murder committed by any of the said ship Worcester's crew; and do verily believe, that if any such crimes had been committed, these deponents should have heard thereof.

GEORGE MADDER,
SALATHIEL ROLPH.

Jurat vicesimo sexto die Martii, 1705,
coram me, J. SAUNDERS.

A LETTER from Captain GEORGE WEOLEY, to Mr. PEARSON, chief of the English East India Company's Factory at Callicut.

Worshipful Sir; Nov. 7, 1703.

Yours of the 5th reached my hands this morning the 11th hour; it being impossible for me to give you an account at large of every thing relating to the actions of the pirates, but here send you the heads of what I saw, and what I had from their mouths in discourses at several times, viz. That three years past one capt. Merrino, a Frenchman, and French company, took a ship belonging to Surat, off, or near Cape Aden, and made a prize of her; wherein was considerable riches, and quitted her after they had taken her moneys and other things out of her, and sailed for the island of Mascarenha, a general rendezvous for pirates, where the said Merrino is now settled, and actually become an inhabitant. This relation I had from some of his own ship's company, which are Frenchmen, and belonged to the ship I was imprisoned in. The same year was taken off St. Johns, a Surat ship, by the ship Speaker, whose company consisted of all nations to my certain knowledge, the major part being now in the pirates on the coast, and the same commander John Bowen, here near Callequilon; they took capt. Conaway from Bengal, selling ship and goods in shares; viz. One third part to a merchant of Callequilon, another third to a merchant of Poeca, the other third to Malpa the Dutch broker of this place, which relation I had from capt. Bowen, and several of his company; then left the coast, and sailed for the island Madagascar, but in the way was lost on the island Maritijus, on St. Thomas's Reef, where they were most curiously received and feasted, their sick carried into their fort, and cured by their doctor, and a new sloop sold them, and supplied with all sorts of necessaries for their cutting her; and making her a brigantine, which they performed by the middle of March, and took their leave of the governor, giving him 2,500 pieces of eight, their vessels and necessaries, leaving their lascars with him to be conveyed for Surat; and being invited to make it a place of refreshment, sailed for the island of Madagascar, where, at a place on the east side, called Maritan, the captain with a gang settled themselves, till two Scotch ships or vessels falling in the port, were both surprized and taken by them. By another gang which settled at St. Augustine, the ship Prosperous was taken, the remainder went for New Mathelge, where they gave the king their brigantine, where I saw her and left her when the pirates sailed from thence. The pirates having these three in their possession, in searching after one another, lost one of the Scotch vessels, but at last two met at Mayotta, where it was my misfortune to fall into their hands, and detained by them after they had slain my chief mate, and another European, and plundered what they pleased, let the ship go and sailed for Mathe-

lage; from thence to the islands of Mayotta, and Johannah, from thence to the high land of St. Johns, off which, and at Surat's river mouth, they took two sail of Surat ships from Moca; she at the river's mouth was taken by Thomas Howard in the Prosperous, the other by John Bowen in the Speedy Return, a Scotch ship: Having taken the following sums out of each ship, viz. out of her taken at the river's mouth 168,000 pieces of eight, counting each piece of gold two pieces of eight. In the other ship was taken 88,000 pieces of eight, at the same reckoning. One ship they left adrift off Daman without anchor or cable, the other they carried to Rajapore. Thus by the help of our friend's brigantine, have been taken six sail of ships, and hundreds ruined. Here in Rajapore was both the pirates ships burnt, and both companies transported on board the Surat ship, detaining about 70 Lascars, mounting 56 guns, and 164 fighting men, of which part are 43 English, the better part of the company French, the rest Negroes, Dutch, &c. nations that cries 'yaw'; from whence they sailed for the coast of Mullabar, and about three leagues to the northward of Cocheen they anchored and fired several guns, but no boat coming off, the quarter-master went near the shoar, and had conference by boat with the people, who supplied them next day with hoggs, &c. refreshments. And from Malpa the Dutch broker came a messenger, who advised of the ship Rhimee, her being in Mudbay, and that if the pirates would take her he would buy her of them; this I heard myself, and that they should be supplied with pitch, tarr, and other necessaries. I took an opportunity to ask the messenger, who sends the things on board, not knowing but that I was one of the pirates, told me the Dutch, but he should be sent off with them; but before he brought them on board I got clear of the pirates. There had been several Dutch on board, before I got ashore; and since my abode here for my health, I have seen no difference between a pirate and a merchant ship; both black and white flocking off with all sorts of merchandizes and refreshments, jewels, plate, and what not, returning with coffers of money: And Malpa the broker has been so impudent, as to offer them to sail a small ship which they want, and asked one Thomas Punt to carry her off to them, who desired him, telling him, now he was not ashamed to shew his face; but should be guilty of so base an action, he must never see the face of his countrymen, which made the gentleman change his countenance.

Thus are those villains encouraged by our pretended friends, which Atga Rhimee cannot chuse but see; and if at his arrival at Surat, will speak the truth, must declare the same. I would have waited on him to that purpose, but so feard of being taken notice of, and loose the benefit of the physician, which at present am in great need of, I dare not do it.

These being the heads of what I remember, and what I heard, and had from their mouths

in discourses at several times, from the reports of the pirates on board them in my seven months imprisonment, having omitted nothing but the many hazards of life and abuses received from those villains. I conclude with my humble service to yourself, &c. gentlemen of Callicut, I remain, your worship's most humble servant,
GEORGE WOLEY.

Sir George Mathews, captain of the London, met the said ship Worcester on the coast of Mallabar, February the 1st, 1703-3, and was on board her, and bought some wine of captain Green, and left her the 4th of the said month, and met her again in Bengall, and never heard of any piracy, robbery or murder, committed by her crew.

The Worcester being very leaky, captain Green and Mr. Callant the supra-cargo went ashore to the English fort of Anjango on the Mallabar coast on May 4, 1703, to advise with the governour and council, were to go with the ship to stop their leaks, who gave captain Green an ample certificate, signed J. Braburn, Simon Cowse, William Kiffin, advising him to go to Bengall to stop the leaks, which advice those gentlemen would not have so kindly given captain Green, had they thought him guilty of piracy or murder, but ought and could have stopped him, he being then in the fort, and being but the very day before he sailed from the coast, and long after the time of the pretended engagement, which they could not be ignorant of, if it had been committed on that coast, as is deposed.

CERTIFICATES from Captain JOHN BLEWITT, Commander of the Aureng Zeb, and others, as also of the Governour and Council of Anjango.

To all persons whom it may concern, this is to certifie, That whereas captain Thomas Green, commander of the good ship Worcester, did on the 24th of April 1703. receive an order in writing, under the hand of Robert Callant, supra-cargo of the said ship, to weigh anchor, the said ship then riding at an anchor at Callequilon, upon the coast of Mallabar, and to come to an anchor at Quilon on the said coast, pursuant to which order the said captain did weigh, or cause to be weighed the said ship's anchor, and did use his best endeavours to come to an anchor at the said Quilon; but meeting with hard gales of variable and uncertain winds, together with strong currents, was drove beyond the said Quilon, and obliged to come to an anchor about three leagues and an half to the southward of the same, wherein about an hour's time after coming to an anchor, it was found the said ship had sprung a leak, which caused her to make ten inches water in a glass, or half hour's time, whereupon a consultation was held on board the said ship, the 30th day of April aforesaid, by the persons whose names are hereunder written, who did

then and there resolve, adjudge, determine, and conclude the said ship incapable of performing her intended voyage, without being first halled on shoar, and refitted. And the said parties whose names are hereunder written as aforesaid, did also at the same time, adjudge and determine Tutacareen Bay, near Cape Comorin, upon the said coast, to be the most convenient place to hale the said ship on shoar, both for the safety of her, as also the preservation of her cargo, as witness their hands this 30th day of April, 1703.

JOHN BLEWITT,
STEPH. GRANDELL,
JOHN MADDER.

JOHN REYNOLDS,
WILL. BALDWIN.

Whereas we the commander and council for affairs of the right honorable the governour and company of merchants of London, trading to the East Indies at Anjango, upon the Mallabar coast, having seen a writing subscribed by John Blewitt, commander of the ship Aureng Zebb, with his chief mate, Mr. Grandell, and other officers belonging to the ship Worcester, captain Thomas Green commander; purporting that seeing the said ship Worcester has unhappily sprung a leak, in such sort as disables her to proceed with safety of the men's lives, ship and cargo, upon the said voyage to Dellagoa and England, till she be laid ashoar and mended, they advise, she may go to Tutacareen, near Cape Comorin, to be repaired, as is more fully expressed by the copy of the paper hereunto annexed: And whereas the said captain Green has thought fit to ask our advice about his going to repair his ship at Tutacareen, we do say, that in our opinion, it is better for the owners and freighters, that he goes directly for Bengall, and that for the following reasons:

1. Tutacareen being under the obedience of the Dutch, we have known many late examples of English ships and vessels that went thither, in great need of repairs, who were always refused any assistance by the Dutch, without whose consent and assistance nothing can be done or procured there.

2. If the Dutch, contrary to expectation, should permit the ship to be laid ashoar there, then seeing the tide does not flow above two or three feet, the ship must be haled up by cables and other engines, by which means the leaden sheathing will be rubbed off.

3. If that happens, or if for any other occasion you want workmen, planks or timber, there is no such thing to be had in the country, unless the Dutch will help you with them, and spare stores out of their own stores; which we do not believe.

4. There is but little provisions, and none fit for salt to be had there, which the Worcester will need for her intended homeward voyage.

5. There is no hope that at Tutacareen, the captain can raise any money for his necessary occasion, but by disposing of part of the cargo,

which must be done at very low rates, less than prime cost.

6. If the Worcester goes to Tutacareen, she will not get out till October next.

Now in Bengall you will be sure to meet assistance from your own countrymen, you may lay the ship ashoar there, with great ease, and without rubbing off the sheathing, you may there get planks and workmen, timber as much as you need, and also you will have store of provisions, as also it is likely you may meet with such as will advance money upon the ship's bottom, or otherwise for her repairs, or else you may dispose of some of the cargo with some profit; and lastly, you are as near England in Bengall as at Tutacareen.

Now if the Dutch at Tutacareen should refuse you all sort of assistance, then we do not see which way you can ever get the ship in a condition to go home: for these reasons our opinion is, that you ought to go to Bengall, if you think the ship can perform the run.

J. BRABOURNE.

SIMON COWSE.

Anjango, May 4, 1703.

WM. KYFFIN.

By Robert Callant, *Supra-cargo of the Worcester.*

Having seen the paper signed by captain Blewitt, and his chief mate, and by Mr. Maddar, chief mate, &c. officers of the Worcester, declaring the inability of the Worcester going for Dellagoa and England, till the leak she lately sprung is stopped: and having thereupon seen the advice of the commodore and council of Anjango, to captain Green, I say, that I agree with the commodore and council, and think that Tutacareen is no good port for our occasion; and that it suits and agrees best with the interest of the owners and freighters, that seeing the ship is not in a fit condition to undertake her voyage to Dellagoa and England, that she goes rather to Bengall than Tutacareen.

ROBERT CALLANT.

Anjango, May 4, 1703.

Mr. Edward Wilkinson, and Mr. Francis Murrough, *supra-cargoes* in the ship Resolution, arrived at Cannanore, on the Mallabar coast, September the 14th, 1703; from thence went to Tellechery and Callicut, on the said coast; departed from Callicut November the 18th, 1703, and arrived at London in August, 1704. Also Mr. James Cross and Mr. John Rogers, *supra-cargoes* in the Alexander-Galley, arrived at Cannanore in December, 1703, from thence went to Tellechery and Callicut. Departed from Callicut in January, 1703-4, and arrived at London in October 1704; all which persons do declare, they never heard of any piracy, robbery or murder committed by captain Green, commander of the Worcester, nor by any of the said ship's crew in her late voyage to East-India.

CERTIFICATE from Mr. THOMAS WOOLLEY, Secretary to the Old East-India Company.

ACCOUNT of Ships employed by the Old East-India Company; and which have arrived in England, being dispatched from the East Indies in, or since October, 1702.

Ships.	Commanders.	From what place dispatched.	Time of their Departure.	When arrived in England.
Loyal Cook	Rich. Bealton	Fort St. George	October, 1703	In May, 1703.
Hampshire	Zach. Tovey	Ditto	Oct. 1702	
John and Mary	Bayley Kent	Bay } Bengal	Jan. 1702	
Wentworth	Wm. Wells	Ditto	Feb.	November, 1703.
Fleet Frigate	Tho. Burgess	China	Ditto	
Phoenix	Joh. Carvell	Fort St. George	Ditto	
Nathaniel	Ben. Dennis	Bombay	Ditto	
Loyal Bliss	Rob. Hudson	Calicut	Ditto	April, 1704.
Oreng Zeb	Jo. Grandille	Calicut	Feb. 1703	
Colchester	Alex. Reed	Fort St. George	Ditto	October, 1704.
Union	Jo. Goodsale	China	About Feb. 1703	
Regard	Tho. Warner	Bombay	June, 1704	March 27, 1705.

These are humbly to certify all whom it doth or may concern, that the above-mentioned twelve ships are all the ships employed by the governor and company of merchants of London, trading into the East-Indies, commonly called the Old East-India Company, which have arrived in England within the times above-mentioned; and that in the letters which they brought to the Company, there is no advice or account that the ship Worcester, captain Thomas Green commander, or any men belonging to her, had committed any piracy or hostilities during their stay in the said East-Indies.

It is further humbly certified, that the said East-India Company have a letter from the president and council at Fort William, in Bengal, dated Nov. 18, 1703, wherein the president and council write that they had sent the said letter by the Worcester frigate, captain Green, commander, but intended to enlarge by the Colchester, and the said Company received the same from Scotland the 7th of August last.

The said president and council likewise at the same time wrote by the Worcester to the Court of Managers for the united trade of the English Company, trading to the East-Indies, which was also received from Scotland in August aforesaid, but do not mention therein any thing of piracies or hostilities committed by her, or any of her men, in the East-Indies.

THOMAS WOOLLEY, Secretary.

Dated at the East-India House, in London, the 7th of April, 1705.

CERTIFICATE from Mr. JOHN GARDNER, Secretary to the New East India Company.

Tankerville, captain Newman, from Bengal. Jan. 27, 1703-4, arrived in England the 4th of November, 1704.

Hallifax, captain Hudson, from Bengal, Jan. 25, 1703-4, arrived in England the 4th of November, 1704.

Robert and Nathaniel, captain Sayth, from China, November 22, 1703-4, arrived the 5th of October, 1704.

Liamo, captain Monck, from China in Jan. 1703-4, arrived the 4th of November, 1704.

Edward and Dudley, captain Lambert, from Borneo, March 30, 1704, arrived the 26th of March 1705.

Above is an account of all the ships belonging to the New East India Company, which departed from India since May 1703, and are since arrived in England, by whom the Company has received no account or relation of any piracy committed by captain Green, commander of the Worcester, or by any belonging to him.—JOHN GARDNER, Secretary to the said Company.

Stinner's Hall, London, April 7, 1705.

By the foregoing affidavits, &c. and by the testimony of several other persons, who were on the Malabar coast, and at Surat and Bengal both at the time, and several times since the Worcester was on the coast of Malabar, it does plainly appear that no such piracy or murder has been heard of in India, nor no such ship or men missing, as is pretended to be piratically taken and murdered, which if it had been true, the taken ship must unavoidably have been known to Mr. J. Braburne, the governor of Anjango: it being deposed she was sold to Ceja Comodo, at Quilon, which is but twenty miles from Anjango, and if it had been known to him, he would most certainly have advised the East-India Company thereof by some of their ships before mentioned.

During the voyage from the Malabar coast to Bengal, and thence to Scotland, which was about fifteen months, none of the witnesses against captain Green, and crew, pretend to have heard any discourse of any taken ship. Nay, the surgeon, Charles May, one of those witnesses, deposes, that he never heard any such discourse; neither doth any of them pretend to know of any thing piratically taken,

save some China root, which is a general commodity, and is not pretended to have any mark to be known by, neither does it appear on the strict search that has been made in Scotland by the Lords of the Privy Council, on their seeing unladen all the cargo, and searching all cabins, chests, secretors, &c. and even ripping off many of the planks of the ship; wherein nothing appears, either in the cargo or otherwise, which can be said to be piratically taken, neither can any thing relating to the pretended piracy and murder be collected by the Scots out of the journals, books, accounts and papers: all which were seized and examined by them, when the ship was first seized in Scotland, which was many months before captain Green, and his crew, was apprehended for piracy and murder.

When captain Green, and his crew, were apprehended in Edenborough at that time, Ballantine, a Scotchman and one of the Worcester's crew, during his voyage to India, was with his friends at Burroughstons, some miles from Edenborough, where a warrant was sent to apprehend him; who being informed thereof by some friend, that he might make his escape, did nevertheless go away by himself (and not in custody) immediately to Edinburgh, and there surrendered himself to justice, as knowing his own innocency, but is now condemned with captain Green, &c.

Thomas Linstead, a passenger in the Worcester, and George Haynes, servant to captain Green, were both condemned for piracy, &c. since which, as we are informed, these two persons have made confessions of, and relating to the crimes charged against captain Green and crew, and that George Haines has his pardon, and Thomas Linstead is to have his pardon. As yet we have received no copy of their confessions, so cannot answer thereto: but if that be true which the Flying-Post publishes in the paper of April 5, 1705, we hope the foregoing affidavits, &c. are sufficient to confute all therein relating to the piracy and murder. And whereas George Haines therein confesses, that when the Worcester was in the Downs, he received a letter from a friend in London, telling him that 'twas surmised in London that their ship was going out upon some ill design, and that he had likewise another letter from his father to the same purpose. In answer to which give the following Affidavit:

AFFIDAVIT of Mr. GEORGE HAINES. *

George Haines, one of the elders of the East India warehouse in Leadenhall-street, London, maketh oath, that he this deponent never heard, that the ship call'd the Worcester, captain Green, commander, went out upon any ill design, neither did he this deponent ever write any such thing to his son George Haines before the said ship the Worcester departed from

* These Confessions are after their condemnation.

the Downs, on her voyage for the East Indies; neither did he this deponent ever receive any letter from his said son George Haines, that the said ship Worcester was going out upon an ill design.

GEORGE HAINES.

Jurat Septimo die Aprilis Anno
Dom. 1705, coram me, O.
BUCKINGHAM, Mayor.

Whereas in the Flying Post aforesaid is mentioned, that while the ship was on the coast of Malabar she sprung a leak in the streak next the keel, and that they did not go in to help the leak on the coast of Malabar, being always reputed pirates, after the aforesaid action and selling the ship to Coga Comodo. In answer to which, refer to the certificate of Mr. J. Braburne, &c. governor and council of Anjingo.

And whereas in the Flying Post aforesaid, is mentioned a letter from the owners in London to captain Green, which bore, that although the crew were condemned in Scotland, they had pardons ready to send down for them, which is notoriously false; for there never was any letter writ from the owners and freighters to that purpose, save one by T. H. copy of which is hereunder.

"If please God you should be convicted, send an express immediately with the particular account of your trial, as full as if it were to be printed, and particularly the full evidence of the witnesses, and if upon oath, or otherwise, that we may try to get a pardon from the queen, which I will use my utmost endeavours to procure, &c."

This Case is a very remarkable proof how dangerous it is to convict a person of murder before the 'corpus delicti' (the death of the party alleged to be murdered) is established.

"I would never," says lord Hale, "convict any person for stealing the goods *cujusdem ignoti* merely because he would not give an account how he came by them, unless there were due proof made, that a felony was committed of these goods.

"I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead," [This was also a rule in the civil law. Dig. Lib. xxix. Tit. 5, § 24.] "for the sake of two cases, one mentioned in my lord Coke's P. C. cap. 104, p. 292, a Warwickshire case. [That case was thus, An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for some offence, she was heard to say, Good uncle, do not kill me; after which time the child could not be found, whereupon the uncle was committed upon suspicion of murder, and admonished by the justices of assise to find out the child by the next assises, against which time he could not find her, but brought another child as like her in person and years as he could find, and apparelled her like the true child, but on examina-

tion she was found not to be the true child; upon these presumptions he was found guilty and executed; but the truth was the child being beaten ran away, and was received by a stranger, and afterwards, when he came of age to have her land, came and demanded it, and was directly proved to be the true child.]

"Another that happened in my remembrance in Staffordshire, where A. was long missing, and upon strong presumptions B. was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon B. was indicted of murder, and convict and executed, and within one year after A. returned, being indeed sent beyond sea by B. against his will, and so though B. justly deserved death, yet he was really not guilty of that offence, for which he suffered."

See, also, Vol. 11, p. 463, of this Collection, and Mr. Wynne's Argument for Bishop Atterbury, A. D. 1723.

The lord advocate of Scotland (Duncan Forbes) in his Speech in the House of Commons on the motion for the commitment of the Edinburgh Riot Bill [See in this Collection the Case of Porteous, A. D. 1736] said:

"One of the first incidents that happened after I came to act any part upon the stage of life, was a proof to me of the service this guard may be upon some occasions. And I shall the rather mention it, because I hope it will serve to shew how early I endeavoured to shake off those foolish but fatal prejudices, that reigned among the subjects of that part of the united kingdom against the English. One Green, a master of an English vessel, having been forced by stress of weather into the harbour of Leith, a report was spread that he was a pirate; upon which he and his officers were taken up, tried, and upon the evidence of some of his crew, no two of which concurred in their evidence, condemned, for murdering one Drummond, and seizing his ship. I was present at the whole trial, and was sensible with what partiality and injustice it was carried on; the unfortunate men seemed to me to have no other crime but that of being Englishmen, and of being obliged to put into Scotland at a time when great animosities were subsisting in that kingdom on account of some proceedings against the natives of Scotland, which were judged there to be unjust and harsh. For those and no other crimes, this poor unfortunate gentleman, and the officers of his ship, were to suffer an ignominious death. The populace in the mean time began to have a surmise that the privy council, which sat that time at Edinburgh, intended to reprove the criminals. As every surmise to an enraged mob is a proof, they attacked the lord chancellor, beat his chair in pieces, and obliged him to fly for his life; and had it not been for the city guard, who rescued him with their bayonets upon the muzzles of their guns, they had torn him to pieces. They afterwards went and knocked at the door of the house where the

privy council was sitting, bawling out for the blood of these persons; and the privy council, in a mean and scandalous manner, gratified them by signing an order for their execution that very day. I was so struck with the horror of the fact, that I put myself in deep mourning, and with the danger of my life attended the innocent but unfortunate men to the scaffold, where they died with the most affecting protestations of their innocence. I did not stop here, for I carried the head of captain Green to the grave; and in a few months after letters came from the captain for whose murder, and from the very ship for whose capture the unfortunate persons suffered, informing their friends that they were all safe. These letters, Sir, were of a date much later than the time when the crimes, for which Green was condemned, were pretended to be perpetrated." Parl. Hist. vol. 10, 384. See, also, Gent. Mag. 1737, p. 538.

Of captain Drummond, for the murder of whom Green was executed, several particulars are related in "The Adventures of Robert Drury, during fifteen years captivity on the island of Madagascar." See pp. 17, and seq. 52, 56 et seq. 91 et seq. 432, ed. of 1807. In this work it is stated that Drummond's ship while at anchor off Madagascar was taken by a pirate; that Drummond himself was permitted with three or four of his crew to go on shore, and that after various adventures he was killed upon the island, from which he had not been able to escape. In authentication of Drury's narrative of his adventures, there is prefixed to it a certificate from captain Mackett who brought him home, and a preface, in which latter captain Mackett is related to have said, that in a subsequent voyage to Madagascar, he had there seen persons "as well natives who spoke English and knew Drury, as some who were saved by flight with captain Drummond and others, with this particular account, that this very captain Drummond was killed at Tullea seven leagues to the northward of Augustine bay, by one Lewes a Jamaica negroe." For more concerning Drury, see Gentleman's Magazine for 1769, p. 172, and Hughes's Letters published by Duncombe, vol. 3, p. 83, 2nd edition.

The following Case of the Perrys, of which an abridged account was inserted in the Appendix to vol. 10 of the former Edition, I place here, because, like the case of Green and the other two mentioned by Hale, it corroborates the doctrine laid down by him:

A TRUE AND PERFECT ACCOUNT OF THE EXAMINATION, CONFESSION, TRIAL, CONDEMNATION, AND EXECUTION OF JOAN PERRY, AND HER TWO SONS, JOHN AND RICHARD PERRY, FOR THE SUPPOSED MURDER OF WILLIAM HARRISON, GENT.

Being one of the most remarkable occurrences which hath happened in the memory of man, sent in a letter (by sir T. O. of Burton, in the county of Gloucester, knight, and one of his majesty's justices of the peace) to T. S. Dr. of Physic in London.—Likewise Mr. Harrison's own account, how he was conveyed into Turkey, and there made a slave for above two years; and then his master which bought him there, dying, how he made his escape, and what hardship he endured, who at last (through the providence of God) returned to England, while he was supposed to be murdered; here having been his man servant arraigned (who falsely impeached his own mother and brother as guilty of the murder of his master) they were all three arraigned, convicted, and executed on Broad-way-hills in Gloucestershire.*

A TRUE AND PERFECT ACCOUNT, &c.

Upon Thursday the 16th day of August, 1660, William Harrison, steward to the lady viscountess Campden, at Campden in Gloucestershire, being about seventy years of age, walked from Campden aforesaid, to Charringworth, about two miles from thence, to receive his lady's rent; and not returning so early as formerly, his wife (Mrs. Harrison, between eight and nine of the clock, that evening) sent her servant John Perry, to meet his master on the way from Charringworth: But neither Mr. Harrison, nor his servant John Perry, returning that night; the next morning early, Edward Harrison, (William's son) went towards Charringworth to enquire after his father; when on the way, meeting Perry coming thence, and being informed by him he was not there, they went together to Ebrington, a village between Charringworth and Campden, where they were told by one Daniel, that Mr. Harrison called at his house the evening before, in his return from Charringworth, but staid not: They then went to Paxford, about half a mile thence, where hearing nothing of Mr. Harrison, they returned towards Campden; and on the way, hearing of a hat, a band, and comb, taken up in the high-way (between Ebrington and Campden) by a poor woman, then leasing in the field; they sought her out, with whom they found the hat, band, and comb, which they knew to be Mr. Harrison's; and being brought by the woman to the place where she found the same (in the highway, between Ebrington and Campden, near unto a great furz-brake) they there searched for Mr. Harrison, supposing he had been murdered; the hat and comb being hackt and cut, and the band bloody; but nothing more could be there found. The news hereof coming to Campden,

* London, printed for Rowland Reynolds, next Arundel-gate, over against St. Clements-church in the Strand, 1676.—Licensed, September the 8th, 1676. ROGER L'ESTRANGE.
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so alarmed the town, that men, women, and children hasted thence in multitudes to search for Mr. Harrison's supposed dead body, but all in vain.

Mrs. Harrison's fears for her husband being great, were now much increased; and having sent her servant Perry (the evening before) to meet his master, and he not returning that night caused a suspicion that he had robbed and murdered him; and thereupon the said Perry was the next day brought before a justice of peace; by whom being examined concerning his master's absence, and his own staying out the night he went to meet him, gave this account of himself: That his mistress sending him to meet his master, between eight and nine of the clock in the evening, he went down Campden-field, towards Charringworth, about a land's length, where meeting one William Reed of Campden, he acquainted him with his errand; and further told him, that it growing dark, he was afraid to go forwards, and would therefore return and fetch his young master's horse, and return with him he did to Mr. Harrison's court gate, where they parted, and he staid still; one Pierce coming by, he went again with him about a bow's shoot into the fields, and returned with him likewise to his master's gate, where they also parted; and then he the said John Perry saith, he went into his master's hen-roost, where he lay about an hour, but slept not; and when the clock struck twelve, rose and went towards Charringworth, till (a great mist arising) he lost his way, and so lay the rest of the night under a hedge; and at day-break on Friday morning went to Charringworth, where he enquired for his master of one Edward Plaisterer, who told him he had been with him the afternoon before, and received three and twenty pounds of him, but staid not long with him. He then went to William Courtis of the same town, who likewise told him, he heard his master was at his house the day before, but being not at home did not see him: After which, he saith, he returned homewards, (it being about five of the clock in the morning,) when on the way he met his master's son, with whom he went to Ebrington and Paxford, &c. as hath been related.

Read, Pearce, Plaisterer, and Curtis being examined, affirmed what Perry had said concerning them, to be true.

Perry being then asked by the justice of peace, how he, who was afraid to go to Charringworth at nine of the clock, became so bold as to go thither at twelve? Answered, that at nine of the clock it was dark, but at twelve the moon shone.

Being further asked, why returning twice home, after his mistress had sent him to meet his master, and staying till twelve of the clock, he went not into the house to know whether his master were come home, before he went a third time at that time of night to look after him; answered, that he knew his master was not come home, because he saw light in his

chamber-window, which never used to be there so late when he was at home.

Yet notwithstanding this, that Perry had said for his staying forth that night, it was not thought fit to discharge him till further enquiry were made after Mr. Harrison, and accordingly he continued in custody at Campden, sometimes in an inn there, and sometimes in the common prison, from Saturday, August the 18th, unto the Friday following; during which time, he was again examined at Campden by the aforesaid justice of peace, but confessed nothing more than before; nor at that time, could any further discovery be made what was become of Mr. Harrison: but it hath been said, that during his restraint at Campden, he told some (who pressed him to confess what he knew concerning his master) that a tinker had killed him; and to others, he said, a gentleman's servant of the neighbourhood had robbed and murdered him: and others again, he told, that he was murdered, and hid in a bean-rick in Campden, where search was (in vain) made for him. At length he gave out, that were he again carried before the justice, he would discover that to him he would not discover to nobody else: and thereupon he was (Friday, August the 24th) again brought before the justice of peace, who first examined him, and asking him whether he would yet confess what was become of his master; he answered, he was murdered, but not by him: the justice of peace then telling him, that if he knew him to be murdered, he knew likewise by whom he was; so he acknowledged he did; and being urged to confess what he knew concerning it, affirmed that it was his mother and his brother that had murdered his master. The justice of peace then advised him to consider what he said, telling him, that he feared he might be guilty of his master's death, and that he should not draw more innocent blood upon his head; for what he now charged his mother and brother with, might cost them their lives; but he affirming he spoke nothing but the truth, and that if he were immediately to die, he would justify it: the justice desired him to declare how and when they did it.

He then told him, that his mother and his brother had lain at him ever since he came into his master's service, to help them to money, telling him how poor they were, and that it was in his power to relieve them, by giving them notice when his master went to receive his lady's rents, for they would then way-lay and rob him; and further said, that upon the Thursday morning his master went to Charringworth, going of an errand into the town, he met his brother in the street, whom he then told whither his master was going, and if he way-laid him, he might have his money: and further said, that in the evening his mistress sent him to meet his master, he met his brother in the street, before his master's gate, going (as he said) to meet his master, and so they went together to the church-yard, about a stone's throw from Mr. Harrison's gate,

where they parted, he going the foot-way, cross the church-yard, and his brother keeping the great road, round the church, but in the high-way, beyond the church, met again, and so went together, the way leading to Charringworth, till they came to a gate about a bow's shoot from Campden-church, that goes into a ground of the lady Campden's, called the Conygree (which to those, who have a key, to go through the garden, is the next way from that place to Mr. Harrison's house.) When they came near unto that gate, he, the said John Perry, saith he told his brother, he did believe his master was just gone into the Conygree, (for it was then so dark they could not discern any man, so as to know him) but perceiving one to go into that ground, and knowing there was no way (but for those who had a key) through the gardens, concluded it was his master; and so told his brother if he followed him he might have his money, and he in the mean time would walk a turn in the fields, which accordingly he did; and then following his brother about the middle of the Conygree, found his master on the ground, his brother upon him, and his mother standing by; and being asked whether his master were then dead, answered no; for that after he came to them, his master cried, Ah rogues, will you kill me: at which, he told his brother, he hoped he would not kill his master; who replied, Peace, peace, you are a fool, and so strangled him; which having done, he took a bag of money out of his pocket, and threw it into his mother's lap; and then he and his brother carried his master's dead body into the garden adjoining to the Conygree, where they consulted what to do with it; and at length agreed to throw it into the great sink, by Wallington's mill behind the garden; but said, his mother and brother had him go up to the court (next the house) to hearken whether any one were stirring, and they would throw the body into the sink: and being asked whether it were there, he said, he knew not, for that he left it in the garden; but his mother and brother said they would throw it there; and if it were not there, he knew not where it was, for that he returned no more to them, but went into the court-gate which goes into the town, where he met with John Pearce, with whom he went into the field, and again returned with him to his master's gate; after which he went into the hen-roost, where he lay till twelve of the clock that night, but slept not; and having (when he came from his mother and brother) brought with him his master's hat, band, and comb, which he laid in the hen-roost; he carried the said hat, band, and comb, and threw them (after he had given them three or four cuts with his knife) in the high-way, where they were after found; and being asked, what he intended by so doing? said, he did it, that it might be believed his master had been there robbed and murdered; and having thus disposed of his hat, band, and comb, he went towards Charringworth, &c. as hath been related.

