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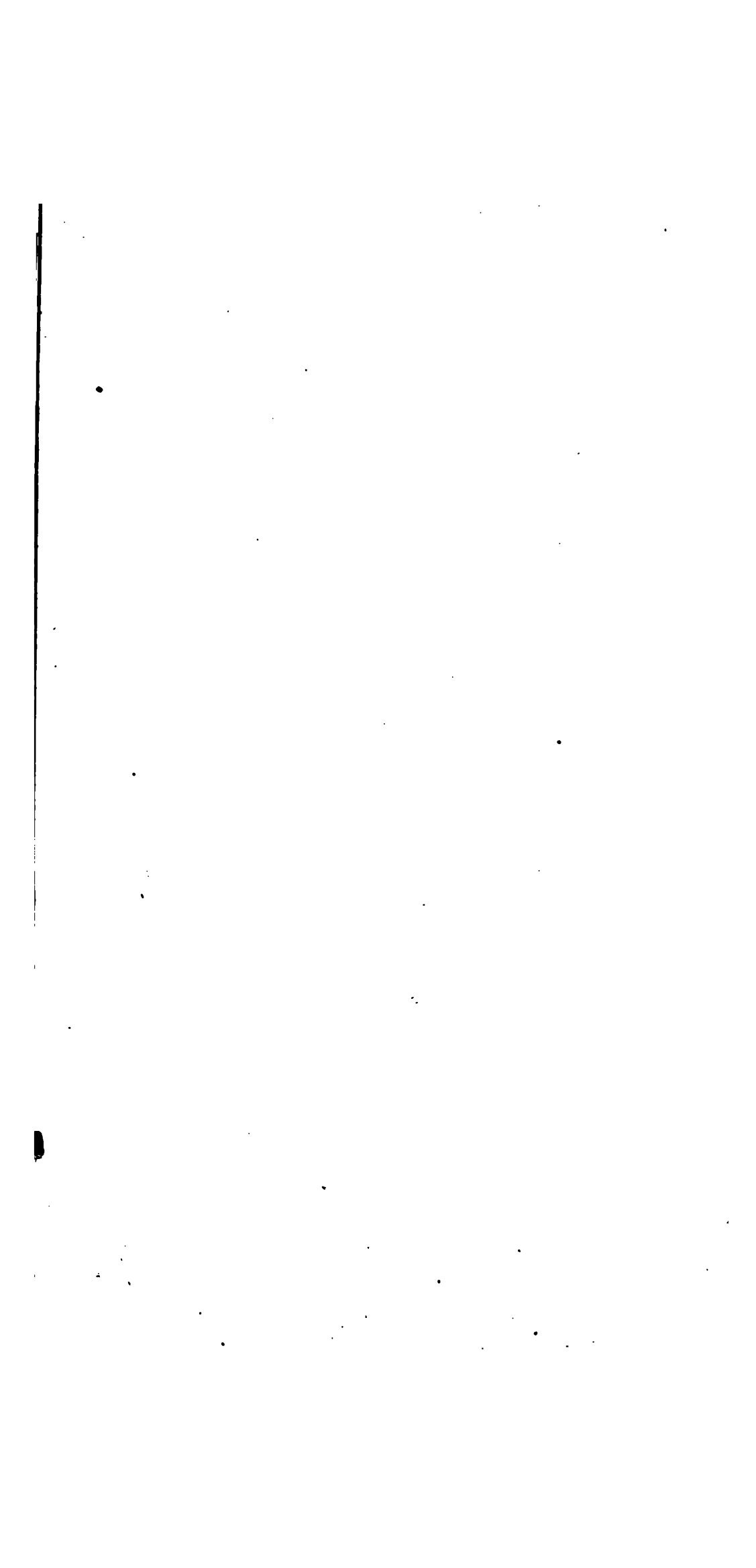






State Trials.

VOL. XI.



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. XI.

32 CHARLES II. TO 4 JAMES II., 1680-1688.

L O N D O N :

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1816.

PH



ROY WEN
J. B. H.
WARD

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C O B B E T T ' S
C O M P L E T E C O L L E C T I O N

O F

State Trials.

925. Proceedings against HERITORS OF THE SHIRE OF FIFE, for Absence from the King's-Host:* 32 CHARLES II. A. D. 1680. [Now first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in Prætorio Burgi de Edinburgh, vigesimo tertio die mensis Februarii, 1680, per honorabiles viros dominos Georgium Mackenzie de Tarbet Justiciarium Generalem, Thomam Wallace de Craigie, Justiciarie Clericum, Jacobum Foulis de Colintoun, Robertum Nairn de Strathurd, Davidem Balfour de Forret, Davidem Falconar de Newtonn, et Rogerum Hoge de Harcarss, Commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

Intran,

— Hay, of Balhousie.
Robert Hamilton, of Kilbrachmont.
James Melvill, of Cassingray.
Alexander Durhame, of Largo.
Captain Gideon Murray, of Pitkeiris.
Charles Cowan, of Corstoun.
David Balcanquill, of that Ilk.
Alexander Nairne, of Samfoord.
James Young, of Kirkton.

* Wodrow does not particularise this Prosecution. However what he says of the proceedings in general against the Absents from the King's Host, is worth insertion:

“ We have several old laws in Scotland made in the time of our feuds, and almost continual differences among families and clans, and when our kings lived in this kingdom, which do make the not coming out when called to the king's host, a great crime, and *ad terrorem* severe punishments are by these laws knit to it; but I question, if for these hundred, or

VOL. XI.

Mr. Alexander Nairne, of Lidsefreirtoun.
John Lundie, of Stratherlie.
George Moncreiff, of Redie.
Sir James Sinclair, of Kinnaird.
John Aitoun, of Inchdornie.
— Brown, of Phinmont.
— Murray, of Pitlochie.
James Kynninmond, of that Ilk.
James Weymes, of Gleniestoun.
Robert Kinncil, of Graingmyre.
Sir James Howburnie, of Menstrie.
John Lindsey, of Dowhill.
David Beaton, of Bandon.
Walter Lawe, of Bruntoun.
— Balfour, of Balbirne.
Sir John Henryson, of Fordell.
Robert Cunningham, of Woodfeild.
Henry Shanks Portioner, of Kinghorn.
Mr. John Mitchell, of Babardie.
Mr. Charles Wardlawe, of Logie.

INDYTED and accused, That wher, notwithstanding be the lawes and acts of parliaments of this kingdome and constant practique therof, the remaining and abyding frae his

hundred and fifty years, they were put in execution, till now they are advanced as an handle against a great many persons, who from different reasons came not out against the West country army.

“ Matters were laid last year for this prosecution; and, of design, I left them to this place, and so we must look back a little. After the rising at Pentland, little or no stir was made about heritors non-attendance upon the army; but now our managers resolve upon severer courses; and when they find that

B

majestie's host and royall standart be hve crymes and severlie punishable; and be the 4th Act, 1st Parliament king James 1, it is statut and orlained, that if any disobeys to

what was to arise from the estates of such as had been personally concerned in the rising, would not answer their expectations, a more general oppression of gentlemen and heritors is resolved upon. It was presumed, that such who did not heartily join the army, were well affected to Presbyterians, and no opportunity of bringing such to trouble was left, especially when it was like to bring in large sums of money. Thus I find by the council-registers, November 6, 'That, at the desire of the lords of justiciary, a committee is named to meet with them, the chancellor, earls of Argyle, Murray, Glencairn, the president, treasurer depute, register, and advocate, and consider what shall be the punishment of absents from the king's host. November 8. Their opinion is reported, that the heritors and freeholders guilty, should be fined; the most guilty not above two years valued rent, and the least in a fourth part of their rent: that those who are fined in the least degree, be appointed to take the oath of allegiance and declaration, and, if they refuse, that they be fined in the highest rank.' The council approve this report. Thus no small persecution for conscience sake, is mixed with this civil kind of crime. Those proposals are transmitted in a letter to Lawderdale, dated,

"Edinburgh, November 11, 1679.

"May it please your grace;

"The just abhurrence we have of the last rebellion, and the too just fears that the same principles may occasion the same distempers, do oblige us to inform his majesty by your grace, that if these who went not to assist his majesty against these rebels, or deserted the king's host, be not punished, we cannot promise his majesty will have any proportional force against any future insurrections, since we find, by our great experience, that these who were at daily expence and hazard in that expedition, are much discouraged, when they see others who stayed at home, or deserted, suffer nothing; and that such as stayed at home, from a principle of unkindness to his majesty's government, do treat the dutifulness of such as went there, as an officious and unregarded forwardness: withal, your grace may inform his majesty, that we are resolved to pursue so moderately these offenders, as may shew that this punishment should be rather a warning; these most guilty being not to be fined above two years valued rent, whilst others, who are less guilty, are to be fined at least in a fourth part of a year's valued rent, and which is little more than what they behaved to have spent in the expedition: whereas, the statutes against the crimes, having left the punishment to be proportioned according to the several circumstances that should occur, such

inforce the king against nottor rebels against his person; when they be required be the king and commandit, they shall be chalenged be the king as favourers of sick rebellers; and be the

offenders have been punished by forfeitures, confiscations, and banishment. These our resolutions, though taken and formed after much serious debate, are subjected with all dutiful respect to his majesty's royal consideration, by
"Your grace's most humble servant,
"ROTHES, Cancell. I. P. D."

"The motions for this heavy oppression of multitudes, we see, came from Edinburgh, and were fallen in with at London. Accordingly, I find a letter from the king upon this subject, recorded in the justiciary-registers, of the date,

"C. R. "Whitehall, Nov. 18, 1679.

"Whereas, albeit by express law, the deserters from our host be punishable by death, yet we are graciously pleased hereby to allow you to proceed against them in the same way, and to the same pains and punishments as you are resolved to proceed against the guiltiest of such as did not come to our host: for doing whereof this shall be your warrant.

"LAWDERDALE."

"By the proclamation issued out during the rising, the absents from the host were to be punished as deserters of it; but that being death by some antiquated laws, and it not being blood but money, a good many about Edinburgh were at this time wanting. This letter was procured with relation to deserters, who, I suppose, were not many, in the ordinary sense of the word; and this was a preface to what followed as to the absents.

"That same day, a letter is writ to the council, approving the proposal in all points, which they make in theirs of the 11th, and so it needs not be insert here. When they are thus warranted to begin their finings upon this head, they go roundly to work, and letters are writ to the sheriffs in each shire, that they send in the books of valuation, or attested copies of them to Edinburgh; and the officers of the army are appointed to send in lists of the heritors in each shire, who did not attend the king's host.

"In December and January, citations are ordered to be given to some hundreds of gentlemen, heritors, and freeholders, by the justiciary: it took some time before the lists could be made up, and the witnesses condescended on, and the managers themselves seem not to be fully agreed, and severals were for moderate courses, gentlemen's excuses being found many of them highly reasonable for not attending musters, and coming to the host. But the violent party prevailed.

"Thus, February 23, a great many considerable gentlemen, heritors, and fears are pannelled before the justiciary for absence from the host, and receive their indictment. Good numbers of the ablest lawyers were con-

57th Act, 13th Parliament king James 2, it is ordained, that all maner of men that has land or goods be readie horsed and geared efter the facultie of his lands and goods for the defence of the realme at the commandment of the king's letters, and whoso beis not, he shall be punished in his person and goods, especiallie when they are requyred therto be his majestie's proclamation for subdueing of traitorous

played by the gentlemen, and their defences are long, and pleadings very large upon the matter in general, and the particular circumstances of the pannels. The advocate gives large replies, and enforces his reasonings with the weight of the letter from the king to the council upon this head, dated November 18, which was noticed just now.

"This argument from a resolution in council, backed with royal approbation, no doubt was unanswerable; and so the lords give sentence against the gentlemen. I cannot insert all who were fined now and afterwards; only, for a taste at this time, James Young of Kirk-toun is fined in 1870*l.* Scots,——of Pitlochrie in 700*l.* Alexander Durham of Largo in 1850*l.* David Balcanquel of that ilk in 500*l.* Alexander Nairn of Samford in 294*l.* George Moncrief of Redie in 300*l.* James Weemas in Glencorstown in 175*l.* and multitudes of others.

"At other diets of the justiciary in February, I find vast numbers of gentlemen and heritors in the shires of Lethian, the Merse, and other places, pannelled, and more than a hundred of them fined in very considerable sums; and, towards the end of March, the Lords are taken up in the same work: sentences are past against as many as in February, if not more, and discharges are produced of the payment of former fines, some of them several thousand pounds.

"Upon the 26th of July, this matter of absence from the king's host, is taken out of the hands of the justiciary, and put in the hands of the council. This was a more arbitrary court, and gave not themselves the trouble of lawyers, and legal defences. That day, I find the advocate produced a letter from the king, of the date,

"C. R. Windsor, June 1, 1680.

"Right trusty, &c. We are sensible of the small effects that have followed by the trial of such who have been absent from our host, before the justiciary; and being informed that summons are issued out to cite many others through the shires for that crime, it is now our will and pleasure, that they be proceeded against, not criminally, but by way of fining, according to the degrees of their guilt, not admitting frivolous excuses for absence or desertion, which we look upon as preparatives of dangerous consequences to our service. We desire none benorth Tay be troubled with trials or citations, these only excepted who are known to be notoriously disaffected to our government in church and state: for though we are at this

and seditious rebels, who had most traitorouslie assumed and taken the boldnes to burne his majestie's lawes and acts of parliament, at the marcat croce of the burghes of Rutherglen, upon the twentie-nynth of May last, a day appointed for ane solemne anniversary thanksgiving for his majestie's restauration to the royall government of this kingdome, and who had most treasonable convocat and as-

time graciously pleased to excuse them from a criminal process, yet we will not suffer absents and deserters to escape without some punishment by way of fining, which we desire you to signify to our justice-court. So we bid you, &c.

"How it came to pass that such a letter as this, of the date, June 1, was not intimated, till July 26, I shall not enquire; certainly somebody or other found their advantage by it. This letter is intimated and recorded in the criminal books, and all processes in dependence before them are deserted, and in their room succeed the processes for forfeiture of life after Airs-moss.

"When this matter comes before the council, they go closely to work, and their registers for some months are mostly taken up with those processes. Many hundreds are cited before them, the diets of some are continued, others are deserted (not without compositions and money privately given.) Multitudes are fined in absence, and some declared fugitive. To enter upon particulars would swell this chapter too much. Let me give only a few instances. 'July 13, Dundas of Borthwick is fined in a year's rent. August 1, the Jaird of Riddel's excuses for absence not sustained, he is fined in two years rent, which is 6,000*l.* Scots; George Douglas of Bonjedburgh fined in 6,000*l.* Scots; Ker of Cherrytrees in 3,000 merks; James Scot of Thirlstane in 2776*l.*; Francis Scot of Greenhill in 800*l.* It is noticed, that they all refused the declaration, probably otherwise they might have had their excuses sustained, or been fined vastly down of those sums; and so they are properly sufferers for their opinion in point of prelacy. August 9, the following persons in Berwickshire, are fined for absence from the host; Patrick Wardlaw in 4,000*l.* Scots, Robert Brown of Blackburn 1,200*l.* Pringle of Greenknow 1,500*l.* Alexander Hume in St. Bathans 200*l.* Samuel Spence 400*l.* Clappertoun of Wylie-cleugh 1,000 merks, George Hume of Bassenden 1,000 merks.' They are all ordained to pay in six days. But particular instances would be endless. Nov. 11, I find the council appoint, 'That caption be executed with concurrence of parties of soldiers, for the fines of the absents from the host; that their escheats be gifted in name of his majesty's cash-keeper; that in time coming, all found guilty of absence shall be kept in custody till they pay the fine.' This obliged many not to compare, and then the soldiers execute the sentence pronounced in absence."

sembled, not only without but against his majestie's authoritie, to the number of fyve or six hundred, and took the boldnes to invade and sett upon some troups of his majestie's forces at Lowdoun-hill, wher having killed and woundit severall of his majestie's subjects and souldiers, and being therby emboldned, they did swell and growe to the number of nyn or ten thousand, to which his majestie's modeled forces wer nowayes equal; and his majestie, for the preservation of his royall greatnes honour and government, the happines, quyet, and tranquillitie, of his good and dutieful subjects, having by his proclamation of the 7th of June last,* called out, requyred

* This Proclamation, among others, was issued upon occasion of the disturbances in the West of Scotland; it is inserted in the Appendix to the second volume of Wodrow's History (N^o 17.) as follows:

PROCLAMATION calling out Heritors to attend the King's Host, June 7, 1679.

"Forasmuch as the insurrection in the Western shires is grown to an open rebellion, and that the number of these desperate rebels do increase so, that all his majesty's loyal subjects in their several shires, ought timeously to look to their own security, and put themselves in a posture to defend the king's authority, and to oppose all attempts of desperate and wicked rebels: and albeit his majesty's privy council have already issued forth their orders for drawing forth the militia forces, horse and foot, in several shires, and appointed particular days of rendezvous, and upon such occasions may require all fencible persons, betwixt sixty and sixteen, to rise for suppressing of these rebels; at this time, they have thought fit only to call out and require the regiments of the foot militia, in the shires aftermentioned; and all heritors and freeholders, who are fencible persons, and their servants and followers, to come out upon horseback; and for this cause, to forbear to require the militia troops, in these shires underwritten, at this time, notwithstanding of the orders already issued forth, in so far as concerns the horse militia allenarly; and do hereby require and command all heritors and freeholders, who are fencible persons, with so many of their servants and followers as they can bring on horseback with arms, within the shires of Edinburgh, Linlithgow, and Peebles, Haddington, Stirling and Clackmannan, Berwick, Roxburgh and Selkirk, Fife, Perth, Forfar, Kincardin and Marshal's part of Aberdeen, Bamff and Errol's part of Aberdeen, Ross, Elgin, Forbes, Nairn, and this side of Ness, to convene at the places and times aftermentioned, and to receive their orders, and to be under the command of the persons underwritten, viz. Edinburgh to meet at the links of Leith upon the 11th day of June instant, and to be under the command of the lord Collingtoun; Linlithgow and Peebles to meet at the links of Leith the 11th day of June instant, and to

and commanded, all heritors and freeholders, sensible [fensible] persons ther servants and followers, to come out upon horseback within the

be under the command of general Dalziel; the shire of Haddingtoun to meet at Beinastoun-muir the 11th day of June instant, and to be under the command of the viscount of Kingstoun; Stirling and Clackmannan to meet at the town of Stirling, and from thence to march to the links of Leith upon the 11th day of June instant, and to be under the command of the lord Elphinstoun; Berwick to meet at Fogo-muir upon the 11th day of June instant, and to be under the command of the earl of Hume, and in his absence, his brother Charles Hume; Roxburgh and Selkirk to meet at Ancrum-bridge upon the 16th day of June instant, and to be under the command of the lord Elibank, and the laird of Stoba, who are to command according to the division of the militia troops; Fife to meet at Cowpar the 18th day of June instant, and to be under the command of the lord Newark; Perth to meet at Perth the 13th day of June instant and to be under the command of the marquis of Montrose, and such persons under him as he shall appoint; Forfar to meet at Forfar upon the 13th day of June instant, and to be under the command of the earl of Southesk; Kincardin and Marshal's part of Aberdeen to meet at Aberdeen links upon the 19th day of June instant, and to be under the command of the earl of Aboyne; Bamff and Errol's part of Aberdeen to meet at Turreff upon the 19th day of June instant, and to be under the command of the earl of Kintore; Elgin, Forbes, Nairn and this side Ness, to meet at Forbes upon the 20th day of June instant, and to be under the command of the earl of Murray, and in his absence the lord Duffus; Ross to meet at Chaury the 23rd day of June instant, and to be under the command of the earl of Seaforth; and ordain all the heritors and freeholders of the shires benorth Forth, to march immediately after the rendezvous to the bridge of Stirling, and all the heritors and freeholders of the shires on the south side of Forth to march after the rendezvous to the Links of Leith, there to continue till further order: with full power to them to seize upon all disaffected persons, and in case of resistance, to use them as enemies, within their respective bounds, or such as shall be suspected to be going out of the shire to the rebels: with power likewise to the said commanders, to appoint officers under them, to command in the several divisions of the shires abovementioned; ordaining hereby the respective commanders aforesaid, to cause public proclamation and intimation to be made hereof to the respective shires under their command, at the several places already appointed for the first day's rendezvous of the militia, that the said meetings may be punctually kept; certifying hereby all such heritors, and others aforesaid, as shall not come out upon horseback them-

shyres of Fyff, Edinburgh, Linlithgow, Peebles, Haddingtoun, Stirling; Clackmanan, Berwick, Roxburgh, Selkirk, Perth, and others therein mentioned; yet the persons above-

selves with their best horses and arms, with so many of their servants and followers as they can bring out upon horseback, they shall be liable to the pains and penalties provided by the acts of parliament against such as do not attend the king's host, or desert the same, and looked upon as disaffected persons, and favourers and compliers with rebels, and pursued and punished accordingly. And ordain these presents to be printed and published at the market-cross of Edinburgh, and other places, foresaid, that none pretend ignorance.

"THO. HAY, Cl. Secr. Conc.
"God save the king."

Wodrow observes, that "the narrative of this proclamation shews it was formed when the regular forces coming back towards Glasgow, thought good to return, since it represents that the insurrection in the western shires is now grown to an open rebellion:" and he proceeds, "This proclamation was matter of very grievous fining to a great many gentlemen and others, who, for different reasons, could not attend the king's host. All or most part of the officers named for that host, were the most violent persecutors of Presbyterians, and there were not a few among them, favourers of Popery, and some professed Papists. This was plainly contrary to law and their own late proclamation this very year, and flowed from the strength of the duke of York's party in council."

He also inserts in the same Appendix (No. 18) the following paper 'writ by a very able hand' intitled "A Letter of Advice writ by a gentleman to his friend, on the occasion of his going out to wait upon the army conform to the proclamation, June 7, 1679."

"Opportunity is the life of action, without which the deepest and most subtilly devised counsels prove abortive. Statesmen know, that for all designs, which otherwise might be startled at, there is no opportunity comparable to that of sudden emergents, whether happy or unhappy, if they appear of any great concern: for mens spirits, by those being set aloft, and so rendered unwary and inadvertent, fair pretexts are then likely to take, if ever; because at such times, men have not, or take not leisure to search to the bottom of things, or to consider them on all sides, and according to all their present and future importance. A recent instance of this, are several grants of the parliaments, both of Scotland and England, to his present majesty, upon the happy and amazing surprisal of his restauration, which neither he, nor king Charles 1, nor yet king James his fifty years peaceable reign, though all assisted with very wise and politick counsellors and profound devices, could ever be able to work out, till that opportune juncture had made way for them. Of which I shall only say, that I

named, did presume to abyd and remain frae his majestie's host and royall standart, and they and ilk one of them, are actors airt and part thereof, which being found be ane assyse,

wish they may prove as effectually beneficial for the true and lasting interest of his majesty and his kingdoms, as I am bound in charity to suppose they were affectionately meant for the good of both.

"To apply this to our present commotions: though I cannot positively charge those who are at the helm, of any underhand contrivance, or certainly conclude the same from the outward appearance of their actings, it being possible that such important suddenties, as have now fallen out, may prompt them to over-reach themselves in their commands, as well as us in our, may be more zealous and forward, than well advised and really dutiful obedience: but, as long ago it was told me, by a witness of a certain great man's behaviour at the engagement, Anno 1648, that he would not say, for all the world, that he had betrayed them, yet he could justly say, that if he had got a house full of gold to betray them, he could have done no more; so I will not assert, with the church or state fanatics of this time, that our counsellors are really designing to introduce upon us, Popery and arbitrary government, and are catching the advantage of the present confusions in prosecution thereof; but in reason I may say, that had they the most real and forward intention of so doing, they could hardly have fallen upon more likely and favourable courses, for that end, than some of those they are taking.

"There is much talking of a Popish Plot, and if there be such a design of arbitrary power, it being also a work of darkness, that dares not assault us with open face, and meet to go in hands with the other, I may call it another Plot, which must work underboard until hell be prepared to defend it. And these two proclamations, the one for volunteers, whereby all the Papists in the kingdom are armed, and called out to the fields; and the other charging, under highest pains, the whole nobility, gentry, and heritors to attend the army, under the command of officers appointed by the council, are like two mines sprung upon the chief bastions of our liberties and religion, and we, like fools, hear the noise, and gaze upon the smoke, but discern not, nor consider what it hath carried away with it.

"For my own part, to give you my judgment freely, as you have desired it; amongst all the grievances which we have been complaining so much of, these years by past, there are but few, that either better deserve the name, or are indeed of greater weight than this; neither know I any one step, whereby Popery and arbitrary power have had occasion of making swifter progress towards their settlement amongst us, or whereby they have gained more ground of us, than by these two acts, however lightly regarded.

they ought to be punished in their persons and goods, to the terror of others to commit the like hereafter.

Persewer.—Sir George M'Kenzie, of Rosehaugh, our sovereign lord's Advocat. /

Mr. Robert Colt, Advocat as Procurator for Hay, of Balhousie, alleadges that the pannall

“By the constitution of our government, we are not only ruled by laws, but also by customs, the obligation whereof is many times equivalent to that of our most positive laws: must it then be a custom, and consequently a law amongst us, that, to satisfy the humour or interest of a court's favourite, we may be liable to most heavy burdens, and taxes upon our estates, to furnish him with power to oppress and crush all that will dare to oppose him? and notwithstanding that we bestow such large parts of our fortunes for the maintenance of soldiers for that end; yet, when by the long continuance and extremity of those oppressions, which were enough to make even the soberest and wisest men mad, he hath forced wars and disorders of the highest nature and consequence, it may be, designedly too, for ought that is seen, and as by no small politicians is reasonably alledged, we nevertheless must be obliged also to come out in person, with our lives in our hands, and serve as soldiers under such commanders, as the council, being mostly his creatures, think fit to appoint: wherein these things are noticeable, which gentlemen would do well in time seriously to consider, if they be indeed content that they go into a law, lest afterward they repent too late.

“That when we have granted never so large taxations for paying of soldiers, the council, without a parliament, or our own consents, may nevertheless command us to serve as soldiers ourselves, though it were but to uphold some particular interests amongst us, which, thus circumstantiate, will be found to be somewhat more than what either our old custom of waiting upon the king and his host with forty days provision, or yet the late offer of our parliament of all betwixt 60 and 16, do import.

“That they may impose commanders upon us, without or contrary to our choice or consent, whom if we offer to reclaim, we may be obliged upon our allegiance, to obey, as I hear they have done in the case of the gentlemen of East-Lothian.

“That they may so oblige us to serve under popish commanders, as they have done with East-Lothian, Kincardin and Marshal's part of Aberdeen, even though there are so many standing acts of parliament against them, and albeit by a late proclamation they are all prohibited the wearing of arms.

“That those commanders thus forced upon us, shall have the power of nominating their own officers.

“And that, to all this slavery we may be subjected, without any foreign invasion, for the destruction of our fathers, children, brethren

cannot go to the knowledge of an inquest, because it is offered to be proven that he was actualie present with the heritors of Perth-shyre, and had two or three servants with him, well appointed and keep't all the rendezvousie with the captain of the shire, and went alongt to the camp with the rest of the gentleman of that shyre, which defence does to-

and kinsmen, perhaps for no other crime, than their standing to the just defence of their and our liberties, against the incroachments of some court parasites, or whatever else it be, that yet his majesty's will being pretended, or at whatsoever rate procured, it must be presumption in us, or somewhat worse, to inquire further into the cause.

“And after all this, what is ours? and what privilege is there that we can lay claim to? If we will not think upon these things, when represented to us, nor lay to heart our great concernment in them; it may be said, without wronging us, that we deserve no less than all the slavery and misery, that by such preparatives are designed for us. Are all the nobility and gentry of Scotland content to settle this yoke upon us and our posterity? Must we be the degenerate succession of so noble and worthy progenitors, by yielding, without a testimony, those liberties, which, with such pains and care, they retained through a tract of so many ages, and transmitted intire into our hands? Were we born to be the betrayers or sellers of our own and our successors birth-rights? and so to be marked as the perpetual shame and opprobry of the history of our nation, unto the end of the world?

“As our readiness to serve our kings, to obey their just laws, and to defend their persons with our lives and fortunes, hath long time been no small part of the glory of our nation; so hath no less been the native courage, and resolute boldness of our ancestors in resisting, and opposing to their face, such flatterers, as, preying upon the goodness of their prince, have at any time, by misrepresentations of persons and affairs, endeavoured to abuse his authority, by forcing or insinuating upon his faithful subjects, customs different from, or contrary to their settled laws, or derogatory to the honour, and opposite to the true interest of king and kingdom.

“The Cabal, who, it seems, knew well enough that their counsels would never be proof either of law or reason, and so behaved only to be propagated by authority and force, had good reason to obtrude upon the late parliament of England, that Test, whereby they were to declare upon oath, that it was unlawful to resist with arms, any person acting by the king's authority, which they, seeing the project, and foreseeing the event, found no less reasonable, for the good both of king and country, unanimously to reject. For to say, that no man acting by the king's authority ought to be resisted, is all one as to say, that it is impossible that kings can be abused; and all one as to

tallie eleid the tybell, which only relates to such as remained from the host.

My Lord Advocat alleedges, that the allegiance ought to be repelled in respect be the

say, that if a wicked minister design the ruin both of king and kingdom, under colour and pretext of authority, it is unlawful to hinder him, though it were in our power. If Haman's Plot had taken effect before Esther's access to the king, who will judge it to have been a crime, though the Jews had stood to their own defence, until such time, as his treachery, their innocence, and the king's damage had been represented? though God in his mercy and justice provided a better outgate for them, and a worse end for him; a dreadful example, and which ought to strike with horror all abusers of their king's favour and authority.

“ He deserveth that a tyrant should reign over him, and is not worthy of the protection of a lawful prince, that will not cheerfully hazard his life and fortune for the defence of his person, honour, and just laws. But what if the king's name be made use of, to acts manifestly contrary to his interest in all these, and which, it may be, every reasonable man, and loyal subject is bound in duty to believe, his majesty would abhor, if impartially consulted in them?

“ If this be not impossible, I hope our next parliament will see to it, and consider what the former hath done; and till then, before you engage yourself too deep in the cause, you have good reason to examine, both what are the true causes of these poor people's appearing in arms, and what they would be at; and if they be oppressed contrary to justice, or demand not unreasonable things, you would think, what may become of you and us all when they are broken.

“ They say, the devil should have his due; and to deal no worse with the Presbyterians, though they were as bad as he; I must confess, that never a people on earth were dealt more hardly, or more unreasonably with than they. They stand upon a scruple of conscience, that they must have no meddling with the bishops, and that both by scripture, and their solemn oath to God, which they think no man can dispense with, together with an opinion of more sensible benefit to their souls, they are bound to hear none other than those of their own way; which being granted them, as it was once the utmost of their aim, so, no doubt, would have as absolutely secured them to peace, and obedience to magistrates, as any other subjects whatsoever: but this not being allowed them, they, for avoiding public offence and the reach of the law, assembled themselves privately in houses for hearing their preachers; which, albeit the same be done openly, and without either challenge or punishment, in England and Ireland, yet here was looked upon, as so notorious a crime, that strict and most severe acts were immediately issued forth, and the poor people hunted from house to

houses and acts of parliament heritors are to assist the king, to punish rebels, and are to enforce the king against rebels, both which necessarilie implys as the nature of their duty

house, apprehended, imprisoned, some in close prisons, some tortured for procuring confessions from them, some weak or sickly persons blocked up, till they died in prison, others fined in great sums of money, some whereof paid again and again, to the great diminishing of their fortunes, and detriment of their posterity, others not paying were kept still in prison, some whereof have been prisoners many years bypast, and are yet so, who never saw a field-conventicle.

“ Thus they were constrained to betake themselves to the hills and deserts in the fields, for shunning of these severities, for which they were more cried out upon than ever, as persons not only disobedient to the king's laws, but designing a rebellion against his person and authority by these field-meetings. They, like so many Roman vindicators of their liberties and rights, knew that desperate diseases required desperate remedies, and therefore thought no hazard too great for them to undergo, for preventing the bondage threatened against them and their posterity; while we, like so many asses, crouch under the burden. He must see to his freedom, he to his life, he to his fortune: and though our endeavours in those methods befool us never so often, yet we'll sit still and see the public interest sink, rather than think of another way. If our wounds will not cure without pain, we'll let them rot upon us. But behold the end of this sure dealing, of this thin-skinned and effeminate tenderness. Fly upon it! it looks as if this generation were made for no other end but to be trampled upon, then destroyed, and well to deserve both.

“ Upon this head, the then armless multitude was pursued from hill to hill, as so many traitors; armed men sent against them, by whom many of them were apprehended, some wounded, some killed, some imprisoned in close prisons, some tormented, some sold as slaves to foreign plantations, though by the Providence of God, delivered in a strange way, to the shame of their enemies. Some of their women, both old and young, most barbarously used, being stript naked by the rude soldiers, their clothes carried away, and they left in that destitute condition in the open fields. And as if all this their patient suffering, had served for no other end, but to incense their adversaries' fury and implacable malice the more against them, as a more eminent proof of their despite at them, they raised a great army, with a sumptuous train of ammunition and artillery, to fight against the very wind of the west country, as carrying alongst with it an infectious presbyterian air, whereby other places might be endangered; for the poor people in the mean while were all sitting peaceably in their houses.

generallie does, not a simple coming to the host, but one remaining till the enemies be defate; but so it is, that Balhousie did not stay with the host, but came home and so is lyable; and, if this wer allowed, the act of parliament

"This their host mainly consisted of barbarous highlanders, by whom, like as many savages, cruelties, oppressions, plunders, and other horrid abuses were exercised upon them, too great, villainous and shameful to be named, by any man who owns himself a country man of those who committed them, or of those state ministers by whom they were authorized.

"In the mean time, by an act of non-addresses, and another of intercommuning, whereby it is unlawful for the son to give a bit of bread, or to speak to his father, or the wife to her husband, though lying starving at their doors, all access by supplication, or otherwise, either by themselves or their friends, being cut off from them, either to his majesty or his council; and whatever acts of grace his majesty was pleased to send in their favours, the same being either so minced and clogged, or wholly suppressed by the means and power of the bishops in the council, that they were altogether deprived of the benefit thereof, as was done with a late order from his majesty, for liberty to them to preach in houses: and after all this, a proclamation being emitted, whereby it is declared treason for them to be found at those meetings with any arms, and the standing forces having received orders of fire and sword against all that should withstand them; which being put in execution by captain Graham of Claverhouse, to the effusion of much blood, and the same measure being declaredly appointed for the whole remainder of that party; let any sober and disinterested man judge, if, with that wise and honourable counsellor the earl of Shaftsbury, it may not rather be thought a miraculous work of God, that these people, having the hearts of men in them, should have sitten and suffered so much and so long; than be thought strange, that now at length they appear in arms for their own defence from such utter and imminent ruin; or yet strange, that such numbers should flow in to them at such a nick of time, when both those of our own nobility and gentry, who have so much endeavoured to represent to, and convince his majesty of our grievances, have, by the forgeries and insinuations of evil counsellors, been so often, and yet are, not only totally frustrated, but slightly and misregardfully treated, as persons opposite to his majesty's interest and designs: and also by proroguing of the English parliament, mens hopes of help and safety, either for liberty or religion, so universally fail them, and the succession of the crown, as well here as there, is so likely to be devolved upon a known and avowed papist

"Are you willing then to bestow your assistance, for completing the sum of all these oppressions? Or do you think that your loyalty engageth you so to do? Yet before you go, I

should be elusorie, the countrey undefendit, and rebels unpunished.

Sir *George Lockhart* replies, that the defence stands relevant notwithstanding of the answer, because it is not contraverted what is

would have you answer me seriously these two or three questions.

"Are you sure that your loyalty would fortify you to suffer patiently all those things, if the burden were on your own shoulders?

"Have all these arguments, that you are so well furnished with, against implicate faith to churchmen in church-affairs, no proportionate weight at all against implicate faith to statesmen in state-affairs? (Or can you not say that the streams are muddy, unless you conclude the fountain to be so also?)

"Who had greater respect to the king's honour, interest and laws, those, that without the conditions required by the law, in obedience to the act of council, found caution of law-borrowers for his majesty's safety? (Or they, who in obedience to law, reason, conscience, and their allegiance to their prince, did altogether refuse it, both as a thing wherein the law could not be answered, and which they found exceeding derogatory to his majesty's honour, dignity and sovereign authority, which our allegiance obligeth us, 'with our lives and fortunes, to the uttermost of our power, constantly and faithfully to maintain, defend and advance against all and whatsoever persons, power or estates, who shall presume in any ways to pre-judge, hurt or impair the same?'" James 6, par. 18, cap. 1.

"In which, by the way, it is worth the noticing how miserably those patrons of supremacy, those champions of the arbitrary letter law over-reached and faltered themselves, by this their notable legal invention for supplying the room, and saving the credit of their illegal bond, in that, while they are contending so much to exalt the king above the law, they, in the mean while, not only make him a supplicant and demearer of himself to the law, but subject him to so mean and humble a degree of necessity of supplicating, a degree so far unsuitable to a supreme governor over all persons, and in all causes, that not only he is the first of all kings, that ever was made, by his own counsellors, to stoop so low, and like to be the last; but even amongst his own subjects, there are many thousands, that would think it very far below them to lawborrowers of such as his majesty, at least his council declareth him ready to take by that act, yea, who have so much honour to maintain, as would make them disdain the very thought of such a practice. We may judge then what a shift our council hath been put to for a colour of law to their actings, when they behoved to make this their choice.

"Now this was a proclamation and act of council, yet how contradictory, both to the true honour and interest of the king's majesty and to those fundamental standing laws, whereof

the import of the acts of parliament lybelled upon, whether they be sufficient to found ane dittay against deserts, yea or not; but the

by our whole representatives have unanimously bound themselves and us, and their and our successors, to the perpetual and unalterable maintenance of both, is evident to all that will not wilfully shut their eyes.

“Is it for us then, to take upon trust our king’s mind, honour or interest from such law-givers? Or if we do, may we not afterward be found as culpable in obeying, as they in commanding?”

“If this prevail not, consider but these heads of the oath of coronation, wherewith, and whereupon our kings receive the crown of this kingdom, ‘that they shall rule the people committed to their charge, according to the honourable laws and constitutions received in this realm; that they shall procure to the uttermost of their power, to the kirk of God, and hail Christian people, true and perfect peace in all time coming; that they shall forbid and repress, in all estates and degrees, reift, oppression and all kind of wrong; that in all judgments, they shall command and procure, that justice and equity be kept to all creatures without exception, as the Lord and Father of all mercies be merciful to them.’ James 6, parl. 1, cap. 8. Think then how deep it may draw upon their score, not only before God, but before man, who presume to take upon them to advise or persuade his majesty to act, or to act themselves under colour of his authority, things manifestly contrary and repugnant to this solemn oath of God, and chief fundamental law of our nation; and of what fatal consequence it may afterwards prove, not only to them, but also to their abettors, aiders, encouragers in such wicked unlawful counsels and practices; at least, if ever Scotland be so happy as to return again to the unbiassed right use of law, reason or conscience; and yet more especially, when, to the conviction of all men, our king is of himself so naturally propense and inclinable to all ways of justice and clemency.

“It is known, that his majesty, at his restoration, declared himself resolved not to alter the government of the church then established. It is known, that of late also, a plenary and universal indulgence was granted by him, in favours of the nonconformists. These are the native effects of our king’s inclination, goodness and clemency, by either of which all these imminent mischiefs might have been prevented. Who then were the obstructers? Ought they not now rather to be searched for, looked upon, and dealt with as the greatest enemies of king, people and government, than assisted in the prosecution of such pernicious counsels as have occasioned so unhappy and so unseasonable a breach in our peace and safety?”

“Shall I ever believe that his majesty, who, of his own nature, is so wise and so just a pat-

only defence is, that ther is no criminall lybell raised against the pannall as a deserter, but simplie for byding frae his majestie’s host

tern of civility and obligingness, and who ruleth by compact betwixt him and his lieges, would ever have forced commanders upon the nobility and gentry? especially at a time, when it appears, he needeth so much their service, and they are so willing to bestow it. When the French king, who hath no other law for his actings but his own will, yet doth not so much as propose any officer to the gentry, when he calleth them forth, but remitteth that matter wholly to lot.

“Can it be supposed, that his majesty, whose life, honour and kingdoms are so hunted for, by plot after plot of these bloody emissaries of Satan, the Papists, the greatest and most insolent enemies of monarchy, and the most incurable plague and bane of all human society, and who therefore commanded lately his proclamation to be issued forth, for apprehending or banishing many, and wholly disarming all of them within all the corners of the land, would ever not only have restored to them the power of their arms, but have put great numbers of his faithful and honourable Protestant subjects under some of their commands?”

“Can any man think it his majesty’s will, that Bailie Baird’s son, who was never a soldier, should be cornet of a troop where the earl of Lothian, earl of Dalhousy, viscount of Oxenford, lord Torpichen, Balmerino, &c. are to ride as troopers, and where his grace the duke of Buccleugh, when he arrives, can, according to the proclamation, pretend no higher than the right hand of the first rank?”

“And since we have such ground to doubt of these, and it is so well known, that his majesty did not of himself intrude bishops upon us, but only, by the selfish treachery of some who were employed to secure us from them, he was persuaded, and made to believe, that that government would best agree with us: who, in reason, can, or ought to imagine that it proceedeth from his majesty, that his subjects of his three kingdoms should be engaged in blood, wars and devastation of their fortunes, whereby they may be rendered a prey to foreign enemies and lurking Papists, and unfit to serve his majesty in a more necessary cause, and of far greater concern to king and kingdoms, with the uncertainty of what further ruin these evils may grow to, rather than part now with that government of the church, when he sees how far he hath been misinformed concerning it?”

“His majesty’s both mind and true interest being thus cleared, this then, in plain terms, as a consequence clear enough of itself, must be the true state of the affair. Duke Lawderdale is obliged to the bishops, they helped well to uphold him when he was tottering, and yet help him, and therefore we must uphold them, though we should all fall in the quarrel.

“Is the cause then sufficient? Can you

and royall standart, which is altogether distinct from the crime of desert, and ther are severall defences competent in the one case that are not

proper in the other, and criminall lybells of their own nature are *strictissimi juris*, and cannot be extendit beyond the precise termes on

take your life in your hand, and securely rest your conscience upon it? Though you could, are you sure that his gain shall be yours? And, pray, whether was it interest or conscience, that made that statesman, when he was last amongst us, endeavour so much to have struck in with the Presbyterian party, those rebels against the king and government, when he saw them growing so fast, and so difficult to be borne down? Which likely had taken effect, if he had not been checked in the bridle at his first starting aside, and so behoved to renew his engagements, with fresh and evident testimonies of his reality, not finding it fit to unhinge himself of the one party, while he was yet unsure of the other.

“ If this then be the sum of the matter, that the bishops serve duke Lawderdale's interest, and we therefore must serve the bishops interest at any rate, lest otherwise we should seem weary of being tread upon; all I can say is, that captain Carstairs, Baile Carmichael, the town-major and his men, are like to come to no small credit by so noble and numerous a train of assessors, as the whole nobility and gentry of Scotland. However on some accounts, they must yield to them the preheminance, those only having the advantage of profit for their service, being mercenary rogues, and having others also under them to wait their commands, while these have the honour to testify their zeal, by far greater coudescendency of serving under command, and some under those they hate, some under those that hate them, some under insignificant green-horns, and others under worse than some that are, or have been their hired servants, and all this not only gratis, but to their great expence, and with the exposing of their lives and fortunes.

“ If you think this honourable for you, you may be doing as much, and as silent as any, albeit on all the forenamed grounds you have so just and handsome a way to retreat: if not, I freely give you my advice, that, as I doubt not but you will both be as forward and cordial as any man, in testifying your affection for the real maintenance of his majesty's authority; so, if you find not yourself indeed concerned to give proof of it in this quarrel, you disengage yourself in time; or if otherwise, that yet you go not out, nor do any thing without a protestation of *salvo jure*, upon the forementioned accounts, that, by a bad preparative, you be not the occasion of an irreparable damage to your country; which, at such a time, were I of one of those shires that are called out, you may believe me, I would think it my duty and honour to do, though with the greatest hazard, and though there were not another to second me.

When the public interest is like to suffer, by the ignorance, neglect or cowardice of all, he meriteth double glory, making all his nation,

and all their posterity his debtors, who steppeth in at such a nick of extreme need, with opportune help and assistance.

“ Take courage then, and regard not the clamour of court sycophants, who live upon their country's ruin, and will be crying down such heroick acts, as opposite and prejudicial to his majesty's authority. But be you confident, that it shall always at long run, be found and seen that he is the best friend to his king, that is the best friend to his country, and to the laws and liberties thereof, which both king and parliament have declared to be the birth-right and inheritance of the subject, and the security of their lives and fortunes, Charles 2. Parl. 1. Act 17. and that these two interests are as indivisible in the body politick, as are those of the head and the body natural.

“ For what is further, consult the scripture and your conscience and be fully perswaded in your own mind. For me you know, how much and how often I have contended for episcopacy: But now I have considered their partial behaviour in the matter of Danby and the lords in the Tower, those arch enemies of our king and government. I see them both there and here so knit to the bias of the court, that they will rather sell their souls, and the whole interests of the kingdom, than not swing to that side right or wrong. I see them generally to be men altogether set upon their own profit and advancement, and that, when once they can make their court well, they little mind religion, or the care of souls. I see they take no effectual course for curbing of profanity, and that, if a man will but stand for their grandeur and revenues, they easily dispense with his being otherwise what he will. I see, that almost any scandalous fellow that will own them, and hath but an M before his name, may have a kirk; too many whereof I know, and more here than with you. I have considered bishop Sharp, as their head and last introducer, whose reward hath been terrible in the justice of God, whatever the actors have been. And I have considered bishop Paterson as the tail, whose reward is, no doubt, waiting him also, if he mend not his manners. I have not forgot their cruel, arrogant and blood-thirsty stopping of his majesty's gracious bounty, and keeping up of his remission after the business of Pentland, which, with their torturing and hanging of the poor people, after quarters given them in the fields by general Dalziel, as it was a singular reward to him for his good service done them, so may it, to all honest hearts, be as palpable, as it is an odd example of their faith and manners. I see the very off-scourings of the earth employed by them as their trustees and heroes, for propagating of their conformity, and some of them, though base all over, and despicable above all expression, yet owned and caressed by them, as brave fellows and chief

which they are lybelled, and certainly the defence proponed is a total defence against the lybell *ut libellatur*.

My Lord Advocat duplyes, that abyding is expresslie implied in assisting and enforcing, for no man cane inforce but he that hyds, and his majestie's advocat insists, according to the subsumption, that he did remaine and abyd frae the host the day of Bothwel feight.

Sir George Lockhart, adhearing to the defence, craves a distinct interloquitor, and farder alleedges that tho deserting hade bein lybelled, yet the dittay cannot be put to the knowledge of ane assyse, because the pannall did obtaine ane passe from the marquis of Montrose, captaine of his majesties guards, and commander of the Perth shyre gentlemen, wher upon the considerationes therein mentioned, and particularie that the pannall was tender and validinarie and not able to attend, and that he hade left three well appoynted horsemen to attend his majesties service, he grants him licence and libertie to goe home without trouble or mollestation, as the said passe at length bears.

promoters of their principles and interest: yea, so little choice make they on this head, whether as to Profanity, Popery, Atheism, or what else you can think on, that, for ought that appears, as many devils out of hell would be welcome to them, to prop their Dagon of preclacy, and to be a scourge to the fanatics. I see, force and the rigour of the law are their two grand pillars, the Jachin and Boaz of their temple; and that their whole power, interest and endeavours are so joyntly and intirely bestowd upon the suppressing of conventicles, and for hindring the preaching of the gospel, by those of the nonconformist party, which renders it to me dreadfully suspicious, that their cause must be but so and so, when themselves judge it the main support and security thereof, that it never came to a fair hearing; for the truth is, they reckon themselves undone, if ever the people get leave to hear these men. I see, most of them look either with affection or indifference upon Popery, that the Papists themselves favour them more than any other government, that by their slackness in prosecuting them, they are the occasion of much evil to these lands; and that they give much life to all their mischievous plots, by the hope they find of yet ascending up on that step of their hierarchy remaining amongst us. Whereas, on the other hand, it cannot but be acknowledged by all, that the Presbytery else what it will, it is certainly the best remedy against Popery in the world; the total rooting out whereof amongst us, now after the discoveries we have, ought on many accounts to be esteemed the grand interest, wherem the power, wit and endeavours of every good subject, every good countryman, and every good Christian should terminate. And, in fine, since to all this may be added, the fatal consequences of the former establishment of bishops amongst us, with the appear-

His Majesties Advocat replies, that those gentleman and heritors being, by the custome of the nation and by the proclamation of the councill, obleiged to attend the king's host, to assist and enforce as said is, it was not in the power of the marques of Montrose or any commander whatsoever to relace them from this duty, for as they came not ther by his or ther authoritie, so 'ejus est nolle cujus est velle,' and if it wer other wayes captaines might absolutely disapoynt his majesties service, wheras they are choised not to dispense but to command and therfor they are 'extra officium' when they dispense, but if the sicknes was such as necessarilie and certainlie hindered Bousie from going on, it shall be found relevant, which is all that any good subject cane crave to be done in his favours; and this is not the granting of a passe but the remitting of ane duty which the lawe exacts: and by the proclamation wherby the commanders wer appoynted, it is declared that such as came not or deserted wer to be lyable, so that they wer to knowe ther duty by the proclamation, and non who commandit (but the councill) could warrant ther deserting.

Sir George Lockhart duplyes, that the pannall oppons the passe and the acts of parliament lybelled upon ordaining all persons to enforce his majestie against nottor rebels, bears that exception, unlesse they have ane reasonable excusation, and ther cane be no excuse more reasonable then a passe from a commissionat officer, under whose conduct and command the pannall was requyred to serve. And lawyers were clear as 'Grotius de jure belli et pacis,' that [qu. not] only supream commanders

ance of what is like to be the end of the present; and that our nation hath drunk in such an inbred and indelible prejudice against them, that though these fourteen men were as many saints, neither can much good be expected from them, under that character, in this place, nor yet they ever long settled without blood and confusion.

"I wish only the Presbyterians would give some pithy and incontrovertible testimony of their real affection to his majesty their lawful sovereign, and to the true line, in so far as by Popery it is not interrupted; with such a proof of their abhorrence of episcopacy, as may make them take up an antipathy at their prelatial way of having no sooner power in their hands, but instantly, with oaths, declarations and bonds, flying like as many wild cats, in the throat of our consciences; and that they, Presbyterians, would rather take a more gospel way of instructing us in love and meekness, and in patience wait, till by the use of means, and their affectionate carriage towards us, we be won to the discerning and perswasion of those things that are not fundamentals, wherem we differ, and may the king's majesty say, Amen. Then welcome presbytery, unity and peace; and farewell to confusion, schiam, prelacy and popery for ever."

but also inferior officers under their command may grant passes, and the considerations expressed in the passe itself makes it evident that the marques of Montrose, who is a person of great honour and zealous and forward for his majesties service, would have granted no such passe unless there had been sufficient cause for the same, and it cannot be imagined or presumed that any having the honour to serve his majestie as commissionat officers would grant passes to the detriment and prejudice of his majesties service, so that there is no fear from the inconvenience urged. And it cannot be contraverted but the marques of Montrose or any commissionat officer might have ordered and disposed of his troupe as he thought fitt, and who (if they act unwarrantable) are answerable; but it were against all reason that passes, granted be them to those immediately under their command, should not be exoner nor excuse, that be the lawes and customes of all nations, being allowed to every commissionat officer; and the proclamations that were publickly emitted, did lay no restraint on commissionat officers, why they might not act in this case, which is done every where, there being nothing more ordinary then for inferior officers to grant passes which were never contraverted nor drawn in question, why they did not excuse those to whom they were granted. Lykeas the marques of Montrose was appointed to be commander of the shyre, and its offered to be proven the pannall was present when these gentlemen were regimented and put under his command, and if a passe from a commissionat officer would excuse and exoner persons immediately under their command, tho they were his majesties modell'd forces and under pay, there is no collar nor pretence in lawe why the pannall ought to be in a worse case, especially when the marques of Montrose, granter of the passe, did take care that his majesties service was not prejudged, three well appointed horsemen being left, who remained with his majesties army during the whole tyme.

The General Defence against the Lybell.

Master William Moniepenne, for Killbrackment and the other pannalls, alleadges, allwayes denying their absence from his majesties host or that they are heritors, they cannot passe to the knowledge of an assyse upon the lybell, as being foundit upon the 4th act 1st parliament king James first, or the 57th act 2d parliament king James 2d. In respect as to the first act, the samen does only militat against those who refuse to enforce the king against nottor rebels against his person, which must be understood only of such as are convict or declared fugitives, but does not at all concerne the absents from his majesties host, the punishment thereof being expressly determined by the 15 statut king Alexander the second; and, as to the second act, the samen, as appears, both by the rubrick and the express tenor thereof, does only relate to weapon showings, and for putting the subjects in powster and rea-

diens, seeing the samen does expressly determine the armour and harnessing.

2d. Both the saids acts and all other lawes to that purpose are to be understood with this condition, that the subjects be lawfullie advertised, and its here denied that they were lawfullie required. The proclamation not being intimat at the marcat croce of Coupar, which is the head burgh of the shyre, tho it bears expresse warrant for that effect.

3d. Esto the defenders could passe to the knowledge of an assyse upon the lybell as its foundit on the saids acts of parliament, yet the tyme of the making thereof in the reigne of king James the first, his majestie had no standing forces or modelled army; but all his subjects in case of rebellion betwixt sextie and sextein, without distinction of heritors, were required to attend his majesties host; but now his majestie having a standing militia, and the saids old acts of parliament being the foundation of that new constitution of the militia, it ought to exoner the defenders, seeing the militia was upon their charges and expenses, and the designe of it was for easing of the heritors.

4th. By his majesties gracious act of indemnitie, the pannalls are likwayes exonerred, and altho it containe an exception of heritors, yet the same is only of such as did not assist his majesties host, so that tho they were not personally present, yet such of them as sent out their servants and horses did thereby assist his majesties host, and so cannot passe to the knowledge of an inquest, especially seeing his majesties commands all his judges lairly to interpret the said act.

5th. It is offered to be proven, that about the tyme of his majesties proclamation, My Lord Chancellor having represented to his majesties privie councill the condition of the shyre of Fyff, and that there were companies of armed men traveling up and down, rifeing houses and plundering horses; by a letter direct to my lord Newark, they ordaine that such of the heritors as had their horses plundered or were otherways unable for travelling, should stay at home and guard the country, and to be readie upon advertisement from the sheriff depute, to convene and take effectual course for that effect, sune that such of the saids heritors who have their horses stolen from them, were otherways unfit for travell ought to be exonerred, seeing the letter from his majesties privie councill does sufficientlie purge any contempt or disobedience to his majesties proclamation, and their defences are proponed, a denying their absence or that they are he

His *Majesties Advocate*, answers to that that the act of Parl. K. Ja. 1. is opposed posterior to all those old acts, and that was verie justlie enacted, since the pain only the giving of some quays; the of the quays was not able to enforce against rebels who would have taken quays from him.

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To the fourth, it needs no answer; and, to the fyfth, it deserves no answer, except the letter wer produced, for private men cannot make up the tenor of letters from the councill, which must be known and expounded by the context, as to the sense of which private men may be mistaken; but to shew his majesties justice, it is found relevant of consent that persons wer unable to travell, likeas it is found relevant of consent that their horses wer taken away, so that they could not goe, they having done exact diligence to get other horses and taking their declarations to show that the horses wer not taken away by their own connivance, wherby each man might furnish himself with an defence by causing his horse be taken away, and without this ther is no possibility to know what was connivance.

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As to the last, repeats and oppons the defence and the lords of privie councill having writtten a letter of the tenor, mentioned in the defence, and upon the consideration of the hazard that the rebellion might break out in that countrey, the pannalls who are able to found upon the termes of the said letter, ought to be excused, and it is positivlie offered to be proven, that as to the persons to be condescendit upon ther goods, wer rifled and ther horses robbed, wherby they wer incapabe to repair to his majesties army, and the pretence of simulation is nowayes relevant, unlesse it wer proponed positive, and offered to be proven, and if need beis the pannalls are content to purge themselves by ther oath, that ther was no simulation, but that ther horses were robbed, and so they have clearlie the benefit of the lords of privie councill ther letter, and it will clearlie apper by the probation, to be led upon the exculpation, and cannot but consist in the knowledge of such of the lords of justiciarie as are upon the privie councill, that the said letter was wrott to my lord Newark, and who being called, may be able to produce the same, and by the councill bookes, it will apper ther is a warrant from the councill to the chancellor to writt to the lord Newark for securing the peace of the countrey.

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As to the fyft defence foundit upon the [qu. Chancellors] letter, the lords superseid to give determination therupon, as it is proposed in generall for all, reserving to themselves to determine therupon as occurs in particular.

THE PARTICULAR DEFENCES.

Kilbrachmont.

Mr. William Moniepenne, for Hamilton, of Kilbrachmont, alleadged, That the tyme of his majesties proclamation, his horses being not only stolen from him, but his servants deadlie sick, yet such was his zeal for his majesties service, that he went to Faulkland market and furnished himself with horses, and did come the length of the South-ferrie, and taryed ther two dayes, and returned with the rest of the gentlemen efter the rebells wer defate, and is content to take the declaration.

Deserted as to Menstrie.

Mr. William Hamilton, for Howburne, of Menstrie, alleadges, he is past the age of sextie years and is not sensible, [qu. fencible] and sent out his men and horse, who attendit his majesties host all the tyme.

The lords find this defence relevant, and in respect of the nottorietie of the defender's being past the age of sextie years deserted, and he thir presents deserts the dyet simpliciter, and discharges the raising or taking up of any new letters or dittay against the defender, for the cryme above specifit, in tyme coming, wherupon he asked and took instruments and protested for his cautioners relief, which the saids lords admitted.

Largo ad Assisam.