Upon this confession and accusation, the justice of peace gave order for the apprehending of Joan and Richard Perry, the mother and brother of John Perry, and for searching the sink where Mr. Harrison's body was said to be thrown, which was accordingly done, but nothing of him could be there found: the fish-pools likewise (in Campden) were drawn and searched, but nothing could be there found neither; so that some were of opinion, the body might be hid in the ruins of Campden-house, burnt in the late wars, and not unfit for such a concealment, where was likewise search made, but all in vain.

Saturday, August the 25th, Joan and Rich. Perry, together with John Perry, were brought before the justice of peace, who acquainting the said Joan and Richard with what John had laid to their charge, they denied all, with many imprecations on themselves, if they were in the least guilty of any thing of which they were accused: But John on the other side, affirmed (to their faces) that he had spoken nothing but the truth, and that they had murdered his master; further telling them, that he could never be at quiet for them, since he come into his master's service, being continually followed by them, to help them to money, which they told him, he might do by giving them notice when his master went to receive his lady's rents; and that he meeting his brother Richard in Campden town, the Thursday morning his master went to Charringworth, told him whither he was going, and upon what errand: Richard confessed he met his brother that morning, and spoke with him, but nothing past between them to that purpose, and both he and his mother told John he was a villain to accuse them wrongfully, as he had done: but John on the other side affirmed that he had spoken nothing but the truth, and would justify it to his death.

One remarkable circumstance happened in these prisoners return from the justice of peace his house to Campden, viz. Richard Perry (following a good distance behind his brother John) pulling a cloth out of his pocket, dropped a ball of inkle; which one of his guard taking up, he desired him to restore, saying, it was only his wife's hair lace; but the party opening of it, and finding a slip-knot at the end, went and shewed it unto John, who was then a good distance before, and knew nothing of the dropping and taking up of this inkle; but being shewed it, and asked whether he knew it, shook his head, and said, yea, to his sorrow; for that was the string his brother strangled his master with. This was sworn upon the evidence at their trial.

The morrow being the Lord's-day, they remained at Campden, where the minister of the place designing to speak to them (if possible to persuade them to repentance, and a farther confession) they were brought to church; and in their way thither, passing by Richard's house, two of his children meeting him, he took the lesser in his arms, leading the other

in his hand, when on a sudden, both their noses fell a bleeding, which was looked upon as ominous.

Here it will be no impertinent digression to tell how the year before Mr. Harrison had his house broken open between 11 and 12 o'clock at noon, upon Campden market day, whilst himself and his whole family were at the lecture; a ladder being set up to a window of the second story, and an iron bar wrenched thence with a plough-share, which was left in the room, and 140*l.* in money carried away, the authors of which robbery could never be found.

After this, and not many weeks before Mr. Harrison's absence, his servant Perry, one evening, in Campden garden, made an hideous outcry, whereat, some who heard it, coming in, met him running, and seemingly frightened, with a sheep pick in his hand, to whom he told a formal story, how he had been set upon by two men in white, with naked swords, and how he defended himself with his sheep pick; the handle whereof was cut in two or three places, and likewise a key in his pocket, which he said, was done with one of their swords.

These passages the justice of peace having before heard, and calling to mind, upon Perry's confession, asked him first concerning the robbery, when his master lost 140*l.* out of his house, at noon day; whether he knew who did it? who answered, yea, it was his brother: And being further asked, whether he were then with him, he answered, No, he was then at church; but that he gave him notice of the money, and told him in which room it was, and where he might have a ladder that would reach the window; and that his brother after told him he had the money, and had buried it in his garden, and that they were at Michaelmas next to have divided it: Whereupon search was made in the garden; but no money could be there found.

And being further asked concerning that other passage of his being assaulted in the garden; he confessed it was all a fiction, and that having a design to rob his master, he did it, that rogues being believed to haunt the place, when his master was robbed, they might be thought to have done it.

At the next assizes, which were held in September following, John, Joan, and Richard Perry had two indictments found against them; one for breaking into William Harrison's house, and robbing him of 140*l.* in the year 1659. The other for robbing and murdering of the said William Harrison the 16th day of August, 1660. Upon the last indictment, the then Judge of Assizes, (sir Christopher Turner,) would not try them, because the body was not found; but they were then tried upon the other indictment for robbery, to which they pleaded Not Guilty; but some whispering behind them, they soon after pleaded Guilty, humbly begging the benefit of his majesty's gracious pardon, and act of oblivion, which was granted them.

But though they pleaded guilty to this in-

dictment, being thereunto prompted (as is probable) by some who were unwilling to loose time, and trouble the court with their trial, in regard the act of oblivion pardoned them; yet they all, afterwards, and at their deaths, denied that they were guilty of that robbery, or that they knew who did it.

Yet at this assize, as several credible persons have affirmed, John Perry still persisted in his story, that his mother and brother had murdered his master; and further added, that they had attempted to poison him in the jail, so that he durst neither eat nor drink with them.

At the next assizes, which were the spring following, John, Joan, and Richard Perry, were by the then Judge of Assize (sir Robert Hyde) tried upon the indictment of murder, and pleaded thereunto, severally Not Guilty; and when John's confession, before the justice, was proved, *vis voce*, by several witnesses who heard the same, he told them, he was then mad, and knew not what he said.

The other two, Richard and Joan Perry, said they were wholly innocent of what they were accused, and that they knew nothing of Mr. Harrison's death, nor what was become of him; and Richard said, that his brother had accused others as well as him, to have murdered his master; which the judge bidding him prove, he said, that most of those that had given evidence against him, knew it; but naming none, not any one spoke to it, and so the jury found them all three guilty.

Some few days after, being brought to the place of their execution, which was on Broadway-hill, in sight of Campden, the mother (being reputed a witch, and to have so bewitched her sons they could confess nothing while she lived) was first executed: After which, Richard being upon the ladder, professed as he had done all along, that he was wholly innocent of the fact for which he was then to die; and that he knew nothing of Mr. Harrison's death, nor what was become of him; and did with great earnestness beg and beseech his brother (for the satisfaction of the whole world, and his own conscience) to declare what he knew concerning him; but he with a dogged and surly carriage told the people he was not obliged to confess to them; yet immediately before his death said, he knew nothing of his master's death, nor what was become of him, but they might hereafter, possibly, hear.

Some years afterwards Mr. Harrison returned home, and gave the following account of what had befallen him, in a Letter addressed to sir Thomas Overbury, knight of Bourton (not far from Campden) in Gloucestershire.

For Sir Thomas Overbury, knight.

Honoured Sir; In obedience to your commands, I give you this true account of my being carried away beyond the seas, my continuance there, and return home. On a Thursday

in the afternoon, in the time of harvest, I went to Charringworth to demand rents, due to my lady Campden; at which time the tenants were busy in the fields, and late ere they came home, which occasioned my stay there till the close of the evening. I expected a considerable sum, but received only three and twenty pounds, and no more. In my return home (in the narrow passage, amongst Ebrington-furzes) there met me one horseman, and said, 'Art thou there?' and I fearing that he would have rid over me, struck his horse over the nose; whereupon he struck at me with his sword, several blows, and run it into my side; while I (with my little case) made my defence as well as I could; at last another came behind me, run me into the thigh, laid hold on the collar of my doublet, and drew me to a hedge, near to the place; then came in another: they did not take my money, but mounted me behind one of them, drew my arms about his middle, and fastened my wrists together with something that had a spring lock to it as I conceived, by hearing it give a snap as they put it on; then they threw a great cloak over me, and carried me away: in the night they alighted at a hay-rick which stood near unto a stone-pit by a wall side, where they took away my money, about two hours before day (as I heard one of them tell the other he thought it to be then) they tumbled me into the stone-pit; they staid (as I thought) about an hour at the hay-rick, when they took horse again, one of them bid me come out of the pit, I answered, they had my money already; and asked what they would do with me, whereupon he struck me again, drew me out, and put a great quantity of money into my pockets, and mounted me again after the same manner; and on the Friday, about sun-setting, they brought me to a lone house upon a heath, (by a thicket of bushes) where they took me down almost dead, being sorely bruised with the carriage of the money: when the woman of the house saw that I could neither stand nor speak, she asked them whether or no they had brought a dead man? they answered no, but a friend that was hurt, and they carrying him to a chirurgeon; she answered, if they did not make haste their friend would be dead before they could bring him to one: there they laid me on cushions, and suffered none to come into the room but a little girl; there we staid all night, they giving me some broth and strong-waters: in the morning, very early, they mounted me as before, and on Saturday-night they brought me to a place where were two or three houses, in one of which, I lay all night on cushions, by their bed-side: on Sunday-morning they carried me from thence, and about three or four o'clock they brought me to a place by the seaside, called Deal, where they laid me down on the ground; and one of them staying by me, the other two walked a little off, to meet a man, with whom they talked; and in their discourse, I heard them mention seven pounds; after which, they went away together, and about

half an hour after returned. The man (whose name, as I after heard, was Wrenshaw) said, he feared I would die before he could get me on board; then presently they put me into a boat, and carried me on ship-board, where my wounds were dressed. I remained in the ship (as near as I could reckon) about six weeks, in which time I was indifferently recovered of my wounds and weakness. Then the master of the ship came and told me, (and the rest who were in the same condition) that he discovered three Turkish ships; we all offered to fight in the defence of the ship and ourselves, but he commanded us to keep close, and said, he would deal with them well enough: a little while after he called us up, and when we came on the deck, we saw two Turkish ships close by us; into one of them we were put, and placed in a dark hole, where, how long we continued before we were landed, I know not: when we were landed, they led us two days journey, and put us into a great house, or prison, where we remained four days and a half; and then came to us eight men to view us, who seemed to be officers; they called us, and examined us of our trades and callings, which every one answered: one said he was a chironurgeon, another that he was a broad-cloth weaver, and I (after two or three demands) said I had some skill in physic: we three were set by, and taken by three of those eight men that came to view us: it was my chance to be chosen by a grave physician of 87 years of age, who lived near to Smirna, who had formerly been in England, and knew Crowland in Lincolnshire, which he preferred before all other places in England: he employed me to keep his still-house, and gave me a silver bowl double gilt, to drink in; my business was most in that place; but once he set me to gather cotton wool, which I not doing to his mind, he struck me down to the ground, and after drew his stiletto to stab me; but I holding up my hands to him, he gave a stamp, and turned from me, for which I render thanks to my Lord and Saviour Jesus Christ, who staid his hand, and preserved me. I was there about a year and three quarters, and then my master fell sick on a Thursday, and sent for me; and calling me as he used, by the name of Boll, told me he should die, and bad me shift for myself: he died on Saturday following, and I presently hastened with my bowl to a port almost a day's journey distant; the way to which place I knew, having been twice there employed by my master about the carriage of his cotton wool: when I came thither, I addressed myself to two men who came out of a ship of Ham-borough, which (as they said) was bound for Portugal within three or four days; I enquired of them for an English ship, they answered there was none; I intreated them to take me into their ship, they answered, they durst not, for fear of being discovered by the searchers, which might occasion the forfeiture, not only of their goods, but also of their lives: I was very importunate with them, but could not pre-

vail; they left me to wait on Providence, which at length brought another out of the same ship, to whom I made known my condition, craving his assistance for my transportation; he made me the like answer as the former, and was as stiff in his denial, till the sight of my bowl put him to a pause: he returned to the ship, and after half an hour's space, he came back again accompanied with another seaman, and for my bowl undertook to transport me: but told me I must be contented to lie down in the keel, and endure much hardship, which I was content to do, to gain my liberty; so they took me aboard, and placed me below in the vessel in a very uneasy place, and obscured me with boards and other things, where I lay undiscovered, notwithstanding the strict search that was made in the vessel; my two chapmen, who had my bowl, honestly furnished me with victuals daily, until we arrived at Lisbour in Portugal; where (as soon as the master had left the ship, and was gone into the city) they set me on shore money-less to shift for myself: I knew not what course to take, but as Providence led me I went up into the city, and came into a fair street; and being weary, I turned my back to a wall, and leaned upon my staff: over against me were four gentlemen discoursing together; after a while one of them came to me, and spake to me in a language that I understood not: I told him I was an Englishman, and understood not what he spake; he answered me in plain English, that he understood me, and was himself born near Wisbich in Lincolnshire; then I related to him my sad condition, and he taking compassion on me, took me with him, provided for me lodging and diet, and by his interest with a master of a ship, bound for England, procured my passage; and bringing me on ship-board, he bestowed wine and strong-waters on me, and at his return, gave me eight stivers, and commended me to the care of the master of the ship, who landed me safe at Dover, from whence I made shift to get to London, where being furnished with necessaries, I came into the country.

Thus honoured Sir, I have given you a true account of my great sufferings, and happy deliverance, by the mercy and goodness of God, my most Gracious Father in Jesus Christ, my Saviour and Redeemer; to whose name be ascribed all honour, praise, and glory. I conclude, and rest, Your worship's in all dutiful respect,
WILLIAM HARRISON.

Letter from Sir Tho. Overbury to Dr. Shirley.

Sir; It has not been any forgetfulness in me, you have no sooner heard from me, but my unhappy distemper seizing on my right hand, soon after my coming down into the country, so that till now I have been wholly deprived the use of it. I have herewith sent you a short narrative of that no less strange than unhappy business, which some years since happened in my neighbourhood; the truth of

every particular whereof I am able to attest, and I think it may very well be reckoned amongst the most remarkable occurrences of this age: you may dispose of it as you please, and in whatever else I can serve you, you may freely command me as, Sir, your most affectionate kinsman and humble servant,

THOMAS OVERBURY.

Burton, August 23, 1676.

The preceding Account, published by authority, was concluded by the following observations:

Many question the truth of this account Mr. Harrison gives of himself, and his transportation, believing he was never out of England: but there is no question of Perry's telling a formal false story to hang himself, his mother and his brother: and since this, of which we are assured, is no less incredible than that of which we doubt; it may induce us to suspend hard thoughts of Mr. Harrison, till time, the great discoverer of truth, shall bring to light this dark and mysterious business. That Mr. Harrison was absent from his habitation, employment, and relations, near two years, is certain; and if not carried away (as he affirms) no probable reason can be given for his absence; he living plentifully and happily in the service of that honourable family, to which he had been then related above 50 years, with the reputation of a just and faithful servant; and having all his days been a man of sober life and conversation, cannot now reasonably be thought in his old age, so far to have misbehaved himself, as in such a manner voluntarily to have forsaken his wife, his children, and his stewardship, and to leave behind him (as he then did) a considerable sum of his lady's money in his house; we cannot therefore in reason or charity, but believe that Mr. Harrison was forcibly carried away; but by whom, or by whose procurement, is the question. Those whom he affirms did it, he withal affirms never before to have seen; and that he saw not his servant Perry, nor his mother, nor his brother the evening he was carried away; that he was spirited (as some are said to have been) is no ways probable, in respect he was an old and infirm man, and taken from the most inland part of the nation; and if sold, as himself apprehends he was, for 7*l.* would not recompence the trouble and charge of his conveyance to the sea-side.

Some therefore have had hard thoughts of his eldest son, not knowing whom else to suspect; and believe the hopes of the stewardship, which he afterwards (by the lord Campden's favour) enjoyed, might induce him to contrive his father's removal; and this they are the more confirmed in, from his misbehaviour in it; but on the other side, it is hard to think the son should be knowing of his father's transportation; and consequently, of these unhappy persons' innocency, as to the murder of him, and yet prosecute them to the death, as he did, and when condemned, should be the occasion

of their being conveyed above 20 miles, to suffer near Campden, and to procure John Perry to be there hanged in chains, where he might daily see him, and himself to stand at the foot of the ladder, when they were all executed, as likewise he did.

These considerations, as they make it improbable the son should be privy to his father's transportation, so they render the whole matter the more dark and mysterious, which we must therefore leave unto Him who alone knoweth all things, in his due time to reveal and bring to light.

Together with the Account of the Case of the Perrys, was inserted in the former edition, the following Article:

THE CASE OF A MURDER IN HERTFORDSHIRE, FOUND AMONGST THE PAPERS OF THAT EMINENT LAWYER, SIR JOHN MAYNARD, SERJEANT AT LAW, AND SOME TIME ONE OF THE LORDS COMMISSIONERS OF THE GREAT SEAL OF ENGLAND, VIZ.*

[The Case, or rather history of a Case, that happened in the county of Hertford, I thought good to report here, though it happened in the 4th year of king Charles the first; that the memory of it may not be lost by the miscarriage of my papers or otherwise. I wrote the evidence that was given, which I and many others did hear; and I wrote it exactly according to what was deposed at the trial at the bar of the King's-bench. Note to edition of 1766.]

Jane Norkott, the wife of Arthur Norkott, being murdered, the question was, How she came by her death?

The coroner's inquest, on view of the body, and depositions of Mary Norkott, John Otman, and Agnes his wife, were inclined to find Jane Norkott a *felo de se*; for they informed the coroner and the jury, "That she was found dead in her bed; the knife sticking in the floor, and her throat cut. That the night before she went to bed with her child (plaintiff in this appeal,) her husband being absent, and that no other person, after such time as she was gone to bed, came into the house, the candles lying in the outer room, and they must needs have seen or known if any stranger had come in:" whereupon the jury gave up to the coroner a verdict that she was *felo de se*. But afterwards upon rumour amongst the neighbourhood, and their observation of divers circumstances, which manifested that she did

* Communicated (many years ago) to the editor, by Dr. Rawlinson, F. R. S. This account being from the MS. notes of so great a man, we here insert, though rather a narrative than a trial. Former Edition.

could possibly (according to those circumstances) murder herself; thereupon the above verdict was not yet drawn into the coroner, assented, and desired that the body which was buried might be dug up out of the grave, which the coroner consented unto; and 30 days after her death she was dug up, in the presence of the jury and a great number of people: whereupon the jury returned their verdict; and the persons being tried at Hertford assizes, were acquitted; but against the evidence, that judge Harfall is of opinion, that it were better an execution were brought, than so foul a murder unpunished. And, Pascha quarto Caroli II. were tried on the appeal, which was by the young child against his father, his mother and aunt, and her husband Okeman, because the evidence was so strange, exact and particular notice. And it was thus:

The matters above-mentioned related, the next day the dead person, minister to the church where the fact was committed, being called to give evidence, according to custom, said, "That the body being taken up out of the grave, 30 days after the party's death, lay on the grass, and the four defendants present, were required each of them to touch the dead body. Okeman's wife fell on her knees, and prayed God to shew tokens of her innocence. The appellant did touch the dead body; whereupon the brow of the child which before was of a livid and carrion red (in *terminis*, the verbal expression of the witness,) "began to have a dew, or gentle sweat arise on it, which increased by degrees, and sweat ran down in drops on the face; and turned to a lively and fresh colour, the deceased opened one of her eyes, and again; and this opening the eye was done several times; she likewise thrust out the marriage finger three times, and pulled it in; and the finger dropped blood from the grass." Sir Nicholas Hyde, chief justice, seeming to doubt the evidence, asked the witness, Who saw this besides you?

The witness. I cannot swear what others saw: My lord, (said he) I do believe the whole jury saw it; and if it had been thought a proof would have been made of it, and they would have attested with me. Then the witness, observing some admiration in the audience, spoke farther: "My lord, I am minister of the parish, and have long known all the defendants, but never had occasion of displeasure to any of them, nor had to do with them, nor with me; but, as I was minister, the fact was wonderful to me: but I have no interest in the matter, but as called upon to testify the truth, and that I have done." (This witness was a very reverend person, as I find, of about 70 years of age; his testimony was delivered gravely and temperately, the great admiration of the auditory.) Upon applying himself to the chief justice, he said, "My lord, my brother here pre-

sent is minister of the next parish adjacent, and I am sure saw all done that I have affirmed:" Therefore that person was also sworn to give evidence, and did depose in every point, "the sweating of the brow—the change of the colour—thrice opening the eye—and the thrice motion of the finger, and drawing it in again;" only the first witness added, that he himself dipped his finger in the blood which came from the dead body to examine it, and he swore he believed it was blood.*

I conferred afterwards with sir Edward Powell, barrister at law, and others, who all concurred in the observation: and for myself, if I were upon oath, can depose, That these depositions (especially the first witness) are truly reported in substance.

The other evidence given against the prisoners, viz. the grandmother of the plaintiff, and against Okeman and his wife, That they confessed they lay in the next room to the dead body that night; and that none came into the house till they found her dead the next morning; therefore if she did not murder herself, they must be the murderers. To that end further proof was made,

First, That she lay in a "composed manner in her bed, the bed-cloaths not at all disturbed, and her child by her in bed."

Secondly, "Her throat cut from ear to ear, and her neck broke;" so that if she first cut her throat, she could not possibly break her neck in the bed. *Non contra.*

Thirdly, "There was no blood in the bed, saving a tincture of blood on the bolster whereon her head lay, but no substance of blood at all."

Fourthly, "From the bed's head there was a stream of blood on the floor, which ran along until it ponded in the bendings of the floor to a very great quantity; and there was also another stream of blood on the floor at the bed's foot, which ponded also on the floor to a very great quantity; but no continuance or communication of blood of either of those two places, from one to the other, neither upon the bed," so that she bled in two several places; and it was deposed, turning up the mat of the bed, "that there were clots of congealed blood in the straw of the mat underneath."

Fifthly, "The bloody knife was found in the morning sticking in the floor, a good distance from the bed; but the point of the knife, as it stuck, was towards the bed, and the haft from the bed."

Lastly, "There was the print of a thumb and four fingers of a left hand."

Mr. Burnett (Treatise on various branches of the Criminal Law of Scotland, p. 529,) after quoting from the indictment (see it in this Collection, vol. 5, p. 1583.) against the marquis of Argyle, says, "In various trials for murder, we find the notion of the corpse bleeding,

* See the case of Philip Standfield, vol. 11, p. 1380.

touched by the murderer, a circumstance founded on. In Stewart Abercrombie's case, January and February, 1718, we see it stated in the information for the prisoner, as a circumstance in his favour, that he had, without fear or dread, gone and touched the dead body of the person murdered. And in the case of James Howatson, tried for murder at Dumfries in May, 1727, before lord justice clerk Cockburn, we find it stated and insisted in, as a strong circumstance of suspicion against him, that he had refused to go to the lifting of the corpse. This even is stated as one of the circumstances in the interlocutor of relevancy, and perhaps rightly so, on the supposition of the popular belief of the effect of the murderer's touching the corpse."

He also mentions, that "in the trial of Duncan Terigalia's clerk, and Alexander Bain M'Donald, before the court of justiciary, for murder, in June, 1754, we find two witnesses swearing to their seeing a spirit or ghost, which they said had told them where the body was to be found, and that the pannels were the murderers;—circumstances which would probably not now be admitted in proof."

In the *Biographia Scoticana*, which abounds with prophecies, judgments, and other marvels, I find the following passage in the account of Mr. James Guthrie; "A few weeks after he was executed, and his head placed on the Nether-bow port, Middleton's coach coming down that way, several drops of blood fell from the head upon the coach, which all their art and diligence could not wipe off: and when physicians were called, and desired to enquire if any natural cause could be given for this, they could give none. This odd incident being noised abroad, and all means tried, at length the leather was removed, and a new cover put on; but this was much sooner done, than the wiping off the guilt of this great and good man's blood upon the shadders of it, and the disgrace from this poor nation."

Eugene Aram, upon his trial on the 3rd of August, 1759, for the murder on February 8, 1744 5, of Daniel Clark (see Annual Reg. for 1759, p. 360.) referred to the case of the Perrys, as reported by Dr. Howell. Moreover, the case is related in 3 Harl. Misc. 547, and in Rodder's Hist. of Gloucester.

439. The Trial of ROBERT FEILDING,* esq. at the Old-Bailey, for Bigamy,† in marrying the Duchess of Cleveland, his former Wife being then living: 5 ANNE, A. D. 1706.

Wednesday, December 4.

AT the Sessions-house in the Old-Bailey, this day came on the trial of Robert Feilding, esq. for felony, in marrying her grace the duchess of Cleveland; Mary Wadsworth, his first wife, being then alive. The Court being sat, proceed in this manner.

Cl. of Arr. Set Robert Feilding to the bar. (Which was done.) Robert Feilding, hold up thy hand (Which he did).

* This man (the Orlando the Fair of the Tatler) who is generally mentioned by the name of beau Feilding, was very notorious in his time, and is frequently noticed in the contemporary periodical and other publications.

Among the persons who made a mean contemptible figure in some action or circumstance of their lives, Swift mentions, "Beau Feilding at fifty years old, when in a quarrel upon the stage, he was run into his breast, which he opened and shewed to the ladies, that he might move their love and pity, but they all fell a laughing."

And he has an article in the *Lives of the Gamblers, Sharpers, &c.* of his time.

† See the Case of Mary Moders, vol. 6, p. 273; of the duchess of Kingston, A. D. 1776.

Cl. of Arr. Robert Feilding, you stand indicted by the name of Robert Feilding, late of the parish of St. James's within the liberty of Westminster, in the county of Middlesex, for that you, on the 9th day of November, in the 4th year of her now majesty's reign, at the parish aforesaid, in the county aforesaid, took to wife one Mary Wadsworth, spinster, and the same Mary Wadsworth then and there had for your wife; and that you the said Robert Feilding, afterwards, viz. on the 25th of the same month of November, in the year aforesaid, at the parish of St. Martin's in the Fields, in the said county, did feloniously take to wife the most noble Barbara, duchess of Cleveland,* (the said Mary Wadsworth his former wife, being then living) against the peace of our sovereign lady the queen, her crown and dignity, and against the form of the statute in that case made and provided.—How sayest thou, Robert Feilding, art thou Guilty of this indictment, or not Guilty?

Feilding. Not Guilty.

* A well-known mistress of Charles the Second. She was wife of Lord Castlemaine, against whom see the proceedings in the year 1680; vol. 7, p. 1067; and in the year 1689; vol. 12, p. 597. Like her colleague the duchess of Portsmouth, she seems to have been a compound of lust and avarice. See vol. 11, pp. 599, 600.

Cl. of Arr. Culprit, how wilt thou be tried?

Feilding. By God and my country.

Cl. of Arr. God send thee a good deliverance.

Cl. of Arr. Call the jury. Mr. Feilding, if you except to any of the jury, you must do it before they are sworn.

Feilding. I do not challenge any of them.

The jury sworn, viz. Francis Chapman, Thomas Moody, Peter Levigne, Hugh Merchant, Joseph Devenish, Edward How, Edward Boswell, John Mills, Richard Hazzard, Samuel Chace, Tho. Yeomond, John Johnson.

Proclamation made, that if any can inform the queen's justices and the queen's counsel, of any the matters the prisoner stands charged with; let them come forth, and they shall be heard.

Mr. Raymond. My lord, and you gentlemen of the jury, I am, in this case, counsel for the queen. The prisoner at the bar, Robert Feilding, stands indicted, that he on the 9th day of November, in the 4th year of her now majesty's reign, &c. (the indictment repeated.) To which indictment he has pleaded not guilty, and put himself on God and his country, which country you are. I hope, if we prove the indictment, you will find him guilty.

Sir Ja. Mountague. My lord and gentlemen of the jury, I am of counsel with the queen against the prisoner, Mr. Robert Feilding, who stands indicted, for taking to wife Barbara duchess of Cleveland, after he had before married one Mary Wadsworth, who is still alive: this is a crime that amounts to felony; and though the law doth not take away from him that shall be convicted thereof, the benefit of his clergy; yet, since it is such a crime, as doth take away from the prisoner the assistance of counsel, I shall only state matter of fact, which is as followeth.—About a year ago, or a little better, there was a young lady left a widow by Mr. Deleau, and reputed a great fortune; Mr. Feilding thinking himself qualified for the greatest fortune, had a design upon this lady, and in August 1705, he applied himself to one Mrs. Streights to consult with her, and contrive some method how he might have access to court this widow. This Mrs. Streights had no acquaintance with the widow herself, but knew Mrs. Charlotte Villars was acquainted with her, and used to cut her hair; so the best thing they could think of at that time, was to make Mrs. Villars their friend, that by her means he might have admittance into the lady's company; for he did not question if the lady had but once a sight of his very handsome person, she would have the same affection for him, that he had met with from other ladies, even on their first seeing of him. Mrs. Villars was promised 500*l.* to bring this affair about; and though she doubted with herself whether she could ever accomplish it, yet by these means she might perhaps make a penny of it to herself: and thereupon she promises Mrs. Streights to use her endeavour to serve the major-general, meaning Mr. Feild-

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ing, though Mrs. Villars could not be sure such an overture would be well received by Mrs. Deleau: yet being well acquainted with one Mary Wadsworth, a young woman, not much unlike in person to Mrs. Deleau, she imagined it would be no difficult matter for her to set up the said Mrs. Wadsworth to represent Mrs. Deleau; and accordingly it was done, and Mr. Feilding proved so intent upon the matter, that he went in few days to Doctors-Commons, to see for Mr. Deleau's will, (and found thereby that Mrs. Deleau was left very considerable). And that he might judge the better whether she were truly the fortune she was represented to him, he took a copy of the said will, and soon after went to Mrs. Villars, and told her, that what Mrs. Streights had said concerning Mrs. Deleau's fortune was true: and being very well satisfied with her fortune, he was resolved to get a view of her. Soon after, Mr. Feilding went to Tunbridge, and after two or three days stay there, returned and called at Waddon, the place where Mrs. Deleau resided, with a pretence to see the house and gardens, but in reality it was to see the widow; he thought nothing else was then to be done, but to give the lady a sight of his handsome person he designed to lay at her feet; but it happened that the lady would not be seen herself, but her servants were permitted to shew him the gardens, and he fancied himself that he had had a sight of Mrs. Deleau too; for a kinswoman of Mrs. Deleau's looking out into the garden while he was there, gave him the sight of a woman at the window, and he presently concluded it could be nobody but Mrs. Deleau admiring beau Feilding. About three days after Mr. Feilding's return from Tunbridge, which was about a fortnight after St. Bartholomew-tide last was twelvemonth, he told Mrs. Villars of his calling at Waddon, and that he had acquainted the duchess of Cleveland of the fine gardens that were there, and he said that her grace had a great desire to see them, and therefore directed Mrs. Villars to go from her grace to Mrs. Deleau to ask the favour of her to permit her grace to see the house and gardens. Accordingly Mrs. Villars went down to Waddon; and Mrs. Deleau treated her very civilly, and told her whenever her grace pleased, she should see her house and gardens; but as she was a widow she could not attend upon her grace: but though the duchess was expected after this, yet she did not go, for indeed she did not know any thing of the message. So the next time Mr. Feilding attempted to see her, was at a horse-race at Banstead-Downs, whither he went for that purpose, but did not see her. After this, or some time before, he sent a letter to Mrs. Deleau's house, but the servants, when they saw the name to it, knowing the character of Mr. Feilding, threw it into the fire.—When Mrs. Villars found that the duchess of Cleveland knew nothing of her being sent to Waddon, and that it was only a contrivance of Mr. Feilding's to get an opportunity of seeing

Mrs. Deleau, and that in truth he had never seen her, she resolved to play trick for trick with him, and thereupon proposed the matter to Mary Wadsworth, the woman I before mentioned to be of her acquaintance, but one that Mr. Feilding did not know, and one that would not worst herself much by such an undertaking, whether it succeeded or not. Mrs. Wadsworth upon the first opening of it readily embraced the offer; and thereupon Mrs. Villars went to Mr. Feilding and told him she had proposed the matter to the lady (Mrs. Deleau) which she at first rejected, but at last did give a favourable ear to it; and that she did not fear, but if matters could be prudently managed, his desires might be accomplished.

A little before my lord mayor's day last was twelvemonth, she told Mr. Feilding that she had at length obtained of the lady the favour of a promise of an interview, and that she was shortly to bring her to his lodgings, but he must take care not to let her know they were his lodgings, or to give her the least cause to suspect he had any thing to do there: accordingly Mrs. Villars, the evening of my lord-mayor's day, brought Mrs. Wadsworth in a mourning coach and widow's dress to Mr. Feilding's lodgings: he was not within at the time they came thither, but being sent for came in soon after, and was extremely complaisant for some time; but at length, though he had been cautioned not to let the lady know they were his lodgings, yet he could not forbear shewing her his fine cloaths, and what furniture he had, and in a little time after sent for Mrs. Margaretta to sing to her; and pretended he was so extremely taken with her, that nothing would satisfy him but being married that night; but she, with a seeming modesty, checked his forward behaviour, and made a shew of going away in displeasure; but before they parted, he prevailed upon her to promise not to put off their marriage longer than Wednesday seven-night. My lord, Mr. Feilding rightly judged by this conversation what an interest he had fixed in the lady, and looking upon himself to be sure of her, he actually went to a goldsmith, and bespoke a ring, and directed himself what posy should be engraved. When the day came which had been first agreed on, sham pretences were made, not to seem over hasty in so serious a matter, and the marriage was put off till the Friday following, being the 9th of November last was twelve-month; at which time Mrs. Villars and the lady came again to Mr. Feilding's lodgings, where he received her with an extraordinary transport of joy, and the marriage must immediately be proceeded on; but she for some time framed several put-offs, and at length made an offer to have gone away; but Mr. Feilding by no means would permit her to go, without making her his own, which he was resolved should be done presently; and to make all things sure, he ran out and locked the chamber-door to keep her and Mrs. Villars in, whilst he went for a

priest; and taking coach immediately drove to count Gallas's the emperor's envoy; when he came to his gate, he enquired of the porter for one Francisco Drian, that was stiled, The Father in Red, upon account of a red habit he usually wore; but he not being within, Mr. Feilding asked for another father; and one father Florence was called to him, whom he acquainted with the business he came about; but whilst he was treating with father Florence, the father in red luckily came in, and Mr. Feilding immediately took him away with him in the hackney-coach to his lodgings. My lord, and gentlemen, we shall shew you, that this father in red stayed there about an hour, and then went away.—We shall shew your lordship likewise, that Mr. Feilding and Mary Wadsworth supped together, and after supper he was actually married to Mrs. Wadsworth. And that this marriage was consummate, we shall prove by several particulars, viz. That clean sheets were laid upon the bed, and all ceremonies performed that are usual upon such occasions; and they actually went to bed together, and lay together all that night; and the next day the lady and Mrs. Villars went away, and as Mr. Feilding supposed, to Waddon, the widow Deleau's house, to which place your lordship and the jury will find he directed his letters to her afterwards, and in the superscriptions stiles her the countess of Feilding. To corroborate this evidence we shall likewise prove to your lordship, that about a week after he lay with her again at the very same lodgings; and we can make it appear that he hath lain with her three several times since this first night, twice before, and once, after his marriage with the duchess of Cleveland. My lord, we shall shew you that he made her presents, furnished her with money, and treated her as his wife, until the cheat was found out, which was not till May after; and then finding how he had been served, that instead of marrying a fortune of 60,000*l.* he had been imposed upon, and married one not worth so many farthings, he discarded her in great wrath.

My lord, we will call our witnesses, who will prove to your lordship, step by step, how this matter was brought about; and first we will begin with Mrs. Villars.

Mrs. Villars sworn.

Mrs. Villars. My lord, there came one Mrs. Streights to my lodgings, and wanted to speak with me, (it was Bartholomew tide was twelve-month) but I was not at home; when I came home, they told me Mrs. Streights had been there, and left word that I was always out of the way when it was to do myself good; she said it would be five hundred pounds out of my way if I did not come to her. I met with her and Mr. Feilding, and being acquainted with Mr. Feilding's design upon Mrs. Deleau, he asked me whether I knew the lady? I said I had no particular acquaintance with her, but I used to cut her hair. He told me that he was

in love with her, and asked me, whether I would assist him in his courtship? And whether a marriage might be brought about? I told him I could not tell, I did not know whether I had that interest in the lady as to be made serviceable in such a design. Mr. Feilding enquired very strictly after her, and said, he would try means to come into her company, that he might gain her acquaintance: upon which we parted at that time. — And about three days after Mrs. Streights came to my house again, and said, Mr. Feilding would speak with me. I went to him; and he told me, he found that the lady was worth 60,000*l.* as he had been told before. He asked me where it was she lived? I told him, in Cophthalm-court, near the Change. I told him likewise where her country-house was; that it was at Waddon in Surrey. Mr. Feilding told me, he would go to Tunbridge, and call by the way to see the gardens; and by that means he might have an opportunity of seeing Mrs. Deleau; which he did accordingly. I was sent for again; and he told me he had seen the gardens, and they were very fine: and that he saw the lady through a casement; and that she might have the more perfect view of him, he took divers turns in the garden, pulled out his watch, and set it by the sun-dial: and that he came round the country, and almost murdered his horses, to get a sight of her. But he desired to be in her company, that he might have a full view of her. He desired me to go to Mrs. Deleau, and tell her, that the duchess of Cleveland had heard a great character of her gardens, and was very desirous to see them. — I went and acquainted Mrs. Deleau with it: she said she would not refuse a woman of her quality, but would take it as a great favour, to show her any thing that belonged to her; but desired that it might not be that week, but the week following; because she was to see a race on Banstead Downs. I told Mr. Feilding this; and he made answer for the duchess of Cleveland, and said the duchess was not well; and could not go to see the gardens. When I found that Mr. Feilding did not send me from the duchess, but from himself, I was out of countenance, that I should innocently impose upon the lady. Mr. Feilding told me, he would go and see the race upon the Downs; and when he came back, he would send for me, and acquaint me whether he had seen the lady. And when he came to town again, he sent Mrs. Streights to me to come to him; and when I came to him, he told me he saw Mrs. Deleau, he believed upon the Downs. Mr. Feilding made a bow to them, and they to him. He said, from thence he went to Epsom, and sent a letter to be delivered into Mrs. Deleau's own hands, by a servant of his not in a livery. I think, it was accordingly delivered. Mr. Feilding told me, Mrs. Deleau read it, and said it required no answer: and said no more. Mr. Feilding asked me whether I could not get a letter to Mrs. Deleau; He said, he was much in love with her. I told him, I believed he

was mistaken: and that it was another whom he saw.—I perceived that he had no knowledge of Mrs. Deleau.—I acquainted a young woman (whom I supposed he might have seen, with his inclination (Mrs. Wadsworth): she said, she did not expect to be so happy; but wished it might be so. I engaged to Mr. Feilding to do what I could to bring it about.— There were divers letters passed between them till my lord mayor's day. Divers presents were sent from Mr. Feilding, by me, to the lady. The first present was a gold apron struck with green: that was the first present Mr. Feilding sent to Mrs. Wadsworth, whom he thought was Mrs. Deleau all the while; but it was Mrs. Wadsworth. I did not think Mrs. Deleau, who was a great fortune, would agree to marry a man of Mr. Feilding's character. Mr. Feilding kept sending of presents and letters from that time, from the latter end of Bartholomew-tide to my lord mayor's day. He sent her a suit of white satin knots and gloves, and other things. He desired I would bring her to his lodgings on my lord mayor's day, at night; which I did, about nine a-clock, in a mourning coach. Mr. Feilding was not at home, but came immediately. When he came in, he fell down upon his knees, and kissed her; and expressed abundance of fond expressions. He asked her, why she stayed so long? And whether she loved singing? He said, he would send for Margareta to come up. When she came, Mr. Feilding bid her sing the two songs which he loved;—which she did; the one was, Charming Creature; and the other was Ianthé the Lovely. After which, Mr. Feilding sent for two pints of wine, and some plumb-cakes. He urged very much to marry her; but she declined it, and made him a promise to come to him the Wednesday following. In the interim she sent him a letter, to acquaint him she could not come, according to her appointment; but she would come to him on the Friday following, which was the 9th of November. Then he sent her another letter, to desire her not to fail, but come to his arms; and told her, that there wanted nothing but the holy father to join their happiness; for their hearts were all one already. And when Friday came, Mrs. Wadsworth and I went to Mr. Feilding's lodgings again: he was not within; but came running into the room in a little time after, with a great deal of joy, and took Mrs. Wadsworth into his arms, and said, "Nothing could ease his mind, but a promise to make him happy, in marrying him presently."—He said, he would fetch the priest; but Mrs. Wadsworth refused his proposal, and would have dissuaded him from going then; and desired him to put it off till another time, and would have gone away. But he would not hear of it; and said, she had disappointed him before; and that he repented he had let her go away before; but now he was resolved to make her his own, before she went away. Mr. Feilding then went for the priest, and locked the chamber-door after him, and took the key with him, for fear

Mrs. Wadsworth should go away; and ordered Boucher to let no body into the dining-room till his return. Mr. Feilding returned in a little time, and brought a priest with him, in a long red gown lined with blue, and a long beard, and a fur cap. Mr. Feilding told her that this was the holy father that was to make them one. Mr. Feilding then ordered the man to lay the cloth, and fetch a dish of pickles to supper.—At supper Mrs. Wadsworth seemed cautious; and for fear the priest should not be in orders, said, "How shall I know that this is a priest in orders?" Mr. Feilding questioned him. Then the priest pulled a picture out of his pocket, about the bigness of a crown-piece, and told them "that none but priests had such pictures." And that she might still be further satisfied, she desired another token.

After this, Boucher, and the rest of the servants, were ordered down stairs. Then the priest called for water, salt, and rosemary, to make holy water. Boucher brought up water and salt, but could get no rosemary. Mr. Feilding and I received it at the dining-room door. Then Mr. Feilding locked the door, and took the key in the inside. Mr. Feilding asked Mrs. Wadsworth, whether it should be done in the bed-chamber, or dining-room? Mrs. Wadsworth agreed it should be in the bed-chamber. There were none present but Mr. Feilding, Mrs. Wadsworth, the priest, and myself. The priest made holy water, and blessed it: Then he set Mrs. Wadsworth at the right of Mr. Feilding; the priest stood before them, and read the ceremony in Latin, as I understood; and Mrs. Wadsworth said, "She was not yet satisfied he was a priest." Then he laid down his book, took from under his gown a piece of silk like a scarf, that was marked with a cross in the middle; and said, none but priests used such a thing. Then Mrs. Wadsworth was well satisfied he was a priest. Says Mr. Feilding to her, "Do you think, my dear, that I would have any body to do this business, but the holy father?" Mrs. Wadsworth was well satisfied, till he came to that part, "Wilt thou have this woman to thy wedded wife?" She desired it might be spoke in English by him, as well as he could. He did so. He asked Mr. Feilding, "Whether he would have this gentlewoman to be his wedded wife?" He said, "Yes, with all my heart." He asked the lady then, "Whether she would have this gentleman for her husband?" She said, "Yes," faintly: But says Mr. Feilding, you don't speak it so earnestly as I do: you must say, "With all my heart and soul;" which she did. Then the priest blessed the ring, and gave it to Mr. Feilding, to put it on the lady's finger. He said something in Latin; but what it was I know not. Then we went into the dining-room. Boucher brought up wine; and when all had drank, the priest was discharged. Mrs. Wadsworth and I went into the bed-chamber, and I put her to bed. Mr. Feilding called her his dear wife, the countess of Feilding; and said, he would

make haste and fly to her arms. After I put her to bed, he went to bed to her; and ordered me to come into the room to see them in bed: which I did. I rose the next morning, and came to Mr. Feilding's room where Boucher came soon after to light a fire: Then I saw Mrs. Wadsworth in naked bed with Mr. Feilding. Mrs. Wadsworth put on her cloaths as soon as she could; and a hackney coach was called for her, and she went away. At parting with Mr. Feilding, she told him, she did not know when she could return; but about a fortnight after, she came again. There were fires made in both rooms, and candles lighted up; clean sheets upon the bed, and every thing prepared for her lying there. Mrs. Wadsworth went to bed. Mr. Feilding did not come home till late that night. I saw them that night in bed, and went into the room the next morning, and saw them in bed again: She rose, and went away as before. Mr. Feilding desired her not to stay so long as she had done before; for if she did, he would come and fetch her. She promised him she would return sooner. Mr. Feilding kept sending of letters to her between times, which was about fifteen or sixteen days, till she came to him again. He desired her to come to him, and he would be at home to receive her. She accordingly came to him, after having given him notice of her coming. He was not at home when she came; but she went to supper by herself.—She had for her supper some toasted cheese, a pint of wine, and a bottle of oat ale. When he came home to her, he asked her, "Why she did not send for something better for supper?" They went to bed again as before; and I saw them in bed together. Mrs. Wadsworth got up in the morning; Mr. Feilding treated her; and away she went as before. Then Mr. Feilding kept writing to her, [which Letters are inserted in their proper places] and desired her to come to him again, as being the last night she should lie with him at his lodgings; for he was going to leave his lodgings for altogether, and be with her grace the duchess of Cleveland. Mrs. Wadsworth came; but neither Mr. Feilding nor Boucher were at the lodgings: But she had not been there long, but Boucher came in, and said, that he had brought his master's night-gown and slippers from the duchess of Cleveland's.

Counsel. Mrs. Villars, you say, most of the service was in a language you did not understand?

Villars. It was, my lord—But one part of it was in English. I heard Mr. Feilding say, "He would take this lady to be his wedded wife."

Counsel. Who is that lady?

Villars. That lady, Mrs. Wadsworth; pointing at her; (she being in Court.)

Counsel. What did you hear Mrs. Wadsworth say?

Villars. I heard her say, "That she took Mr. Feilding to her wedded husband."

Counsel. What did you observe else that was remarkable?

Villars. I saw the ceremony of the ring performed. I saw the priest bless the ring with holy water, and sign himself with the sign of the cross. The priest held Mrs. Wadsworth by the lower joint of the finger, and put the ring on.

Counsel. What is Mrs. Wadsworth's christian name?—*Villars.* Mary.

Counsel. What did he say further, when he said, "I take thee to be my wedded wife?"

Villars. He named no name, but "I take this lady, &c."—The priest asked him, "Whether he took her with all his heart and soul?" He said, "I take her with all my heart, and soul, and blood, and every thing else."

Counsel. What time was this?

Villars. It was Bartholomew-tide was twelvemonth, as near as I can remember to the time.

Counsel. Did Mr. Feilding tell you he had been at Waddon?

Villars. Yes, he did; and said, that he had seen the lady through the window, whence he fell in love with her.

Counsel. Why was this marriage kept private?

Villars. Because Mr. Feilding took the lady to be Mrs. Deleau.

Justice Powel. How long was it before it was discovered?

Villars. It was not discovered till the latter end of May last, or the beginning of June.

Justice Powel. When was the time Mr. Feilding was married?

Villars. It was the 9th of November was twelve-month.

Counsel. What was the reason why the marriage was carried on so privately?

Villars. The reason was, because Mrs. Deleau had a father alive, who had in his hands a part of her fortune; and for fear of disoblighing him, Mrs. Wadsworth, that went for Mrs. Deleau, was willing it should be kept private.

Counsel. Can you tell the reason of its being discovered?

Villars. Mrs. Wadsworth sent to Mr. Feilding for money.—Then Mr. Feilding found he had not a woman of that fortune which he took her to be. When Mr. Feilding did find it out, he took Mrs. Streights into a closet, at the duchess of Cleveland's, and sent for me there: Then Mr. Feilding wanted to have the presents returned. Mr. Feilding then beat me, and asked me whether that was a fit wife for him? And then took a thing made of steel at one end, and a hammer at the other end; and told me, if I would not unsay what I said of his marriage with Wadsworth, he would slit my nose off: And that he would get two blacks; the one should hold me upon his back, and the other should break my bones.

Just. Powel. One would have thought you should have been afraid to have seen Mr. Feilding.

Villars. My lord, it was not till then found out.

Sir Ja. Mountague. My lord, I think she hath clearly proved the marriage; and that

she saw them three times in bed together, in the space of six weeks after the marriage.

Feilding. By what name did Mrs. Wadsworth go?—*Villars.* By no name at all.

Feilding. Did I ever appear with her in public?—*Villars.* No, never.

Feilding. What was the first place I saw her in?

Villars. The first place you saw her, was at your lodgings, last lord mayor's day was twelvemonth.

Feilding. My lord, I desire it may be asked her, how she came to think that I should send such mean presents as she hath mentioned, to a lady of Mrs. Deleau's fortune? They were not at all suitable to Mrs. Deleau.

Just. Powel. Ay, Mrs. Villars, what say you to that? Mr. Feilding thinks it a very strange thing, that he should send such trifles to a lady of Mrs. Deleau's quality.

Villars. He did think, at that time, that he made his addresses to Mrs. Deleau; and I am sure such presents were sent; and he was really married to her, and married her for Mrs. Deleau.

Just. Powel. Mrs. Villars, Mr. Feilding desires this question should be asked you; when was the first time you acquainted the duchess of Cleveland with this matter?

Villars. I will tell your lordship. Mrs. Feilding, that is now, told me, Mr. Feilding beat her at the lodge at Whitehall (I did not see the beating) and said, she should have occasion to bring me upon my oath, to prove that Mr. Feilding was married to her the 9th of November. I went with Mrs. Feilding to the duke of Grafton, and told him, I was sure he was married the 9th of November before.

Just. Powel. How long was it after the beating, before you and Mrs. Feilding went to the duke of Grafton?

Villars. It was about three weeks.

Just. Powel. Are you sure it was before that time that there was any parting betwixt Mr. Feilding and the duchess of Cleveland.

Villars. Mrs. Feilding acquainted me with it herself, that the beating was before the difference between the duchess of Cleveland and Mr. Feilding.

Counsel. Although you did not see what passed at Whitehall; whether was this before the difference between the duchess and Mr. Feilding?

Villars. I believe it was about a fortnight or three weeks.

Feilding. How came it to pass that it was not discovered till now of late?

Villars. It was not discovered till she sent to Mr. Feilding for money, about May, after the marriage.

Just. Powel. Why did you not apply yourself to Mr. Feilding for the reward?

Villars. I was to have no reward.

Feilding. Mrs. Villars, what reward did the duchess of Cleveland promise you?

Villars. I never saw the duchess of Cleveland; and I was never promised any reward.

Just. Powell. Was you not to have had a reward for helping Mr. Feilding to Mrs. Deleau?

Villars. Mrs. Straights left such word at my lodgings; but I had no promise of it from Mr. Feilding.

Sir Ja. Mountague. My lord, Mrs. Villars has given you so full an account of every thing I have opened, that all that we have to do now, is to support Mrs. Villars's evidence; and to make it appear to your lordship, that she is right in all these particulars that she tells you of. And the better to make ourselves understood, we will go on, and give your lordship an account how these things were carried on from time to time. But first we shall prove to your lordship, how that after Mr. Feilding was thus married to Mrs. Wadsworth, he did actually marry the duchess of Cleveland.

Feilding. My lord, I do not deny my marriage to the duchess of Cleveland.

Sir Ja. Mountague. Then, my lord, we will not trouble you with any proof of that matter, but go on with making out the circumstances of his marriage with Mrs. Wadsworth; and we shall verify, in every particular, Mrs. Villars's evidence. And first we shall prove, that he actually took a copy of Mr. Deleau's will. For that call Mr. Searle. (Who was sworn.)

Sir Ja. Mountague. Mr. Searle, give my lord and the jury an account of what you know of Mr. Feilding's coming to Doctors' Commons, to see the will of Mr. Deleau.

Searle. My lord, I am a servant to Mr. Cottle, proctor to the Prerogative office. Mr. Feilding came to Doctors' Commons about the beginning of Michaelmas term, 1705, and desired me to search, and see whether Mr. Deleau's will was come into the office, or no. I looked in the kalendar, and found it was come in; and spoke to the clerk, in whose possession it was, and he read it over to him; and he desired a copy of it, which I wrote out. Mr. Feilding came in three days after for it, but it was not done. I desired him to come another time; which he did, and had it.

Counsel. Who did he bespeak it of?

Searle. He bespoke it of me, and had the copy of me.

Counsel. When was this?

Searle. It was about the beginning of Michaelmas term.

Sir Ja. Mountague. The next thing we shall prove, is, that Mr. Feilding was actually at Waddon, Mrs. Deleau's house: And we shall prove that even by Mrs. Deleau. (Who was sworn.)

Counsel. Pray, Madam, have you any acquaintance with Mr. Feilding?

Deleau. None at all.

Counsel. Do you remember he came to your house in the country?

Deleau. He did about Bartholomew-tide was twelve-month.

Counsel. When he was there, had he a sight of you, Madam?

Deleau. No, my lord; he was not in the house, but in the garden.

Counsel. Do you know Mrs. Villars?

Deleau. I do, my lord.

Counsel. Did she ever come to you upon such a message, That my lady duchess of Cleveland and Mr. Feilding had a desire to see the gardens?

Deleau. She did so; and it was about the same time Mr. Feilding had been there, or some little time after, I believe.

Counsel. Did you go to the race on Banstead downs?—*Deleau.* No, my lord.

Counsel. Did Mrs. Villars use to cut your hair?

Deleau. No, my lord—her mistress did.

Counsel. Was there any letters brought to your house from Mr. Feilding?

Deleau. I heard there was.

Counsel. Who received the letter from Mr. Feilding?

Deleau. Some of the servants, but I received none; but some of the servants received it. I was then at my father's, and left orders that they should take in no letters but such as came from my relations, which would come by themselves.

Counsel. When had you notice of Mr. Feilding's being at your house?

Deleau. My own butler came up, and acquainted me Mr. Feilding was below. He came to my house with the character of major general Villars. I did not see him; but here is the lady that saw him out of the window; who, it seems, he took for myself.

(That lady sworn.)

Counsel. My lord, we only bring this lady to prove what the first witness said, That Mr. Feilding saw Mrs. Deleau through a window.—Madam, Do you remember Mr. Feilding was at Waddon, and when?

Lady. He was there about Bartholomew-tide was twelve-month. I did see him through a window, and informed my cousin of it.

Counsel. Then call Mr. Boucher. (Who was sworn.)

Counsel. Mr. Boucher, pray, give my lord and the jury an account of all you know of this matter.

Boucher. My lord, I went with Mr. Feilding to my lord-mayor's show last lord-mayor's day was twelve-month. He went in his chariot to Mr. Feilding's a linen-draper's at the Three Legs in Cheapside. I looked into the balcony, and saw Mrs. Villars there.—My master came down again, and went to sir Basil Firebrass's; from thence I was ordered to go home, and meet my master in Bond street; which I did. He asked me whether any body had been at his lodgings to enquire for him? I said, no, and went home again. Then I found the lady and Mrs. Villars at Mr. Feilding's lodgings. They had been there but a little time, but Mr. Feilding came in. Mr. Feilding complimented the lady, and asked her if she loved singing? Mrs. Margareta was sent for,

and accommodated this lady and Mrs. Villars with two songs. Mr. Feilding treated them with a bottle of wine and a plumb cake.—Margaretta went away; and soon after Mrs. Villars and this lady went away. So, says Mrs. Heath afterwards to me, Do you know what woman of quality that is in the coach? This Mrs. Heath is the landlady where Mr. Feilding lodged. Mrs. Villars and the lady went away in a coach. She was in a mourning dress, and the coach was a mourning coach.

Counsel. What time was this?

Boucher. It was my lord-mayor's day was twelve-month, on the 29th of October.

Counsel. Well, go on, and tell what you know of the marriage.

Boucher. Not long after this, my master ordered me to be at home, to get clean sheets for the bed, wax candles, and sconces, and fires in both the rooms: He told me some ladies would be there that night; and ordered if he was not at home when they came, to tell them, that he would be there presently. Accordingly they came, and he was not at home; but in a little time he came and went up to them. Some time after that, he came down stairs in great haste, and said, Boucher, go and bespeak a dish of pickles. I did so; and brought over a cloth, and the rest of the things, and left them in the window. I stayed by the stairs till he came back in a hackney coach, with a priest along with him in a long gown, and long beard, and a fur-cap; I knew him to belong to the emperor's envoy; and I heard Mr. Feilding call him reverend father. Then I was ordered to set the table and glasses, and wine, and things of that kind, upon the side-board. I waited at table all the while. When supper was over, Mr. Feilding ordered me to go down and fetch water, salt, and rosemary, I went and got water and salt, but could get no rosemary. Then I was ordered to go down, and they were locked in about three quarters of an hour: He then called, Boucher, says he, Will you fill some wine?—I did so, and perceived upon the thumb of this lady, upon her left hand, a plain gold ring, which before supper she had not. When this was over, the priest went away. Presently after, says Mr. Feilding, take the sheets from my bed, and lay them on the other bed, for Mrs. Villars; and see that none lie there. I told my master it was done. Mrs. Villars, in the mean time, put the lady to bed. When I came down to tell them of it, I saw the lady's clothes upon a stool in the chamber; and Mrs. Villars folding them up, and laying them in another room. I then light Mrs. Villars to bed, and then went to bed myself. In the morning I was called to make a fire; I then perceived Mr. Feilding and this lady in bed together. The fire being made, I was ordered to get a hackney coach. Mrs. Villars dressed the lady hastily, and she was carried away in the hackney-coach. About a fortnight after, Mr. Feilding ordered me to prepare the lodgings again. This lady came to my master's lodgings that night, and had something

for supper; my master ordered me to get ready Mrs. Villars's bed: I did so. In the morning was called down to make a fire, which I did: the curtains being open next the fire, I perceived them in bed again. I was ordered to get a hackney-coach, which I did; and they went away again. This was about the 25th of November. Soon after this, I understood by some of the duchess of Cleveland's servants, that Mr. Feilding was married to my lady duchess. At the same time Mr. Feilding ordered me to go to Mrs. Heath's to bring his night gown, cap and slippers to the duchess of Cleveland's house, and to attend the next morning, with clean linnen, his wig, &c. And about, or on the 5th of December, says he, Boucher, get my lodgings in order again, for I expect Mrs. Villars and the lady to be there; which accordingly I did. I was sent from the duchess of Cleveland's with his night gown, cap and slippers. Mrs. Villars and the lady came accordingly that night, and had a boiled chicken for supper. Mr. Feilding and the lady lay together that night; and in the morning I saw them in the bed together; and when she got up, she went again in a hackney-coach. That was the last time I saw the lady in Mr. Feilding's lodgings.

Counsel. Were you at Epsom with Mr. Feilding?

Boucher. I was there with him, and went to Waddon with him to Mrs. Deleau's. Mr. Feilding went into the gardens and walked in them.

Feilding. I would ask you, Boucher, whether the priest that came in a red gown lined with blue, whether you did not sometimes see him dine at the duchess of Cleveland's house?

Boucher. I did see him there, I cannot say often; but once I am sure I did.

Just. Powell. Was it not that priest that was there that night upon which Mr. Feilding was supposed to be married at the duchess of Cleveland's?

Boucher. I saw him there once.

Just. Powell. Was it before or after that supposed marriage?

Boucher. I cannot be positive whether it was before or after.

Feilding. Whose servant are you at this time?

Boucher. I am now cook to col. Webb's regiment.

Feilding. How came you here?

Boucher. My master desired me to go to the duke of Grafton's house, where his grace told me I was to justify the truth of what I knew of Mr. Feilding's marriage; that is all. I was sent for to England by my master.

Feilding. I desire to know whether he did not only make Mrs. Villars's bed, but lie with her likewise?

Counsel. Call Mrs. Martin. (Who was sworn.)

Sir Ja. Mountagus. Mrs. Martin, will you give my lord and the jury an account of what you know of Mrs. Villars?

Martin. I know Mrs. Villars.

Counsel. What do you know of her, and of any body else coming to your sister's house after Mr. Feilding?

Martin. The next day after the lodging's were taken, Mrs. Villars came and asked for the major-general, and continued coming almost every day, as long as he was at our house.

Counsel. What time did Mr. Feilding come first to your house?

Martin. It was the beginning of October was twelve-month.

Counsel. Did you ever see any other gentlewoman come with her?

Martin. My lord, on my lord-mayor's day, at night I saw Mrs. Villars come in, and another gentlewoman with her.

Counsel. Did you see the coach they came in?

Martin. There are others that saw the mourning-coach.

Counsel. What time was this?

Martin. It was my lord-mayor's day, at night.

Counsel. Where do you live?

Martin. At Mrs. Heath's, my sister's, in Pall Mall, at that time.

Counsel. Did Mrs. Villars and the lady continue there all night?

Martin. No, they did not.

Counsel. Was there any body came in afterwards?

Martin. I did not see any body.

Counsel. How long did they continue in your sister's lodgings that night?

Martin. I cannot tell.

Counsel. Did you see them there again?

Martin. The second time was about November.

Counsel. Who came then?

Martin. I did not see them come in: but Mrs. Villars came into the parlour, and said, that there was the same lady that had been there the night before.

Counsel. Did they stay then that night?

Martin. I believe they stayed there that night?

Counsel. Did you see them go away in the morning?

Martin. I did not see them in the morning.

Counsel. Did you ever see any body come at them whilst they were there in an extraordinary habit, red gown, &c.?

Martin. There was a tall man knocked at the door, in a long gown, blue facing, and fur cap, with a long beard. He was conducted to the major-general's up stairs.

Counsel. Do you remember the supper that night?

Martin. I remember a dish of pickles.

Counsel. How long did the gentleman in red stay?

Martin. I know not; I did not see him go away again.

Counsel. Do you remember that the lady and Mrs. Villars, with a gentleman in red, and Mr. Feilding were together?

Martin. I remember when they were together Boucher was sent down.

Counsel. Do you remember any bed got ready?

Martin. I remember that orders was given to his servant to make ready a bed, and to put on clean sheets.

Just. Powel. Do you believe there was any marriage that night?

Martin. I do not know any thing of the marriage.

Counsel. Then call Mrs. Heath. (Who was sworn.)

Sir Ja. Mountague. Mrs. Heath, give an account what time major-general Feilding came to take lodgings at your house.

Heath. About the beginning of October last was a twelve-month.

Counsel. Do you remember that one Mrs. Villars came to see him there?

Heath. Yes, frequently, my lord, she has been in my parlour, and told me there frequently, that she came from a lady of quality.

Counsel. Did you ever see this lady?

Heath. I never saw her, my family being retired from lodgers.

Counsel. What discourse did you hear from Boucher?

Heath. He said that a woman of quality was there, and that she came there two or three times with Mrs. Villars.

Counsel. What time did you hear of that lady's being there first?

Heath. On my lord mayor's day; for I dined in the city, and when I came home, my family acquainted me with it. Mrs. Villars came down to me one night, which was the night the man in red was there, but I did not see him.

Sir Ja. Mountague. Do you know of their staying there all night?

Heath. Mrs. Villars came to me, and said that her lady was a person of quality worth 80,000*l.* she shewed me a little picture, which she said was her lady's picture: that night she came to me, and desired that the lady and she might lie in a room up two pair of stairs; for they had stayed late, and did not care to go home. I disputed it; but she said she should have no trouble, for Boucher should make the bed, and the general's sheets should serve them.

Counsel. Do you remember at any time after that, that Mr. Feilding came to you, and railed against Mrs. Villars?

Heath. He did come to my house, after he had discharged my lodgings, and he told me that Mrs. Villars was a very bad woman; and that she imposed a woman of the town upon him for a woman of quality.

Counsel. What time was it that Mr. Feilding told you so?

Heath. It was two or three months ago, but I do not well remember the time; says he, "Damn her, I do not know how she contrived it, but I saw her at a woman of quality's house in the country." He said this at that time.

Counsel. Let us hear it again ?