Mr. William Moniepenne, for Durhame, of Largo, alleadges, That the tyme of his majesties proclamation, his house was assaulted in the night tyme by several armed men, who threatened to putt fyre to it, and who did actualle take away his horses and his furniture, and he did endeavour to furnishe himself, and did find out one of his own horses which he offered to redeem at any rate, but he could not have them; and he offers to purge himself, by one solemn oath, that there was no collusion between him and the rebells, but that his horses were forcible taken away.

My Lord Advocat answers, That the defence ought to be repelled as to that which may be collusion, except the person purge himself by taking the declaration, ther being nothing more easie then to diassemble and cover this collusion by oath; some friends and relations may allwayes cause take away a man's horses without his own expresse knowledge, so that the event should be ane reward of ther loyaltie be exposed to all the danger, and put to all the trouble of opposeing, both by ther indeavours in tyme of peace, and by ther armes in tyme of ware, whilst these who are of peritious principles, should have ther crimes made a protection to them, against all those troubles and expences.

Mr. William Moniepenne replies, That the defence stands relevant, unlesse his Majesties Advocat will positively alleadge that the defender did actualle collud with the robbers, which is found relevant of consent to be proven, and his offering to purge himself by his oath is sufficient of itself without taking the declaration, unlesse my lord advocat will positivelis offer to prove simulation.

Bruntown ad Assisam.

Mr. William Beaton, for Lawe, of Bruntown, produces two testificats, one under the hand of the minister and elders of the parroch wher he lives, and the other under a phisitian's hand, bearing his sickness all the tyme, and besides he is past the date of sextie years.

Dyets deserted, and Letters discharged against Captain Murray.

Mr. Colin McKenzie, for Captain Gideon Murray, of Pitkerrie, alleadges he is past threescore years of age, and for instructing therof, produced the indenturs past, betwixt him and William Muir, merchant in Edinburgh, dated the eleventh of January, 1637; and farther alleadged, that he was sick and unwell, all the tyme of the host, of a dangerous sicknes, so that he was liker to dye then live, and produced two testificats for proving therof, one under the hands of Dr. Crawford and David Pringle, chirurgeon, and the other under the hands of the ministers and elders of Kilrony. The lords in respect of the nottorietie of thir defences deserted, and be thir presents deserts the dyet, simpliciter, and discharges all new letters or dittay to be taken up or raised against the defender for the cryme forsaid in tyme coming, wherupon he asked and took instruments, and protested for his cautioners relief, which the saids lords admitted.

Balcunquhill ad Assisam.

Mr. Alexander Maccolme, for Balcunquhill, of that ilk, alleadges, that the tyme of the proclamation his horses wer taken away.

Sansford ad Assisam.

Mr. William Moniepenne, for Nairn, of Sansford, alleadges, that he having upon his majesties Proclamation sent out three men with horses to serve his majestie, in respect he could not attend himself, being ane foot captain of militia, and having thereafter endeavoured to convey his company, could only raise the number of ten men, which being offered to the earle of Weymes, collonel of the regiment by the defender himself, he adjoynd them to another companie, so that the defender could not serve his majestie in the quality of ane heiror, his horses being sent away.

Glenieston ad Assisam.

Mr. David Dewar, for Weymes, of Glenieston, repeats the samen defences proposed for Sansford.

My Lord Advocat, alleadges, the defence

is noways relevant, for they should have gone to the host with the men they hade without collors, and though they hade no men they should have gone alongs with the regiment.

It is alleadged for James Young, of Kirkcoun, that if he was absent, it was not out of any principle of disloqualitie or dissatisfaction to his majestie, or his government, but the tyme of his majesties proclamation, did unhapplie tryst with his lady's sicknes, and having gone some way to attend, notwithstanding of her indisposition, being bige with child, yet she did followe him a considerable way, with woves and oaths that she would never leave him, and if she dyed her blood would be on his head, and so dangerous was her condition that she fell down in the way, in a manifest hazard of abortion, so that he was necessitat to return with a resolution, that if she wer any better he would repaire to his majesties host, and did keep his horse for that effect.

His *Majesties Advocat* makes no answer, but that his absence appeirs to have bein from dissatisfaction, seeing he refuses to take the declaration.

It is proposed for Mr. Alexander Nairn, of Little Treiertoun, that he was sick at the tyme, which is attested by ane declaration under the hand of the arch dean of St. Andrews, and that his mother lyffrents his wholl lands and produced ther lyffrent infetment for instructing therof, and that he lives in the toun of St. Andrews, and watched and wardit ther, and never kept a horse.

Stratherlie ad Assisam.

Mr. James Graham, for Lundie, of Stratherlie, alleadges, that his horses wer all taken away, and he is content to take the declaration for testifieing his loyaltie.

Redie ad Assisam.

Mr. William Moniepenne, for George Moncriff, of Redie, alleadges, that the tyme of the Proclamation, notwithstanding his lady was extremelie sick, yet he was so zealous to serve his majestie that he kept the first rendezvouze, and did actualle send furth ane young gentleman, his own brother-in-lawe, who was not ane heritor himself, and was a trained souldier, with this condition that he should serve in the defender's name, and if he should not be received as his substitut, that he should return the same night, that he might goe himself, and he was accordingly accepted.

Mr. James Alexander, for sir James Sinclair, of Kinnaird, alleadges, he was sick and infirme at the tyme, and sent out horse and men, and produces two testificats, one from the ministers and another from the phisitian, for proveing thereof, and is content to take the declaration.

It was alleadged, that Actoun of Inchdermie's son and appeirand aire, being killed at the tyme, he was 'in recenti lectu,' and that his horse was taken from his son.

Phinmont deserts and discharges Letters.

It is alleadged for Brown, of Phinmont, that he is past sextie years of age.

The lords in respect of the nottorietie of this defence deserts the dyet, and discharges all newe letters or dittay against the defender for the cryme above specifit in tyme coming.

Pitlochie ad Assisam.

It is alleadged for Murray, of Pitlochie, That he is no heritor, nor kept he a horse this twelve years, and he is readie to renounce his heritage in the king's favours.

My *Lord Advocat* answers that ane heritor by the courtisae of Scotland is in all respects ane heritor, the courtisae being a legall dispensation during the tyme, as a comprysing is, and therfor seeing he is in *feudo* he should serve upon the account of his feudatorie obligation.

It is replyed, that the Proclamation is opposed which calls only heritors and freeholders, and the pannal is neither heritor nor free holder.

The advocat duplys, that the courtisae is *feudum ad tempus*, and consequently he that has it is during the tyme ane heritor.

Kyninmond ad Assisam.

Mr. James Alexander, for the laird of Kyninmond, alleadges, he was sick at the tyme as ane testificat upon soull and conscience, under the ministers hand testifies, and a declaration under the phisitians, which is sufficient; lykeas he has raised exculpation and cited witnesses, who are able to prove that he hors'd his brother-in-lawe the laird of Raras, whose horses were stollen, and that he sent another horse and his own man, well armed who attendit this majestie's host, ay, and whill the rebels wer defate.

Mr. David Dewar, for Weymes, of Glenietoun, alleadges also, that he was sick and sent out his man and horse armed.

My *Lord Advocat* answers the same is not relevant, personall presence being requyred, and the defender refuses to take the declaration.

Graingmyrs deserts and discharges Letters.

Mr. Alexander Malcolme, for Robert Kinneill, of Graingmyrs, alleadges he is a mean heritor not exceeding ane hundredth merks, and not being able to furnish a horse, he therfor went on foot. The lords therfor deserted, and be their presents [qu. desert or deserts] the dyet simpliciter and discharges all letters or dittay against the defender for the cryme above specifit in tyme coming.

Dowhill continued.

Mr. Walter Pringle, for John Lindsay, of Dowhill, alleadges, That at the tyme of the host, he was under proces before the lords of privie council, and under caution to answer all the dyets of council, under the paine of 10,000 merks; and that before the proces was in-

tented he had been taken prisoner, out of his own house at Culrose, and all his arms were taken from him, so that when he was sett at libertie, he was putt under the foresaid caution to attend all the dyets of the proces, and so was under an absolute necessity to wait the coun-cill's farder order, seeing the proces was only continued from day to day, and if he had not appeared at every day he would not only bein declared fugitive, but his cautioner would have forfeit the 10,000 merks.

My Lord Advocat answers, That 1. He should have made application to the coun-cill, desyring to knowe what should be his cariage: 2. The proclamation would have defended him if he had gone, and being the posterior order took off all former restraint: 3. This came be no defence why he sent not out his men since the coun-cill did not disarm them.

The lords continues the dyet against John Lindsay, of Dowhill, till the third Monday of June next.

Bandon ad Assisam.

Mr. William Beaton, for David Beaton, of Bandon, alleadges, That his wvff was at the poynt of death, and he sent out both horse and foot, as a testificat under the liertenants hand testifies, and he is content to take the declaration.

Balbirne ad Assisam.

Mr. James Alexander, for Balfour of Balbirne, alleadges he was sick at the time, as ane testificat produced bears, and the horse he provided was taken from him, and he is content to take the declaration.

Fordell ad Assisam.

Mr. William Beaton, for sir John Henryson, of Fordell, alleadges he sent out three horse and three men, and at that time he was unable to travell, as ane testificat under the ministers hand bears, and its nottor he was not able thir three years bygone to drawe on ane boot; lykeas he was one of the gentlemen allowed to stay at home by the coun-cill's letter, inhibit by the Lord Chancellor, as a person unfit for goeing to the host, be reason of his corpulencie and infirmitie.

Cassingray ad Assisam.

Mr. David Dewar, for Melvill, of Cassingray, produced ane pass and license for him by the captain to stay at home be wanting horse and his lady being sick,

Deserts and discharges Letters.

It is alleadged for Robert Cuninghame, of Woodfield, that he has not fourtie pound of valued rent, and lives in Kirkadie, and keeps no horse.

For Henry Shanks alleadges the same, and that he commandit the tounsmen of Kinghorne who was in armes for the defence of the Burgh, and for resistance of the rebels.

The lords deserts the dyet simpliciter as to

the saids Robert Cuninghame and Henry Shanks, and discharges all new letters or dittay against them, for the cryme foresaid in tymes coming.

Mr. William Manispennie, for Mitchell, of Balbardie, alleadges, That he being convened befor the circuit at Coupar, he proponed a relevant esoney, which was proven to the judges so as to him it is *res judicata*.

Mr. John Lauder, for Mr. Charles Wardlaw, propones the same defence.

His Majesties Advocate takes instruments that the hail pannels, except Hay of Balhousie, do judiciously confesse their absence from his Majesties host.

The Lords continue the diet till the twenty fift instant, and ordains parties witnesses and assizers to attend.

Interloquitor upon the particular Defences,
25th February, 1680.

The lords justice general and commissioners of justiciary find the defence proponed for Thomas Hay, of Balhousie, foundit upon the passe relevant; as also find the defences proponed for Robert Hamilton, of Kifbrachmont, James Law, of Bruntoun, Mr. Alex. Nairn, of Little Friertoun, Lundie, of Stratherlie, sir James Sinclair, of Kynnaid, Kynninmond, of that ilk, David Beaton, of Bandon, sir John Henryson, of Fordell, Robert Balfour, of Balbirnie, and James Melvill, of Cassingray, lykeways relevant and remitts the same to the knowledge of the assize; as also finds the defences proponed for Alexander Durhame, of Largo, Charles Cowan, of Corstoun, David Balcauquhill, of that ilk, Alexander Nairn, of Samsford, George Moncrieff, of Redie, and James Weymes, of Gleniestoun, relevant to alleviat the punishment, though not to elied the lybell according to his majesties gracious letter and remitts the same to the knowledge of the assize.

The lords repell the defences proponed for James Young, of Kirkcoun, and Murray, of Pitlochrie.

ASSIZE.

- Hamilton, of Raploch.
- John Stewart, of Gairnuttie.
- Gordon, of Cairnborrow.
- Mr. Robert Irvin, of Peilsyre.
- Geo. Drummond, of Milnabb.
- Patrick Tailzfer, merchant.
- Patrick Smith, of Methven.
- John Montgomerie, merchant.
- Duncan M'Autosh, merchant.
- John Brown, merchant.
- Joseph Marjoribanks, of Lenchie.
- Baird, of Sauchtounhall, younger.
- Robertson, of Strowan.
- Kinloch, of Bandoch.
- Charles Maitland, of Pitrichie.

The Assize lawfullie sworn, no objection in the contrair.

His Majesties Advocate took instruments that the haill Pannels, except Balhoussie, hade acknowledged their absence from the host, and that Balhoussie acknowledges his deserting of the samen.

The defenders for proveing of their innocence and grounds of exculpation, adduced the witnesses and other evidence after mentioned, viz.

Patrick Murray fiar of Auchtertyre, aged 32 years, unmarried, purged and sworne, depones, That he saw *Thomas Hay*, of Balhousie in the king's host, in summer last, and that to the best of his knowledge he was in bade conditione of health, and that if he hade stayed he would have been in danger be reason of sickness, and that he sawe him coming off in this bade condition, and that he sawe him have the marquis of Montrose passe, who was his captain; and that he left three or four men well appointed behind him in the army *causa scientie* he was present, and this is the truth as he shall answer to God.

Sic Subscritur, P. MURRAY.

Mr. Thomas Stewart, son to *Mr. Hary Stewart*, in *Pearth*, purged and sworne, depones *conformis precedenti*, except that he did not see the passe, and knows that he hade two horses left behind with the host at least, and did not see him come off; and that to his knowledge his staying would have endangered his health.

Sic Subscritur, STEUART.

Mr. Robert Colt, for farder probation, repeats the marquis of Montrose passe, and licence to the pannell to return home.

David lord Newark being sworne, depones, that it was the common report of the country that *Robert Hamilton* of *Kilbrachmonts'* horses were taken away, and that he sawe him coming on his foot to the randevouze to tell this, *causa scientie*, he is his near neighbour.

Sic Subscritur, NEWARK.

James Melvill, of *Cassingray*, being solemnie sworne, depones, he saw two of *Hamilton* of *Kilbrachmonts'* horses in the rebells hands who robed him, the foresaid rebells having come to his house to have robbed the deponent's horses.

Sic Subscritur, JAMES MELVILL.

The said *Robert Hamilton* produced lykeways ane testificate under the hand of *Mr. Wm. Hay*, minister of *Kilconquar*, testifieing that he is ane orderlie person and cherisher of the regular and orthodox clergie, and that his horses wer robb'd and servants sick the tyme of the host, and yet recruited himself and advanced some considerable part of the way till he heard the rebells wer defate.

James Craufurd, collector of *Fyff*, depones he sawe *Lawe*, of *Burntoun*, lyeing verie sick the day of the randevouze, and that the doctor who was with him said it was the misles.

Sic Subscritur, J. CRAUFORD.

Robert Balfour, of *Balbirno*, being sworne,

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depones he sawe *Lawe*, of *Brunton*, lyeing sick the tyme of the host, and lyeing bedfast.

Sic Subscritur, R. BALFOUR.

The said *James Lawe*, of *Brunton*, produced lykeways the minister of *Markinch*, and *Dr. Alexander Balfour's* testificats upon his being sick of the measils the tyme of the host.

Mr. William Moniepenne, for *Mr. Alexander Nairn*, of *Little-Freirtoun*, repeats the bishop of *Dunkell's* testificat of his sicknes the tyme of the host upon soul and conscience, and that he is ane well affected person to the present government, and lykways repeats his mother's lyffrent infestment.

James Craufurd, collector of *Fyff*, depones, That *Stratherlie's* brother's horse and arms wer taken away by the rebells, and *Stratherlie* himself was not in use to keep horse.

Sic Subscritur, J. CRAUFORD.

James Pitcairne, writer, in *Edinburgh*, depones, That *Stratherlie's* brother declared in *Dune* that his horses and armes wer taken away by the rebells, and that this was the common report of the country.

Sic Subscritur, JAMES PITCAIRNE.

Dr. Andrew Balfour depones, that he gave constant advise to *Mr. James Sinclair*, of *Kynnaird*, the tyme of the host, he being sick of ane ague at that tyme.

Sic Subscritur, A. BALFOUR.

Robert Master, of *Burghlie*, being sworne, depones he sawe *Mr. James Sinclair's* man, *James Arnot* and his horse, well armed, attend his majestie's host all the tyme.

Sic Subscritur, R. BALFOUR.

Mr. George Arnot, wreitter, in *Edinburgh*, depones *Mr. James Sinclair's* man, unwell the tyme of the host, and not able to travell, and that he sent out his horse to the host who stayed all the tyme.

Sic Subscritur, GEO. ARNOT.

The said *Mr. James Sinclair*, in farder evidence of his innocencie and defence, produced ane testificat of his sicknes (the tyme of the host) under the hand of *Dr. Alexander Balfour*, and another under the hand of the minister and elders of *Ebdie*.

Colin Pitcottie, son to generall major *Pitcottie*, aged threttie years, purged and sworne, depones, that *Kynnimond* of that ilk was so sick and unwell the tyme of the host that he was not able to come abroad, and that he sawe his horses at the host at *Bothwell-bridge*.

Sic Subscritur, COLIN PITCOTTIE.

James Abercrombie, of *Lochgellie*, sworne, depones *Kynnimond* of that ilk was so unwell the tyme of the host that he could not come abroad, and that he sent out his horse to the host.

Sic Subscritur, JAMES ABERCROMBIE.

The defender repeats likeways the minister's testificat and phisitian's letter, bearing his being unwell all the tyme of the host.

D

John Henryson, in *Fordelgrein*, depons, That *Bandon's* man and horse, well armed, attendit the host all the tyme.

Sic Subscritur, J. HENDERSON.

Colin Pittcottie, above designed, depons that *Bandon's* man and horse well armed attendit the host all the tyme.

Sic Subscritur, COLIN PITTCOTTIE.

John Dempster, of *Pitliver*, being sworne, depons he knowes *Fordell Henryson's* condition to be such that he was neversein him able to loup on a horse, and knowes he sent out his men and horse to the host.

Sic Subscritur, JOHN DEMPSTER.

Alexander Spittle, of *Lenchat*, depons he knowes *Fordell Henryson* to be infirme and unable to mount a horse without help, and that he sent out his men and horses to attend the host.

Sic Subscritur, ALEXANDER SPITTELL.

David Beaton, of *Bandon*, being sworne, depons that the moneths of *May* and *June* last *Robert Balfour*, of *Balbirno*, was sick and unable to goe to his majesties host.

Sic Subscritur, D. BETHUN.

David Spittle, servant to the minister of *Markinch*, depons *Balbirno* was sick and unable to travell the tyme of the host, and he providit aue horse to send to the host, but the horse was stollen and taken away by the rebells, and he cannot wrytt.

Sic Subscritur, GEO. M'KENZIE. I. P. D.

John Dowe, servant to the laird of *Brun-toun*, depons conformis to *David Spittle in omnibus*, and he cannot wrytt.

Sic Subscritur, GEO. M'KENZIE. I. P. D.

James Melvill, of *Cassingray*, in vindication of his innocence produced aue testificat, under the hand of *David Lord Newark*, whereof the tenor followes:

I, *David Lord Newark*, doe hereby testifie and declare, that *James Melvill* of *Cassingray*, having conforme to the proclamation appeired at the randevouze with the rest of the heritors of the shyre, and he having told me his lady's condition, who hade bein for severall moneth befor veris sick, which being well knowen to me and the rest of the gentlemen, I did therupon dismiss him, and allowe him to goe home to wait upon his lady; as witness my hand at *Coupar*, the second day of *October*, 1679.

Sic Subscritur, NEWARK.

David lord Newark depons upon the truth of the testificate produced under his hand, in favours of *James Melvill*, of *Cassingray*.

Sic Subscritur, NEWARK.

John Neilson, *Plesterer*, in the *Cannogate*, aged 40 years, depons he knowes the laird of *Largo's* horses wer taken away by the rebells on aue Sabbath day, and he persewed after his

horse to have gott them restored, *causa scientie*, he was working in the house at the tyme.

Sic Subscritur, JOHN NEILSON.

John Neilson, son to the said *John Neilson*, above designed, depons conformis to his father and that the laird of *Largo* went with a charged carrabin after the rebells to have gott back his horse.

Sic Subscritur, JOHN NEILSON.

Alexander Derhum, of *Duntarvie*, depons he knowes the laird of *Largo's* horse was taken away by the rebells.

George Scot, of *Pitlochic*, being sworne, depons that the voice of the country was that *Charles Cowan* of *Courtoun's* horse was taken by the rebells, and within two days thereafter the said *Charles* came to the deponent and told him one of his tennents hade taken the said *Charles* horse, and when he came home he confess that his horse was in the company with the rebells.

Sic Subscritur, GEORGE SCOTT.

John Williamson, servant to *Pitlour*, depons he knowes *Charles Cowan* of *Courtoun's* horse was taken away by the rebells; he cannot wrytt.

Sic Subscritur, GEO. M'KENZIE. I. P. D.

George Scott, of *Pitlochic*, depons that he heard *Balcanquhill's* horse was taken away, and being walking in the fields he sawe some horses with the rebells, and one of the deponent's servants told him that one of these horses belonged to *Balcanquhill* as he thought.

Sic Subscritur, GEORGE SCOTT.

The said *John Williamson* lykwayes depons, that the common report of the cuntry was that the laird of *Balcanquhill's* horse was taken away by the rebells.

Sic Subscritur, GEO. M'KENZIE. I. P. D.

John Henryson, in *Fordelgrein*, depons weymes of *Glenistoun* hade a man and horse armed at the host, who attendit all the tyme.

Sic Subscritur, J. HENDERSON.

Alexander Danskin,* servant to the laird of *Lawchat*, depons conformis to *John Henryson*.

Sic Subscritur, ALEXANDER DANSKIN.

His Majesties *Advocat*, declares he holds the defence proponed for *Alexander Nairn* of *Samsford* that he sent out his horse and armes to the host as proven.

George Moncrieff, of *Redie*, for proveing of his defences produced the testificats under wrytten, whereof the tenor followes:

These are testifieing that I kept the randevouze at *Coltoun*, of *Balgownie*, in *June* last, in name of *George Moncrieff*, of *Redie*, my brother-in-lawe, with the said *George Moncrieff*, his servants, horses, and armes, and

* This variation occurs in the transcript from the Record.

marched under my lord Newark's command, and efterward under the earle of Balcarras command, and continued in the host till it was disbandit by order; and all that in obedience to his majestie's Proclamation for my said brother-in-lawe. In testimonie whereof, I have subscribit thir presents with my hand att Auchlentytie, this twentie nynt of September, 1679 years, befor thir witnesses John Moncrieff, nottar publict, wreitter hereof; and Mr. James Sibbald, schoolmaster, at Auchtermitie.

Sic Subscribitur, Jo. MONCRIEFF.

PATRICK LESLIE, (witness.)

J. SIBBALD, (witness.)

We Colin earle of Balcarras, and David lord Newark attests the above wriitten declaration to be of veritie, as witness our subscription at Coupar of Fyff, the second day of October 1679,

Sic Subscribitur, BALCARRAS, NEWARK.

David Lord Newark upon oath, adheres to the attestation given be him in George Moncrieff of Redie's favours that the samen is truth and veritie.

Sic Subscribitur, NEWARK.

John Moncrieff of ——— depons Moncrieff of Redie sent out his brother-in-lawe, to the king's host with this expresse condition, if he wer not accepted of he would go himself, *causa scientia*, he was with him, and heard as he has deponed.

Sic Subscribitur, Jo. MONCRIEFF.

Thomas Gilchrist, in Auchtermoughty, depons he knowes Redie sent out his brother-in-lawe to his majestie's host with this expresse condition, that if he wer not accepted of, he would goe himself or send his son, and knowes his lady was sick at the tyme.

Sic Subscribitur, THOMAS GILCHRIST.

The Lords ordaines the Assyse to inclose and returne ther Verdict upon the 27th instant, and ordaines all parties to attend.

27th February 1680.—The said day the persons who past upon the absent heritors from the host in Fyff-shire, returned ther Verdict in presence of the saids lords, wherof the tenor followes: Edinburgh 25 February 1680.—The Assyse finds the lybell proven, as also the assyse be one voice be the mouth of ther chancellor George Drummond, finds the defences for Robert Hamilton, of Kilbrachmont, James Lawe, of Burntoun, Mr. Alexander Nairn, of Littlefreirtoun, ——— Lundy, of Stratherlie, sir James Sinclair, of Kinnaird, ——— Kininmold, of that Ilk, David Beaton of Bandon, sir John Henryson, of Fordell, Robert Balfour, of Balbirno, James Melvill, of Cassingray, and Thomas Hay, of Balhousie, pannalls, contained in the first classe, proven, except Beaton, of Bandon's defence of his wyff's sicknes, which the assyse finds not proven, but the rest of the said Beaton of Bandon's defence they find proven.

Sic Subscrib., GEO. DRUMMOND, CHAN.

The Assyse be one voice, be the mouth of George Drummond, ther Chancellor, finds the defences for Alexander Durhame, of Largo, Charles Cowan, of Corstoun, David Balcanquhill, of that Ilk, Alexander Nairn, of Samfurd, George Moncreiff, of Redie, and David Weymes, of Glenistoun, pannalls contained in the second class, proven.

Sic Subscrib., GEO. DRUMMOND, CHAN.

The Assyse all in one voice, be the mouth of George Drummond, ther Chancellor, finds James Young, of Kirkton, and ——— Murray, of Pitlochie, guilty of ther remaining, and abiding frae the king's host in June last.

Sic Subscrib., GEO. DRUMMOND, CHAN.

Efter oppining and reading of the whilk verdict of Assyse, The lords justice general, justice clerk, and commissioners of justiciary, absolved and assolyed, and be thir presents absolves and assolyes the hail persons contained in the first classe from the libell and dittay above mentioned, and discharged, and be thir presents discharges all new letters or dittay to be raised or taken up against the defenders for the cryme above specifit, in all tyme coming, wherupon they and ther procurators asked and took instruments.

His Majesties Advocat produced his majesty's gracious letter direct to the lords of his most honourable privie council, anent the punishing of the absents from, and deserters of his hynes host, and desyred the saids lords might proceed conforme therunto, and to his majesties other gracious letter direct to ther lordships of the same date, and recordit in the books of Adjournal, upon the twentie sext day of November last: followes the tenor of his majesties said letter direct to his privie councill:

CHARLES R.

Right trustie and welbeloved cousin and counsellor, right trustie and welbeloved cousins and counsellors, right trusty and welbeloved counsellors, and trusty, and welbeloved counsellors, We greet you well. Having sein and considered your letter of the elivinth instant to the duke of Lauderdale, our secretarie, concerning those who did not assist us in suppressing the late rebellion, and those who deserted our host at that tyme: we are fullie convinced that it would prove a great discouragement to our faithfull subjects, who, in the discharge of ther duty, have bein at a great deall of expense, trouble and hazard in that expedition, if they should not see some suitable punishment inflicted upon those who (without any reasonable excuse) did not come to our assistance at that tyme, and upon those who efter coming to our host, deserted the same; and therefore we doe readlie approve the resolution you have taken, to fyne the most guilty, not above two years of ther valued rent, whilst others who are lesse guilty are to be fyned at least in the fourth part of a year's valued rent, which we take to be so moderat (considering howe dismall the effects of ther cryme might

have bein if God of his infinit goodnes have not prevented them,) that (as you say verie well) it may rather be thought a warning then a punishment, for we doe well knowe that such offenders have formerlie bein punished by forfeitures, confiscations and banishments; and so we bid you heartly farewell. Given at our court at Whithall, the 18th day of November, 1679, and of our reigne the 31st year: By his majesties commaund.

LAUDERDALL.

The lords justice general, justice clerk, and commissioners of Justiciary, having considered the lybell and verdict of assaye above written, together with his majesties gracious letters, signifying his royall will and pleasure, anent the punishments to be inflicted upon the absentis from, and deserters of his hynes host. They be the mouth of James Henryson, maceer of court, decerned and judged the said James Young, of Kirktoon, to be in ane unlawe and unmerciamet of ane thousand eight hundred th and sevenie pounds Scots, — Murray, of Pitlochie, in the soume of seven hundredth pounds Scots, Alexander Durham, of Largo, in the soume of ane thousand eight hundredth fyftie three pounds Scots, David Balcauquill, of that ilk, in the soume of fyve hundredth pounds Scots, Alexander Nairne, of Sausford, in the sum of two hundredth nyntie four pounds ten shilling Scots, George Moncreiff, of Redie, in the soume of three hundredth pounds Scots, and James Weynes, of Gleniestoun, in the soume of ane hundredth sevenie fyve pound Scots, and ordained them to grant bond for payment of the forsaid soumes to his majestie's cash keeper for his hynes use, at the terme of Landis next, and to find caution for presenting ther persons, before the lords commissioners of his majesties thesaurie, the last Friday of July next, under the pains respectively above mentioned, and ordaines them to be carryed to prison, there to remain till they subscribe the said bond, and find the sovertie, which was pronounced for doom. The said day John Murray, of Pitlochie, being of tymes called to have compeired before the said lords this day and place, in the hour of cause to have heard and sein doom and sentence, pronounced against him for his remaining and abyding frae his majesties host and royall standart, and to have granted bond for payment of his unlawe, and found caution for presenting of his person to that effect conforme to the sentence lawfull time of day bidden, and he not enterand nor appeirand. The lords justice general, justice clerk and commissioners of justiciary, therfor be the mouth of James Henryson, maceer of court, decerned and adjudged the said John Murray of Pitlochie, to be outlave and fugitive frae his majesties lawes, and to be putt to the heine and all his movable goods and gear to be escheat and inbrought to our soveraigne lord's use, for his hye contempt and disobedience, which was pronounced for doom.

The books of Adjournal for this period contain Records of the proceedings against several other heritors, who were brought to trial on the like indictments. But between them and the case here reported there does not appear to be difference sufficient to render the insertion of them either interesting or instructive.

Fountainhall's account, under dates Feb, 23 and 25, 1680 (1 Decisions, 87) of this procedure, is as follows:

"At the Criminal Court the absentis from the king's host in June last, to the number of 25 gentlemen of Fife, are now pannelled. Nota, this is not the third part of those who were absent in the shire of Fife, and there is another indictment raised against the rest.

"They first proposed general defences: and alledged, that they having put out their militia, they were not obliged to attend in person, the parliament having consented to the militia in place of that servitude. This was not sustained. 2. Alledged, the proclamation calling them out was not published at the several market-crosses, as it expressly bears and appoints. Answered, Their private knowledge supplied that defect.

"Their particular defences founded upon specialities, were, 1. That some were sick. But the Lords found testificates from ministers, physicians, officers of the army, &c. not sufficient, without witnesses were adduced by an exculpation, for 'testibus non testimoniis est credendum.' See a pleaunt story in Philip Comineus* how Lewis 11th of France fined some gentlemen for tlying from his host against the duke of Burgundy, and they offered to prove others were spared, who fled 9 miles further off than they did—Though physicians pretend a privilege not to testify upon oath and conscience, yet the justices declared, they would reject all testificates that wanted it. 2. It was alledged for some, that they were past the age of 60. This was found relevant, they proving it instantly, providing they had sent out their best horses, and their best men well appointed. 3. Some pretended they were officers of the militia, and went out with it, or that they had lands in another shire, and answered there. These were found relevant. 4. Hay of Balkousie founded his defence on a pass to return from the marquis of Montrose, his superior officer. Answered, He not being in the king's guard, Montrose was not his officer. 2do, Commanders have no power to give them licence to desert, else the half of the army might be dismissed. Replied, 1mo, deserting is not libelled, but only not coming. 2do, Grotius 'de jure belli et pacis' is very clear that other officers besides the general may give 'salvum conductum de re deundo,' and if the grantor have exceeded his duty, then blame him. Duplied, deserting is

* So printed in the book.

consequentially and 'per equipollens' libelled, in so far as the 4th act parl. 1424, founded upon; commands them to enforce the king against rebellers; which the deserters do not: see act 110, parl. 1428. 2do, Esto inferior officers may grant furloofs and passes 'teim-pore pacis,' yet not 'in bello flagranti,' and when the army is standing 'in procinctu;' for at this rate it should be in their power to dismiss all. 5. Alledged for Ayton of Inchdarnie, that he was 'in recenti luctu,' his only son having been killed some few days before, upon a mistake as if he had been one of the archbishop of St. Andrew's murderers, which he was not; and the Jas Novell. says, 'per novem dies non inquietetur. qui proximi funus duxerat.' 6. Some pretended that their wives were then lying dangerously sick, or near the time of their delivery; or that their wives opposed and contradicted their going. This in law is not relevant. 7. It was alledged for others, that their houses, their horses and their arms were plundered, and so they neither could, nor were obliged in law to go on foot; and they could not at that time get other horses to buy, they being all picked up.—Because there was a presumption of simulation in this robbing, that it was caused to be done by themselves, or at least by their wives to keep them at home; therefore the declaration was offered to them, as a testification of their loyalty if they took it: but sundry of them declined it, and offered to purge themselves upon oath, that there was no collusion. Yea, some apprehended that their defence of sickness at such a time as this might be simulate. 8. Some denied that they were heritors, and so were not obliged to attend with the gentry. The advocate craved they might then renounce all their heritage to the king, 'ad remanentiam.' Answered, they were not obliged. Replied, Where one is pursued for taxation, and denies he is an heritor, then the lords of session oblige him to renounce. 9. Some alledged they were only apparent heirs, and not infest, and were in possession of nothing, but all was liferented. Answered, the right of apperency forfeits by the 69th act of parl. 1540, and so the king has right to what they might succeed to. 10. Alledged for some, they were only wadsetters, or only possessed 'jure mariti,' or by the courtesie of Scotland, where they had married an heretrix; and so were not heritors. Answered, Since the law was so courteous as to give them the liferent-courtesie, they ought to be so discreet and thankful as to defend the law, and their own country, and a courtiser was 'jure feudali et dispositione juris vasallus pro tempore et ad tempus;' and so was liable to all services.—Quer. If a blench vassal who pays his 'reddendo pro omni alio onere,' may plead exemption from hosts and raids; certainly he cannot. 11. It was alledged for some, that they had no inheritance but some crofts and burrow roods, within 100l. Scots of yearly rent, and so were not bound to go out in person with

the heritors, their rent not being able to sustain them as horsemen.—Though they should go and protect their own property, yet this exception seems very relevant. I heard the lords assoilzied them whose heritage was within 300 merks yearly, as not being able to keep a horse on that rent: but what if they have a good fortune *aliunde* in money? Some make 100l. Scots of valued rent the rule; and if they have under that, they are not obliged to attend hosts and raids. The old criminal adjournal books mention sundry excuses, for such as absented themselves from hosts and raids. Anent the French ban and Arrier-ban, see Craig p. 213. Some alledged they were merchants and burgesses within a burgh royal, and watched there. Answered, Since they were landward heritors, they ought either 'refutare feudum,' or else serve the king for their land. 13. It was contended for some, that it was 'res hactenus judicata,' for they had been summoned to the circuit at Couper and there had got absolvitors. Answered, The diet there was only deserted, and that did not hinder raising of new letters. Replied, It was more than a deserting, for it proceeded upon trial of the relevancy of their excuse; and being found just and proven, it was admitted, and they assoilzied. 14. Alledged for some that were absent from the bar, that they were lying sick, or that they were within 16 years of age; for the law condescends upon all heritors between 16 and 60: but these were repelled as not instantly verified, and they were fined. 15. Henderson of Fordell, &c. alledged, that they were of unquestionable loyalty, but were unable to travel on horseback for the gout, gravel, copulency, &c. but that they had sent one more sufficient than themselves. Answered, Their serving 'per substitutum' did not exoner; which see debated by Craig, diag. 1, lib. 3. 16. For Lindsay of Dowhill it was alledged, That, by a command of privy council, he was ordered to attend them and their diets, at the same very time that the heritors were called out. Answered, 'Posteriora derogant prioribus,' and the proclamation calling the heritors out was after that act of privy council anent him; and he should have obeyed the last. Replied, the proclamation was only general, their order for his appearance, under the pain of 10,000 merks, (which was uncertain when they might call for him,) was special, and 'in toto jure generi per speciem derogatur.'—Besides the foresaid remarks, having got a summary abbreviate of the defences and debate, with the interlocutors following thereupon, as they are recorded in the Criminal Adjournal books, I thought fit also to insert them 'ex superabundantia' here. The 1st general defence is, that the 4th act, 1st parl. king James 1, founded on, anent the refusing to enforce the king against notour rebels, must be construed and understood only of rebels, either convicted or declared fugitive: and the 25th act, 2nd parl. J. 2, relates only to weapon-shawing. 2do, That the proclamation was not inti-

mate to the heritors and lieges, at the market-cross of the head burgh of the shire of Fife. 3to, That the foresaid old acts were made when the king had neither standing forces nor militia; but now having both, the subjects ought to be exonerated, and the said acts not be founded upon. 4to, The king has indemnified several crimes, except those who did not assist his host: but they who sent out their servants and horses did assist, and so are pardoned, and cannot be pursued. 5to, They founded on a letter, alleldged written by the chancellor, in name of the Secret Council, allowing such heritors as were valetudinary, wanted horses, or had any other reasonable excuse, to stay at home and guard the country.—The first 4 general defences were all repell'd.

“Then they came to the special defences; and it was alleldged for

“Bousie,—That he attended the host with servants and horses, well armed; but being valetudinary, he procured a pass and licence to return home, and left his horses and his servants in his majesty's service.

“Hamilton of Kilbrachmont,—That his horses were robbed from him by the rebels, and his servants were sick; yet he furnished himself with horses, and followed the Fife heritors to have served the king, but they were returning after the victory; and he offered to take the declaration.

“Law of Brunton,—That he was sick and bed-fast during all that time.

“Nairn of Littlefrietown's defence was sickness, and that all his estate was liferented by his mother.

“Lundy of Stratharie's,—That his horses were robbed by the rebels, and that he was content to take the declaration.

“Sir James Sinclair, Kinninmond, and Balbirny's defences were sickness all the time of the host.

“Beaton of Bandon,—his lady's dangerous sickness, his sending his servants and horses to the army, and his taking the declaration.

“Melvill of Cassingray's,—a licence from the captain to stay at home, his lady being sick, and he wanting horses.

“Durham of Largo,—his horses were robbed by the rebels, and he offered to rescue them by force, or to redeem them with money, but could not have them. He offered to give his oath that this was not collusion; but refused to take the declaration.

“Cowan of Corstone,—his horses were taken away; he is no heritor, but only possessor and factor of an estate for his own payment, and the payment of other creditors: But he refused the declaration.

“Balcanquhall, of that ilk,—That his horses were robbed; but shunned to take the declaration for fear of disquiet from his wife.

“Nairn of Sandfurd,—That he sent his servants and horses; and being a captain of foot, he endeavoured to conven his company, but none coming save ten, his colonel adjoined them to another company; and so his horses being

gone before, he could not get himself timeously furnished with others: He refused the declaration.

“Moncrieff of Readie,—That his lady being sick, he sent an expert soldier with his horses, who were accepted of, and he had offered to go himself if they had not been received; but he refused the declaration.

“Wemyss of Glenniston's defence is the same with Sandfurd's.

“Young of Kirkton,—his lady's dangerous sickness, and bitter curses if he should leave her; and the appearance of abortion upon his offering to go from her: But he refused the declaration.

“Murray of Pitlochrie,—That he bruiks his little estate by the courtesy of Scotland, and the heir is on life, &c.

“Muirhead of Linhouse,—That he was within 14, and so pupil, and he could not go, not being fencible: yet some thought in strict law his tutors should have sent out a man for the land, even as one that is past 60 should do.”

Then he gives abstracts of interlocutors.

“Largo, Corsteu and Balcanquhall were unlauded in one year's valued rent. Sandfurd, Glenniston, and Readie, were amerced in half a year's valued rent.—The diet was deserted as to Holborn of Menstrie, and Gideon Murray of Pitkerie, and others, it appearing that they were past the age of 60. So there is small room left for that question, whether *senus 60 inchoatus* (as being *in materis favorabili*) will excuse, or if they must be 60 complete. The declaration was offered to none whose defence was sickness, or who had any other defence that put them beyond a possibility of attending.

“I heard where there was a liferent and a fiar, that the fiar was found liable to attend the king's host, and be at the expence of sending men; yet it would seem much more equitable that the liferenter who possesses should be liable for their *onera fundi realia*, than the fiar; ‘*Onus temporarie indictionis ad fructuarium pertinet. l. 28 D. de usu et usufr. legato.*’ For it is a real burden, and liferenters should bear it. See Nov. 1673, f. 228. For Physicians, vide ‘*Mattheus de afflictis decis. Neapolitan. 41; tot. tit. Cod. de professor. et medicina.*’ The lords were inclined to think any eminent physicians were exempted as to personal attendance, but these who were salaried to attend the army; only they should have sent.”

He has also another entry respecting prosecution of persons for absence from the King's Host:

“March 6, 1680. At the Criminal Court, some heritors of the three Lothians were pannelled for absence from the king's host. James Ellies of Southside, Durham of Dunstrie, and many others were fined, some in 1000 marks, some in 300 marks, some in more, some in less, according to their valued rent; and the lords proceeded with moderation enough.

“In Mr. William Chieaty's case, as heritor

of Cowburn, the defence of his being a member of the college of justice was proponed, to exeem him from personal attendance at the king's host, and was repelled, as I hear; but it was neither fully debate, nor the acts in their favours shown; and therefore the criminal lords continued the diet against Mr. Thomas Learmont, Mr. James Hunter, and the other advocates who were convened for their absence, and had got indictments and citations for that effect, and they forbore to insist against them. It may be alledged for advocates, that they are not obliged to attend hosts and raids, and a man in arms for them; and ought not to be pursued for absence therefrom: 1mo. Because the Roman law exeems and privileges them 'ab omnibus functionibus provincialibus,' l. 3, & 6. C. 'de advocat.' div. jud. et tot. tit.

'C. de professor, et medicis; immo ab excubiis,' as Gothofred there affirms. 2do. They are liberate by an express act of Sederunt made by the duke of Chatterheraut governor in 1545. 3tio. In June last the Lords sat all the time of the raid and campaign, and so advocates could not warrantably desert their clients affairs contrary to their oath *de fidei*, and of attending the Lords. 4to. By acts of secret council then made, the college of justice were listed into a company, to help to guard the town of Edinburgh, and they chused their captain, lieutenant, and other officers, and got arms from the castle, and marched, and drew up, and used discipline. Nota, This makes not against the college of justice, for Mr. William Chiesly is deprived from being a writer to the signet."

326. Proceedings against the GORDONS, of Earlestoun,* and others, for Treason: 32 CHARLES II. A. D. 1680. [Now first printed from the Records of Justiciary in Scotland.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in pretorio burgi de Edinburgh decimo octavo die mensis Februarii, 1680, per honorabiles viros dominos Georgium M'kenzie de Tarbet Justiciarium Generalem, Thomam Wallace de Craige, Justiciarie Clericum, Robertum Nairn de Strathurd, Davidem Balfour de Forret, Davidem Falconer de Newtoon et Rogerum Hoge de Harcares, commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

THE said day anent our sovereigne lord's criminal letters raised, used and execut at the instance of sir George M'kenzie, of Rosehaugh, our sovereigne lord's advocat for his hynes in-

terest, and also at the instance of lieutenant colonell Edmond Mayne against master William Ferguson, of Ketlock, Mr. William and Alexander Gordons, of Earlestoun, elder and younger, and James Gordon, younger of Craisbley; and also anent our said sovereigne lord's other criminal letters, raised at the instance of his majestie's said advocat for his hynes interest, and lieutenant colonell James Douglas, his informer againest — Gordon, of Culvenan, — Dunbar, of Machrimore, and — M'Ghie, of Large, mak and mention, That wher notwithstanding be the common lawe, lawe of nations, lawes and acts of parliament, and constant practice of this kingdome, the ryseing of his majesties subjects, or any number of them, the joyning and assembling

* See in this Collection, the Introduction to the Trials for the Ryehouse Plot, inserted in vol. 9, particularly pp. 454 et seq. See, also, as to the torture of Earlestoun and some other particulars, vol. 6, pp. 1217, et seq. and of the 10th volume, pp. 751, et seq.

It appears from Wodrow, that Gordon, of Earlestoun, having been, together with several other persons, cited to answer for being present at House and Field Conventicles since the year 1674, and for reset and converse with intercommuned persons, and not compearing, was with the rest, on February 18th, 1679, ordered by the Council to be denounced, and put to the horn.

Upon May the 8th, 1679, the Council approve of the Report of a Committee of Public Affairs to the following effect: "That they had writ a letter of thanks to C. Carne and William Carmichael, sheriff-deputes of Fife, for their diligence in searching after the murderers of the primates; and had impowered

them to secure and put under inventory the goods of John Balfour of Kinloch, Hackstoun of Rathillet, the three Balfours, in Gilstoun, persons most suspect of the murder, until they themselves be brought to a trial: that they had called before them ten persons apprehended in the south by the laird of Meldrum, two of which, Robert Neilson and Nicol Story, can make great discoveries of Welsh his haunts and reset, Neilson having confessed that he rode with him and Story; that he collected contributions at their meetings, rolls of which were found on him. They are remitted to the advocate, with other four prisoners sent in from Air by captain Murray; and are to continue in prison till they receive a libel for being at conventicles. That the cautioners of Mr. Alexander Gordon having forfeited their bond, by not producing him, be charged for five thousand merks; that Mr. Andrew Kennedy, of Clowburn, upon refusing to depone, be held as confest, and fined in a thousand

together in armes without and contrary to his majesties command, warrant and authoritie, and the abating, assisting, receyving and keeping correspondence with such rebels, and supplying of them with levies of men, horse, money, or armes, and furnishing of them with meat, drink, powder, ball, and other munition bel-

marks; that Mr. Robert Maxwell, now confined at Paisly, because of his great age and infirmity, have the diet continued against him, he finding caution to appear when called, under the pain of a thousand merks; that, upon the testimony of the archbishop of Glasgow, Mr. John Law be dismissed, upon caution, to appear when called, upon bond of a thousand merks; that Bennet, of Chesters, continue in prison till he receive an additional libel; and Scot, of Pitlochrie, and his cautioners be cited to the next council day."

The Council also continue Earlstoun's case till next diet.

The Gordons, of Earlstoun, elder and younger, are mentioned by name in the Proclamation published by the Scots Council, on June 26, 1679 (inserted, N° XXX, in the Appendix to 2 Wodrow) by which the king discharged and prohibited all his 'subjects, men or women, that none of them offer or presume to harbour, reset, supply, correspond with, hide or conceal, the persons' there enumerated, or any others who concurred or joined in the late rebellion, or who, upon the account thereof, had appeared in arms in any part of the kingdom of Scotland.

Wodrow, in relating the transactions at Bothwell-bridge [June 22, 1679] says, "Whether it was this day or the following, I know not, but at this time that excellent person, William Gordon, of Earlstoun, who was coming up to the western forces, was killed by the English dragoons." It seems to be clear that the person spoken of in the above passage, is the Alexander Gordon, elder, of the Case before us; for under date February 18th, 1680, Wodrow writes, "Mr. William Fergusson, of Kaitloch, Alex. Gordons, elder and younger, of Earlstoun, James Gordon, younger, of Craichlaw, William Gordon, of Culvennan, Patrick Dunbar, of Machrimoir, and M'Ghie, of Larg, are called."

"It hath been remarked before, that Earlstoun elder was killed about the time of the defeat. This good man is prosecuted after his death, of which we shall meet with more instances." [See, too, in this Collection, vol. 2, p. 707, the Case of Robert Logan, and the Note at the end of that Case, p. 722. See, also, Laing's History of Scotland, edition of 1804, vol. 3, p. 54, where it is said, "According to a legal maxim that no person can be condemned in absence his (Logan's) bones were dug up, and in parliament produced and arraigned at the bar"] "The prepared witnesses depone as to their accession to the rebellion, and they all are forfeited in common form, ex-

cept M'Ghie, of Larg, who is continued until the second Monday of June."

Under date Aug. 21, 1683, Wodrow writes,

"Earlstoun's process before the justiciary is very short, upon the same day. They proceed upon the former sentence, and only name the day for execution. 'The Lords find the pannel, Alexander Gordon of Earlstoun, was found guilty of treason by an assize, February 19, 1680, and adjudged to be executed and demeaned as a traitor, when taken; being now apprehended, he is sentenced to be beheaded at the cross of Edinburgh, September 28, next.' This is all I find about this gentleman in the criminal records.

"In the Council Registers there is much about him, but I shall not enter into any larger detail of his affair. He was taken going to Holland the last of May, or first of June this year, which made a mighty noise, and people thought a great discovery would have been made; every body was upon the scent and chase as to the plot against the king's life, and the council and bishops hoped for wonders out of Earlstoun's papers, but there was nothing of that kind to be found in them. The real account of that matter in short stands thus.

"Earlstoun had been abroad very much since Bothwell; he came home this spring, and joynd himself to the society people, where he was safest from falling into the managers hands. In April or May, at one of their general meetings at Edinburgh, I find, by the original records of the societies, that he was pitched upon by the general meeting to go again to Holland, and joynd in a commission with Robert Hamilton brother to the laird of Preston, his brother in law, for representing the true condition of these people and their principles to the reformed churches abroad. I have before me the copies of their commission and instructions, and several letters and representations they sent with him, too long to be insert here, but they have no relation at all to the English plot.

"I find by an original letter in my hands from Earlstoun to the societies, dated Newgate, June 9, this year, that when he had got safe to Newcastle with Edward Atkin his servant, formerly spoke of, and was aboard a ship for Holland, some waiters came and challenged them being strangers. Earlstoun fearing the seizure of the papers he had with him, dropt them into the sea, where they were noticed, and taken up, and both of them seized and sent up to Newgate, whence they with the papery were sent down to Scotland to be tried.

"June 2. The council write a letter to the

rebell against the king's person, under the paine of forfaiting of lyff, land and goods, and be the threttie sevinth act of his second parliament, it is statut, that no man willfullie receyt,

mayor of Newcastle upon this affair. ' Sir, We received your express, wherein you acquaint us with two persons apprehended and committed to his majesty's gaol in your town, with whom are found several seditious papers and letters, and that these persous were going beyond sea, under the names of Alexander Pringle and Edward Livingstone, but were by your care prevented, and their papers, which they attempted to destroy, preserved. Colonel Struthers also hath sent us copies of some of these seditious papers, the originals whereof you have done well to send to his majesty. We are very sensible of your care and zeal in his majesty's service, and return you thanks for acquainting us therewith, and desire you may be pleased to detain them in separate prisons, and continue your care in searching for suspect persons, guilty of pursuing seditious courses in this kingdom; for we have reason to believe that several rebel-preachers, and other fugitives from justice, do lurk concealed in and about your town. We shall not be wanting to inform his majesty of your zeal in his service. Yours, &c.

' ABERDEEN.'

" At the same time they write another letter to colonel Struthers, signifying, They received his of the first instant with the copies of some of the papers, thank him for it, and desire him to continue his diligence in discovering seditious and suspect persons in the North of England.

" The council were very exact in the examination of all the papers, when sent down to them. They drew up their queries and written answers from Earlstoun; he was most ingenious in giving accounts of all he knew with respect to the papers, as I find by a copy of his answers to the council queries, and there was indeed nothing in them save commissions and instructions to him and Mr. Hamilton, with letters to some Dutch ministers and Scotsmen in Holland, and papers on civil business. And after all their endeavours to find somewhat relative to the Plot, they could fix upon nothing, for nothing was to be found of that nature.

" Nevertheless the managers, after the justiciary had renewed their former sentence of death upon him, resolve to put him to the torture. And being straitened in point of law to torture a person under sentence of death, the council write the following letter to the secretary, dated August 21. ' Right honourable, Alexander Gordon late of Earlstoun having been frequently brought before, and examined by the council, and in committees by some of their number, and from whom, it seems, nothing more can be had from all the interrogatories they could propose to him, than what hath been already put in writ, and sent to his royal highness and your lordship, and

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maintaine or doe favour to opin or manifest rebels against his majestie and the common lawe, under the paine of forfeiture; and be the fourteint act of the seixt parliament of king James

' the council having had under their consideration what is further to be done anent him, he being a person under the sentence of death for high treason, thought fit, in regard there are only in town three of the justices, the rest not being to be here till November, to desire your lordship to take advice of his majesty's advocate, (now at London) if by the laws of this kingdom, and in the circumstances he is now in, being under the sentence of death, he may be put to the question by torture, upon such pertinent questions as your lordship and he shall think fit to draw up. And if he find that he may, by the laws of this kingdom, be now put to the torture, that the advocate, as soon as may be, come down himself and answer any thing that shall happen to be objected against it by the said Earlstoun, or send a commission to some fit person to do it for him in absence, against the next council day, September 11, with such interrogatories as shall be thought fit to be proposed, that the council may do justice in that matter. The justices having met this day have given us an account, that they have appointed the 28th day of September for putting the sentence of death in execution against Earlstoun. I am, &c.

' ABERDEEN, Cancel' I. P. D.'

" An answer came not to this letter until September 20, when a letter from Middleton, secretary, dated September 14, to the chancellor, is read, and follows: ' My lord, In answer to yours of the 21st of August, I am now by the king's command to acquaint your lordship, that his majesty in a full Quorum of his privy council of Scotland now here, proposed to his advocate, whether Alexander Gordon late of Earlstoun, notwithstanding of his being condemned to die, might be put to the question by torture. His answer was, that though no man can be put to torture upon interrogatories only relating to the cause for which he was condemned, yet he may be tortured with relation to plots, conspiracies, and combinations that have happened after the time when the crimes were committed for which he was condemned. And since it is undeniable that the said Alexander Gordon did accept a treasonable commission from rebels, and it doth appear by a letter direct to him from J. N. dated at London, March 20, last, that he was privy to the late horrid conspiracy against his majesty's person and government, and yet refuseth to give an account either of those from whom he received the said commission, or such as he knows were accessory to the said conspiracy, and both these points being of so great consequence for the future security of his majesty's person and government, it was therefore resolved by

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the 2d, it is statut, that non rebell against the king's person or authoritie, or make warr against the king's leidges, and whoso does in the contrair to be punished efter the qualite and quantie of such rebellion; and be the twenty fyft act of his first parliament, It is statut, that if any man comunt or doe treason against the king's person, or ryse in fear of wear against him, or receipts any that has committed treason, or supplies them in help, redd or counsell, shall be punished as traitors; and be the 144 act 12 parliament king James 6, it is statut, that wherover any declared traitors repairs in any part of this kingdome non of his majestie's leidges shall presume to receipt, supplie or intercomon with them or give them any relieff or comfort; and that immediately upon knowledge of ther repairing in the bounds, all his majesties obedient subjects doe ther exact diligence in searching and apprehending the saids traitors and rebels, and that with all speed they certifie his majestie, or some of his secret counsell, or some persons of authoritie and credit within the shyre, that such rebels are within the same, under the paine that the saids rebels and traitors ought to sustaine if they wer apprehendit and convict be justice: lykeas by the fyft act of the first session of his majesties first

his majesty, that the said Alexander Gordon shall be put to the torture, and interrogate on what may pertinently relate to these two heads, to wit, as to those who have had accession to the granting the said commission, or the said conspiracy, of which it is his majesty's pleasure you acquaint the lords of his privy council. I am, &c.

'MIDDLETON.'

"In pursuance of the above letter, the council that same day nominate the marquis of Douglas, earls of Tweeddale, Wintoun, and Linlithgow, the lord Livingstone, general Dalziel, the president, lord Collingtoun and Castehill, or any five of them, as a committee to meet Tuesday next, at ten of the clock forenoon in the ordinary place, and consider the interrogatories to be put to the said Alexander Gordon, and see him questioned in the torture upon them, and others arising from them, and generally with power to them to do all things requisite to that purpose, as they shall see fitting; and ordain all the members of the justice court to be present, and Mr. George Bannerman, as having commission from the advocate, to draw interrogatories pertinent relating to the said two heads, and to be present with the committee.

"Accordingly, September 25, the foresaid counsellors examine Earlstoun, with the instrument of torture standing by, but did not apply it, he protesting he would be as ingenuous and more full than he could be in torture. The interrogatories and his answers are already printed in Doctor Sprat, late bishop of Worcester, [Rochester] his account of the

parliament, it is declared, that it shall be hye treason to the subjects of this kingdome, or any number of them, more or lesse, upon any ground or pretext whatsoever, to ryse or continue in armes, to make peace or ware, or to make any treaties or leagues with forraigne princes or estates, or amongst themselves, without his majestie's speciall authoritie and approbation first introposed thereto; and all his majestie's subjects are discharged upon any pretext whatsoever to attempt any of these things, under the paine of treason; and be the eleventh act of the first session of his majestie's second parliament, it is statut and ordained, that in tyme coming in all cases of treasonable ryseing in armes, in oppin and manifest rebellion, against his majestie and his authoritie, his majesties advocat may and ought to insist against and prosecute such persons, as he shall be ordered by his majestie or his privie counsell to persewe, and if they be cited and doe not appeir, his majestie's justices, notwithstanding of ther absence, may and ought to proceed to consider and give ther interloquitor upon the lybell, and if it be found relevant to admit the same to the knowledge of ane inquest, and upon the verdict of the inquest finding the samen proven, the doom and sentence of forfeiture ought to proceed and be given,

Rye-house Plot, though with some mistakes; and so I shall not say any thing of them here, but that neither the Plot against the king's life, nor the design of rising could be fixed on this gentleman, or the people who sent him, who really knew nothing of the matter.

"All I find further in the Registers upon this gentleman's case is, November 25. 'Upon a new letter from the king, the council order Earlstoun yet to be put to the torture: but when he is brought in, he appears to be in distraction, and physicians were called to consider his case. November 27, the physicians report he is affected with that distemper called *alienatio mentis*, and advise he may be sent to the castle, that by the change of the air his case may be better known. December 7, Earlstoun petitions for pious divines to be sent to him, that he may have their benefit before his death, and as a dying man declares his innocence of any plot against his majesty, prays for the king, and adheres to the answers he gave to the interrogatories. He is reprieved till the last Friday of January, January 17. Earlstoun's reprieve is continued till the last Friday of April, and his petition for pardon transmitted to the secretary. April 11, he is reprieved again till December. And in May he is sent to the Bass for his health. In September following he is made close prisoner.' Thus he continued confined sometimes with more liberty, and sometimes less, with his excellent lady, until he was liberate by the revolution. And all the endeavours of the bishops and managers, to fix the plot against the king's person upon Sects Presbyterians, came to nothing."

and pronounced in the same manner as if the persons accused had compeired and wer present ; nevertheless the saids Mr. William Fergu- son, of Ketlock, Mr. William and Alexander Gordons, of Earlestoun, elder, and younger, James Gordon younger, of Craishley, ——— Gordon of Culvenan, ——— Dunbar, of Mach- rinoir, and ——— M'Ghie, of Large, and ther rebellious associates and accomplices, shacking off all fear of God, conscience and sense of duty, allegiance, and loyaltie to his majestie ther sovereigne and native prince, have most perfidiouslie, and treasonable presumed to com- mit, and are guilty of crymes above mentioned in suafare, as John Balfour, of Kinlock alias capt. Burlid, David Hackston, of Rathilet,* George Balfour, in Gilstoun, James Russill, in Kettle, Robert Dingwall, a tenants son, in Caddam, Andrew Guillaun Wobster, in Balmirinoch, ——— Henrysons, sons to John Henryson, in Kilbrachmont, and George Fleyming, son to George Fleyming, in Bal- buthie, these impious and sacraleigious murders and murdering reformers, who to progate christianitie, like Jesuits doe murder chrystians, these enemies of mankind having gone in April last to the toun of Newmilas, in the night time they did murder in cold blood † a souldier in captain † companie, and left another of the saids souldiers for dead †

* See his Case, Vol. 10, p. 791.

† Sic in Orig.

‡ Of this transaction the following is Wod- row's account:

“ From the parcelling of the soldiers up and down, and their numbers and activity, the keepers of conventicles were obliged a little to alter their method. Towards the end of the last year, [1678] some ministers began to withdraw from preaching with their brethren, with whom they used to preach in the fields formerly, who were now for entering either upon the indulgence or cress in their sermons to vulgar auditories, and drew up with the young preachers I have formerly spoken of, and continued to preach together with them pretty much on these points this winter and spring. Some papers before me, writ by some of that side, say, That field-meetings in the beginning of this year were more numerous than formerly, and many were obliged to come with arms to defend themselves, because they were frequently attacked by the soldiers and garrisons ; and for their safety as well as harmony, the ministers and such who waited upon them, resolved to keep as close together as might be. They had found that by preaching in separate places, and scattering themselves, they were very much weakened, and the soldiers got advantage this way against them, and sometimes the ministers were in hazard to be seized, and several of the hearers were taken. Therefore they determined to narrow themselves into one meeting in such places which stood most in need of the gospel, and where they might gather and preach in the

and thereafter having conceived a criminall and deadlie hatred against his grace the late arch- bishop of St. Andrews, and upon the third day of May last, having cruellie, impiouslie and sacraleigiouslie murdered him, they to escape justice and involve others in ther guilt (still falslie pretending pietie and religion, goe into the Westerne shyres, and most treasonable joyne in armes with Robert Hamilton, bro- ther to the laird of Preston, Mr. John Kac, and ther accomplices, dissoint and flagitious persons, to the number of threscore and up- wards, who, upon the twenty nynth day of May, a day appointed for a soleinn annie- versarie thanksgiving for his majesties Restau- ration to the royall government of his kingdome, did goe to the burgh of Rutherglen, and ther most prouddie and treasonable having read acts of their own coining, shacking off ther alleag- ance to his majestie, they most treasonable and wickedlie burnt severall acts of parliament, as- serting his majestie's prerogatives, and establish- ing the government of the church, drowned out bonefyres sett on in commeration of that day, and thereafter they treasonable convocat and assembled together, the number of four, five, sex or sevin hundreth, or thereby, and did waylay a small and few company of men under the command of the laird of Claverhouse, and did most cruellie murder and kill some of

greatest safety. Thus they continued for twenty sabbaths without intermission from De- cember to May. I do not doubt but this course they took tended to heighten the separation ; and when they were alone without conversing with others, and preaching with persons more moderate, severals who joyned with them did heighten the breach, and screw up matters the length they came to. Meanwhile, Mr. Welsh and others of his temper preached in other places, with whom there were not many in arms, and endeavoured to calm matters as much as might be.

“ Upon the 30th of March there was a ser- mon and large meeting at Cumberhead, in the parish of Lesmahago, not far from Lanerk. The soldiers hearing of it, sent a good body of men to dissipate them : The party understand- ing the numbers of the meeting, and how well many of them were armed, did not find it con- venient to attack them ; but kept at some dis- tance, and satisfied themselves with rifling some women, who were going to the meeting, of their plaids, bibles, and the like, and seizing some men. This coming to the knowledge of the meeting, a good number was sent off in arms to require the prisoners, and the womens plaids, &c. The commander of the soldiers refused both, and a scuffle ensued, wherein the officer was wounded, and some of the soldiers taken prisoners ; but they were soon dismissed. When the account of this came to Glasgow, my lord Ross and the soldiers there, marched up towards Lanerk, and the country thereabout was sore harrassed for some weeks.

“ The accounts of this scuffle came in to the

his majestie's souldiers under his command, and being proud and insolent with ther treasonable cruelties, murders and villanies, the persons above named did joyne with the saids

council, April 3. very much aggravated: And they order the commissioners for assessment in the shire of Lanerk, to meet and provide hay, straw and corn for the forces to be sent there against some rebells who have lately appeared in arms about Lesmahago, where it seems the scuffle was; and if it be not timeously provided, the major-general is allowed to give orders to take it where it may be had, upon paying the established prices. And next day they appoint the earls of Mar, Glencairn, Linlithgow, lord Ross, the advocate, and several others as a council committee, with a justiciary power to sit at Lanerk, and examine this matter. Their commission I have annexed Appendix No. 3. Accordingly they met April 25, and made a most diligent enquiry, and were not unwilling to have found some of the country people guilty; but nothing further than what is above could be found. This matter will appear best from their own Report which they made to the council April last, which I have inserted Appendix No. 9. The reader will observe that they take notice of the murder of two soldiers near Newmills, which I now come to give some narrative of, as what made a great noise at this time.

And I shall give a candid and fair account of it from letters writ by good hands, the rather that this was the only thing which could give any colour for charging those who did not conform with murders and assassination: it was carefully improved, and maliciously magnified, and laid upon presbyterians most groundlessly. All other persons blame the fact; and as, I must own, it is uncertain who were the actors, so after my utmost enquiry into it, to me it seems to land upon a tool and a spy sent in among some who haunted field-meetings.

This matter stood thus: three foot soldiers of captain Maitland's company had been sent to quarter upon a countryman near Lowdonhill, because he had not paid the cess: they continued there near ten days; the man in the house being sick, they were not altogether so outrageous as many of their gang at this time used to be. The wife, or woman servant had during that time threatened them, that if they left not the house they might come to repent it; but they were not much careful about that, and answered, they came by orders, and behoved either to have their errand, or orders to go away. One of the three went down to Newmills upon Saturday, and staid all night, whether he was any way conscious to the design, or only affrighted by the warning, was not known. But upon sabbath morning April 20, five horsemen, and about as many foot, came about two of the clock in the morning, and rudely knocked at the barn-door where

rebells and murderers, and ther accomplices, to the number of two or three thousand men, in armes and, upon the day of June last, did most treasonable attack and assault a

the remaining two soldiers were lying. They taking it to be their comrade come from Newmills, one of them rose in his shirt, and opened the door: he was saluted with reproachful words, Come out you damned rogues, and was shot through the body, and fell down dead without speaking one word. The other got up upon this, to put to the door, and received a shot in the thigh from the same hand. The assassin alighted from his horse, and came in upon the soldier, who grappled a little with him, till another came up and knocked him down. He was perfectly dammished with the stroke; and when he recovered his senses, he thought it convenient to lye still in the place as dead. The murderers came into the barn, and took away the soldiers arms and clothes, and in a little went off.

This soldier lived till the Friday or Saturday after, and then died of his wounds. The people of the house said, they knew nothing of the matter: all the account that could be had was from this second soldier before his death, and he declared what is above, and added, that, to the best of his knowledge, the person who shot was one John Scarlet; the rest he did not know, there being but little light, and he in a confusion. This Scarlet was a notorious rogue, a tinker by trade, and had six or seven women whom he tormented his wives, who went about the country with him. Two or three years before this, he had been taken, and gilded to be a new levy to some French captain, and procured a mutiny in the ship, and got off. After this he was in the army, and several accounts bear, that he was in that party before spoke of, commanded by captain Carstairs, when Garret was wounded. Last harvest he was in Home's troop, and was cashiered for some misdemeanour, or, as some at that time thought, dismissed upon some design: for a month before this, he had been in the shire of Air, and was lately in Kilmawers, in a change house, a night or two, with three of his wives.

And, that I may give all I know of this villain, it seems he was after this taken, or offered himself as an evidence; for by the justiciary records I find, May 12, this year, John Scarlet, tinker, being examined by the lords of justiciary, declares, that, in summer 1674, the declarant did take on to serve with Mr. John Welch, and was to have twelve pounds in the half year, and clothes; that he had a brass from him, with a sword and pistols, upon which he rode; and that he was but with him a fortnight, and there were in company one Bell and Sutherland, and some others who still had swords and pistols. Declares he cannot write. Signed G. Mackenzie, Tho. Wallace, James Fowis, David Balfour, Roger Hog.

There is no more about him in the regh-

small partie of his majestie's forces within the town of Glasgowe, under the command of the lord Rosse and the laird of Claverhouse, be whose prudence and government these nottor, oppin and manifest rebels wer repulscd. And yet they being encouraged and imboldened with the hopes and promises of the levies of men, horse and armes, from the saids persons above named, and others of ther rebellious and traitorous principles, they did swell and grow to the number of ten or twelve thousand, and they and ther accomplices, within the sherriff-dome of Wigtoun, and Stewartrie of Kirkcudbright, did most treasonable convocat, ryse and joyne in armes to the number of four, fyve, sex, seven or eight hundreth, and took the boldnes to come to the burgh of Wigtoun, upon the day of June last, wher they and ther accomplices robbed and villaged the citizens and inhabitants therin, and searched for horse,

armes, powder, ball, and other instruments of warre, and did with ther rebellious accomplices march to the town of Dumfries, and did treasonable quarter upon the inhabitants thereof, and did rife and plunder from them, ther horse and armes, and did robb the house of Drumlanrigge, belonging to the earle of Queensberrie, and did march forward to the burgh of Sanquhar being to the number forsaid, and theretier to the burghs and shyre of Aire, and did continue in ther treasonable armes robbing, plundering, rifeing and pillageing his majesties dutifull and good subjects; and the persons above named did maintaine, supplic and comfort Mr. John Welsh, Mr. Samsiel Arnot, forfaitued and declared rebels, for the rebellion 1666, and did supplic, and shelter, and protect these impious, horrid and sacraleigious murders of the late arch-bishop of St. Andrews, and having marched towards Bothwell and

ters: only I find, in one of the prints anent the bishop of St. Andrews's death, that in June he was arraigned for his treasonable crime of assisting and guarding a declared traitor: but as the justiciary made nothing of his being fourteen days or thereby riding with Mr. Welsh, who probably, seeing his looseness, dismissed him; so this is a very slender ground to make him of Mr. Welsh's guard, and far less will it be a proof that afterwards he might not serve under Carstairs, or at this time that he might not be made use of for a tool.

"I have ground to think, that the managers were not ignorant of what the soldier had declared about him, since the gentlemen of the shire of Air, as we shall hear, sent in my lord Cochran and others to Edinburgh upon this incident; and the letter from which the above account is given, was writ by a very worthy person in my lord's family, and no doubt, but the matter in it was communicate to the council: so that I cannot help jealousing, that this villain Scarlet, on whom no punishment was inflicted at Edinburgh, that I can hear of, hath been of design dismissed from the army, to mix himself with some others of another character and put them to extremities.

"Indeed I find it alledged, That, at this time, this rascal came and joynd himself with some others in arms, who were a kind of guard to Mr. R. Cameron, who preached in the fields: whether it was so, or not, I cannot affirm; but this report was certainly the ground upon which these who haunted field-meetings, and particularly Robert Hamilton, and some others who rode in arms, were loaded with this barbarous murder. Be who they will who committed it, from this fair and just account I have given from letters writ at this time, it appears to have been a villainous act, and that Scarlet was the actor, and that suffering presbyterians cannot be charged with it. Indeed all good men must lothe such a wickedness.

"This falling out in the shire of Air, where a handle had been taken from things less cla-

mant than this, last year, to harass and depopulate that country; and the noblemen and gentlemen there detesting such villainies, they met at Air upon the 28th of April agreed upon, and by three of their number sent in the following letter to the council, which, I am well informed, was designed both to exoner themselves, and to be a preamble to an intended address to the king, for some relief to their burdens, and further liberty to presbyterians:

"My Lords;

"The noblemen, gentlemen, and heritors of the shire of Air, underscribing, being met here this day, by the knowledge and allowance of several of the lords of his majesty's privy council, having heard of an horrid murder committed upon the person of one of his majesty's soldiers, and the wounding of another, upon the borders of this shire, as also of some armed field-meetings of some numbers of the commonalty, sometimes in one place, and sometimes in another upon the confines of this and other neighbouring shires, occasioned by a few unsoand, turbulent, and hot-headed preachers, most part whereof were never ministers of the church of Scotland, making it their work to draw people to separation and schism from pre-ordinances and instil in them the seeds of rebellion, by their informations, exhortation, and doctrine, as we are informed: we, in the sense of our duty to authority and religion, and the quiet of this kingdom, have thought it fit and incumbent upon us, in all humility, to signifie to your lordships our detestation of, and dissatisfaction with these horrid and dangerous courses; and we shall endeavour not to be wanting in our capacities and stations, in any thing that becomes good christians and loyal subjects. And that we may not be further troublesome, the earl of Lowdon, lord Cochran, and sir John Cochran, will give a fuller account of the matter of fact, which we humbly intreat may be communicated to the lords of his majesty's privy council, from,

My Lords,
Yours, &c."

Hamilton, wher ther wer eight or nyn thousand of ther rebellious associates, the saids Mr. William Ferguson, of Ketloch, Mr. William and Alexander Gordons, of Earlstoun, elder and younger, James Gordon, younger, of Craichley, — Gordon, of Culveuan, — Dunbar, of Machrimore, and — M'Ghie, of Large, did joyne in armes with them; and they and ther associats did take the boldnes to issue furth proclamations and print declarations, bearing the treasonable grounds of ther rebellion, and not content therwith, they and ther accomplices did proceed to other degrees of rebellion, and did presume to modell ther rebellious associates, and to forme and give them the name of ane army, modcling, and formeing themselves in troops, companies and regiments, naming colonels of regiments, captaines of companies, commanders of troops, and other officers, under the command of the said Robert Hamilton, John Balfour, of Kinloch, Hackstoun, of Rathlet, and others, the impious and bloodie murderers of the late archbishop of St. Andrews; and they and ther accomplices did incampe themselves at Hamilton Muir for severall dayes together, in June last, and did obstanatlie continue in armes, making detachments for rifleing and plundering of the country to make provisions for ther rebellious camp, and that notwithstanding of ane proclamation issued furth by his majesties privie councill, declaring the said insurrection to be ane manifest and horrid rebellion, and hie treason, and commanding these rebels to desist and lay down ther rebellious armes, yet they and ther rebellious accomplices did continue and abynd in ther treasonable armes, did beat parlies be drums, and did take the boldnes and presumption to send ther commissioners to the royall camp, and treasonable did requyre the subversion and overturning of the government of the church, proudlie and insolentlie boasting of ther treasonable, (and as ther commissioners wer pleased to call them) formidable armes, in which they treasonable continued untill the twentie second of June last, that his majesties forces did attackq and assault them at Bothwel bridge, wher they by God's blessing upon his majesties armes, and by the valour and conduct of James duke of Buccleugh and Monmouth his majesties generall, and officers, and souldiers under him, ther numerous and rebellious army was dissipat, routed, vanquished and defate; in doring wherof or ane or other of the saids deeds, the saids Mr. William Ferguson, of Ketloch, Mr. William and Alexander Gordons, elder and younger, of Earlstoun, James Gordon, younger, of Craichley, — Gordon, of Culveuan, — Dunbar, of Machrimore, and — M'Ghie, of Large have committed and incurred crymes and paines of treason, above mentioned, and are actors art and part therof, which being found be ane assyse, they ought to be punished with forfaiture of lyff, land and goods, to the terror of others to committ the like herefter, as in the saids criminal letters

and dittay above written, insert therein till at more length is contained.

Persewcr.—Sir George M'Kenzie, of Rosehaugh, our soveraigne lord's Advocat.

His majesties Advocat produced ane warrant from the lords of his majesties privie councill, ordering him to persewe a proces of forfaiture against the persons above named, wherof the tenor followes, "Edinburgh, the 10th of February, 1689." The lords of his majesties privie councill doe hereby give order and warrant to his majesties advocat to persewe ane proces of forfaiture befor the justices aginest — Gordons of Earlstoun, elder and younger, — Gordon of Craichley, — Gordon of Culveuan, Ferguson of Ketloch, — Dunbar of Machrimoir and — M'Ghie of Large.— Extract be me.

Sic Subscritur, AL. GIBSONE.

His Majesties Advocat lykways produced the forsaid criminal letters deulie execut, and indorsat aginest the hail defenders above named at the marcat croce of Edinburgh, pair and shoar of Leith upon threescore dayes, and at ther respective dwelling houses and marcat croces of the head burghes of the shyres and stewartries within which they live, and ther lands lye upon fourtie dayes warning, by sound of trumpet, with his majesties coat of armes displayed, and using all other solemnities necessary, and leaving and affixing at the saids respective places, full doubles of the forsaid criminal letters, word be word, with lists of the hail assyers and witnesses names to be adduced aginest the saids defenders. Compirred lykwayes William Glover, Rothsay herald, together with the witnesses to his executions, and being solemnlie sworn, made faith upon the truth and veritie therof, that the samen letters wer execut at the tymes, places, in manner and with the solemnities mentioned in the samen executions. The lords, with consent of his majesties Advocat for severall causes movinge them, continued the dyet aginest the said M'Ghie, of Large, defender, till the second Monday of June next, and ordained witnesses and assyers to attend; the saids Mr. William Ferguson, of Ketloch, Mr. William and Alexander Gordons, of Earlstoun, elder and younger, James Gordon, younger, of Craichley, — Gordon, of Culveuan, and — Dunbar, of Machrimoir, being oftymes called to have compeired and proponed ther defences aginest the lybell and dittay above written, why the samen should not pass to the knowledge of ane assyse, and to have given in ther objections aginest the witnesses and assyers to be adduced aginest them, if they any bade, lawful tyme of day bidden, and they nor son of them compeirand to the effect forsaid, the lords justice general, justice clerk, and commissioners of justiciary, therfor be vertue of, and according to the tenor of the forsaid elevinth act of the first session of his majesties second parliament, did proceed to consider and

give ther interloquitor upon the lybell, of the whilk interloquitor the tenor fellowes :

The lords finds the dittay against Gordons, elder and younger, of Earlestoun, Ferguson, of Ketloch, Gordon of Culvenan, Gordon of Craichley, and Dunbar, of Machrimoir, relevant, and remits the same to the knowledge of ane assyse of the persons followeing : they are to say,

Patrick Murray, of Dewchar.

Mr. James Lewis, of Meirkiestoun.

George Drummond, of Milnork.

James Naesmith, of Posso.

Sir Patrick Nisbet, of Dean.

* Alexander Nisbet, of Craigintinie.

Mr. James Elies, of Stonhopsmilns.

Sir Wm. Primrose, of Elvingstoun.

Major Sharp, of Howston.

James Murray, of Skirlin.

James Gray, of Wariestoun.

* James Somervail, of Drum, elder.

John Johnstoun, of Poltoun.

James Elies, of Southsyd.

Capt. James Wood, in the Potterrawe.

The whilk persons of Assyse above-named, swer all solemnlie sworne, purged of partiall council, malice, hatred, or ill will against the defenders, or any of them.

His Majestie's Advocate, as Persewer, for Probation, adduced the witnesses efter deponing, viz.

James Gordon, wreitter, in Kirkcudbright, being solemnlie sworne, purged of partiall council, aged twentie-four years, and unmarried, depons, That in June last, some fewe dayes befor the feight at Bothwel-bridge, he sawe towards two hundreth men in armes betwixt Sanquhar and Dumfries, with drum and collors ; and that amongst them he sawe Patrick Dunbar, of Machrimore, younger, Wm. Gordon, of Culvenan, — Gordons, of Earles-

* Upon the Trial of Campbel, of Cesnock, (see his Case, Vol. 10, p. 919.) Alexander Nisbet, of Craigentiny, and James Somerwel, of Drum, were two of the Assizers of whose spirited conduct, and of the measures which were adopted in consequence of it, an account has already been given in pp. 970, et seq.

Search has been made in the Records of Privy Council, from the 27th March, 1684, the day of Cesnock's trial, to 21st April of the said year, but no entry relative to that affair was found.

In the Records of Justiciary, of the 21st April, 1684, there appears the following :
 " The which day, compeired sir Patrick Maxwell, of Springkell, Alex. Nisbet, of Craigintinie, and James Sommervill, of Drum, being persewed before the counsell for making
 " a noise in the court the tyme of Cessnock's
 " triall, when the witnesses were examined,
 " wer ordained to appear in court and make
 " acknowledgement and apologie therefor,
 " which this day they accordingly did."

toun, elder and younger, Mr. Wm. Ferguson, of Ketloch, and James Gordon, younger, of Craichley, all in armes, *reddens causas scientie* : he sawe and knewe the persons formerlie, and farder depons, he sawe all the saids fyve persons, except old Earlestoun, in armes with the saids rebels, betwixt Sanquhar and Hamilton ; and this is the truth, as he shall answer to God.

Sic Subscritur, J. GORDOUNE.

William Ker, son to George Ker, provost of Sanquhar, aged twentie-one years, or thereby, unmarried, purged of partiall council, and solemnlie sworne, depons he sawe the rebells come into Sanquhar in June last, some fewe dayes befor the feight at Bothwel-bridge ; and that they wer towards three hundreth in number as he conjectures, and that they came in militarie order, with collours, drums and ane trumpet ; that he sawe amongst them Patrick Dunbar, of Machrimoir, younger, Gordon of Earlestoun, younger, Mr. Wm. Ferguson, of Ketloch, and Gordon of Craichley, younger, in armes, with swords and pistols ; that they marched away nixt morning from Sanquhar in militarie order with the saids rebels, and that he sawe Barscobb and Mr. Samuel Arnot amongst them, *reddens causas scientie* ; these persons were known to him befor, and he sawe them being at Sanquhar at the tyme, and this is the truth as he shall answer to God.

Sic Subscritur, WILLIAM KER.

Thomas Corbie, messenger, aged fourtie years, married, purged of partiall council, and solemnlie sworne, depons, That in June last, some fewe days before the feight at Bothwel-bridge, he saw those who rose in armes, then in the west, towards two or three hundreth come to Sanquhar, most of them in arms with drums and ane trumpet, and that amongst them he sawe Gordon, of Culvenan, Gordon of Earlestoun, younger, Ferguson of Ketloch, and Gordon of Craichley, younger, in armes, and that Mr. Samuel Arnot and Barscobb was with them, and that they marched away the nixt morning from Sanquhar towards Cumnock, beating drums, *causa scientie* : these persons were known to him befor. Farder depons that he sawe the forsaid persons with the rebells at Corberiehill, beside Dumfries, in armes, and that he sawe old Earlestoun come to them in armes, and that he sawe these persons march alongst with the rebells towards Bothwellbridge ; lykwayes depons he sawe young Earlestoun and young Craichley with the rebells at Hamilton Muir the day of the feight, and he saw Mr. John Welsh with the rebells ther, he being present on the place ; and this is the truth, as he shall answer to God.

Sic Subscritur, THO. CORBIE.

Captain *John McCulloch*, of Grainge, aged threttie years, married, purged of partiall council, and solemnlie sworne, depons he sawe Dunbar, younger, of Marchimore, in armes with the rebells, four mylls on this syd of Dum-

frise; that he sawe Gordon, of Culvenan, in armes with them at Hamilton-Muir, as also he sawe master Samuel Arnot in company with them at Hamilton *causa scientie*: he sawe the saids persons at the places forsaids and knewe them befor; and this is the truth, as he shall answer to God, and this he sawe a fewe dayes befor Bothwellbridge.

Sic Subscribitur, J. McCULLOCH.

Robert Park, messenger, at Saughar, purged of partial councill, solemnlie sworne and examined, depons he sawe the rebells enter Saughar some fewe dayes befor the feicht at Bothwell-bridge, in armes, with drums, collops and one trumpet, depons some of them took five quarters, and some not; that amongst them he sawe Gordon, of Earlestoun, younger, Ferguson, of Ketloch, Gordon, of Craichley, younger, in armes, and that he sawe them march away the next morning with the rebells towards Cunnock, depons they came in to Saughar with ther swords drawn under the colour of three captaines, and this is the truth as he shall answer to God, and depons he knewe the saids persons formerlie.

Sic Subscribitur, RO. PARK.

William McGeorge, town clerk, of Dumfries, purged of partial councill, and solemnlie sworne, depons that he sawe Gordon of Earlestoun, elder, in company with the rebells, marching throu Dumfries in June last, a fewe dayes befor Bothwellbridge *causa scientie*: he sawe him at one Kirk befor, and he was called Earlestoun, elder, by those wer present, and this is the truth as he shall answer to God.

Sic Subscribitur, W. MACGEORGE.

Hugh M'Watter, in Stonraves, being solemnlie sworne, purged and examined, depons he sawe Dunbar, of Machrimore, younger, and Gordon, of Craichley, in armes with the rebells at Hamilton-muir.

Sic Subscribitur, HUGH M'WATTER.

The lords ordaines the assyse to inclose, and returne ther verdict to-morrow at eight a'clock. 10th February 1680. The said day the

persons who past upon the assyse of Gordons, of Earlestoun, and others, returned ther verdict in presence of the saids lords, wherof the tenor followes:

The assyse all in one voice, be the mouth of sir Patrick Nisbet, of Dean, ther chancellor, finds Mr. William and Alexander Gordons, of Earlestoun, elder, and younger, master William Ferguson, of Ketloch, James Gordon, of Craichley, younger, — Gordon, of Culvenan, — Dunbar, of Machrimoir, younger, guilty of the crimes of rebellion and treason, in respect of ther accession to the late rebellion, conforme to the depositions of the witnesses.

Sic Subscribitur, PAT. NISBET, Chan.

After opening and reading of the whilk verdict of assyse, the lords justice generall, justice clerk, and commissioners of justiciarie, be the mouth of Adam Auld, Dempster of court, decerned and adjudged the saids Mr. William and Alexander Gordons, elder and younger, of Earlestoun, Mr. William Ferguson, of Ketloch, James Gordon, of Craichley, younger, Patrick Dunbar, younger, of Machrimoir, and William Gordon, of Culvenan, to be execut to the death, demained as traitors, and to underlye the paines of treason and utter punishment appoynted by the lawes of this realme, when they shall be apprehendit, at such tymes and places and in such manner as the lords justice general, justice clerk, and commissioners of justiciary, shall appoynt, and ther names memorie and honours to be extinct, and ther names to be riven furth and delate out of the bookes of armes, suae that ther posteritie may never have place nor be able herefter to bruk or joyse any honours offices nor dignities within this realme in any tyme coming, and to have forfait on that and tint all and sundrie ther lands, heretages, tenements, annual rents, offices, titles, dignities, tacks, steadings, rounes, possession, goods and gear, whatsoever pertaining to them, to our soveraigne lord, to remaine perpetualle with his hynes in proprietie: Which was pronounced for doom, wherupon his majesties advocate asked and took instruments.

227. Proceedings against JOHN LORD BARGENY,* for Treason :
32 CHARLES II. A. D. 1680. [Now first printed from the
Records of Justiciary in Scotland.]

CURIA JUSTICIARIE, S. D. N. Regis, tenta in Prætorio Burgi de Edinburgh, decimo sexto die Mensis, Martii, 1680, per Honorabiles Viros Dominos Georgium M'Kenzie de Tarbet Justiciarum Generalem, Thomam Wallace de Craigie, Justiciarie Clericum, Jacobum Foulis de Colinton, Robertum Nairn de Strathurd, Davidem Balfour de Forret, Davidem Falconar de Newtown, et Rogerum Hoge de Harcars, Commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata,

Intran,

John Lord Bargenie,

INDYTED and accused, That wher notwithstanding be the common lawe, and lawe of nations, and constant practique of this kingdome and particularlie be the twentie-fyft act of the sext parliament of king James the 2d, It is statut and ordained, that if any man committ or doe treason against the king's person, or his majestie, or receipts any that has committed treason, or that supplies them in help, redd or counsell, they shall be guilty of treason; and sicklyke, be the hundreth fourtie and fourth act of the twelfth parliament of king James the sext, It is statut that wher ever any declaired traitor or rebels repairs in any part of this realme, non of his majesties leidges shall presume to recept, supplie or intercomon with

* " All the account I can give of the trouble of John lord Bargeny, in the shire of Air, is from the registers. He was suspected to favour the cause of liberty, and to be of the other side from the duke of Lawderdale; and last year after Bothwel, some surmises were raised of his favouring the people concerned in that rising, whereupon he was made prisoner in Blackness. In the council registers, December 4, last year, just after the duke of York's coming down, I find a report from a committee who had been appointed to examine him in Blackness, that they had taken his declaration, which is read, but not recorded. That day the governor of Blackness is allowed to permit persons to speak with him in his own hearing, and to give him pen, ink and paper, providing he see whatever he writes. At the same time the advocate produceth a letter from the king ordering him to proceed against the lord Bargeny, as having incited persons to rise in the late rebellion. No more is about him in the registers till January 14, this year, when their act about him runs, " Anent the petition of John lord Bargeny,

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them, or to give them any releiff or comfort, and that immediately upon knowledge of ther repairing in the bounds all his majesties obedient subjects doe ther exact diligence in searching and apprehending the saids rebels and traitors, and that with all speed they certifie his majestie or some of his secret council, or some persons of authoritie or credit, within the shyre, that such rebels are within the samen, under the paine that the saids traitors and rebels ought to sustaine if they wer apprehendit and convict be justice, and be the fourth act of the sexteint parliament of king James the sext, whosoever invades, or persewes any of the lords of session, secret council, or any of his majestie's officers for doeing of his majestie's service, shall be punished to the death; lykeas be the lawes and practque of this kingdome the designing, contryving, or hounding out others to massacar and assassinat his majestie's commissioner and representative, is in itself the cryme of lese majestie, his majestie's commissioner being in the construction of lawe, his hynes representative, and in place and vice of his royall person: and be the second act of the second session of his majesties first parliament, It is declaired, that if any person or persons shall, by wreeting, printing, or be any malicious and advised speaking, expresse, or declare any words to stirre up the people to the hatred of his majestie's royall prerogative and supremacie, in causes ecclesiastick, or of the government of

" that he hath been now two months close
" prisoner in Blackness, occasioned by the
" suggestions and unalicious informations of
" his enemies, and he being conscious of his
" innocence of any disloyalty that can be laid
" to his charge, and that in his heart he did
" never harbour, far less did he ever practise
" any evil against his majesty or government,
" craving that he may either be liberate, or
" presently put to a trial; and that in the
" mean time, or since his imprisonment, there
" may be no process, or decreets of session
" moved in, or given out to his prejudice, his
" adversaries at this time being ready to take
" advantage. The counsell ordain the said
" lord to be brought in to the castle of Edin-
" burgh, whenever the advocate hath pre-
" pared his indictment.

" This matter is still put off till the end of March, when I find him before the justiciary. The managers had a mind to have had his estate, but their probation failed them, and the crimes in his libell must be reckoned of the advocate's framing." 2 Wodrow, p. 151.

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the church, by archbishops and bishops, as it is now settled by law, or to justify any of the deeds, actings, practices, or other things declared against by the said act, every such person or persons so offending and being legallie convict thereof, are declared incapable to exerce any place or employment, civill, ecclesiastick, or militarie, within this church, or kingdome, and are lyable to such farther paines as are dewe by the lawe in such cases. Neverthelesse it is of veritie, that the said John lord Bargany having shacken off all fear of God, respect and regard to his majesties lawes and person, his native prince, and to whom he was in one more eminent way obliged, his majestic having raised him and his predecessors to be peers of this his majestie's ancient realme and hereditary counsellors therein, and having bestowed upon him and his family extraordinary marks of his bounty as well as favour, yet the said John lord Bargany forgetting all these obligations, and the horrid and dreadfull effects of that late rebellion which did overthrow the monarchie, and enslave and depauperate the subjects of this kingdome, and hoping as it seemes to raise himself by such new confusions and rebellions to be a chieff ringleader in and disposer of the government of the kingdome, from a share in which government suitable to his fancied merit he thought himself excludit by the present choise of his majestie's officers and servants, he did therfor most treasonable in one or other of the moneths of the years 1674 or 1675, with great oaths and execrations, curse some of the chieff nobilitie of the kingdome, because they would not make themselves the head of the phanaticks, and swore that they would never signifie any thing because they hade lost that oportunitie; and because his grace the duke of Lauderdale hade, by his extraordinary prudence,* care and loyaltie, defate the designs that he and the said phanaticks wer managing for disturbing the government of the church and state, he did in one or other of the moneths of the years 1677 or 1678, publictie regrate

* See the Case of the duke of Lauderdale, vol. 6, p. 1025, of this Collection, and the additional Charges against Lauderdale in the Somers Tracts. See also in the Collection of State Tracts from the year 1660 to 1669, published in 1692, pp. 93, 96. Some particular matters of fact relating to the administration of affairs in Scotland under the duke of Lauderdale, and the impeachment of the duke and duchess of Lauderdale, with their brother, my lord Halton, presented to his Majesty by the city of Edinburgh. In private, Charles acknowledged that many detestable things had been done by Lauderdale against the Scots, but that nothing against his service had appeared; a sentiment not less dishonourable than natural to a sovereign, who, when he separates his own interest from the people, forgets that he creates an interest in opposition to the throne. See 4 Laing, 103, edit. 1804.

that the English or the phanaticks did not kill and assassinat the said duke of Lauderdale, and did hound out* and intyse others to assassinat and fall upon him in his own house, and particularlie in the moneths of

1675 or 1676, he did endeavour to perswade George Martin, nottar, in Dally, who then lived in this land, that the phanaticks would never gett ther busenes done whill the duke of Lauderdale was alive, and that one hundred men would doe more to assault him in his own house of Lethingtoun then all they could doe beside, and because he would not complye with the said lord Bargany's inhuman and cruell designe, he did still thereafter discountenance him, and declared to his friends his lye dissatisfaction with him upon that account; lykeas one Mr. John Welsh, a factious trumpet of sedition and treason, and forfault for the rebellion, in A.D. 1666, having made a constant trade of convocating his majestie's subjects in treasonable feild meetings, the said lord Bargany did keep correspondence with him, and having direct a letter to him whilst he and his complices wer contriving the last rebellion, he did send the said letter to Sauchhill by his own serrant in May or June last, which being read at the said conventicle as having come from him, did encourage and extremie invit his majestie's subjects to ryse in that rebellion, to which rebellion he did by all means invite and drawe in as many of his friends and followers as was possible, and particularlie he kept a correspondence with — Cuninghame, of Bedland; and, amongst other letters, he did writt to him one about the beginning of June last, which was immediatlie before the rebellion, whereby he earnestlie desyred the said — Cuninghame, of Bedland, to repair in all hast to the Westland army, and to move and perswade all gentlemen and others about him to joyn with him, wher they should see the said lord Bargany himself shottlie, to which rebellion he might invite the people with greater confidence, because it was not they allon that should countenance that busenes, but persons of fare greater qualitie, who would assuredlie joyn with and own them in that affaire; and albeit many of the said John lord Bargany's own tennents hade been in the said rebellion, yet he did not give notice of them to his majestie's privie councill, shirriffs or other officers, but did uncertaine those that wer nottor rebels in his house and service, and particularlie — Mitchell, nephew or cousin to Mr. James Mitchell, who hade been execut for many execrable treasons against his majestie, and who himself was in the late rebellion in A.D. 1666, and Andrew McClarkin, whom he kept in his own house and service efter he hade returned from that rebellion to which he hade houndit him out; and also in the moneths of

or one or other of the dayes of the sament, the said John lord Bargany did pub-

* See a Note to vol. 10, p. 1048.

licitlie maintaine the principles of Nephthali, Jus Populi Vindicatum, et Lex Rex,* these infamous and jesuiticall feed plots of all murder and treason, declairing that Scotland would never be well till it wanted episcopacie, or the present government of the church wer destroyed as unfit for the nation; and in the moneths of October or November last, he did oppinlie de-claime against the sacred order and function of episcopacie, swearing that we would never be in peace till the curats wer routed out, and that they wer all but knaves and rogues: wherthrowe the said John lord Bargany has committed, and is guilty of the treasonable crymes and others above mentioned, and is actor airt and part therof, which being found be ane assyse he ought to be punished with forfeiture of lyff, land and goods, and other paines above mentioned, to the terror and ex-ample of others to commit the like herefter.

Persewer.—Sir George M'Kenzie, of Rose-haugh, our sovereign lord's Advocate.

Procurators in Defence.—Sir George Lockhart, sir John Cuninghame, Mr. Wm. Hamilton, Mr. John Elies, Mr. Robert Stewart, Mr. Roderick Mackenzie.

Sir George Lockhart, as procurator for the defender, craved he might be putt to the know-ledge of ane assyse, or that the dyet might be deserted and be set at libertie.

His Majesty's Advocate alleadges, That he cannot be obleidged, nor can he in duty to his majestie's interest, putt the pannall to the knowledge of ane assyse, because he did not gett a coppie of the first and second summondes of exculpation, without which, the list of the witnesses signified nothing, because it is the reasons in the exculpation that instructs him to what end the witnesses are adduced, and consequently by which he is only instructed howe to cast these witnesses with relation to those poynts for which they are to be adduced; and be the elevinth act of the late act † of parliament, regulating the justice court, it is most clear, that both lybells and exculpations should be execut in the same way and manner, and are *jure parcs termini*.

Sir George Lockhart answers, That the objection proponed be the king's Advocat is not competent *hoc loco in limine processus*, but is only competent against the probation, and the reason is most evident, because though the objection wer foundit in lawe, as the pannall humble conceaves it is not, yet it tends only to depryve the pannall of the benefit of the exculpation, and wherby his majestie's advocat has no prejudice nor disadvantage; but on the contrarie, if he wer able to adduce any relevant probation of the lybell, it would remaine unprejudged by the exculpation, it being the

same case in lawe as if the exculpation had not been raised nor execut.

2d. Though the state of the proces could admitt of the objection, as certainlie it cannot, yet it has no ground from the act of parliament, and it is impossible to inferre any such thing from the act of parliament, that ane pannall haveing ane just and relevant defence in lawe for defending his lyff, honour and reputation, and offering to prove the same by witnesses, against whom ther is no lawfull objection, that such a defeuce can be repelled, and consequentlie ane innocent man condemned, and the true import and sense of the act of parliament is only this, that wher a pannall thinks fitt to raise a summons of exculpation, and to have the benefit of dilligence, in case his witnesses doe not compeir in that case, he most observe the formality of the act of parliament, but wher the pannall will undergoe the hazard of a tryall, and subject his innocencie to ane assyse, whither the witnesses he cites for proving his defence compeir or not, or would offer to prove his defence, either be his judges or be members of the inquest, or any other persons present, it is ther the irrefragable opinion of all lawyers, and practise of all criminall tribunalls in the world, that such a defence and probation cannot be repelled, and thereby ane innocent man condemned, and which is suitable and consonant to the practise of the lords of justiciarie, ther being nothing more ordinarie, even since the act of parliament, then to sustaine relevant defences proponed *per modum exceptionis*, and not *per modum actionis*, as the nature of exculpations are; and the act of parliament as to the poynt of allowing summons of exculpation to pannalls being introduced in ther favours, cannot be detorted to ther prejudice, especiallie to prejudge them of the benefit of the lawe of nature, and nations defences being *de jure nature*, and most properlie, and of ther own nature proponable be way of exception, and as the pannall humble conceaves the grounds above mentioned to be foundit upon the clear principles of lawe, so to convince the lords of justiciarie howe unnecessary this debate is, it is offered to be proven by William Glover, the pursevant's oath, that he delyvered a list of the witnesses to my lord advocat, and which does fullie satiasie the act of parliament, which does not requyre the summons of exculpation to be execut, but only that a list of the witnesses be given; and this the pannall propones to this effect, that if he think fitt, he may have the full benefit and privilege of his exculpation in case any of the material witnesses for proving therof be absent; lykeas the exculpation was produced the last day, and publictly read, and bears no warrant for giving a coppie of the reasons therof to my lord advocat.

His Majesty's Advocat replies, That as to the first the exception proponed be him upon the not being legallie cited, and not having a list legallie given him upon the exculpation, is most competent *hoc loco*, since he was there-

* Three publications on the part of the malcontents. The title of that here first mentioned is *Naphthali*.

† So in the Original.

by in *bonâ fide*, not to prepare himself for this dyet being *tutus justâ exceptione*; and not only so, but he was by this putt in ane invincible ignorance howe to manage the proces, for his majestie and the kingdomes interest, in some fare, as he could not knowe which way to find out the strength of his own probation, not knowinge howe his probation might be cleidit by the exculpation, and though he gott a list of the witnesses, yet he oppous expresslie the act of parliament, which parallels the summons and the exculpation, and therfor as upon the whole matter, it would have been a verie good preliminarie defence to the pannall, why he could not goe to the knowledge of ane inquisite; that he gott not ane coppie of the lybell, and that he hade gott it, but ther is no execution against him, or that he gott not ane list of the witnesses, subscribed by the advocat, as it would be for the advocat that he gott not a list subscribed by the pannall, because upon either syde this is the only check to knowe what true witnesses wer trulie given in list, so ought this to be a sufficient preliminarie defence for his majestie, who, without this, could not knowe what was the import or strength of his own probation as said is.

As to the second, his Majesties Advocat acknowledges, that before the late regulation of the justice court a pannall might have at the bare caused examm witnesses, even as, and because witnesses might have been adduced for the king at that tyme, without giving them in list to the pannall, and it wer just that the procedor should have been equal upon both sides, for as it is the interest of the pannall that his innocence should have been defendit, so it is the much greater interest of the common wealth 'ne crimina maneat impunita;' and yet notwithstanding of this great and important reason, it is undenyable that nowe the king could not prove the clearest and most important crime in the world, except the advocat hade given in to the pannall a list of the witnesses to be adduced, and therfor since the late act has taken away this just priviledge from the king: competent to him formerlie by the lawe of all nations, and by as strong reasons as are now alleadged for the pannall, the said act and article did justlie allowe the king the same favour that it did to the pannall in equalling both caces, and the reason inductive of this favour craved by the people did militat as stronglie for the king as for them, viz. that it was hard that witnesses should be adduced who might have been parties, or lyable to just exceptions, it being undenyable, that the king and the publet interest may be as much prejudged by leading exceptionable witnesses for cleiding of the crime, as the pannall may be, by being blindlie exposed to the means of ane unceitaine and unknown probation, and whatever might be said in this case for securing the pannall's lyff, in the not admitting a witness wher ther is the least hazard, yet there can be no shadowe why this should not be received, when the import is only that by a delay

the king may have his proces instructed by ane necessary probation; and as it wer ane unaccountable severitie in ane king's advocat to cutt off a pannall from a just defence and witnesses, because he wanted ane exculpation, and as the justices have verie often, and verie justlie allowed ane new dyet, to ane pannall, wher his exculpation was not deulie raised, if his was proposed before: the proces was entered upon as here, so it wer as great injustice and cruelty to the common and publet interest, not to sustaine this as a preliminarie defence, in favours of his majestie, and would in the event, upon the partie of reason, prove great crueltie to the people, since they behooved to gett the same measure; wheras in equitie a fair and equal tryall, and what may tend therto, is the common interest of both and of each apart.

His Majestie's Advocat adds, that the king having done exact diligence, and returns of the diligence having been shouen to the justices against witnesses which are knowen to be necessary: the dyet ought to be continued, especially seeing Craige, a witness, coming in upon a warrant from the justices, he was apprehendit in his way by Alexander Crawford, balye-deput, of Cunninghame, deput to the lord Montgomerie, who is brother-in-law to the lord Cochran, and to sir John Cochran,* who are now upon pannall with the lord Bergany, the said Alexander Crawford being advertused, that Craige was coming in upon a securitie given by his majestie's Advocat, which he contemned, and said he would take that on his hazard, and his majestie's Advocat is content to make faith, that he is a necessary witness, and its knowen to his majestie's privie councill, who heard his deposition.

Sir George Lockhart repeats, and oppous the former debate and the act of parliament, and alleadges, that it wer a prepetative of most dangerous consequence to lay any such foundation that pannalls accused in criminall processes should be prejudged of ther defences, whatever way proposed, either by way of summons of exculpation or by way of exception, it being a certaine principle in lawe, that as to defences and probation *numquam concluditur contra reum*, and that ther defences may be proponed at any tyme betor enclosing of the assys, and ther is not the least collar from the act of parliament to tye the pannalls, to propone all ther defences by way of exculpation. As to the second, the pannall repeats and oppous the nature of criminall processes, wherin the dyets are peremptor, specialie upon the part of the accuser, and all that ever was allowed was in case the witnesses did not appeir at the first dyet to grant a farther diligence, and which accordinghe has been indulged, and the lords of justiciary, that some of the witnesses wer formerlie absent, did continue the dyet

* See his Case in this Collection, vol. 10, p. 989.

till this day, and therfor his majestie's advocat ought to have come fullie instructed and no pretence of the absence of any of the witnesses ought in justice to be any ground for new prorogations, and to keep the pannall, who is now readie at the bare, to subject his innocencie to the strictest inquirie and tryall under the staine and imputation of so hye and atrocious crymes, and to continue him in ward efter fyve moneths imprisonment, and efter he has bein at extraordinary expence and trouble to cite threscore ten wytnesses in his exculpation, most of them from Galloway, and whom it is impossible for the pannall to bring still here to attend uncertaine dyets of criminall processes, and all lawe has considered the cace of pannalls as favorable befor conviction, and as it were impossible for a pannall to pretend or have allowed any farder diligence for producing his witness in ane exculpation, so ther is fare lesse reason to allowe prorogations of dyets in favours of accusers, and as to the pretence that one of the materiall witnesses has bein detained by the balyie deput, of Cuninghame, it is absolutie denyed, and it cannot in the least be presumed, that any person clothed with authoritie durst have adventured or presumed to stope or hinder any witnesses who wer cited for his majestie's interest and service, so though any such thing could be qualified, it is not in the least relevant, unlesse it could be made appeir that the pannall hade accession therto, which is absolutelie refused; and on the contrair, the pannall and his friends have used all indeavours to bring this matter to a tryall; it being extraordinary hard that he should continue in imprisonment, and under the staine and imputation of so hye crimes upon pretence of the absence of witnesses, and impediments of this kind may be still obrudit, and therfor the pannall craves the benifit of lawe and justice, and the inviolable procedor of this court, his majestie's advocat having gott already allowed all the diligences lawe and the formalitie of process cane admitt of, and if the balyie deput be guilty of any such malversation as is pretendit, his majestie's advocat by the severitie of punishment may prevent the danger of such preparatives, and his majesties interest cannot suffer, tho the dyet wer deserted, since if ther should be any sufficient ground to insist against the pannall for any of the crymes libelled, it is but *absolutis ab instantia*, and cannot prejudge, and the pannall is a person of that character and qualitie, and of that consideration, as to fortoun, that ther is no fear he will withdrawe himself.

The lords in respect that his majestie's advocat wants some of his material witnesses, notwithstanding that he has used all possible dilligence for adduceing them, and also in respect that the pannall hath neglected to give a double of his letters of exculpation, and a subscribit list of his witnesses for proveing of his exculpation, doe therfor continue the dyet till the second Monday of June next, and ordaine the assyessers to attend at that tyme, each

of them under the paine of ane thousand merks, and the witnesses each of them, under the paine of three hundreth merks.

His Majesties Advocat takes instruments upon the lord Strathnaver, the lord Cochran, sir John Cochran, — Balyie, of Lamingtoun, Kennedy, of Culzean, and David Drummond, brother to M'Kany, ther entering the pannall with the lord Bargany.

14th June, 1680.

Intran,

John lord Bargany,

Indyted and accused for the cryme of treason, sedition and others mentioned in his dittay, which is recordit in the books of adjournal upon the sexteint of March last; as also indyted and accused for that, upon ane or other of the dayes of May, June, July, August or September, he hearing that his grace the late archbishop of St. Andrew's was murdered, he said that it was well or happie, for he was a great enemy to the cause of God, and his people or the kirk of Christ, or some such words; lyk as he, or some by his command, or whom he rathabited, did offer armes to James Kennedy to goe to the late rebellion, at least he was offered armes in the said lord Bargany's house for that effect.

Persewers.—Sir George M'Kenzie, of Rosehaugh, our Sovereigne lord's Advocat.

Procurators, ut ante.

Mr. William Hamiltoun, Advocat as procurator for the lord Bargany, produced in presence of the saids lords, ane act of his majestie's privie council* wherof the tenor folowes: "Edinburgh, the third of June, 1680,

* "The king's Letter, upon which this process is stopped, bears, 'That he had received a petition from the lord Bargany, representing his father's loyalty and sufferings, asserting his innocence of the crimes he is indicted for, and attesting God thereupon, and his majesty being unwilling, he, or any subject should receive prejudice by long imprisonment, until there appear evident proofs of their guilt, requires him to be liberate, under sufficient caution to appear in order to trial, if hereafter sufficient proofs of his guilt be found.' And that this Letter be communicated to the justice-court and advocate."

2 Wodrow, 152.

"March 16, 1680. The lord Bargany was both the 1st day of March, and this day on the pannall, and was, after much debate, continued and sent back to the castle, on pretence that the advocate wanted some of his material witnesses against him; as also he gave in some additional articles, anent his furnishing men with armes to the later rebellion.

"June 3d. At privy councill lord Bargany was liberate, finding caution to appear when called under pain of 50,000 merks."

Fountainhall.

the lords of his majestie's privie counsell, in obedience to his majestie's commands, signified to them in a letter, under his royall hand, of the eleventh of May last, gave ordor and warrand to the governor of the castle of Edinburgh, to sett John lord Bargany at libertie furth of the said castle in regard he hath found sufficient caution acted in the books of privie counsell that he shall compeir befor the lords of counsell whenever they shall call for him in ordor to his tryall, as to those crymes for which he stands indyted befor the lords commissioners of Justiciary, under the pe-

nalty of fyftie thousand merks Scotts money in caise of falyie. Extract by me,
Sic subscribitur, "WILLIAM PATERSON."

The lords justice generall, justice clerk and commissioners of justiciarie, in respect the king's Advocat (because of his majestie's letter to the counsell and the act of counsell intimating the same to ther lordships) does not insist against the lord Bargany, therfor deserts the dyet simpliciter, wherupon the said lord Bargany's procurators above named asked and took instruments.

328. Proceedings upon a Process of Error,* raised against ALEXANDER BLAIR and others, for the acquittal of James Dick and others, indicted for Treason and Rebellion: 33 CHARLES II. A. D. 1681. [Now-first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio Burgi de Edinburgh, decimo octavo die mensis Julij, 1681, per honorabiles viros Ritchardum Maitland de Dudop, Justiciarie Clericum, Robertum Dominum de Nairn, Dominos Jacobum Foulis de Colingtoun, Davidem Balfour de Forret, et Dav idem Falconar de Newtoun, Commissionarios Justiciarie dictij S. D. N. Regis.

Curia legitime affirmata.

Intran,

*Alexander Blair, merchand.
Lewes Johnstoun, inerchant.
Thomas Noble, merchant.
Captain John Binning.
Alex. Rothwell, of Glencross.
James Baillie, merchant.
Mr. Andrew Temple, of Ravilrige.
James Baird, of Saucktounhall.
Robert Sandielands, merchand.
Robert Elliot Wright.
Alex. Henryson, of Newehaven.
James Gray, of Waricetoun.
John Dundus, of Harriestoun.*

INDYTED and accused, that wher, notwithstanding be the lawes and acts of parliament

* "Of old, before inclosing the jury, the Lord Advocate or prosecutor used to protest for an Assize of Error against the Inquest, if they assoilzied. [See an instance of such a Protest in this Collection, vol. 16, p. 790. See, also, vol. 10, p. 855.] This Great Assize, as it was called, consisted of twenty five noble persons, though afterwards, in practice, landed men were sustained: [Act of Sederunt, 7th June, 1591] who were to inquire, if the jurors were guilty of wilful error, in their verdict; and the punishment was escheat of moveables,

and inviolable practiq of this kingdome, and speciallie be the 64th act 8 parliament king James 3rd, It is statut and ordained, that if any of our subjects choisen upon the assyse of any criminal persons doth acquyt them be temerarie, or wilfullie be favours or partialitie, they shall be put to the tryall of ane assyse of twenty five persons, and being convict thereof, shall be punished efter the forme of the auld lawes contained in the book of Regiam Majestatem, and be the 14th chap. 1 Book Reg. Majest. the pain of them that commits wilfull error upon ane assyse is declared to be tinsell, and forfeiture of all ther cattell and other moveables, to be inbrought to the king's use, imprisonment be the space of ane year and day at the least, and that in all tyme coming they shall tyne the benefit of the law and of the land, and shall incurre the paine of infamie, shall never be heard as witness in probation or in acquytance (or purgation) nor to make ane oath befor ane judge nor in any other kind of matter: Nevertheless it is of veritie, that the saids Alexander Blair, Lewes Johnstoun, and the other persons above-named, being in ane court of justiciary, holden within the Tolbuith of Edinburgh, upon the 18th day of March last bypast, by the lords justice clerk and commissioners of justiciary,

infamy, and one year's imprisonment. [Reg. Maj. l. 1, c. 14, ratified parl. 1475, c. 63.] But the pannel, who was acquitted, remained so, and could not be brought upon a new trial. Assizes of error were justly complained of as a grievance at the revolution, and are now obsolete. By such assizes, persons who attended trials as jurors, were greatly put in fear of being punished, instead of being rewarded for their trouble, and the subjects were unsecure in their lives and liberties, by the prosecutors, in many cases, threatening the jury with an Assize of

choisen, received, sworne and admitted upon the assyse of William Dick, in Lanerk, James Park ther, John Bunckle ther, Tho. Hinshelwood ther, Hugh Somervail, of Urrats, James

M'Quharrie, of Scoricholme, William Park, fewar, of Lairfad, John Hutchieson, of Harelawe, Luke Greinshells, of Hogcastle, and others, notoriouslie and manifestlie guilty of

Error if they acquitted the pannel by their verdict; and, by abolishing these assizes, such fears are removed, and peoples rights and liberties are delivered from such danger." Louthian's "Form of Process before the Court of Justiciary in Scotland," &c. p. 113, edition of 1752.

In the "Acts and Orders of the Meeting of the Estates of the Kingdom of Scotland," Act 18th, April 13, 1689, entitled, "The articles of grievances represented by the estates of the kingdom of Scotland, to the king's most excellent majesty, to be redressed in parliament," the 5th representation is, "that Assizes of Error are a grievance, and that juries be considered by parliament." But I do not find any parliamentary enactment against the Assize of Error, so that it's abolition appears to rest upon desuetude corroborated by that repro-

bation. "The Assize," says M'Kenzie (Criminals part 2, tit. 23, see 5), "is either an ordinary, or great assize. The great assize is that whereby an ordinary is tried, if they do wrong, and I find some foundation for thir terms 'par la custume de Langumais, act 4, et de la Rochal, art. 1, la grand assize est du seneshal, 'la petit du juge prevestal.' An ordinary assize uses to consist of fifteen persons, but they may consist of more, or fewer, if the number be unequal; and thus, the penult of June 1614, Ronald was tried, and convict for dismembering Donaldson, by an assize of thirteen persons. The reason why the assize must be unequal in number, is, lest by equality of votes, affairs be not terminated and brought to a speedy issue: for which cause likewise, lib. 2. Reg. Maj. cap. 5, and by the 87th act 6 parl. king James 1, it is appointed, 'That arbiters should be appointed in an unequal number,' and yet I find, that in the civil brieve of right, an assize should consist of twelve sworn men." It is observable, that Mackenzie says, "As the defender may decline them, if there be any reason for it, so they are sworn; nor is it presumable, that any will be so impious to condemn a man to die, to please others: upon which presumption our law leans so much, that though assizes condemn unjustly, they are not liable to an Assize of Error, as is believed."

It has been said, (see, 'A Guide to juries setting forth their antiquity power and duty from the Common Law and Statutes,' published in 1699, and the authorities there cited,) that the reason why in England attaint lies not in criminal cases against a jury for a false verdict of conviction, is that the convict's guilt have found credit with at least twenty four jurors (viz. with the twelve of the petty jury and with at the fewest twelve of the grand inquest) but as Hawkins says (Pleas of the

Crown, Book 1, chapter 72, sect. 5), "It seems to be certain, that no one is liable to any prosecution whatsoever, in respect of any verdict given by him in a criminal matter, either upon a grand or petit jury. For since the safety of the innocent, and punishment of the guilty, doth so much depend upon the fair and upright proceeding of jurors, it is of the utmost consequence, that they should be as little as possible under the influence of any passion whatsoever. And therefore, lest they should be biased with the fear of being harrassed by a vexatious suit, for acting according to their conscience, (the danger of which might easily be insinuated, where powerful men are warmly engaged in a cause, thoroughly prepossessed of the justice of the side which they espouse) the law will not leave any possibility for a prosecution of this kind.