Heath. Mr. Feilding told me, " That Mrs. Villars was a bitch, and had imposed a base woman upon him instead of a woman of quality." He said likewise; " That he thought he saw the lady look out of a window of a person of quality's house in the country.

Just. Powel. Mrs. Heath, did you ever hear or believe that they were married ?

Heath. I did not believe it a marriage, but a conversion; because his man came down into the parlour, and asked for salt and water and rosemary; which occasioned these words, " Lord," said I, " I fancy they are making a convert of this woman;" because they said it was a priest above. And his man at that time said, there was a priest above.

Feilding. Did my man, at that time, tell you I was married to that woman, or any time else ?

Heath. Nothing, my lord: nobody told me Mr. Feilding was married at that time.

Counsel. Then call Mrs. Margaretta. (Who was sworn.)

Margaretta. My lord, I remember that Mr. Feilding sent for me to his lodgings in Pall Mall; I was sent for in the evening, but I cannot tell how long it was before he was married to my lady duchess.

Counsel. What company was there in the room at that time ?

Margaretta. I cannot tell.

Counsel. What were the songs you sung ?

Margaretta. I sung several Italian songs, and one English, and that was *Ianthe the Lovely*.

Counsel. Who was then in the room ?

Margaretta. Nobody was there then, as I remember, but the gentlewoman, Mr. Feilding, and I.

Counsel. What sort of woman was this you speak of ?

Margaretta. She was in mourning, she had a velvet-scarf. I never heard her speak, for he desired me to sing that song, *Ianthe the Lovely*; for he said he had the original of it, and had translated it out of Greek.

Just. Powel. Were you then more than once at Mr. Feilding's lodgings ?

Margaretta. But once; and I saw no more there than the gentlewoman that sat by the fire with her back towards me. But I did not see her face, nor hear her speak.

Just. Powel. What time was it ?

Margaretta. I cannot tell justly the time; it was dirty weather and dark: I believe it might be about six a clock; but am not sure.

Feilding. My lord, she says there was but one woman there: Mrs. Villars was not there.

Just. Powel. Name the persons that were there.

Margaretta. There was that gentlewoman in mourning, whose name I do not know, Mr. Feilding, and myself; there was nobody else that I saw; and nobody could be there but I must see them, for I was mistress of all the doors.

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Just. Powel. Did Mr. Feilding pretend it was to entertain his wife ?

Margaretta. No; he desired me to come to him, and left a direction at my lodgings, and said there were some people of quality there; and when I came I saw none but the lady that sat by the fire.

Counsel. Then call Mrs. Price. (Who was sworn.)

Counsel. Mrs. Price, do you live at Mrs. Heath's house?—*Price.* I do.

Counsel. Give an account to my lord of the mourning coach coming to Mr. Feilding's lodgings on lord-mayor's day was twelve-month.

Price. I saw a mourning coach come to Mr. Feilding's lodgings at Mrs. Heath's house, but did not see the ladies come out of it; two ladies were lighted into Mr. Feilding's lodgings, Mrs. Villars and another; and Mrs. Villars followed the other lady up stairs, and immediately Mrs. Villars came down, and asked for the general; Boucher in the mean time came in, and told them he would be there presently. Accordingly he came. They continued some time, and when they were gone, the coach was gone.

Counsel. Was Mrs. Margaretta there ?

Price. I did not see her.

Counsel. Do you know of any other time of their coming there ?

Price. Some time after my lord-mayor's day, this gentlewoman and Mrs. Villars came again; at the same time Mrs. Martin told me she let in a gentleman in red, in an Armenian habit; but I cannot tell what he came there for; I think his man Boucher said he was a priest.

Counsel. Whilst the priest was there, do you remember Boucher's coming down for any remarkable thing ?

Price. I remember Boucher came down, but do not remember what he came down for.

Counsel. How long did they stay the second time ?

Price. They staid there all night; there were clean sheets put on the bed, and lodgings prepared for the lady and Mrs. Villars.

Counsel. Do you know Mrs. Villars ?

Price. I did know Mrs. Villars by her coming to Mr. Feilding.

Just. Powel. Do you know what reputation Mrs. Villars has ?

Price. I do not, my lord.

Mrs. Heath called again.

Heath. My lord, I never had any acquaintance with Mrs. Villars, no more than by her coming to the major general. One Mrs. Howard came with her, and she has told me that she was a woman of no reputation, and that she was a singer too, my lord.

Counsel. Then call Thomas Sowe. (Who was sworn.)

Counsel. What do you know of Mr. Feilding's buying a ring of you? Give us an account of it.

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Sone. I know Mr. Feilding, by sight; the bought a gold ring of me, but I cannot remember the time.

Counsel. How long ago do you think it is?

Sone. I believe it may be a year ago.

Counsel. Was there any posy in it?

Sone. Yes, I graved a posy whilst he took a turn in the alley: the posy was by his direction, *Tibi soli.*

Counsel. Who did you deliver this ring to?

Sone. I sold it out of my glass to Mr. Feilding.

Counsel. Swear Mr. Wilkins. (He was sworn.)

Counsel. What do you know of Mr. Feilding's buying a ring of Mr. Sone? The time when this ring was bought?

Wilkins. It is about a year and two months ago; I was by when the gentleman gave direction for it; and I saw him write down *Tibi soli.*

Counsel. Then swear the register of Doctors' Commons.

The Register of Doctors Commons sworn.

Counsel. Shew the Register the ring.

Register. My lord, this ring was brought by my lady duchess's proctor with the letters.

The ring produced, and shewn to Mr. Sone the goldsmith, who deposed, That that was the ring which he made for Mr. Feilding; and the posy the same which Mr. Feilding directed.

Counsel. How do you know it to be the same which you sold to Mr. Feilding?

Sone. I know it to be the same by my mark and work.

Mr. Cooke, Proctor, sworn.

Cooke. My lord, there was a ring brought, it is the same that was exhibited in court, and the ring was brought first of all by the lady, Mrs. Feilding; it was afterwards in the custody of my brother; my brother brought it to me, and I delivered it to the Register, and believe it to be the same ring by the posy, *Tibi soli.*

Counsel. Now, my lord, we shall prove Mr. Feilding's coming to count Gallas's for a priest.

Constantine Passy sworn.

Counsel. Where do you live?

Passy. I am a servant to the emperor's envoy.

Counsel. Do you know Mr. Feilding?

Passy. I know general Feilding by sight; I remember one night he came and asked for the father in red. I told him that he was not within; then he asked for count Gallas's almoner (meaning father Vanderber, his lordship's first chaplain), but he happened not to be within neither. I told him that father Florence, one of the chaplains, was within. Then, said Mr. Feilding, call him to me; I did so. Upon which Mr. Feilding gave me half-a-crown. Mr. Florence came immediately to Mr. Feilding.

Counsel. Was there a priest at that time in red, that had a long beard?

Passy. My lord had such a priest then; after Mr. Florence and Mr. Feilding had been discoursing some time in the hall together, Mr. Florence went up stairs to count Gallas; whilst Mr. Florence was up stairs, the father in red came in; I saw Mr. Feilding and the father in red go away together in the hackney coach before Mr. Florence came down.

Counsel. What time was this?

Passy. It was in November, the beginning of it.

Counsel. Did you hear what Mr. Feilding and Mr. Florence did discourse of?

Passy. No, nothing.

Counsel. Upon them swear Mr. Florence. (Who was sworn.)

Counsel. Give my lord and the jury an account of what you know of Mr. Feilding's coming to you.

Florence. I have seen Mr. Feilding.

Counsel. Upon what occasion had you any discourse with him?

Florence. It was on Friday night, post-night, about the beginning of November, Constantine Passy came under my chamber-window, called to me and said, Here is major general Feilding, he wants one of the chaplains, he desires to speak with you. I went to him immediately, and introduced him into the hall. The major general spoke to me in French. Sir, says he, I come here to look for the father in red; but I understand he is not at home; you will do as well, be pleased to go along with me. He told me he had courted a young lady for some time, and now found her well-disposed, and therefore desired me to go along with him to marry them. I understood there had been some treatment between him and the duchess of Cleveland, and therefore I asked him, whether it were to the duchess? He did not inform me. I told him I did not care to do any thing out of the house; and desired him to let me ask my lord; says he, Give my service to count Gallas, and tell him. I went up to him, and spoke to him, and told him the business Mr. Feilding came about. He bid me, says he, What you do, do it wisely. When I came down Mr. Feilding was gone; I was told that the gentleman in red came in, and that Mr. Feilding and he were gone away together.

Counsel. That which he would have you to do, was to have married him with a certain lady, was it not?—*Florence.* It was so.

Counsel. What time was that?

Florence. It was upon Friday, I am sure.

Counsel. Had you any discourse with Mr. Feilding after this?

Florence. The next Sunday after this, says he, I give you many thanks for the last favour. I knew of no other favour I did him but this.

Counsel. Then call Matthew Paul. (Who was sworn.)

Counsel. Do you give my lord and the jury an account of Mr. Feilding's beating a gentlewoman; and if any marriage was claimed at that time by a gentlewoman.

Paul. Mr. Feilding came to Whitehall-gate

in a chariot; he lit out of it. There was a hackney coach brought two women; one of these women got out of the coach, and came up to Mr. Feilding: Mr. Feilding called her 'Bitch;' the lady called him 'Rogue,' and said, She was his lawful wife; at that Mr. Feilding having a stick, he punched it at her; it happened upon her mouth, and made her teeth bleed. He ordered the sentry to keep her till he was gone, and he would give him a crown. She said, as I told you before, That she was his lawful wife, and for that reason they did not care to meddle with her.

Counsel. Sir, do you know what time this was?

Paul. I cannot justly tell: it was, as near as I can judge, about the latter end of May.

Counsel. Pray, call Mrs. Feilding, and let the witness see if he knows the woman again that he saw Mr. Feilding beat.

Mrs. Feilding called into Court.

Counsel. Is this the woman you saw?

Paul. This is the woman, my lord, I really believe.

Counsel. Then swear Mr. Seymour. (Who was sworn.)

Counsel. Do you know Mr. Feilding?

Seymour. Yes, Sir.

Counsel. Do you remember his beating any woman at Whitehall-gate?

Seymour. Yes, Sir.

Counsel. What time was it?

Seymour. It was in the last summer, but I cannot be positive to the time.

Counsel. Do you know the gentlewoman when you see her?

Seymour. Yes, I do; that is the gentlewoman, [pointing to Mrs. Feilding.] I am sure of it.

Counsel. What did she say to Mr. Feilding?

Seymour. She said to him, You are a rogue, I am your lawful wife.

Counsel. Then swear captain Eaton. (Who was sworn.)

Counsel. Captain, do you know any thing of Mr. Feilding's beating a woman?

Eaton. I was at the King's Arms tavern, and whilst I was there, the drawer came to me, and told me there was two women would speak with me; this woman [pointing at Mrs. Feilding] and another, whom she called mother. She told me, she was married to Mr. Feilding before he was married to my lady duchess, and desired me to acquaint my lord duke of Northumberland with it, that the duchess of Cleveland might know of it: I told her I did not design to concern myself about it. She told me she had been much abused by him.

Counsel. What time was this?

Eaton. It was some time before the 18th of August; it was the latter end of June, or beginning of July.

Counsel. Was it before the difference between Mr. Feilding and my lady duchess?

Eaton. It was before that time.

Counsel. Now we shall produce Mr. Feild-

ing's own letters, where, under his hand, your lordship will find he took Mrs. Wadsworth for Madam Deleau.

[Divers Letters produced in Court.]

Counsel. Call Mr. Lilley. (He appears.)

Counsel. Do you know these letters to be Mr. Feilding's hand-writing?

Lilley. I am a stranger to his hand.

Boucher called.

Counsel. Can you read and write?

Boucher. Yes, my lord, I can.

Counsel. Do you know these letters to be Mr. Feilding's hand-writing?

Boucher. This is his hand, I believe. I have seen him write an hundred times; I have had the curiosity to observe his hand, and this is his own writing.

Counsel. Then swear Frances Beale. (Who was sworn.)

Counsel. Do you know Mr. Feilding's hand-writing?—*Beale.* I do, my lord.

Counsel. Do you know that letter to be his hand?

Beale. I have seen him write several times, and believe it to be his hand.

Counsel. Now, my lord, we will beg the favour to read these letters; and first of all, one directed

"To the Countess of Feilding.

"*Sunday Night.*

"I hope my dearest wife will easily believe that nothing can be welcome to me than the assurance of her health; but as I received hers but this day, I could not have the felicity of seeing her to-morrow, and she have notice of it; therefore, if she thinks fit on Thursday next at four o'clock, I will see her at Puggy's, and there endeavour to repair this tedious absence. Eternally your own, FEILDING."

Another Letter proved to be his hand by Boucher and Beale.

"To my dearest Wife, the Countess of Feilding.

"*Friday.*

"I had returned my dear wife's favour long before now, but my lady duchess's sickness on one hand, and more than ordinary business (of which I will give my dear a particular account) on the other hand, has not given me a moment of time to write to my love. Puggy brings you the set of knots you desired, and the pattern of the damask; or if my dearest life wants any thing else, she may with pleasure command it; for I am never so well pleased as when employed by my dearest wife, and must be ever her affectionate husband till death,

"FEILDING."

Another Letter proved by Boucher and Beale.

"*Nov. 27, 1705.*

"The last letter I had from my dearest wife has mortified me much, finding, that notwithstanding all my kindnesses, she taxes me with coldness in my letters, which I call Heaven to

witness I never in the least intended; and beg my dearest to give me some warning before she taxes me of unkindness. Puggy tells me that my dear designs to come to town to-morrow, which I hope she will put off till another day, because I am obliged to be at her grace's to-morrow all the afternoon, and till late at night; but any other day my dear shall find she is always welcome to the arms of him who loves her more than life itself; and I shall never fail of giving her fresh proofs that I am her loving and affectionate husband,
FEILDING."

Just. Powel. It is plain it is his hand; and that he wrote to one whom he terms his wife.

Counsel. Do you know these letters to be writ by Mr. Feilding, and sent to his wife?

Villars. I have seen them before, and I believe them to be Mr. Feilding's hand. I saw Mr. Feilding write them, as well as I can see by my eyes; and when he had writ them, he delivered them into my hands, and ordered me to deliver them to his dear wife.

Counsel. What does he mean by Puggy in his letters? Who is Puggy?

Villars. He used to call me Puggy.

Counsel. My lord, we have done for the present (having proved clearly his marriage with this woman), without Mr. Feilding denies his marriage to the duchess of Cleveland.

Feilding. My lord, I own my marriage with the duchess of Cleveland.

Just. Powel. Mr. Feilding, you have heard from the evidence that hath been given against you, that you were married to another woman before you were married to the duchess of Cleveland: and now is the time to make your defence.

Feilding. All the evidence against me consists in what Mrs. Villars hath said: she is the only evidence that swears positively to this fact; the rest are very inconsistent with themselves. I beg of your lordship, in a case so nice as this is, where my honour and reputation, and every thing that is dear lies at stake, that the evidence in this cause may be clear and positive. Mrs. Villars, my lord, hath forsworn herself; 1. In that she swears she cut Mrs. Deleau's hair: Mrs. Deleau takes notice, that she never cut it. And as to her reputation, it is so bad, that when our witnesses are heard, I hope your lordship will see little reason to believe any thing she says to be true. My lord, we will prove, that she hath been in custody of a master of Bridewell; that there she hath received the correction of the house; therefore I think she is not fit to appear as evidence in this court. She swears, that the singing-woman was at the marriage; but it appears she was not, for the singing-woman contradicts it. And as to this Mrs. Wadsworth, who they set up, she was married to another man, one Bradby.

Just. Powel. I must deal plainly with you, Mr. Feilding, from the proof: I cannot speak of Mrs. Villars's credit, for she is an ill woman, no doubt, from her own evidence, in that she

put a false woman upon you: but her evidence is well supported by circumstances of time and place; and all of them put together bid fair for a proof, that you were married to this woman. You may call what witnesses you please to Mrs. Villars's reputation, and they may be heard. No woman of reputation will bring a mean woman to a man, instead of a person of quality. I think you say, Mrs. Wadsworth was married to another man at the same time: indeed that will be to the purpose, if you can make it out.

Feilding. My lord, I can. She was married to another husband, one Bradby. Call Elizabeth Basset. (Who has sworn.)

Just. Powel. Do you call this woman to be witness to the marriage?

Feilding. My lord, I do.

Just. Powel. Do you know Mrs. Wadsworth?

Basset. My lord, I do not know her from another woman; but there was a certain woman, two or three months ago, came to take a name out of the register-book.

Counsel. What register do you speak of?

Basset. The Register of Marriages in the Fleet.

Counsel. Who keeps that book?

Basset. I keep it at present: My father-in-law is the keeper of them; but he is sick, and therefore he left them in my charge.

Counsel. Where is your father?

Basset. He is not able to appear.

Counsel. Do you keep them in your custody?

Basset. Yes, I do.

Counsel. Does nobody else come at them but yourself?

Basset. No, not this twelve month; since they have been in my keeping.

Counsel. Who then makes the entries?

Basset. These were my father's books when he was in health.

Counsel. What can you say of this woman?

Basset. I do not know her. But some time ago there was a woman came to my house: She told me she wanted to speak with Mr. Basset. I told her she could not speak with him. She pressed to speak with him: But when I told her he was ill, and could not be spoken with; says she to me, here is a marriage in your book of one Lilly Bradby and Mary Wadsworth. Says she to me, if you will put it out of your book, I will give you a piece of money.

Counsel. Is this the woman that made you this offer?

Basset. I will not swear to the woman: I never saw her but that one time, my lord, I am not positive in the matter; but I believe it is.

The Certificate of the Marriage read.—
"Lilly Bradby married to Mary Wadsworth, the 28th of October, 1703. The man of St. James's, the woman of St. Margaret's, Westminster."

Just. Powel. Who used to write down the Certificates in the Register book?

Basset. Several people, my lord, we hired to do it.

(The place of the Register shown Mrs. Basset.)

Counsel. Have not you yourself looked upon this place now given as evidence?

Basset. Yes, I have.

Counsel. Whose hand is that? (Pointing to the Certificate.)

Basset. It is my father-in-law's: He that was clerk of the Fleet.

Counsel. Is the whole leaf of his hand writing?

Basset. I cannot tell.

Just. Powel. Can you read writing?

Basset. Yes, my lord.

(The Certificate viewed by the Court, and proved to be a different hand from the rest.)

Counsel. There are hands various in this book.

Basset. My husband's brother used to make entries sometimes.

Sir Ja. Mountague. Does your husband's brother use only to make entries at the latter end of the book?—**Basset.** I do not know.

Counsel. Do you know when the entry was made?

Basset. I do not know when the entry was made.

Counsel. Do you remember that there were any gentlemen with you to examine the book?

Basset. Yes, Sir, there were.

Counsel. Did you shew them this very book?

Basset. I did not; because Mrs. Wadsworth said there would be some trouble about it.

Counsel. Have you several registers at the same time?

Basset. Yes, there are several ministers, and therefore entries are made in several books.

Counsel. Why were you so friendly to Mrs. Wadsworth; when the gentlemen came to examine the book for this register, and you shewed them other books instead of this?

Basset. I did not shew them that, because Mrs. Wadsworth desired me.

Counsel. What did Mrs. Wadsworth give you?

Basset. She gave me nothing. I will not say it was Mrs. Wadsworth.

Counsel. Do you remember you shewed any books to these gentlemen, where there were marriages registered in 1703?

Basset. The book is at home in my house.

Counsel. Do you keep two books for the register of marriages, for one and the same year and time?

Basset. There are several books; and we enter sometimes in one, and sometimes in another; by reason that there are several ministers, and each hath his particular book.

Counsel. Did the gentleman ask you at that time, whether there were more books of marriages?—**Basset.** I do not remember.

Counsel. How many books have you of that year?—**Basset.** But two.

Counsel. Did you shew them any false

books? That is, did you shew them a false register of marriages for a true one?

Basset. I know nothing of that.

Feilding. Call Mrs. Drinkwater. (Who was sworn.)

Just. Powel. Do you know Mrs. Villars?

Drinkwater. I have known her above a year.

Just. Powel. What is her character and reputation?

Drinkwater. I know nothing of that.—But I know so far of her, that she said she was married to colonel Feilding on the 5th of November: She accordingly gave it out, that she was with child by him. And that she told me, that the duchess of Cleveland proffered to give her 200*l.* and 100*l.* a year for fifteen years, if she would prove the marriage with Mr. Feilding: But that she would do more for Mr. Feilding for 40*l.* than she would for the duchess of Cleveland for a much greater sum. And said, it was purely want that made her comply with my lady duchess's desire. I have read all the letters between Mrs. Villars and the colonel; and I never heard of any marriage between Mrs. Bradby and Mr. Feilding, but between Mr. Feilding and Mrs. Villars.

Counsel. When was this discourse between you and Mrs. Villars?

Drinkwater. I cannot tell exactly the day; but the time they were married was the 5th of November was twelvemonth, as she said.

Sir Ja. Mountague. You pretend to say, she said, that if Mr. Feilding gave her 40*l.* she would do more for him, than she would do for a greater sum from my lady duchess. How long was this ago when she said this?

Drinkwater. It was about three months, or better.

Counsel. Where was this discourse, pray?

Drinkwater. It was at her lodgings, when she lodged at the back-side of Red Lion Square, at a widow gentlewoman's house.

Counsel. How came you to be there when this discourse was?

Drinkwater. She, some time before, gave me an invitation to her lodgings; and I went to give her a visit, and then this discourse happened.

Counsel. Who was by then?

Drinkwater. None but I and she. She said, it was want and necessity that made her act after this manner.

Feilding. Did she not send for you, to tell you she was going to forswear herself?

Drinkwater. She talked of it first.

Counsel. When did you tell the colonel of it?

Drinkwater. I do not know justly the time.

Counsel. How long have you been acquainted with colonel Feilding?

Drinkwater. Not but since this thing happened. I never had any further conversation with him, than to speak in her behalf to him. But I have this further to say, that an outlandish man came to me about a fortnight's distance, and said, if I could do any thing on the

behalf of the duchess of Cleveland, it would be a considerable sum of money in my way.

Counsel. Where do you live yourself?

Drinkwater. I live in the same house where Mrs. Villars lodged: I am a servant to one captain Howard: my master is now in the service.

Counsel. Who lives in the family?

Drinkwater. We have none but a footman and my master.

Feilding. Call Mrs. English. (Who was sworn.)

Just. Powel. What have you to say?

English. My lord, I went down to Mrs. Villars's lodging, the morrow after last Valentine's day, for some money; for I washed for her. Says she, I have none at present. She told me, she would send her spouse for some. A gentleman came in and said, I have none for you: says he, my master says, if a crown will do, he will send it you out of charity; but he cannot supply your extravagances. On the fifth of November (she said) she was married to Mr. Feilding; and she said, she would have money from Mr. Feilding, or she would send her soul to the devil.

Feilding. Call Mrs. Fletcher. (Who was sworn.) Give my lord an account of what you know of Mrs. Villars.

Fletcher. All I know of her and Mrs. Bradby is, Mrs. Villars lived with me a twelvemonth. She told me she had had two bastards; one by my lord Torrington, the other by my lord Stamford.

Just. Powel. How long was this ago, that she was at your house for a twelvemonth?

Fletcher. It was about four years ago. She confessed she had two bastard children; and that she had been in Bridewell. I have nothing more than from her own tongue, that she was a very infamous woman.

Sir Ja. Mountague. Mistress, how long have you been acquainted with Mrs. Villars?

Fletcher. She was recommended to me by one in the court, and by her good behaviour.

Sir Ja. Mountague. Would you have a correspondence with a woman that had two bastards? Pray what is your way of living in the world?

Fletcher. My husband is a hoken mercer; he allows me 20*l.* a year.

Counsel. What vocation are you of?

Fletcher. I drive little trade, but work plain-work.

Sir Ja. Mountague. You are acquainted with Mr. Feilding; are you not?

Fletcher. I know him.

Counsel. How long have you known him?

Fletcher. About three or four years.

Counsel. You would not scruple to assist Mr. Feilding, if he wanted a fair lady. Look upon that letter, and see whether it be your hand-writing, or no?

[Then a Letter was shewn her.]

Mr. Longford. If you deny it, we will prove it.

Fletcher. It is my hand-writing.

Just. Powel. Mistress, you can say no more of it?—*Fletcher.* No, my lord.

Feilding. Call Mrs. Gardiner. (Who was sworn.)

Just. Powel. What have you to say?

Gardiner. My lord, Mrs. Villars lodged in my house; and she came one morning—

Counsel. When was it?

Gardiner. It was the 6th of November last was twelvemonth; she came in then, and had been abroad all night. She told me, she was married to colonel Feilding. She gave a pair of gloves to me, and to this gentlewoman; and likewise gave favours and garters in the house. But she desired me to keep it secret. Mrs. Bradby, about a fortnight or three weeks before Christmas, came into Mrs. Villars's lodging, and happened to fall down as if she had been in a swoon; and within a few days she fell in labour.

Just. Powel. Was it a boy, or a girl, she was delivered with?

Gardiner. I was not there. It was not at my house; but at new lodgings.

Just. Powel. Where was it she was brought to bed?

Feilding. We can bring evidence of that, my lord.

Just. Powel. Woman, how can you swear, that she was brought to bed before Christmas?

Gardiner. I may say it, my lord, because here is one, I believe, that will swear it. Mrs. Villars herself told me so; and the midwife said she delivered her, for which Mrs. Bradby gave her a guinea. The next day after her fall she was very ill, and continued so till she was brought to bed.

Just. Powel. Was she big?

Gardiner. She was past breeding; she was very big.

Mrs. Drinkwater called again.

Just. Powel. What can you say about Mrs. Bradby's labour?

Drinkwater. My lord, Mrs. Villars and I were at Mrs. Bradby's labour.

Counsel. When was this?

Drinkwater. To the best of my remembrance, it was about a fortnight before Christmas; but she did not look before February. I do not know, but the fall she had in Mrs. Villars's house might be the occasion of her coming before her time.

Just. Powel. Was she delivered of a live or dead child?

Drinkw. I do not remember that, my lord.

Counsel. Was it a boy or a girl?

Drinkwater. I know not that neither.

Just. Powel. I thought verily, that if you were at her labour, that you could tell whether she had a child or no child?

Drinkwater. There were others that were at her labour, can justify that the midwife said she had a child.

Counsel. Do not you know what became of the child afterwards?

Drinkwater. To the best of my knowledge, I think it died as soon as it was born.

Counsel. Just now you said, you did not know whether it was alive or no?

Drinkwater. Here is madam Luet will justify it.

Mrs. Villars called again.

Just. Powel. Mrs. Villars, do you know she was with child?

Villars. I know that she miscarried.

Counsel. What time was it?

Villars. After Christmas.

Feilding. Call the Keeper of the House of Correction. (Who was sworn.)

Just. Powel. What can you say?

Keeper. All that I know of Mrs. Villars, is, that she was a prisoner in the house where I live.

Just. Powel. Where is that?

Keeper. In Westminster. I remember this person was in my custody above five years ago.

Just. Powel. Had she the correction of the house?

Keeper. She had not the correction of the house, because she was then with child.

Feilding. Call Mr. Minors. (Who was sworn.)

Just. Powel. Mr. Minors, what have you to say?

Minors. My lord, in October was twelvemonth, when Mr. Feilding lodged at Mrs. Heath's, I was then with Mr. Feilding almost every day; I saw this woman there every day, except Saturday and Sunday. I dined there, and there was Mrs. Margaretta, and sung these songs which she spoke of now. Two or three days after this, Mr. Feilding communicated to me his treaty of marriage with the duchess of Cleveland, and spoke to me to settle some writings between them. (He produced the writings.) Mr. Feilding desired me that I would be ready with them by the beginning of November, or the latter end of October. This is all I can say of this matter. As to the women, I saw these, and abundance of common women of the town: I saw him take no more notice of Mrs. Bradby, than he did of any of the others.

Just. Powel. When did you see Margaretta there?

Minors. I cannot speak to a day; but she was at dinner when I dined there, about October was twelvemonth.

Feilding. Call Mr. Chomley. (Who was sworn.)

Just. Powel. What can you say?

Chomley. My lord, not long ago there was a certain person taken up, by the name of Villars, about a twelvemonth ago.

Just. Powel. Do you know her when you see her?

Chomley. My lord, I believe that is the per-

son (pointing at her;) but whether she was committed or not, I cannot say. I have seen her divers times at a lewd time of night, when she ought to have been at home.

A letter produced of father Dryan's, and shewn to Mr. Florence.

Mr. Florence sworn.

Counsel. Mr. Florence, do you know this letter?

Florence. I have seen it, and given an answer to it accordingly.

Counsel. Is it Dryan's hand?

Florence. I cannot say positively it is his hand. There are some more of his letters in the house: I cannot believe, or disbelieve it.

Counsel. Could Francis Dryan speak English?—*Florence.* Very little.

Counsel. How long was he in England?

Florence. About eleven months. He hath been gone a considerable time.

Justice Powel. This father that is now gone, did he speak English at all?

Florence. He was learning of it. Some English he could speak; for I taught him from time to time.

Justice Powel. Do you think he could enquire for Mr. Feilding in English?

Florence. I believe he might say, is Mr. Feilding at home? but could speak little sense in English.

Justice Powel. Do you think that if he were desired to speak these words, "I take this man for my husband," that he understood so much?

Florence. I believe he might say what another said before.

[Then the Queen's Counsel replied.]

Sir J. Mountague. My lord, Mr. Feilding's Defence consists of two parts. First, he does endeavour to falsify his marriage with Mrs. Wadsworth, by contradicting the evidence of Mrs. Villars; and for that he calls divers to prove Mrs. Villars to be a dishonest woman. My lord, we think there is no occasion for us to make a reply to that particular, since we ourselves do not pretend to say she is a woman of very good reputation. That which we insist upon is, that Mr. Feilding hath been imposed upon, and married this woman; and this we hope we have proved, not only by Mrs. Villars's evidence, but by other concurring circumstances, which are so strong, that they cannot possibly be denied. And as to these facts, he hath not at all contradicted our evidence. For he does not so much as give your lordship an account how he came by the ring, or for what end and purpose he bespoke it. He does not deny that he directed the poxy of it to be *Tibi soli*. So that, my lord, he gives no manner of answer to all these matters.

In the next place he seems to admit that he had been foolish enough to be thus imposed upon by these intriguing women. But, says he, they have not gained their point; for this imposing upon me signifies nothing, because

this woman was wife to another man, when we said she was married to Mr. Feilding. Now this sort of defence does, in great measure, admit the thing we contend for, his marriage with Mrs. Wadsworth; and whether he hath made it appear that this marriage is null and void, shall be taken into consideration next, by making some few observations on the nature of the evidence that he hath produced to prove this woman's marriage with another man. He says she is the wife of one Lilly Bradby. That man, by the book, is described to live in St. James's, and the woman to be of St. Margaret's Westminster. But he hath not so much as given you any account that there is such a man in the world, that he would have to be the supposed husband of this woman. In the next place, they have not undertaken to produce one witness that was by at this marriage, not one witness. And what do they rely upon to prove this wedding? Truly, nothing but the register-book; and the man that keeps the register-book is not here. It is true, indeed, they say that it is a true register, but we desire the jury may inspect it; for it appears by divers circumstances to be a counterfeit-entry; for it is written in another character than what the rest are; and it is written in the lower part of the leaf, where we may suppose a vacancy left to insert such a thing as this is, upon occasion. The person that wrote it is not here. The whole year that is set down here, is all entirely one hand-writing; and it is not at all like the writing of this entry. I think they pretend to say, there is something of the like hand-writing in the same book; and that they make use of to be a corroborating circumstance. But that appears likewise to be at the latter end of another book. The book is ruled, and this entry is writ below lines without a rule.

My lord, this is what I think fit to take notice upon the view of the thing. We had an intimation given us of this book. It was rumoured about the town, that this was the defence which we were like to meet with. Therefore we did send to all places where suspicious registers were kept, and among the rest to this Fleet-register. My lord, we shall shew you that our witnesses went to enquire for this book; but there they found no book where this entry was written. It is a very unaccountable thing that this book should be concealed. Here is a woman, indeed, gives you a reason why she did it. She says she did it, because she was desired to keep it secret by a woman whom she never saw before; and of whom she says she never had a penny. This, methinks, is very extraordinary. But this very book was shewn them, if my instructions be true; and the place where this entry is made was then a blank, and filled up since. There was no such entry at that time when they looked upon it. This is all we shall say in respect of the register, which is all the evidence they bring to prove this marriage.

But there is another thing they insist upon :

they make it an objection, that this father in red was seen at dinner with the duchess of Cleveland, after Mr. Feilding was married to my lady duchess. As to that matter, we say it does not appear when that time was; nor do they make it out that the father in red did know that he was married to the duchess of Cleveland at that time; though in fact they might be married. Twenty people might be at dinner there, and yet might be ignorant of this marriage. It is possible that a man may eat and drink with another, and yet not know whether he be married or unmarried. They do not make it appear that there was any occasion given at table that would give rise to such a discourse. The man not having an opportunity to speak of it, to what end and purpose should he do it? The next thing they insist upon, and have endeavoured to prove, is, that Mrs. Feilding was with child, and brought to bed the Christmas after she was married to Mr. Feilding. But they do not pretend to tell, whether the child she was brought to bed of was dead or alive, or whether it was a boy or a girl; but at last it proved a miscarriage. We have given your lordship an account how it is likely she should be with child; for we have proved to you undoubtedly that she was married to Mr. Feilding; that they lay together several times; and we have no reason to suspect Mr. Feilding's ability. Mr. Feilding knew she was with child by him. He was the proudest man in the world of this thing, and called it 'young lord Tunbridge.' To prove this, my lord, here is a letter written by himself. The stile is something peculiar too; it is directed, 'To the best of wives, Anne countess of Feilding.' Now, my lord, Mrs. Delean, whom Mr. Feilding thought he had married, her name is Anne, but Mrs. Feilding's name is Mary.

The Letter produced and proved by Boucher and Beale; and it was directed 'To the best of wives, Anne countess of Feilding, at Waddon.'

" *Novem. 14, 1705.*

" There is nothing can please me more upon this occasion, than to hear my dearest wife say I made her sick, by turning her liver; for without that we could not hope for a young lord Tunbridge; which would be, the next to my dear herself, the most welcome present to my arms. Make haste, then, my dearest life, to cultivate the young spark; and be sure you do not starve my boy. As for your coming to me, it wholly depends upon yourself, who can best judge when it is most proper to come to me; which you can do, by giving out, you are to stay all night in London; and then you and Puggy have nothing to do but to come to me at bed-time, and so we may go to bed and lie till morning, when Puggy may come again and call you. Adieu, my soul's love! whom I must ever value more than life. FEILDING."

• *Counsel.* Call Mr. Longford. (Who was sworn.)

Sir *Ja. Mountague.* Were you directed to go to the Fleet and look into the register-book?

Longford. Mr. Attorney General telling me that he heard there would be some pretence of a marriage that would be set up, advised me to enquire after it. I was informed, that some certificate was, or would be given in the Fleet. I went with Mr. Rescorloe to see the books. We looked all over those months for the year 1703. This book is the very book I take it to be, but am not positive. That which we saw, I observed had an entry dated the year 1705, before the marriages in the year 1704, in yellowish ink at the top of a leaf.

Counsel. Call Mr. Rescorloe. (Who was sworn.)

Sir Ja. Mountague. Do you remember that you saw that book?

Rescorloe. I do remember that I saw that book with Mr. Longford.

Mr. Longford and I went, by the Attorney General's order, to search the books at the Fleet, to see whether we could find any entry of Lilley Bradby's marriage with Mrs. Wadsworth. This woman that gave her evidence here brought in this book, and we looked back for three years. We found no such entry as she shews here in this book. We asked her again, whether there were any other books of entries of marriages? She said, no. I asked her, whether there had been any one there to see after such a certificate? She said there was a woman and a man about a week or fortnight ago. I asked her, whether she shewed them this book? She said, she had shewed them this book, and they gave her a shilling for searching it. She said positively there was no such certificate entered in the book, and that there was no other book for the entry of marriages. We searched the month of October more strictly; we looked for the very certificate with the greatest care and industry that could be. We went to Basset's house, who, this woman said was not at home. She laughed in her sleeve, and said, he was a doating man; and if he spoke two words, he could not speak a third. I do really believe this to be the book. I took good notice of the blank where this certificate is entered, and did remark that there was a vacant space under this certificate, where was no writing. Mr. Longford and I turned back again to the year 1705, which was put before the year 1704, and observed it then, as it appears now, to be the book, except this entry. I do believe it to be the same book we then saw.

Sir Ja. Mountague. There is but one thing more that I would mention, which is, that the woman in the top-knot confessed, that this letter was her own hand-writing. I desire it might be read.

The Letter was read. It was directed

“ To Major-General Feilding.

“ Tuesday morning.

“ All that know the name of major-general Feilding, must own the generous and charitable actions that your honour daily bestows upon them. I, among the rest, shall ever ac-

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knowledge your goodness. It is necessity that forces me to dispose of this picture. Your honour is a nice judge of painting, as well as an admirer of such pieces, which makes me humbly present it to you first; and in accepting the same, your honour will highly oblige, as well as serve, Your humble servant,

“ M. FLETCHER.”

“ P. S. I long to see you. For your encouragement to grant me that favour, I am now acquainted with a young lady that is pretty, and lives in good fashion. Your honour will oblige me in letting me receive your commands.”

Just. Powel. Gentlemen of the jury, the prisoner, Mr. Robert Feilding, stands indicted for a capital offence, for felony in marrying a second wife, his first being then alive. This is the offence charged against him. The counsel for the queen have called several witnesses to prove this matter upon him. And the first is one Mrs. Villars. She hath given her evidence from one end to the other, if you believe what she swears. She swears, that one Mrs. Streights came first to her lodging, and she was not at home; but left word that she must needs speak with her; that she was always out of the way when any thing offered that would do her a kindness; and that it would be 500*l.* out of her way if she did not see her. It seems, that when Mrs. Streights met her, she acquainted her with Mr. Feilding's inclinations; and being informed that she was acquainted with the lady, that she used to cut her hair, thought that she might have such an interest in her, as to be made serviceable to bring the matter about; which if she was, it might be worth 500*l.* to her. Mrs. Villars undertakes the business to bring Mr. Feilding and Mrs. Deleau together; she did readily accept of it; thereupon Mr. Feilding and she discoursed together concerning this matter: she told him she was acquainted with Mrs. Deleau, and that she would do the best she could to bring it about. Mr. Feilding upon this went to Mrs. Deleau's country-house at Waddon, in Surry, that thereby the lady might have an opportunity of seeing him. She says, Mr. Feilding told her, that he had access to the gardens; that when he was there he saw the lady through the glass window; he was willing to give the lady a full view of him, therefore he stood still and set his watch by the sun-dial, and took several turns in the garden; and he did afterwards send a letter to her. Mrs. Villars was afterwards sent of a message, as though it was from the duchess of Cleveland, to acquaint the lady that the duchess had a great mind to see the gardens. Mrs. Deleau told Mrs. Villars, that she should be proud that a person of her quality should come to her. She said that Mr. Feilding sent her, and she found afterwards that the duchess of Cleveland did not intend to go; nay, that she knew nothing of the matter. But see how she managed the matter, and played this trick upon Mr. Feilding; it is no better, if true.

They agreed together that Mrs. Deleau should come to a place where Mr. Feilding should appoint; that something of music, or some entertainment should be provided; they contrived when it should be; the time was on my lord-mayor's day at night; and according to appointment Mrs. Villars came with Mrs. Deleau, as Mr. Feilding thought, but in reality it was one Mary Wadsworth, which represented Mrs. Deleau; she came in a mourning coach, and dressed in a widow's habit; after this manner they came to colouel Feilding's lodgings in Pall Mall. The lady, truly, was not to know that they were Mr. Feilding's lodgings; however, Mr. Feilding was not at home; but it was not long before he came: he came up to the lady: you have heard what addresses he made to the lady, and how much love he expressed towards her: asked her, whether she loved singing? One Margaretta was sent for, and sung two songs. Mr. Feilding was so taken with her, he would have married her presently; but she being coy, modestly declined it, and so they parted for that time. Mrs. Villars was to bring her afterwards, which was on the 9th of November, on the night the supposed wedding was; Mrs. Villars brought her. When she came there Mr. Feilding proposed to be married to her forthwith; she seemed to be shy at present, but Mr. Feilding said he would fetch the priest immediately; he locked them in, took the key with him, and returned in three quarters of an hour; the priest she describes to be in a long red gown lined with blue, a long beard and a fur cap upon his head, so he brought him along with him; when he came, he said, "This is the man that should join their hearts together." She tells you further, that Mrs. Wadsworth questioned the priest; required of him a proof to shew he was a priest in orders.* The priest pulled a picture of the pope out of his pocket, which he said was a credential for priests. After supper the marriage was proposed, whether it should be in the dining room, or bed-chamber? That was the question. The lady thought the bed-chamber best; he thought so too. Well then, in the bed-chamber it must be. The priest did want water, salt and rosemary, things that he used in performance of the ceremony; Boucher was sent down for them; he brought up water and salt, but could get no rosemary: After these things were brought up, Boucher the servant was turned out, and the doors were shut. Then there was nobody present but Mr. Feilding, the lady, the priest and Mrs. Villars. Then she tells you of the ceremony of the wedding, the ceremony of the water, and the ceremony of the ring. After that was done, they proceeded to the marriage; the office was in Latin. When they came to the marriage words, "I take thee to be my husband," &c. Mrs. Wadsworth desired it might be spoke in

English; thereupon Mr. Feilding did say it in English, "I take this woman to be my wedded wife, with all my heart and with all my soul." The gentlewoman she said her part likewise in English, "I take this man to be my wedded husband;" but Mr. Feilding observing her to speak it too low, desired her to speak it as earnestly as he did: Whereupon she did say, "I take this man to be my husband, with all my heart, and with all my soul." The ceremony of putting on the ring the priest directed; that was, to take hold of the end of one of her fingers, and put it on; she saw that done, and when the ceremony was over, the priest went away; that when he was gone away, she undressed the bride, and put her to bed, and then gave notice to Mr. Feilding that the lady was in bed. Then Mr. Feilding went to bed, and she saw them in bed together. Then she went to bed herself in a lodging that was provided for her up another pair of stairs: That the next morning she arose, came down, went into the room where there was a fire made by Boucher; that then she saw them naked in bed together. If you believe her, she swears the marriage by this priest, and the consummation of it. Mrs. Villars goes further, and swears, that she brought her two other times, and that those times she saw them in bed together as man and wife. I asked Mrs. Villars at last, How Mr. Feilding came to be undeceived? She says, It was kept secret from November to May. Then money was wanted; that was a great disappointment to Mr. Feilding, for he thought he had married a lady that would have furnished him with money. Then he discovered the fraud, and found he had been imposed upon; then he was angry with her, beat her, and called her names. Indeed, gentlemen, I must deal plainly with you: If her evidence stood alone, her reputation is shaken to that degree, that in truth, where a man stands upon his life, one would not have a great regard for what such a woman swears, if it were not supported otherwise.* Now, though by herself she be not a good evidence, yet the matters of fact which she swears to, are likewise proved by the concurrent testimony of others.

First, they call Boucher, and truly he fortifies her evidence in a great many particulars, gives an account of Mrs. Villars bringing Mrs. Wadsworth to Mr. Feilding's under the character of a person of quality; gives an account, just as she does, of their coming to Mr. Feilding's lodgings in a widow's habit and mourning-coach; their having a treat of plum-cake and two bottles of wine. He further gives an account of their coming a second time, and an account of the priest; knew the priest; knew him to be the emperor's envoy's priest. He remembers the priest coming to the place; he remembers also the circumstances of being sent for water, salt and rosemary. He says he was

* As to marriage by a Popish priest, see the case of the King v. The Inhabitants of Brampton, 1 East, 282.

* Concerning the operation of incontinency on the credit of a female witness, See vol. 10, p. 643.

ordered down, and the chamber door was shut, and the priest was then in the chamber with Mr. Feilding, the lady, and Mrs. Villars; and that when the priest was gone, Mr. Feilding and the lady went to bed; that he saw them in bed together; that the people that were below, when Boucher was sent down for salt and rosemary, they could conclude no otherwise but that they were making this lady a convert. Now, gentlemen, this is a material thing, that there was a priest at that time, and they were private together; this is a concurrent evidence to strengthen Mrs. Villars's testimony. There is Mrs. Martin, Mrs. Heath, and Mrs. Price, they remember several of these matters perfectly well. Mrs. Martin saw this person and her mourning coach; she saw the lady and Mrs. Villars go up stairs, and the time when the priest came in, she let him in; describes him by his particular habit, as the rest do. Mrs. Heath remembers Mrs. Villars coming with a woman that she thought was a woman of quality, but saw not the priest. Mrs. Villars told her she was worth 80,000*l.* she asked her whether she might lie there that night, for it was too late to go home? She agreed they should lie together, Mrs. Villars and Mrs. Wadsworth. But now here is another circumstance that hath mighty weight in it, that is, the ring; they have brought the person of whom Mr. Feilding bought the ring to the value of 20*s.* that the ring was ready made, and Mr. Feilding directed the posy (*tibi soli*) to be engraved in it. There was another man by when Mr. Feilding bought the ring, and ordered the posy for it; and this very ring with this posy has been produced first by the proctor and register; the proctor does say, it was first brought to him by Mrs. Wadsworth, who came to retain him in an action of nullity of marriage; he took notice of the ring, and said that it had this posy in it. Afterwards when Mrs. Wadsworth came again; he was not at home; it was in the hand of his brother, and he is sure it is the same ring. The goldsmith swears it to be that ring Mr. Feilding bought of him; he knew it by the mark and workmanship of it; for goldsmiths know one another's work. This, gentlemen, hath a great deal of weight in it; it is a very great circumstance, unless they could tell you, which they have not, upon what occasion this ring was bought at this time.

Gentlemen, they give a further account of this matter by the testimony of letters, which they prove to be Mr. Feilding's hand. Mrs. Villars was the carrier of these letters; Mr. Feilding stiling her in them by the name of Pnggy, a name by which it seems he used to call her. These letters are proved by Boucher and a lady in the gallery, to be Mr. Feilding's writing. These letters have been read to you; they are written as from a husband to a wife; in them he owns her to be his wife, calls her countess of Feilding, stiles himself her husband. These letters have been read to you. This, gentlemen, as I remember, is the sub-

stance of the evidence that hath been given for the queen.

Sir Ja. Mountague. My lord, be pleased to take notice of Mr. Feilding's going to the emperor's envoy for the father in red.

Just. Powel. It is true, I had forgot the evidence of Mr. Florence a chaplain, that is a priest, now belonging to count Gallas the emperor's envoy, and the porter. They tell you, about this time Mr. Feilding did come to enquire for this priest, and gave the porter half a crown (by a good token); but the priest he asked for not being at home, he enquired for Mr. Florence; he told Mr. Florence, that he had been in love with a young lady a good while, but now had prevailed with her to marry him. And seeing the father in red was not there, he desired he would go along with him and do the office. Mr. Florence told him, it was improper for him to go without the envoy's leave; he went up to the envoy, and acquainted him with it; the envoy gave him caution to do it with discretion; but when he came down again, it seems that the red father had been with Mr. Feilding in the mean time, and were both gone together.

Now, gentlemen, you hear what defence Mr. Feilding makes against this great charge against him.

First, He calls a great many witnesses to prove that this Mrs. Villars was married, as she pretended, to colonel Feilding, and that she was a very common woman, so far as that she has been in a public house of correction; and one of their witnesses does bear hard upon her testimony; that is, that she should declare to her that she was married to colonel Feilding, and that my lady duchess should say to her, If you can make out that you are married to Mr. Feilding, she would give her 200*l.* and settle 100*l.* a year upon her for 15 years together. Then as for Mrs. Wadsworth, they call you divers to prove that she was brought to bed about Christmas after this supposed marriage. But when they came to be examined, they did not prove very much of that; for indeed it proved to be a miscarriage; the woman could not say she saw the child, could not tell whether it was a boy or a girl; whether it was dead or alive; it did not appear by their evidence that she went out her time with a child. Another part of Mr. Feilding's evidence is this, to prove Mrs. Wadsworth married to another person; and then admitting she was married to Mr. Feilding, it is a null marriage. To prove that Mrs. Wadsworth was before married to another, they have brought the book of marriages of the Fleet, and in that book there is an account of one Lilley Bradby, married such a time to Mrs. Mary Wadsworth; the man of St. James's, the woman of St. Margaret's, Westminster. The woman of the Fleet, in whose custody this book was, pretends that Mrs. Wadsworth came to her, and desired if any came to see the book, that she would not let them see the entry of her marriage; and why? Because there would be troubles about

her marriage. This woman swears that there were two men came to search the book, but she shewed them another book; but this book she did not shew them. She was asked whether she had two books of marriages for the same year? She said, she had several books for the same year: one parson made his entry in one book, and another parson in another book. She pretends she did not shew them this book; but the book she shewed them was at home. I cannot conclude much from what this woman hath said; but, gentlemen, you have looked upon this book: and if you are satisfied from this evidence, that Mary Wadsworth was married to Bradby at this time, I confess Mr. Feilding will not be within the statute. You have looked into the book; they give you no account that there was ever any such man as Bradby, nor of no cohabitation; but a mere book is produced, and not of the best credit neither; it is entered in the bottom of the leaf, but not in the middle: it is written with another coloured ink, and in another hand. I asked the woman whether she knew the man that wrote it? She said, yes; and it was her husband's brother's hand. He is alive, why is not he produced?

Gentlemen, they have called no witnesses to prove the marriage with Lilley Bradby. There were two gentlemen on the other side, they went to the Fleet to search the books of the entry of this marriage.* They say that a person informed them, that there had been there a man and a woman before them; these gentlemen went and desired to see the book, particu-

* In the case of the barony of Say and Sele, in Dom. Proc. (1781) a certificate of marriage under the hand-writing and signature of the minister of the Fleet, was offered in evidence. It does not appear whether it was admitted or not, but the marriage was allowed to be good. See Cruise on Dignities, chap. 6, sect. 72, 73.

"The books of the Fleet, however corroborated by other circumstances, are not in any case received as evidence of a marriage, not because a marriage celebrated there was not good, for such it clearly was before the Marriage Act, [see stat. 26 G. 2, c. 33,] but because the manner in which those marriages were celebrated, and the conduct of the persons who without any legal authority assumed the power of registering them, have thrown such an odium on those books, as to take from them the authority even of a private memorandum." Peake's Law of Evidence, chap. 2, sect. 2. See Reed v. Passer, Peake's Cas. 251. Espin. 213. So such books were rejected by De Grey, C. J. of C. B. in Howard v. Burtonwood, sittings at West. after Trin. 1776, and by Le Blanc J. in Cooke and another v. Lloyd, Salop, Summ. Ass. 1803. Peake's Law of Evidence, Appendix, lxxiv. But in Passingham v. Lloyd, Salop, Summ. Ass. 1794, Heath J. admitted them in evidence, see Peake's Law of Evidence, chap. 2, sect. 2, note (u).

larly for the year 1703. They say the woman did produce the book of marriages, but they could not see such an entry; she denied to them that she had any other book for that year; they cannot swear positively that this is the book that was shewn them; but one of them says, he believes it to be the same; for in that which he saw, he observed entries of the year 1705, before the year 1704. He took good notice of it, and so it is found in court. The other gentleman says, he took particular notice of the space that was in the book, where this entry is now written. Now the woman does not bring the other book she pretended to have shewn them. Now, as to the labour, they have produced a letter under Mr. Feilding's hand, whereby Mr. Feilding takes notice of her being with child, directs the letter to Anne countess of Feilding, at Waddon; he took it that he had married Mrs. Delean, for her name is Anne, he directed his letter to her country-seat. There is another thing of Mr. Feilding's coming to Mrs. Heath, and complaining what an ill woman Mrs. Villars was, for she had served him a base trick; instead of a woman of fortune, she had put a common woman upon him. Gentlemen, you have heard the account too concerning his beating of her; for this woman, it seems, was troublesome to him at Whitehall; she demanding him as her husband, said she was his lawful wife; he struck her, and caused her to be held till he got away from her.

Gentlemen, it is a very great charge upon Mr. Feilding, it is true, if there be evidence to maintain it; it does not really depend upon Mrs. Villars's evidence; for if her evidence were to stand alone, no credit should be given to it; but as it is supported by concurring evidence, I leave it with you, whether it be not sufficient to find Mr. Feilding guilty. But if you think that Mrs. Wadsworth's marriage to Lilley Bradby is proved sufficiently, then, although you think Mr. Feilding's marriage with Mrs. Wadsworth sufficiently proved, yet you are to find for the defendant.

The Jury having withdrawn for some time; brought in their verdict, That Mr. Feilding was guilty of the felony he stood indicted of.

Mr. Feilding (in case he was found guilty) had obtained the queen's warrant to suspend execution of this sentence; and then by his counsel took exceptions to the indictment, and moved in arrest of judgment; but they were answered by the counsel for the queen; but Mr. Feilding having obtained a suspension of the execution, the judges by a Cur' Advisare Vult (as the form is) suspended giving judgment till the next sessions, and accepted bail for Mr. Feilding's appearance the next sessions.

The next sessions, being the 15th of January following, Mr. Feilding appeared, and his counsel waving their exception (as being frivolous) he was asked what he had to say why the Court should not proceed to judgment

and execution? And then he craved the benefit of his clergy; which was allowed. And then judgment was given (as usual) that he should be burnt in his hand. But he having the queen's warrant to suspend execution, he was admitted to bail.*

THE PROCEEDINGS AGAINST ROBERT FEILDING, ESQ. IN DOCTORS COMMONS.

Notwithstanding Mr. Feilding was found Guilty of felony at the Old Bailey, her grace the duchess of Cleveland having instituted a cause of nullity of marriage against the said Mr. Feilding, by reason of a former marriage with the said Mary Wadsworth, in the Arches Court of Canterbury; and having by examination on oath of divers credible witnesses, made good and sufficient proof of the several articles of the libel by her grace exhibited in the said Court against the said Mr. Feilding, did proceed to obtain the sentence of the said Court; and accordingly on the 23rd day of May, in the year of our Lord God, 1707, the right worshipful sir John Cooke, knight, doctor of laws, official principal of the said Court, then judicially sitting in the common hall of Doctors Commons, London, being then present the duke of Grafton, the duke of Northumberland, the earls of Litchfield, Sussex, Jersey, and the lord Quarrendon; as also the respective proctors of her grace the duchess of Cleveland and Mr. Feilding, did, at the petition of her grace's proctor, read and promulge his definitive Sentence in Latin, of the tenor following, viz.

"In the name of God, Amen. We John Cooke, knight, doctor of laws, official principal of the Arches Court of Canterbury, lawfully appointed, rightly and duly proceeding, having heard, seen, understood, and fully and maturely discussed the merits and circumstances of a certain cause of nullity of marriage, by reason of a former, now depending before us, between the most noble lady, Barbara duchess of Cleveland, the party agent and complainant, on the one part; and Robert Feilding, esq. of the parish of St. James's, Westminster, in the county of Middlesex, the party against whom it is complained, on the other part: the parties aforesaid lawfully appearing before us in judgment, by their proctors respectively; and the proctor for the said most noble lady, Barbara duchess of Cleveland, praying sentence to be given, and justice to be done to his party; and also the proctor of the said Robert Feilding, esq. praying justice to be done to his party: and having carefully and diligently searched

into, and considered of the whole proceedings had and done before us in this court; and having observed all and singular the matters and things, that by law in this behalf ought to be observed; we have thought fit, and do thus think fit to proceed to the giving our definitive sentence, or final decree, in manner following; viz.

"Forasmuch as we have by the acts enacted, deduced, alleged, exhibited, propounded, proved and confessed, that the proctor for the said most noble lady, Barbara duchess of Cleveland, hath fully and sufficiently proved and founded his intention in a certain libel, and other matters now remaining in the registry of this court, propounded and exhibited in this cause on the part and behalf of his said client; and that nothing hath been, on the part and behalf of the said Robert Feilding, effectually excepted, deduced, alleged, exhibited, propounded, proved and confessed, which might, or could in any wise (touching our sentence hereafter to be pronounced) hurt or weaken the intention of the said most noble lady, Barbara duchess of Cleveland:

"Therefore, we John Cooke, knight, doctor of laws, the judge aforesaid, having first called upon God, and setting him alone before our eyes, and having heard counsel thereupon; do pronounce, decree, and declare the before-named Robert Feilding, esq. and one Mary Wadsworth, mentioned in the proceedings of this cause, being free from all contract and promise of marriage with any other (so far as appears to us), on the ninth day of November, in the year of our Lord God, 1705, at a place mentioned in the libel in this cause, did contract marriage, and did solemnize, or procure the same to be solemnized between them; and did afterwards consummate the same: and that the said Robert Feilding and the said Mary Wadsworth were, and are man and wife. And that the said Robert Feilding, esq. after the solemnization and consummation of the aforesaid marriage, not having the fear of God before his eyes, on the 25th day of the said month of November, in the said year of our Lord God, 1705, and in the place also in the aforesaid libel mentioned, did contract a pretended marriage with the said most noble lady, Barbara duchess of Cleveland. And also we pronounce, decree, and declare, that the said pretended marriage, or rather a shew of marriage, between the said Robert Feilding and the said most noble lady, Barbara duchess of Cleveland, at the time and place libellated, was solemnized, or rather prophaned, the said Mary Wadsworth, alias Feilding, being then and since living. And also we pronounce, decree, and declare the same pretended marriage, or rather shew of marriage, between the said Robert Feilding, and the said most noble lady, Barbara duchess of Cleveland, so as aforesaid contracted and solemnized, or rather prophaned, by reason of the former marriage between the said Robert Feilding and the said Mary Wadsworth solemnized and consummated.

* See the law of Bigamy, or more properly Polygamy, collected in East's Pleas of the Crown, chapter 12. See, too, the duchess of Kingston's Case, A. D. 1776, *infra*, and for the particulars at present required for the due celebration of marriage, see the stat. 26 G. 2, c. 33, commonly called the Marriage Act.

mated, was, and is, from the beginning, void, and of no force in law, and doth, and ought to want the force and the effect of the law. Therefore, by this our definitive sentence, or our final decree, which we now promulge in these our writings, we do pronounce, decree, and declare, the said most noble lady, Barbara duchess of Cleveland, was and is free from any bond of marriage with the said Robert Feilding, and had and hath the liberty and freedom of marrying with any other person.

“The original sentence was signed thus,
JOHN COOKE.”

The aforesaid Sentence having been publicly read by the judge, at the time, place, and in the manner aforesaid; the said judge did decree one or more public instrument or instruments thereof to be made (at the petition of her grace's proctor) by Mr. Henry Farrant, the principal register of the said court, which accordingly he hath since issued under the public seal of the office of the said judge, on the day following, viz. the 24th of May 1707.

On Wednesday, the 25th day of June, in the year of our Lord 1707, before the right worshipful sir John Cooke, knight, and doctor of laws, official principal of the Arches Court aforesaid, in his dwelling house at Doctors Commons; in the presence of the said Mr. Henry Farrant, notary public, and principal register of the said court; Mr. Feilding, by his proctor, did renounce all benefit of appeal from the said sentence, in the manner following, viz.

“Appearing personally, Mr. Edward Cooke, proctor for her grace, the most noble lady, Barbara duchess of Cleveland; and Mr. Thomas Willymot, proctor for the said Robert Feilding, esq. at which time the said Willymot did exhibit a certain letter, or epistle of the tenor following; viz.

“Mr. Willymot; When sentence is given in behalf of her grace the duchess of Cleveland, pray enter no instrument of appeal, for I shall proceed no further therein.—Your friend and humble servant,
Feilding.”

“And the said Willymot alleged, that the said letter was all of the proper hand-writing of the said Robert Feilding; and that he the said Willymot received the said letter from the said Robert Feilding. And the said Willymot further alleged, that no appeal from the definitive sentence given by the said judge on the part and behalf of the said most noble lady, Barbara duchess of Cleveland, had been, or was interposed by, or on the behalf of the said Robert Feilding. And the said Willymot, as proctor of the said Robert Feilding, did renounce all benefit of appeal from the said sentence, in the presence of the said Cooke, as proctor of the said most noble lady Barbara duchess of Cleveland, who, on the part and behalf of the said most noble lady, Barbara duchess of Cleveland, accepted the aforesaid allegation and renunciation of the said Willymot; and then also prayed the golden ring, and seven letters, by him exhibited on the part of her grace, and annexed to the libel in this cause, to be delivered out of the registry of this court, for the use of her said grace. Whereupon the judge, at the petition of the said Cooke (the said letters being first registered in the said court) decreed the said golden ring, and the seven letters, to be delivered to the most noble lady, Barbara duchess of Cleveland, or to the said Cooke for the use of her grace; as by act of the Court had been expedited at the time and place aforesaid, and now remaining in the principal registry of the said court, relation being thereunto had, doth and may more fully appear.”

440. Proceedings against WILLIAM GREGG,* at the Old Bailey, for High Treason, before Lord Chief Justice Holt, and other Judges: 6 ANNE, A. D. 1708.†

January 19, 1708.

THE Post-master of Brussels discovered a correspondence between Mr. Secretary Harley's office and the French, and communicated his

knowledge to the government here; whereupon Mr. William Gregg, a clerk in that office, was tak'n into custody of a messenger, and, after several examinations before the council, was committed to Newgate; and on the 19th

* See East's Pleas of the Crown, c. 2, s. 66.

† “At this time two discoveries were made, very unlucky for Mr. Harley: Tallard wrote oft to Chamillard, but he sent his letters open, to the secretary's office, to be perused and sealed up, and so to be conveyed by the way of Holland: these were opened, upon some suspicion in Holland; and it appeared, that one, in the secretary's office, put letters in them, in which, as he offered his service to the courts of France and St. Germans, so he gave

an account of all transactions here: in one of these, he sent a copy of the letter, that the queen was to write, in her own hand, to the emperor: and he marked what parts of the letter were drawn by the secretary, and what additions were made to it, by the lord treasurer: this was the letter, by which the queen pressed the sending prince Eugene into Spain, and this, if not intercepted, would have been at Versailles, many days before it could reach Vienna. He, who sent this, wrote, that by

of January was indicted of high treason for compassing the death of the queen, and also for adhering to her enemies. The indictment imported, "That he had sent letters to Monsieur

this they might see what service he could do them, if well encouraged; all this was sent over to the duke of Marlborough, and upon search, it was found to be writ by one Gregg, a clerk, whom Harley had not only entertained, but had taken into a particular confidence, without enquiry into the former parts of his life; for he was a vicious and a necessitous person, who had been secretary to the queen's envoy in Denmark, but was dismissed by him, for those his ill qualities. Harley had made use of him to get him intelligence, and he came to trust him with the perusal, and the sealing up of the letters, which the French prisoners, here in England, sent over to France: and by that means, he got into the method of sending intelligence thither. He, when seized on, either upon remorse, or the hopes of pardon, confessed all, and signed his confession; upon that he was tried; he pleaded guilty, and was condemned as a traitor, for corresponding with the queen's enemies. At the same time Valiere and Bara, whom Harley had employed, as his spies, to go oft over to Calais, under the pretence of bringing him intelligence, were informed against, as spies employed by France, to get intelligence from England; who carried over many letters to Calais and Bulloign: and, as was believed, gave such information of our trade and convoys, that by their means, we had made our great losses at sea. They were often complained of upon suspicion, but they were always protected by Harley; yet the presumptions against them were so violent, that they were at last seized on and brought up prisoners. These accidents might make Harley more earnest, to bring about a change in the conduct of affairs, in which he relied on the credit of the new favourite. The duke of Marlborough, and the lord treasurer, having discovered many of his practices, laid them before the queen: she would believe nothing, that was suggested to his prejudice: she denied she had given any authority, for carrying messages to the Tories; but would not believe, that he or his friends had done it, nor would she enter into any examination of his ill conduct, and was uneasy when she heard it spoke of. So these lords wrote to the queen, that they could serve her no longer, if he was continued in that post: and on the Sunday following, when they were summoned to a cabinet council, they both went to the queen, and told her, they must quit her service, since they saw she was resolved not to part with Harley. She seemed not much concerned at the lord Godolphin's offering to lay down; and it was believed, to be a part of Harley's new scheme to remove him; but she was much touched with the duke of Marlborough's offering to quit, and studied, with some soft ex-

Chamillard, one of the French king's prime ministers, particularly one dated the 28th of November last, and others, wherein were inclosed the proceedings of both Houses of Par-

pressions, to divert him from that resolution: but he was firm, and she did not yield to them: so they both went away, to the wonder of the whole court. Immediately after, the queen went to the cabinet council, and Harley opened some matters, relating to foreign affairs: the whole board was very uneasy; the duke of Somerset said, he did not see how they could deliberate on such matters, since the general was not with them; he repeated this with some vehemence, while all the rest looked so cold and sullen, that the cabinet council was soon at an end; and the queen saw, that the rest of her ministers, and the chief officers, were resolved to withdraw from her service, if she did not recall the two, that had left it. It was said, that she would have put all to the hazard, if Harley himself had not apprehended his danger, and resolved to lay down: the queen sent the next day for the duke of Marlborough, and after some expostulations, she told him, Harley should immediately leave his post, which he did within two days: but the queen seemed to carry a deep resentment of his and the lord Godolphin's behaviour on this occasion; and though they went on with her business, they found they had not her confidence. The duchess of Marlborough did, for some weeks, abstain from going to court, but afterwards that breach was made up in appearance, though it was little more than an appearance. Both houses of parliament expressed a great concern at this rupture in the court; and apprehended the ill effects it might have: the Commons let the bill of supply lie on the table, though it was ordered for that day: and the Lords ordered a committee to examine Gregg and the other prisoners. As Harley laid down, both Harcourt, then attorney-general, Mansell, the comptroller of the household, and St. John, the secretary of war, went and laid down with him. The queen took much time to consider, how she should fill some of these places, but Mr. Boyle, uncle to the earl of Burlington, was presently made secretary of state.