"It is true indeed, the jurors were formerly sometimes questioned in the Star-chamber, for their partiality in finding a manifest offender not guilty; but this was always thought a very great grievance; and surely as the law is now settled by Bushel's case, there is no kind of proceeding against jurors in respect of their verdicts in criminal matters allowed of at this day. As to the objection, that an attaint lies against a jury for a false verdict 'in a civil cause,' and that there is as much reason to allow of it in a criminal one, it may be answered, that in an attaint, a man's property is only brought into question a second time, and not his liberty or life; and also it may be generally presumed, that a jury is likely to be equally influenced with the fear of an attaint from either of the contending parties, whereas if any such examinations of their proceedings were allowed in criminal causes they might be often in great danger of one side, by incurring the resentment of a powerful prosecutor, and provoking him to call their conduct into question for their supposed partiality; but they could have little to fear from an injured criminal who would seldom be in circumstances to make his prosecution formidable."

So, too, Mr. Barrington (Obs. on Westminster the 1st,) says, "It is to be observed, that attaint lay only in civil cases, either by the common law or by this statute. The reason of which seems to have been grounded upon the strong presumption, that no jury would condemn a criminal contrary to the evidence, and that it would be inconsistent with principles of liberty, to permit the crown, when it might intend oppression, to call in question a verdict of acquittal. It is for the same reason, when a crime is prosecuted by appeal, the remedy of a private person, and not by indictment which is the suit of the crown, that there is no intervention of a grand jury to find the bill."

the crimes of high treason and rebellion, and who wher indyted and accused for rysing and joyning in armes with the bloodie and sacrilegious murderers of the late archbishop of St. Andrews, under the command of Robert Hamilton, brother to the laird of Prestoun, and most treasonable burning his majestie's lawes and acts of parliament, at the marcat croce of Rutherglen, upon the 29th day of May, 1679, proclaiming and publishing acts of their owne coyning, drowning out honetyres, sett on in commemoration of his majestie's happie restauration to the royall government of this kingdome, and for assaulting a partie of his majestie's forces at Loudounhill, under the command of the laird of Claverhouse, upon the day of June, thereafter, killing and murdering severalls of them, and marching to the town of Glasgowe, upon the day of the same moneth, and assaulting and attacking a partie of his majestie's forces therein, under the command of the lord Rosse and laird of Claverhouse, and for marching up and down the countrey throve the shyres of Lanerk, Aire, Rensfrew, Dunbartoun, and others, in warlike and military pouser, with ther accomplices, to the number of ten or twelve thousand, robbing and pilageing his majestie's good subjects, quartering upon and oppressing them, printing and publishing declarations and proclamations, bearing the treasonable grounds of ther rebellion, modelling and forming themselves into troupes, companys, and regiments, naming and appoynting commanders and officers over them, beating parties be drums, sending commissioners to the generall of his majestie's forces, requyring the subversion of the government of the church, and continuing in ther said desperat and avowed rebellion till the 22nd day of the said moneth of June, 1679, that they

were defate at Bothwell-bridge, as the said ditty produc'd be his majestie's Advocat as perseswer therof, against the forsaid persons above named, indyted, and accused judicially, thereby, of the crimes forsaid therein contained, in presence of the lords of justiciary sittand in judgement, in itself at length propors; after reading of the whilk ditty, the lords justice clerk and commissioners of justiciary being ryple, and at lenth advysed therwith, stand the same relevant, and remitted the same to the knowledge of the persons above named as an assyse thereto, after pronouncing of the whilk interloquitor, the saids Alexander Blair, Lewes Johnston, and the other persons above named, being called upon, received, sworn and admitted upon the assyse of the persons above named for tryall of ther guiltiness of the crimes above specifit, his majesty's advocat for verification and clearing to them of the forsaid persons ther guiltiness, adduced the witnesses efter named, viz. agament the said William Dick, Gavin Mont, in Lanerk, who depons that he sawe the said William Dick in Lanerk with the rebels in armes, in or about Glasgowe, betwixt the first and twentie second days of June, 1679, and that he knew him particularie, as also Archibald Hunswood, in Lanerk, who depons, that he sawe the said William Dick ryding out of the town of Lanerk, with armes, the tyme the rebels wer in armes in the West, and likewise William Heaste, in Lanerk, who depons, that he sawe the said William Dick on horseback with a sword about him ryding with the rebels, and James Whytt, in Lanerk, who depons, he sawe the said William Dick, in armes, in his returne from Bothwell-bridge, the day the rebels were defate ther, and for proving the saids James Park's guiltiness, adduced the said Gavin Mont, who depons he sawe the said

See, also, sir Thomas Smith's Commonwealth of England, book 3, chap. 2. 'What remedie is, if sentence bee thought unjustly given.' By a passage in Wodrow there is reason to think that Charles the Second designed to publish this trial together with some others; but whether such publication was ever made I know not. The passage is as follows:

"In March this year, a letter comes down from the king to the council, and one of the same import to the lords of justiciary, ordering extracts to be made out of the registers, of the trials of such as were condemned for rebellion. The letter will best speak for itself.

"C. R.

"Right trusty, &c. Whereas we have thought fit to appoint extracts to be made out of the books of aijournal of our justice-court, of the trials of some of the most notorious rebels, as also of the trial of John Niven, and those persons found guilty by a great Assize of Error, and likewise of all papers whatsoever relating to the trial of Archibald late earl of Argyle, and the process of forfeiture led against him, to the end the same may be digested and

methodized by Charles Hauser of Gray's Inn, esq. and published for the satisfaction of our good subjects: we have hereby thought fit, to authorize and require you to transmit to our secretary of state, to be delivered to the said Charles three and exact copies of all proclamations, letters, examinations, confessions, trials, indictments, declarations, and others, since the decease of our royal grandfather king James 6, of blessed memory, that relate to public matters, our prerogative in former and late rebellions, the rebels their suppression or caption, the security of the peace whether in church or state, or the advancement of the interest of our bishops and their regular clergy in that our ancient kingdom, and of all informations, relations, or petitions, sent to our privy council from time to time about any thing of this nature, as convenicles, insurrections, insokencies, or errecities of facticks, and such other papers of any public concern, which you judge most proper to be published, for the satisfaction of all good subjects; which are to be attested under the hand of our chancellor. Given at Whitehall, February 21, 1680.

"MIDDLETON."

James Park, in Lanerk, in armes with the rebels, betwixt the first and twentie second dayes of June, 1679, and that he knewe him particularly, and the said William Heastie, who depones he sawe the said James Park with the rebels in armes on foot, in June, 1679, within the toun of Lanerk; and likeways William Mastertoun, in Lanerk, who depones, that he sawe the said James Park in company with the rebels, within the toun of Lanerk, in the said moneth of June, 1679, and for provinge against the said John Bunckle, his majestie's advocat adduced the said Gavin Mont, who depones he sawe the said John Bunckle, in armes with the rebels, betwixt the first and twentie second dayes of June, 1679, and that he knewe him particularly; and the said William Heastie, who depones, that he sawe the said John Bunckle, in armes with the rebels within the toun of Lanerk, in June, 1679, and likeways the said Archibald Hinselwood, who depones that he sawe the said John Bunckle going from the toun of Lanerk, with armes, the tyme forsaid, and against the said Thomas Hinselwood, adduced the said William Heastie, who depones, he sawe the said Thomas Hinselwood, in armes with the rebels, within the toun of Lanerk, in June 1679, and the said Gavin Mont, who depones, that he sawe the said Thomas Hinselwood in arms, with the rebels, and knewe him particularlie; and also Robert M'Ghie, in Lanerk, who depones, he sawe the said Thomas Hinselwood goe alongst with the rebels and a staff in his hand, and likeways John Lindsay, shoe-maker in Lanerk, who depones he sawe the said Thomas Hinselwood in company with the rebels, with a sword, and against the said Hugh Sommerville of Urrats, his majestie's advocate adduced James Tod in Hamiltonn, who depones, that he sawe the said Hugh Somervail severall tymes in armes with the rebels betwixt the first of June and the twentie second day thereof the forsaid year, and that he knewe him particularlie, and Roger Cleiland, in Lanerk, who depones, he sawe the said Hugh Somervail, of Urrats, in armes with the rebels, at Lanerk, Hamiltonn, and Hamiltonn-muir, betwixt the first and the twentie second dayes of June, 1679, and likeways James Alexander, saidler, in Hamiltonn, who depones he sawe Hugh Somervail, of Urrats, in armes with the rebels, within the toun of Hamiltonn, betwixt the conflict at Drumcloghe and the defate of Bothwell-bridge, and against the said James M'Quharric, of Scorieholme, his majestie's advocate adduced John Wilson, writter in Hamiltonn, who depones he sawe James M'Quharric, of Scorieholme, in armes with the rebels, at Hamiltonn and Hamiltonn-muir, betwixt the first and twenty-second dayes of June, 1679, and that he was ryding on a black horse with them and William Pollock in Hamiltonn, who depones, that he sawe the said James M'Quharric, in armes with the rebels, at Hamiltonn, in June, 1679, and the said James Alexander, who depones, that he sawe the said James

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M'Quharric, in armes, with the rebels, within the toun of Hamiltonn, betwixt the conflict at Drumcloghe, and the defate at Bothwell-bridge, and against William Park, sewar, of Lairfad, his majestie's advocat adduced John Allan, in Hamiltonn, who depones he sawe William Park, sewar, of Lairfad, in armes with the rebels, within the toun of Hamiltonn, Robert Scot, in Hamiltonn, who depones he sawe the said William Park, severall tymes in company with the rebels, at the deponent's house, betwixt the first of June and the twentie-second day thereof, and John Robertson, in Earnoch, who depones he sawe the said William Park, sewar, of Lairfad, in armes with the rebels, in Hamiltonn-Muir, in June, 1679, and against John Hutchieson, of Harelawe, adduced James Tod, in Hamiltonn, who depones he sawe the said John Hutchieson severall tymes in armes with the rebels, at Hamiltonn, betwixt the first of June, and the twentie-second day of the same moneth, and knewe him particularlie; and William Mastertoun, in Lanerk, who depones he sawe the said John Hutchieson, in armes with the rebels, in June, 1679, the tyme of the late rebellion, and Archibald Hinselwood, in Lanark, who depones he sawe the said John Hutchieson ryding with armes from the west homewards, the tyme the rebels wer in armes; and against the said Luke Greinsheills, his majestie's advocat, adduced the said Gavin Mont, in Lanerk, who depones he sawe him in armes with the rebels, and knewe him particularlie; and Andrew Robertson, in Belshill, who depones he sawe the said Luke Greinsheills in armes, with two troupes of the rebels, at the Shawehedmuir, on Sunday befor the break at Bothwell-bridge: The whilk witnesses above named, wer received, sworn, purged and admitted, in presence of the persons above compleaned upon, assysers received and sworn in the said cause for tryall of the persons above named, ther guiltines of the crymes above specifit, which was most clear and manifest, ther being not only one but three and four witnesses deponing positive therupon, in respect wherof his majestie's advocate then protested for wilfull error, against them in case they should acquytt or cleng the defenders above named of the crymes forsaid contained in ther dittay; yet true it is, that the saids persons above named being thereafter removed furth of court, and inclosed within the assyse-house, and having consulted and reasoned upon the poynts of the dittay above wrcitten, referred to ther knowledge and determination, and re-entered againe in court, they notwithstanding of the clear verification and probation of the persons above named, ther guiltines of the crymes above specifit; led and adduced in ther presence, be the mouth and judiciall declaration of the said James Baird, of Sauchtounhall, ther chancellor elected and choisen be them, upon the said assyse, wilfull be favour, partialitic, temerariouslie, be partial meanes, assolyed the said William Dick, James Park, and the other

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persons above named, though they wer bound in lawe, by oath, and conscience, to have judged according to the depositions of the witnesses and probation adduced be his majestie's advocat, received, sworne and admitted in ther owne presence, which is a most clear, manifest and conviacing probation of the persons above named, and ilk ane of them ther guiltines of the crymes above specifit. In doing wherof, the persons above complained upon, have most wickedlie committed and incurred most wilful, manifest, partiall, perjurious, at least temerarious error, nyn severall tymes against the light of ther own consciences, and against the most clear probation that ever was or cane be adduced in any cause, civill or criminall, in hie contempt of his majestie, and his authoritie, the whilk being suae found be ane assyse, they and ilk ane of them ought to be punished in ther persons and goods, with the paines above written, which ought to be inflicted upon them in most examplarie maner to the terror of others, to comit the like herefter.

Persewer.—Sir George M'Kenzie, * of Rosehaugh, our Sovereigne Lord's Advocat.

Procurators in Defence.—Sir George Lockhart, sir John Cunningham.

The lords in regard ther was not a competent number of assysers present, continued the dyet till Monday next, and ordaines the pannalls to find caution for their appeirance at that dyet, and the assysers present wer cited, *apud acta* to attend ilk person, under the paine of two hundreth merks.

GURLE JUSTICIARIE, S. D. N. Regis tenta in Pretorio Burgi de Edinburgh, 25 die mensis Julii, 1681, per honorabiles viros Ritchardum Maitland de Duddop Justiciarium Clericum, Dominos Jacobum Foulis de Colintoun, Davidem Balfour de Forret, Davidem Falconer de Newtoun, et Rogerum Hoge de Harcaris, Commissarios Justiciarie dictii S. D. N. Regis.

Curia legitime affirmata.

Intran,

Alexander Blair, merchant.

Lewes Johnstoun, merchant.

Thomas Noble, merchant.

Captain John Binning.

Alexander Bothwell, of Glencorss.

James Bailie, merchant.

Mr. Andrew Temple, of Ravilrige.

James Baird, of Sauchtounhall.

* In sir G. M'Kenzie's treatise on the Criminal Law of Scotland, upon several occasions assizers are mentioned, slightlyly, if not contemptuously; and the same work exhibits a strong bias in the mind of the author, in favour of the authority and power of judges, rather than those of assysers. Of his treatment of the latter, see two instances in this Collection, vol. 8, 823, vol. 10, p. 971, and 986.

Robert Sandilands, merchant.

Robert Eliot Wright.

Alexander Henryson, of Newhaven.

James Gray, of Wariestoun.

John Dundas, of Harviestoun.

Indyted and accused for the crime of wilful error *ut in die precedente.*

James Baird, of Sauchtounhall, who was chancellor to the said assyse, declares, that ther came but about sex pannalls to his vote, and he fand them guilty according to his knowledge.

His Majestie's Advocate declares, he insists primo loco, against Alexander Blair, Alexander Bothwell, John Binning, James Bailie, Mr. Andrew Temple, and John Dundas, of Harviestoun, and James Gray, of Wariestoun.

*Sir George Lockhart, for the pannalls acknowledges, that they cannot be put to the knowledge of ane assyse because the process itself being a process of error, and that the pannalls were 'temere jurantes super assisam,' as it is extraordinar and without any precedent upon record, so it is only foundit upon the 63 act, 8 parliament king James 3, and therfor cannot be farther sustained then in the precise termes and cases mentioned in that act of parliament; and the expresse case stated in that act is only wher indyted persons are shoven befor the assyse in the accusation of a trespassor nottor and manifest knowledge of the trespassor being hade it happins the persons that passe on the assyse willfullie be favours or partiall meanes to acquytt, that such assysers being convict *de temerario juramento* may be persewed as guilty of error, but that act of parliament does not in the lest concerne the case of these pannalls; in respect it cannot be subsumel that the persons indyted wer shoven and produced to them, the pannalls then called befor the assyse not being sisted, but the procedor only against them as absents which albeit warrantied by the late act of parliament, in suae fare as concerns the legalitie of that procedor as to any sentence, coudemning them, or forfeiture, or confiscation of ther estates, yet does it not at all concerne the case of the act of parliament king James 3, which in the clear and distinct words therof, proceeds and requyres that the persons indyted should be shoven and produced, and by the common principles of law *in materia criminale*, ther cane be no extention of lawes and acts of parliament 'de casu' in casum etiam ex paritate et identitate rationis,' although ther is no paritie or identitie in the case wher pannalls are absent, and wher they are present; in respect wher pannalls are present, assizers have oportunities of more full, more evident, and conviacing convictions, by the cariage, answers and composure, and interogations, which in ther own presence they may hear made, or may make, to the pannalls themselves, and therfor this case being of so high and extraordinary importance as to the lives and fortunes of his majestie's subjects, and wherupon all assysers may be called in*

question by great assyses, and these great assyses drawn in question againe before a parliament; this proces of error not being in the termes of the act of parliament king James 3, wherupon it is foundit, cannot be sustained, or the pannalls put to the knowledge of ane assyse therupon.

2. Although the case wer in the expresse termes of the act of parliament, that the pannalls had bein sisted and produced, the contrair wherof is nottor and known to the lords of justiciarie, yet no person can be persewed as guiltie of perjurie, and committing wilfull error, except wher ther are relevant and speciall qualifications condescended upon and offered to be proven, that the assysers did assolyie the trespassors be favour or partialitie, and the reason is most evident, because the assyse being by the lawes and inviolable practice of this kingdom, the sole and absolute judges of the probation according as they shall be convinced therof, in ther consciences, and who in the nature of their office and duty, have it in ther power to consider 'momentum probationes quantum fidei est testibus adhibendum,' it is nowayes sufficient to persewe ane assyse 'super hoc solo medio,' that ther was a probation adduced, but it most be made appeir that the assyse had no regard to the said probation upon other extrinsic grounds and consideration of partialitie and favour, such as brybrie, corruption and other qualifications of that kind, but if no such favour, qualifications or gratifications cane be condescendit on and qualified, so as the assyse have procedit upon the single conviction of ther own reason and consciences, no such procedor cane fall under the act of parliament to found against them ane process of error, and that they are 'temere jurantes super assisam.'

His Majesties Advocate replies to the first, That the law having forsein the great arbitrienes and villainies that might be committed by clenging persons guilty, wherby not only the principles of government but of human societie would be dissolved, in respect that the greatest malefactors might expect impunitie, wherby not only government but all securitie would be cast louse, and every privat man have power to remitt and indemnifie crymes, though never so great and horrid, they therfor made this excellent and clear law which does very clearlie ordaine all 'temere jurantes super assisam' to be punished without distinction, and which act could never be put in execution in a case of greater moment then is the assolyeing of nyn oppin and nottorious traitors, who had absolutelie disowned the king, declared him a tyrran, and burnt his lawes, nor in a case so clearlie proven, the probation being as to all the nyn, most clear and convincinge, and the parties assolyied having not only bein ther to the knowledge of wholl shyres and countreys, and who durst not compeir when cited but are yet ryding in parties threatening and murdering the king's honest and loyall subjects, nor in a tyme wherin perju-

rie for principles passes for a christian duty and heroic devotion, both in this and our neighbour nation, which as it makes the debatinge of these two points absolutlie unnecessary, the act and matter itself being so clear, yet for formalities sake, his majesties advocat answers as followes:

To the first the act is opposed, bearing all who are guilty *de temerario juramento* (without distinction) to be punished, which if it should hold in any case, should much more hold in treason, and against persons who are so guilty as they dare not appeir, and the justices may consider what wise men our lawyers had bein, if they had punished these who had assolyed a man for pettie theft, or mutilation, and yet would have allowed impunitie to oppin rebels persisting in rebellion, nor does the words foundit upon in the act of parliament any way weaken the lybell (those words shouen to the assyse) meaning only that wher persons are designed and specified to the assyse in a lybell, and not wher the bodies are produced, for I may shoue a man to be a rebell, and yet not shoue his person to be at the bare, and it is verie straing to think that rebels either to be forfait in absence or efter death, or if the lawe should yet ordaine other persons to be forfait in absence (as probable they shortlie will) ther being greater probabilitie of assolyeing these be partialitie then any others, because of the identitie of priinciples, law should not have provided a remedy wher ther was greatest temptation and hazard.

2d. The act of parliament ordaining persons to be forfaited in absence, appoynts the probation to be led against them as if they wer present, and therfor ther is no distinction to be made but *fictione juris*, the lawe makes them to be present, nor does the reason of difference condescendit on militat any wayes in this case, for the assyse are not to consider what might have bein said if they had bein present, but are to proceed 'secundum allegata et probata,' and therfor if the probation being incontraverted (as in this case it was) they should have condemned, and if the pannalls had any thing to say for themselves *sibi imputent*, that did not compeir being cited, and they may have a remedie if they thereafter compeir and offer themselves to a tryall.

To the second the act of parliament is opposed bearing that persons assolyeing unjustlie are to be accused, not only of perverse and partiall assolyeing, but of 'temere jurantes super assisam,' and the law could not distinguish whither men did by partialitie or wilfulness assolyie, or if they assolyied only rashlie by error for malice and designe, being latent acts of the mind, the lawe could not know them but by the effect, for ane assyer may be of those pernicious principles that thinks Bothwelbridge was no rebellion; and yet no man knewe it but God Almighty, and therefore the law has fixed upon most clear grounds which is to know the cause by the effect, nor cane ther be any other proof of wilfulness and partialitie if it wer to be condescendit

on and proven, then that efter a clear and convincing probation was led of the guilt they assolyed, and this is the same probation that could be led of 150 witnesses wer led, for in the construction of lawe, he does wilfullie assolyie who assolyies contrair to probation, that the lawe allowes, and the probation of two or three witnesses in a palpable matter that falls under sense, such as being in armes with the rebels, is as convicting a probation as if 150 did depone, and if this condescension wer requisit, this lawe would be absolutlie overturned, elludit and made useless, since it will be impossible for the king to prove partialitie and wilfulness otherwayes then *ex re ipsa*, so that this interpretation being inconsistent with the designe of the lawe, and the securitie of the common wealth, this sense cannot at all be sustained or fastened upon it, for that wer not to interpret a lawe, but to abrogat it.

Sir John Cunninghame duplies, That the punishment which is to be irrogat in case the pannalls be found guilty, being no lesse then infamie, that they should have no right to stand in judgement, the timesell of there estates, &c. and this being so great a concerne of the kedges, they ought not to pass to the knowledge of an assyse in order hereto, but upon a clear, positive, and expresse law, and for a crime subsumed upon in the termes of lawe, and therefore seeing it cannot be contraverted that the parties clenged wer not shown nor produced before the assyse, the assysers who be pluralitie clenged, cannot upon that act be perswed for error, and as to the replye made be his majestie's advocat, that these words in the act of parliament, viz. the indyted person shown and produced, imports nothing else but that the person be speciallie designed, the act of parliament is opponed, which requyres the showing of the indyted person, and it is most certaiue, and cannot be contraverted, that the act requyred the production of the person on the pannall, because before the late act of parliament, never person past to the knowledge of an inquest but wher he was present on the pannall, and as those are the expresse words and clear import of the act of parliament, so in order to the clearing of ane assyse, ther is ane absolut vast difference betwixt ane assyse clenging or convicting *parte auditâ et presente et parte inauditâ*, wher the conscience of the assize is to be convinced of the pannall's accession to the guilt, or freedome from the guilt by the moment of a probation, against which a pannall may object, or by the moment of the pannal's defence or exculpation, and notwithstanding of this act of parliament, and that now in the space of 200 years since the making thereof, ther could not but have occurred cases wherein ther was much more evidence and clearnes to indyt ane assyse of error then in this case, yet his majestie's adocat cannot make appeir by the Journalls of Justiciary, that ever ane assyse was convict of error, and so fare as is knowen never ane assyse accused of error but twice,

viz. 1604 and 1635, which took no effect, nor was the assyse put to ane assyse.

2d. The act of parliament 1669, which appoynted probation to be adduced in presence of ane assyse in absence of a traitor, in crimes of treason, cannot be extendit to comprehend the case of ane assyse of error, for as the crime of error is altogether contradictist from the crimes mentioned in that act of parliament, which was the only subject of the parliament's consideration at that time, so no lawe can import the punishment of error; but the act foundit upon in the proposition under which the pannalls fall not as aforesaid, nor in so great and important cases to the kedges which lawe equiparats to ther lyff, must consequential inferences and illations from posterior lawes be a ground to irrogat so hie punishments, especially wher the disparities are so urgent and pregnant as are adduced in the defence.

3. That notwithstanding of his majestie's advocate's allegiance, the lybell ought to bear and should be qualified upon partialitie and favour, is evinced first from the expresse termes of the act of parliament; 2dlie, from the nature of a verdict wherin assysers proceed upon the motion and conviction of their own consciences upon the poynt of probation; 3dlie, from the qualitie of persons who passes upon the assyse, whom not only the law of the kingdome presumes to be *probi homines terre*, but being persons called and nominat by his majestie's advocat, ther integritie and fidelitie cannot be drawn in question nearlie, because of ther verdict, wherin they are supposed to have served ther consciences, being under that *magnam sacramentum* which assysers give when they are choisen, and the lords of justiciary would be pleased to consider howe important ane case this may prove wher ther is so frequent use for assysers, that if the assyser serve his conscience and clenge, he must then ruse the hazard of ane great assyse, and yet serve his conscience he most in regard of his oath, and his conviction, and it is upon this consideration that the lawe has expresse requyred partialitie and favour, because it is not to be presumed that a man upon oath would damne himself either to assolyie or condemne, unless it could be made out by these qualifications of lordes or brybrie, or downright favour from kindnes to the partie, which cannot be pretendit in this case, wherin non of the parties insisted against did so much as knowe any of the parties clenged, and the pretence that it was done from a principle is a worse accusation then the dittay, and absolutlie unjust, because those verie assysers concerned in the convicting of eight and fourtie at the same tyme.

Sir George Lockhart adds, that it is most evident by the act of Parliament, king James 3d, and by the inviolable practiq, and records in the books of adjournal, that the persons of the pannalls ought to have been assistid and produced, and it is a glosse altogether inconsistent with the act itself, that these words (the par-

son indyted shoven to the assyse) is to be understood only of a designation of the pannall, be name and sirename, or the lyke, and the reason is most clear, for whither the pannall be present or absent, all criminall lybells, and civill requires such designations, and therfor the showing the person indyted was a sisting and producing the person, and which not only is requyred by the said act of Parliament, but was also requyred by the common law, and the laws of all nations, and the contrary wherof was never pretendit or heard of till the late act of parliament 1679. And as to that argument that the late act of parliament *hoc ipso* that it allows a procedor against absents and declares the sentence and doom of forfeiture, followeing thereupon valid, does also inferre that assysers, if they should assolye against a clear probation may be persewed for error, it is answered, the argument is ane absolute inconsequence, and on the contrair the same is retortid, because his majestie and estates of parliament making a lawe in *materiâ connexâ* and declairing the special effects of that procedor, that it should be valid as to the sentence condemning and the doom of forfeiture, and being *lex correctoria* as to these poynts, it is impossible that a lawe declairing, as to speciall effects, and being both a correctory lawe, and 'in *materiâ maxime odiosâ,*' it can be extendit to any other effect then these exprest, and the common rule of lawe takes place that '*casus omnisus habetur pro omisso,*' and the lords of session are in use so to interpret laws and acts of parliament, even 'in *materiâ civili,*' wher the lawe itself allows a just and rational extension '*ex præsumptâ mente legialtoris,*' as for example in those statutes relating to comprysing and adjudications, because the statut as to adjudications does not bear that special effect, that the adjudger should pay a composition to the superior, the lords upon the common grounds of lawe, that statutes were *strictissimi juris,* and could not be extendit, though ther was the same paritie of reason, yet would not extend the statut of comprysing to the case of adjudication, untill by the late act of parliament, that particular case was providit for, but it wer ane absolut overturning of the fundation of all criminall lawes, that a posterior act of parliament being *lex correctoria,* as to special effects therein mentioned, and proceeding upon a special narrative that it wer unjust that persons by ther absence and contumacy should reap any advantage, which narrative, tho it be verie just, as to the pannalls themselves, who did not compeir, yet does not in the least militat against the assyse, that such ane act of parliament proceeding upon such special considerations, and only innovateing the former lawe and custome as to the special facts therin mentioned, should by ane interpretation be expoued to lay ane fundation of a proces of error against the assyse, when the pannalls wer not present, and by whose presence they might have been cleared in ther consciences, of many

doubts and questions, wherof it was impossible they could be cleared being absent, and tho ther wer any reason to extend the act of parliament king James 3d, that it should proceed in the case of assysers wher pannalls are absent, it cane only be done by act of parliament.

2do. Assysers by the lawe of the kingdome, being absolut judges of the probation, as they may condemne without any probation at all upon the single conviction of ther own consciences, so '*momenta probationum sunt in arbitrio judicis;*' and to convince the Lords of judiciary, that ther is neither absurditie nor any unwarrantable stretch in this poynt, ther is not a more famous question in the cannon lawe, then whither '*judex contra privatam conscientiam teneatur sequi allegata et probata,*' wherin there is great and eminent authorities upon all hands; But the lawe of this kingdome has clearlie determined the case as to assysers, that they are to proceed and determine according to the conviction of ther own conscience, which most be presumed, unless his majesties advocate wer able to qualifie and instruct such qualifications against them, as would make it appear that they did not proceed upon conviction of ther consciences, but upon other unwarrantable and unjust grounds which if they wer condescendit upon and proven, wer a clear ground to a great assyse to find that the former assyse were '*temere jurantes super assisam,*' and it is straing doctrine to think that ane assyse who generalie are not lawyers but called as '*probi et fideles homines patrie,*' to proceed according to that measure of light and conviction, that God has endowed them with, and after they have taken ther great oath to proceed without partialitie or favour, that such ane assyse upon the single pretence that a probation does convince others, which did not convince them in ther consciences, should be aground for ane assyse of error, unless qualifications of brybrie and corruption, or antecedent pactions to acqnyt parties whatever should be proven could be qualified, and proven aganist them; And as to that pretence that if such qualifications wer requyred the act of parliament would be elusorie, and that it is not possible for his majesties advocat to prove the same;

It is answered, the pretence is most groundles and irrelevant, and its most unjust and inconsequential, that lesse qualifications should be requyred to convince ane assyse of error, '*et de temerari juramento*' then the lawe requyres even in civil cases to rescind sentences; and yet such qualifications of corruption, brybrie, and partialitie, are requyred to be made appeir against witnesses in any reprobatior of ther testimonies, and without which, such reprobators never was nor cane be sustained, and therfor ane hundreth instances cane be given that such qualifications both have occurred and been proven, so that ther is no reason to pretend, but these both might and ought to be proven in the case of assysers, and without which, it is impossible that in lawe,

or justice they can be found guilty of acquitting pannalls wilfullie, temerarioussie, or by partialtie and favour, which are the expresse termes requyred by the act of parliament, king James 3d, and if such a fundation wer laid, there is no man, nay scarce lawyers of the greatest reputation, could adventure to be members of assyses, not knoweing howe fare they may be charged or overtaken. And the lawe of the nation puttis assysers upon no such racks or difficulties but only that as honest and well meaning men they should proceed according to the integreitie of ther consciences to condemne and assolye, and it is beyond doubt, and the bookes of adjournall make mention, as the persewer protests for error, so the pannalls may doe the same, so unto what inextricable labyrinths should assysers be involved in by such protestations and hazards upon all hands that ther estates and reputations may be drawn in question as guilty of perjurie upon that single pretence, that they ought to have procedit otherways upon the probation adduced; men's reasons and apprehensions, being as different as ther faces, and that which seems to be clear and convincing to one being dubious and debatable as to another, and therfor the case being so high and of such extraordinary importance as to all men's securities, a process of error can be no farther sustained then according to the act of parliament of king James 3d, and even though the pannalls then indyted had bein sisted and compeired, his majestie's advocat should prove and qualifie bybrie, corruption, and other grounds of gratification.

The lords justice clerk and commissioners of justiciarie having considered the lybell and debate, they repell the defence and dupic in respect of the lybell and replie, and remits the lybell to the knowlede of ane great assyze.

ANSISA.

William, Earle of Dalhousie.
 Robert, Earle of Roxburgh.
 Colin, Earle of Balcarras.
 The Earle of Airlie.
 The Viscount of Oxfoord.
 The Lord Livingstoun.
 John, Lord Elphinstoun.
 The Lord Elibank.
 Andrew, Lord Rollo.
 Capt. Alexander Livingstoun.
 The Laird of Gosfoord.
 Mr. Henry Maule.
 Capt. M'kenzie, of Suddie.
 Alexander Murray, of Melgum.
 Sir Andrew Bruce, of Earleshall.
 Mr. William Livingstoun, of Kilsyth.
 Sir Mark Cars, of Cockpen.
 Sir John Whyturd, of Milstoun.
 John Skein, of Halysairds.
 Henry Trotter, of Mortounhall.
 Adam Urquhart, of Meldrum.
 Mr. John Bayne, of Delneys,
 Sir William Graham, of Gartnmoir.

Sir Wm. Binning, late provost of Edinburgh.
 Capt. Andrew Dick.

The Assyse lawfullie sworne, no objection in the contrair.

His Majesties Advocate, for Probation, adduced the Witnesses Deposition, led and adduced be him against the persons whom the pannalls have assolyed with their verdict following thereupon, as also the Pannalls Declarations emitted before the lords of his majestie's privie council, whereof the tenor follows:

Edinburgh, 16 June, 1681, in presence of his majestie's privie council*.

James Gray, of Waricstoun, being examined

* If the verdict had been taken with perfect regularity, there would not have been occasion to resort to any other proof of the votes, which had been given by each of the assizers. This will appear from the following passages of Mr. Hume's Commentaries, "respecting Trial for Crimes."

"To pass to the last article of the duty of the assize, the return of their verdict into court. For this purpose an hour is appointed by ordinary style of the interlocutor ordaining them to inclose; though if they be still sitting when that hour comes, the court may adjourn anew, and appoint them another hour. In the ordinary case, the verdict can be received only in the presence of the pannal; for, as mentioned formerly, if even at this period of the process he make his escape, or withdraw his appearance, no farther step can be taken in the trial, but sentence of fugitation only be pronounced, in like manner as if he never had appeared at all. Like other rules, this one may however be departed from in extraordinary circumstances, where, without injustice, or great inconvenience, it could not be observed. And such a situation occurred in the trial of Peter Glasgow, and others, in October 1797, for riot. It happened here, that Glasgow was taken ill while the assize were inclosed, and became unable to attend at the appointed hour for receiving the verdict from their hands. Nevertheless, as others were under trial on the same indictment, it was held that these had a right to know their fate, and could not on his account be subjected to farther anxiety or confinement. The verdict was received therefore in absence of Glasgow, and he had sentence afterwards, in pursuance of his conviction.

"It is equally true, that in the ordinary case, the verdict can be received in the presence only of all the persons of assize. And the reason is, that they may, in open court, hear the verdict read out from the record, and there own and acknowledge it, as the very verdict which they have found, and have committed to the keeping of their chancellor, to be delivered by him, as their act and decision to the bench. For, as the writing is authenticated with the names only of the chancellor and clerk, it would otherwise be in the power of these

confesses he did assolyie some and condemned others, but does not remember particularie whom, and declaires he is not convinced of rash swearing, but will stand by his verdict.

Sic Subscritur, JA. GRAY.

Alexander Blair, merchand, declaires conformis to James Gray.

Sic Subscritur, A. BLAIR.

Alexander Bothwell, of Glencorss, declares he assolyed some of the pannalls, and condemned others, but does not remember whither he assolyed any of the nyn or not; confesses his fault and comes in the king's will.

Sic Subscritur, A. BOTHWELL.

two persons, in concert with each other, to suppress the true verdict, and substitute another in its place. As long therefore as the persons of assize are all surviving, and able to attend, the court will not readily receive the verdict in the absence of any of them; but will rather adjourn that business to another time, and take order for compelling the obedience of him who is refractory, or negligent of his duty. Such an adjournment seems to have taken place in the trial of Alexander Cunningham for fire-raising, July 31st, 1677. But, like the former, this rule is suitable only to the ordinary case, and is not observed so much for necessity, as out of scrupulousness, and because in such matters the law is desirous of having the best and most solemn evidence, if it can easily be obtained. It is not therefore to be imagined, that the verdict is lost, if one or more of the assize, or even the chancellor himself, happened to die, in the interval before the hour appointed for returning it. Nay, if any of them be taken with a long and severe illness, such as disables him to attend, it seems probable that here too, on account of the pannel, who ought not to be kept in suspence, and has right to his immediate freedom in case of acquittal, the verdict shall be received in the presence, and under the faith and testimony of the other members of assize.

"The names of the inquest being called over in presence of the court, they are asked concerning their chancellor, which of them he is; and from his hands the verdict is received by the presiding judge; who having unsealed and perused it, delivers it to the clerk of court, to be by him transferred into the record; after which, and a careful comparison of the record and original writing, which takes place under the eye of the court, it is announced and read out aloud. The verdict is then sealed up, in compliance with the regulations of 1672 (No. 9) which declare that it shall never again be opened, but by order of the judge; and that if the clerk infringe this prohibition, he shall be punished with the loss of his office, and otherwise, at the discretion of the court. At that time, as appears from the way in which this article is introduced in the statut 1672, it was the main object of this order, to prevent any alteration by the clerk or others, of those marks which were then subjoined to the names of the

John Binning declaires he assolyed some of the defenders, and condemned others that wer pannalled, confesses his fault and comes in the king's mercie.

Sic Subscritur, JOHN BINNING.

James Baillie, merchand, declaires he does not remember whom he condemned or assolyed of the persons condescendit on, and stands to his verdict.

Sic Subscritur, JAMES BAILLIE.

Mr. Andrew Temple, of Ravilrige, declaires for the most part he condemned all * and assolyed some, and comes in the king's mercy.

Sic Subscritur, ANDREW TEMPLE.

several assizers, for signifying how they voted and which served as a direction whom to arraign, in case of a prosecution for wilful error on assize. Though not at first intended, this practice serves however the far more useful purpose, of hindering all alteration of either the substance or the form of the verdict, on the part of the clerk or others, whereon to found a plea of disconformity of the record and verdict. If any question of this sort shall arise, the verdict having remained sealed all the while, and in the custody of the court, will, on being opened in their presence, stand free from all suspicion, and testify for itself. In the trial of Alexander Blair and others by an assize of error, on the 25th of July, 1681, the lords ordained the verdict of assyse against the nyn persons assolized to be oppined and broke up, and given in to the great assyse as a mean of probation. The verdict was opened and compared with the record, and again sealed up, in the case of Gabriel Cunningham, July 28th, 1730, who insisted in suspension of a capital sentence, pronounced in an inferior court. The like revision seems to have taken place in the case of Livingston (Maclairin, No. 55.) where the verdict was remitted for consideration, by the judges who had received it on a circuit. In the case also of Hog and Soutar, July 24th, 1738, on a motion for the pannels, "That there was some variation in engrossing the verdict of assize in the record from the principal verdict," order was given to unseal and compare it; and, being found right, it was again sealed up." Vol. 2, p. 266.

"The form [of the verdict] must be a wriitten form. Wherein the first thing that is marked, is the *Sederunt*, or the nunes of the persons of assize; which serves the double purpose of vouching that they were fully met, and of applying the verdict to the particular case or trial. Formerly, this was needful for a third reason, in order that each man's vote might be subjoined to his name, whereby to distinguish the persons who might be liable to trial for wilful error on assize: in which view the regulations of 1672, particularly ordered the chancellor of assize to attend to that matter." Vol. 2, p. 278.

* This word *all* appears to be redundant.

John Dundas, of Harviestoun, declares he condemned and assolyied some, but does not now remember he assolyied any of the nyn, and holds by his verdict.

Sic Sub. J. DUNDAS. ROTHES, Canc. I. P. D.

Sir John Cuninghame, for the pannalls, takes instruments that his majestie's advocat declares that he makes use of no other probation against the pannalls, but the depositions led against the persons assolyied, ther verdict and declarations above written.

The lords justice clerk and commissioners of judiciary, ordained the verdict of assyse against the nyn persons assolyied to be oppined and brock up and given in to the great assyse as a mean of probation.

Follows the verdict of the assyse.

The assyse, all in one voice, elected the earle of Airlie chancellor, and A. Murray ther clerk; The chancellor and wholl assyse having particularie considered the several depositions led against the nyn persons contained in the lybell, assolyied by the pluralitie of the assyse, finds all in one voice the pluralitie of the said assyse guilty of error; and as to the sevin impannalled they find James Grey and Alexander Blair, guilty by pluralitie of votes, my lord Balcarras, my lord Oxefurd, Gosfurd, Mr. Henry Maule, Rollo, Alexander Murray, Mr. Livingstoun, Mortounhall, the laird of Gartmore, sir William Binning, find them guilty if the councill declare that those nyn wer the only persons proposed, and they confessed they absolved them. As to Alexander Bothwell, of Glencorse, John Binning, Vintner, Mr. Andrew Temple, of Ravilrig, are found guilty by the assyse all in one voice; and as to James Baillie, finds him guilty by pluralitie of votes, my lord Balcarras and the rest befor named qualificie as formerlie in the case of Gray and Blair; As to John Dundas, finds him not guilty by pluralitie of votes; The earle of Airlie chancellor, my lord Dalhousie, Earleshall, captain M'Kenzie, find him guilty.

Sic Subscritur, ARLIE, Chancellor.

John Dundas, of Harviestoun, takes instruments upon the verdict. The lords continues the pronouncing doom against the persons found guilty of error till the 27th instant, and ordains them to be carryed to prison, and continues as to the other pannalls till the said day.

July 27, 1681.

The lords continues the dyet against assysers for error, till Wednesday next, and ordaines that are found guilty to be detained prisoner till then, that in the mean tyme the saids lords may advise with the councill anent the punishment of such who came in the king's mercy.

August 3, 1681.

The lords continue the dyet against captain John Binning, Alexander Bothwell, of Glencorse, and Mr. Andrew Temple, of Ravilrige, who are found guilty by ane assyse of error,

with the pronouncing of doom and sentence against them till Thursday next.

The said day the lords with consent of his majestie's advocat, deserts the dyet against Lewes Johnstoun, merchant, Thomas Noble, merchant, James Baird, of Sauchtounhall, Robert Sandielands, merchant, Robert Eliot Wright and Alexander Heuryson, of Newhaven, who wer persewed for error conforme to ther dittay booked the 23th of July last, *Simpliciter*.

Mr. Walter Pringle, for Alexander Blair and James Bailie, merchants, James Gray, of Wariestoun, protested against the verdict, as the ground of any sentence against them, in respect that ther was a former verdict, and the doors oppined and the samien brock up,*

* "One thing" says Mr. Hume, *Commentaries "Respecting Trial for Crimes,"* vol. 2, p. 273, "is now matter of uniform observance, indeed it is a necessary consequence of the statute 1587, c. 92, that the decision of the assize is transmitted to the court through the medium of the written verdict alone. Wherein if there be any thing obscure, or defective, or even contradictory or unintelligible, this cannot be explained, supplied, or amended by the assize in court, on the question or suggestion of the judge; neither can the judge remand them into a state of inclosure, privately to reconsider and correct their verdict, for themselves. It must be taken from them as it is, and receive the judgment of the court, with all its imperfections, how gross soever these may be, and without regard to the prejudicial consequences, which may sometimes attend such an issue of the trial. It is true, instances are to be found of the infringement of this rule. Such as that which is recorded by Fountainhall, in the trial of James Learmouth September 10th and 11th 1678, where, as that judge relates it, the assize were repeatedly re-inclosed, till they found against the pannel. Such also as that in the case of Marion Weir, December 3rd, 1678, reported by the same judge, where the assize, "after they had been abroad all night, were the next day, by command of the criminal lords, and instigations of the king's advocate, re-inclosed to mend their verdict." As far as I can judge from the record, though expressed somewhat obscurely, the like had happened in the trial of Alexander Blair and others, August 3rd, 1681, convicted of wilful error as jurymen in a trial for treason. It was objected, that no sentence could pass against the pannells, "in respect there was a former verdict, and the doors oppined, and the samien brock up, upon which Mr. Thomas Skene as procurator for the pannalls, took instruments." The record does not say that any answer was made to this challenge; nor is any notice taken of it in the doom which passed on the verdict. Let me mention too, that at an advanced period even of the present century, a verdict seems to have been sustained by

upon which Mr. Thomas Skene as procurator for the pannalls took instruments, to which instrument the saids pannalls adhere and protests for remeid of lawe, and that this ther protestation might be insert in the bookes of adjournall.

the Lords, notwithstanding an irregularity of this sort. I allude to the suspension, pursued by Gabriel Cunningham, of a capital sentence of the regality court of Glasgow August 1730, one of this man's allegations was, (but it was mentioned in passing only, and was not insisted on as a reason of suspension,) that, having made up their verdict, the jury separated for the night, and next day returned it into court; and that after a hasty and not very audible reading (as was said) they reinclosed by order of the judge, Mr. Orr, and again found a verdict, to the same or nearly the same purpose. On th 7th of November 1730, "the said Thomas Orr being called to the bar, the court took notice, that he had failed much in his duty, in suppressing or refusing to allow the *first verdict* returned against the said Gabriel Cunningham to be openly read in court, which was the pannel's right, and the right of every subject; and that he pronounced sentence of death against Cunningham upon the *second verdict*, although the facts libelled were found conjunctly relevant, and that the jury had found one of these facts not proven; therefore the Lords recommended to the lord justice clerk to rebuke the said Thomas Orr for these proceedings, and he was accordingly rebuked in open court," &c. Yet the Lords had previously sustained this verdict as warrant for sentence of transportation. Notwithstanding this precedent, I still cannot help entertaining an opinion, that where the final and only verdict which passes on record is pronounced after re-entry into court, the regular consequence is the full absolvitor of the pannel, as for an infringement of the statute 1587.

"It is true, that in reporting the said case of Marion Weir, lord Fountainhall seems inclined to distinguish on this head, according as the assize have or have not dispersed, at the close of their first sitting. Lord Royston too, expresses himself somewhat to the same effect; and notice may be taken also, of the authority of at least one decision, where this doctrine seems to be right plainly delivered. I allude to the trial of Alexander Cunningham for fire-raising, July 30th, 1677, where the interlocutor was, as follows: "The Lords, &c. having considered the verdict of assyse returned upon the said Alexander Cunningham, that the same is not clear in sua far as they find him guilty of the presumptions, and have not fund him guilty of wilful fyre-raising conforme to the ditty; and interlocutor remitting the same to them; and that when the verdict was first offered, all the assysers were not present, some of them having immediately on disclosing gone out of town, and three days having thereafter past before they came to be all present at the giving in of the verdict, 'so that there has

Mr. Pringle also alleadged that the verdict did bear them guilty but not of error, and therfor the justices could not proceed to sentence against them upon that verdict. The lords justice clerk and commissioners of just-

'bein occasion for the assizers to meet and 'speak with the persewars and defenders, or 'some persons from them, doe therefore find 'that they cannot again inclose the assize:' but considering the verdict as it stands, with the petition given in be the pannel offering himself to banishment, they therefore, by the mouth of Adam Auld, &c. Dempster of court, decerned and adjudged the said Alexander Cunningham to be banished," &c. But truly, for my own part, I find great difficulty of reconciling a reinclosure of the assize, in any case, with the injunction of the stat. 1587, c. 92, which does not distinguish between communication with the judges, and with others. And especially directs the assize, if they have any doubt of which they would be resolved, to propose it openly, before inclosing or removing forth of judgment; and forbids them to be removed from their state of custody, till they be finally agreed on their answer. ["It is statute and ordained, that how soone the haill persute, defenses, and answers thereto, ar fully heard be the assize, gif ony of the saids assis-sowres hes ony doubt quhairof they wald be resolve:l, that they propone the same openly, in presence of the parties, in face of the judgement before they passe out themselves, and immediately after that the said assize hes chosen their chancellor, the clerk of judiciary sall inclose the said assize them allane, or in an house be themselves, and anser na person to be present with them, or repaire them in onywaies, nather clerk nor others, under pretense of furdur information, resolving of ony doubt, or ony uther colour, or occasion quhatsumever; but that the said house be halden fast, and na man present therein but the said assisoures, and that they be not suffered to come out of the said house, for quhatsumever cause, or to continue the giving of their sentence to another time; but that they be inclosed as said is, 'unto the time they be 'fully agreed,' and return their answer be the mouth of the said chancellor to the judge."'] Whereas, if they be reinclosed, their final answer is not given until after the dissolution of their sitting, and a conference with the court concerning their decision, and under the influence of the sentiments, instructions, and perhaps censures, which have been thrown out on that occasion. It is true, this conference takes place under the public eye; but then, it for certain has relation to the trial, which may not always be the case as to intercourse with the jury while inclosed: and if it were no more than this, it is an objection, according to the spirit of the statute 1587, that the assize are witnesses of the reception, whether favourable or otherwise, which their verdict meets with from the audience, and the court."

ciary, be the mouth of James Henryson, macer of court, decreed and adjudged the saids Alexander Blair, James Baillie, and James Gray, of Warristoun (as being found guilty by ane assyse of error) to have forfalt amitted and tint all their cattell and other moveables to be inbrought to the king's use, and to be carryed to prison within the Tolbouth of Edinburgh, therein to remaine for the space of ane year and day, and till they be liberat by the justices ordor, and that in all tyme herefter, they have tint the benefit of the lawe, and of the land, and have incurred the paine of infamie, and shall never be heard as wittnes in probation, or in acquytance (or purgation) nor to make ane oath before ane judge, nor in any other kind of matter, which was pronounced for doom.

August 8th, 1681.

Captain John Binning, vintner, Alexander Bothwell, of Glencross, and Mr. Andrew Temple, of Revilrig, who wer found guilty by ane assyse of willfull error, and imprisoned within the Tolbouth of Edinburgh, and the sentence and doom against them continued till this day, being sett at libertie by the lords of his majestie's privie counceill, the lords justice clerk, and commissioners of justiciary, did continue to pronounce sentence against them till the counceill should give order thereaut.

Wodrow, after mentioning the hard measures which were received by David White and 46 others of Lanekshire, whose names were inserted in the Proclamation of October 3, 1681, (of whom he says, "these had probation led against them in absence, and all that is proven against most of them is Converse with Rebels, when they were going up and down that shire, and lying in camp there, in which the whole shire was necessarily at that time involved; and they are all forfeited in common form, and ordered to be executed as traitors, when they shall be apprehended.") proceeds thus:

"A few others are brought off by the verdict of the assize, as not having their indictment proven against them; indeed the probation against them who are forfeited is abundantly lame; but, it seems, the advocate would have all, who did not resign their lands, to be concluded under the same condemnation, and threatened the people on the assize, with a process of error; and I find, August 3, a process of error raised against those who had been upon the assize in March last, and had liberate some of the heretors of the shire of Lanerk, notoriously known to have been at Bothwel-bridge. There are in the Records very long and learned debates, by the lawyers, in defence of the assizers. The matter is very intricate, and turns upon quæstiones points. At length all the assizers except three come off one way or other. Some of them decline their defences, and come in the king's mercy, the advocate deserts the diet against others. The

three whom he insists against, are Alexander Gray and James Baillie, merchants in Edinburgh, and James Gray of Warristoun. The court decreed them to have amitted all their chattels and other moveables, to his majesty's use, and to ly in prison a year's time. This was done *in terrorem*, and to fright all others, who should be afterwards on the assizes of persecuted people, heartily to fall in with the measures of the managers."

Of this proceeding Fountainhall writes thus:

"June 16. At privy council, a precognition was taken for preparing a dittay by an assize of error against James Baird younger of Saughtoahall, Mr. Andrew Temple of Ravilridge, Dundass of Jervieston, James Baillie, Thomas Noble, and Robert Sandilands, merchants; Robert Elliot, Hugh Johnston, John Binny, Alexander Blair, and others; the assizers, who had on the 16th of March last cleansed Somerville of Urat, and sundry other heritors, who were pannelled for being at Bothwel bridge, though there was clear probation against them. The 15 assizers were called in one by one before the council, and interrogate to declare (but not upon oath, which is a new method,) whether they voted files and condemnis, or cleanses and assoilzies; (for it was not marked in the verdict how every particular man voted, as should have been done by the regulations of the justice court, and ratified by the 16th act p. 1672). Some four of them had found Urat, &c. guilty, which they declared, and so were freed: Others craved pardon for their cleansing him, and came in the king's will and mercy: Some said, they did not remember how they voted: Others more stoutly adhered to their verdict *absolutor*, and that in so doing they had served both their light and conscience. The council remitted them to the criminal court, to be pannelled there on the 6th act parl. 1475, 'tanquam temere jurantes super assisam,' and to be judged by a great assize of 25 noble persons *ad est*, gentlemen at least. The libel uses to be in Latin, and under the quarter seal. This was a strange trial, contrary to the nature of all other precognitions taken at privy council, where they were ever designed in the pannel's favours for mitigation, and never to his prejudice, as here.

"There was never any of these assizes of error that ever took effect before this, in Scotland: But see one learnedly debate in December 1685, p. 318, of my *Crim. Collections*.

"On the 25th of July 1681, the libel against them was sustained as relevant by the crim. judges, and after much difficulty was found proven by the assize of 25, (though they had packed them, making the major part of them officers in the forces, and other dependers,) against seven of them, (the rest having come in the king's will,) who *in terrorem* of others were imprisoned, fined, and declared infamous on the said old act in anno 1475; though generally this sentence did not beget them any reproach."

"January 17, 1683, James Baillie and some of the assizers, who in 1681 were convicted as guilty of giving an erroneous verdict in Somerville of Urat's Case, having been set at liberty upon bail, are again committed to prison, till they should pay their fines."

The Case which Fountainhall mentions to have occurred in 1635, is in the Records of Justiciary, as follows:

CURIA JUSTICIARIE, S. D. N. Regis tenta in pretorio de Edinburgh, secundo Decembris, anno d'ni 1635, per mag'ros Alexander Coluile et Jacobum Robertoun, Justiciarios Deputatos.

Intran'

Alexander Irwing, of Lenturk,
Alex. Banerman, of Elsik,
John Ogilvie, of Glassiche,
Wm. Seatoun, of Scheathyn,
Hector Abercrombie, of Fetter-neir,
George Gordoun, of Tilliechöwdie,
James Seatoun, hurges of Aberdene,
Charles Stevin, burges yair,
Mr. Mathow Lummsden.

Assyors Persewit for Error.

Dilaitit of ye error committit be thame in the partiall and willfull elangeing and acquitting of James Gordoun sone to George Gordoun of Logyaltoun of resetting and intercommoning of and with Alex. Leith and Nathaniell Gordoun rebellis and fugitiues for dyu's grit hearschips reaf's thiftis and oppressiones committit aganis ye Laird of Fren draucht and his tennentis spe'it in ye said James Gordoun his dittay Quha was indytit and accuset y'of befor his maiestis justice and his deputes upone the fyft day of August last 1635 and the pannell being admittit and suorne vponne his assyse was acquit be thame of ye cryme foirsaid.

Persewar—Sir Thomas Hope of Craighall, knight barronet, his Ma'ties Aduocat for his hienes intries.

Prolocutors in defence—Mr. James Baird Mr. Thomas Nicolson younger Mr. John Nisbit Mr. William Forbes aduocates.

The persones vponne pannal askit instrumentis of yair entrie and protestis for yair cautioneris releif.

My Lord Aduocat producet ane Warrant of ye lordis of secreit counsall of ye dait the fyft August last 1635 for persute of ye pannell for the error aboue writin Quhair of the tenor followis &c. togidder with the counsallis Act' daitit ye saxt day of ye said moneth of August 1635.

Thairefter my lord aduocat producet ye dittay and declairet that he had gevin ane coppie y'of to Mr. John Nisbet quha was aduocat for James Gordoun in ye first proces Off ye quhilk dittay the tenor followis—" Alexander Irwing of Lenturk George Dempster in New-

toun Alexander Banerman of Elsik Johne Ogilvie of Glassache William Seatoun of Scheathyn Alexander Abercrombie of Berkinboig Hector Abercrombie of Fetter-neir Alexander Keith of Duffus George Gordoun of Tulliechoudie George Gordoun of Newtoun Mr. Mathow Lummsden burges of Aberdene James Seatone burges yair Charles Stevin Letster burges yair John Caddell seruitor to Ballandalloch and George Bruce burges of Aberdene ze and ilk ane of zowar indytit and accuset Forsaiekill as be the lawis actis of parliament and inviolable practique of this kingdom And speciallie be ane act maid in the reg'ne of our souerane lordis predecessor king James the thrid of guid memorie It is statute and ordainit that gif ony of his ma'ties subiectis chosein vponne the assyse of ony criminall persones doith acquit thame be temerarie or willfullie be fauor or partialtie Thay sall be put to ye tryel of ane assyse of tuentie fyve persones And being convicted y'of sal be punesched according to the lawis of ye kingdom as in the said act of parliament at leuth is contenet Nochtwithstanding q'rof it is of verritie that ze and ilk ane of zow being in ane court of justiciarie halden within the tolbut of Edinburgh vponne the fyft day of August last by past in this instant zeir of God 1, m. vi, c. threttie fyve zeiris be Mr. Alexander Coluile of Blair his ma'ties justice depute choiseing resauit suorne and admittit vponne the assyse of James Gordoun sone to George Gordoun of Logyaltoun quha was brocht furth of waird and that day presentid vponne pannell befor the said justice depute as ane nottoun malefactor and trespassour indytit and accuset be dittay of the crymes efter spe'it at leuth mentionet y' intill viz. ffor recepting and intercommoning of ane Alexander Leith and Nathaniell Gordoun baith rebelles and fugitiues for thift slauchter and burning of the laird of Fren drauchts coirnes and vtheris hearschips and oppressiones committit againes the said laird of Fren draucht and his tennentis speciallie for recepting of the said Alexander Leith and Nathaniell Gordoun rebelles foirsaidis in ye moneth of Merche last 1636 zeires And intercommoning with thame within the said James Gordoun his duelling house in Knokleith at ye leist within his close y'of As also for intercommoning and keipping company about auch dayis y'effar with the said Nathaniell Gordoun and Alexander Leith with the duelling house of Robert Collene in Hassie Wallis quhair ye said James Gordoun and the saidis rebelles soupped togidder that ny't and commoned and confered togidder be ther space of three houres efter supper befor thay went to year beddis And the said James Gordoun and thay lay altogidder in ane chalmers that ny't the said Nathaniell Gordoun Alexander Leithe being in ane bed and the said James Gordoun with ane Robert Dempster of Cuschnie in ane vther bed and that expres aganis the actis maid in the contrair speciallie the 97 act of the sevint parliament of our souerane lords darrast grandf'r king James the

fyf of eternal memorie quhairby it is expreslie provydit statute and ordainit that na manner of persone wilfullie or wittinglie recept supplie manteine defend or do favor to ony of his majesties rebellis being at the home within yair house landis boundes or bailzerics vnder the pane of dait to be inflicted vpon the contravener with confiscation of his hault moveable guidis and aganis the tenor of his ma'ties proclamaciones maid and publeisit in ye contrair in ye moneth of Januar last at ye mercat croces of Aberdene Banff and v'theris mercat croces of the north parts of yis kingdome discharggeing all recepting and intercommuning with ye saidis rebellis vnder the pains foirsaidis spe't in ye said act of parliament As the said dittay produced be sir Thomas Hoip of Craighall knyght baronet advocat to our souerane lord as persewar y'of for his hienes intreis aganist the said James Gordoun than indytet and accuset iudicialle y'rby of ye crymes foirsaidis y'in content in p'ns of ye said justice depute than sitand in judgment in ye self proportis Efter accusation of ye quhilk James Gordoun be verteur of ye said dittay of ye crymes foirsaidis spe't it y'intill it was allegit be Mr. Johne Nisbett advocat as prelo'r for the said James Gordoun that ye dittay in that point y'of anent intercommuning was naways relevant be inferring capitall punychment y'upon becaus the said dittay was nocht foundit vpon the act of parliament nor vpon the common law Nather was it relevantlie subsumet y'intill that wittinglie or willinglie the pannell intercommoned And that ane occasionall rancountering could nocht impoirt ane accessioun to yair rebellious quhair p'teis ar surpriset with y' cunning to yair awin hous or to other places quhair they are And cannocht desingadge thameselfis of yair companie for feir of irritating of thame as ane instance of Walter Hay and Jame Grant And in the present caise as ye pannell has deponeit That he had bene in Robert Colles house in Hassiewallis with Robert Forbes brother to the persone of Auchterles Robert Dempster of Cuschnie and Robert Collisone burges of Aberdene. All vnsuspect and honest men half ane day befor the rebellis cuming to ye house quhilk cuming of ye rebellis to ye said house was at nyne houres of the ny't quhan the pannell could nocht gae elis quhair being benichted. And the rebellis for yair securitie haifing schote and maid fast ye durris of ye said house And as to that word 'conference' mentionet in ye dittay The samen is nocht relevant to impoirt intercommuning rules It had bene subsumet y'in that ye pannell had trocitt with ye rebellis concerning y' rebellion thair rebellious practizes and designes off purpos to help and favour thame conform to ye act of parliament quhilk prohibeittis all recepting supplieing and mantening of rebellis and generallie all doing of favor And the law joynes "conversantes tractantes cum bannitis auxiliunq. presantes complexe" Phar. quest. 130 Num. 172. Last "conversatio et tractatio cum rebellibus sunt verba frequentativa." And

y'foir cannocht be subsumet relevantlie vpon ane at ye maist tua occasionall fortuite surpryses quhair vnto aneier being maid be his majesties advocat as persewar of ye dittay And namelie to that pairt of ye said alledgeance proponet aganist the second pairt y'of That the samyn aucht to be repellit in respect of ye dittay quhilk is foundit vpon the actes of parliament and nocht vpon the common law, and ye particular allegationes adducet out of ye law and doctors hes only place in bannitis for ane particular cryme committit aganist ane subiect But nocht in thame quhair or bannitis and proscryvet for ane publick rebellious as this is And the occultation of ye delinquent quhilk is vryet in the defence is only in fragranti crimine and q'r ye committer of the crymes is perscwit hett fute in quhilk crise occultation lies some respect bot nocht vyerways And for the poynt of knowledge in ane publick rebellious the notorie is sufficient bot to mak the pannell inexcuseable his meitting with the rebellis at ye times q'tenit in the dittay As in M'che 1635 efter publick inhibition maid be his ma'ties l'res in Januar of befor And the excuse of chance in meitting or of ye intentions and purpose is frivolous for than everie man could be excuset vpon his intention And the cryme of recept and intercommuning (quhilk in so publick a rebellious is equal to ye cryme itself) could be vnpuncheit but the pannell cannocht be hard to pretend nather accidentall meitting nor excuse of intention becaus at the first tyme they came to his awin house and in talkin of y' familiaritie they socht ane lane for him of ane pistolet and within aucht days y'etter, they mett at the house of Hassiewallis within ane myle to his awin house q'upone instrumpentis was tane be his ma'ties advocat that it was grantit be the pannell that day in judgment that ye said house of Hassiewallis was within ane myle to his awin house quhilk renderis the pannell to be altogether inexcusable specialis in respect of ye actis in ye parliamentis 1567 1581 1592 quhilk commandis all subiectis vnder the pane of dait to follow and reveill rebellis with hoy and cry And to have na conference with thame without command of ye s'reff of the schyre.

To the quhilk poynt of my lord advocattis ans'r conceining his l'ps distinctioun de bannitis. It was y'etter duplyt be the pannell and be Mr. Jon. Nisbet his prelo'r That ye samyn is altogether without warrand in law quhilk speakis indistinctlie et specific etiam de bannitis et proscriptis locis supra citatis Farther it was duplyt that occultatio being essential in the cryme of recept quhairby recept is only defynet in the law most be lybellit non solum in fragranti crimine Bot in all dittays concluding the recepting and punychment y'of It was also duplyt be ye said James Gordoun and his prelo'r that the notorie of ye rebellis rebellious and proscriptiounes cannocht be obtundit at leist sa aggravallie the said allegit cryme of recepting being ane schorte

after y' proscriptioun And last it was duplyit that ye fortuite rancounter of rebellis most purge intercommoning or ellis et sull be arbitrarie to mak ye kingis loyall subiectis intercommoneris as is instanced of befoir be Walter Hay And speciallie in this caice q'r ye fortuitnes and accidentall meiting with the saidis rebellis is nocht only averred be the pannell but may be cleird be thre or foure unsuspect gentilmen quhilkis war present with the pannell and violentlie detenit and keipit in the house with him.

Efter the proponeing of the quhilkis alledgeances ans'ris and duplyis about writin The justice being ryplie and at length advyset y'with be his interloquiter gevin and pronuncet y'untill repellit the foirsaid alledgeances and fand and declairet That ye said James Gordoun than vpon pannell aucht to pas to the knowledge of ane assyse for intercommoning and remittit that p't of ye alledgeance wittinglie or willinglie to be cognocet vpon be ye said assyse As the process with the interlo'r aboute written pronuncet y'in at lenth proportis.

Likas efter ye pronouncing of ye quhilk interlo'r be the justice ze and ilk ane of zow being callit vpon ressaut suorne and admittit vpon ye said James Gordoun his assyse as said is for tryell of his guiltines of ye cryme aboute writtin spe'it in his dittay And his mai'teis aduocat askand instrumentis y'upoun and for verificatioun and cleiring to zow of the pannelles guiltines of ye said dittay in sua fur as did consist in factu q'r vpon ze war only to cognosce product judiciallie the said James Gordoun than vpon pannell his Deposition quhilk was than judicallie reid in zo'r pn's and audience subscriuit with his hand As also repeitit vnto zow the notorieite of ye rebelles rebellious The hoirningis and l'res of intercommoning vset and execute in Januar last Efter ye q'lk publicatioun and inhibitioun y'in exemit the pannell mett twyce with the rebellis s'rances in his awin house And w'thin aucht dayis y'after within ye house of Robert Collie in Hassiewallis quhilk is only ane myle from the pannellis awin house confessit be him judiciallie And that he soupet and conferrit with thame thre ho're y'after and lay with thame in ane chalmur all that nicht his house being within ane myle yairof And in respect of sua cleir and manifest probatioun his maicsteis aduocat than protestit for wilfull error againes zow in caice ze sould acquit or clange the said James Gordoun of ye cryme foirsaid contentit in his dittay And trew it is that ze all being yaireftir removet furth of court and incluset within ye assize house of ye said tolbuthe and haifing consultit and reasonet vpon the poyntes of dittay aboute writtin referrit to zor knowledge and determinatioun And re-entering agane in court ze nocht withstanding of ye cleir verificatioun and probatioun of ye said James Gordoun his guiltines of ye cryme foirsaid vset and product be his

maicsteis aduocat be the mouthe and judicall declaratioun of ye said Alex' Irving of Lenturk chanceller elekit and choosen be zow vpon the said assyse all in ane voice fand pronuncet and declairet wilfullie be favor partiallie temerariouslie and be partiall meanes The said James Gordoun to be cleane innocent and acquit of intercommoning with the rebellis specifiet in his dittay and depositiones wittinglie or wilfullie at ye tymes nex'ine mentionet y'intill In the doing quhairof ze and ilk ane of zow hes committit wilfull and manifest at ye leist temerarious erro'r and augh't and sould be puneist in zor persones and guidis conformis to ye lawis and actis of parliament of this kingdome Becaus efter the alledgeance aboute writtin maid be the said James Gordoun and his said prelo'r. and ans'ris maid y'to be his maicsteis aduocat nathing being referrit to zo'r cognitioun and tryell bot allanerlie the pannellis intercommoning with the rebellis at ye tymes contentit in his dittay And yat p't of ye alledgeance anent wittinglie or willinglie to be also cognosret and tryed be zow Quhilk intercommoning with the qualitie y'of viz. that ye samyn was wittinglie or wilfullie done was cleirlye proviu to zow be ye pannellis awin depositiones Quhairby he granted and confeset his intercommoning with the rebellis at the tymes q'tenit in his said dittay and in maner cleirlye sett down y'intill And as for the qualitie of wittinglie or willinglie q'rof either of thame is sufficient of ye law to infer the puneishment aboute writtin the samyn And speciallie that member y'of wittinglie was cleirlye provin baith be the said James Gordoun than impannellit his depositiones and als be ye notorieite of ye rebellious q'rof ye said Alex'y Leith and Nathaniel Gordoun war speciall acc'to'ris And they denuncet rebellis and put to ye horn in ye month of Januar preceeding Quhairby they war denuncet at ye m'cat croce of Aberdene being ye mercat croce of ye heid bur' of the s'reidome within ye quhilk the said James Gordoun intercommonet w't the saidis rebellis And als be the l'rez direct be the lordis of secret counsall inhibittit and dischargeing all his maicsteis legis and subiectis intercommone w't the saidis rebellis Quhilkis war deulie execute and pubeist at ye said m'cat croce of Aberdene vpon the saxt day of Januar last Quhilkis depositiones l'rez of hoirning l'rez of intercommoning and executiones y'of was product and red to zow And quhilkis did evidentlye prove and cleirlye verifie that ye intercommoning was wittinglie done in respect that member of ye dittay wittinglie respectis onlie the knowlege of ye subiectis committing ag'inst the lawis and actis of p'liament be intercommoning viz. that they knew of ye rebellious And that the persones w't quhome thay intercommoned war rebellis The quhilk is cleirlye provin first be the said James Gordoun his awin depositiones Namelie be that article y'of be arand that ye said James being de-

mandit be ye lordis his examinatore quhat conference past betuix him and ye brokin men at that tyme of y' being in Robert Colles house in Hassiewallis He deponet that he hard thame say that thay behovet to leave vpon the laird of Frendraucht till ye marquis haue cuming becaus they wald be forced to leave the cuntry As also hard Nathaniell say that he had chaiset ane of Frendrauchtis men that day thre myles And that all that thay had tane fra Frendraucht was spent, and had never done thame guid &c. And als is cleirlye provin be the notorie of ye said rebelloun, and be the l'rez of horning and intercommoning product. Quhilkis of thame selfis ar sufficient to prove knowledge of the rebelloun and of the persones declaired rebellis and of the danger of the law be intercommoning with thame and as to the vther member of the dittay and actis of p'liament q'r vpon the samyn is foundit quhilk beiris *wilfullie*, That member (albeit the said James Gordoun had bene frie y'of as he is nocht) could nocht haif fred him from the cryme of intercommoning. The vther member of (wittinglie) quhilk *per se* is sufficient of ye law being sa cleirlye verifeid as said is: And of the quhilk poynt of intercommoning (wittinglie) ze the foirnamet persones of assyse hes claget the said James Gordoun baith wittinglie and wilfullie And zit to convince zou and ilk aue of you assysors foirsaidis of sa oppin manifest and inexcusable proceeding aganis law and justice and of zor solempne oathe gevin be zow at zor ressaucing and suing vpon the said assyse It is certane be the proces and course yairof, and writtis and probatioun product for verificatioun of ye dittay That the said member (wilfullie) was also cleirlye verifeit to zou and everie aue of you assysors foirsaidis; and that in the clanging of ye said James Gordoun y'of ze nocht only haif committed wilfull and manifest error, bot also to ye great contempt of his majestie and of his hienes royall authoritie hes done quhat in zou l'is to foster the said publick rebelloun in the northe, by proclaimeing libertie in sa far as in zou l'ies to all his maisteis subiectis to intercommoun with ye saidis rebelles, in sua far as be zour said verditte ze haif fund in effect all intercommoning with the saidis rebellis to be lau'll vpon the sole declaratioun of ye intercommoner that the samyn was nocht done wilfullie but accidentalie, albeit be the lawis and actis of p'liament, all intercommoning with rebellis (speciallie be sic ane oppin rebelloun) is nocht only prohibeit vnder the pane of death bot also his maisteis haill subiectis ar commandit to follow rebellis and tratore with hoy and cry and to present thame to justice And that all his maisteis subiectis do thair vter diligence at the vtermost of yair power in searching siking taking and apprehending the rebellis and following of thame and to mak intimatioun to the magistratris and to per-ones of power and authoritie for apprehending of them to be brought to justice, and that none intercommoun with the

rebellis vpon ony pretext without the expres warrand and knowledge of ye s'reff and judge of ye cuntry and all intercommoning most bewarill Quhilk is done aganis the expres ordour preseryuit be ye saidis actis of p'liament And speciallie aganis ye actis in December 1567 October 1581 and June 1592 quhilkis war quotted and alledgit to ye justice and to zow as assysors and the samyn cleirlye verifeit to be so be the said James Gordoun his awin confessioun in so far as in his depositions he grants and confesses his intercommoning with the saidis rebellis in his awin close at quhilk tyme he was obleist to acquent the s'reff or some judge of the cuntry of yair being in that part of ye s'refdome And as to his intercommoning with thame in Hassie-wallis he hes deponet That about acht dayis eftir his meitting with the saidis rebellis Nathaniell Gordoun and Alexander Leith with thair teemen come to Robert Colles house in Hassie-wallis the marquis of Huntleyis landis q'r the said James Gordoun (compnellit) and Robert Dempster brother to ye persones of Auchterles Robert Dempster of Cusehine and Robert Collesone burgis off Aburden was the tyme and had bene yar half ane day of betour And that Nathaniell and Alexander Leith come to this house about nyne ho'rs at ny't and that he (viz. ye deponer) and his companie souppd with thame that ny't and remanet with thame about thre ho'rs befor they went to bed And tha. the conference that past betuix the deponer and the brokin men at that tyme was that he hard thame say that thay behovet to leave vpon the laird of Frendraucht till ye marquis haue cuming becaus they wald be forced to leave the cuntry than And that he hard Nathaniell say that he had chaiset ane of Frendrauchtis men that day thre myles and all that they had tane frae Frendraucht was spendit and had never done thame guid And deponet that ye cause q'r fore Nathaniell chaset Frendrauchtis man as he affirmed to ye deponer, was becaus he was the s'reffis spy Deponet lykways that Nathaniell Gordoun had tuo lang pistolettis and ane gwn And that his man had ane pistolett and yat Alexander Leith had ane gwn and ane pistolett Deponit also that the ny't thay war in Robert Colles house the deponer and Robert Dempster lay in ane bed and Nathaniell Gordoun and Alexander Leith lay in ane v' bed in the same chamer as ye said depositioun heiris Lyk as ye said James Gordoun than vpon pannell grantit in judgement q'r vpon his ma'teis aduocat tuik instrumentis that ye said house of Hassie-wallis was within ane myle to his awin house Quhairby it is evident that ye said intercommoning was wilfullie and in gret contempt of his ma'teis lawis and auctie becaus this was the secound tyme of his meitting with thame efter the first, and was within ane myle to his awin house Sna that he ny't haif retreid himself to his awin house that ny't and schwyned y' companie q'lk he did nocht bot be the contrair souppd with thame and eftir supper con-

ferred with thame thre ho'r And y'efir lay in ane chalmr with thame quhilk is all confessit in his aboue writtin depositions And q'r as it may appeir that the alledgeance maid for ye said James Gordoun anent this poynt of intercommoning wilfullie was remitted be the justice to ye assyse that can be na callo'r nor pretext to frie zou or any of zou as assysors of periurie and contempt of his ma'teis authoritie Becaus all that was allegit be the pannell and be Mr. John Nisbet his prelo'r was that the dittay was nawayis relevant inferring capitall pwnishment vpon intercommoning because it is nocht foundit vpon the act of parliament nor vpon the commoun law Nather is it relevantie subsumet y'intill that wittinglie and willinglie the pannell intercommoned And ane ocasionall rancontering can nocht impoist ane accessioun to yair rebellious qu'han p'teis ar surprysed with thair cuming to yair awin houss' or to vther places quhair thay ar and can nocht disingadge thamselvis of yair companie for feir of irritating of thame as is instanced be Walter Hay and James Grant and in ye present caice as the pannell hes depouet that he had bene in Robert Colles house in Hassie-wallis with Robert Forbes brother to the persone of Auchterles Robert Dempster of Cuschnie and Robert Collefone burges of Abirdene all vnsuspect and honest men half ane day befor the rebellis cuming to the house quhilk cuming of ye rebellis to ye said house was at nyne ho'r at night q'n the pannell could nocht goe els' q'r being benighted And the rebellis fer y' securitie haffing schote and maid fast ye durriss of ye said house And as to that word 'conference' mentioned in the dittay the samyn is nocht relevant to impoist intercommoning vules it had bene subsumet y' in that ye pannell had treittet with the rebellis concerning y' rebellious thair rebellious practizes and designe of purpos to help and fauor thame conforme to ye act of p'liament quhilk prohibeittis all recepting supplieing and mantening of rebellis and generallie all doing of fauor And the law joynes "conversantes tractantes cum bannitis auxiliiumque prestantes complexe" Phar. quest. 130. Num. 172. Last "conversatio et tractatio cum rebellibus sunt verba frequentativa" And y'foir can nocht be subsumet relevantie vpon ane at ye maist tua occasionall and fortuite surpryses as the said exceptionn beiris lyk as y'efir in fortificationn of ye said exceptionn It was duplyit be the said Mr. Johnne Nisbet to the ans'r maid be his Maiesteis Aduocat That the distinctionn maid be his p'p' de bannitis was altogidder without warrant in law, q'lk speikis indistinctlie "et specificie etiam de bannitis et proscriptis, locis supplicatis" As also it was duplyit that *occidit* being essentiall in the cryme of recept q' the same recept is only defynet in the law moost oclyt *Fit non solum in flagranti crimine* but also in concluding the recepting and p'nting of the same As lykways it was duplyit be the said Mr. Colles that the notorieite of the rebels rebellious and proscriptioun could

nocht be obtroidit at leist sa aggravatie the alledgit cryme of yair recepting being sa schorte efir yair proscriptioun And last the fortuite ranconter of rebellis most purge intercommoning or ellis it sall be arbitrarie to mak the kingis loyall subiectis intercommoneris as was instanced be Walter Hay And especiallie in this caice q'r the fortuitues accidentallie of yair meiting is nocht only averred be the pannell bot nicht be cleired be thre or foure vnsuspect gentilmn quha war present with the pannell and violentlie keipit and detenit in the house with him as at lenth is content in the said dittay.

Quhilkis alledgeance, gifand the samyn had bene relevant, as thay war nocht lyk as the judges in effect hes fund the samyn nocht relevant In sa far as they repellit the alledgeance *in jure* And referrit the fract and deid to zor cognitioun as assysors and judges y'to Nather was yair ony thing product be the pannell viz. James Gordoun or be his pro'rs before the sweiring of zou as assysors or to and befor you efter ze war sworne besoir zor removeing out of judgement to verifie that poynt that he was compellit or that ye durriss war schote and made first &c And thairfoir ze and ilk ane of zou as assysors was in law aith and conscience bund to have judged according to the depositions and verifications product be his ma'ties aduocat Quhairby the said James Gordoun his wilfull intercommoning was sufficientlie verifeit to zou as saidis nor zit was it possible to ye said James Gordoun than vpon pannell or his prelo're to produce ony verification for cleiring of that poynt or gif he had product ony (quhilk was not done) his Ma'ties Aduocat as persewar wald haif cleired that the samyn could nocht haif verifeit that poynt; that ye said James Gordoun was forcet or compellit becaus it is granted in ye said James Gordoun's depositions that yair was with him by the guidman of ye house and his serrandis thre vtheris persones viz Robert Forbes brother to ye persone of Auchterles Robert Dempster of Cuschnie and Robert Collusone burges Aberdene Quha being ane number of persones about six or seven, or mae accairding to ye number of the serrandis of ye house the number q'rof was weil knawin to pairt of zou that war vpon the said assyse could nocht haif bene forced be ye saides tua rebellis or gif thay had forced thame in schuitting of ye durriss and keiping the kie in y'awin handis The said James Gordoun and remanent persones being with him war obleist in law as guid and faithfull subiectis to haif sent out ane boy be ane privat way or window and to have y'by gevin advertisement to the gentlemen of ye cuntry neirest about off ye saides rebellis being yair quhilk my't haif bene easalie done befor yair going to bed and moir easalie efir ye rebellis war in yair bed and sleipping y'in lyk as thay war bund in law immediatlie efir the saidis rebellis yair away going in ye moirneing furth of ye said house to have ob-

served the way quhair they went and to have raised the country and to have followit thame be hoy and cry, quhilk they did nocht bot it is granted be ye said James Gordoun in his depositions that he tuik na heid of yair pairting or away passing in the moirning Be the quhilk deductioun circumstances depositions and vtheris befoir deducet it was maist cleir and manifest to zou the saidis persones reassuit suorne and admittit vpon the said James Gordoun his intercommoning aboue written with the saidis rebellis was wilfullie done he him expres aganis the lawis and actis of p'liament and proclamations publicist in the contrair And thairfoir ye foirnamet persones suorne and admittit vpon his assyse in sa far as ze haif claget and acquit ye said James Gordoun of ye said poynt of wilfull intercommoning hes nocht only incurrit wilfull and perurious error aganist the light of ze'r awin consciences bot also hes committit ane grit contempt aganist his ma'tie and his hienes au'tie And y' throw hes incurrit the pane and punishment spe'it and set down in the auld lawis and actis of p'liament of yis kingdome Quhilk auch't and sould be execute aganist zou and ilk ane of zou in maist exemplare maner to the terror of vtheris.

Thairestir my lord Aduocat producet an Act of ye Lordis of secrett counsell of the dait the first of December 1635 no'iating and appoynting John erle of Traquair Archibald lord of Lorne William lord Alexander and sir John Hay kny't clerk of register or ony tua of thame to be assessore to his maiesteis justice in this proces of erro'r p'awit aganis ye persones on pannel at ye instance of his ma'ties aduocat for the erro'r committit be thame in ye temerarious and wilfull clangeing of James Gordoun of intercommoning with the rebellis q'tenit in his dittay Lyk as the saidis John erle of Traquair Archibald lord Lorne and Wm. lord Alexander being iudiciallie present acceptit ye said charge as assessors vpon thame to his maiesteis justice in ye matter aboue writtin Q'rvpone my lord aduocat askit instrumentis.

The said Mr. Thomas Nicolsons aduocat as ane of ye prelo'rs for ye pannel conpeirit also for Alexander Key't of Duffus as pro'r for him and protestit yat he my't be hard to propone his lau'll defence vpon the order prescryuet be the act of p'liament viz. That ye said Alexander Key't of Duffus can nocht (for his nocht compeirance this day w't ye rest of ye persones of assyse) be lau'lie domet nor adjudget to be put to ye horne in respect he was nocht charget nor cuitted to compeir befoir ye lordis of secrett counsell as ye rest of ye assysor conpeiraud war citet and charget.

Thairestir the pannel and ye prelo'rs befoir no'iat desyret that befoir ony farder proces be led in this caus that ye saidis prelo'rs for yair better preparatioun to ans'r to ye poyntis of dittay producet and red may haif ye coppie

y'of and ane tyme affix to thame to ans'r y'to My lord Aduocat dechairt that in respect of ye production of ye dittay and publict reading yairof in judgement in audience of my lord justice and persones vpon pannel and that y'efir the pannels prelo'rs schewes present disputatioun and craves ane coppie of ye dittay My lord Aduocat y'foir and to ye effect the prelo'rs for the pannel may be prepared to answeir without farder delay nor that quhilk ye justice sall be pleiset to grant to thame at this tyme producet the proces criminall q'r in James Gordoun is assoilzeit togidder with the baill writtis q'rvpone the criminall dittay is foundit and speciallic the said James Gordoun his depositions The tua Prez of hoirneug q'r by he was denuncet rebell The Prez of intercommoning q'r by all ye subiects war inhibited to intercommon with the rebellis And y'ut repeitit the actis of p'liament Ja. the 1st parliament 7, cap. 97, Jacobi sexti: par. 1, cap. 21. And par. 12, cap. 144, in anno 1592 Quhilk war the groundis q'r vpon James Gordoun was pannelit and accuset and nocht w't standing y'of claget And y'foir desyret that my lord justice wald ayer grant present proces or gif he grant or inclyne to ony continuatioun that it may be with this certificatioun that yai sall haif na farder delay vpon the sight of ye writtis now producet and repeitit.

The justice continewis this dyet to this day nucht dayis q'k is ye nynt of yis instant moneth of December And ordanit ye persones enterit vpon pannel this day to synd can'un for re-entrie that day ilk persone vnder ye panes q'tenit in the former act viz. of ane thousand merkis money.

The persones of assyse summons to this day warrit apud acta ilk persone vnder ye pane of s'm m'kis money.

Conpeired Mr. Wm. Gordoun appeiraud of Straloch and become souertie for entrie of ye said Alexander Irwing of Leuturk.

Mr. Robert Reid burgess of Ab'd' for entrie of Alexander Ramerman of Elsick and Mr. Mathow Lamisden.

Harie Gordoun in Glassach for entrie of John Ogilvie of Glassache.

Mr. James Cheane wyter for entrie of George Gordoun of Tilliechowdie and Wm. Seatioun of Sebethyn.

Adame Abercrombie for entrie of Hector Abercrombie of Feterneir his brother and James Seatioun burgess of Aberdeen.

Robert Bauerman in Elsick for entrie of ye said Charles Steivin burgess of Edinburgh [qn. Aberdeen] the said nynt day of December instant.

CURIA JUSTICIARIE S. D. N. Regis Tenta in pretorio de Ed'r nono Decembris 1635 Per Mag'ros Alexandrum Coluile de Blair et/ Jacobum Robertoun aduocatam Assessores Justiciario John Erle of Traquair David Erle of Southesk Archibald lord Lorne.

Intran'

ASSYSE OF ERROR.

*Alexander Irwing, of Lenturk.
Alexander Banerman, of Elsick.
Mr. Mathew Lumisden, burges of Aberdene.
John Ogilvie, of Glassiche.
Wm. Seatoun, of Scheathyn.
George Gordoun, of Tilljehondie.
Hector Abercrombie, of Fetter-neir.
James Seatoun, burges of Aberdene.
Charles Stevin Lister, burges y'.
Alexander Abercrombie, of Birkinboig.
George Gordoun, of Newtown.
Alexander Leith, of Duffus.*

Dilaitit of ye willfull errors committit be thame in ye clangeing partiallie and wilfullie of James Gordoun sone to George Gordoun of Logyaltoun of intercommoning with Alexander Leith and Nathaniell Gordoun rebellis of ye north.

Persewar.—Sir Thomas Hope of Craighall kny't his Maiesteis Aduocat.

Prolocutors for the pannel.—Mr. James Baird Mr. Thomas Nicolson Mr. John Nisbet.

My lord Aduocat producet ane act of secreit counsall q'r'by David Erle of Southesk is no'iat and adioyned to the assessors formerlie appointed for assisting the justice in the proces of error depending befor him daitit the aucht day of December instant vpon the production q'r'of and of my lord of Southesk his personall p'ns and acceptatioun his maiesteis aduocat askit instrumentis.

The persones enterit vpon pannel befor no'iat askit instrumentis of y' entrie this day specialie Alexander Abercrombie of Birkinboig George Gordoun of Newtown and Alexander Keith of Duffus and protestit for ye cautioneris relief.

My lord Aduocat befor any furder disputatioun vpon the dittay producet and red, pass' fra that pairt and article y'of 'wilfullie' 'pro loco et tempore' And declares that he insistis only vpon that vther pairt of ye dittay q'r'by the persones that war vpon James Gordones assyse ar pannellit for clangeing ye said James of intercommoning and conference wittinglie with the rebellis and insistis aganis thame as haifing claget the said James wilfullie partiallie at the leist temerarioussie and takis instrumentis of the reiding of ye dittay and of the writtis producet be his lo' at ye last dyet for verificatioun of ye same viz the act of parliament king James the fifth par. 6, cap. 97, Jacobi 6, par. 12, cap. 144, with the depositions of James Gordoun and the l'res of intercommoning.

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Mr. James Baird for himself and in name of ye rest of ye pannellis prelo'rs protestis that in caice my lerd aduocat vse any furder probatioun he writt aganis the pannel for proveing of y'r errors nor quhat was producet at ye last dyet that ye samyn may be sene and consideret be thame befor his l'p propone ony thing y'upoun.

My lord Aduocat declared that he vied the writtis producet the last dyet of yis proces and now repeited be his lo' with the actis of p'liament q'r'vpon the dittay is foundit, for ye full verificatioun of the dittay.

The pannel declairis that yai accept the assessors no'iat to his maiesteis justice w'lhout ony objectionn that may be proponet be thame in ye contrair.

It is alledgit be Mr. James Baird for ye pannel that ye dittay is nawayis relevant to put the pannel to ye knowledge of ane assyse for ye error lybellit Because it is nather subsumet in the dittay nor proven that the pannel now standing in judgment haue acquit the former pannel for private respect be favor or be partial meanis w'tout the q'lk war subsumet and provein the dittay is nawayis relevant besydis that the act of parliament maid be king James the thrid of eternal memorie gois vpon the same groundis viz. the aucht parliament evin so the same rewle is keptit and hes bene keptit thir many zeiris by gane w'tin the kingdome of England Albeit for ye maist pairt ye samyn dois occure in civile busines as is cleir be ye tuintie ane statute maid be king Henrie ye sevint in the ellevint zeir of his regim'e And be ye thrid statute maid be king Henrie ye aucht in the tuintie thrie zeir of his regim'e and be ye tuintie five statute maid be quene Elizabeth in the threttene zeir of hir regim'e be all these actis and statutis the grand jure hes only power to try and cognos' give any of ye first jure had ressaute any sowmes of money rewardis or promeis of guid dead done to yame selfis or to any vther to yair behuiff for ye verdeit and na vther wayis This is lykwayis clear be ane statute maid in the dayis of Edwarde the thrid in the threttie four zeir of his regim'e that ye grand assyse q'lk is our fyve and tuintie hes only power to cognos' and try giue ye first assyse hes bene brybit as said is q'lk being nay' qualescit nor provein is nawayis relevant igitur, &c.

It is addit be Mr. John Nisbet that ye dittay is nawayis relevant in sua far as it subsumes g'n'ralie that ye pannal hes acquit wilfullie and temerarioussie be partial meanis or favor And condescendit not vpon any meanis or motives of partialtie or favor nor vpon any practizer or corrupter and inducer partialtie nor be quahis favore thay have bene misled without ye quhilk condescending ye generalitie of ye lybell is innept quia accusatoris Libellus certitudine donandus et beandus venit. Battander regula sexta; et omnes libellistas de forma libell criminalis; et lege in causis criminalibus Cod. de accusationibus; et eximis glossa secreta-

rium vbi forma libelli criminalis proponitur; et in criminibus non vagandum: *Lege decima ff. de dolo malo* "et accusator non debet vagari cum existimatione alia in discrimine, sed certum dicere. *Lege si in reum; ff. de rei vindicatione et in criminibus complexis et correlativis et adulterio vbi adulter et adultera et repetundis et barratria et corruptione iudicis per sordes vel gratiam uberiorum pene et corruptus correlata sunt, non tantum locus et tempus exprimi debent in libello, sed et personæ cum quibus communione criminis complicantur rei *Lege Libellorum ff. de accusationibus ut in forma libelli de corruptione iudicis.* Auidens—*De Castello ostendit in tractu de Iudicio.* Tharitoir seing ye crime quihik is the subject of ye law is not errorr simple quihik is incident to ye most innocout and in law and seuce importith na guilt bot ye wilfull depravatioun of assys'ors be favor and partiall meanis And ye assys'ors ar to cognos' and delyuer not so much of error, as of ye qualitie of it quhither partiall or wilfull be favor or partiall meanis A g'nerall assumption of favor and corruptioun cannot pas to ye knowledge of ane grit assyse And the pannell cannot be prejudget of ye defence quihik wald result preguantlie vpon ye condescending of ye practiceris and meanis of partialitie and motives q'with ye pannell hes bene misled viz. That ye parteis conscendit vpon be partiall meanis or practizes and favor to haue corruptit ye pannell was not of that estait as to haue corruptit yame nor of yat predominant favor as to haue invaigled systene men in wilfull inniquitie and to haue maid thame conspyre in the most atrocious and impresumable crime nixt to that aganis ye Holy Gost qu'with it is allmost coincident viz. a wilfull opposing God and consciencia quem Cicero appellat "Deum vel saltem domum Dei quo nihil divinius" *De Officiis libro tertio.* And all delyvnes "voluntatem Dei revelatam si non materialiter saltem formaliter et interpretative quia quod conscientia dicitur sub ratione voluntatis Dei dicitur" Amesius *de Conscientia cap. 4.* Aganis ye quihik it cannot be presumed nor relevantie assumet that any man erres be favour or partialtie without some apparent or lybellit motive And the consonance of our law with ye statutis of England vrged be Mr. James Baird is constant be ye act of parliament aient ye oath of assys'ors that they sull nather tak bud nor incid The contravencit of ye quihik aithe prescryvit be ye act of parliament is *temerarium juramentum* and not q' a man delyuerith according to his knowledge alicit enoncialie Becaus in law and the custome of all nationes the concretum and meaning of ye oath of judges is only "quod iudicabunt non quod justius et melius abstracte, sed quod justius et melius ipsis visum fuerit." *Lege 14. Cod. de Iudiciis.*—"Et iudex tenetur tantum si scienter fallit, quia in scientia multa versatur in vita." Cicero *Lib. 4. Academicarum questionum.**

Secundo, the ditay is nawayis relevant in sua far as it quideris the official and temerarious

delyuerance and depravatioun of assyseowrie be the materiall error and allet' inniquitie of y' verdict Becaus in law it is a paralogisme to argue from errorr and ignorauce to crime and from the inniquitie of ye sentence to the inniquitie of ye judge "quia sententia potest esse iniusta ex animo proferentis, et justa ex ordine et causa; et contra justa ex animo sed iniusta ex causa; Decret: *Causa secunda quest. tertia*" *Canone 62.* And errorr argueth ignorance in intellectu, and not in justice in *opinionibus* et voluntate, que maleficia distinguit non autem exitus et veritas. *Lege Divi Hadriani ff. ad Legem Corneliam de Sicariis:* Et non omnis injustum aliquid dicens vel faciens est iniustus. *Arist. Lib. 5. Ethicor. Cap. 6.* Et quippiam ex intentione et electione iniustum facere reddit aliquem iniustum non autem facere preter intentionem et per accidens sed ignorantiam *Conclusio Divi Thomæ in secunda quest. 59, Articulo secundo.* Et cum Iudicium sit aggregatum ex actu voluntatis inclinantis ad recte Judicandum prudentie autem seu rationis determinantis. *Thomas in 2a 2de quest. 6.* in conclusione articuli primi. The fatalitie of errorr quihik is incident to ye bes' and is ane naturall eclips of reasone occasioned by ye indisposition of organes quia aliqui habent rationem depravatam ex mala habitudine naturæ *Thomas 2a 3de quest. 1. 91.* qualefais not relevantie wilfull perversities and partialtie of ye will Becaus in law and be ye universall practique of all nationes and tymes the errorr of judges is not a crime bot sorit and partiall depravatioun is only punisichable *Lege 12 Tabularum* repprobit by *Aulus Gellius libro secundo noctium, Cap. 1. Lege Julia repetundarum ff. et Cod. ad Legem Juliam de repetundis. Lege Constantini Cod. de pena Iudicis qui male iudicabit Novella Justiniani et Litigatoribus in exordio Litis Iudicium § Si quis autem ex Litigatoribus, et alia Novella ejusdem, ut iudices suo quoque suffragio fiant § Si quis autem constitutione Valentis et Valentiniani Lege universis Cod. ubi causæ fiscales agantur constitutione Gratiiani, Valentiniani et Theodosii Lege Iudicis Cod. de dignitatibus.* In all quihiks lawis *corruptio depravatio depredatio furca schelera* and in the cannon law *si quis passim* ar ye crimes only punisiched in judges, and abjured be thame with schampne conception of oithes at yair admissioun. *Novella 8.* "ut Iudices sine quoque suffragio" *Cap. 17. et Novella 9. Jusjurandum quod prestatur ab his qui in Administratione sint, Demosthenes contra Democritum de Jurament' Iudicium,* the contravening of quihik aithes makis yame lyable and not a involunter inaffectat errorr quihik bath in law divinitie and philo'phie is excusable, and without a gros' absurditie cannot found ane dittay *Arist. Libro quinto ethicorum, Cap. 8* "Divus Thomas, Amesius et omnes casuiste de conscientia errante quia iudex tunc litem suam facere intelligitur cum dolo malo in fraudem legis sententiam dicit Et dolo malo videtur hoc facere. Non cum sententia iniusta est sed si evidens arguatur

eius vel gratia vel inimicitie vel sordes." Leg. 15. ff. de Judiciis " Et pejerat tantum qui sciens fallit " Lege 26 ff. de Jurejurando." Et formula Jurisjurandi olim erat. Si sciens fallo diespiter me bonis ejiciat. Minochius Consilio 891. " Et Judices debent maxime estimare conscientiam mentis sue." Cicero pro Milone et passim: et conscientie etiam errorum dicantur sequi quia obligat: omnes causuiste de conscientia errante adeo vt voluntas discordans a conscientia etiam errante mala sit et iniusta. Quia quicquid est contra conscientiam et non ex fide peccatum est ad Romanos cap. 14. Thomas 2 quest. 19 articulo 5. Be the whilks allegations it is constant that ignorance and error in judges is nocht ane cryme Et imperitia et imprudentia per quam judices litem suam faciunt non est maleficium Institutionibus De obligationibus que ex quasi delicto nascuntur, ff. de obligationibus et actionibus. Lege 5. § si Judex. Et lege finali de variis et extraordinariis judiciis and that formall iniquitie and partialitie cannocht be subsumet vponne sentences maleflicie erroneus. And speciallie aganist the assysors quha or nocht judges profitentes peritiam et qui ideo tenentur assumendo officium ex quasi delicto. Pharina quest. 102. Num. 389. Bot pedaneous and witnessing Judges requirret to serve the king accordiing to thair conscience " non habentes jurisdictionem sed cognitionem tantum eamque facti tantum cuius ignorantia non est lata culpa nec temeritas nec quasi delictum et interpretatio prudentissima etiam fallit" ff. De Juris et facti ignorantia Bot speciallie in this caice the alledged iniquitie of the sentence querrellit cannocht qualifie wilfull error aganis thair gentilmen now pannellit being all honest gentilmen acknowledgedit be me lord advocat himself quha hes gevin prufe of yair loyaltie in ye lait disordoures of ye countrie And hes assistit the s'reff and vther commissioneris for repressing thame And cannocht be presumet to haif indangerit thair honor and estait be a wilfull acquitting of ane poore inconsiderable man in quhome they had no interest and quhome for the maist pt' they had nevir sene In respect y'of seing " in dubio dolus non presumitur sed ex indicis perspicuis probari convenit" Lib. 2. Cod. de dolo malo cheiflie aganist Judges. Phari. quest. 89 Num. 2. Et omnes doctores in Lege 2. Codices de officio Civiliu Judicum in verba non arbitramur. And in the present caice all presumptiones exclusive of dolo ar concurring to the qualitie of ye pannell haifing bene hitherto honest and unsuspect gentilmen The qualite of the partie acquit quha could nayer practice nor deserve fauor The number and consonancie of the baill panna in yair acquitting a man in quhome they had no interest and y'foir can nocht be presumit to have conspyred without ony cause in wronging y'r consciences seing they had fyled him of ane cryme moir capitall viz. of slauchter defectus cause quhilk in the law and in all syndicattis is ane maist pregnant presumption " quia cessante causa

cessat delicti presumptio; et dolus non presumitur vbi non adest lucrum." Cravetta Concilio 175 et Concilio 319, Baldus Concilio 25, volumine secundo. " Multo minus vbi damnum sentiretur" Phari. quest. 84. num. 44. It is y'foir concludit " quod frans potest esse sine pena sed pena non sine fraude nec obesse debet iis quorum sententia fuerit soluta et rescissa nisi convinci poterint vel iniquo animo iudicasse vel aliqua gratia et cupiditate depravari." Decretal. Causa 2, quest. 6, canone 31. " vbi glossa si convinci argumentatur quod contra iudicem malum non presumitur quamvis sententia iniqua et rescissa sit nisi convincatur et propterea qui dicit iudicem dolo aliquid egisse probare debet." Phari. quest. 102. num. 381. vbi ex verbo evidens in Lege si filius. ff. de judiciis colligit quod ad iudicis dolum probandum non sufficient presumptiones nisi sint evidentes et concludentes et non presumi ex facti qualitate nisi sit talis vt nulla palliatione excusari possit." Num. 35. " Et iudex errando etiam in iure non in dolo sed lata culpa esse dicitur lege" ff. de verborum significatione. Phari. quest. 111. num. 473. " Vbi astruit sententiam suam innumeris testimoniis doctorum asserentium quod licet ex iudicis ignorantia arguatur lata culpa Non tamen arguitur dolus et quod nec etiam dolus presumptus inducitur multo minus punitur quia in criminalibus lata culpa non equiparatur dolo. Phari. quest. 84. § finali. Num. 21. Phari. quest. 86. Num. 18. Et omnes doctores et de iure et consuetudine iudicis non sic iudicantur de sententiis per imperitiam legis sed de dolo et barratris. Baldus, in lege observari § proficiisci ff. de officio pro consulis et legati. Hyeronimus Jachimus Concilio de iudicatu vbi citat Baldum Bertasium et omnes doctores in materia si iudicatis tenentes iudicem non teneri de imperitia et contra iudicem sijudicandum non sufficere presumptiones sed probationes sole clariores precipue vbi cessat commodum et utilitas. Quo casu sententia iniqua non dicitur dolosa: ibidem num. 149. Quia in qualibet materia considerari debet potius causa facti quam factum. And the act of parliament 1475 puneishes only fals assysors as the rubrik beiris And ignorance in law can never impoirt falsett " quia falsum non potest esse sine dolo." ff. de dolo malo. And the act of parliament only puneishes wilfull acquitteris be favore or partial meanes and temerarie in the act of parliament is taken copulatiue with wilfullie as the disjunctive ' or ' it ever interpret quhair yair sould ensew vtherwayis ane inhumane absurditie and temerarie is only puneishable quando provenit a dolo malo. Phari. quest. 90. num. 63. Alioqui temeritas fallitatis veniam continet et pena non potest irrogari ff. ad senatusconsultum in Turpilianum et origo negligentias semper consideranda est si enim sine dolo sit non est delictum. And the auld law of the maiestie q'r vnto the act of parliament is relative puneishes only perriurie Cum quis degravit et dejerasse perconvictus est. And

y'foir in respect of the rubrik beiring only falsset and that in law rubrica dat interpretationem statuto. Mascarius de generali interpretatione statutorum et ostendit mentem statuentium dicta conclusionem. And that statutes ar to be interpret non secundum corticem verborum bot accoirding to the rubrick and vniuersall strayne of law and reasons precipue quando sequeretur absurdum. Mascarius ibidem eadem questione temerantie. Thair can never be interpret ignorance quhilk in law and sen's can nevir impoirt ane cryme quod consistit ex voluntate et affectu et dolo malo. As is constant be all the criminal editis of ye law in the 27 and 28 buik of the Digests q'in the haill matter of crymes is contened and almost in everie title and everie paragraphe dolo malus data opera animus affectus propositum voluntas fraus ar requyret and repellit.

It is liket be Mr. Thomas Nicolsone to the last alledgeance proponet be Mr. John Nisbett and chiefie in fortification of that poynt y'of aenent the interpretation of the partiele (or) to be vnderstuid as gif it war the partiele (and) and that temerantie in the act of parliament is to be conioyned with wilfull error and partialitie It is alleget that nather in law nor evin in the actis of parliament thamesellis is the samyn ane impropriat significatioun strange or nocht findable net in law bot in ye contrair for eschewing of civill dangeris in matters of guidis or heritage The partiele (aut) (or) (vel) is interpretit and tane for the partiele (and) et As chiefie in Lege 57. s. 2. ad Trebellianum senatus-consultum perpeo de te vxor charissimum morieris hereditatem meam restituas filiis meis vel vni eorum vel nepotibus meis vel cui volueris respondi (inquit jurisconsultus) inter filios substitutione commissa factum videri. And zit be ye woirds y'of to witt 'vel' thair was power gevin to greve the heritage to ane of thame as also Lege 53. ff. de verborum significatione in expres termes sepe ita comparatum eat vt coniuncta pro disiunctis recipiantur et e contra disiuncta pro coniunctis nam cum dicitur apud veteres agnatorum gentiliun-que pro separatione accipi ac cum dicitur super pecunia tutela ve sua. Tutor separatum sine pecunia dari non potest. And also Lege 4. Codice de verborum et rerum significatione ibi melius itaque nobis visum est inquit imperator omni huiusmodi verbo citato coniunctionem aut pro et accipi vt videtur copulatio modo esse prelata quemadmodum in interdico quod vi aut clam coniunctio (aut) pro (et) appertissime est posita. In q'lk caices for civile respectis the impropriation or the word (aut) is in vse And yairfoir thair rather aucht ye samyn to haif place in this caice qr' without the samyn the act of parliament in the woirds of temerantie can nocht resseane ane interpretation accoirding to law and equitie And yat the word (or) evin in sindrie actis of p'liament dois not so sepatat the words betuix quhilk it is put as that thay could have different sens' in substance It is cleir out of the act of p'liament 1582 qr' vpon the first dittay was

foundit quhairin it is said that nane presume or tak vpon hand to receip or intercommoun &c. For heir 'or' does not sepatat woirds of dyu's sens' in sun far as to presume and to take vpon hand ar all ane And in the strict acceptation of ye woirds aucht to be interpret de dolo premeditato et appensato non de dolo simplici. As gif ony man knowing that intercommoung with rebellis war a cryme nochtwithstanding y'of he wald attempt to commit the said cryme thinking by some vther evasion to evit the punishment of ye law and to schaw cleirly that ye said word (temerantie) in the act of parliament most be that same with wilfull error and partialitie The act of parliament in alleading the enus of the great assyse vpon only this that gif ony sall haif acquit be wilfull error or partialitie and speikis nathing of temerantie Quhilk woirds of the act being strenghened be the rubrick of this act and the common law aucht to strenghen and interpret any subsequent woirds of the act ordaned be the samyn in respect of thaise woirds wilfullis or partialis weines contened in the first end of the act.

Tertio it is allegit be Mr. Thomas Nicolsone that the pannell cannocht go to the knowledge of ane assyse vpon the dittay in respect the samyn is naways relevant as it is declairt be my lord aduocat "in ingressu Litis" viz. that his lo' insistis only vpon this dittay as it lybellis the pannellis as temerariouslic or willfullie to haif' cianget James Gordoun the persoun first pannellit frome witting intercommoung Because the dittay does nocht relevantlie subsume fra the act of p'liament 'de pena temere jurantium super assisam' in sun far as the said act beiris That in ye accusation of ane trespassore noutour and manifest knowledge being had of ye trespassour Than gif it sall happin the assyse to clenge the trespassore and gif it sall be verified evidenced to ye assyse of error that ye p'tie acquit was ane trespassor that than ye acquitteris of him sall incur the pane of 'temeri jurantium super assisam' Bot as it is that ye dittay subsuming that ye pannellis assoizeng James Gordoun frome witting intercommoung does nocht subsume that thay assoiziet ane trespassor and chiefie such ane trespassor as qr' by meanet be ye act of p'liament And y'foir it is nocht relevantlie subsumet fra ye act of p'liament *de pena temere jurantium* That James Gordoun being ane naiked witting intercommoung is no trespassor It is cleir out of ye definition of witting intercommoung allegit be my lord aduocat in ye dittay viz. that allenarie knowing that the p'teis with q'm he intercommounged war rebellis he intercommounged with thame for to mak ony intercommoung a cryme and such a cryme as be the lawis of the countrey ar. punisichable be death Nocht only most thay be presupponet that ye intercommoung knew the rebellis to be rebellis bot also that knowing thame to be rebellis befor the act of intercommoung gif the tyme of ye same he had a frie will and intencion to intercommoun with thame For of the law of all nationes in-

controllable observet and mantenet be all docto'rs wryting vpon the caice of commissioun of crymes and how the same are puneischeable It is cleir that in crymes the puneishment q'of is corporall quibidder capitall or not That *Dolus* that is the frie will and intention of ye committer is requiret As in the grittest of all crymes in Crimine lese maiestatis per totum titulum ff. ad Legem Juliam Maiestatis thair is ever mentioun maid of Dole Bot chieflye *Lege 4. eodem titulo* anent suppleing of rebellis q'lk caice in the same with oures And mair ibi ciusve opera dolo malo hostes populi Romani comeatu armis telis equis pecunia aliave qua re adjuti erunt et nisi intervenerit dolus in commissione criminis reus ordinaria pena non est puniendus Julius Clarus Practica Criminalis §. finali quest. 84 num. 1. Antonius Gonilsius variarum resolutionum Tomo. 3, De homicidio num. 13. Crimen enim commissum sine dolo quanq'm id sit materialiter quod revera esset crimen si ad fuerit dolus in quo consistit forma et essentia criminis commissi qua criminis sine tamen doli commissum committenti nuquam imputatur dolus autem adesse dicitur si voluntas committendi crimen vel delictum reus habuerit. *Lege 1. Cod. de Sicariis ibi si quis sine animo occidendi occiderit enim non puniri. et Lege 14. ff. eodem* Ibi Divus Hadrianus in hec verba rescripsit in maleficii voluntas spectatur non exitus. The reason q'of is gevin be Phari. quest. 87 inspectione prima num. 6. Quia sine dolo et animo delinquendi delictum non committitur ergo nec punitur, non committitur inquit quia animus et propositum distinguunt maleficia et in delictis et maleficiis voluntas spectatur et non exitus. And grundis himself vpon expres lawis as *Lege 1. § 3. ff. ad Legem Corneliam de Sicariis* Ibi eum qui hominem occidit si non occidendi animo admisit absolvi posse et *Lege. 33a. in principio ff. de furtis*. Ibi qui iniurie causa januam effregit quamvis inde per alios res amoti sunt non tenetur furti nam maleficia voluntas et propositum delinquentis distinguunt; et capite cum voluntate de sententia excommunicationis cum voluntate et proposito maleficia distinguuntur excommunicationis sententiam non incurrit qui excommunicato in his qui ad absolutionem vel alias ad animæ salutem pertinent in locutione participat licet etiam alia verba incidenter interponat. ita sentit Minochius de Arbitrariis Judicium Casu 324. num. 1. Dum ait veram et divinam esse omnium sententiam delictum sine dolo non puniri And that caice de requisitione doli in criminibus is so inlarged be all the doctours that they hold it evin quhair it is providit be ony statute simpl'r That ye committer of the cryme sall be puneischet be death. Et statutum intelligendum si delictum sit dolo commissum quia statuta recipiunt interpretationem passivam a jure communi, ne quis damnatum indebitate patiat. glossa 10, *Lege. 2 Cod. de Nox. act. Jas. Lib. in actionibus num. 26, ff. De Litem Jurando* Ibi tenens in trepide contrarium Idem Jas. in rub. Tit. ff. de lege

num. 19, et 20. Ant. Gom. Variarum resolutionum Tom. 3, Cap. 3, num. 15. Paul de Cas. in rubric. Tit. ff. de lege num. 19. Alexander Consilio 140 num. 4, volu. 2, Et per totum consilium vbi consulit eum qui posuit offendiculum ad fenestram causa capiendi fures noctu accedentes non teneri de occiso si contigerit aliquem volentem per se vestram ingredi mediante offendiculo precipitem lapsam in terram et mortuum esse eo quod qui offendiculum posuit animum occidendi non habuit. Et consilio 88, vol. 10. ubi consulit locum esse jure representationis in successione non obstante statuto vocante ad successionem cognatos proximiores in gradu quia per hoc non excluditur jus representationis. Tira. de jure primogenitorum quest. 40, num. 22, et 89. Pharina. de delictis carnis, quest. 145, num. 211, et num. 159. Alias si statuta interpretarentur sequeretur maximum absurdum: Nimirum quod esse homicidio casuale quod sine aliqua culpa contigerit quis decapitare deberet quod esset valde Iniquum. Idem Paulus in Lib. 3, Cod. de Epis. Audientia jure secundum ius commune statuta iudex interpretare potest quamvis ea servare juraverit per eius enim juramentum non tollitur arbitrium quod ei datur a jure communi dictus. Paulus in Lib. 3, Cod. exqui Caus. infamia irrogatur vbi ait se istam causam habuisse de facto et quendam evasisse a pena mortis imo verba statuta sunt potius impropiand in civilibus et etiam aliquando pro superfluis habenda quam ferant sensum jure communi contrarium et patiat quod damnum indebitate. Joannes Tugona singular. suo 16 num. 7, Hipp. de Mar. singular. suo 640 num. 5, Ergo multo magis in criminalibus ne quis damnatum vite indebitum eiusque dispendium patiat.