"The lords, who were appointed to examine Gregg, could not find out much by him; he had but newly begun his designs of betraying secrets; and he had no associates with him in it: he told them, that all the papers of state lay so carelessly about the office, that every one belonging to it, even the door-keepers, might have read them all. Harley's custom was to come to the office, late on post-nights, and after he had given his orders, and wrote his letters, he usually went away, and left all to be copied out, when he was gone: by that means he came to see every thing, in particular the queen's letter to the emperor. He said, he knew the design on Toulon in May last, but he did not discover it; for he had not

lament, in relation to the augmentation of our forces; also a copy of a letter from the queen to the emperor, and copies of private business sent to the duke of Savoy," &c. To which indictment Gregg pleaded Guilty; and the recorder pronounced sentence of death upon him.

entered on his ill practices till October: this was all he could say. By the examination of Valere and Bara, and of many others, who lived about Dover and were employed by them, a discovery was made of a constant intercourse they were in with Calais, under Harley's protection: they often went over with boats full of wool, and brought back brandy; though both the import and export were severely prohibited: they, and those who belonged to the boats, carried over by them, were well treated on the French side, at the governor's house, or at the commissary's; they were kept there, till their letters could be sent to Paris, and till returns could be brought back, and were all the while upon free cost: the order, that was constantly given them, was, that if an English or Dutch ship came up to them, they should cast their letters into the sea; but that they should not do it, when French ships came up to them: so they were looked on, by all on that coast, as the spies of France. They used to get what information they could, both of merchant-ships, and of the ships of war, that lay in the Downs; and upon that they usually went over, and it happened that soon after some of those ships were taken: these men, as they were papists, so they behaved themselves very insolently, and boasted much of their power and credit. Complaints had been often made of them, but they were always protected; nor did it appear, that they ever brought any information of importance to Harley but once, when, according to what they swore, they told him, that Fourbin was gone from Dunkirk, to lie in wait for the Russia fleet; which proved to be true: he both went to watch for them, and he took a great part of the fleet. Yet, though this was the single piece of intelligence that they ever brought, Harley took so little notice of it, that he gave no advertisement to the Admiralty concerning it. This particular excepted, they only brought over common news, and the Paris gazettes. These examinations lasted for some weeks; when they were ended, a full report was made of them to the House of Lords; and they ordered the whole report, with all the examinations, to be laid before the queen in an address, in which they represented to her the necessity of making Gregg a public example; upon which he was executed: he continued to clear all other persons of any accession to his crimes, of which he seemed very sensible, and died much better than he had lived." Burnet.

Judge Foster in his Reports, p. 198, takes notice, "That the papers found in lord Preston's custody, those found where Mr. Layer

On February 9, 1703, the House of Lords, (taking into consideration that William Gregg, who stood convicted as above, had since his conviction continued in Newgate, and was not executed,) appointed by ballot, the duke of Somerset, the duke of Devonshire, the duke of Bolton, earl of Wharton, lord viscount Towns-

had lodged them, the intercepted letters of doctor Henzey, were all read in evidence as overt-acts of the treason respectively charged on them. And William Gregg's intercepted letters might in like manner have been read in evidence, if he had put himself upon his trial. For those papers and letters were written in prosecution of certain determinate purposes, which were all treasonable, and then in contemplation of the offenders, and were plainly connected with them. But papers not capable of such connection, while they remain in the hands of the author unpublished, as Mr. Sidney's did, will not make a man a traitor. Lord Hale (1 Hale, p. 119—123.) mentioneth two circumstances as concurring to make words reduced to writing overt-acts of compassing the king's death, That they be published, and that they import such compassing.

"Sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, (except what is done in case of superior force) though the intelligence should happen to be intercepted; for the party in sending did all he could; treason was complete on his part, though it had not the effect he intended. So ruled by the judges assembled in the case of William Gregg, viz. Tracy, Dod, Price, and Denton; and by the Court of B. R. Trin. 31 of the late king, in the case of Dr. Henzey." Foster, p. 217. And p. 218, he adds,

"For Gregg was indicted for compassing the death of the queen, and also for adhering to her enemies; and Henzey's indictment was in the same form; and so was lord Preston's. And the writing and sending the letters of intelligence, which in the case of Gregg and Henzey were stopped at the post-office, was laid as an overt-act of both the species of treason. So that, admitting for argument's sake, which is by no means admitted, that it was not an overt-act of adhering, since the letters never came to the enemy's hands, and consequently no aid or comfort was actually given; yet the bare writing and sending them to the post-office, in order to be delivered to the enemy, was undoubtedly an overt-act of the other species of treason. In Gregg's case the judges did resolve, that it was an overt-act of both the species of treason charged on him. And in Henzey's, the Court adopted that opinion, and cited it with approbation." [See East's Pleas of the Crown, c. 2, ss. 56, 58. And Leach's Hawkins's Pleas of the Crown, Book 1, c. 17, s. 31.]

"Though the cases of these men were in substance the same, the charge against them

head, lord Hallifax, lord Sommers,* lords committees to examine into his case, with the usual powers, and to report, &c.

And on the same day the House addressed the queen, to lay before them all such papers, &c. as had been had or made use of in the examination, proceedings and trial of Gregg. The queen answered that she would give orders for that purpose, and accordingly on the 11th, lord Sunderland presented to the House such papers, &c. and they were referred to the lords committees appointed on the 9th.

On the 3d of March, the duke of Somerset, from the committee, reported the examinations taken by them: and on the same day a much larger committee was appointed to reduce into method so much of the said examinations, &c. as they should judge most necessary for the public service, with the usual powers, and to report, &c.

On the 10th, the lord steward (duke of Devonshire) reported from the last mentioned committee, that they had put the said examinations, &c. into a proper method, contained in two reports.

On the 15th the House resolved:—"1. That the crime of which William Gregg stands attainted is of so heinous a nature, and attended with such extraordinary circumstances, that it may prove of a most pernicious consequence, if not made an example.

"2. It plainly appears, by the examinations before this House, that Alexander Clerk, alias Valiere, and J. Barra, were all along, during their being employed between England and France, in the interest of the French, and carried intelligence from time to time to the enemy, to the great damage of the trade of this kingdom and her majesty's government, and were apparently at first persons unfit to be employed by any one entrusted by her majesty.

"3. That the open and public manner of the correspondence managed by the said Valiere and Barra, with the governors and commissaries of Calice and Bulloign, could tend only to carry on an intelligence with her majesty's enemies; and it is highly probable,

varied in one particular. Gregg's indictment chargeth, that the letters were sent from the place where the Venue is laid, into parts beyond the seas (in partes transmarinas) to be delivered to the enemy. Henzey's with much greater propriety, and agreeable to the truth of the case, chargeth, that the letters were sent from the place where the Venue is laid, to be delivered in parts beyond the seas to the enemy. As the letters never went abroad, this was undoubtedly the safer way of laying the charge." Former Edition.

* Boyer says, "The House of Peers appointed a committee of seven lords, of whom the earl of Sunderland was the chief manager, to examine into that matter." (History of Queen Anne, p. 332.) But Sunderland was not one of the seven Lords.

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that thereby the stations of our cruizers, the strength of our convoys, and the time of our merchants' ships sailing, have been betrayed to the enemy.

"That the said Report, and Resolutions of this House thereupon, be humbly laid before her majesty, by an Address of this House; and that, in the said Address, her majesty be likewise humbly desired, that for the future, such care be taken in the secretaries offices, as that the papers and letters of the greatest importance be kept private from the clerks and under officers in those offices; and, in order to put a stop to this pernicious correspondence, her majesty would be pleased to take effectual care to prevent the like dangerous intercourse for the future."

On the 18th the House addressed the queen as follows:

"We your majesty's most dutiful and obedient subjects, the Lords spiritual and temporal in parliament assembled, having been informed, that William Gregg, a clerk in the office of the late secretary, Mr. Harley, had been indicted for high treason, in holding correspondence with your majesty's enemies, and betraying to them secrets of the highest importance; and that upon his trial he had confessed the indictment, and by that means had prevented the examinations, whereby the public might have been truly informed of the particular nature and circumstances of his crime; we thought ourselves indispensably obliged, in duty to your majesty, and for the future safety of the kingdom, to do all that was in our power to find out the rise and progress of this dangerous correspondence.

"In order thereto we made our humble address to your majesty for all papers relating to the charge against William Gregg; and your majesty having been graciously pleased to give orders, that the papers should be laid before us, we referred those papers to a committee, and directed them to examine Gregg, and to report the said examination to the House, as also what they observed upon the papers, together with such other matters as they should think proper, upon their enquiry into the said affair: And the Report having been made, and taken into consideration by the House, we humbly conceive it to be very highly for your service to lay the same before your majesty.*"

REPORT CONCERNING GREGG.

The House having appointed a Committee to examine William Gregg, who is a prisoner

* Die Martis, 23 Martii, 1707. It is ordered by the Lords spiritual and temporal in parliament assembled, that the Address of this House, and the Reports therein contained, with the several examinations annexed, presented to her majesty yesterday, and her majesty's most gracious Answer thereunto, shall be forthwith printed and published.

MATT. JOHNSON, Cler' Parliamentor'.

in Newgate, convicted for high treason; and having also been pleased to refer to the same Committee several papers, which, upon the humble Address of the House, had been laid before your lordships by her majesty's command, do humbly take leave to inform the House, that the effect of the several papers referred to the Committee is as follows:

I. A copy of Gregg's letter, which was intercepted, dated the 23rd of November, 1707, O. S. sent to Mr. Chamillard, inclosed in a packet from Marechal Tallard, directed to Mr. Robineau, his steward, at Paris.

In this Gregg sends to Mr. Chamillard a copy of the queen's letter, written with her own hand to the emperor.

In the same letter, Gregg takes notice of two letters sent by him to Mr. Chamillard, the one dated the 24th, the other the 28th of October last, which he understood Robineau had put into his hands.

That perceiving by Robineau's letter to his master, that Mr. Chamillard desired to know the marechal's sentiments of Gregg, Gregg had himself written to him.

In expectation of his answer, Gregg flattered himself that the paper then sent was of that importance, that there could be no longer doubt of the devotedness of a Scottishman for France; not to speak of his zeal for the service of his prince who had found refuge there.

That the lines under which he had drawn a stroke, were the thoughts of the lord treasurer, which he had added with his own hand to the first draught of the letter.

The same letter contained some other news.

II. There was a copy of a letter, dated the 25th of November, O. S. in the same packet, subscribed William Gregg; in which notice is taken of what Robineau writes to Mr. Tallard concerning him, and that he himself had written to the marechal, and desired Robineau to deliver the inclosed according to the address, as being of great consequence.

III. The copy of a letter from marechal Tallard to Robineau, dated the 10th of December, N. S. in which Mr. Tallard says, that as to the letters of which Robineau made mention in his of the 25th and 28th of November, that he had delivered them according to the address. Mr. Tallard knew nothing of their contents, but by the same post which brought his letters.

That he was obliged for the offers, but could make no use of them while he was a prisoner. When the peace was made, he would give proof of his acknowledgment to him who made the offers, and would endeavour to engage the person to whom the letters were addressed to do the same. In the interim Robineau was to tell the person to whom he delivered the letters, for whom the marechal had the utmost consideration, that he was much obliged to him for desiring to know his thoughts before he would determine what to do; that the offers made did not suit with the present time, at least as to him, &c.

IV. An original letter of the 2^d of December, 1707, to Mr. Robineau, from Gregg, to solicitate him for being delivered from an importunate man, as would appear by marechal Tallard's letter, unless his last to Mr. Chamillard had not made him determine otherwise.

V. Copy of another letter of Gregg to Mr. Chamillard, dated the 23^d of December, O. S. which was also taken in marechal Tallard's packet, in which he pretends to give Mr. Chamillard an account of what passed in parliament, with the queen's Answer to the Address of the two Houses, and his excuse for not sending the Address itself.

VI. A letter of Robineau to Mr. Tallard, 26th of December, N. S. from Paris, (transcribed by Gregg in his own hand) in which he says, he was going to Versailles to deliver the answer with which he was charged; that he received every post letters from the same person, and that he took care to deliver them according to the address.

VII. Another of the 30th of December, 1707, N. S. that he had been to deliver, as Mr. Tallard had charged him, the answer which was desired of Mr. Tallard.

VIII. Another letter in Gregg's hand, dated the 30th December, 1707, found in Gregg's closet, written to Mr. Chamillard, giving an account of the intention to send Mr. Palmes to Savoy, and to take several other German courts in his way.

IX. A Confession of Gregg, delivered to the lords of the committee, and signed by him.

On Thursday the 18th of this instant February, the committee appointed by your lordships went to Newgate, in order to examine William Gregg.

They acquainted him with your lordships' order, and told him, that as the crime of which he stood attainted was of the most heinous nature, so there were some circumstances so extraordinary, which attended his case, that the House of Lords thought it might be of service to her majesty and the kingdom, to have all the beginning and progress of his treasonable correspondence fully laid open; that her majesty, upon the application of the House, had ordered all former examinations and papers concerning him to be laid before them.

They told him farther, that if he, by a true, ingenuous and full confession, would deserve it, he might have ground to hope the House of Lords might intercede in his behalf for mercy from her majesty, which otherwise he had no reason to look for.

He was also told, that being a man of understanding, he was not to expect to be asked questions, but was to give an account of himself, when, and how he became first employed, when and by what instigation he was drawn in to correspond with the queen's enemies, and how far it proceeded.

He said, that one Mr. Gregg, the late king's resident at Copenhagen, was his kinsman, and sent for him thither, and he continued with him

about three years, till his death, which happened about two months before the late king died.

That Mr. Vernon was sent envoy to Denmark, and took him, whom he found there, into his service, in which he continued about two years and an half, and then he was discharged from his service by Mr. Vernon.

Mr. Vernon coming for England about his private affairs, while Gregg was in his service, and staying here some time, in that interval Gregg received some letters from Mr. Secretary Harley, which gave him occasion after to apply to him.

The 9th of December, 1704, Gregg came to England, and soon made application to Mr. Secretary Harley for employment, but was not recommended to him by any body.

The 3d of January he saw him first at his office, where he attended often.

The 5th of February, 1704-5, Mr. Jones, the Secretary's first clerk, came to him, and told him, the Secretary would speak with him. He attended on the Secretary the same day, who asked him, if he would be willing to be employed in his own country? Gregg said, he was willing to be sent upon any good errand. Mr. Secretary told him, it was to give an account of the proceedings of the ensuing parliament, which was to be held under the duke of Argyle.

The 6th of February he went to the office, and Mr. Secretary told him, he should be dispatched in a few days.

To make some trial of him (as he supposed) Mr. Secretary asked him, if he could give an account of the court of Denmark? Gregg said, he was willing to do it as well as he could; and accordingly, in some time, he drew up a state of that court, and it was not disapproved.

He attended daily; and on the 20th of April Mr. Secretary Harley gave him a note of 20*l.* to be paid by his steward in Scotland-yard.

On the 23d of May, 1705, he was ordered to go for Scotland, and about a week after set forwards on his journey. When he was dispatched, a note of 30*l.* was given to him.

Mr. Secretary always amused him, with telling him, he should have instructions for his directions in Scotland; but at last ordered him to draw up some queries himself about the state of affairs in Scotland, which he did, and they were approved.

Some of the queries were, what were the designs of the several parties? What correspondence between the highlands and St. Germain's? How affected to the House of Hanover? &c.

He was also ordered to form a cypher of letters, whereby to design the great men there.

The 2d of June, 1705, he arrived at Edinburgh, and wrote to Mr. Secretary the Thursday following, being ordered to direct all his letters to Thomas Bateman, in Scotland-yard.

Mr. Secretary promised the receipt of his letters should be acknowledged, and he pressed often for it, to know they came to hand, fearing

his letters were intercepted, because he was suspected as a spy in that country; but though he wrote thrice a-week, he never heard one word from Mr. Secretary, or by his order, during his whole stay in that country. Being asked by the lords, if he was recommended to any body in Scotland? he answered, no.

The 15th of October he arrived at London, and the next day waited on Mr. Secretary, who thanked him for his letters, and told him, he had named him to the queen, upon occasion of a paper he had sent: But Gregg said, he believed the queen had never heard of his name, till this last unhappy accident.

On the 29th of October, Mr. Secretary ordered him 25*l.*

He attended daily, and pressed much to be sent abroad, particularly to go with Mr. Methuen when he was sent to Savoy, but it was declined.

On new year's-day Mr. Secretary dropped a word which startled him much: He told him, he would fix him; which Gregg understood was bringing him into his office.

Upon this he presented a petition, that he might not be in the office, because the salary was small; and being in debt, he could not live on it.

He attended every day. The Secretary inquired of him, what he knew of languages? He said, he knew some French and German, but knew Latin better than either.

The 16th of April, 1706, he was admitted into the office, and a note was given upon Mr. Jones, as for one of the clerks; and Mr. Secretary told him, it was only to keep his hand in use, and that he would provide better for him.

The 16th of May, copying a letter sent to Mr. Vernon, that he was to consider of somebody fit to be left behind, Gregg thought it to be intended in his favour, and wrote to Mr. Vernon on that occasion, desiring his countenance.

But the 28th of May, Mr. Secretary writing word to Mr. Vernon, that he had leave to come at his own time, but must leave somebody behind; and this being wrote before any answer could come from thence, Gregg saw nothing was meant for him in the former letter.

Gregg made offers of service to Mr. Palatney when he was to go; but he said, he was provided.

Then he told Mr. Secretary, his mind was depressed by his debts, and desired to be thrown abroad, and to go with sir Philip Meadows; but that was refused, and Strahan was sent.

Then Mr. Secretary asked, what would make him easy? And he gave in a list of his debts, amounting to about 35*l.*

Since that, Mr. Secretary has ordered him at several times about 20 or 25*l.* in the whole; the last sum was 7*l.* in October last, part of a bill of 14*l.* for which debt he was pressed at that time.

Being asked by the lords, if his debts only made him so desirous to be gone? he said, at

the suit business was managed in the office; it was a parcel of druggery.

There is a great number of letters, about eleven or twelve at a post, and they stay till two or three or four, though sometimes not above two letters to dispatch, and he thought himself happened also could get away sooner.

The practice was first the letters were taken up about half afternoon, were laid out, sent to Mr. Secretary's office, to be signed, and after returned to the office, to be enclosed; so that they were out, and sometimes to stay till four o'clock in the morning.

He said that in April last, when His Majesty's messenger was sent to Turin, the paquet was first made up, though the youngest clerk, to be made up, and delivered to the messenger.

In that paquet there was a letter to Sir John Norris, and another to Mr. Custard, most of the last letter was in cypher; Gregg entered both those letters. There was also another letter to Sir Claudy Monell, and letters from the lord treasurer. He put them all up in the paquet, and after gave them to His Majesty's messenger.

Being asked, if he knew by the letters what the message was? Gregg said, he understood Toulou was to be besieged: He could not read the whole, but knew enough to find out that. He said, it was written in the cypher of the other office by Mr. Harley, the earl of Sunderland, being sick at that time.

The queen's letters de Cachet are made up before they are brought to the office, but the clerks are obliged to make up other letters.

The lords' committees required him to give the whole relation of his correspondence, when it began, and how long it had been carried on.

Gregg said, the true motive of his writing to France was in order to get money, by obtaining a pass, and that his first letter was the 24th of October last.

From his first entering into the office, he had always a great hand in perusing the French prisoners letters: That convenient opportunity, and his poverty, gave him the temptation.

The French prisoners letters came under a general cover, directed to Mr. Lewis, Marechal Tallard's letters are under a flying seal, the rest of them come always sealed, but are opened at the office.

Generally Mr. Lewis threw them down on the table, and left the perusing them to the clerks, to Mr. Mann, and Gregg; and since Mr. Mann left the office, they have been trusted wholly to Gregg.

If Gregg observed any thing that he thought material, he made an extract of it, and shewed it to the secretary or under-secretary. He mentioned a particular extract he had made out of a letter of Mr. Chamillard's to marechal Tallard.

Letters came from Nottingham every post; sometimes twenty letters came to them in a day from France: those came always sealed. From the time he came into the office, these letters were never perused either by the secretary or under-secretary, which he is sure of, because they

were sealed when he looked on them. He cannot for that reason say, but Mr. Lewis might have done this in marechal Tallard's letter, because that had a flying seal: but the rest were left sealed, as they came by Mr. Lewis to the clerk's proposal.

Gregg said, he had a dispute with Mr. Lewis upon the account of these letters; Gregg declaring he thought it not to be a business fit for the under-clerks to be trusted with.

Mr. Secretary Harley wrote a letter in answer to one from Mr. Ponsotbaron, thanking him for his civility to one Miodrom.

In those things, Gregg found it so ill-turned, and the French so bad, that he acquainted the Secretary with it at eleven o'clock at night in October last. This letter was copied and lay a month in the office; but after Mr. Lewis set it away as it was wrote at first.

The rough draught of the queen's letter to the emperor, as it was altered by the lord treasurer, was left in the public book of the office, to be entered, the same night it was to be sent away; there, Gregg said, he found it and transcribed it, and any other clerk of the office might have done it as well as he.

All the books in the office, he is a press, the key is always in the door, and not only the clerks, but the chamber-keepers may have access.

All letters, except those wrote to the duke of Marlborough, are entered in the books, but those are only copied in loose sheets. Gregg said, he had copied many of those.

The draught of the queen's letter to the emperor was prepared by Mr. Lewis; it was then written in the hand of Mr. Thomas, Mr. Harley's domestic clerk. The addition was in the lord treasurer's own hand. Mr. Mann saw it as well as Gregg. Mann said to Gregg, that what was added by the lord treasurer, was much the better part of the letter.

Gregg said, he sent all his letters to France under the cover to Mr. Robineau; he owned he sent the copy of the queen's letter to Mr. Chamillard the same night the queen's letter was dispatched to the emperor.

Gregg said farther, that the letter in the queen's own hand was given to Gregg by Mr. Secretary himself about one o'clock at night, and he was solely intrusted to put it up in Sir Philip Meadows's paquet, after every body had left the office.

Robineau, in his letter to Gregg, took notice, that he had delivered his letters to Mr. Chamillard, and that Mr. Chamillard sent to advise with marechal Tallard upon Gregg's proposal.

Upon this, Gregg wrote a letter to marechal Tallard, of which he said he had no copy, but pretended to repeat the words of the letter to the lords' committees.

The lords' committees told Gregg, it would be expected by the House, that he should be very clear and particular in declaring by what advice or encouragement he first began such a correspondence. He said, by none at all: he

was tempted to it by the devil, and the hopes of getting money.

He said, that upon hearing a French perriwig-maker was committed to Newgate for high treason, he had desired to be admitted again to the lords of the cabinet-council.

But he would not own that he knew the man; but said, he had since heard his name was Valiere or Clarke; he was told so by a gentlewoman who came to see him since his condemnation.

He said, he held no correspondence in England, but only in sending the common letter of the office, with other printed news-papers, to some gentlemen.

Gregg said, he had been long acquainted with one Crookshanks, who promised that if he would procure a French pass, he should have 200 guineas; and Gregg undertook to procure the pass.

The first time he wrote to Mr. Chamillard was the 24th of October last.

Brown, a merchant, father-in-law to Crookshanks, and one Bollinger a merchant, were acquainted with this agreement about the pass, and they dined together at Brown's house; and Brown undertook for the money if the pass could be procured.

Gregg said, he acquainted Bollinger of his having sent a copy of the queen's letter to Mr. Chamillard, at the Cross-keys tavern in Covent-garden, and shewed him extracts of marshal Tallard's and Robineau's letters. He said also, that he read the extracts of their letters at another time in English to Brown and Crookshanks.

The lords committees asked him, to what end he told Bollinger of what he had done, in sending the queen's letter to Mr. Chamillard? He only said, it was downright madness.

The lords committees asked him, if any body came to him? He said, one Mr. Arbuthnot came to him, and nobody else, and his business was to bring him charity.

The lords committees asked Mr. Gregg, if he had no more to acquaint their lordships with? He said, No: and being told by them that it concerned him very much to consider of it; that the lords observed he had told them nothing but what he knew they had means in their hands to be fully informed of, without his saying any thing; and how hard it would be for the House of Lords to believe that he would venture upon such a correspondence, without some support or encouragement; he persisted in it, that he had no more to say.

As the lords committees were risen up, and had called for the keeper to take Mr. Gregg away, he took a brown paper out of his pocket, which was sealed up, and took out of it a paper, which he said he had prepared against the queen's birth-day, and desired the lords to read it. It purported to be a petition to the House of Commons. He pretended he knew not how to get it delivered, because he concluded all the papers sent by him would be delivered to Mr. Secretary Harley.

The lords finding the paper to be addressed to the House of Commons, told him, it was not proper for them to receive it, and delivered it immediately back to him again.

The lords committees, as they went away, told Gregg, That if he would recollect himself, and set down in writing any thing that he thought might be for his own service, or of use to the queen and her government, he might send it to them, and the keeper should have directions to convey it safely.

The next morning Gregg sent a letter to the lords committees, which, as soon as they had perused, they returned to him again by a gentleman, with the following message:

"The lords of the committee have ordered me to return this paper to you, they being of opinion that it is not material to the examination for which they were sent to you by the House."

The lords committees think themselves obliged to acquaint the House, that they did not observe Gregg to be under any disorder or terror from the apprehension or sense of his danger.

The indictment of Gregg for his treasonable correspondence with her majesty's enemies, was brought before the lords committees, which indictment he confessed upon his trial, and judgment was thereupon given against him.

The lords committees do think it their duty to acquaint the House, that they having been informed, by means of the keeper of Newgate, that one William Gregg had been formerly in Newgate, and indicted for counterfeiting the coin of the kingdom, and that it was talked amongst the turnkeys in the prison, that this was the same man; they sent to search the books in Newgate, and found there, That in May 1697, William Gregg and Elizabeth Gregg were indicted for counterfeiting the coin. Thereupon they sent for Mr. Tanner, who has the custody of those records; he brought the indictment before them, and it appeared that Elizabeth Gregg was found guilty and executed, but that William Gregg was acquitted; and that Thomas Holloway and Simon Newport were the witnesses at the trial, who, as was said, are both dead since that time.

But one Thomas Kinserley and James Biddle declaring, that they both knew that Gregg, who was then indicted, very well, and believed they should know him again if they saw him; the lords committees sent them severally to see William Gregg, now in Newgate, and they both of them did declare, That they believed, and were confident, that the same person now in Newgate was the same William Gregg who was then indicted, and whose supposed wife was then found guilty, and burnt; and they did both of them voluntarily make oath to this effect, and James Biddle swore, That after the trial, the discourse in the neighbourhood was, that Elizabeth Gregg took the whole matter upon herself at the trial.

Their two affidavits are laid before your lordships.

After one of these persons had been to see William Gregg, William Gregg wrote a letter, directed to the lords of the committee, in which he did very positively deny that he was the person who had been tried for coining in May 1697.

[Here follows a Digest of the Report of the examinations of Valiere alias Clarke, of Barbier, of Bara, of captain Whitehall, of William Mason, of Isaac Howard, of Carter, Bland and several other persons.]

“ May it please your most excellent majesty ; We, your majesty’s most dutiful subjects, the Lords spiritual and temporal in parliament assembled, having entered into a serious consideration of the said several Reports, have unanimously come to the following Resolutions thereupon : That it is our opinion, That the crime of which William Gregg stands attainted is of so heinous a nature, and attended with such extraordinary circumstances, that it may prove of very pernicious consequence if he should not be made an example. And also, That it does plainly appear to us, as well by what Alexander Valiere and John Bara have informed against each other, as by the many examinations taken concerning them, that they were both in the French interest, and unfit to be trusted or employed by any persons in your majesty’s service : And that the open and public manner of the correspondence managed by them with the governors and commissaries of Calais and Boulogne, could tend only to carry on an intelligence to the advantage of your majesty’s enemies ; and that it is highly probable thereby the stations of our cruisers, the strength of our convoys, and the times of sailing of our merchant ships, have been betrayed to the French.

“ May it please your majesty : It is your majesty’s glory, and the happiness of Europe, that you are at the head of one of the greatest confederacies that ever was known in history ; and it is the common concern of the whole alliance, that your councils should be kept with the strictest secrecy : But, in the papers now laid before you, your majesty will be pleased to observe, that some of your resolutions of the greatest moment, and that required the utmost secrecy, have been sent to your enemies by the same post they were dispatched to the allies ; that all the papers in Mr. Secretary Harley’s office have, for a considerable time, been exposed to the view even of the meanest clerks in that office ; and that the perusal of all the letters to and from the French prisoners was chiefly trusted to Gregg, a person of a very suspicious character, and known to be extremely indigent. It is not easily to be known what ill consequences may have attended such negligence. But we depend upon it, that these matters being thus plainly laid open to your majesty, we shall be secured against any dangers of this nature for the future.— We are further in duty bound to beseech your majesty, that all possible methods may be used

to put a stop to that dangerous, and which may soon prove fatal intercourse between your majesty’s subjects and France, which has of late received so great an encouragement by the countenance and protection given to Valiere and Bara ; since, unless that be effectually done, your majesty’s enemies will continue to have what intelligence they please, your majesty’s men of war and merchant ships will be in danger of being betrayed to the French, and that most destructive trade of sending wool to France, which has been with much charge and trouble interrupted, and in good measure suppressed, will be revived to a greater degree than ever.”

[Here follow the Examinations of Valiere, &c. with which the Lords conclude their Address.*]

HER MAJESTY’S most gracious ANSWER.

“ My Lords ; I am sorry that any who have been employed by those in my service should have proved false to their trust, and injurious to the public.

“ The examples you lay before me, will, I do not doubt, be a sufficient warning to keep all matters of importance as secret as may be, and to employ such only as there shall be good grounds to believe will be faithful.”

Gregg lay one hundred days under sentence before he was executed : but a few years after Mr. Francis Huffman (a person of some note) wrote thus in a pamphlet to the public.†

* The parts of the Address which I have omitted seem not materially to concern the relation between Harley and Gregg, which constitutes the prominent object of this article.

† See Secret Transactions during the hundred days Mr. William Gregg lay in Newgate, under sentence of death for high treason. Former Edition.