Tum autem maxime statuta criminibus penam capitalem imponentia simpliciter sine vlla doli mentione interpretationem a jure communi recipere debent vt loqui intelligantur modo crimen dolo sit commissum, quando statuta his verbis vtantur, ne quis audeat vel presumat, verba autem audeere vel presumere actum animi et voluntatis presupponunt. Phari. in questione 87, num. 32. et audeere vel presumere ex alieno secunda parte presumptionum Num. 2. nihil aliud significant quam presumptive et superbe aliquid agere auctoritate propria contemptu superioris auctoritatem; contemptus etiam et supercilium in animo et voluntate habent. Ita Alex'r Consilio 123. num. 9. vol. 4. s'for ony statute or act as *exempli gratia* The act of parliament in anno 1592 aganis intercommoneris beiring thaise words That none presume or tak vpon hand ayer most be understand to speik of crymes committed *animo et proposito committentis* or ellis the saidis actis sal be contrair to the commoun law that puneisches na crymes capitallie bot crymes committit of will and intention And also ye saidis actis sall be contrair to thameselffis and imply aue contradiction in the committer of the

cryme gif thay sal be vndirstuid of thesse quha committis any allegit cryme "sine proposito et animo delinquendi" quhan zit thay speik only of thesse quha sall presume or tak vpon hand to commit the cryufe That is quha contempning the supreame authoritie in yair myndis attemptis to doe in the contrair of ye same and to perpetrat ye cryme forbidden quhilkis tua qualitas viz. to commit any allegit cryme "sine proposito et animo delinquendi," and to commit the same "animo presumptuoso et legem spernente" ar nocht compatible "eodem tempore et actu." And nocht only of the law in this intention callit *dolus* he the doctors naikedlie requirer to interuene in ye commission of any crime bot the same is so strictlie exactit and linkit to that gif be some gross negligence et lata committentis culpa quod crimine videtur committitur, pena tamen ordinaria committens puniri non potest quia puniendus veniret si ex proposito admittatur crimen quanquam enim in civilibus lata culpa dolo equiparetur non tamen in criminalibus. Lib. 7. ff. de sicariis. Ant. Gom. dicto capitulo 3. Num. 15 versu; imo quod magis est quamvis homicidium sit commissum lata culpa. ff. titulo de homicidio quest. 125 § 1. Num. 92 et 45 Lata enim culpa non est dolus verus sed presumptus. Julius Clarus § de homicidio Num. 4. Minochius de arbitrariis iudicis cas. 352 Num. 12. ff. in. dicta questione 125. Num. 45. In the whilkis places the doctore affirms Crimen sine dolo commissum non ordinaria sed mitiore pena plectendum etiamsi adsit lata culpa, dolus enim in dubio in delictis non presumitur sed semper vrget pro reo generalis presumptio, vt ea actus interpretatio fiat ne quis incidat in delictum Math. Mathei sing. suo 110. Jas. in lib. hoc Jure Col. pena vitima versu 3. fallit ff. de actionibus Bart in L. 7. ff. de sicariis et in Lib. si adulterium tum incesta § iilem imperatores. ff. de adulteris tenet aliquando in delictis nullo modo puniri latam culpam et distinguit inter crimina et delicta que principaliter in alterum committuntur vt homicidium in quibus ait Latam culpam extraordinaria puniri posse pena, et inter delicta que personam alicuius principaliter non respiciunt vt est stuprum incestum et in n'ro casu conversatio cum banito; in quibus delictis ait Bartol. Latam culpam nullatenus puniri. Quod autem de delictis capitaliter puniendus dictum est requiri voluntatem et propositum delinquendi sano sensu est intelligendum; Ita vt voluntas sit libera et non coacta neque vi neque metu justo; justo nimirum qui in constantissimum hominem cadere potest, voluntas enim est animi motus, nullo, cogente ad aliquid non iuitandum vel adipiscendum, hoc est non faciendum vel faciendum: Cap. 10. Cas. 15. quest. 1a Decreti 2 parte Proinde si quis vi coactus vel metu etiam justo aliquid fecerit vel perpetraverit pro non facto habetur in civilibus et in criminalibus; precipue in iis criminalibus que alterius personam principaliter non respiciunt perpetratum pro non crimine habetur

vt in civilibus passim haberi est: per totum titulum ff. De eo quod metus causa, et quod vi et vi armata; sed precipue in *Legge Caesar* ff. de publicis vbi cum *Cesar* insulam *Creten* locaret *Legem* ita dixerat: ne quis preter redemptorem post idus martias cotem ex insula *Crete* fudito neve eximito neve avellito; cuiusdam navis ante idus martias cotibus onusta ex portu *Crete* profecta vento relata in portum erat, dein iterum post idus *Marcias* profecta erat, consulebatur num contra *Legem* factum quod post idus *Martias* ex insula *Crete* cotes exiisse viderentur: Responsum secundum casum propositum videri non contra *Legem* factum; ideo quia relatus erat nauta tempestate, et sic in *Legem* latam committere coactus involuntarie autem hoc est coacta voluntate commissa non puniuntur. *Glossa* *Gothofred.* in dictam *Legem*. *Vergo* multo magis in criminalibus que quis vi vel justo metu coactus in *Legem* committit vel statutum non puniuntur quasi contra statutum facta; sic statutum prohibens rem mobilem alienari sub pena in forensium Locum solum habet in alienatione voluntaria non necessaria. *Clarus* § finali quest. 82. stat. 2. Num. 4. sic in receptoribus coactus, recipientes banitum non voluntarie sed coacte quia plures sunt baniti simul et eis expellere non potuissent sine periculo pena aliqua non puniuntur. Ita *Barard.* in add. ad *Clarum* quest. 90. Num. 46. vbi ait tales receptores non teneri banitos in domo relinquere et recedere, justus autem metus est et talis qui in constantissimum hominem cadere potest: Est terror armorum etiam absque eo quod arma habentes iis vi fuerant. *Legge* 3. § qui armati 3. ff. de vi et vi armata. *Alexander* *Consilio* Lib. 5 consilio 156 Num. 3. et Lib. 3. *Consilio* 98. Num. 2. etiam absque ulla comminatione vel percussione sufficit terror armorum. *Alexander* dict. *Consilio* 98. Num. 3. Et etiam quamvis qui cum armis accessit arma deposuerit: *Glossa* in dict. § qui armati, et *Alexander* dict. *Consilio* Num. 3. Sufficit enim inquit dictus *Alexander* Num. 4. et 6. ibidem. solus timor violentie inferende ut sit iustus metus modo subsit justa causa propter quam futuram violentie impressionem timere debemus licet violentia neque fuerit secuta imo neque comminata; non enim debet quis periculo extremo sese subijcere: vnde *Barard* *Loco* supra citato receptores banitorum eos appellat coactos qui banitos cum plures essent simul receperunt eos expellere non valentes sine periculo. Item de *Jure* determinatum est, quod dicatur metus iustus, hoc est viri constantissimi quando subsit metus mortis vel metus cruciatus corporis *Alexander* Lib. 3. consiliorum, *Consilio* 99. Num. 3. sed et si 5. ff. ad *Legem* aquilium, Ibi et si metum quis mortis furem occiderit. L. 3 § decimo ff. quod metus causa L. 4. Cod. eodem L. 13 de transactionibus; Ibi sed talem metum probare oportet qui salutis vel periculum vel corpus cruciatum continet. L. 7. Cod. de his que vi metusue causa gesta sunt, ibi instrumentum

metu mortis vel cruciati corporis extortum. Bartholus dict. L. 3. § armis dijectis, ff. de vi et vi armata. And y'foir seeing according to the lawis and testimoneis of docto'rs adducet heirtofoir all aggreing with equitie and reason no allegit cryme. And thanfoir doch't ye witting intercommoning lybellit aganis James Gordoun the first pannell can be estimat to be ane cryme puneschable be death or to cum vnder ye compas of the act of p'liament aganist intercommoneris inflicting vpon thame the pwnischment of deathe except it be lybellit and vnderstuid that as he was ane witting intercommoner so he was ane wilful intercommoner. That is quhane he intercommoned he hade ane fre will and intention vncocact in the doing of the same. The pannellis assyseris in assyolzeing the said James Gordoun from witting intercommoning hes nawayes acquit ane trespasoure againes the act made againes intercommoning and thairfoir are not suche assysouris againes quhome ane relevant dittay vpon the act of parliament "de pena temere litigantium super assysam" can be relevantlie lybellit for acquitting the said James Gordoun of witting intercommoning. The said qualitie of witting being vnderstuid as in the dittay distinct from the qualitie of wilfull intercommoning and without the samyne vnes my lord aduocat would conjoyne the saidis tua qualities as they ar to be conjoynt in the act of p'liament for albeit they be conceived in the same disjunctive zit they ar to be vnderstuid copulative ne statutum ferat sensum jure communi contrarium et sibi ipsi. In quhilk caice gif the act of parliament sould be vnderstuid copulative us of equitie it aucht to be and the dittay conforme thairto carie wittinglie and wilfullie it sal be cleirit that the qualitie of intercommoning wilfullie was nawayes proven to the assyse by James Gordounes depositions and circumstances thairof product to the said assyse. But on the contrair it shall be schawin cleirly, that out of the said depositions and vy'r wayes out of the generall presumptiue cariadge of the rebellis viz. that being desparatlie disordonrit men and haiveing schakin aff the feir of God and his ma'ties lawis and haiveing interprysit ane desperat cours' of preying vp and doune the countrie be publict hostilitie. That it is euer to be presumit againes thame and in favo're of the leidges quhome they accidentalie surpryst. That gif the leidges doe not haive conference with thame at thair meiting bot preice to doe thair deutie vtherwayes for apprehending of thame, that the saidis rebellis sould execute thair malicious intentionis aganis the leidges by attempting againes thair lyfe. And also by the rebellis thair cariadge and thair t' accidental surpryses of James Gordoun knawin to the assyse it sal be verifiet that the said James Gordoun for any thing that was knawin to the assyseris was trowlie forcit and compellit to ony intercommoning he had with the rebellis and that be ane just feir of the danger of his lyfe quhilk trowlie might haive

bene ane grit dainger gif he had p'reiced ay'r to refus' to heir thair discourse or to abyde with thame durning thair pleas'r or gif he had preiced to haive gone his way or raisit any hoy and cry to advertyse neighbouris (gif any was as trowlie thair was name) to haive apprehendit the rebellis. In respect of the quhilk alledganc' the dittay as it is declairit is nawayes relevant.

It is alledgit be Mr. Jo' Nisbett as proloquitor for the pannell that the dittay is nawayis relevant concluding penam temere jurantium super assisam, vpon the alternative conception of the act and assumptioun y'upona unles it be vnderstuid joyntie and copulativelie viz. that wilfullie be favo'r and partial meanes and temerarioulie this pannell as assysor' hes acquit James Gordoun aganist notto'r and manifest knowledge. Becaus in law temerarie is nocht ane cryme vles it be vnderstuid with a presuppositioun of wilfulness and dole q'lk is essentialie requyret in all crimes, as is at lenth evincet in law and reason and w'thout the quhilk temerarie resolving in ane involuntarie ignorance incident to the liest, can nather be schwnnet nor pwnest in assysors quha one yair aithes ar nocht obleist to vindicat yair judgment from error bot from depravatioun be partialietie as at length is schawin in law and is constant be the 33 act parliament '6 Jaco. primi. Quhair the oath prescryvet to all judges is. That thay sall determine all caus' according to thair ewnning and skill, absque favore odio fraude vel colore aliquo juxta suas scientias. And y'foir gif yis pannell have delyverit according to yair conscience (as my lord aduocat hes acknowledged) albeit ignorantlie—they cannocht be indytit de temerario vel illicito juramento. As the law in the ma'tie speiketh seing thay haif done all that was incumbent to thame in yair deutie vpon y' oathe. And gif thay had done vtherwayis without respect to thair awin knowledge and conscience, albeit yair delyerance war supposet materiallie just thay sould be teyntid with formall perjurie q'lk is only the cryme pwneschable in judges in all lawis and in the law of ye maistie is emphaticallie qualifeit w't the word *dejerasse* and illicitum 'juramentum de pena temere jurantium super assisam q'lk an nocht quadrat to ignorance albeit nevir sac gros'. Because no man is so blasphemous as to swear that he sall not err ignorantlie. And thair is great difference betuix ane ignorant assysor and ane fals' assyseor, betuix ignorance and falsit q'lk being the adequat subject of ye act and rubrick being conceived thus (anent fals assysores in criminal caus's) q' in the alternatives ar joynet, evinceth that they are to be takin copulativelie for otherwayis temerarie or erro'r w'thout wilfulness could nocht importe falsit in assysors because in law nemo tenetur falsi nisi sciens et dolo malo ff. ad legem Corneliam De Falsis L. 9 § 3 et per totum. Et non nisi dolo malo falsum committentes crimini subiungantur. Cod. eodem L. 20. And be the 17 act of the 6 parliament of

king James the second officers and judges trespassing in y'r offices wilfullie ar only pwneschable et imperitia in se non est delictum. L. finali ff. de variis et extraordinariis judiciis: vbi per imprudentiam interpretatur iusticiam juris que dicitur stultitia L. si per imprudentiam de evictione et lata culpa, qualis est error iuris et fatua temeritas, in criminalibus non equiparatur dolo. Clarus quest. 4. num. 1. precipue vbi agitur de pena corporali, vel infamia. Glossa in L. actionibus in verbis non etiam ob culpam. ff. de iuramento ut litem et qualibet causa et levis facta temeraria imo bestialis excusant a dolo et pena infamie. Faria. quest. 9 per totum: et omnes decores, et bona fides etiam ex rationibus irrationabilibus et temerariis causatur; Non solum in iis que sunt a jure permessa sed etiam que sunt de jure prohibita vt homicidio falso poriturio crimine lese maiestatis, ibidem. And thairfor temerarie in itself can not be ane cryme vnles it be takin copulativelie with wilfulnes quhilk is subioynet in the act of p'liament not alternativelie bot exigetiohke as the 27 act of king James ye thrid par. 6 partial malice or ignorance is takin copulativelie and ar joynet bothe in the rubrick, being conceavet wilfull and ignorant error of assysors and in the body of ye act notwithstanding the designation befor in thaise wordes partial malice or ignorance falsset or ignorance ar y'estir joynet in ane word the said falsset quhilk is subioynet efter the alternativie of ignorance or falsset and repeating both evidences that ignorance is taken copulativelie w't partialitie and impoirtes only wilfull and partiall ignorance and falsset and nocht simple ignorance and temerarie quhilk in na law is pwneschable ja respect q'r of the dittay can nocht pas to the knowlege of ane assyse because in ane alternative sense, disjoyneing temerariousslie from wilfullie it is absurd and irrelevant to infer the payne of infamie, against honest men quha hes done conscienciouslie albeit (gifand and nocht grantand) erroneoullie and in ane copulative sen's my lord aduocat will nocht sweir that he hes iust reasone to perseu it since he hes dyu's tymes acknowlegit that (in his opinoun) this pannell hes done innocente and according to y'r conscience.

It is alledgit farder that temerarie is nocht relevantie qualifeit be the allegit iniquitie of ye pannellis sentence because in law non quavis ignorantia aut iniquitas temeritas est, sed quando iudex resistit juri, actum a jure diserte prohibitum faciendo, vel eius precepta sine rationabili causa negligendo: doctores in cap. dilecto de sententia excommunicationis in sexto et quando iudex constitutionis temerarius est violator. Cap. 1. eodem; Et quando sententia fertur contra jus constitutionis, non autem contra jus litigatoris Cod. quando provocare non est incesse. L. 2. Nec quando erratur in facto et ex causa probabili, quo casu prelato non irrogatur pena, et si fulmen gravissimum excommunicationis injusta strinxerit.

Decretal. De sententia excommunicationis, cap. 48, vbi glossa in verbo *probabili* affirmat errare ex causa probabili, qui errat in probationibus dubiis, quhilk the law interpretis, quando reus non est plene convictus per conspirans testimonium aut omnimodam confessionem facti et qualitatem. Cod. de penis. L. 16. And in the act of parliament 1478, q'lk is the grund of the dittay—nocht everie acquittal of trespassors is qualifeit wilfull and temerarius bot quban thair is nottor or manifest knowlege of the trespassor; and nocht with standing y'r of assysors temerariousslie and wilfullie acquittis thame quhilk can non quadrat aganis thir persones impannellit because the verificatioun adducet be my lord aduocat was nocht of the evidence as importeth in the law notorieit being only ane qualifeit confessioun q'lk cannot be captioisid disjoynet and is moir a deoyell than a confessioun acknowledging the fatalitie of the fact, bot denying the formalitie of intentioun. For in law, Notorium est quod sese aperte in oculos ingerit et nulla tergiversatione et causatione clari potest. L. sed etiam pupillus. ff. de institoria et actione. L. palam, ff. de ritu nuptiarum. L. palam, ff. De verborum significatione. Et omnes doctores ad eas leges: et notorium est quod omnes sciunt quando nullus est locus inficiationi et cuius vniverse vicinie populus testis est: cap. cum delictis filiis, s. presertim. decret. de purgatione canonica: cap. cum socius causa prima. Quest. 1. Dammoderius in praxi criminali, cap. 10. speculator de notorio, per totum. Et quando reus ita in obiecto flagitio deprehensus est, vt vix ea que comiserat negare sufficiat. Cod. de penis, L. 16. Et non sufficit quod factum sit notorium nisi notoris etiam sint qualitates. Et non sufficit quod constet lejum occidisse, nisi constet etiam quod nulla discussio vel excusatio competit leio quo minus puniendus sit, potest enim fieri vt occideret ad sui defensionem. And y'rtoir seing ye qualiteis q'rof the cryme consistis, viz. that James Gordoun intercommoned wilfullie and wittinglie of fair knowlege and set purpose knowing the mettting of the rebellis and trying with thame for that effect was nocht constant to the assysors be the pannallis confessioun or vtherwayis Bot in the contrair the pannell James Gordoun exposed his materiall conferencie with the rebellis, affirmeing probable that it was nocht wilfullie Bot as sindrie vtheris knawin to thame selfis in the countrey quhair they duell that he was surprieset and necessitat be just fier *qui potest cadere in constantem virum* it cannocht be said that this pannell hes acquit him against nottor knowlege and evidences.

It is lykwayis alledgit be the said Mr. Jo'n as pro'r for the pannell that the dittay is na-wayis relevant as it is declairet be my lord aduocat insisting only against this pannell for acquitting James Gordoun of intercommoning wittinglie because y'r can nocht be a dittay of error bot for acquitting ane nottor trespassour of a cryme as the act beiris quhilk is the grund

of the dittay: Bot sa it is that intercommoning wittinglie being takin abstractlie frome ye qualitie wilfullie past fra is not a cryme and is incident to the best being surprysed with a multitude of rebellis quhome thay knew: And notwithstanding they knew thame may interteine with generall discourse and ar nocht obleist to irritat thame with sullannes and silence and be a foolish nyceenes to ventor yair lyves And in law wilfulnes being the essenuall difference of all crymes cannot be seperat frome thame without irrelevancie and absurditie. Quia maleficia propositum et voluntas distinguit: L. qui iniurie. ff. De furtis Institutionibus de obligationibus: And in all the criminali edictis, and interdictis of the law and pragmatikis and statutes of all nationes dole and will is evir requyret and pweishet in crymes. De furtis, L. 1, s. 3, vbi fraus. L. 53 vbi voluntas et propositum, L. 47, s. 7, L. 25, s. 2. Ubianimus, L. 5, s. 2. Vbi dolus malus. Titulo, si is qui testamento Liber jussus erat corrupisse aliquid dicatur: liminaria verba sunt si dolo malo. ff. de vi bonorum raptorum vbi dolus malus passim. L. 2, s. 8 et 9, L. 4, s. 4, ff. De incendiis et ruina, vbi dolus malus in fronte edicti; et tituli ibidem. L. 3, s. 7 et 8, vbi scientia et prudentia; et L. 12, s. 1, vbi data opera, ff. de iniuriis. L. 3, s. vbi affectus ex quo crimen consistit. L. 11, vbi dolus, s. de extraordinariis criminibus vbi data opera. L. 4. et animus. L. 7. ff. De sepulchro violato, vbi dolus malus in fronte edicti. ff. De prevaricatione, vbi notio verbi importat dolum. ff. ad Legem Juliam maiestatis. L. 1, vbi dolus definitionem ingreditur. L. 4, vbi quater repetitur. ff. ad Legem Juliam de adulteriis, vbi scientia et dolo malo junguntur. L. 14. vbi Consilium et dolum malus: ad Legem Corneliam de sicariis vbi dolus malus in initio; animus, s. 3; voluntas, L. 14, sponte, L. 16. ad Legem Corneliam, de falsis, per totum. ff. ad Legem Juliam de Annona. Et ad Legem Juliam de peculatu, et ad Legem Juliam de sacrilegiis, passim. Et ad Legem Juliam de plagiaris, vbi sciens et dolo malo. L. 6, s. 2. Et ad senatus-consultum Turpilianorum. L. 1, vbi meus semper spectanda, s. 3, et 5. et in omnibus interdictis dolum aut intelligitur, aut exprimitur: ff. quorum bonorum ne vis fiat, &c. And Stellation q^ulk is *crimen genericum et subsidium*, quhair ye occurrence of ane strange caice quadrattis not to ony peticular law is defynet "per dolum." ff. 47. tit. 20. de stellationatu, et codice, iisdem titulis supra citatis. Marcus Giarba, Consilio 28, witnesses that ye style of pragmatikes against crymes, *et specificice* the receipting of banito, is *spontanea mente*, or wilfullie. And in oure awin actis of p^lliament doillis or wilfulnes is ayer expressit or implit in woirdis, denoiting it as (that nane presume or tak vponie hand) "quæ verba supponunt dolum." Giarba Consilio 28. Quest. 90, Farrin. num. 28. Parlia. Jacobi 6, 1567. act. 21. That nane receipt supplie or manteine or trust to that effect: the woird is emphaticke importing wilfulnes. Jobo. 6, par. 1592, act.

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144, *verba sunt*, That nane presume or tak vponie hand to receipt supplie or intercommon Quene Marie: parl. 1555, act. 60, *verba sunt*, tending to steir the heartis of subiectis to that baitred quhilk implyis ane wilful intention Jacob. 6, 1364, act. 129, *verba sunt*, contemptuous declyneing of his hienes judgement Item that nane sall presume nor take vponie hand. And in the act 130, eodem parlamento verba eadem et act 134 eiusd parliamenti verba eadem: Jacobi 6. parlamento 10. act 10. verba eadem: Jacobi 2. parlia. 6. act 17. *verba sunt* officeris trespassing wilfullie: Jacobi 2. par. 10. Cap. 51. *verba sunt* that nane raise ane fray iu the hoist wilfullie: Jacob. 1. Parlia. 3 Cap. 37. That nane receipt or doe fauor to rebellis wilfullie: Jacobi 5. par. 3. cap. 5. Anecht wilfull fyre raising: Jacobi sexti par. primo actu ultimo *verba eadem*: Jacobi 5 par. 7. actu 97. That nane receipt or doe fauor to rebellis wittinglie or wilfullie: Jacobi 6. par. 3. Actu 46. Aganis wilfull manteyneris of erroneus doctrine: In fine Jacobi 6. par. 13. Actu 164. *verba sunt*. Any persone that receipts or interteneis wittinglie trafficquene jesuites: be all quhilk allegations it is evident that *scientia sine dolo et voluntate* is nocht an cryme Et accipienda est semper scientia eius qui prohiberi potest; ff. de noxialibus sectionibus; L. in delictis; Carcius de auxilium prestante post delictum ubi scienter et dolose, ar qualiteis necess^lie requyret in *crimine receptationis*. And y^ofoir it is constant that intercommoning wittinglie without ye qualite wilfull can nocht be the ground of ane dittay Nor the acquitting of intercommoning wittinglie, the acquitting of ane trespassor, and the ground of the dittay of error And the alternative concepioun of the act cannocht import that intercommoning wittinglie without wilfullie is sufficient to fyle p^lteis of ane capitall cryme becaus the qualiteis wittinglie and wilfullie ar to be takin *complexe* as thay ar takin in all criminali statutis, and the impropratioun of ye disjunctione is mair vsuale and tollerable than the barbarus absurditie that sould insew vponie ye taking of thame separatelie viz. that ane cryme sould be without will and intention and that Walter Hay and other guid subiectis, becaus thay haif intercommoned wittinglie being surprysed and forcet sa to doe for feir of yair lyves sould be lyable in capitall guilt and puneishment seeing statutes punientia facta capitaliter requirunt dolum, etiam si eius mentio non fiat: Et multo magis quando imponitur pena pro eo quod de Jura comuni non est punibile; as intercommoning with rebellis; Et quando de dolo aliquo modo fit mentio. As in the act of parliament be way of alternative: Far. quest. 90 Num. 22. vsque ad. 28. Et intelligenda sunt statuta secundum mentem statuentium. Mascard. de generali statutorum interpretatione; conclusione 3a. Num. 4. q^ulk is argued be the motive and end of the legislatour expresset in the statutes As in the present caice, the repressing of rebellis be taking from thame all maintenance and comforte quhilk is not preiudget be forcet and

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occasionall intercommuning. Et intelligenda sunt statuta magis secundum intentionem quam formalitatem verborum. Mascard. Conclusionem prima, Num. 9. Et secundum jus commune, Consilio 2. per totum; ut rationabilem sensum continent et ne videantur statuentes ea ex abrupto statuisse, etiamsi essent verba impropiand: ut ne absurdum continent et non Judaice secundum corticem verborum, sed potius secundum veritatem quam rudem figuram statuti. Et ne quis indebite damnum iuratur ibidem et nulla juris ratio aut equitatis benignitas patitur vt que salubriter pro utilitate hominum introducuntur dniori interpretatione contra eorum commodum producamus. ff. de legibus l. 25. Et posteriores leges ad priores pertinent vbi agitur de interpretatione. l. 25. ibidem. Et in legem committit qui verba anplexus contra leges nititur voluntatem. Cod. de legibus. l. 5. et exemplo graue est ita Latrones requirere et innocentibus fiat periculum: Cod. de his qui Latrones &c. l. 2. in fine. And y'foir since the common law and reasons requyres wilfull doill and oure auin law be ane act of king James the first parl 3. cap. 37 punisches wilfull recepting of rebellis, the alterative concepioun of the 97 act of king James the fifth his 7 parliament cannot be takin strictlie in a Judaik construction as the law speikis deboarding from the common strayne of law and of all criminall statutes. And the dittay passing frome the qualitie wilfullie is altogether inuevalant and may quadrat alsweil againis Walter Hay and the maist loyall subiectes in the land as against the most guiltie intercommoneris.

It is farther eikit for the pannell be Mr. John Nisbet that the dittay is nawayis relevant qualifying the pannell to haif acquit James Gordoun wilfullie and temerariouly be the alledget iniquitie of the sentence. Becaus thair verdict is nocht fals and temerariouly bot weil and warrantablie delyverit. In as far as the cryme y'of James Gordoun was acquit being intercommuning consisting nocht only of conference with rebellis bot of a wilfull associatioun with thame of foir knowledge be trysting or vtherways as is constant in law and be the straine of the act of parliament and it being remitted to this pannell to try quhidder James Gordoun had intercommoned wittinglie or wittinglie they delyverit that he was free of intercommuning wilfullie or wittinglie of foir knowledge of yr' meitting or cumming for ony thing that was provein. My lord aduocat to quhome it was incumbent to prove not only conference with rebellis bot the qualitie y'of the cryme consistis having adduct nathing to astruct it and it nocht being constant to thame selfis in yair own knowledge but the contrair in the generall that many guid subiectis in the places q'r' they dwell hes bene inueglet in conference with rebellis without ony disloyall intention or practise and ye first pannell viz. James Gordoun disavowing vpon his greif oathe in his depositions ony commerce with thame and publiclie in iudgement affirming

that he was violenced in his stay with thame. Quhilk asseveratioun of the pannell being probable in the generall and in the particular secundit with the declaration of some of y' number anent the violence vsed be the rebellis in shooting the durris and keeping in James Gordoun could haue preponderat ony slender and remote presumptiones adduct be my lord aduocat to infer the qualiteis foirsaidis. Quia in criminalibus probationes debeant esse luce meridiana clariores l. finali: Cod. de probationibus quaz reperitur canonis causa 2. quest. vltima capite sciunt. And some of the best criminalists maketh example to condemne vpon presumptiones albeit yair war verit so mony and pregnant. Etiamsi essent mille; Paulus. de Castro: quia presumptio non est veritas sed veri similitudo. And q'as the dittay qualiteis the error of ye sentence be the notorietye of the qualitie wittinglie and that James Gordoun conferrit with ye rebellis knowing thame to be rebellis and that they could nocht haif acquit him of intercommuning wittinglie. In respect of ye verificationes aduct by my lord aduocat and that it was not denyit be James Gordoun that he spake with thame and at that same tyme knew thame to be rebellis. It is answerit that yair meaneing in acquitting him of intercommuning wittinglie was not that they said that he knew nocht the rebellis but that they fand him frie of intercommuning wittinglie as it is takin in the act of parliament in ane copulative sens' with wilfullie and as it inportis a voluntar ingadginge in the companie of rebellis of foir knowledge knowing thame to be rebellis. And the occasioun of yair meitting q'k is the only meaneing of the act of parliament and of y' delyuerance conforme q'r' vnto the counsell hes dismissed without censure sindrie challengit for recepting knawin rebellis. And namelie ane Prat and his assolzeit thame of yr' recepting wittinglie or wilfullie because they war surprysit and could nocht resist thame. And q'ras the error of ye sentence is aggravated in respect that vpon the sole declaratioun of ye pannell they haif acquit thame and consequentlie done quibat in thame lysis to inueit and emancipat all men to intercommon vpon hoipe of passing frie vpon thair awin declaratioun that yair intercommuning was fortuite and against yr' will. It is answerit that albeit the pannell had nocht declarit and asseverit his innocencie thay nicht haif acquit him. The cryme and the essential qualitie of it nocht being provin vnto thame. Quia actore non probante absolutur reus. And nathing being vsed to verifie the cryme bot his awin depositions quhilk he qualified confessing intercommuning with the qualitie of fortune and necessitate quhilk expiatis ye cryme and implicetlie denoitted in his depositions be thaise wordis that they come to him to his awin close and was yair bot half ane houre and had no discourse bot of ye lane of ane pistolet quhilk he refusit and that they come to ye house q'r' he was at nyne ho'rs at night bodin bothe the

tymes with wappones and with the number that he could nocht without danger oppose thame All quhilk circumstances importeth, surpryse and violence: et iustus metus qui potest cadere in constantem virum: q'lk he qualified y'fter expresslie in judgment affirmeing vpon his grit oathe that ye durris war schott and y'foir confessio qualificata non debet scindi. Balet. L. 1. num. 45. Cod. de confessio. Farin. Quest. 81. num. 149. et 150. Et precipus in iis que non sunt jure communi prohibita nec habent contra se juris presumptionem et quando qualitas alite justificatur probationibus vel presumptionibus; et quando aliter non constat de delictis quam per confessionem. Q'lk conditiones quadrattis pregnantie to the present caice the qualitie of the surpryse being probable in the gđerall, and knawin to haiff bene incident to mony guid subiectis and in this caice the cryme being verifeid no vtherways against the pannell nor be his awin confessioun and the declaratioun of pairties vpon oathe may be ane sufficient motive and informative to assysors seing it is admitted warrantable be judges ad probandum innocentiam que in animo consistit. Be the law of God Exodi. cap. 22. versu vndecimo de furtis Deuter. cap. 21. de eede Number cap. 5. versu 19. de uxore suspecta. And be the civile law per textum in L. furti. s. qui jussu. ff. de his qui notantur infamia: Glossa in verbo innocentiam: et Decius 156; ubi aserit standum declarationi rei cum juramento; quia dependentibus ab animo statur juramento eius de cuius animo dubitatur: L. 1. Cod. de sicariis et aliis ab eo citatis. Et Gaylus Lib. 2do observationum cap. 106. Ita in camera iudicatum refert. And quhair as the pannallis intercommuning viz. James Gordoun is aggravatit in that he advertised nocht the s'reff of ye schyre of y' being in the cuntrie that he had no licence to intercommoun with thame from hime and he followed thame not with hoy and cry. It is ans'rit that the warrand and licence of ane s'reff is requyrit quhen ane partie for some caus intendeth to confer with rebellis and the want of ane warrand cannot be imputed to pairties surprysit and thair war no necessitie to advertis' the magistratis of ye rebellis being in the cuntrie becaus it was noutourlie knawin that they war roaving up and down the cuntrie and the following with hoy and cry is incumbent to guid judges quhen they ar of that number and power as they may overtak tham Lastlie the not dilaitting and apprehending of rebellis ar different crymis from intercommuning quhair of only James Gordoun was indytit and acquitt And quhairas his intercommuning wittinglie and of foir knowledge may seame to be constant be his awin depositionis and to be evidencit from his reiterat meiting with the rebellis and from the discours' he had with thame and his familiaritie in soupping and instaying with them ane baill night and in one chalmber, and the place being so neir his awin house q'r'to he might have retir'it and q'r' it cannot be presumit that he wold haive stayit being being so

neir home bot of intention to intercommoun chiefie in the house q'r' he stayit being suspect to haive bene the harbour and randevous' of rebellis. It is ans'rit that his depositionis beiring the occasioun of thair meiting, the straine and subject of his conference, the number of the rebellis and thair equippage and furnitor with armes theire that his intercommuning with thame was fortune and passive As Baldus speiketh, Consilio 36. in fine Lib. 3. Craveita Cpsilio 6. Num. 84. Rebellis dici non potest qui per metum aut coacte aliquid facit et talis dicitur rebellio passiva, vt quando aliquis recepit rebelles qui sunt plures et non possunt expelli sine periculo. Bald. in L. delictis: ff. de Noxialibus. For the occasioun of intercommuning with thame his depositionis beiris That it was nocht wittinglie bot he was surprysed inexpectedlie with yair cumming and that they come to his close and the house quhair he was and the subiect of his conference deponet be him anent the lane and refuse of ane pistolett the first tyme argues that he intercommuned nocht wittinglie and knawing that they war to meit and to cum to his close seing it cannot be presumet that he wald haiff endangered himself to no end and vpon no intention of treatie or accessioun to yair practizes and the discourse of the rebellis the second tyme in Hassiewallis overhard be the pannell impoirteth nocht intercommuning in the subiect let be ye qualitie of wilfullis or wittinglie For James Gordoun depones only of his hearing thame relate some of yair doings and designes bot not of ony intercommunication of discourse and it was nevir hard that beiring was ane cryme, quhen p'teis dar nocht profes' the dislyking of discourse, if thaise quho ar moir powerfull and insolent and bodin with armes as the rebellis war And the being w't rebellis impoirts nocht conversationem illicitam, nisi conversatio sit continua et stricta, alioqui si sit interpolata et discontinua non facit iudicium sufficiens ad torturam: Farin. Quest. 52, num. 19. Item, the place of the second meiting q'r'in the dittay placeth ane gritt presumptioun of the intercommuning wilfullie and consequentlie wittinglie It is retortit that most of all the places being so neir his awin house his stay thair from nyne ho'rs in ye moorning till nyne at ny't the companie q'r'in he stayit his going to bed befor the rebellis and ignorance of the tyme of yair ryseing evinces, that his meiting was not wittinglie foir intendit seing it can nocht be preswmet that being so neir his awin house he wald haiff appoynted a meiting in so publick a place q'r his practizes with the rebellis my't have bene discovered and that he could haiff stayit so long befor y' cuming in the companie of honest gentulmen and efter y' cuming could haiff bene so strange as not only to afford na supplie and not to be maid previe to yair wayis and correspondence and conscious of yair randivous and places of recept' he hes deponet Bot to be ignorant of yair going to bed and ryseing quhilk in commoun guid fellowship can nocht

be presumet vules he had distykit the companie and estranget himselfe frome thame Item the lying in one chalmer w't rebellis argues not so much internes and familiaritie w't thame as the straitnes of rowmes knawin to ye assyso'rs Item his meiting can not be aggravatit from the place as suspect to be harbour of rebellis because it was nocht representid to the pannellis that ye house of Hassiewallis was sic a place and it not being knawin to thameselfis thay could not haif had any ground of presumptione frome it Chieflie seing the pannel deponet vpon his grit oathe that he knew not q'r the rebellis war recept And consequentlie that the house of Hassiewallis was not ane house q'r thay uset to be harbouret Nather can the pannellis flagitiousnes and his nottor correspondencie with the rebellis and favouring of thame be now vrged as ane presumptione of hys awin guilt because thair was nathing provin to the first assyse' bot his awin confession that he had slane a man (q'lk was done in his awin defence) and that he mett occasionallie with the rebellis And the assyso'rs knew him not vtherways brandit as ane favourer and complice of rebellis as thay will depone vpon y' great oathe and maist of thame had never sene or hard of him Item q'r as his intercommung wittinglie agains actis of parliament is presumptivelie qualesaid in that he joynd not w't thaise of ye house and the companie w't quhome he was to oppose the rebellis And convoyit not ane boy furth be a privat way or window and qu'by gaue not aduertisement of ye rebellis being yair q'lk he my't haif done befor thair going to bed or ettir quhen thay war asleep at leist my't haif obseruet the way thay went and raised the cuntry It is ansrit that as his conference is justlie excusiet Ob justum metum qui potest et debet cadere in virum constantem: Decret. de iis qui vi, mictuse causa: Cap. 4. And in the law etiamsi non sit vis de facto, nec minre, timor etiam violentie inferende justum infert metum, et visus armorum, etsi deferens iis non vitatur. L. 3. ff. de vi armata: Garba cons. 28 num. 20. Et constans vir elegit prudenter minus malum, ad majoris mali periculum vitandum: Covaruvius de metu in matrimonii contractu interveniente: Num. 4. Be grutter reasone his not attempting against thame be way of deid is moir excuseable Because the imaginative resolutenes of the dittay is not in law requyret of guid subjectis quho are not obleist to tempt God and laveisch yair lyves against rebellis vules yair war grit assurance of advantage quhilk was not Four disperatlie resolvit and redoubtit men viz. Alexander Leith and Nathaniell Gordoun w't yair tua men bodin all w't gwnes and pistolettis being too strong for foure honest men wanting thame and ane vnnirmit crew of servandis And albeit James Gordoun had bene fuillishlie stoute, it is not constant that he had power of the rest to mak thame joyne w't him And sould haif bene mad to expose himselfe to haif bene the bute of pistolettis alone Item ane

boy over quhome James Gordoun had power and quhome he nicht haif sent furth at ane window or privat way whence he nicht haif sent him the rebellis inadvertance and cairles securitie ar improbablis supposet it nocht being consunt that yair was any way or window sua law that ane boy my't haue bene let down or that thair was ony boy quhome James Gordoun mycht have sent And it nocht being presumeable that the rebellis who had so great reasone to be apprehensive and quho for yair awen securitie uset to schoote durris, wold nocht advert that yair was no privat way or window q'r by thay might haue bene surpyret and he could not haif observet the rebellis wayis in ane dark morning, thay haifing gone away befor he was awarris and consequentlie the raising of the cuntry to follow thaim was needles seing he knew not quhat way thay had takin Lastlie q'r as the assyso'rs y'r vnwarrantable temerarious procedo'r is exaggerat for acquitting James Gordoun contrair to ye evidences representit be my lord Aduocat and vrged frome his awin depositions conforme q'r vnto thay war obleist to have judged nothing being product to veritie that he was forset and necessitat and that the durris war schoote It is answerit that assyso'rs ar not so much judges as witness' Jaco. 6. parlia. 6. act 79, et passim in our law and in the Engliche law And y'foir the pannel neidit not to astrict and verifie the qualitie alledgit be him for his defence be ony vther testimonie nor the knowlege of ane assyse q'r vnto he was remittit and quhan thay war incloset the testimonie of tua or thre of yair number might haue bene ane guid warrant to the rest to acquit him as it was some of thame haveing witnesset to ye rest that they knew probable of thame that ye durris war schoote and that James Gordoun wold have retereit himselfe bot was stayed be the schooteing of the durris And albeit yair testimonie was only *de auditu* and of the report of thaise quho war present thameselfis and may be quarrellit alsweil as James Gordoun it might haif bene ane sufficient information to the assyse since thase that war present thameselfis could only witness' and was nott to the pannellis knowlege brandit with ony suspition of associatioun or intercommung with the rebellis and in the law Testimonium de auditu facit presumptionem, que operatur vt unus plene probandi transeat in *universarium*, et si deinde aliquod admuniculum accesserit plena resultat probatio, precipue in iis que sunt difficultis probationis, quale autem esset hoc admuniculum Judicis Arbitrio reliquitur. Minorsius de arbitrariis Judiciis, casu 475, vsque ad num. 12, et omnes doctores de testibus. And y'foir seing assyso'rs ar not tyed preceislie to the strict reulis of probatioun Because yai ar probatioun thameselfis and witness' and the testimonie of some of yair number was admuniculed with the vsuale practize of ye rebellis in schooteing all the doores quhair thay come knawin to thameselfis thay haif procedet warrantablis vpon the testimonie of some of

yair number Albeit they be not tyed in law to judge strictlie *secundum allegationes et probationes* both because they ar witness' and because albeit in this caice only the law makis a distinction of conscience on publict infarmet be allegationes and relevant probationes as the deposition of tua witness' of a deid and ane vther privat informet be ane propper and intestine knowlege in *scrinio pectoris* As quhan the judge knoweth that witness' deponet and the contrair is trew In the quhilk caice he is obleist to judge *secundum conscientiam publicam et allegata in civilibus* Neveryeles in *criminalibus* the law is so tender as not to vrge ony judge to delyuer against yair conscience *secundum veritaciones*, nisi sint notorii juris vt *confessio facti et qualitatium* And thairfore the pannallis delyuerance is maist just, and proceidis vponne all possible and warrantable grundis quhilk can be imagined in ane caice of this nature viz. the qualification of the pannallis confessioun quhilk in law is indivisible—the pannallis asseveratioun vponne his grit oathe—the testimonie of some of thair number admicled with y'r awin knowlege in the generall anent the practize of ye rebellis and is nocht only conforme to ye generall groundis of law bot to ye decisiones of ye most famous iudicatoreis and jurisconsultis in the lyk caice "de receptatione banitorum" qlk is frequentlie occurrent in Italie Marius Guiarba instantes abe caice 28, quhilk will serve to vindicat the pannellis delyuerance frome being so vnjust as is lybellit *Species facti erat*: Hier. Baro in arce caropipi moram trahens cum uxore et filiis bannitorum adventu percussus cum fuerit obfirmato arcis ostio, banniti interim hortum ingressi filiam baronis cum nutrice deprehendunt. Baro abducte infantis metu percussus bannitos accersiri jubet, a quibus, restituta filia, obnixè rogatus est vt eos quidam beneficiò donaret quippe id eum facultatis a prorege obtinuisse se certo scire dicebant. Negavit baro hanc se potestatem habere; verum de ea re se ad proregem literas daturum pollicetur: tum deinde eos brevi cœna refectos dimisit. Cum in questione criuiniis a fisco vocatus esset, conversationis nimirum cum bannitis initæ et auxilii iis prestiti, pro eo arguit jurisconsultis quod allocutio seu modica cum forasticæ conversatio delictum non indicat, cum non omnis simplex et accidentalis conversatio mereatur penam, nec eadem sit ratio que in receptatione favore vel auxilio. Secundo, receptatio, quæ dolosa et ad malum finem non est; penam non meretur, quod astruit innumeris testimoniis et verbis pragmati 'audeat et presumat' que supponunt dolum; nec delinquentem associare per se delictum est, nisi ad malum sit; proinde dignus est laude qui mali vitandi causa bannitum receptat: proclama namque quicquid prohibetur non propter se sed ad evitandum malum non illaqueat transgressionem ad illius penam, si finis illius non violatur. Tertio qui bannitos coacte receptat puniendus non est si expellere eos non potuit absque sui periculo; quod similiter confirmat testimonis, cum nec teneatur domo cedere et

illic eos relinquere; quod astruit testimoniis et durante filie carceratione: omnia per impressionem presuntuntur, et justus est patris metus in filiorum persona, nec vis de facto esse debet, sed minæ sufficiunt vt coacte receptet. Timor nimirum violentiæ inferendæ infert iustum metum, quia armorum visus justum infert metum et si deferens iis non vtatur et paria sunt coacte acta aut timore coactionis. Bald. L. novisse ff. quod falso tutore. Q'iks grundis quadratis appositelie to ye present caice and more pregnantlie because the cryme of intercommoning is not so great as the cryme of recept q'lk is prohibeit in ye comoun law and in the caice related thair was ane voluntar act in sending for the rebellis and interteneing and supplying of thame quhair as in the present caice thair can be nothing qualifeid bot surpryse and in the former caice ffatherlie tendernes is not so impressiue as the feir for ane mans awin lyfe.

It is also farder alledgit be Mr. James Baird that seing the pannell did convict James Gordoun of Slauchter quhilk is ane heicher cryme nor intercommoning And y'by did quhat in thame lay to tak his lyfe, it can nevir be presumed that wilfullie and in contempt of his ma'tie thir gentilmen wald haif clauget him of intercommoning q'lk is a les' cryme nor slauchter gif they had not bene rewled with the licht of y'r awin consciences and vponne sufficient informations of his innocencie. Quhilk information is that the hail assyæ at ye leist the grittest pairt y'of war informet be Robert Collie in quahis house James Gordoun and the rebellis rancountered be accident and be Robert Dempster of Cnschnie be Robert Forbes brother to ye persone of Auchterlies be — Collesone burges of Abirdene and be certane vther gentilmen quha war all in Robert Colles house the tyme of the rancounter And being all going to supper at nyne houris at evin in ane stormie wynter ny't the rebellis being armed men boddin feir of weir with bagbutis pistolletis and hieland durkis and all vther wappones invasive enterit the house and immediatlie estir yair entrie schote the durris sa that y'r was nather egress nor ingress And in taikin y'of ane servand of Robert Colles being without was not sufferit to enter ye house that night Nather was yair ony of Robert Collie his servandis sufferit so mekill as to goe out and meate yair guidis Bot he ye contrair the guidis fastit all that ny't (gif yis be wilfull intercommoning God knowis) and nocht only is this of treuth bot it is also trew, that my Lord Aduocat did iudiciallie accuse the said James Gordoun being than on ye pannell vponne the same poyntis quha declairet all that I haif now alledget to be of treuth vponne his salva'un And farder declairet that he wald haif bene so fayne quyte of the rebellis seing that he could not wyn out (thay being maisterris of ye durris) that he staw quyetlie to his bed and knew not quhan the rebellis lay down nor quhan thay went away in ye moirning quhilk was a grit cleiring to the assyæ yat he was no willing intercommoner Cheiflie seing his purgatioun

procedit vpon my Lord Advocatis demand in p'ns of thir same gentile men than being sitting as assysors In respect q'rof they could nocht in conscience haif convicted him of wilfull intercommoning for his meitting with the rebellis in Robert Colleis house because they fand it was *casus fortuitus et vis maior* In respect q'rof the pannell aucht to be simpl'r assoilzeit be interloquitor of my Lord Justice and my lordis assessors and aucht naways be put to the knowlege of ane assyse.

It is ans'rit be my Lord Advocat That ye haill alledgeances preceeding proponit be the persones on pannell and yair prolocutors aucht to be repellit in respect of ye dittay and writtis produced for verificatioun of ye samyn In respect q'rof the dittay is bothe relevant and provein and aucht so to be fund be the justice and assessors and nothing is to be remitted to the assyse bot thay allanerlie to cognosce *de facto* gif sic writtis and probatioun was schawin to the assyse as is lybellit in the dittay to haif bene schawin and producet in ye first proces And q'r it is alledged that fortuite or accidentall intercommoning with rebellis fallis nocht within the compas of the act of p'liament And that to mak ony persone culpable of intercommoning with rebellis thair is requyret foir-knowledge and prescience of yair cuming or ane appointit tryer for that effect The samyn is direct contrair to the act of p'liament and to the l'rez direct be the lordis of secret counsall prohibeiting all intercommoning Lyk as this being proponed in the first proces the samyn was repellit be the justice and nothing remitted to the assyse but gif James Gordoun intercommoned wilfullie or wittinglie And to that qualitie of wittinglie nothing is requyred bot allanarie knowledge of the rebell and of his rebellious quhilk was grantit be James Gordoun himself And q'r of the assyse did wilfullie at leist temerarioulsie clange the said James Gordoun and to requyre *precientiam* quhair the law requyres *scientiam tantum* As it is altogidder impertinent so it war to proclame impunitie to all intercommoneris with rebellis quha sould euer be acquit and purged of intercommoning gif foir knowledge war nocht proven quhilk is improbable bot be aith of partie and so to illuid the lawis and actis of p'liament And q'r it is alledged that albeit the act of p'liament prohibeits intercommoning wilfullie or wittinglie sit the samyn must be takin *copulatiue* or coniunctie that is direct contrair to the act of p'liament quhilk beiris the samyn to be set down *alternatiue* And it war agains common sense and reasons to mak the samyn to be takin coniunctie for wilfullie includis wittinglie And thairfoir the subioyneing of wittinglie gif it war takin c'ijunctie war absurd But being set down *alternatiue* hes ane trew and guid sense and maist aggreable to ye lawis and actis of p'liament forbidding intercommoning with rebellis nocht only of foirknowledge quhilk is 'wilfullie' bot also of knowledge quhilk is 'wittinglie' And the act of p'liament 1592, cap. 144, makis the matter

cleir and out of all subtiltie or cavillationn Becaus be the said act with the prohibitioun of intercommoning is conioyned ane command to all subiectis to don thair exact diligence at the vtermost of yair power in searching seeking taking and apprehending of ye rebellis And in following of thame and in making intimatioun to the magistratus and persones of power of the bring of the rebellis in suche ane place quhair they may be apprehendit, quhilk exact diligence and intimatioun is alsweill requyret in ane accidentall meitting with the rebellis as in ane meitting of purpos And the pannell nor thair pro's can not now alledge that wittinglie and wilfullie most be expouct coniunctie Because the first dittay buir the samyn *alternatiue* and this subtrill evasion was not than alledged nixt the dittay was fund *religant et ternatiue tertio* it was remitted to thair *knowledge alternatiue* And last they gave out y'r verdict *intermediis alternatiuis* be assoilzeing of James Gordoun baith wittinglie and wilfullie; and q'r it is instanced be Walter Hay his rancounter with James Grant; that a fortuite intercommoning is not punishable, the caise is noways alyk bot verrie far different For Walter Hay was bot ane passinger bot James Gordoun was ane actual inhabitant w'tin the boundis q'r the rebellis hanted and q'r the rebellious was committed Nixt Walter Hay was knawin to be ane man of honest guid fame and vsuspect and in effect the vnfriend to the ennemie being ordiner pro'r for Ballindalloch: bot James Gordoun was knawin to the assyse to be ane flagitious man being accuset in the said dittay for slaughter q'rof he was convict be thame And quha was persewit be the laird of Frendraucht and put to ye borne for nocht compeirance befor the justice to vnderly the law for soirneing vpon the laird of Frendrauchtis tenementis quhilk ye said assyse knew at the leist sould not haue misknawin becaus the l'rez of hoirning quhilk was producet in the first proces and repetit to the assyse for verifiteing that Nathaniel Gordoun and Alexander Leith war rebellis buir also the said James Gordoun to be denuncit rebell Lyk as it is notourlie knowin to the said assyse that the said James Gordoun was tane and apprehendit be the marquis of Huntlie be vertue of his commissioun As ane of thaise quha was dilaitit of troubling of the peace of the cuntry and was sent heir in chenzeis with ane number of vther persones quha war all pannellit vpon the fourt of August of befor, and all fund guilty be the said assyse And this James Gordoun his tryell in respect of Mr. Jo'n Nisbet his compeirance was supercedit till the morrow And last the said Walter Hay as ane guid and faithful subject immediatlie efor he was frie of the said James Grant his companie warned the haill gentilmen and nameie Ballandalloch quha raiset the number of fyftie or threecor persones and persewit the said James Grant for the space of tua dayis quhilk was nottourlie knowin to the cuntry quhair this James Gordoun having

intercommonet with the rebellis at tua seuerall tymes be his awin confessioun did nather geve signe of discontentment the tyme of his cuming nor made ony wairning to his ma'ties leiges And zit this James Gordoun quha was pannellit with his remanent followis vpone the fourt of August and continewit to the morne All the rest were convict and fylet, and this James Gordoun was be the same assyse (quha convictit all ye rest) clanget For the quhilk the counsall did ordane the assyse to be persewit to the effect be y'r puneishment or terror his maiestis subiectis sould not presume to intercommon with the rebellis vpone expectatioun of the lyk impunitie As James Gordoun saud be the temerarious proceeding of the said assyse and quhair it is alledged that the said James Gordoun his intercommoning with the rebellis was not spontaneous bot foreot in respect of ye schuiting of ye durris be the rebellis It is ans'rit first That this was proponet in the first proces and repellit *Secundo* this ctyddis not the first intercommoning at his awin house in Knokleithe quhilk *per se* was sufficient to infer his intercommoning wittinglie with the rebellis, thair being na sic alledgance of force of schuiting of the durris at the first tyme *Tertio* the samyn is contrair to James Gordoun his awin depositioun quha in the second intercommoning in Hassiewallis grantis his conference with the rebellis his soupping with the rebellis his lying in ane chalmer with the rebellis bot never a word of his coaction or shooting of ye durris in all the depositioun and the assyse war bund to cognosce according to his awin confessioun product and vset against him be his maiestis aduocat specialie seeing ye said schuiting of durris was proponet and repellit be the judge And quhair it is alledged that the assyse hes libertie to judge according to thair conscience And that some of y'r awin number did attest to thame that thay did heir be ye report of thaise that war in the house that the rebellis did schoote the durris It is answeirit that albeit q'r na probatioun is the assyse may judge according to their privat consciences, zit quhair probatiounes ar vset to the assyse in judgement Thay ar tyed to judge according to the probatioun led and product in judgement and can not judge against the samyn vpone pretence of privat knowlege or conscience ffor that war to destroy all justice specialie Seeing be the lawis and actis of parliament all probatioun in criminall causis is ordanit to be vset opponlie and in face of judgement and the privat knowlege quhilk they alledge to haif had be the depositioun of some of yair number can be no excuse to thame first Becaus it is grantit that they deponit only *ex audita et non ex visu* Nixt becaus theis quha deponet *ex auditu* declairet yat they hard the samyn frome Robert Collie quha was maister of the Innes Robert Dempster of Cuschnie and Robert Forbes brother to ye persone of Auchterles and fra Robert Collesone burges of Aberdene and certain vther gentil-

men quha war in Robert Collies house the tyme of the rebellis incuming qr'upone his ma'teis aduocat takis instrumentis and ans'ris that the declarations of ye saidis persones being *sub eodem reatu* be intercommoning with rebellis could not be ane warrand to the assyse to clange James Gordoun As it could nocht be ane warrand to clange thameselfis gif they haile bene pannellit specialie seing the said house of Hassiewallis q'rof the said Robert Collie was maister was ane verrie suspect place the samyn being grantit be the depositioun to haue bene vnder the marquis of Huntlie within quhais boundis the rebellis presumit to find fautor Lyk as the said Robert Collie maister of the house and Robert Dempster fra quhome it is deponent thay hard the said attestation war both denuncet with the said James Gordoun rebellis at the instance of ye laird of Frendraucht for not compeirance befor the justice to vnderly the law for soirning and oppressioun committit vpone his tenentes quhilk the said assyse could nocht misknaw thay being denuncet rebellis be the same l'rez of hoirning quhilk was product to verifie that Nathaniell Gordoun and Alexander Leith war denuncet rebellis And farder the said James Gordoun and all the remaneat gentlemen being in the Innes at that tyme war altogidder inexcusable because it is grantit that they war to ye number of fyve gentlemen *nominatim* by vther gentilmen quha war in the house and double number to ye rebellis And sua sould haif concurrir togidder for reverence and obedience to his ma'teis lawis either to haue apprehendit the rebellis or to haue made warneing to the cuntry to apprehend thame The place of Hassiewallis being within the parochin of Auchterles quhilk is ane inland pairt of the cuntry and populus, and ane number of gentlemen within the samyn quha sucht and sould haif concurrir with thame for that effect lyk as his ma'teis aduocat acceptis that pairt of the alledgance quhilk deiris that a servand of Robert Colleis being without was nocht sufferit to enter within the house that ny't quha being frie of ony violence my't haue bene directit ayer be Robert Collie maister of the house or be James Gordoun or ony one of the rest of the gentill men to haif maid wairning to the cuntry Lyk as the said James Gordoun and all the rest of the gentilmen being w'tin ye innes that ny't ar altogidder vnexcusable because albeit they pretendit the schuiting of the durris zit efter the rebellis went to bed in ane seuerall chalmer, thay war obleist to vse exact diligence conforme to the act of parliament be some means or y'r to haif ceasezed vpone thair airmo'r quhan they war sleiping or to haif ramforced the chalmer durr without till the cuntry sould haif laine adverteised at the leist sould haif wairmet the cuntry in the moirning quhan they went furth bot nane of thir was done And q'r as they pretend violence thay can not be hard 'Quoniam nullum fuit signum resistencie' and

of the law 'Metus non excusat nisi metus sit justissimus, qui etiam probandus est.' And all the criminalists holdes "quod coactio etiam probata non excusat nisi statim postquam quis liberatus est a vi coactiva denunciaverit" As is learnedlie concludit be Farin quest. 133. Num. 36. 37. 38. 39. 40. and 41 And this excuse of feir is no moir pardoneable nor that q'lk subiectis vnlachfullie hes or apprehendis quha sittis vnder the assurance of theves or payis thame blak maill quhilk out of question is against yair will and of ane bas' and desloyall feir And zit suche as is puniechable to death be the lawis and actis of p'liament bot nochtwithstanding of all thir pretences James Gordoun was maist, guiltie and could not haue bene clanget be the said assyse Nather of his first intercommoning against ye quhilk yair is nathing alledgit bot want of foirknowledge q'lk can nocht excuse him of the law quhilk only requires knowledge or wittinglie nor zit of ye secund intercommoning becaus he being within ane myle to his awin house nocht only souppet with the rebellis conferred with the rebellis efter supper bot also lay in ane chalmer with the rebellis efter supper and maid na takin of resistance bot all talkines of willingnes familiaritie and affectioun and maid na internatioun or wairneng to the countrey and being a persone suspected and takin be the marquis commission as suspect could nocht haue bene clanget of intercommoning q'lk he himself confessit with all the qualiteis and circumstances asoirsaid And gif the wilfull and temerarious proceeding of the assyse in clangeing of him be not punieched bot allowed and approvin it will impoirt a heaue preparatiue to the preiudice of ye publick peace and to his maiesteis authoritie and caireie with it a proclamatioun of a feirfull libertie to all his ma'teis subiectis to intercommon with oppin rebelles in the maist publick rebellious q'lk everie guid subiect could abhor and detaint in respect q'of all the saidis alledgeances aucht to be repellit and the dittay fund relevant and proven be the writs producet and ye samyn dittay referrit to the knowledge of tuentie persones according to ye act of parliament And that allanerlie sua far as the samyn consistis *in facto* quhilk is this only poynt viz. That the writtis y' probatioun alledged in ye dittay to haif bene producet in the first proces for verificatioun of that dittay against James Gordoun was *de facto* producet at that tyme agains him for that effect.

The Justice continewis this dyet to Friday next being the xviii of December instant And ordanit the persones on pannell to find caution fer y'r reentrie ye said 18 day of December instant ilk persone vnder ye pane of ane thousand merkis For obedience q'of compeirit James Cheane of Arnadge and become caution for ye lairds of Lenturk Birkinboig Fetterneir Mr. Mathow Lummsiden the guid man of Tulliechoudie the lairds of Elsie and Schethyn Compeirit lykways the laird of Innermarkie and become souertie for

George Gordoun of Newtoun and siclyk John Ogilvie of Glassache become souertie for Alexander Keith of Duffus and the said Alexander Keith of Duffus become souertie for ye entrie of ye said John Ogilvie and hail remanent persones vpon pannell vnder ye pane foirsaid.

The persones of assyse warnet apud acta ilk persone vnder the pane of ane thousand pundis.

CURIA JUSTICARIE S. D. N. Regis tenta in pretorio de Ed'r xviii Decembris 1635 Per Mag'ros Alexandrum Colville et Jacobum Robertoun Justiciarios deputatos.

Intran'

Assyso'rs accuset of Erro'r Continewit to ye Morne the 19 Instante.

Alexander Irving, of Lenturk.

Alexander Banerman, of Elsieck.

Alexander Abercrombie, of Birkinboig.

George Gordoun, of Newtoun.

William Seaton, of Schethyn.

George Gordoun, of Tulliechoudie.

John Ogilvie, of Glassache.

James Seaton, burges of Aberdeen.

Charles Steven Lister, burges y'.

Alexander Keith, of Duffus.

Mr. Mathow Lummsiden burges of Aberdeen.

Hector Abercrombie of Fetter-neir.

Dilittit of ye error committit be thame in ye temerarius acquitting of James Gordoun some to George Gordoun of Logyaltoun in mannes speit in ye dittay.

Persewar.—Sir Thomas Hope of Craighall knight barronet his Ma'teis Aduocat.

Prelo'rs in defence.—Mr. James Baird—Mr. Thomas Nicolson younger.—Mr John Nisbet.

The pannellis tukis instrumentis of y'r entrie and p'testis for y'r cautioneris relief.

It is duplyit be Mr. John Nisbet as prolo'r for ye pannell to the reply maid be his maiesteis aduocat in the last dyet of yis proces That ye dittay is nather relevant nor provin for the reasones alredie adducet And q'r it is replyit be my lord aduocat that nathing is to be remitted to ye assys'ors bot only to cognosce *de facto* quhidder gif such writtis and probatioun was schawin to the first assyse It is duplyit that the meaneing of ye estaittis in requiring sua numerous and noble ane assyses is nocht that thay sould only cognosce of that q'lk is vndenyable and is obvious to be judget be any man Bot that thay sould try quhidder the evidences deducet to the first assyse be of that cleirnes as vpon thame resulteth notto'r knowlege of ye pannell his guilt q'lk sould obles' ony man indewit with reasone to convict the pannell And the hail assumptioun and qualiteis contenit in it is to be referrit to the knowledge of the assyse viz. quhidder thir persones on pannell as acquit temerariouly

and wilfullie be fauor and partiall meanes For albeit vpon the same evidences schawin to the first assyse it sould be fund that they haif acquit a trespassour vnles that they find that they haif acquit him wilfullie and temerariouelie they cannot fyle thame of the cryme of falsset puneischet be the act of parliament gif they be perswaidit that they haif done innocentie and according to yair conscience as my lord aduocat himself hes acknowledged For gif thaysould acknowledge yair error and excuse it be ignorance the great assyse could nocht conuict thame of temerariou periuirie vpon thair awin confessioun qualifiet with the excuse of ignorance as is cleir be the strayne of the act of parliament insinuating that the grant of ignorant error is nocht ye grant of the cryme and fault of assyso'rs seing nochtwithstanding the granting y'of they may be put to ane grit assyse Quhairis parties granting y'r fault ar not put to forder knowledge And quhair as it is replyd that the law and l'rez ef intercommiong prohibeittis all intercommiong without distinction quhidder vpon foir knowledge or be surpryse And that ye law requyryng *scientiam* it is impertinent to superad *prescientiam* since foir knowledge is only probable be oath of partie quha wald easilie redeame thameselfis with ane oath And be y'r impunitie to incurrage and inbolden vtheris to ye lyk practizes And that y'for the justice repellit the defences proposed for James Gordoun that he was surprysed and occasionallie engadged without foirknowledge or trysting It is ans'rit y'to that the act of parliament 1567 is expres of trysting of purpose to fortifie rebellis and most interpret the rest of the actis and l'rez raisit y'upoun seing without absurditie they can nocht be understuid vtherways And *scientia* in sens' can not impoirt a cryme without will and intention quhilk is argued be foirknowledge and nocht be surpryses of thethe quho ar more powerfull And with quhome pairteis ar necessitat to interteyne discourse or inconsideratie or vchristianlie to be y'r awin murtheraris be irritating rebellis and procureing y'r awin death And the impwatie of rebellis is nocht sua considerable as the danger of loyall subiectis quha may be involved be surpryses of rebellis as thousandis of thame has bene in ye lait disorderis And yair is not only heir the oathe of the pairtis accuset bot a pregnant presumption from the rebellis knawin practice to surpryse guid subiectis And ye pannell his confessioun beiring that thay come to him in such a number and order that he could nocht schwne yame being bodin with pistollettis And yairfoir seing it is ye only ground of dittay vrgett against him without ony vther evidence could nocht haif bene saue mutilatie being adminicled with the former presumption And na christiane judge can condemne a pairtie confessing intercommiong agnainst his will and vpon surpryse vpon his awin confessioun sua qualifeid and pregnantlie adminicled in his fauor with a strong presump-

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tion and his great oathe And the judges interlocuto'r repelling the foirsaid defence can be obtuidet Becaus the justice being only propper judge of the relevancie judges only of ye relevancie quhidder or not the act of parliament be ane relevant ground of dittay and ye assumption conforme y'to And repellis ony defence that impunges not ye relevancie of ye dittay albeit relevant in law to purge the cryme and competent only to the assysors to judge quha ar propper judges *in facto* quhidder pannellis he guiltie or not as gif a man indyttit of slauchter sould defend himself be alledging that he was furious or necessitat in his just defence and the justice sould remit to ye knowledge of the assise thease qualiteis It war absurd to think that he had repellit thame as irrelevant in law becaus he has referit thame to be tryt be the persones assysors And q'r as it is replyt be my lord aduocat that ye qualiteis 'wilfullie' or 'wittinglie' ar to be taken alternative conforme to the conception of the act of parliament or vtherways wilfullie implying willinglie The repetition of wittinglie war ane absurd tautologie And that ye act of parliament requyres an exact diligence in dilaiting of ye rebellis and apprehending thame in accidentall surpryses as in meittings purposis and that ye first dittay was alternative and thaise evasions nocht alledget and in ane alternative sense admittit to the knowledge of ane assyse and conforme yairis thair delyuerance was alternative It is duplyt for the pannell that we repeat v'r former ans'r evinceing from sens' law and reasone the copulatie sens' of the act of parliament and the taking of wittinglie as it presupposethe wilfullie And we vrge my lord aduocat gif he thinks in conscience That parteis knawin to haif bene surprysed and violenced for iust feir as it is evident that mony in ye lait disorderis has bene forcet to geve y'r purses to James Grant sould be pwneist capitalie for speiking with him wittinglie albeit it be constant that it was against yair will quhilk is ordiner in statutes and in the actis of parliament And the tautologie and superfluite of wordis q'likis ar nocht considerable in consideration of ye cruell absurditie or law sould vtherways be brandit with and the exact diligence requyret be the act of parliament argueth not that ye qualiteis wittinglie sould impoirt the cryme of intercommiong without will and intention And the subsequent negligence and omission of pairteis inferris not relevantlie commission and a cryme quhilk cannot be without a wilfull and sinister intention previous and intervening in the act of cryme Cheiflie seing the delaiting of the rebellis was vnnecessar efter proscriptioun and yair receipt and randievous in Rothiemay was notto'r to ye magistrattis And consequentie yair being in the cuntrey neidit not to be intinat lastlie the alternative conception of the judges interlocutor and of the assyses delyuerance being conforme to the act of parliament ressaues the same interpretation As the assysors will depone vpon yair

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conscience they thought thameselfis obleist to conceive it And vpon their conceiption of it to acquit James Gordoun of intercommoning wittinglie as it importes a cryme and the nocht proponing of the soirsaid defence vpon the disunctive sens' of the act of parliament can not be obtroidit Because the ditay was conceaved of intercommoning generallie without these qualiteis And it was vrget be ye said Mr. John Nisbet as prolo'r for ye pannell that it was irrelevant nocht expressing these qualiteis proposed be him *copulatiue* as the proces will schaw and it was nevir doubtit that it could be takin vtherwayis And q'r the disparitie of Walter Hay his intercommoning with James Grant is repliyt frone the different qualiteis the one being ane passenger the vther resident in the cuntrey and a Gordoun presumet to fauour the rebellis of his name and Walter Hay being ane honest vnuspect man and knawin vnsfreund to James Grant and James Gordoun knawin to be ane flagitious man fyllet be thameselfis of slauchter and persewit be the lord of Frendraucht and put to ye horne for non vnderlying ye law for sworning and denuncet rebell and c'tenit in the l'rez product to verifie the rebelloun of the rebellis with whome he intercommoned and tane be my lord marquis and sent in cheynes vpon dilatioun maid of him as ane perturber of the countrie It is duplyt y'to that ye parrallell of the tua caices is instancet to euince that the best subiectis may be necessitat to intercommon wittinglie as Walter Hay without incurring ony guilt or pwnishment and y'foir the qualitie wittinglie without willinglie cannot relevantlie infer a cryme and thaise dispariteis was nayer vrget nor constant to ye assyse And as for the disparitie in the poynt of aboid the one being bot ane passinger the vther ane resident it is not considerable these that ar resident being als obnoxious to surpryses as vtheris and the iust feir of residentis being moir impressiue and excusable Not only in respect of the inuinent violence gif they had untymouslie bowrayed vntowardnes bot in respect they sould haif exposed thameselfis to the daylie pray of rebellis And for the disparitie of yair lyfe and prohibie it was not vrget and the pannellis conviction of slauchter as it vindicatis the assysors frone partialitie in respect they convictit him of ane mair capital cryme than intercommoning sua it can found a presumption of ane cryme altogidder different being the remission of the pairtie interest and letter of slaues productet to ye assyse schew that the slauchter comittit be him was rather be fatalitie and surpryse in his defence as it was vrget be the said Mr. Jo'n his preio'r than vpon forthocht felonie And his former lyfe being vnkawin to thir gentlemen now impannellit as they will depone vpon y'r consciences and nocht being traductet be my lord aduocat could not vncharitabillie be presumet to be flagitious and the letter of horning contening James Gordoun his denuncetion was not vrget and contains na sic thing mather can Walter Hay his subsequent loyaltie

and dilligence in convocating people to persew James Grant expiat his witting intercommoning gif it be a cryme as it is not nor James Gordoun his negligence to doe the lyke be sua aggravat scing intercommoning with the rebellis and nocht apprehending of thame ar different crymes And James Gordoun was only iudytit of intercommoning and his omission in nocht delaiting can not be respectit efter notto'r knawledge of the rebellis being in ye cuntrey and harbouring in Rathiemay And quhair it is repliyt that the defence proponet for James Gordoun that his intercommoning was not spontaneous bot forset cannot be respectit because it was repellit in the first proces and because it quadrates only to purge his secund meitting othair being an act of violence condescendit vpon at his first meitting and because it is contrair to his depositions qualifeing pregnantie nocht only his willingness bot familiaritie in his conference stay soupping with the rebellis and lying w't the rebellis in ane chalner without ony mention of violence It is duplyt us of befoir that it was repellit as icept to stay the pannell frone going to ane assyse Bot nocht to vindicat the pannell being fundin etter tryall to haif bene violence scing in law and nature *Justus vultus* is ane irrefragable defence admitted in the most bluidie inquisitionnes and sunaget barbares And his first meitting was purget be ye said Mr. Jo'n Nisbet his preiucator in respect of his surpryse and iust feir quibulk in law and conscience "non solum potest sed debet cadere in constantem virum," *Decretalibus de iis qui metus causa cap. 4.* Requires not necessarillie a present act of violence bot is defynet in law "instantis vel futuri periculi causa metus trepidatio" L. 1. ff. quod metus causa As is at lenth evinct in our former ans'r and in the present caice flour redoubted men arinet with pistolettis nicht haif quelled the maist constant and loyall man being alone And lastlie the pannell his last meitting is at lenth vindicat frone being wilfull as is cleir be our ans'ris And quhair it is repliyt that the assysors ar tyed to judge according to ye probatioun deductet befoir thame and not according to yair privat knawledge scing the act of parliament requyres that all probatioun sould be vset oppinlie and it sould conuell all justice gif judges vpon pretext of y'r privat knawledge sould be licenciat to judge at randome and that the testimonie of some of y'r awin number being vpon credit *et ex auditu* frone thaise that was teyrit with ye lyk guilt could nocht haif bene sufficient informations to the assyse scing Robert Collie and Robert Dempster fra quhorne they had knawledge was denuncet rebellis in the same l'rez productet be my lord aduocat to verifie Nathaniell Gordoun and Alex'r Laith yair rebelloun It is duplyt that quban ane fact is only proven be the verifications adductet and the qualitie purgeing the fact and cryme as that of necessary defence in slauchter is constant to assysours in y'r privat knawledge they sould judge according

to yair awin propper knowledge since thay ar attestet as witness and thair testimonie is compatible with the verifications adducet To affirme that gif a pairtie convict be the depositions of wites' of slauchter sould refer himself to ye knowledge of ane assyse viz. that he had committed it being furious or in his awin defence it war absurd to affirme that ane assyse may nocht acquitt vpon yair awin knowledge of these expiatorie qualiteis And the act of parliament requyreing probatioun to be deducet oppinlie dishables not assyours to nitnes thair knowledge quhan thay ar incloset bot prorydes only that all informateris to ye assyse adducet be yair pairteis sould be deducet publictie *Item* the testimonie of the assyors albeit *super auditu* my't haif ane guid and warantable informative be the assyors conscience quha ar not tyed to extraneous probatioun And ar probatioun yameselfis and the rebellious of Dempster and Collie quihilk my't haue randered yair testimonie suspicious was not vrget to ye first assyse be my lord aduocat and ye dispute be ye pannell his pro'r heires that they war vnsuspect men and than war not brandit to the pannellis knowledge and ye'rez than producet befor thame huir na sic thing And quhair as James Gordoun his videntifulnes is aggravat in respect he joynt with thame of ye house it is at lenth answerit befor and q'r as it is vrget that ane servand of the house being schote furth my't haue bene directit be James Gordoun to aduerteis the cuntry It is duplyt that being detenit w'tin he could not haif penetrat the dur to geve directioun And Colliesman his fait can nocht be imputed to James Gordoun and q'r it is replyt that "nulum fuit signum violencie et resistencie et quod coactio non liberat nisi denunciatio sequatur" It is ans'rit that in law nocht onlie viz. quihilkis relative to resistance Bot "Justus metus excusat quod metus causa" quihilk is not only "ob presens periculum sed futurum" And the instance of blak mail in the paying q'of pairteis albeit violencet ar excuset is nocht considerable becaus the payeris of blak mail maketh aue illicet and voluntar fractioun with rebellis quhair as they may schelter thame selfis frome yair violence be a retreat in the cuntry And implore the protection of the king and counsell and thair is great oddis betnix a present surpnyseing and imminent violence and a voluntar lig with rebellis and a suffering of thame to reave herrie and oppress thair nichtbor's with yair knowledge and in thair sight w'thout resistance or contradictioun as the act of parliament anent blak mail beiris and payeris of blak mail ar lyable as supplicaris of rebellis be ane bas' tribute In respect q'r of it is evident that the dittay is nawayis relevant nochtwithstanding of the replyis maid be the lord aduocat and the qualitie wittinglie without wilfullie cannot impoirt a cryme specialie seing wittinglie is hot anes mentionat in ye actis of parliament viz. the act of king Ja. the 5 par. 7 in anno 1540 Quhair it is joynet with the wordis recept defend supplie mantean or

due fauouris, and not with intercommoning in the actes prohibeitting intercommoning q'lk requyres wilfulnes and intention be ye words presume to take vpoun hand, as is alreddie schawin And the act of parliament of king James the first his third p'liament quihilk is the ground of all the rest of the actis against receptoris and manteineris of rebellis beires that na man sall recept or mantean rebellis wilfullie and makis no mentioun of wittinglie And y'foir seing "posteriores leges ad priores pertinent vbi agitur de interpretatione" ff. de legibus L. 28. The foirsaid act of necessite most interpret all the subsequent actis of that nature in a sen's consonant with the common law and reason.

The Justice c'tinewis this dyet to ye morne the 19 instantis and ordanis the pannell to find caution for y' reentrie vnder the panes sp'eit in ye former actis set down heir-anent.

The cautioneris foirsaidis fund be ye pannell in the last act being persohnallie pr'nt becaus cautioneris for ye pannellis re-entrie the said xix of December instant vnder ye panes foirsaidis.

The persones of assyse warnit *apud acta* vnder ye panes foirsaidis q'vpoue my lord aduocat askit instrumetis.

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio de Ed'r decimo nono Decembris 1685, Per Magros' Alexandrum Coluile et Jacobum Robertson Justiciariorum deputatos.

Continewit to the saxt of July nixt 1686.

Intran.

Alexander Irwing, of Lenturk.

Alexander Banerman, of Elsik.

Alexander Abercrombie, of Birkinboig.

Hector Abercrombie, of Fetterneir.

Alexander Keith, of Duffus.

William Seatoun, of Scheathyn.

John Ogilvie, of Glassache.

George Gordoun, of Tilliechowdie.

George Gordoun, of Newtown.

Mr. Mathow Lummsiden, burges of Aberdene.

James Seatoun, burges yair.

Charles Stevin Litster, burges yair.

Dilait of ye error committit be thame in the temerarius and wilfull acquitting of James Gordoun of ye wilfull and witting intercommoning with the rebellis c'tenit in his dittay.

Persewar.—Sir Thomas Hope of Craighall, knyght, his ma'ties aduocat.

Prolocutors in Defence.—Mr. James Baird, Mr. Nisbet, Mr. Thomas Nicolson younger.

July 6. The justice with advyse of ye assessors and of consent of ye persewar continewis this matter to the first Wednesday of July nixt cum being the saxt day of ye said moneth and ordanit the pannell to find caution for yair re-entrie and comperance that day in the tolbut of Edinburgh in the ho'r of caus to vnderly the law for the cryme foirsaid ilk persons

vnder pane of ane thousand merkis for obedience qu'of Compeirit James Cheane of Arnage quha. become sou'tie for ye entrie of the said Alex. Irwing of Lenturk Alex. Abercrombie of Birkinboig Williame Seatoun of Scheathyn and Mr. Mathew Lummsiden—Lykas William Gordoun of Tulloche compeirand personallie become souertie for ye entrie of Alexander Banerman of Elsieck—Compeirit lykwayis Alex. Abercrombie of Birkinboig and become souertie for the entrie of ye said Hector Abercrombie of Fetter-neir—Compeirit in lyk manner George Gordoun of Tulliechowdie and become souertie for entrie of the said Alexander Keyth of Duffus—Lykas ye said Alexander Keyth of Duffus become souertie for entrie of ye said George Gordoun of Tulliechowdie And siclyk the said Alexander Banerman of Elsieck become souertie of ye said Charles Stevin And lykwayis compeirit personallie Johnne Gordoun of Inner-markie and become souertie for entrie of ye said George Gordoun of Newton And last compeirit John Seatoun baxter burges of Edinburgh and become souertie for entrie of ye said James Seatone burges of Aberdeen The day foirsaid vnder ye pane aboue spe'it Quhar'pone my lord aduocat askit instrumentis.

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio Burgi de Edinburgh sexto Julii, 1636. Per Mag'ros Alexandrum Coluile et Jacobum Robertoun Justiciarios deputatos.

Assyse of error continewit to Fryday ye viii. Julii.

Intran'

*Alexander Irwing, of Lenturk.
Alexander Banerman, of Elsieck.
Alexander Abercrombie, of Birkinboig.
George Bruce, saidler burges of A'b'd.
Hector Abercrombie, of Fetter-neir.
Alexander Keith, of Duffus.
Wm. Seatoun, of Scheathin.
James Seatoun, burges of Ab'd'.
Charles Stevin Litster, y'r.
Mr. Mathew Lummsiden.
George Gordoun, of Tulliechowdie.
John Ogilvie, of Glasniche.*

Dilaitit of the error comittit be thame in the partiall and wilfull clyngeing of James Gordoun, sone to George Gordoun of Logyaltoun.

Persewar.—Sir Thomas Hoip of Craighall kny't baronet his ma'ties aduocat.

The justice with aduyce of his lo' assesso'rs continewis interloquitor vpon the allidgances duplyis and triplyis and ans'ris maid y'r'to in this proces of befor to Friday next and ordanis the cau'rs fund of befor to stand for the defenderis vnder the paine contentit in the former act.

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio de Edinburgh octavo Julij 1636 per Ma'gros Alexandrum Coluile et Jacobum Robertoun.

Intran'

Assyse of Error c'tenewit to ye xv instantis.

*Alexander Irwing, of Lenturk.
Alexander Banerman, of Elsieck.
Alexander Abercrombie, of Birkinboig.
Hector Abercrombie, of Fetter neir.
James Seatoun, burges of Aberdeen.
George Bruce, saidler burges y'r.
George Gordoun, of Tulliechowdie.
John Ogilvie, of Glasnac.
Alexander Keyth, of Duffus.
William Seatoun, of Schethyn.
Charles Stevin Litster, burges of Aberdeen.
Mr. Mathew Lummsiden, burges y'r.*

Dilaitit of ye error comittit be thame in ye temerarious clangeing of James Gordoun sone to George Gordoun of Logyaltoun.

Persewar.—Sir Thomas Hope of Craighall kny't baronet his ma'ties aduocat.

Prolo'rs in Defence.—Mr. James Baird—Mr. Thomas Nicolsoun younger.

The Justice continewis interloquitor to ye systene of this instant moneth of July And ordanis ye pannellis cautioneris to stand obleit for yair entrie yat day vnder ye panes c'tenit in ye former actis.

CURIA JUSTICIARIE, S. D. N. Regis tenta in pretorio de Edinburgh decimo quinto Julij 1636 Per Mag'ros Alexandrum Coluile de Blair et Jacobum Robertoun advocatum Justiciarios deputatos dict. S. D. N. Regis.

Intran' [as before.]

Error c'tinewit to ye xxii Februar.

Dilaitit of ye temerarious and wilfull error comittit be thame in clangeing of James Gordoun sone to George Gordoun of Logyaltoun of ye cryme c'tenit in his dittay.

Persewar.—Sir Thomas Hoip of Craighall kny't baronet his ma'teis aduocat.

Prolo'rs in defence.—Mr. James Baird Mr. Thomas Nicolsone younger.

The pannell takis instrumentis of yair entrie and protestis for yair cautioneris releiff.

The Justice continewis interloquitor zit as of befor to the xxii day of Februar nix to cum And ordanis the pannellis former cautioneris fund be thame of befor viz. vpose ye 19 day of December last 1635 to stand obleit for ye re-entrie ye said xxii day of Feb'r nix to cum vnder ye panes spe'it in ye said act And declaires that ye compeirance of John Ogilvie of Glasnac and James Seatoun in name of ye rest of ye pannell that day sall be admittit, &c.

CONSA JUSTICIARE S. D. N. Regis tenta in pretorio de Edinb' r xxii Februarii 1687 Per Mag'rum Alexandrum Coluie de Blair Justiciarium deputatum.

Contraire the Assyso's of Error continewit to the xxii Junii nixt.

Anent ye criminall dyet and pronouncing of interloquitor y'intill vpon the alleadgances and ans'ris maid in ye action and caus persewit be his maiesteis aduocat for his heines intrés aganis Alexander Irwing of Lenturk Alexander Abercrombie of Birkinboig William Seatoun of Scheathya and Mr. Mathow Lummsiden burges of Aberdeen Alexander Banerman of Elsik Hector Abercrombie of Fetter-neir Alexander Key't of Duffus George Gordoun of Tillechowdie Chairles Stevin George Gordoun of Newtown George Bruce saidler burges of Aberdeen and James Seatone burges y' Fer ye alleudit error committit be thame in acquitting and clangeing of James Gordoun sone to George Gordoun of Logyaltoun of ye cryme. c'tenit in his dittay they being suorne and admittit vpon his assyse as ye summond and dittay of yr' wilfull error y' anent in the self proportis Quhilk interloquitor and pronouncing y'of was vpon the xv day of July last 1636 continewit be ye justice to thir day And caution funds be ye saidis persones defenderis for ye entrie and compeirance this day and place to ye effect and vnder ye panes speit iu ye act maid yr' vpon compeirit judicialle sir Thomas Hope his maiesteis aduocat for his heines intrés as persewar on the ane p't and on ye vther p't the saidis persones defenderis being oftymes callit to haif compeirit personalle and enterit thameselfis vpon pannel as thay that fand caution for yr re-entrie and compeiret this day and place to ye effect aboute written, compeirit Mr. Robert Patrie wryter in name of ye baill defenderis aboute writin And product ane act of ye lordis of secret counsall daitit at Edinburgh the saxt day of December last by past ordaning and commanding his maiesteis justice clerk and y'r deputtia to continew ye said dyet to ye tuentie tua day of Junii nixt to cum of ye q'lk act of counsell the tenor followis :

“ At Edinburgh the saxt day of December zeir of God 1 m. vic. threttie sax yeires anent the supplicatioun presentit to ye lordis of secret counsall be Alexander Irwing of Lenturk for himself and in name of ye remanent gentilmén who war summond vpon the assyse of error concerning James Gordoun makand mentioun That quhair it is nocht vnknawin to the saidis lordis quhat great and heaveie trouble and expens' the supplicantes hes sustenit besyde the neglect of yair adoes at home by yair lang attendance vpon that proces And how at last efter mony continuationes it was continewit to ye tuentie tua day of Februar now approaching q'lk is ane deid tyme And so vnseasonable for travelling frome ye northe heir that it will be vnpossible for the supplicantis to keip that dyet in respect of the

sensene of the zeir q'lk is ever most vnseasonable at that tyme And the far distance of the place being aboute four score myles fraim this burgh the way being so deip and foule with tao ferreyis and ane number of watteris and montanes interiected As all travelling at that tyme will be at that tyme almost impossible and the ait seid begynnes at that same tyme and seasons the neglecting q'of will vndoe the maist part of ye supplicantis and seing thay haif nevir schwyned yr' tryell but evir offered yameselfis y'vnto in ane legall forme and maner allowable be the lawis of this kingdome humblye desyreing y'foir ye saidis lordis to gine command for present proces or vtherways to prorogat the said dyet till the tuentie tua day of Junii nixt lyke as at maire lenth is contentit in the said supplicatioun Quhilk being red hard and considerit be the saidis lordis and thay weil advysed y'with the lordis of secret counsall ordanis and commandis his ma'teis justice justice clerk and yair deputtis to continew the criminall dyet aboute writin till the tuentie tua day of Junii nixt and to dispence with the saidis supplicantis thair compeirance vpon the said xxii day of Februar Thay finding new caution conforme to ordur quhair anent thir presentes call be to thame ane warrand And the saidis lordis declaires that sall no prorogatioun be afurwards grantit in this matter ordaning in ye meane thame his ma'teis justice and his deputtis with the lord heigh thesaurer of this kingdome and remanent assesso'rs to his maiesteis justice to peruse and consider ye proces And to geve furth yair interloquitor thairanent—Extractum de libris actorum secreti consilii S. D. N. Regis per me Jacobum Prymrois clericum eiusdem sub meis signo et subscriptione manualibus.

“ Sic Subscribitur, JACOBUS PRYMROIS.”

According to the quhilk act and ordinance of secret counsall the said Mr. Robert Patrie in name of ye persones defenderis aboute writin desyret that the dyet aboute mentioned appoyntit to this day maycht be continewit be ye justice to ye said xxii day of Junii nixt The justice for obedience of ye said act of counsall and ordinance speit y'intill continewis this dyet with all pronouncing of interloquitor in the premissis to ye said tuentie tua day of Junii nixt to cum and ordanit caution to be fund for ye defenderis aboute speit that yai and ilk ane of thame sall compeir befor his maiesties justice and his deputtes in ye tolbuth of Edinburgh the said xxii of Junii nixt to cum in ye houre of caus to heir interloquitor pronuncet in the premissis and to vnderlye the law for the error aboute writin vnder the panes specifiet in ye former actis maid in this proces Compeirit yairefter ye persones respectives following viz. the said Mr. Robert Patrie wryter and become caution for ye saidis Alexander Irwing of Lenturk and Mr. Mathow Lummsiden yair entrie and compeirance ye saidis day and place to ye effect and vnder the pane aboute expremitt Compeirit also Mr. James Clayne wryter as

cautioner for Wm. Lentoun of Scheathyn and George Gordoun of Tillichowdie and oblaist him to enter ay'er of thame ye saidis day and place to ye effect and vnder ye pane foirsaid And siclyk compeirit Mr. John Abercrombie wryter and become souertie for ye entrie of Alexander Abercrombie of Birkinboig And Hector Abercrombie of Fetterneir compeirit in lyk maner James Keyth writer and become cautioner for the entrie of Alexander Keith of Duffus And siclyk compeirit Alexander — saidler burges of Aberdene quha be his band product be Mr. John Pape zounger aduocat his pro'r daitit ye xi of Febr' instant become souertie for ye entrie of George Bruce saidler And Mr. Robert Vdnie of Lammingtoun compeirand be his obligatioun product be himself daitit the tuentie day of Februar instant, become caution for ye entrie of the said Charles Stevin Litster the saidis day and place in the hours of caus to ye effect for ye causis and vnder ye panis aboue expremit.

CURIA JUSTICIARIE S. D. N. Regis tenta in Pretorio Burgi de Edinburgh, vigesimo secundo Junii 1637. Per Mag'rurum Alexandrum Coluille et Mag'rurum Jacobum Robertoun Justiciarios deputatos.

Intran'

Continewit to ye 28th of Junii instant.

Alexander Irwing, of Lenturk.
Mr. Mathew Lumisdail, burges of Aberdene.
William Seatoun, of Schitline.
Alexander Abercrombie, of Birkinboig.
Hector Abercrombie, of Fetterneir.
Alexander Keith, of Duffus.
James Seatoun, burges of Aberdene.

Dilaitit of the error comittit be yame in elyngeing of James Gordoun sone to George Gordoun of Logyaltoun for ye recepting of ye rebellis callit the light horsmen specifit in his dittay.

Persewar.—Sir Thomas Hoip of Craighall knyght baronet his Ma'teis aduocat.

Prelocutor in defence.—Mr. Thomas Nicolson younger.

The justices with advice of his ma'teis aduocat continewit the interloquitor vpoun the alledgances and answeris maid in this proces to Wednesday next the tuentie aucht instantis the personis vpoun pannell ilk ane cautioner for vytheyair reentrie that day vnder ye paines specifit in ye former act.

Intran' eodem 28 Junii 1637.

Assyse of Error Dessertit be warrant of ye lerdis of secreit counsall.

Alexander Irwing, of Lenturk.
Mr. Mathew Lumisden, burges of Aberdene.
James Seatoun, burges yair.
Alexander Abercrombie, of Birkinboig.
Hector Abercrombie, of Fetterneir.
William Seatoun, of Scheathyn.

Dilaitit of ye error comittit be thame in ye

wrangus acquitting and clangeing of James Gordoun sone to George Gordoun of Logyaltoun of ye wilfull recepting of ye rebellis callit the licht horsmen and intercommuning with thame contrair ye actis of parliament.

Persewar.—Sir Thomas Hoip of Craighall knyght baronet his maiesties aduocat.

The persones on pannell askit instrumentis of ye entrie and compeirance and protestis for ye cautioneris releif.

The Justice be warrant of ye lordis of secreit counsall conforme to y' lordshipis act and ordinance insert yairin of ye dait xxvii day of Junii instant Desertis ye dyett and hail criminall proces led and deducet in yis matter anent ye error *simpliciter* Quhairvpone the pannell askit instrumentis off ye ql'k act of counsall the tennour followis :

Apud Edinburgh vigesimo septimo Junii 1m. vic. xxxvii.—The lordis of secreit counsall having hard his maiesties justice justice clerk and justice deputis, and the assessors appointed to them be the saidis lordis for advyseing the proces led and deducet at the instance of his maiesties aduocat aganis Alexander Irwing of Lenturk and vtheris gentilmen who war criminallie convened for ane assyse of error And having considerit the opinioun and judgement of the said justice and assysors foirsaidis tuicheing the relevancie of the lybell, and of the exceptiones and answeiris maid y'rto in behalf of the pannell And being weil advyset yairwith the saidis lordis being lothe to dye further in this bussines ordains his maiesties justice justice clerk and justice deputtis to desert the dyet appointed to ye said laird of Lenturk and vtheris mentionet in the criminall P'rez and nocht to proceed ony farder thairin Dischairgeing heirby the justice clerk and his deputtis of all directing of ony P'rez at ye instance of his maiesties aduocat againes the saidis personis vpoun this ground and caus in tyme they receive ourdour thairanent be a publict delivverance from the tabill quhairanent and the hail premissis, the extract of this be to the said justice justice clerk and thair deputtis a sufficient warrant—Extractum de libris actorum secreti consilii S. D. N. Regis per me Magistrum Gilbertum Prymrois clericum eiusdem sub meis signo et subscriptione manualibus.

Sic Subscribitur, M G. PRYMOSE.

[Although this CASE of ASSYSE of ERROR is not, under the apparent abolition of that process, likely to form a precedent for future proceedings, it seemed to me to be on several accounts a very curious document of Scots legal antiquities. I have endeavoured exactly to exhibit the strange orthography (if I may so say) of the Record, not only as to the vernacular language, but also in the authorities mentioned and passages cited of foreign authors. As to the incorrectness of the ancient Scots Records of Justiciary, see a Note in vol. 10, p. 881, of this Collection.]

329. Proceedings against CHARLES Earl of LAUDERDALE,* RICHARD Lord MAITLAND his Son, and others, for Official Malversations respecting the Royal Mint of Scotland: 34 and 35 CHARLES II. A. D. 1682—1683. [Now first printed from the Privy Council Books at Edinburgh.]

THE following Narrative and Reflections concerning this Case, which occur in 1 Fountain-hall's Decisions, throw much light upon it :

November 3, 1681.

"A commission came down from his Majesty to examine the accounts of the treasury, how the King's public money hath been spent, and employed these several years bygone.—This was principally levelled against Halton Treasurer-Depute, because the most of these who were named auditors of their compts, were none of his friends.

* He was brother to the duke of Lauderdale. See his Case, vol. 6, p. 1025. Lord Halton appears to have actively co-operated in the mal-administration of affairs in Scotland under his brother the duke, as is set forth in the following two articles published in the Collection of State Tracts from the year 1660 to the year 1685, published in 1692:

"*Some particular Matters of Fact relating to the Administration of Affairs in Scotland under the Duke of Lauderdale. Humbly offered to your Majesty's Consideration, in Obedience to your Royal Commands.*

"1. The duke of Lauderdale did grossly misrepresent to your majesty the condition of the western countries, as if they had been in a state of rebellion, though there had never been any opposition made to your majesty's authority, nor any resistance offered to your forces, nor to the execution of the laws. But he purposing to abuse your majesty, that so he might carry on his sinistrous designs by your authority, advised your majesty to raise an army against your peaceable subjects; at least did frame a letter, which he sent to your majesty to be signed by your royal hand to that effect; which being sent down to your council, orders were thereupon given out for raising an army of eight or nine thousand men, the greatest part whereof were Highlanders; and notwithstanding that, to avert threatening, the nobility and gentry of that country did send to Edinburgh, and for the security of the peace did offer to engage, that whatsoever should be sent to put the laws in execution, should meet with no affront; and that they would become hostages for their safety: yet this army was marched and led into a peaceable country, and did take free quarters according to their com-

May 8, 1682.

"A commission having come down for trying the State of the Coinage and Mint, to duke Hamilton, Perth, Tweddale, Athol, Southesk, the Chancellor, Register, general major Drummond, Gordonston, Balie Baird, &c. all enemies to Halton, general, and to sir John Falconer, master of the Mint; they proceeded, while Halton was yet at London, to take cognition by the declarations upon oath of all the members and officers in the Mint; and it is said sir John Falconer in hopes to liberate himself, at least on promises that it should extenuate his

missions, and in most places levied great sums of money, under notion of dry quarters, and did plunder and rob your subjects; of which no redress could be obtained, though complaints were frequently made: all which were expressly contrary to the laws of the kingdom.

"2. In their quarters it was apparent that regard was only had to the duke's private animosities; for the greatest part of those places that were most quartered on and destroyed, had not been guilty of the field conventicles complained of, and many of the places that were most guilty were spared upon private considerations.

"3. The subjects at that time were required to subscribe an exorbitant and illegal bond, which was impossible to be performed by them; that they, their wives and children and servants should live orderly according to law, not go to conventicles, or entertain vagrant preachers, with several other particulars; by which bond, those that signed it were made liable for every man's fault that lived upon their ground.

"4. Your majesty's subjects were charged with laborrows, denounced rebels; and captions were issued out for seizing their persons upon their refusing to sign the aforesaid bond; and the nobility and gentry there who have ever been faithful to your majesty, and had appeared in arms for suppressing the last rebellion, were disarmed upon oath. A Proclamation was also issued, forbidding them upon great penalty to keep any horses above four pounds ten groats price.

"5. The nobility and gentry of the shire of Ayre were also indicted at the instance of your majesty's advocate of very high crimes and misdemeanors: whereof some did import treason. These indictments were delivered them in the evening, to be answered by them

own guilt, did go great lengths to load Halton with misdemeanours and malversations, by inverting the king's part of the emoluments of the Scots Mint to his own private gain. 2. In

the next morning upon oath: and when they did demand two or three days time to consider of their indictments, and crave the benefit of lawyers to advise with in matters of so high concernment; and also excepted to their being put to swear against themselves in matters that were capital, which was contrary to all law and justice; those their desires were rejected, though the like had never been done to the greatest malefactor in the kingdom. And it was told them, they must either swear instantly, or they would repute them guilty and proceed accordingly.

"6. The noblemen and gentlemen knowing themselves innocent of all that had been surmised against them, did purge themselves by oath of all the particulars that were objected to them, and were thereupon acquitted. And though the committee of the council used the severest manner of enquiry to discover any seditious or treasonable designs, which were pretended as the grounds of leading in that army into these countries; yet nothing could ever be proved: so false was that suggestion concerning a rebellion then designed that was offered to your majesty, and prevailed with you for sending the aforementioned letter.

"7. The oppressions and quarterings still continued. The noblemen and gentlemen of those countries went to Edinburgh to present to your council the heavy pressure that they and their people lay under, and were ready to offer to them all that in law or reason could be required of them for securing the peace. The council did immediately upon their appearing there, set forth a proclamation requiring them to depart the town within three days upon all highest pains: and when the duke of Hamilton did petition for leave to stay two or three days longer for some very urgent affairs, that was refused him.

"8. When some persons of quality had declared to the duke of Lauderdale that they would go to represent their condition to your majesty, if they could not have justice from your ministers; for preventing that, a proclamation was set forth, forbidding all the subjects to depart the kingdom without license; that so your majesty might not be acquainted with the said condition of your subjects from making their application to your majesty, no less contrary to your majesty's true interest (who must always be the refuge of his people) than to the natural right of the subject.

"The former particulars relate to the invasion of the rights of great numbers of your subjects all at once. What follow, have indeed only fallen on some single persons; yet are such, that your whole people apprehend they may be all upon the slightest occasions brought under the like mischiefs.

"1. The council hath upon many occa-

making the fineness below the standard. 3. In coining 17,000 stoves of copper money, beyond the quantity contained in his Majesty's two warrants for the copper journeys: all

sions proceeded to a new kind of punishment; of declaring men incapable of all public trust; concerning which your majesty may remember what complaints the said duke made, when during the earl of Middleton's administration, he himself was put under, and incapacitated by an act of parliament. The words of his paper against the earl of Middleton are [incapacitating] was to whip with scorpions, a punishment to rob men of their honour, and to lay a lasting stain upon them and their posterity. And if this was complained of, when done by the highest court of parliament, your majesty may easily conclude, it cannot be done in any lower court. But yet notwithstanding it is become of late years an ordinary sentence in council, when the least complaints are brought against any, with whom the duke of Lauderdale and his brother are offended.

"Instances of this are:

"The declaring thirteen worthy citizens of Edinburgh incapable of public trust, against whom no complaint was ever made to this day, as your majesty will perceive by a paper more fully concerning that affair. The true cause of it was, that those men being in the magistracy, that duke and his brother could not get a vast bribe from them out of the towns-money, which was afterwards obtained when they were removed.

"The provost of Glasgow, Aberdeen and Jedburgh were put under the same sentence, for signing a letter to your majesty in the convention of the boroughs with the rest of that body, which letter was advised by him who is now your majesty's advocate, as that which had nothing in it which could bring them under any guilt; and yet those three were singled out of the whole number, and incapacitated, besides an high fine and long imprisonment, as to your majesty will more fully appear by another paper.

"Sir Patrick Holme, of Polworth, being sent by the shire of Berwick to complain of some illegal proceedings, and to obtain a legal remedy to them, which he did only in the common form of law, was also declared incapable of public trust, besides many months imprisonment.

"The provost of Linlithgo being complained of for not furnishing some of your forces with baggage horses, was called before the council, and because he said they were not bound in law to furnish horses in such manner, he was immediately declared incapable of public trust, and was both fined and imprisoned.

"There are also fifty of the town of St. Johnstons incapacitated upon a very slight pretence, so that it's very impossible for them to find a sufficient number of citizens for the magistracy of that town.

which struck as much, if not more, against himself as master, than against Halton; yet he presumed his openness and ingenuity would procure him favour. When Halton came from London

“ 2. Your subjects are sometimes upon slight, and sometimes upon no grounds imprisoned, and often kept prisoners many months and years, nothing being objected to them, and are required to enter themselves prisoners; which is contrary to law. It was in the former article expressed, that many of these persons declared incapable of public trust, did also suffer imprisonment; and besides these instances, lieutenant general Drummond (whose eminent loyalty and great services are well known to your majesty) was required to enter himself prisoner in the castle of Dunbarton, where he was kept one year and a half; and was made a close prisoner for nine months of that time, and yet nothing was ever objected to him to this day to justify that usage.

“ The lord Cardross was for his ladies keeping two conventicles in her own house (at which he was not present) fined 110*l.* and hath now been kept prisoner four years in the castle of Edinburg, where he still remains; although he hath often petitioned for his liberty; and sir Patrick Holme hath been now a second time almost one year, and nothing is yet laid to his charge.

“ Besides these illegal imprisonments, the officers of your majesties forces frequently carry warrants with them for apprehending persons that are under no legal censure, nor have been so much as cited to appear; which hath put many of your subjects under great fears, especially upon what was done in council three years ago: captain Carstairs (a man now well enough known to your majesty) did intrap one Kirkton, an outed minister, into his chamber at Edinburgh, and did violently abuse him; and designed to have extorted some money from him: the noise of this coming to the ears of one Bailey, brother-in-law to the said Kirkton, he came to the house and hearing him cry Murder, murler, forced open the chamber door, where he found his brother-in-law and the captain grappling; the captain pretended to have a warrant against Kirkton and Baily desired him to shew it, and promised, that all obedience should be given to it: But the captain refusing to do it, Kirkton was rescued. This was only delivering a man from the hands of a robber, which nature obligeth all men to do; especially when joyned with so near a relation. The captain complained of this to the council, and the lord Hatton with others were appointed to examine the witnesses: and when it was brought before the council, the duke of Hamilton, earls of Merton, Dumfrize and Kinkarden, the lord Cochen and sir Archibald Primrose, then Lord Register, desired, that the report of the examination might be read; but that not serving their ends, was denied. And thereupon those lords delivered their opinion, that sithence

in the beginning of July, they proceeded very summarily with him, and urged him to depones as the rest had doue; he refused, seeing no man is bound *jurare in propriam turpitudinem*

Carstares did not shew any warrant, nor was cloathed with any public character, it was no opposing of your majesty's authority in Baily, so to rescue the said Kirkton; yet Baily was for this fined in 6,000 marks, and kept long a prisoner.

“ Those lords were upon that so represented to your majesty, that by the duke of Lauderdale's procurement, they were turned out of the council, and all command of the militia. And it can be made appear, that the captain had at that time no warrant at all against Kirkton, but procured it after the violence committed: and it was ante-dated on design to serve a turn at that time. This manner of proceedings hath ever since put your subjects under sad apprehensions.

“ There is one particular further offered to your majesties consideration, concerning their way of using prisoners.

“ There were 14 men taken at a field conventicle, who without being legally convict of that or any other crimes, were secretly and in the night taken out of prison upon a warrant signed by the earle of Lynlythgo, and the lord Hatton and Collington, and were delivered to captain Maytland, who had been page to the duke of Lauderdale, but was then a French officer, and was making his levies in Scotland, and were carried over to the service of the French king in the year 1676.

“ 3. The council hath upon many occasions, proceeded to most unreasonablen and arbitrary fines, either for slight offences, or for offences where the fine is regulated by law, which they have never considered, when the persons were not acceptable to them: so the lord Cardross was fined in 1,111*l.* for his ladies keeping two conventicles in his house, and christning a child by an outed minister without his knowledge. The provost formerly mentioned, and Baily with many more were also fined without any regard to law.

“ The council hath at several times proceeded to the taking of gentlemen's dwelling-houses from them, and putting garrisons in them, which in time of peace is contrary to law. In the year 75, It was designed against twelve of your majesties subjects, and was put in execution in the houses of the earl of Calendar, the lord Cardrosse, the lady Lumsden, &c. and was again attempted in the year 78, the houses belonging to the leirds of Cosnock, Blogan, and Rowal, and were possessed by souldiers, and declared garrisons. Nor did it rest there, but orders were sent from the council, requiring the countries about those houses, to furnish them for the souldiers use, and to supply them with necessaries, much contrary to law. It was against this, that sir Patrick Holme came to desire a remedy; and common justice being denied him, he used a legal

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where the case may be criminal, nor to accuse himself; but he gave in a representation of the State of the Mint; they refused him a hearing, or a sight of the process, or the testimonies of

protestation in the ordinary form of law, and was thereupon kept for many months a prisoner, and declared incapable of all publick trust, &c.

“ There is another particular, which because it is so odious, is unwillingly touched: yet it is necessary to inform your majesty about it; for thereby it will appear, that the duke of Lauderdale and his brother have in a most solemn manner broken the publick faith that was given in your majesties name.

“ One Mitchel being put in prison upon great suspicion of his having attempted to murder the late arch-bishop of St. Andrews, and there being no evidence against him, warrant was given by the duke of Lauderdale (then your majesties commissiонер) and your council to promise him his life if he would confess; whereupon he did confess, and yet some years after, that person, who indeed deserved many deaths, if there had been any other evidence against him, was, upon that confession, convicted of the crime, and the duke of Lauderdale and his brother being put to it by him, did swear, that they never gave or knew of any assurance of life given him: and when it was objected, that the promise was upon record in the council books, the duke of Lauderdale did in open court, where he was present only as a witness, and so ought to have been silent, threaten them, if they should proceed to the examination of that act of council, which, as he then said, might infer perjury on them that swore: and so did cut off the proof of that defence, which had been admitted by the court as good in law, and sufficient to save the prisoner, if proved. Thus was that man hanged upon that confession only, though the promise that drew it from him, doth appear upon record, and can be proved by good and clear evidence. And from this your majesty may judge, what credit may be given to such men.

“ We do not at present enlarge on other particulars though of great importance; such as monopolies, selling places of honors, turning men of known integrity out of their employments, to which they had a good and just right during their lives: the profits of one of the most considerable of these, being sequestered for some time, and applied for the dutchess of Lauderdale's use: the treating about, and receiving of great bribes by the duke and dutchess of Lauderdale, and the lord Hatton, and particularly from the towns of Edinborough, Aberdeen, Lynlithgo, and many others, for procuring from your majesty warrants for illegal impositions within these towns: the manifest and publick perverting of justice in the session: besides the most signal abuses of the mint and copper coin, that are most grievous to all your subjects. But the number of these is so great, and they will require so many wit-

nesses, to be brought hither for proving them, that we fear it would too much trouble your majesty now to examine them all: but your majesty shall have a full account of them afterwards.

“ One thing is humbly offered to your Majesty, as the root of these and many other oppressions, which is, that the method of governing that kingdom for several years hath been, That the lord Hatton and his adherents frame any letter that they desire from your Majesty to your council, and send it to the duke of Lauderdale, who returns it signed; and this is brought to the council: upon which if at any time a debate ariseth concerning the matter of that letter, as being against or with law; and when it is proposed, that a representation of that should be made to your Majesty; then the lord Hatton in his insolent way, calls to have it put to the question, as if it were a crime to have any warrant either debated or represented to your Majesty, which is procured by the duke of Lauderdale or himself; and this is echoed by his party, and by this means any further debating is stopped.

“ There are some other particulars relating to these heads, that are to be offered to your Majesty in other papers, which are not added here, lest your Majesty should now be troubled with too long a paper.”

“ *The Impeachment of The Duke and Dutches of Lauderdale, with their brother my Lord Hatton, presented to his Majesty by the City of Edinburgh. The matters of fact particularly relating to the town of Edinburgh, humbly offered for your Majesties information. Before the matter of fact be spoken to, it is necessary that your Majesty be informed of one thing upon which this whole affair hath moved.*

“ The city of Edinburgh had at several times given considerable sums of money to the duke of Lauderdale, amounting to upward of twelve thousand pounds sterling, and the lord Hatton, brother to the said duke, being enraged by that their former practice, and being arrived to great height and influence in the administration of your Majesties affairs in Scotland, did thereupon resolve on a design of getting money for himself also from them, as will appear to your Majesty by the following narration; but the magistrates at that time, and such others as had then the principal influence in the deministration of affairs in that town, being honest men of good fortunes, and not to be brought to comply with his design, he thought himself of all ways to vex them; and knowing they did much value the prosperity of the town, he thought that the first means for promoting that his design, was to have them threatened with removing your Majesties

probatio loaded him with. His objections against sir John Falconer's deponing against him are, 1. *Inimicitia*. 2. He is *consciuis criminisq; socius*. 3. He depones to liberate

Publique Judicatures from that city to Sterlin, and perswaded his brother the duke of Lauderdale to move your Majesty to that purpose; but being disappointed of that project by your Majesties royal wisdom, your Majesty looking upon it as if it were to declare to the world that you were jealous of so great a part of that your ancient kingdom, he bethought himself of new ways to accomplish his design, for which he judged nothing so proper and effectual, as to disturb them in the choice of their magistrates and town-counsel; and by all means possible to get some of his own chusing, fit for his own ends, brought in to the administration of the affairs of that city. In order to which, being impatient of any longer delay, he laid hold of what follows, being the first occasion that offered, though a very frivolous one.

"At Michaelmas 1674, The said city of Edinburgh being to go about the election of their magistrates for the ensuing year, there was procured a letter from your majesty to your privy counsel commanding them to forbid the magistrates and town counsel to proceed in their elections, but to continue the magistrates that then were, till your Majesty's further pleasure should be known; the reason suggested to your majesty for it, was taken from this circumstance, That the election ought to be made upon the Tuesday after Michaelmas, and (it happening this year that Michaelmas fell to be on a Tuesday) they were resolved to proceed to their elections upon Michaelmas-day.

"Though this was a very small matter, and upon very good and prudent considerations resolved, as will afterward appear, yet was it represented to your majesty as a factious design, and an innovation of dangerous consequence, tending to create and maintain faction in that city, contrary to your majesties service. Your majesties foresaid letter being intimated to the magistrates and town counsel, they did immediately give exact obedience to the same.

"They did also represent to your majesties privy council, the rights that they had for chusing their own magistrates, which had been granted to them by many of your majesties royal ancestors, and confirmed by many parliaments; by virtue of which they humbly conceived they ought to be suffered to proceed in their elections.

"They did also represent to your majesties privy council, the reasons which had moved them to resolve of making their elections on the said Tuesday, being Michaelmas day, which in short were, that by their constitution they were obliged upon the Friday before Michaelmas, to make the list out of which the Magistrates are to be chosen; after the doing of which there is a surcease and vacation of all

and exoner himself. 4. To elicit this deposition from him against Hatton, there were promises of personal favours to himself; which is the highest degree of bribery and corruption.

ordinary courts of judicature within the town, and the whole time is spent by the common people and tradesmen of the town, in rioting and drinking, until the elections be finished, which in this case would have been twelve days; which they did in prudence think they ought to shorten, not conceiving it contrary in the least to the established rules of their election.

"On these things they did humbly crave your Majesties privy council would be pleased to represent to your majesty, that thereby they might be freed from the suspicion of any factious design, with which they were charged by the said letter.

"This being, through the influence of the lord Hatton, refused by the privy council, they dispatched a gentleman to the duke of Lauderdale, with letters and instructions full of respect and submission to his grace.

"The gentleman at his first arrival found duke Lauderdale very kind, and was made believe he should be quickly dispatched with answers according to his desire; but some delays having fallen in, the duke of Lauderdale fell likewise upon thoughts of getting money from the town upon this occasion, and therefore pretending still more and more kindness to the said gentleman; he did first by some insinuations let fall to him his expectation, and at last flatly asked him if he had not brought a heavy purse with him; which when he understood he was not to expect, he changed his method, and grew harsher; and having detained him five or six weeks, he the said duke entered into consultation with his old friend sir Andrew Ramsey, how to order the affair. By his advice he did write a letter and sent proposals to the said town, That they should give bond and security, that the townsmen should live regularly as to all matters ecclesiastical in the largest extent, as the same is determined by the late acts of parliament; and to keep the town free of all sorts of tumults, either of man or woman: Judging that this was impossible for them to perform, and unfavourable to attempt, and that therefore it would oblige them to make offers of money.

"This letter was all the gentleman could obtain, and having gone back to Scotland and delivered it to the magistrates, they were so far from being carried in the design, that they were glad of that opportunity to witness their zeal to serve your majesty; for they did very heartily comply with what was proposed concerning the bonds and securities demanded; and immediately urged that your majesties officers and lawyers would cause draw such bonds and securities as was fit for the purpose; offering good security for great sums of money for the performance. But this not being

Then he gave in his defences why he was not liable. 1. Because he had exonerations and discharges from his Majesty. 2. Because he was pardoned and included in the general act

the thing truly intended, their ready compliance with it, set them yet farther off from their desired settlement, and served for no other intent than to cause the lord Hatton to double his diligence to find out new means to mollest them; to which end it was alledged by him, that they had of old forfeited their privileges and liberties by some great misdemeanour, and that therefore they had not right to chuse their own magistrates, for which he would needs have their records searched; and accordingly they themselves, with their books and records, were in a most unusual manner brought often before him and his friends, though they had not authority for it, to the great disturbance and annoyance of the citizens, by being abundantly jealous of their liberties, were with no small care kept within the due bounds of moderation, by the loyalty and vigilancy of their magistrates.

"They the said magistrates, finding how they were used at home by the lord Hatton, did again apply themselves to the duke of Lauderdale, both by private letters to the duke of Lauderdale and his duchess, from some of the most eminent of them, full of assurances of particular respect to their graces, and by a public letter to him from the whole town council, offering bond and security to him in the terms proposed by his fore-mentioned letter. But this could not prevail, it being objected to them, from some frivolous things the lord Hatton had scraped together out of their old records, that they had lost their liberties, and that the right of chusing their magistrates did no more belong to them.

"Then did they produce their charters, and did convincingly clear all mistakes, and evidently make appear that the right of chusing their own magistrates did remain to them undoubtedly and intirely.

"All these things being cleared and open, they expected to be restored to the free exercise of their election in their accustomed manner. They were still kept off with delays, until the lord Hatton, in pursuance of his design, fell a practising with some few of themselves, who did undertake with his assistance, to get such elected as were fit for his ends; whereupon he writes to his brother the duke of Lauderdale to move your majesty for a letter, and accordingly the letter was procured from your majesty upon the 7th of August 1675; wherein your majesty, after reciting your former orders in that affair, did declare, that you were well informed of their obedience to your commands, and of their dutiful carriage in your concerns; and therefore ordair ed them, the next day after the receipt of the letter, to convene their whole council, after their accustomed manner, and out of the lists already made, to elect the lord provost, bailies, and other officers.

of indemnity past in 1679.—This was resented as a declining of them; and they repelled them *hoc loco*, seeing they could not hinder them to enquire and proceed *per modum inquisi-*

"According to which letter, they did the next day proceed to their elections, but instead of those whom the lord Hatton expected they would have chosen, they did elect some men of good fortunes and integrity, not at all fit for his purpose (these who had engaged to him not being men of that esteem or influence as to be able to carry his design as they had undertaken).

"The new magistrates and council, did immediately after their election, acquaint your majesty with their procedure, and gave your majesty great acknowledgments and assurances of their care of the peace of the town, and of your majesty's service in all matters, both ecclesiastical and civil.

"The said lord Hatton being exceedingly enraged at this act of theirs, did by advice of sir George Mackynge, now your majesty's advocate, send a letter to the duke of Lauderdale; to which he procured your majesty's hand upon the 25th of the same month of August, by which your majesty ordered your privy council to intimate to the magistrates and town council, that it was your royal pleasure that there should be turned out of the town council and declared incapable of any public trust in the said town, twelve of the most eminent of the same men with whom your majesty had expressed yourself so well pleased, and whose actings your majesty had approved, by your letter of the 7th of the said month.

"This was accordingly executed by the privy council, without ever so much as calling before them the said persons, though great crimes were laid to their charge, as being factious persons, and misrepresenting your majesty's proceedings, without mentioning any particular fact of theirs which could import any such crime. And though they be threatened by the said letter to be pursued for these great crimes, and that your majesty's advocate is commanded in the same to assist against them, yet could they never obtain from your majesty's privy council that they should be tried for these things, though by a petition signed by the whole twelve, they did represent the great prejudice they sustained both in their reputation and trade, by being kept under such threatenings; and therefore did humbly offer themselves to the strictest and severest trial. To which petition they never received any answer.

"To make appear to your majesty that these things were done for private and sinister designs, and not upon account of the ill affectedness, or factious dispositions of the men, as was pretended: your majesty is humbly prayed to take notice of these particulars following:

"First, There are three of the most considerable of these very persons who had been

tionis. Then being somewhat diffident of the King's advocate, on the pretence he was sometimes out of town, they conjoined sir Patrick Home advocate to him, who was a sworn enemy

charged with so great crimes, admitted since that time, by bribing the duchess of Lauderdale, into a trust in your majesty's affairs in Scotland, more eminent and considerable than any trust the town of Edinburgh can confer, viz. the paying off your majesty's forces, and bringing in your majesty's excise.

"Secondly, No sooner were these twelve men turned out of the town council, but after many great and essential informalities (with the recital of which it is needless to trouble your majesty) they elected for magistrates men of no reputation, either for parts, estate, or honesty: and though these bonds and securities, which had been demanded from the others, and consented to by them, was formerly pretended to be of great importance for your majesty's service, yet they were not so much as once demanded, either by the duke of Lauderdale, or the lord Hatton, from these men who were now chosen.

"Thirdly, These new magistrates were not long in their seats, when off comes the mask, and the true design of getting money appears. For by an act of the town council there is about 5,000*l.* sterling disposed on amongst their nameless friends, which were the duke of Lauderdale, the lord Hatton, and some other of their friends. A great sum to be got from that city, considering that the duke of Lauderdale had got before that about 12,000*l.* sterling from them.

"The duchess of Lauderdale, did also since that time endeavour to get more money from them, and did with great wrath threaten the magistrates in plain terms, for not giving her a present, notwithstanding all the good she said she had done for them, reckoning the favours your majesty hath at any time been pleased to bestow upon them, as done by herself.

"Thus hath that poor town been abused, and doth now lie, having magistrates without either conduct or courage, in a time when the disorders of that nation doth require persons to be employed there of eminent fidelity and capacity to serve your majesty."