These Secret Transactions are inserted in the 4th Collection of Sommers’s Tracts, vol. 3, p. 393 : where it appears that the article was printed in the year 1711, (the year in which Harley became lord treasurer). After the title follows this introduction, which discloses at once the object and the temper of the writer :

“ Published for the better information of such as have been deluded, misinformed, or imposed on by the dishonest abettors of a late set of men, whose power and prevalency occasioned many to take up with such reports, as malice and interest dictated. While (through their suppression of the truth) abundance of others remained wholly ignorant, or have imbibed nothing but the partial suggestions of the party they side with.

“ This impartial account is dedicated to all honest men, who will (doubtlessly) consider, and be convinced hereby, how truly bright and spotless the right honourable Mr. Robert Harley’s reputation must be, which the subtlety, lies, venom, and unprecedented malignancy of

"I was abroad at the time of Mr. Gregg's trial which has made so much noise; and the great esteem people had of the duke of Marlborough on account of his glorious successes, occasioned them to think very hardly of the honourable Mr. Robert Harley, then one of the secretaries of state, when they heard his grace would have laid down, unless the other was removed; and Mr. Harley having been reflected on, ever since he was made a peer and lord treasurer, on Gregg's account, I thought myself obliged by truth and justice, to give the following account, as I received it from Mr. Lorrain, a man of character; and Mr. Lorrain did, in a most solemn manner, declare to me, not only his being fully convinced of Mr. Harley's innocence, but told me of so many endeavours to corrupt Gregg's conscience, not only with repeated offers of life, but of great preferments and advantages.

"It is apparent from hence, that some persons stabbed as directly and villainously at Mr. Harley's life then, as Guiscard did since. I have printed, and caused to be published, a true copy of a letter written to me by Mr. Lorrain himself of what relates to Mr. Gregg, while he was under Mr. Lorrain's care, with Gregg's dying speech, and am, &c.

"FRANCIS HOFFMAN."

A TRUE COPY of the Ordinary of Newgate, the Reverend Mr. Paul Lorrain's Letter to Francis Hoffman.

"My good Friend; When you were with me yesterday, you know I was in haste to go to St. Andrew's, and could not, for that reason, give you the account you then desired; but promised it you against this morning.

"That I may be as good as my word, I have (being now engaged in business from home) left this to refresh your memory, in what I once, and more than once, told you about Mr. William Gregg.

"When that unfortunate person was under sentence of death for high treason, I (according to the duty of my place) constantly visited him, prayed with him, examined him, and applied such directions and exhortations to him, as I thought most suitable for the well-disposing him, and preparing him for another world.

"I found him to be a man of parts, and very sensible of his heinous crime, which he readily confessed, and for which he expressed great horror, sorrow and repentance.

"I often pressed him to discover who (if any) were concerned with him in that treasonable fact.

"And pressed him also, (in an especial man-

the late mighty party (he has over-turned) could no ways blast." It is scarcely worth mentioning; that the article in the text signed Francis Hoffman, is not the whole of his advertisement, or as he calls it apology, which is given at large in the Sommers Tracts. Probably what has been transferred hither will suffice.

ner, upon his eternal salvation, and as he should answer it at the great tribunal of God) freely to tell me, whether Mr. Harley did know any thing of it, or was any ways concerned, or to be concerned in it.

"To which he answered me, with the greatest and solemnest asseveration and protestation imaginable, (he being all the while upon his knees, and calling the great God to witness) that that honourable gentleman, Mr. Robert Harley, knew nothing of it, neither was to know nor to be concerned in it.

"Which he having said, and often repeated to me, I then grew jealous of those people that frequently came to him, who (as he told me) were so far from offering him any thing to quiet his conscience, that on the contrary, they gave a great disturbance to it.

"It seems that among the rest, some friends of that honourable gentleman's coming to see this prisoner, I then expressed some dislike of his being so much disturbed, by persons that resorted to him, even at those hours when myself was to be at prayer with him; but I knew not who those persons were that thus came to him, and my endeavouring to keep them from him, was with no other design than for the good of that poor man's soul, who did all along express to me his great desire of being in the chapel, and privately in his room with me, as much as possible.

"And as he also told me, that he was proffered his life, and a great reward, if he would accuse his master; so I must own to you, I was very uneasy at his frequent visitors, especially when I considered how they disturbed his mind, and how much they took up of his precious moments, and hindered him from his devotions, and my assistances to him therein.

"I urged him many and many times and ways to clear his conscience, and not violate it for the whole world; telling him, that it was infinitely better to die with a good conscience, than make shipwreck of it, and save his life here; yea, and gain all the world, by laying a false accusation on that honourable person, or any other he knew to be innocent, for that would certainly make him miserable both here and ever, &c.

"With such like expressions and admonitions (God's grace intervening) I fixed his (then unsettled) conscience, weaned him from the vain hopes and desires of this life, and directed his thoughts and affections to far better things, which I told him it was possible for him to obtain, if he earnestly and entirely laboured after them.

"He thanked me for my good advice, and the great concern I shewed for his eternal welfare, and said, he would now give the deaf ear to the world, and so hoped God's ear would be open to his prayers, &c.

"At the place of execution, he thanked me publicly for all my pains with him, which had proved so happy to his soul, praying God to bless me and my family.

"Then he delivered a paper into my hand,

for me to publish; in which paper, he (among other things) acknowledges God's mercy to him, in preventing him from prostituting his conscience to save his life.

"Now the reason why I did not presently publish that paper, was this:

"That it was commanded and kept from me by the then present sheriffs, sir Benjamin Green (to whom I was then chaplain) and sir Charles Piers, even from the time of its delivery, which was the 28th of April, 1708, to the 6th of May, then next ensuing; at which time, having received it again, I waited with it on the right honourable the earl of Sunderland, then one of her majesty's principal secretaries of state, who immediately gave me leave to publish it.

"Telling me withal, that I was the properest person to authorize such papers, as were thus delivered to me.

"Upon this, I forthwith sent it to the press, and it then appeared under my name, as you may see by the printed copy here inclosed: I am, dear Sir, your very humble, and affectionate servant,

PAUL LORRAIN."

"Christ's hospital, Tuesday

"morning, June 13, 1711."

A COPY OF WILLIAM GREGG'S PAPER,* delivered by him to the Sheriffs of Loudon and Middlesex, Sir Benjamin Green and Sir Charles Piers, and Paul Lorrain, Ordinary of Newgate, at Tyburn, the place where he was executed for High Treason, on Wednesday the 28th of April, 1708. Printed from the Original, and published by authority.

"The crime I am now justly to suffer for, having made a great noise in the world, a paper of more than ordinary length will be expected from the criminal; who therefore takes this last opportunity to profess his utter abhorrence, and sincere repentance of all his sins against God, and of the heinous crime committed against the queen, whose forgiveness I most humbly implore, as I shall heartily pray for her majesty's long life and happy reign over her united people, and success against her

* Boyer tells us, "He left a paper with the sheriffs, wherein, in particular, he entirely cleared Mr. Harley: but, notwithstanding this testimony of a dying man, some were apt to suspect that cunning statesman of being the contriver of that very paper; and ascribed the composedness which visibly appeared in Gregg's countenance, till he came to the place of execution, to a firm expectation (which he was made to entertain) of a reprieve. Others gave out, that he complained, That there was no trust in man: but these being only vague conjectures and reports, no wise man will lay any stress upon them: nor is it, after all, reasonable to believe, that so great a politician as Mr. Harley, whatever designs he had in his head, would employ an under clerk in his office, to carry on a correspondence with the enemy."

enemies, with my parting breath; this being all the satisfaction I can make injured majesty.

"I declare, in the next place, the reparation I would make (were it in my power) to those of her majesty's subjects I have wronged in any kind.

"And particularly the right honourable Robert Harley, esq. whose pardon I heartily beg for basely betraying my trust. Which declaration, though of itself sufficient to clear the said gentleman, yet for the sake of those whom it was my misfortune not to be able to satisfy in my life time, I do sacredly protest, that as I shall answer it before the judgment-seat of Christ, the gentleman aforesaid was not privy to my writing to France, directly nor indirectly.

"Neither I, his unworthy clerk, any ways accessory to the miscarriage before Thoulon, nor the losses by sea; all which happened before the first of my letters, which was written the 24th of October, 1707.

"As for my creditors, as I am in no condition to satisfy them; so I earnestly beg they would forgive me, and I pray God to make up their losses to them seven fold.

"For my own part, I do freely forgive all men, and die in perfect charity with them, not without humble hopes of finding forgiveness, through the merits of Jesus Christ, with God, who in mercy touched my conscience so powerfully from the beginning, as to prevent my prostituting the same to save my life; for which instance of his love (to be preferred before life itself) I bless and magnify his holy name, with unspeakable joy and comfort, at my death nothing near so ignominious, as would have been such a life.

"After this confession, the duty of a dying man leads me to profess the religion in which I was brought up, and do now die, which is the Protestant.

"The scandal given whereunto, by my enormous practices, cannot be better taken away, than by my publishing to the world my hearty sorrow for those sensual pleasures which have proved my bane.

"Wherefore let all that shall read this poor paper, take warning by me to shun the like youthful lusts, to which whoever gives up himself, cannot tell how far they may (when indulged) carry him, even to the committing of such crimes, as he thought himself incapable of sometime a-day.

"Of which sad truth, I (to my woeful experience) am a melancholy instance; but at the same time, I appeal to the great God, before whom I am now going to appear, that notwithstanding all the pains taken to make me out an old offender, by fastening on me the crime of counterfeiting the coin, this is the first fault that ever I ventured upon, which was not out of zeal for the Pretender, whom I not only disown at my death, but solemnly declare, that in all my life I never thought he had any right to these realms, how foolishly soever I may have rendered myself obnoxious in this particular.

"But the only motive of my mad undertaking was money, of which I never received any, on account of the ship pass, though I have met with the more just reward of such secret services, intended by W. GREGG."*

After which Mr. Hoffman adds thus: "Here it is evident, that he lay in Newgate after sentence of death passed on him for high treason, in corresponding with her majesty's enemies, from the 19th day of January, 1707-8, to April the 28th, 1708, which was the day of his execution, as a traitor, at Tyburn.

"So that, in the whole, he lay under sentence of death, from the time of his sentence to the day of his execution, 100 days.

"All which time Mr. Lorrain laboured very diligently and devoutly with him, by good admonitions, and frequent prayers to God for him, and with him, that he might not violate his conscience, nor betray his master

"While, on the other side, Gregg often declared to Mr. Lorrain, no manner of solicitations, or offers of life, preferment, and great advantages were wanting, to induce him to bring Mr. Harley's innocent blood on his head.

"So long a respite from death, as 100 days, was enough to make any man so unwilling to die, as to make him to do any thing to save his life, right or wrong; and Mr. Lorrain said, Gregg so often wavered in his mind about it, being put so much, and so often, in hopes of living with splendor by certain persons, that he almost resolved to say and do any thing Mr. Harley's enemies would have him.

"Against which, Mr. Lorrain fortified his mind with all manner of upright industry, and at length with final success. So that Gregg gave a deaf ear to all their farther attempts.

"Here was 100 days hard struggle between life and death, innocence and party-malice.

"Who those persons were that offered Gregg his life, with great preferments and advantages (if he would but accuse his master), may not uneasily be guessed at; for most of the time he was locked up, none but people of note were permitted to come near him, who made him strange promises, and often repeated them.

"And here it would be worth while to examine how, and why, a certain person got out of Newgate, who was justly confined there for life, by act of parliament.

"Submitting to stop Gregg's dying speech for eight days only.

"And then, when it was published by another hand, for the two sheriffs of London to

* "All that the Sessions' Paper says of his trial, is, That William Gregg, of the parish of St. Martin's in the Fields, gent. was indicted for high treason against the queen and government, in corresponding with her majesty's enemies, the proceedings of which will be printed by itself, and published in a few days; but the proceedings at his trial were never printed." Secret Transactions, &c. 4 Sommers' Collection, vol. 3, p. 398.

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send Mr. Lorrain to the earl of Sunderland, to ask leave to print a dying speech they had commanded, and kept from him, till to keep it any longer, or indeed so long, was a burning shame to them; but of no manner of farther service.

"From hence you may conclude, how generous it was to say to Mr. Lorrain, 'You are the proper person to give authority to this paper, and I will give you my word, you shall come to no trouble for the printing and publishing it.'"

The execution of Gregg constitutes an exception to the assertion of Tindal. See *ante*, p. 1036.

This Case of Gregg gave rise to different pamphlets; among others, to one entitled, "A Letter to the Seven Lords of the Committee appointed to examine Gregg;" and to "Remarks upon a Pamphlet entitled, A Letter," &c. published in vol. 4, p. 227, of Swift's Works, edition of 1803.

"It was Mr. Harley," says Swift, "who detected the treasonable correspondence of Gregg, and secured him betimes, when a certain great man, who shall be nameless, had, out of the depth of his politics, sent him a caution to make his escape, which would certainly have fixed the appearance of guilt upon Mr. Harley; but when that was prevented, they would have enticed the condemned criminal with promise of a pardon, to write and sign an accusation against the secretary; but to use Gregg's own expression, his death was nothing near so ignominious, as would have been such a life that must be saved by prostituting his conscience." Examiner, March 15, 1710-11, N° 33. See, also, to the same effect, the Examiner for May 10, 1711, N° 41.

Swift in a letter to archbishop King (Feb. 12, 1707-8) says, "Seven Lords of the Whig Party are appointed to examine Gregg; and a certain lord of the council told me yesterday, that there are endeavours to bring in Harley as a party in that business, and to carry it as far as an impeachment. All this business has been much fomented by a lord whom Harley had been chiefly instrumental in impeaching some years ago." [Query, Does he mean lord Halifax or lord Sommers? See their Case in the present volume, p. 234.] "The Secretary always dreaded him, and made all imaginable advances to be reconciled, but could never prevail, which made him say yesterday to some one who told it me, that he had laid his neck under their feet and they trod upon it." And four years afterwards he says, in a letter to the same archbishop, "The late ministry and their adherents, confess themselves fully resolved to have his [lord Oxford's] head whenever it is in their power, and were prepared upon the beginning of the sessions, when the vote was carried against any peace without Spain, to move that he should be sent to the Tower." After the accession of George the

First, he was impeached and sent to the Tower. See his Case, A. D. 1717. With respect to statesmen, who having been active in the impeachment of others, were in their turn the

objects of impeachment, see vol. 11, pp. 632, 633; and vol. 8, p. 127. See, also, the duke of Wharton's Speech in Attorney's Case, A. D. 1723.

441. The Trials of JAMES STIRLING, of Keir, and others, in Scotland, for High Treason: 7 ANNE, A. D. 1708.

November 15.

CURIA JUSTICIARIA, S. D. N. Regine, tenta in novo Domo Sessionis Burgi de Edinburgh, decimo quinto Die Mensis Novembris, Millesimo Septingentesimo Octavo; per Nobilem et Potentem Comitem, Georgium Comitem de Cromertie, &c. Justiciarium Generalem, et Honorabiles Viros Adamum Cockburn de Ormistoun, Justiciarium Clericum; Dominos Joannem Lauder de Fountainhall, Gulielmum Anstruther de eodem, et Gilbertum Eliot de Minto; Magistrum Robertum Steuart de Tilli-courtie, et Magistrum Jacobum Erakine de Grange; Commissionarios Justiciarii dict. S. N. D. Regine.

Curia legitime affirmata.

Intran'

James Stirling, laird of Keir.

Archibald Seaton, laird of Touch.

Archibald Stirling, laird of Carden.

Charles Stirling, laird of Kippendavie; and

Patrick Edmonston, of Newtoun.

INDICTED and accused at the instance of sir James Steuart, her majesty's advocate, for her highness interest, and as having special warrant from her majesty for that effect. That where, by the law of God, and the laws of this, and all other well-governed realms, the crime of treason and lese-majesty, and the treasonable and unlawful rising and continuing in arms, are most atrocious and heinous crimes, punishable by forfeiture of lands, life and estate, or other pains of law. Likens by the act of parliament, Jac. 1, par. 1, cap. 3, it is statute, that no man openly rebel against the king's person, under the pain of forfeiture of life and goods. And by the act of parliament, Jac. 2, par. 6, cap. 24, it is statute, that who commit treason against the king's person, or majesty, or who rise in feire of weir against him, shall be punished as traitors. And by the act of parliament, Car. 2, par. 1, sess. 1, cap. 3, it is declared to be high-treason, for the subjects, more or less, upon any pretext, to rise and continue in arms; and to make treaties or leagues with foreign princes or states, or among themselves, without his majesty's special authority first interponed. And by the act of parliament, Car. 2, par. 1, sess. 2, cap. 2, it is statute, that if any person shall plot, contrive or intend death and destruction to the king, or bodily harm tending thereto; or deprive, depose, or suspend him from the stile, honour,

and kingly name of this, or any other his majesty's dominions; or levy war, or take up arms against him, or any commissionate by him; or entice strangers, or others, to invade any of his dominions, and express and declare such treasonable intention; he shall be adjudged a traitor, and punished as in the case of high-treason. Likens by the act of parliament, 1702, intituled, Act recognizing her majesty's royal authority, it is declared, that it shall be high-treason in any of the subjects of this kingdom, by writing, speaking, or any other manner of way, to disown, quarrel, or impugn her majesty's royal power and authority, or right and title to the crown. And by the act of parliament, 1703, intituled, Act asserting and recognizing her majesty's authority, it is again statute and declared, that it shall be high-treason in any of the subjects of this kingdom, to disown, quarrel or impugn, her majesty's right and title to the crown of this kingdom, or her exercise of the government thereof. Nevertheless it is of verity, that the said James Stirling of Keir, Archibald Seaton of Touch, Archibald Stirling of Carden, Charles Stirling of Kippendavie, and Patrick Edmonston of Newtoun, all and each of them were guilty of the said crimes, in sua far as they all, and each of them shaking off all fear of God, and regard to her majesty's person, authority and laws, upon one or other of the days of the months of February, March, or April last, when an invasion of that part of Great-Britain called Scotland was threatened,* by an enemy-fleet of ships with forces and an army abroad, sent by the French king or by the Pretender, who went some time by the name of the prince of Wales, and now assumes to himself the name, stile and title of king James, as king of her majesty's dominions; with a manifest and open design to invade her majesty's dominions, and to destroy her majesty and her good subjects; at least to deprive and depose her majesty from the stile, honour, and princely name of these her dominions; Did convocate and convene in arms, with others their accomplices; such as major William Graham, Alexander Steuart, uncle to Ardvorlich, George Seaton, brother to the said Archibald Seaton, and Mr. Charles Fleeming, alias Hay, brother to the earl of Wingtoun, all since absconded, and upon the same account declared fugitives: And thus did rise and continue in arms with-

* As to this, see Boyer's History of Queen Anne, pp. 354, et seq. Somerville §11, et seq.

out her majesty's special authority first interponed; and did levy war, and take up arms against her majesty. And farther, they having never before qualified themselves by any mark of good affection to her majesty or her government, did (at the time aforesaid) gather themselves together, with their accomplices, in arms, with swords and pistols, and other offensive weapons, in an open correspondence with the said enemies and invaders, at the very time of their said invasion; and being so convocate and convened in arms, did march in one body, or company, with their said accomplices, several days and nights, to and from several places, in the shires of Stirling, Perth, and other shires adjacent, on purpose to encourage and strengthen the said invaders, or at least to raise her majesty's other subjects in rebellion against her. Likeas for that end, they did openly drink to the good health of their master, as they called him; who could be none else but the said Pretender. And did by their said rising in arms, and open correspondence with her majesty's said declared enemies, and otherways, entice them and others to invade her majesty's dominions, to the destroying of her, and her good subjects; at least to deprive and depose her from the stile, honour, and princely name of queen and sovereign of this and her other dominions; or at least thereby endeavour the alteration of the right of succession to the crown, so happily by law settled upon her majesty and her successors. By all which they, and each of them were guilty, art and part, of the foresaid crimes of treason, rebellion, and lese-majesty, at least of treasonable rising and convening in arms, without her majesty's special authority first had thereto; at least of a most unlawful convocation in arms, in a most dangerous and threatening season, and in open correspondence with the said enemies and invaders; to the destruction of her majesty's government, and of the quiet and peace of her dominions. Which crimes, all or any of them, being found proven against all or any of the forenamed persons, by the verdict of an assize, before the lords justice-general, justice-clerk, and commissioners of justiciary; they, and each of them, ought to be condemned by sentence and doom of the said lords commissioners, to forfeit their lands, lives and goods, as traitors; and be otherways punished in their persons and goods, by the pains of law, to the example and terror of others to commit the like in time coming.

Sic Subscritur,

JA. STEUART.

Pursuers.—Sir James Steuart, of Goodtrees, her majesty's advocate. Mr. Wm. Carmichael, one of her majesty's solicitors. Sir Walter Pringle, and sir Francis Grant, advocates.

Procurators in Defence.—Sir Patrick Home, sir David Forbes, sir James Steuart, Mr. Alexander Macleod, Mr. James Graham, Mr. Walter Steuart, Mr. John Elphinston, Mr. Colin Mackenzie, Mr. Charles Cockburn, and Mr. David Lauder, advocates.

My Lord Advocate judicially produced her majesty's letter, authorizing and requiring his lordship to raise and insist in the aforesaid process; whereof the tenor follows, superscribed thus:

“ ANNE R.

“ Right trusty and well-beloved, we greet you well. Whereas James Stirling, laird of Keir, Archibald Seaton, laird of Touch, Archibald Stirling, laird of Carden, Charles Stirling, laird of Kippendavie, and Patrick Edmonston, of Newtown, were about the time of the late intended invasion apprehended by warrants, for suspicion of treason, and treasonable practices, against us and our government; and have since been committed by warrants for high treason, depositions upon oath having been made against them; our will and pleasure is, and we do hereby authorize and require you, to raise a process in the ordinary form, before the commissioners of justiciary, against them, and each of them, for the treasonable practices wherewith they, or any of them, are, or shall be charged. And herein you are to take the assistance of sir David Dalrymple, Mr. William Carmichael, sir Walter Pringle, and sir Francis Grant, advocates; or any two of them, if necessary; and who are hereby required to concur with you accordingly. For all which, this shall be your warrant.—Given at our castle at Windsor, the 19th day of July, 1708, in the 17th year of our reign.—By her majesty's command,

Subscribed thus,

“ SUNDERLAND.”

Directed on the back thus,

“ To our trusty and well beloved sir James Steuart, our advocate for Scotland.”

Which being read in presence of the said lords justice general, justice clerk, and commissioners of justiciary, they ordained the same to be recorded.

Sic Subscritur, CROMERTIE, I. P. D.

Thereafter, there was a Petition presented to the said lords, by James Stirling, of Keir, Archibald Seaton, of Touch, Archibald Stirling, of Carden, Charles Stirling, of Kippendavie, and Patrick Edmonston, of Newtown, humbly shewing, “ That the petitioners being indicted at the instance of her majesty's advocate for the crimes of treason and lese-majesty; and this being the day of their compareance and trial, they had, according to the privileges allowed to all the lieges, and confirmed by acts of parliament, made choice of the following lawyers, to appear before their lordships in their defence; viz. Sir Patrick Home, sir David Forbes, sir James Steuart, Mr. Alexander Macleod, Mr. Walter Steuart, Mr. James Graham, Mr. Colin Mackenzie, Mr. Charles Cockburn, and Mr. John Elphinston. And it being also usual in cases of treason, that lawyers are publicly authorized and warranted to manage the trials in their pannels' defence; therefore humbly craving their lordships would

be pleased to allow of the petitioners choice of the lawyers above-mentioned, and to authorize these gentlemen accordingly, as the said Petition bears."

Which being considered by the said lords, they by their deliverance thereon, allowed such advocates as the pannels should think fit to employ to appear and debate for them in the above-mentioned indictment; they being already sufficiently authorised by law for that effect.

Sic Subscribitur, CROMERTIE, I. P. D.

The said Indictment being read, and fully debated, *viva voce*, in presence of the said lords, pannels and assizes; the said lords justice-general, justice-clerk, and commissioners of justiciary, ordained the pannels to give in their information thereon betwixt and Wednesday's night next; and her majesty's advocate to give in his, betwixt and Friday's night thereafter, in order to be recorded; and continued the dyet till Monday next, at nine a-clock, in the forenoon; and ordained the whole assizers and witnesses to attend then, each of them under the pain of one hundred merks; and the pannels to be carried back to prison.

INFORMATION for the Laird of Keir, and others, against her Majesty's Advocate.

It is alledged for the pannels, denying always the indictment, and hail articles and qualifications thereof; 1. That the indictment is not relevantly libelled, in respect it does not condescend upon any overt-act or deed done by them, that could possibly be stretched to infer the pains libelled; and the acts of parliament libelled on, expressly require such facts and deeds to infer the pains of treason therein mentioned. As act 3, parl. 1, James 1. That none rebel openly or notourly. And act 11, parl. 6, James 2, bears, And if it happens, any within the realm, openly or notourly against the king to rebel, or make war against the king's lieges, against his forbidding, &c. And act 2, sess. 2, parl. 1, Charles 2, has these words: And shall, by writing, printing, preaching, or other malicious and advised speaking, express or declare such their treasonable intentions, &c. And the act 1702, bears, That it shall be high-treason, by writing, speaking, or any other manner of way, to disown or impugn her majesty's royal authority, &c. Which laws, and generally all laws, as well as the nature of crimes, require, that the same should be by express words, writs, or deeds: and not strained by remote inferences and conjectures: and in the present case, there is neither words, writ, or deeds, condescended on, that could possibly be drawn to infer the crimes libelled.

2. Whereas the indictment bears, that the pannels did convocate and convene in arms, with others their accomplices, and so did rise and continue in arms without her majesty's special authority first interponed; and did levy war, and take up arms against her majesty. &c. It is answered, That albeit levying war against

her majesty, or rising and continuing in arms without her majesty's authority, be undoubtedly treason when duly qualified; yet there is no circumstance of fact, word, or writ, condescended on in the indictment, that can be imagined to infer a rising in arms, or levying war against her majesty. And albeit the law statutes ancient rising in arms, or levying war generally; yet in all libels duly founded thereupon, the subsumption must condescend upon particular facts and deeds, capable to be found and construed a rising in arms. The common law expresses it thus: 'Qui injussu principis bellum gesserit, delectumve habuerit, exercitum comparaverit.' And our law, act 75, parl. 9, Q. Mary, explains what it is to rise in arms; viz. "That no manner of persons attempt to do, or raise any band of men of war, or horse or foot, with culverins, pistolets, pikes, &c. or other munition bellical whatsoever, for daily, weekly, or monthly wages, in any times to come, without special licence in writ had of our sovereign lady, and her successors thereto." And sir George Mackenzie, in his observation on act 2, James 1, defines rising in arms thus: "The rising of men in warlike manner by mustering them, or forming them in companies, or swearing them to colours." Nor are these qualifications by themselves sufficient, unless there be a formidable number: and therefore he cites the case of Macleod of Assint, Feb. 2, 1674, where the lords of justiciary refused to sustain the articles wherein it was libelled the raising of men, and disposing of them under colours, to be relevant; except it were alledged, that they were an hundred men or upwards, and were under colours, or mustered under weekly or daily pay. Whence it is evident, that the rising in arms must be by public and notour appearance of companies in arms, so as their design and opposition to authority could not be doubted; whereof the least shadow cannot be alledged in this case.

3. Whereas the libel bears further, that the pannels did gather themselves together, with their accomplices, in arms, with swords and pistols, and other offensive weapons, in an open correspondence with the said enemies and invaders, at the very time of the invasion: it is answered, That the said article ancient correspondence is not relevantly libelled; there being no particular condescendence of any acts of correspondence passed betwixt the pannels and the enemy, as is necessary to be condescended on for inferring the crime libelled. Correspondence with the enemy, in the common law, is thus expressed; 'Quive hostibus nuncium literasve miserit, signumve dederit, feceritve dolo malo hostes consilio juventur.' And no such fact or qualifications, can ever be pretended, or alleged in this case; and their meeting together so few in number of near relations and neighbours, as it were lawful for them to do at all times, so the accidental circumstance of an imminent invasion could never render the same unlawful. Nor could their travelling together for some space in the country, be strained to

any design of encouraging enemies, or to raise the subjects in rebellion; whilst they were no other ways appointed or attended, than as they (and others of their character) do usually travel, in a most peaceable manner, without giving the least occasion, by word or deed, to any rebellion or sedition. And as there was not then any body of men in arms in the kingdom, against authority, to whom they could be imagined to resort; so it is an evidence that they had no mind of convocating themselves against authority, that they did not use the means in their power, by convocating their tenants and followers in arms, either for assisting themselves, or giving countenance and encouragement to others on any such designs.

4. Whereas the libel mentions, that the pannels did openly drink to the good health of their master, as they called him, who could be none else but the Pretender; it is no ways relevant. 1. Because the drinking of any person's health is not a crime, there being no law against it. 2. There is no person named, whose health is said to be drunk; and therefore cannot infer any crime. And the gloss put thereupon, that it could be no other but the Pretender, is only a conjecture and uncertain inference of the pursuers; which can be nowise sufficient to fix a crime upon others who can only be answerable for what is clearly expressed and declared by them, by plain words, writs, or deeds.

It was replied for the pursuer, 1. That the libel was most relevant, in so far as it did expressly bear, that the pannels did rise and continue in arms, without her majesty's special authority first interposed: and the said act 5, par. 1, Car. 2, declares it treason to the subjects, or any number of them, more or less, upon any ground or pretext whatsoever, to rise and continue in arms, without his majesty's special authority. And the particular qualifications and circumstances of their said rising in arms, will appear from the probation.

2. The pannels rising in arms, leaving their own houses, and marching in a body through the shires of Stirling and Perth, in company with the other persons mentioned in the libel, whereof some have been since denounced for not compearance, to underly the law therefore; at the same time that the nation was threatened by an invasion of a French fleet, with land-forces aboard, cannot be understood to be upon any other design, than on purpose to encourage and strengthen the invaders, and in open correspondence with them, especially whilst the pannels can adduce no reasonable cause for their so convocating and travelling together; and this was sustained treason in Caldwell's Case.

3. The laws libelled on, do not only make actual rising in arms, and levying war against the sovereign, to incur the crimes and pains of treason, but likewise any attempt so to do: for any attempt or *conatus* in the case of treason, is to be punished with the same pains as the consummate crime, as the law says, "Eadem enim severitate voluntatem sceleris qua effec-

tem puniri jura voluerunt." And attempts are reckoned as treason in the acts above mentioned.

4. The libel bearing art and part, is sufficiently relevant, notwithstanding the generality thereof, such libels being expressly ordained to be relevant by the act of parliament 151, par. 12, Ja. 16th. So that no objection can be sustained against the libels as irrelevant, upon the account of the generality thereof, since art and part is libelled; which takes off any objection, for not particularly condescending upon the pannels accession to the crimes libelled.

It is replied for the pannels to the first, That albeit the rising in arms without authority, be mentioned in general to infer the crime of treason, since the law could not descend to every particular qualification that might happen to infer rising in arms to be treason, but left the same to be determined by the judges competent; yet the pursuer of a criminal libel must adduce special qualifications, and circumstance matters of fact that may be sufficient to infer that the pannels did treasonably rise in arms, or otherways the libel cannot be sustained. For as it could not be allowed to libel in general, that a person is guilty of murder, so no more can it be allowed to libel in general, that a person is guilty of rising in arms without authority, the propositions in these libels being equally founded in law; but the subsumption must be cleared and qualified by circumstance matters of fact, inferring the respective crimes; and if it were otherways, these evident inconveniences would follow.

As, 1. That the pannels would be deprived of the benefit of exculpation, which could not easily be brought to meet with general libels; whereas special circumstance matters of fact might have been more readily taken off by proper particular grounds of exculpation, whereby the deeds condescended on, might be applied to other reasonable causes, that might wholly exclude the "*animus delinquendi*," or "*dolus*," requisite in all crimes.

2. This inconvenience would likewise be inevitable, that the assize would become judges of the relevancy, as well as of the probation. For if the libel bearing in general the pannels to be guilty of rising in arms against authority, should be sustained, and the qualifications left to be determined by the probation, then the assize would be judges both of the relevancy and probation; for they behoved to determine, whether the qualifications arising from the probation, did amount to a rising in arms, or other crimes generally mentioned in the statute: whence it might come to pass, that pannels might be put to the knowledge of an inquest upon irrelevant crimes; and therefore crimes should be particularly subsumed, as sir George Mackenzie observes in his *Criminals*, Tit. Libels, page 465.

To the 2d, it is replied, that whether the pannels travelling for some space from their own houses, either for diversion or business, in the most peaceable manner imaginable, had happened in the time in the threatened invasion or not

could never alter the nature of that deed, since it cannot so much as be pretended, that they were 'versantes in illicito;' the travelling in such a peaceable manner singly with domestic servants, being unquestionably allowed by law. And this defence of the pannels travelling in their usual manner, and with their ordinary equipage, was so evident of itself, that the pursuers acknowledged there could nothing culpable be inferred from it at other seasons; but that the crime now insisted on was founded, in that their meeting and travelling was the time of the threatened invasion, when a fleet of enemies' ships was upon the coast. And yet the libel does not bear, that the pannels knew of any such design, or that the French were actually upon the coast; and without this knowledge, the circumstance which the pursuers insist chiefly to make the crime, was, as to the pannels, no circumstance at all. So that the libel shortly resolves in the pannels travelling with their ordinary equipage, after their usual way, in a peaceable manner; which neither in common sense, nor in the construction and interpretation of our law, and opinion of our lawyers above-mentioned, can be pled a rising in arms against her majesty or government, or give the occasion of the least suspicion of any intention that way. Neither can suspicions, albeit there had been more evident grounds for them, be sufficient to infer a crime; the law saying expressly, that 'ex suspicionibus nemo est damnandus,' Leg. 5, ff. de Pœn. And whereas it is pretended, that the pannels have given no reasonable account of their progress and march at that time; and therefore leaves place for the pursuers' conjectures; the same is no ways of any weight to fortify the pursuers' libel; it being sufficient for the pannels to alledge, that the meeting of a few gentlemen, and travelling with swords and pistols, as they were hitherto used, does not infer a rising in arms. And to pretend that the pannels should give special accounts of their progresses, is plainly to found a criminal charge or libel 'super inquirendis,' and so expressly discharged by law: and doubtless it is sufficient for the pannels to say, that their meeting or travelling together with such small retinue, and in such peaceable and unprovided manner, could not give the least jealousy to any person whatsoever; and if this defence were not sustained, the natural liberty of the lieges would be very much circumscribed; and no man could be sure, but the action of his life which he intended should be most innocent, should be the most fatal, as concluding him under treason, and the worst of crimes. And the practise in Caldwell's case is greatly differed from this, in that there was a considerable body of men with all sorts of arms actually in rebellion against the government at the time; and that Caldwell, with his associates, likewise of a considerable number, had interposed common pests, and particularly some to the earl of Eglington, a privy-council, which was an overt-act, and suffi-

ciently declared their bad design; besides these sentences were reduced, and the persons restored 'per modum justitiarum.'

To the 3d, it is duplyed, that albeit it be generally received by lawyers, that attempt or 'conatus' in treason is punishable as treason; yet that is never to be understood of a naked design or 'actus animi;' the law saying expressly, that 'cogitationis pœnam nemo patitur,' Leg. 18, ff. de Pœn. and 'neminem qui male facere voluit plecti æquum est nisi quod factum voluit etiam fecerit.' But that 'voluntas' or 'conatus' mentioned in law, must break out into an external act; if not consummating the intended crime, at least inchoating the same, so as to become a deed obvious to the external senses, before it can be subjected to the censure of human laws. And albeit 'dolo' or 'propositum' be requisite in all crimes; yet not as it is latent in the mind, but as it is expressed and declared by an external act. And so Mattheus de Crim. in Proleg. says "dolo contrahi crimen diximus, per dolum autem factum dolosum intelligimus." As it is clear by the express statutes libelled upon, particularly the said act 2d sess. 2 parl. 1st Ch. 2. That treasonable intentions should be expressed and declared by writing, printing, or advised speaking, before the same can be said to have inferred the pains mentioned in the act; yea, even where there was writing alleged upon; yet in Mr. Robert Caddel's case, that was not found sufficient to infer the crimes in the statute, unless it should have been qualified, that the writing was published, and out of the writer's hand, whereby the attempt would become manifest; and in the case of an overt act, which was the point upon which Balmerino's * trial proceeded, and without which no crime could have been found against him. And in the present case, as the pannels had truly no manner of ill design, so no external act whatsoever is, or can be condescended on, either of word or deed, that infers any design of the pannels to oppose authority, or to act any thing contrair to law, or their duty to the sovereign; for as they used their natural and innocent liberty of travelling in a peaceable manner with their near relations and neighbours, for their diversion or business, so when they were called by authority, they did not absent or withdraw themselves, but readily appeared and gave obedience, upon the first citation.

To the 4th, it is duplyed, that the libelling of art and part, is not sufficient to exclude the objection upon the generality of the libel, because art and part relates to the particular criminal facts and qualifications thereof libelled, and includes an alternative, that the person complained upon, was either actor, or art and part of the criminal facts and deeds particularly libelled, † which general and indefinite qualification of accession, law and custom had not allowed, without a more special condescendence

* See his Case, vol. 3, p. 591.

† See vol. 3, p. 689. Vol. 10, p. 387.

of the parties accession to the deeds libelled; which could only be certainly and distinctly known by the probation: but still that does not take off the necessity of special condescendences of the qualifications that make up the principal crime libelled, without which pannels could not have the benefit of exculpations; nor could the relevancy be determined by the judges, but remitted with the probation to the assize, which always has been cautiously shunned as of dangerous consequence. And in the present case, the sustaining of the libel in the generality thereof above-mentioned, would be a most dangerous preparative; it being evident, that if a few gentlemen, meeting and travelling together with their ordinar retinue and equipage, which is generally with swords and pistols, could be thought to fall under the act of parliament of rising in arms without the sovereign's consent, no gentleman in the kingdom could be free from grounds of a criminal process, if the bearing such weapons should be construed a rising in arms; and few or many making no difference, as the pursuer contends, it would necessarily follow, that two or three persons meeting or travelling with swords or pistols, might be liable to a process of treason, as rising in arms without authority; which were most absurd, and of dangerous consequence to the lieges. And as no company can ever be found to have met and travelled in a more peaceable and inoffensive manner than the pannels have done, doing no injury by word or deed to any person whatsoever, and travelling in such a simple manner, as did exclude all imaginable jealousy of their having any warlike designs, or creating the least disturbance to themselves or others, and giving a ready obedience when called by authority on a simple citation: so they ought to be assolizied from the said groundless and irrelevant libel.

The pannels shall not take up the lords' time in informing more particularly upon the other circumstances of the libel, such as drinking of healths, correspondence, and enticing of the country; by reason that my lord advocate did not insist upon these in the debate, but only pretended to have libelled them as aggravations, which is of no moment in a process of treason, and can be of no manner of effect in this case, where the crime libelled is so manifestly elided.

Sic Subscribitur, ALEX. MACLEOD.

INFORMATION for her Majesty's Advocate against the Lairds of Keir, Touch, and others, now Prisoners in the Tolbooth of Edinburgh.

Her majesty's Advocate, holding the indictment as repeated, and here premised, before he offer to answer and remove the exceptions and objections made against it for the defenders; takes leave to remember, what cannot well be forgot, that the occasion of the present trial was an actual invasion of an enemy-fleet with French, Irish and Popish forces aboard, in March last, threatening an imminent invasion upon our coast, to destroy her majesty, and all

her good subjects, and ruin our religion, laws and liberties.

Which invasion was the more formidable, that it was intended and carried on by Papists and French, and by Irish Papists, the dregs of both, which are certainly the worst characters that can be apprehended in an enemy.

While we stood thus threatened by such enemies that had risen up against us, and were ready to swallow us up quick, so that the waters had overwhelmed us, and the stream had gone over our soul, if God had not appeared for us; and her majesty, by his blessing upon her careful and most vigilant conduct, interposed for our delivery, and when the enemy was upon our coast, and ready to enter our Firth, and when all good men were in the greatest suspense of the saddest apprehensions of what might ensue, by turning our country at least to a field of blood, and scene of all confusions and mischiefs: yet there were found amongst us, even among Scots Protestants, a knot of men who may justly seem to have wished and longed for that which all men besides feared.

It is now indeed made an argument to exculpate, that they were so few; and yet it may far more reasonably be wondered, that there was so much as one man to be found of such a desperate resolution and practice.

The five gentlemen now in the pannel, being of the knot mentioned, so soon as this invasion was noised abroad, and when it was brought just upon our coast, then they think fit to leave their houses, and going with their horses and servants, and all well armed with swords and pistols, and other invasive weapons, they rise and continue in arms, without any lawful authority interposed: and thus appearing in arms, and marching from place to place in several shires, and for several days and nights, as it were in correspondence with the foresaid invaders, did what in them lay (if not to rise to their assistance, at least) to disturb her majesty's good subjects, from the opposition and defence that was at that time so necessary.

It is true, when their hopes were disappointed, then they shrunk home, and such of them as had more to lose than they knew how to save other ways, compeared and rendered when called; when others of them that had no more guilt, but less to lose, thought fit to retire and abscond: whereupon her majesty most justly ordered, that the persons now in the pannel should be brought to this present trial.

The indictment exhibit against them founds, upon most plain and positive laws and acts of parliament, That none rebel openly against the king's person or government; that none levy war and take up arms against the king and his government; and that for any of the subjects, more or fewer, to rise and continue in arms upon any pretext, or to attempt the same without his majesty's special authority first interponed, it shall be high treason; and that if any levy war, or take up arms against the

king, or entice strangers or others to invade, and express and declare such treasonable intentions, he shall be adjudged a traitor, and punished as in the case of high treason. And then the indictment subjoins, in the very terms of the law, That at such a time, and in such a manner, and with the other circumstances mentioned, the defenders did actually rise and convene, and continue in arms without her majesty's special authority first interponed; which in law is justly construed to be the levying of war, and taking up arms against her majesty, and did plainly appear to be in a real correspondence with, and for the encouragement of the French invaders; whom thereby, and otherways they did entice, to the invading of her majesty's dominions, and the destroying of her and all her good subjects: of which crime the defenders being actors, art or part, ought to be punished with the pains of law.

To this indictment the defenders made answer, denying the crime libelled with all its qualifications; that the indictment is not relevant, in respect it doth not condescend upon any overt act or deed that can be stretched to infer the crime, or any treasonable intention; and that all the acts of parliament libelled upon, require such open facts and deeds; and the act of parliament, Car. 2. parl. 1. ses. 2, requires expressly, That by writing, printing, preaching, or other malicious and advised speaking, such treasonable intentions should be expressed or declared; nothing of which can be found in this case.

To which it is replied, 1. That it is granted, that neither inward thoughts nor intentions, unless some way expressed or declared, can be made criminal, and far less treasonable; but on the other hand, when the law and acts of parliament does set down a specific palpable deed, such as rising and continuing in arms, which is visibly an open overt-act, and requires no more for the declaring of the rebels' intention, save his so rising and continuing in arms, without having her majesty's authority interponed; what more can be required, either as to the overt-act, since the fact itself is truly and openly such; or as to the certainty of the parties' intention when the law hath ascertained it, viz. by the want of authority; which is plainly the present case? But 2. It is to be adverted, that our old laws libelled upon, do indeed bear open and notour rebellion: as likewise, the levying of war against the king and his person and government: but these laws having been found very liable to the very exceptions that the defenders now make against the indictment, when in the year 1661. this came to be considered, and the parliament judged fit to ascertain and define the crime of treason, so as every man might most plainly understand it, and that there could be no place for any of the former evasions: the act of parliament condescends upon rising and continuing in arms, as the very open and overt-act requisite to the crime; and whilal fixes the treasonable intention upon this one qualifica-

tion, that the rising and continuing in arms, is without his majesty's authority interponed, a negative that proves itself, and requires no other evidence. 3. As to what the act of parliament, Car. 2, par. 1, ses. 2, cap. 2, requires, that such treasonable intentions should be expressed and declared; these words are plainly subjoined to a long enumeration of several points and kinds of treason, and are certainly only to be applied to the cases wherein the intention may be doubtful, but can never, in any good sense or reason, be applied to such deeds as the law itself declares to be open, and to import the intention, such as rising and continuing in arms, levying of war, or taking up arms, where both the deed and the intention are manifest, and by law declared and condemned. And in effect to alledge, where there is an open rising in arms, or a levying of war, or the maintaining a fort or garrison, that yet the intention should be desiderate, where the law requires no more to prove, but that it is done without authority, is visibly absurd.

Secondly, Where it is objected, that albeit rising and continuing in arms without her majesty's authority be undoubtedly treason, yet it must still be qualified by some circumstances of fact, word or writ, to infer the intention; and to libel rising in arms is but general, and it ought to be cleared by some particular fact and deed libelled, to make the rising criminal. Thus the common law says, "Qui injussa principis bellum gesserit, delectumve habuerit exercitum comparaveit," &c. And our act of parliament, queen Mary, explains the matter, viz. "That no man raise bands of men of weir on horse or foot, with pistols and other bellical arms, for daily or monthly wages, without special licence," &c.

To all which it is answered, That it is granted by the defenders, that rising and continuing in arms, if duly qualified to be against her majesty, is undoubtedly treason: but then is it not as evident, that all the qualification that the act of parliament requires, is, that the same be done without her majesty's authority? So that where the qualification is so plainly defined, to require any farther, is to impose on the law. It is true, that the act queen Mary, speaks of raising of bands of men of weir, and keeping them under pay; and the common law may also have something of that nature. But if the act of parliament 1661, thought fit so far to secure the prerogative as to cut short and forbid all rising in arms without her majesty's authority, under the pain of treason, is not this plain law, which the defenders could neither usken, nor ought to have transgressed?

The case of Assint is much insisted on, that it was not found to be a treasonable rising, unless there had been more than an hundred men convened, and mustered under colours and pay. But 1. A practick cannot change the law. 2. The reason of that practick is manifest, viz. That Assint's convocation was covered with another colour and pretext, and was certainly not against the government; and therefore the

said qualifications were required, which doth no ways hold in this case.

For to deal plainly, and to cut off all the defenders' groundless pretexes, that they were only innocently convened, that they had no arms, but such as are ordinary, and allowed to gentlemen in their travelling; that they were only a small number of friends and neighbours for their diversion and recreation: that they had no correspondence with the invaders, though their meeting and travelling together happened about that time: and lastly, that if they should be overtaken on the fact and deed libelled against them, none could be in safety to travel with arms, even in the smallest company.

To all this it is answered, 1. For all that the defenders have alleged or can allege for excuse, yet their meeting and marching in arms, at the time and manner that they did, is generally under this prejudice by all that ever heard it, that it was at least the height of folly, and had the worst of appearances.

But 2. If the defenders would have the deed to be considered with all its circumstances, it is not declined. Now as to the deed itself, it is open and palpable, viz. rising and continuing in arms. 2. It has all the qualification that law requires to make it criminal, viz. That it was without her majesty's authority being interposed. But 3. Admit of all the circumstances that the defenders can allege for alleviating, are they not only bare supposition and question? What if they meet by encounter? What if they met for diversion? Are not such meetings ordinary? And what was acted by them against the government? All which do not import so much as one positive colourable excuse. Whereas to consider the deed certainly condemned in law on the other side, with its undeniable circumstances, viz. That the defenders left their own houses, having no just occasion to invite them abroad: that they met in such a company as perhaps all of them never met before; that they met well mounted, and with swords and pistols of all sorts, better appointed than most men that go to war; that they were thus well mounted and armed, beyond what the law and act of parliament 1693, allows to men of their fashion, there being none of them qualified to the government; that all this happened when the invasion was generally known, and just upon our coast: that they marched backward and forward for several days and nights, as it were hovering in expectation of what they looked after: that they did not at all dissolve and go home, until their hope of the invasion was lost; and that since several of them have absconded. Can any man lay and reflect upon these things together, but he must say, that besides their being clearly guilty in the terms of law as having risen and continued in arms without her majesty's authority, which in the construction of law is to levy war against her majesty, their intention was as treasonable as the law presumes: so that upon the whole, this judgment.

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ment may be both righteously and safely passed in this matter, viz. That their rising and continuing in arms at the time and in the manner, and with the other circumstances libelled, without her majesty's authority first interposed, was treason, unless they could exculpate, by at least some colourable or probable pretext, which they never can prove, or so much as alledge.

Nor could a judgment of this nature so clearly founded, be of the least ill consequence or inconvenience, since every ordinary meeting bears its own excuse; nor can indeed a lawful meeting of this sort be found without excuse. And further, it would secure the government, according to the true intention of the law, against all suspicious and evil designs and attempts in time coming.

The defenders object, that the indictment doth not libel relevantly, as to the point of correspondence with the invaders; which should be qualified by a condescendance on the particular acts of correspondence; and, as the common law expresses it, that "*Hostibus nuncium literasve miserunt, signumve dederunt, feceruntque dolo malo quo hostes consilio juventur.*"

To which it is answered; If correspondence with invaders had been the principal crime libelled, the defenders might have contended for such a condescendance 'quo modo' they corresponded: but when the correspondence is only libelled, viz. an open and real correspondence, by their rising at the same time in arms without authority, that a foreign enemy was actually invading: this real correspondence, or this correspondence 'in re ipsa,' is more than sufficient to make out the presumption of law; viz. That their rising and continuing in arms without authority, was plainly against authority. If at the time of the invasion, some hundreds of disaffected persons had got together in arms; would it have been doubted, but that their getting together at that time in arms, without her majesty's authority, was really to correspond with the invaders, and to countenance and encourage them in their invasion? If then all the difference be, that the defenders did convene in a smaller number; it only remains to be considered, that the act of parliament doth expressly declare against any number, their rising and continuing in arms without authority; and that the same is treasonable; which fully reaches the number libelled.

As to what is added, of their being so small a number, and only armed in the ordinary manner accustomed by gentlemen travellers; it is already answered; and withal it is certain, that the greatest mischiefs may have their rise from small beginnings. And as for the defenders, they were very early in their appearance, and visibly did what in them lay, both to encourage the invaders, and to raise an insurrection in the country: and it was only the goodness of God, and her majesty's vigilant conduct, that cut off both their further

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hopes, and the increasing of their numbers; which might have been infallibly expected, if the invasion had succeeded.

The defenders take notice of that part of the indictment, which alleges, that they did openly drink the good health of their master, who could be none else but the Pretender; which they alledge is noways relevant to infer the conclusion of the libel.

To which it is answered, That the foresaid drinking having been only mentioned in the libel for a further illustration of the defenders' intentions, it is granted, that *per se* it is not relevant to infer a crime. But, 2. Being joined with the other circumstances above-mentioned, even in its doubtful sense, it cannot be denied to import a further discovery of these gentlemen's intentions, in appearing and continuing in arms without authority; (which in effect) is the principal crime sufficiently declared by the act of parliament itself, though it were not admixturate by this and the other circumstances above-mentioned.

The defenders go on to resume and answer the charge brought against them; but the whole of the matter being above abundantly cleared, it may suffice to notice, that they still insist, that the rising in arms libelled without authority, is but general, and so could not infer the crime of treason, unless more particularly qualified: whereas it is certain that the rising in arms is a specific act; and of the which, if libelled circumstantiately as to time and place, as it here is, makes a most particular libel. and for qualifying the intention of the act, and of the risers, all that the law requires, is, that the rising and continuing in arms, be without her majesty's authority first interposed; which, in the construction of law, is to levy war against her majesty.

The defenders alledge, that to libel rising in arms in general, is no better than to libel murder in general: but if murder be libelled circumstantiately, as to the person murdered, and the time and place, the libel is no doubt particular and relevant, without any further qualification. What then should hinder, why rising and continuing in arms circumstantiately libelled as to time and place, and plainly qualified as the law requires (*viz.* without her majesty's authority) should not also be a particular and relevant libel of treason?

But the defenders say, that by such a libel they are deprived of the benefit of exculpation. But this is wholly groundless; it having been often said, that if the defenders can but qualify any probable pretext for their rising and continuing in arms without authority, to take off the presumption of the law, it should be admitted: but when they can qualify no pretext, nor can assign the least probable cause for their rising and continuing in arms as they did, except it was to countenance invaders, or to raise insurrections within the country; how is it possible, that this their rising in arms without authority, as is libelled, should not be treason? Nor is there any thing here left to

the judgment of the assize, save most plain and palpable matter of fact; *viz.* That the defenders rose, and continued in arms; which being qualified as the law requires, *viz.* That it was without her majesty's authority, it inevitably presumes the treasonable intention; which being further joined with the circumstances mentioned in the indictment, cannot but evince to all men, that the rising and continuing in arms without authority, and in the circumstances above-mentioned, was an overt-act of rebellion; specially when nothing is, or can be adduced, to give it a more probable interpretation.

The defenders insist much, that they were not '*versantes in illicito*;' that they only went out for diversion, or business, with their ordinary arms and servants: but what can be more '*illicitum*,' than to rise and continue in arms without authority; the very deed forbid by the law as treasonable? And what need of any further qualifications of their intention, since the law makes without authority to be sufficient? And the indictment doth also superadd most pregnant circumstances, to verify their ill intention; which are not so much as offered to be cavilled, except by, What if this? or, What if that? which plainly signify nothing.

The defenders seem to insinuate, that they did not so much as know there was an invading fleet upon our coast: but it is so notorious, that at that time the invasion was universally known, and likewise signified by a proclamation, that this alledgeance is manifestly disingenuous.

But the defenders further alledge *estis*, that rising and continuing in arms as they did, was suspicious; yet suspicions cannot found a libel of treason. But the defenders advert not, that it is not matter of suspicion that is objected, far less their travelling with their ordinary horses, arms, and equipage, as formerly they were wont; but plainly that at such a time, when the country was openly invaded by a foreign and most formidable enemy, they, being never qualified to the government, should have run together in arms without her majesty's authority: which is all that the law requires to make them guilty, and which, in effect with the other circumstances libelled, declares their treasonable intentions to a demonstration.

The defenders say, that their case differs from Caldwell's: But albeit they may vary in some circumstances, yet it is certain, that as to the main, Caldwell and his complices were found guilty of treason, only for their raising of about thirty or forty, and continuing in arms without authority, when there was another party in the country engaged in an open insurrection. So that the defenders have in like manner risen and continued in arms without authority, when there was a far more dreadful enemy imminent upon our coast, cannot but fall under the same construction. And that Caldwell's process and doom was afterwards reduced, signifies nothing; since it was reduced

for reasons wholly different and alien from the case in hand, and which are so well known, as they need not be repeated.

The defenders do also endeavour to take off what was alleged from the act of parliament, That even the attempt and 'conatus' in this case is condemned, by telling us, that this 'conatus' doth also require an overt-act. But *esto*, it be so; what more overt-act can be required, than open rising in arms? And what doubt can there be of the intention and design, when both the act of parliament, and the other circumstances of the deed, do so fully clear it? And therefore it is in vain to notice either Caldwell's case, wherein there was indeed no sentence; or yet Balmerino's case, where the overt act was thought to be doubtful; when the rising and continuing in arms is, in this case, an act both overt in itself, and expressly defined to be such by the act of parliament.

The defenders are at some pains to make it believed, That the libelling of art and part cannot sustain this indictment. But, 1. The Advocate adheres to his indictment, as libelled and qualified with art and part. 2. Though art and part be libelled, and the act of parliament makes it a supplement for relevancy in all cases; yet her majesty's advocate finds no necessity to enter further into that debate, than to adhere as above; seeing that his indictment is founded on clear law, and that he as clearly subsumes in the terms of law; viz. The rising and continuing in arms without her majesty's authority interposed; the levying of war, and taking up arms against her majesty, and open corresponding with her majesty's enemies, and our invaders; and that not only by the above-mentioned real correspondence, but even by enticing them otherways to invade, as shall be proven, if needful. All which are too manifestly acts and deeds of rebellion, to need the constructive support of art and part, further than that actor art and part, are perpetually connected together.

And therefore, upon the whole, since, as hath been said, the country was (at the time libelled) in the most imminent hazard of a most destructive invasion; and that at that very time, the defenders, to the great surprize and astonishment of all her majesty's good subjects, did flee out in arms, and convene and march, and troop together in arms, without her majesty's authority, which in law is sufficient; and that, with the other aggravating and most concludent circumstances, above libelled, which were not offered to be taken off with any rational or probable pretext; It appears to be without question, That the defenders fall under all the conclusions of the libel, and ought to be made liable in the pains thereof.—In respect whereof, &c.

Sic Subscritur,

JA. STEUART.

CURIA JUSTICIARIA S. D. N. Reginae, tenta in novo Sessionis Domo Burgi de Edinburgh, Vigesimo secundo Die Mensis No-

vembris, Millesimo Septingentesimo Octavo; per Nobilem et Potentem Comitem, Georgium Comitem de Cromertie, &c. Justiciarium Generalem, et Honorabiles Viros Adamum Cockburn de Ormistoun, Justiciarium Clericum; Dominos Joannem Lauder de Fountainhall, Gulielmum Anstruther de eodem, et Gilbertum Eliot de Minto; Magistrum Robertum Steuart de Tillicoutrie, et Magistrum Jacobum Erskine de Grange; Commissionarios Justiciarii Dict. S. D. N. Reginae.

Curia legitimè affirmata.

Intran'

James Stirling, of Keir.

Archibald Seaton, of Touch.

Archibald Stirling, of Carden.

Charles Stirling, of Kippendavie; and

Patrick Edmonston, of Newtown.

Indicted and accused at the instance of sir James Steuart, her majesty's Advocate, and as having special warrant for that effect, for the crime of treason and lese-majesty, in manner mentioned in the indictment raised against them thereanent.

Pursuers.—Sir James Steuart, her majesty's Advocate.—Sir Walter Pringle, and sir Francis Grant, Advocates.

Procurators in Defence.—Sir Patrick Home, sir David Forbes, sir James Steuart, Mr. Alexander Macleod, Mr. James Graham, Mr. Walter Steuart, Mr. John Elphinston, Mr. Colin Mackenzie, Mr. Charles Cockburn, and Mr. David Lauder, Advocates.

The Lords Justice-General, Justice-Clerk, and Commissioners of Justiciary, having considered the indictment at her majesty's Advocate's instance, against James Stirling, of Keir; Archibald Seaton, of Touch; Archibald Stirling, of Carden; Charles Stirling, of Kippendavie; and Patrick Edmonston, of Newtown; pannels, with the foregoing debate thereon: They find, the said pannels, their rising and continuing in arms without her majesty's authority, and actually corresponding with an open enemy upon the coast, ready to invade this part of Great Britain called Scotland, relevant to infer the pains of treason libelled against the pannels; and repel the whole defences proponed for the pannels, and remit the whole to the knowledge of an assize.

Sic Subscritur, CROMERTIE, I. P. D.

The said Lords, for several causes and considerations, continued the dyet of the said cause till three a-clock in the afternoon; and ordained assizers and witnesses to attend then, ilk person under the pain of 100 merks, and the pannels to be carried back to prison.

Post Meridiem.

CURIA JUSTICIARIA S. D. N. Reginae, tenta in novo Sessionis Domo Burgi de Edinburgh, Vigesimo secundo Die Mensis Novembris, Millesimo Septingentesimo Octavo; per Nobilem et Potentem Comitem, Geor-

to apprehend him and his horses, occasioned his going away with his horses; and that Touch was with him that morning, and went along with him to Dunkeld, and that they met Carden and Kippendavie at the bridge of Turk; and that Newtown came there that night, and from thence went all to Lochearn; depones, he heard them speak nothing of the pretended prince of Wales, or of the invasion then intended; and that Keir, Carden and Touch, came home together from Dunkeld; and that to the best of the deponent's memory, it was on the 23d of March that they were at Dunkeld, and that he knows not what was the occasion of their parting; and depones, that it was on the seventeenth of that month that they went from Keir; and depones, that Carden and Newtown had neither sword nor pistol that he saw, and that none of his servants had either pistol or sword, except Keir's man, who had a sword; and depones, that Touch's brother, who was in company, had neither sword nor pistol that the deponent saw. *Causa scientie patet.* And this is the truth, as he shall answer to God. And depones he cannot write.

Sic Subscribitur,

CROMERTIE.

*Peter Wilson, servant to the laird of Keir, aged thirty years, or thereby, solutus, solemnly sworn, purged of partial counsel, examined upon the libel, and interrogate, depones, That about the seventeenth day of March last, Keir, accompanied with Touch and his brother, and others, to the number of five horses, came from Keir, and were that night at the bridge of Turk, where Carden and Kippendavie met them, and went all of them next day to Appinadove, where one Mr. Hay met them; depones, that the occasion of Keir's going from his house, was the apprehensions he had of being seized with his horses by the forces then lying at Stirling, as he heard. Being interrogate, if he heard the pannel speak any thing concerning the government, the prince of Wales, and the intended invasion, depones negative; but that they heard that admiral Bing had chased the French fleet off the coast, before they went from Keir; depones, that several of them had swords and pistols, but cannot be positive whether Carden and Touch's brother had any or not; or if any of the other servants had any, except the deponent himself; and that they had no other weapons that he saw; and depones, that it was at Lochearn, and not at Appinadove, that Mr. Hay met them. *Causa scientie patet.* And this is the truth, as he shall answer to God.*

Sic Subscribitur,

PATRICK WILSON.

CROMERTIE.

The Lords Justice-General, Justice Clerk, and Commissioners of Justiciary, ordain the assize presently to inclose, and to return their verdict to-morrow at twelve a-clock, in the High Council-house, and the hail fifteen assizers to be present, each of them under the pain of two hundred merks.

CURIA JUSTICIARIA S. D. N. Reginae, Tenta in Praetorio Burgi de Edinburgh, Vigesimo tertio Die Mensis Novembris, Millesimo Septingentesimo Octavo, per Nobilem et potentem, Comitem Georgium Comitem de Cromertie, &c. Justiciarium Generalem, et Honorabiles Viros Adamum Cockburne de Ormistoun, Justiciarium Clericum; Dominos Joannem Lauder de Fountainhall, Gulielmum Anstruther de eodem, et Gilbertum Eliot de Minto, et Magistrum Jacobum Erskine de Grange, Commissionarios Justiciarii Dict. S. D. N. Reginae.

Curia legitime affirmata.

The said day, the persons who passed upon the Assize of James Stirling, of Keir, and others, returned their Verdict in presence of the said Lords, whereof the tenor follows.

EDINBURGH, 22d November, 1708.

The above Assize having inclosed, did choose sir James Fleeming of Rathbyres their chancellor, and Gilbert Campbell, merchant in Edinburgh, to be their clerk. And having considered the indictment pursued at her majesty's Advocate's instance, as having special warrant from her majesty for that effect, against James Stirling of Keir, Archibald Seaton of Touch, Archibald Stirling of Carden, Charles Stirling of Kippendavie, and Patrick Edmonston of Newtown, for the crime of treason and lese-majesty, with the debate thereupon, the Lords Justice-General, Justice-Clerk, and Commissioners of Justiciary their Interloquitor pronounced thereupon, and Depositions of the witnesses adduced, they all in one voice find the libel not proven. In witness whereof (written by the said Gilbert Campbell) these presents are subscribed by our said chancellor and clerk, day and date aforesaid.

Sic Subscribitur,

JAMES FLEEMING.

GILB. CAMPBELL, Clerk.

After opening and reading of which Verdict of Assize, the Lords Justice-General, Justice Clerk, and Commissioners of Justiciary, assolizied the pannels, and dismissed them from the bar: Whereupon they took instruments.

Sic Subscribitur,

CROMERTIE, I. P. D.

END OF VOL. XIV.

ERRATUM ET ADDENDA.

P. 463, l. 34, *for Delegates, should have been said Archbishop.*

P. 1200, *to the words, "at his return he was snubbed at court for being too merciful," it should have been said, by way of Note, Tindal writes to the same effect. See, also, vol. 11, p. 302, vol. 12, p. 198, of this Collection.*

P. 1036, *At the end of the extract from Tindal should be added the following observation :—*
Tindal is not quite correct. See the Case of Gregg, pp. 1375. 1394, of this Volume.