In the "Account of Scotland's Grievances by reason of the duke of Lauderdale's Ministry" inserted in the "State Tracts" (privately printed in the reign of king Charles the Second, and published in the year 1692) p. 200, is the following passage:

"The fourth grievance is, the 'corruption of our Mint and coinage,' whereof my lord Hatton the duke of Lauderdale's brother is general: this complaint was grounded in the universal clamour of the people; who have found for these several years, that the intrinsic value of our silver coin is sensibly diminished, both in its weight and fineness; to the nation's great dammage and dishonour; besides it doth

to Halton: this dissatisfied the advocate. They frame the report without allowing Halton any sight of it; and sent Perth and the Register with it to London; and though the duke of

add to the resentment, that the same lord Hatton having some years ago filled the countrey with a light copper coin, without observing either the quantity or the weight and value prescribed, was nevertheless by my lord Lauderdale's means secured and indemnified: it is also remembered, that the better to enable him to this deprivation of our silver coin, the Dutch dollars, called the Leggdollars, usually imported by our merchants, and current amongst us at 58*d.* per piece, were cryed down by the duke of Lauderdale's procurement to 36*d.* for no better reason known, than that they might be brought in for bullion to the Mint-house for his brother's benefit: but though, that all demanded in parliament about this matter was, that there might be an examination of the coin appointed, and an account given of the bullion which hath been long neglected; yet the memorial given in for that effect was not regarded: it is true that my lord Lauderdale after the December adjournment of the parliament, did move his majesty to write a letter, and thereupon bring the business to a tryal before the council; but in a manner so partial, that I profess it is my admiration how any man should have a confidence strong enough for such practices. The subject of our complaint is the stock of our current mony, and all appointed by his majesties letter, is that there should be a tryal made upon the essay boxe, and the pieces therein contained; I shall not say, that the oversight thereof hath been altogether in my lord Hatton's own power and trust these years bypast, yet so certain it is, that this box or pixis hath been of late so greatly neglected, that one of my lords commissioners friends appointed for the examen, could not forbear to say, 'That they were met to see whether the officers of the Mint were as much fools as they were suspected to be knaves:' but notwithstanding this the tryal goes on, and moreover the pieces are not brought to the essay severally, but the whole (with what mixture of finer pieces coined and conveyed in on purpose to compense the baser who can tell?) is melted down together in one mass, and thereupon the essay made, and the report thereof with some small lingots sent up to the king; which proving (to be sure) according to the design of the contrivance, his majesty within these few days sends down a second letter to the council, signifying his satisfaction, and willing Hatton and the rest of the officers to be exonerated: but when this letter is read, it is opposed that the grievance of the Mint had been tabled in parliament, where the tryal should also be issued; that his majesties first letter did only order a tryal to be made of the essay boxe, which if either falsified or otherwise eluded, could not be a ground of release to the

York had promised to Halton that no determination should follow on it, till he were heard before his Majesty; yet a Scots Council is instantly called, who on reading the said report of the commission fly very high, as they had been tuned, (Halton not being yet gone up), and procure a letter from his Majesty depriving him of all his places. Halton, to prevent all hazard from the extremity of their malice, formed an ample remission of colonel Lockhart's and his brother the duke of Lauderdale's exoneration; but the duke of York said there was no present necessity for the passing of it by his Majesty.

August 31, 1682.

"At Privy Council, his Majesty's letter was read, against my lord Halton, and the other officers of the Mint, bearing, that he had considered the report of the commission named by him to try the case of his Scots Mint, with the advice of his Scots council at London, and found that they had malversed grossly in their trusts; and therefore suspended and deprived them all;

Mint officers so long as it was manifest, that almost the whole of the current coin is defective and debased; and lastly, there was offered a bagg of money lately received out of the Mint office, sealed with the officers seals, which they could not but still acknowledge, and it was desired that there might be a tryal made on the species therein contained. Notwithstanding all which, my lord commissioner and the plurality of the council proceed and vote an exoneration conform to his majesties last letter. Now is not this a noble way of redressing grievances, to purge the author and leave the thing untouched? Nay to make the greatest aggravation that can be of his failing, viz. The corrupting or frustrating of the chequer the best ground of his clearing, and all this contrary to the reclaiming evidence of almost as many witnesses as there are pieces of his majesties coin minted in Scotland; it being certain that amongst hundreds that have been tryed, very few have been reported to be standard."

And under the head of the eighth grievance, which is 'The mal-administration and profusion of his majesty's revenue' it is said "My lord Hatton hath got in donatives to the value of 15,300*l.* sterling; and hath moreover yearly 1,196*l.* sterling: beside he hath the profits of the Mint and Bullion which last did render in king James's time, 1,000 marks Scots weekly, amounting yearly to 2,500*l.* sterling."

It may here be noticed that Roger North gives high praise to the duke of Lauderdale for his government of Scotland. "It is well known" says he, "that by the prudent conduct of the duke of Lauderdale, Scotland was in a posture not only of safety but (if needed) of giving assistance to the king. No harm could get in or out there while he was commissioner." Examen. part 1. chap. 2. sect. 90.

and put a stop to the coinage till farther order; and ordained his advocate to insist against them either criminally or civilly before the council, as he saw just. And now since the King has ordered them to be pursued before the session for restitution, of what they had intromitted with more than they had warrant to coin, Halton, on the news of his brother the duke's death, parted that same day for London that his sentence was intimate; and a committee was named to go and close up the Mint-house, and seal all.

November 7, 1682.

"At Privy Council, his Majesty's Letter was read ament the officers of the Mint, bearing, that where he had formerly ordered them to be pursued for their malversations before the Privy Council, or the justice court; now he had altered his purpose, and ordained his treasurer and advocate, to insist against them, before the lords of session; and in regard John Falconer, late warden of the Mint, was omitted in the former order; and yet from the report, it appeared, that he was as guilty of malversations as the rest; therefore he ordained him also to be pursued with the rest.—John Falconer, on the news of it, died suddenly of *crebre-cœur* at his house of Phaedo. And on the 24th November 1682, the treasurer caused put up the gift of his moveable escheat, upon a report of his having been *felo de se*, and gifted it to Hugh Wallace, for his Majesty's behoof.

January 19, 20, &c. 1683.

His majesty's advocate against the earl of Lauderdale, late general of the Mint, sir John Falconer warden, and the officers of the Mint. To the first article of the summons, bearing, that they were liable to refund the quantities of the copper coin wherein they had exceeded the warrants his majesty had given them for coining turners. Answered, They could not be made accountable for this excess, because his majesty not only by two exonerations produced, but also by the general indemnity in August 1679, had discharged and pardoned the same; neither could the exonerations be termed subreptitious or obreptitious; and that in law all such writes and rescripts do tacitely bear this clause in their bosom, 'si preces veritate nitantur;' for though the doctors make a great noise of the efficacy of that condition, 'si preces veritate nitantur,' yet they teach us that any of the following clauses take it off, viz. either to insert in the write the words 'motu proprio, ex certa scientia, ex animo deliberato,' or 'ex plenitudine potestatis;' or even the *geminatio actuum* do evacuate it; and with us, by our style and practice, the docquetting of writes to pass his majesty's hand, the passing them through many offices and seals, the presenting them to sundry courts and judicatures, the recording them in their books or registers, the obtaining declarators upon some of them, are far greater checks and controuls, and more fit to purge and obviate fraud or obreption than these above mentioned inventions

of the doctors; and as this proves the validity of the exonerations, so the indemnity certainly cuts off this pursuit: For amnesties of all things are most sacred, being land marks and securities 'non tangenda, non movenda,' unless he would desire with that bloody Roman emperor Caligula, that the whole people of Rome might have but one neck 'ut unico ictu percuteret.'—See the 67th act of parliament 1663, and act 10. Parliament 1662; which are acts of indemnity, and except from it the meddlers with the public money: But this oblivion and indemnity in 1679, is more ample than any of them, being drawn in the most ample and comprehensive terms deviseable as mainly designed to secure Lauderdale and his party for the highland army that they sent in upon the west in 1678, &c. and the pardoning the rebels who rose at Bothwell-bridge was but a sham and colour to draw on the other. The lords in Fairy and Ker's case 13th Feb. 1680, and in Mr. John Kincaid's 1st March 1682, found that the said indemnity did not defend against restitution, and the civil effects of damage and interest, but only from punishment, and that the 'vindicta privata et publica' discharged by the indemnity differed from restitution, because the *vindicta privata* was the confiscation of goods, and the *publica* was the inflicting the personal punishment; which two were only remitted by the act of indemnity, but nowise simple restitution. A discharge that sir Walter Seton had got from the king of his intromissions as collector, did not hinder but the exchequer forced him to compt again; and none will affirm that this indemnity in 1679 would defend the treasurer, treasurer depute, or sir William Sharp as cash-keeper from accounting. The lords immediately removing the parties, advised this point without written informations, and repelled the defences, and found the superplus of the coinage more than was contained in the king's warrants, (though it could not be instructed from the exchequer rolls, or otherwise, that ever that superplus was accounted for in the exchequer, or looked upon as any part of his majesty's revenue,) did not belong to the officers of the Mint, but to the king; and that the exonerations in their narrative were but relative to the warrants, and so could not exceed them and that the act of indemnity did not extend to this process, which was not penal but *rei vindictio* only, and for restitution. The words of the interlocutor were: 'The lords repel the first alledgeance founded on the act of parliament of James 2. and find it extends to the Mint; as also repel that alledgeance bearing that the profit of the copper is a perquisite of the defender's office, as a part of the fee, in regard the king's advocate insists only as to the profits of the quantity of copper coined more than was contained in the warrants; and repel that alledgeance founded on the exonerations, and find these exonerations extend no farther than to the quantity allowed by the warrants, and not to the malver-

tion in relation to the quantity exceeded; and repel the alledgeance founded on the act of indemnity, and find the same cannot secure the defenders from being liable in restitution, 'in quantum locupletiores facti sunt' by the profits of the quantity of copper coined more than was contained in the warrants.'

"The king's advocate represented to the lords, that how far they had made profit and benefit could not be the rule; for what if it were not extant, but spent in living high, or in playing and drinking? whereon the lords expunged these words out of the interlocutor, 'in quantum sunt locupletati;' and made them simply liable, whether 'in rem' or not.

"Though this debate and its interlocutors took up several days from the 19th to 20th January, yet it will not be fit to divide it, but to give it here altogether.

"It being further alledged for Lauderdale, and the other officers of the Mint, that no more of the copper coin could be adjudged to belong to the king but a twelfth part, (which is the proportion he has of the silver) and this also with deduction of the price of the copper, the expence of working, and the fees of the workmen; which being defalked, the free excrement and superplus profits, over and above all these abatements, will be inconsiderable. Notwithstanding whereof, the lords found the whole copper coin made and stamped, more than the officers of the Mint had his majesty's warrant for, did intirely and *in solidum* belong to the king, without any allowance to be deduced for the metal matter or form. 1mo. Because they esteemed it 'rei furtiva et peculatus pecunie publice.'—But if so, then if not penal, yet it was 'mixta, partim rei persecutoria, et partem pœnalis;' and so in part pardoned by the indemnity: Which forced them to run to a second ground, viz. that it was the king's *jure specificationis*; the king's stamp and character being impressed on it, he became 'dominus totius tam materie quam forme.' But here *materia* being *potentior* and predominant, 'et reducibilis ad priorem formam, dominus materie' became *dominus totius*. 2do. By the Roman law in that 'modus acquirendi per specificationem,' the owner of the matter had an action competent 'ad estimationem et pretium sue materie consequendum.' This swerving from the prior interlocutor, and not being intelligible in law; the next day, the cause being again called, it was insisted for the earl of Lauderdale, that he behooved to have deduction of the matter of the copper; for *esto*, the induction of the king's irons and impress transmitted the property to the king, so that it might not *de jure* in prejudice of the king be reduced 'ad priorem materiam,' whereby 'praestantia imaginis et potentia formae trahebat ad se materiam hic' yet it was always with the burden of the price and value of the matter, seeing 'rex non debet locupletari ex jactura alterius;' and the indemnity pardoned the criminal de-

linguency in it. The king's advocate being beaten from the notion of specification, ran to that of accession, that it became the king's *jure accessionis*, like a board yielding to the picture drawn thereupon; and he being in *dolo* to apply the king's irons to more metal than he had warrant for, he ought not to reap benefit 'ex suo delicto.' Replied, That decision of Justinian's was singular 'in pictura ob prae-stantiam artis,' and yet it still went cum 'onere pretii tubulae.' Yes, by the Roman law, 'etiam in persona praedonum benignius visum est deducere impensus tam utiles quam necessarias' and he only lost the *voluptuarias*; l. l. 38. and 39, D. de haered. petit. l. 22. c. de rei vindicat. —The lords being straitened, altered downright their former interlocutor, and found the officers of the Mint ought to have allowance of all copper stamped by them before the act of indemnity 1679, (for after serious consideration they durst not make too bold with the loosening of this act of indemnity,) but found whatever copper was coined since the said indemnity was the king's *confiscationis jure*, without any defalcations; and ordained the officers of the Mint to condescend on the quantity prior to the act of indemnity; whereby they designed to elicit a confession that they had exceeded their allowance, which would hold them in a probation; as also to prove the value of the pound or ston of copper; and would not allow them the current prices it was then giving, but only what it really stood them; and for the expences in coining, allowed them to defalk whatever wages they were yet resting to the artificers and workmen, but refused to allow them what they had already paid. To the prejudices arising from a superfetation of copper coin marked by *me alibi*, we may add, I. That foreign commodities cannot be bought with it; for strangers will not take it. II. Being small and carelessly kept, the half of it in few years comes to be lost, so that the half of the turners coined since the king come in, if they were called in now, are not extant. III. the *bawbies* or sixpenny pieces force and tempt us to buy more of small commodities than we need, and they who formerly bought a turner's worth of pins, spice, &c. are now in a manner forced to buy a bawbie's worth, the turners having become very scarce. Amongst the Venetians, I find it is death to apply one penny of public money to their own private stock or use.

"Then the king's advocate insisted on the second article of the libel anent his refounding the profit of the bullion; and though Lauderdale alledged, that the master of the Mint, by his office, gift and bond of caution, was liable for that; yet the Lords found the general of the Mint, as comptroller of all the rest, liable for his negligence and omission, equally and principally to the king, and not only subsidiariè, reserving him his relief, as accords, against the master; and for this there was cited, 8th act of parliament 1669, anent the bullion, mentioning the general, as well as the master; and

l. 9. § 8. D. 'de admin. rer. ad civ. pert.' where 'curator tenetur nomine collegae si prohibere eum poterat.' Yet I find, l. l. 11. 12, and 13. D. *ad municipal*, make him only liable 'ordine discussionis prius servato'; and all cautioners for administrators have the privilege not to be conveyed in *prima instantia*, till the principal be first discussed. This interlocutor finding the general liable for all the malversations and omissions of the inferior officers of the Mint, was grumbled at. for they had not their commissions from him, but from the king; and he could be in no worse case than a tutor or overseer, 'qui tenentur tantum de dolo lato et Levi culpa.' Yet I find *mandatarii*, among whom also are contained those who have commission for offices and trusts, are liable in law *pro culpa levisima*; but that must only be understood of their own, but not of the *culpa levisima* of these under him, though they be answerable also, *ex quasi delicto*, for their faults: And on this rule, masters are made liable for their tenants and servants, and sheriffs for their deputies; see Statuta Davidis 2. cap. 30. parents and husbands for their children and wives in some cases. The general is made liable for the inferior officers malversations, not only because his knowledge, connivance and command is presumed, but he should have impeded and discharged them to have coined more than was in the king's warrants, and two copper journeymen, and should have revealed and not concealed it and divided the spoil betwixt them; and 'per tit. c. de falsa moneta, etiam consocii puniuntur.' As to the point of relief among themselves, if they be all proven to be delinquents and in *dolo*, and to have malversed in their trusts; this ought to cut off all relief, as is elegantly decided in the case of tutors, l. 1. § 14. D. de tut. et rat. distrab. and if one of them be dead, (as here in Mr. Jaques Falconer's case, who is conveyed for his father the warden malversations,) such actions 'de dolo quae factum puniunt, non dantur contra haeredes,' where it was not established, or litis contested against the defunct in his own lifetime. Yet I find capers, though decerned to restore ships or goods unwarrantably seized on and taken, have relief among themselves, though all decerned in *solidum*.

"Then the lords, after the debate, advised the seventh point or article of the libel, about the profit they had upon the exaltation and crying up of the merks in 1680; and found for all bullion, silver coined or uncoined, they had lying beside them in the Mint-house at the time of that act, there was due to the king, the eight pennies they gained on each merk of it, and ordained them to restore it; and for what bullion they got in since the said act of council, seeing they gave the merchant fifty five shillings and ten pennies, for each ounce of bullion they brought in formerly, and fifty eight shillings eight pennies since that act, that they can be accountable to the king for no more but the sum of _____ unless the king's advocate can prove they compounded with the

merchants, for less than the said fifty eight shillings and eight pennies, and whatever they got down of it, find it belongs to the king.

“Then the king’s advocate and sir Patrick Home insisted on the eighth article, anent the melting down of the dollars and ducatoons, to make bullion of; the lords, notwithstanding act 249, parliament 1597, (which they found in desuetude as to the current coin, though foreign,) found, that the melting down of dollars, was unwarrantable *ab initio*; and of ducatoons, only since they were cried up, as passing money in 1680; and that the king must have the same profit on them, as he would have had of imported bullion, viz. the 12th part; though Lauderdale alleged it was only the 30th part: And found, that not only the coin bearing the king’s impress, but that no foreign coin that passes as current, ought to be melted down at all.

“Then after debate on the articles anent the remedies of fines and weight, the lords found a grain above and below the standard of weight, and two grains above and below eleven penny fine, as the standard of the intrinsic value and fineness, were allowed only as a latitude to work on, where casually they fell above or under, because it would be an insuperable labour to be precise; but found them culpable, the king’s advocate proving they wrought on the remedies beneath standard, as a constant advantage, so that when they came to trone, or weigh a merk piece, if they found it exact weight, they would pare, raze, or scrape a grain off it, till it came to the remead; which fraudulent practice being known, the lords found them liable for restitution of these grains; and finding the article of John Falconer’s bond to Alexander Maitland, was made up of thir remeads, they resolved to confiscate the said sum to the king.

“The king’s advocate thereafter insisted against Mr. James Falconer, that he, as successor ‘titulo lucrativo post contractum debiti,’ must be liable for his father’s part; which he did urge not only for all deeds done by his father as warden, before he gave him a disposition to his estate, but even for all deeds after, because he being intrusted by the king with his money, he became debtor from his first entry to his office, and any disposition he afterwards makes of his estate to his eldest son, must be repute fraudulent, and ought not to prejudice the king’s tacit hypothec, till he be paid of his own, which is agreable to law, and the Fisk’s privilege; vide Anton. Peregrin. lib. 6, de jure Fisci, c. 6. Yet this will exceedingly marr the commerce with such public officers, and is on the matter an interdicting of them.

“Then he insisted for the annualrents of thir sums arising from their delinquency, and *mora* in not paying what they were owing, and therefore annualrent was due here, *nomine damni et interess*, though there were neither law nor paction to infer annualrent; and this is also another privilege of the fisk; vide Peregrin. *ibid.* But there are more principal sums

decerned already, than all the general and the other officers of the Mint, their estates are able to pay, if this rigor be not somewhat remitted by his majesty; so that they need not insist for annualrents, unless it be for example, and to strike terror in others; and it is impossible that any can manage the Mint-office, if they be so strictly searched. But it will be the earl of Stafford’s case, who was found guilty, yet with one breath it was declared it should not be drawn into a preparative. However, let this case of Halton’s stand as a great instance and beacon of the flux and inconstancy of all sublunary greatness.

“The Lords, upon the 2nd of February, 1683, found my lord Maitland, then newly come home from London, liable as conjunct-general with his father, though he never meddled; because he ought to have supervised, and his being adjoined when he was so young as not to be able to officiate, was alienarly his father’s fault. In this case, Halton’s too much debate and opposition, made the decret the stronger; for, they thought to have hooked him in the debate, whether sir John Falconer was bound to relieve him, and to have freed sir John; but Halton smelling it, declared he had no process of relief against him as yet, and would not insist now. It may be doubted, if the chancellor or other lords who were on the first commission, and had already given their opinion there against him, might not in law, have been declined as prejudicate and pre-engaged. Some of the votes against Halton, were carried only by the extraordinary Lords.—*Queritur*, If such interlocutors may not be suspected as not altogether consonant to law, the extraordinary Lords not being bred lawyers? in this process, the Lords followed the ancient summar way of advising processes, by debating and discussing the relevancy of one point, before they heard another, and removing the parties presently, without written informations, and giving them a distinct interlocutor on each of them.

“The Act of Litiscontestation in this Mint-cause being extracted, the Lords, on the 20th of February, 1683, appointed Castlehill, Boyn and Drumcairn, to receive the probation, and to peruse, and to prepare it to the whole Lords, and therein to take the help of lieutenant-general Drummond, Gordon of Gordonston, and Bailie Baird. This was thought odd, to adjoin assessors to the Lords; † but the matter

* Should be Stafford. See vol. 3. p. 1519.

† Mr. Hume (Commentaries on the Description and Punishment of Crimes, vol. 1, p. 41.) says: “The Justice Court began to recover from that state of depression into which it had fallen, and to aspire to the like independence in its proper department, which the other supreme judicatures maintained in theirs. The regulations of 1672, without expressly forbidding the appointment of assessors, had in their preamble alluded to the inconveniencies of that sort of interference. The commission too, of 1671, after investing the new court

was somewhat out of the road. This tedious process was at last advised by the Lords; and upon March 20, 1683, they found it proven by John Falconer, warden, his deposition, that there was 17,000 stone weight of copper coin, though there was only warrant for 10,000 stone, (yet it was objected, that John immediately retracted and amended his deposition, but they would not write it; and that he was only *testis singularis*, and that it was not taken *in judicio ordinario*, but *in summario* on the king's commission; but it was alleged, that he being a party, knew best what was coined;) and found, that Haiton had taken 600*l.* sterling, from sir John Falconer, to get sir John's account of bullion past and cleared; which they decreed him to pay back to the king as *caducum*, being a bribe, unless he condescend upon another cause of his giving him it: And found the sum they were all liable in to the king conjunctly, was 72,000*l.* sterling, for which they decreed them all *in solidum*."

May 10, 1683.

"This day there is a letter from his majesty read at privy council and exchequer, bearing the final sentence and determination he gave forth against the officers of the mint, viz. That whereas his advocate having obtained a decret against them before the lords of session for 72,000*l.* sterling, and be minding the eminent services he hath received from his late general of the mint, now earl of Lauderdale, therefore he mitigates the sentence against him, and finds him only liable in 20,000*l.* sterling for his part of it; whereof 16,000*l.* sterling the king gifts to his chancellor, and 4,000*l.* sterling to Graham of Claverhouse; with this declaration, that if Lauderdale and his son the lord justice-clerk shall dispoise the lands and lordship of

with all the powers and privileges which had belonged to the justice-general, justice clerk, and justice deputies of old, had proceeded to declare, 'quod antedicta curia justiciarie, prout per presentes est stabilita, est et erit nostra suprema curia justiciarie, et ordinarium criminale judicatorium;' and especially it had provided, 'quod nulla causa ad illud spectans abstrahatur ab eodem, nec adducatur ad quodvis aliud ordinarium judicatorium via advocacionis precognitionis, seu super quovis alio pretexto quocunque.' On the part of the privy council, therefore, some of the above-mentioned irregular interpositions, such as the naming of assessors, and the revival of the proceedings of court, were immediately discontinued; and most of the other abuses," [The privy council, however, named assessors to sit with the judge-admiral, in the noted trial of Green and others, for piracy and murder, in 1705] "though not at once laid aside, were practised however, after this time, with more reserve, and in a manner less offensive to the court at least, than formerly; and after the Revolution they came to be entirely disused."

Dundee and Dudhope (of which the king had gifted him the *ultimus heres*, ward, marriage and recognition 11 years ago) in favours of the chancellor, then he shall be free of the foresaid sum of 90,000*l.* sterling, providing he give real warrandice out of other lands, and against all the late earl of Dundee's creditors, or their consents; and that it contain all within two miles of Dundee; so that Glastory and Inner-kiething fall not under it; and that Claverhouse shall have power to redeem the house, yards and parks of Dudhope with the constabulary of Dundee and all its emoluments from the chancellor at 20 years purchase; (which some valued worth 30 years, because of the great dependence and superiority.) As to sir John Falconer late master, the king fined him in 4 years and a half's full rent of his whole estate both personal and real, besides the bullion in his hand.—He was made so easy, because they had privately forced him to give his brother David Falconer a bond of 9,000 merks.—And decreed James Falconer, the late warden's son, and Alexander Maitland the late counter-warden, in 6 years rents of their whole fortunes; though there was no passive titles proven against the first, and not so much as a decret against the second. This way was taken with thir two, because Mr. James's father having hanged himself, as was reported, his son refused to pay any composition for his escheat, shewing a right he had long prior to life rent and all, denuding his father, and much debt upon it: and it was to force the second to demit his place of manery. It was said, the fines of thir three last were given to the two Scots secretaries.—On reading of this letter, I found it likewise commanded the earl of Lauderdale to discharge any relief he claimed or had against sir John Falconer as master, or the

And in another place (1 Comment. cap. 1, pp. 3, 4.) after noticing that in Scotland, it was part of the king's prerogative formerly to judge in person if he pleased, he mentions, "That by statute 1681, cap. 13, the 3rd parliament of Charles 2nd, it was attempted to revive this principle, and carry it into practice." The statute was as follows, 'Act asserting his majesty's prerogative in point of jurisdiction. September 16th, 1681. The estates of parliament considering that all government and jurisdiction within this his majesties ancient kingdom of Scotland, does originally reside in his sacred majesty, his lawful heirs and successors: And although his majesty, and his royal predecessors, have bestowed offices and jurisdictions, upon several of his well deserving subjects, yet these are not privative of his jurisdiction, they do therefore, in a dutiful, and humble recognizance of his majesty's royal right and prerogative as to this point, declare, that notwithstanding of these jurisdictions and offices, his sacred majesty may by himself, or any commissioned by him, take cognizance and decision, of any cases or causes he pleases.'

other inferior officers of the mint. This was a miserable reverse of fortune upon my lord Lauderdale, for all his services, and a great document to all statesmen of the lubricity and instability of their offices: and it was no wonder to see the lords unwarrantable and illegal decreet restricted, they having decided *supra* some very odd and irregular points in it. In August 1683, the chancellor and Lauderdale agree; and he accepts of the half, viz. 8,000*l.* sterling; or 10,000*l.* Scots, and 20,000*l.* Scots farther when they shall be able, and whereon they gave him sir William Sharp, Cockburn, &c. cautioners; and having gotten an assignation to the chancellor's right, they offered to Claverhouse (who resented the chancellor's transacting for himself, and deserting him, and entering into friendship with Halton,) the house, yards and old park of Dudhope, with the constabulary of Dundee for 20 years purchase, as he was to have paid to the chancellor, in whose place they were come. And they being debtors alternative in 4,000*l.* sterling, or that offer, they elected this last; which he declined to accept."

July 4, 1683.

"An act is made anent the mint, closing it up, till the parliament sit to give it new regulations; and ordaining the Spanish Ryals of 14 drop weight to pass at 56 pence. Some merchants think this way of crying up and serving ourselves with foreign coin, is an easier way of furnishing the country; which custom Poland and some other places use; but it is not so creditable."

November 7, 1683.

"The earl of Lauderdale upon a bill to the lords gets a stop to the charge of horning given him by Claverhouse, the high-treasurer, and Hew Wallace cash-keeper on the decreet anent the mint, in regard he offered obedience to the king's final determination in May last, and so ought not to be charged for the whole 72,000*l.* sterling contained in the lords of sessions decreet.

December 13, 1683.

"There is a letter from the king to the chancellor, stopping the procedure against the earl of Lauderdale on the decreet anent the mint till the 15th of January next; and recommending to Claverhouse and him to agree about Dudhop and Dundee, and each of them to nominate two privy counsellors to endeavour an accommodation between them.

January 1, 1684.

"The juncto of the council met on Argyle's letters, and have got Gray of Crigie, and Mr. George Campbell to decypher them. They first touched the earl of Balcarhouse, as he who was touched with the hieroglyphic of D. and 43 above the head of the D. and of H. 75 —When the lady Argyle found her own son thus touched, she then said, that she now re-

membered that D. 43 was only a relative particle in the key between her husband and her, and so meant the L. M. [Lord Maitland] immediately mentioned before; which inferred against him that he was corresponding with and receiving letters from Argyle, a traitor. The juncto upon this sent for the earl of Lauderdale, and sent with him captain Graham, and sir William Paterson their clerk, to seal up all my lord Maitland, his son, (then at London) his papers, trunks and cabinets, till they should sight them.

January 24, 1684.

"Colonel Graham of Claverhouse insisting against the earl of Lauderdale, upon the king's letter, to dispoise to him the house yards and parks of Dudhope, with the constabulary of Dundee, he paying 20 years purchase for it to the chancellor, to which 20 years purchase Lauderdale on his transaction with the chancellor was assigned. It was alledged, Esto this were the king's cause, yet not being called within 48 hours after the returning of the process, he behoved to have 15 days advertisement, conform to the 16th act of par. 1672, ratifying the regulations; which he had not got. The lords repelled this, in regard the king's letter mentioned *supra* 13th December 1683, recommending to them to agree, was a *medium impedimentum*; and there was but 48 hours between the up-giving of the tryst and the calling, which satisfies the act of parliament. Then alledged, the sum of 4,000*l.* sterling of the Mint decreet being gifted to Claverhouse, the king was denuded, and it came to be in the case of a common donator, who had not the privilege of a summar calling, but behoved to abide the course of the roll. The lords find the letter made it still as if it were in the case of one of the king's own causes. After repelling thir dilators, then Claverhouse insisted that lord Lauderdale might either purge all the incumbrances that affected the house and yards, or else give him real warrandice out of his other estate: the lords delayed to answer to this; seeing the offer of absolute warrandice may satisfy; for by an inhibition served upon it, it may be made more effectual than real warrandice, which is restricted to a particular subject out of which it is given; whereas an inhibition stops the disposing upon any lands within these shires where it is served and execute.

February 23.

"Claverhouse's cause against the earl of Lauderdale, was called; and the Lords found they might advise it summarily without inrolling, it being a part of the king's cause; and that they cannot oblige sir John Maitland to consent to his father's disposition to Claverhouse; but ordain the clerk to mark on the process that he was cited; and find by the probation that the twenty years purchase of Dudhope, &c. comes to 6,000*l.* Scots; and on his paying thereof, ordain the disposition to be

delivered up to him before the 20th of March; betwixt and which time Lauderdale may obtain my lord Maitland and his lady's consent; otherwise ordain the decret to be extracted.

March 29.

"The king's remission to the earl of Lauderdale and his son came down; but a letter clogged it with two qualities; 1mo, That he should perfect his disposition to Claverhouse, 2do, That he should discharge his recourse of relief against sir John Falconer, and the other officers of the Mint; and bore peremptorily that thir should be performed within eight days after eight; and if they were delayed, (which his majesty would not believe,) then the remission not to be past the seals."

Much collateral litigation issued from this prosecution, as appears from passages in 1 Fountainhall, p. 337. 353. 360. 394. 469.

With respect to the sealing up of the papers on January 1st 1684, it may from lord Fountainhall's representation seem that Wodrow has not expressed himself with his ordinary exactness. His words are "I find an order from the Secret Committee to captain Patrick Graham and sir William Paterson to go and seal all the lord Maitland's papers in the late Lauderdale's lodgings. It seems a little before this that once great man the duke of Lauderdale died; and notwithstanding his bright parts and long favour with his master at length he fell into the utmost neglect and contempt: and now it seems the present managers resolve to canvass his papers." *History of the Sufferings of the Church of Scotland*, vol. 2, p. 451.

DECRET His Majesties Advocat against E. Lauderdale and officers of the Mint. D. D.

Att Edinburgh the 20th day of March 1m. 6 c. and eightie thrie yeeres aent the sumonds and actions raised and persewed before the lords of counsell and sessione at the instance of sir George M'Kenzie of Rosehaugh his ma'ties advocat for his highnes interest in the maitter hundr written against Charles earle of Lauderdale and Richard lord Maitland his son laite generall of hus ma'ties Mint sir John Falconer laite master thereof Alexander Maitland one of the wairdens thereof Mr John Falconer son and aire to the deceist John Falconer the other wairden his father at the least behaving himself as aire to him be intrromissione with his airship goods at least ex'er to him at least successor to him in his lands and heretadges 'titulo lucrativo post contractum de bitum' at the least universall intrromitter with his goods and gear And Airchbald Falconer laite counter wairden makand mentione that wher albeit by the lawes of all nationes and acts of parliament of this kingdome the cuneyng of black mony without warrand is discharged and

that his ma'tie since his happy restorations was pleased to allow six thousand stone of copper to be coyned at two severall limited tymes Yet notwithstanding the said Charles earle of Lauderdale and Richard lord Maitland laite generall of the Mint sir John Falconer laite master John Falconer and Alexander Maitland laite wairdens and Archbald Falconer laite counter warden did most wjustly and wnwarrantably under the pretence and shaddow of the said six thousand ston allowed to be coyned at two severall tymes did coyne above fourtie thousand ston of copper which was thertie four ston more then was allowed whereof twentie thousand stone darding the first copper jurnay and fourtie thousand stone darding the last copper jurnay to the great losse and prejudice of this ancient kingdome And they having usually coyned thertie six shillings out of every pound of copper of the said thertie four thousand ston that was coyned more now was allowed by his ma'ties warrands which did amount to the soume of nyn hundreth sixtyn nyn thousand and two hundred pounds for which the said Charles earle of Lauderdale and Richard lord Maitland as cheiff officers of the Mint who hade power to supervise and controll the other officers and punish them if they committed any fault who hade special trust from his ma'tie and als the oy' officers of the Mint 'singuli in solidum' ought to be lyable to his ma'tie with the a'rent of the severall soumes coyned at the severall jurnayes more then was allowed by the warrands from the tyme of the expyryng of the rex've jurneyes.

And also abeit his ma'tie and royall predecessors have alwayes hade a speciall caird to provyd buliwyne for the increasing and mantinance of the stock of coynadge of this kingdome and that it is expresly provydit by the act of parliament that the goods and marchadise imported by the marchands should pay soe many unce of bullione or oy'wayes pay twelve shilling Scots for every unce therof the generall and masters of the Mint by the marchants the soume of thertie thousand seven hundreth and twentie pounds yearly as the twelve shilling for every ounce of bullion with which they should have bought two hundred stons of bullione yearly which from Candlsmis 1m. vi c. and siventie which is the daite of the act of parliament by which marchants ware allowed to pay in to the Mint twelve shillings in place of every ounce to Lambas 1m. 6 c. eightie two being twelve yeares and one halfe amounts to the soume of three hundreth and eightie four thousand pounds And yet notwithstanding the laite generalls and masters have received the soume of three hundreth eightie four thousand pounds darding the fors'd twelve yeares and one halfe from the marchants as the twelve shilling in place of every ounce of bullion and should have employed the samin for buying of bullione y't they might have coyned the samen yet they have inverted the said twelve shilling from the use ffor which it was destinat and did not

employ it for buying of bullione but applyed it to ther own privat use And therfor they ought to be lyable to his ma'tie for the said twelve shilling payed in by the marchants in place of bullione extending to the said soume of three hundredth eightie four thousand pounds the yeirs above mentionat with the a'rent of the said thretie thousand seven hundredth and twentie pound they received yearly from the first terme the samen became due to his out ma'tie.

As also his ma'tie of his princly care for the good of his subjects increasing of money within this kingdome and for advancing his revenewes arrysing by the Mint did allow the generalls and master and officers of Mint the yearly a'rent of the soume of three thousand three hundredth thretie three pound six shilling eight pennies yearly as a stock for buying in of bullione frome tyme to tyme which might have bought twentie stons of bullione at every tyme which might have been coyned and exchanged in gold and mony twentie tymes in a yeare the profite therof arrysing to his ma'tie being eight thousand and six hundredth pounds in the year which for twentie one years by past since his ma'ties happy resturatiōne would have amount- ed to the soume of one hundredth and eightie thousand and six hundred pounds notwith- standing the generalls master and oy' officers of the Mint has not employed the stock of money soe that the cuntry has been extremely prejudged and his ma'tie defrauded of the benefite that would have arisen therby if the stock of mony had been employed and the bulyone imported coyned and exchanged so many tymes in the year as it ought to have been according to his ma'ties appointment and y'r for the general master and other officers of the Mint ought to be lyable to his ma'tie for the same with the a'rent of the said yearly profite from the first terme that the same becam due to his majestie.

As also albeit by severall lawes and acts of parliament the mony of this kingdome is ap- pointed to be of equal weight and finnes with the mony of England And y't his ma'tie haveing after the example of his royall predecessors for the advancement of the mony tred and com- merce between the two kingdomes* that the mo- ney coyned in both should be of a like weight and finnes and for that effect in the year 1m. vi c. sixtie two haveing caused frame an indented silver standert plate of sterling finnes and se- cured by his ma'ties seals as a part wherof was sent hither to Scotland as the rule wherby to make essayes of the fineness of silver in all tyme hereafter yet notwithstanding the mony of this kingdome since that tyme has been minted farr below the finnes of the standert plat and albeit the officers of the mint were only allow- ed to work upon the remedies in caico ca- sualitie that the same all over wnder and use oy' wayes yet notwithstanding they did not work upon but even below the remedies soe that the Scots coyne being two grains less then

the indented standert plate they wswallie work- ing upon the remedies of finnes and ther being two hundred stons of bullione y't was coyned yearly the profite arrysing to the officers of the Mint by the differance of the coyn from the finnes of the indented standert plate with the benefite of the remedies being twelve shil- ling upon the pound of silver will extend to the soume of one thousand nyn hundredth and twentie pounds yearly which from Candlsmis 1m. vi c. siventie years to Lambas 1m. vi c. eightie two year being twelve years and one halfe will extend to the soume of twentie four thousand pound for which the generalls master and other officers of the Mint ought to be lyable to his ma'tie *singuli in solidum* with the a'rent yearly after the first termes that the same became due.

As also albeit it be contrary to the na- ture of all mints that any silver thats coyned should pass the kings yrons without ane essey thereof first taken y't it may be found of finnes deliverable yet notwithstanding the half of the coyn of this kingdome wnder the pretence of silver called cluseheads sneips and scropes has been melted and printed without any essey therof taken soe that ther being two hundred stons of bullione coyned yearly and one half y'rof coyned without ane essey will extend to the soume of siventie six thousand and eight hundredth pounds yearly which from Candlsmis 1m. vi c. siventie to Lambas 1m. vi c. eightie two years being twelve years and one halfe extends to the soume of one hundred and sixtie thousand pounds which being coyned without ane essey as said is confiscat to his ma'ties use and the officers of the Mint are lyable to his ma'tie for the samine *singuli in solidum* with the a'rent therof yearly after the same becam due to his ma'tie.

And in lyke mauer albeit by the comon law and laws and acts of parliament of this king- dome It is expresly provydit that noe man should have different weights and that the wuers of false weights should be severly pu- nished and for the security of the weight of mony coyned in this kingdome his ma'tie have- ing alwayes a pyll of weights in the cunzie house with which the officers of the Mint ought to have received in the bullion with the dean of Guilds weights of Edinburgh which is four of the hundredth heavier then the kings weights soe that ther being one thousand and five hundred ston of bullione received by the general and master of the Mint from the mar- chands to be coyned for his ma'ties use these twentie one years bypast since his ma'ties happy resturatiōne will extend to the soume of fourtie thousand pounds for which they are lyable to his ma'tie *singuli in solidum* with the a'rent yearly frae the tyme the samen becam due.

And sicklyke the coyne of this kingdome being cryed up the profit of the exaltatiōne be- ing three shilling two pennies upon the ounce which is fourtie pound ten shilling upon the stone will be upon four hundredth stons which is

* So in the Original.

coynied for a year and ane half since the mony was cryed up will amount to the soume of sixteen thousand and two hundred pounds and the profit of two hundreth stons lying in the Mint the tyme of the exaltatione by the same rule will amount to the soume of eight thousand pounds for which they are lyable to his ma'tie with the a'rent yearly after the first terme the samin becam due. As also the yearly interest and profite arrysing by the bullione payed in to the generalls and Mint by the marchants and not coynied within due tyme seeng it appears by the books that ther was a'wayes three hundreth ston of bullion in ther hands yearly and not coynied for the space of sixteen years ever since the year 1m. vic. sextie six that they began to coyne being twentie thousand marks yearly will amount to the soume of two hundred and therteen thousand three hundreth thertie three pound six shilling eight pennies for which they are lyable 'singuli in solidum' to his ma'tie with the a'rent yearly after the first terme the samin becam due.

As also albeit by many laws and acts of parliament of this kingdome It is declared that in respect the silver and gold put in a fire to be made bullione to other new mony is diminished wested and destroyed in the translatione by the fire and procures great skeath and hurt of the king and his leidges. Therfor it is statued that nether silver nor gold that bears forme and print of coynie be any wayes melted or put in the fire by the kings coyniers without special licence of the king but all gold and silver that is coynied and hes print to be observed and holden hail amongst the kings leidges. As he ordained it to have course and the contraveeners of the law to be severly punished yet notwithstanding the generall master and other officers of the Mint hath melted down the number of ane hundred and fiftie thousand leg and rex dollers twentie thousand ducatdouns and other money by which a great part of the current mony of the kingdome hes been wested and destroyed to the great ruine of tred and impoverishing of the kingdome which ane hundred and fiftie thousand leg and rex dollers and twentie thousand dovcadouns and other mony that hes bein melted down these sixteen years bypast will amount to the soume of fyve hundred and fyve thousand pound for which the officers of the mint ought to be lyable to his ma'tie 'singuli in solidum'. As also the said Charles earle of Lauderdale did receive twice payment of three years sallarie as generall of the Mint being four thousand and nyn hundreth pounds viz. one out of the excyse of Edinburgh by a precept from his ma'tie and therfor did most wnjusly take payment from sir John Falconer laite master upon his ma'ties account of the lyke soume for the said three years sallarie and therfor ought to make payment to his ma'tie of the forsaid soume of four thousand and nyn hundreth pounds with the a'rent from the first terme after the said double payment.

As also albeit the common law and acts

of parliament of this ancient kingdom It is statute that if any judge or minister of the law take buds or brybs they shall lose ther honour fame and dignitie and be oy'wayes punished in ther persones fame and goods yet notwithstanding the said earle of Lauderdale ane of his ma'ties laite generalls of the Mint or thesaurer deput and ane of the commiss'rs of the thesaurie and exchequer who by his officers is obleidged to comptroll the master of the Mint his accounts be having a special trust and sallarie from his ma'tie for that effect yet did take from the master the soume of six hundreth pound sterling as a wider brybe to procure allowance and payment from the exchequer of his most wnjus and exorbitant accounts relating to the Mint and coyne preceeding the year 1m. vic. siventie four staiting his ma'tie debitor to him in fourtie thousand pound Scots albeit his ma'tie was not due to him a sixpence but one the contrar the master and other officers ware debtors to his ma'tie preceeding that tyme in great soumes of mony upon the grounds above mentiod. As also by the common law and laws of all nationes the illiciting and extorting of lands and soumes of mony especially by a superior officer from these in office wnder him is manifest and gross oppresione and severly punishable. Yet notwithstanding the generall of the Mint did vex and truble John Falconer the laite wairden to call him befor the privy counsell wules he would grant a band to Alexander Maitland counter wairden for the soume of twelve thousand marks upon the account of third of the remedies that ware allcadged to be due to him since his entrie to his office which remedies did truly belong to his ma'tie. Yet notwithstanding the wairden was necessitat to grant band for eliven thousand marks and grant ane discharge of a thousand marks which was due to him for his fees. And albeit the band was taken in Alexander Maitlands name yet it appears to have bein to the generalls behoff they having caused use diligence upon the band and put the wairden in prysone whill he was necessitat to compone and transact the same with the generalls for the soume of seven thousand marks which was employed and payed for ther use and behoove. And therfor the said Charles earle of Lauderdale Richard lord Maitland sir John Falconer Archbald Falconer Alexander Maitland and Mr. James Falconer as air to the s'd decessat John Falconer his father laite wairden at least behaveing himselfe as air to him by intromission with his airship goods at least ex'er to him at least successor to him in his lands and heritadges 'titulo lucrativo post con-tractum debitum' at the least wniversall intromitter with his goods and geir aught and should not only be decerned be decret of the saids lords of counsell and sessione 'singuli in solidum' to make payment to the high thesaurer thesaurer deput and Hugh Wallace his ma'ties cash keepere in his ma'ties name and for his use of the rex'ive soumes of mony rex'ive above written due by them to his

ma'tie for the causes rex'ive above mentioned and of the a'rents therof of all bygaines since the rex'ive termes above sett down that the same became due to his ma'tie as afors'd and yearly and termly in tyme coming durence the not payment therof But also they having comitted such manifest gross acts and malversations in relatione to the Mint and ther rex'ive officers they ought to be remitted to the lords of privy counsell or lords of justiciarie to be punished according to law in ther persones and goods to the terror of others to comitt and doe the lyke in tyme coming As is alleadged and anent the charge given to the said Charles earle of Lauderdale Richard lord Maitland his son generall of the Mint sir John Falconer Alexander Maitland and Mr. James Falconer son and aire to the said wuq'll John Falconer his ffather at least behaving himselfe as aire to him or oy'wayes representing him upon ane or oy' of the passive titles above sett down and Archbald Falconer defenders to have compeired befor the saids lords at ane certain day now bygainne to have heard and seen decret and sentence given and pronounced ag't them in mainer wnder written and therein mentioned as in the printt sumonds raised in the said maitter at more lenth is contained The s'd sir George M'kenzie his ma'ties advocat compeir and personally with sir Patrick Home advocat for his ma'ties interest and the said Charles earle of Lauderdale and the s'd Richard lord Maitland generalls of the mint two of the s'ds defenders abovenamed compeirand be sir George Lockhart sir John Dalrymple sir John Lauder Mr. Walter Pringle and Mr. Thomas Skeen advocats ther pro'rs who produced in presence of the saids lords ane gift and comissione granted by his ma'tie wnder his highnes great seall to and in ffavours of the s'd Charles Maitland of Hatton (now earle of Lauderdale) daitt the fourth day of December 1m. vi. c. sixtie years maiking constituting and ordaining the said Charles Maitland durence all the dayes of his lifytyme generall of his ma'ties Mint and office of coyning with all the honours digneties priviledgies pensions and casualeties therto belonging as the said comissione more fully bears with ane other gift and comissione granted be his ma'tie wnder his highnes great seall daitt the twentie third day of September 1m. vi. c. sixtie eight years ratiffieing the former gift and comissione and of new maiking constituting and ordaining the s'd Charles Maitland of Hatton now earle of Lauderdale and Richard Maitland his eldest lawfull son now lord Maitland and longest liver of them two during all the dayes of ther lifytyme generalls of his ma'ties Mint and office of coyning and to all the honours digneties and priviledges pensiones and casualeties thereto belonging together with ane extract furth of the books of privy counsell of ane band granted be David earle of Southesk James lord Carnegie George lord Forrester sir Alexander Carnegie of Balnamoon sir Alexander Falconer elder of Haikertoun And sir Alexander Falconer fiarr therof daitt

the fourth day of August and twentie sixt day of October 1m vi c. thretie seven years Wherby they are bound as cautioners and sovertie for Nicolas Bryat and John Falconer that the s'd Nicolas Bryat and John Falconer shall faithfullie and trewly exerce the office of masters of his ma'ties conzie house and shall loyallie performe the duty incumbent to ther charge also will in what may concerne his ma'ties interest at the good of the leidges And in speciall that they shall make faithfull payment and deliverance to the marchants inbringers of the bullione and forraigne coyne be exchange of the stocks given in to them by the s'ds marchants in his ma'ties coyne in maner and conforme to the tyme accustomed and sett down by the orders of the cunzie house as the s'd extract wnder the hand and subscriptione of sir Peter Waderburne clarke of the s'd privy counsell bearing the samen to be reg'rat in the books of privie counsell upon the tenth day of July 1m. vi. c. sixty two years more fully bears Together with ane act of parliament daitt the twelwth day of June 1m. vi. c. sixtie ano years ordering and commanding Charles Maitland of Hatton generall of his majesties Mint in Scotland and sir John Falconer maister of the cunzie house joynly and equally to coyne or cause be conzied in turners three thousand ston weight of good penther copper which was to be provyded and furnisht by the saids officers equally betwixt them without any mixtur of brass and the samen turners to be of the same extrinsick value the lastjurney of turners was viz. ane turner weighting ane drop ane halfe (four grains less) of troyes weight as the said act of parliament wnder the hand of sir Archibald Primrose clerk register bears together also with ane act of his ma'ties privy counsell daitt the twentie day of October 1m. vi. c. sixtie three years ordaining the two mark peices the one mark peices and the halfe mark peices to be coyned in maner therein specified viz. to pass in lightness through a milne to be cutted by cutters to be troned weighted and justed peice by peice and to be printed by peices that goes by swey and scrued and that the impressiōne of the said two mark peices one mark and halfe mark peices beare on the one syde his ma'ties face and effiges exprest in the poynses therein ment' And the superscriptione therein exprest and one the other syde the coat of armes of Scotland with ane escutcheon by itselſe in maner y'in specified and ordaining the two mark peices to be ten deniers therteen grains nynteen prouns and the weight of the mark peice of fyve denires six graines twentie ane prouns twelve seconds and the weight of the half markepeice to be twodenires fyfteen grains ten prounes eighteen seconds together with three graines of remedie upon each two malk peice also weill light as heavy with two graines of remedie upon each one mark peice and halfe mark peice als light as heavie the saids species of mony being alwayes troned weighted and justed peice by peice as afors'd And ordaining the saids species of

mony to be of ane exact finnes and according to the true standert of the kingdome which is eliven depires fyne out of the fire and two grains of remedie also weill above as wnder as the said act of the date forsaide wnder the hand and subscriptione of Mr. Alexander Gibsone one of the clerks of secret counsell bears together also with ane extract furth of the books of secret counsell of ane band grauted by John Falconer son to sir John Falconer one of the masters of his ma'ties Mint as principall and James earle of Southesk Robert lord Carnegie Alexander lord Falconer of Hackerton sir Alexander Falconer of Chalilk Mr. David Falconer of Glenquharq'r as cautio'urns and soverties for the said John Falconer daited the twentie two day of February 1m. vic. sixtie four yeares wherby they are bound and obleidged con'llie and se'rallie that the s'd John Falconer shall faithfullie and trewly exerce the office of master of his ma'ties conzie house and shall totallie performe the duty incumbent to his charge also weill in what may concerne his ma'ties interest as the good of the leidges As the s'd extract wnder the hand and subscriptione of Mr. Patrick Menzies one of the clerks of secret counsell bearing the said band to be reg'rat in the books of privy counsell upon the twentie third day of February 1m. vic. sixtie four yeares bears And also produced ane Report of the officers of his ma'ties Mint in the Tour of London to his ma'tie anent the silver monyes of Scotland daited the twentie day of February 1m. vic. siventie three yeares Item ane extract furth of the books and records of privy counsell of ane order and warrand from his ma'tie daited at Whythall the fyfteenth day of May 1m. vic. sixtie eight yeares prorogating the coynes of the copper money till the first day of August 1m. vic. sixtie eight yeares terminat And concluded probation and for the said earle of Lauderdale therein designed Charles Maitland generall sir John Falconer master John Falconer his son and John Falconer wairden there further incurragement in his ma'ties service ratifieng and approveing all and whatsoever quantities of copper then already coyned by the said generall and maisters or that should be coyned till the said first day of August sixtie eight yeares And by the said order authorising the same and declaring the said order to be a valid and sufficient exoneratione to them of ther w'hoill actings in ther rex'ive offices anent the premisses and commanding the said warrand or order to be recorded in the books of privy counsell as the said extract wnder the hand and subscripione of Patrick Menzies one of the clerks of his ma'ties privy counsell daited the sixteenth day of July 1m. vic. sixtie eight yeares more fully bears with ane act made by the lord comissioner his grace and lords of his ma'ties privy counsell upon the threite day of March 1m. vic. siventie four yeares finding that the comissioners appointed by them for comparing the haill essayes of silver within the cunzie house and for making all the said essay peaces of sil-

ver and trying the finnes of the same have procedit orderly and circumspectly with good deliberatione And allowing and approveing the report made by them theranent and interponing ther authoretie ther to and declaring that the generall master coynier wairden counor wairden sinker asscyser and all other officers and workmen of his ma'ties coynzie house had dewly faithfullly and uprightly wsel and exerceed ther offices ilk one of them for ther own parts conforme to the acts and ordinnances made theranent in all points and exonered them and every one of them for ever as the said act of the date forsaide wnder the hand and subscripione of Patrick Menzies clerk of counsell more fully bears Together with ane other act made by the lord's of his ma'ties privy counsell upon the twentie fift day of February 1m. vic. siviante fyve yeares commanding the said generall master worker the wairden essay maister compter wairden the graiver and other members of his ma'ties Mint each of them in ther severall stations and charges to proceed to the working and coyning of the four mark two mark one mark halfe marke and fourtie pennie peaces according to the tenor of the warrand mentioned in the said act And that the sinker or graiver of the Mint doe maik graive and sink yrones agreeable to the circumscriptiones and impressiones of the severall species therein mentioned withall diligence wheranent the said act should be to the officers sud all others whom it concerned ane sufficient warrand as the said act of the date forsaide wnder the hand and subscriptione of Patrick Menzies one of the clerks of counsell more fully bears Together also with ane proclamatione containing his majesties gracious pardons of indemnitie daited at Windsor Castle the twentie seventh day of July 1m. vic. siventie nyn yeares together Lyke-ways with ane exlioneratione superscrived be his ma'tie and subscriyved be the duke of Lauderdale secretarie declaring commanding and appointing the coynings of all copper money in six pennie and two pennie peaces within the kingdome of Scotland to be at and upon the tenth day of February 1m. vic. eightie yeares terminat and concluded pro hac vice and for the said earle of Lauderdale therein designed Charles Maitland generall sir John Falconer master John Falconer and Alexander Maitland wairdens of the said mint and ther substitu'ts ther farder incurragement in his ma'ties service His ma'tie by the said writt ratified and approved all and whatsoever quantities of copper then already coyned by the said generall and maister since the first day of May 1m. vic. siventie seven or that should be coyned till the tenth day of February sixt thereafter 1m. vic. eightie yeares authorising the same and declaring the said writt to be ane valid and sufficient exoneratione to them of ther w'hoill actings in ther rex'ive offices anent the premisses and farder commanding the said writt to be recorded in the books of privy counsell as the samen exoneratione daited at Whythall the fourteenth day of January 1m. vic. eightie

years recorded in the books of privy counsell by a deliverance upon the back yr'of upon the sixteenth day of February 1m. vi c. eightie years and aue act extracted thereupon vnder the hand and subscriptione of Mr. Alexander Gibsone clerk to the privy counsell for the tyme bears Together also with aue proclamatione concerning the coyn daited the fifth day of March 1m. vi c. eightie one years ordaining and appointing that in tyme y'rafter the unce of money should be in value three pound four shilling Scots mony and for that effect ordaining that the four mark peices which then were current at fiftie three shilling four pennies should be current thereafter at fiftie six shilling and the inferior species of that coyne proportionable as the s'd proclamatione of the daits fors'd more fully bears And the said sir John Falconer compeirand be Mr. George Bannerman and Mr. William Fletcher advocats his pro'rs who produced in presence of the saids lords aue gift granted be his ma'tie vnder the the privy seall to and in favours of the s'd sir John Falconer daited the last day of December 1m. vi c. and sixtie years ratifeing and confirmiting two former gifts granted by his royall father to the said sir John of the office of master of the conie house of Scotland in swa far as concernes him in the haill tennor and contents and of new givinge and granting to the s'd sir John Falconer and after to his deceise to John Falconer his son the s'd office of master of his ma'ties coynie house In the kingdome of Scotland to be exercised by them respectively aue after aue other durence all the dayes of ther lifetyme and to the longest liver of them two as the s'd gift more fully bears And the said Mr. James Falconer compeirand personallie who declaired he also compeirand Archbald Falconer and Alexander Maitland the other defenders The rights reasons and allegaons of all the saids parties compeirand as said is writtis above mentioned produced by them allcadvances and representationes rex'ive made and proponed for them in maner vnder written replyes duplyes triplyes qualruplyes quintoplyes rex'ive vnder written made therto with the forsaid summons compt compt books missive letters contracts bands tickets and wy' writtis after mentioned produced and depositiones of the persones afternamed adduced be his ma'ties advocat for provcing the se'rall articles found relevant in maner under written Together with the circumduccion of the terme against the saids defenders for not deponing upon the severall points after mentjoned admitted to ther probatione in maner after specified being all atlenh read heard seen and considered be the saids lords and they being therwith weill and ryplye advysed the saids lords of counsell and sessione decernes and ordaines the said Charles earle of Lauderdale laite generall and Mr. James Falconer as representing the said deceist John Falconer laite wairden his father upon aue or oy' of the passive titles above written 'singulos in solidum' to make payment to Wm. marquis of Queensberry lord high

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thesaurer John Drummond of Lundie his ma'ties thesaurer deput and Hugh Wallace his ma'ties cash keeper for his highnesswas and behove of the soume of twentie shilling Scots of free profit upon ilk pound of fourteen thousand ston of copper Whilk the saids lords finds to be coyned be the said generall and officers of his ma'ties mint in the first copper jurnay more nor was allowed be the warrands extending to the soume of two hundreth twentie four thousand pounds Scots mony and also the saids lords decerns and ordaines the saids Charles earle of Lauderdale Richard lord Maitland generalls sir John Falconer master Mr. James Falconer as representing the said deceist John Falconer his father laite wairden upon aue or oy' of the passive titles above mentioned and Archbald Falconer laite counter wairden defenders (whom the saids lords finds lyable 'singulos in solidum') to make payment to the saids lords high thesaurer thesaurer deput and cash keeper above named for his ma'ties was and behoff of the soume of twentie shilling Scots of free mony upon ilk pound of fyve thousand four hundreth fourtie four stons of copper Whilk the saids lords finds more nor was allowed be the warrands the second copper jurnay befor the act of indemnitie extending to the soume of eightie seven thousand nyn hundreth and four pound Scots mony with thretie two shilling Scots for ilk pound of three thousand nyn hundreth nyntie nyn ston of copper Whilk the saids lords finds to be coyned after the act of indemnitie extending to the soume of aue hundred and two thousand three hundreth nyntie eight pound eight shilling mony fors'd And lykewayes to make payment to the said lord high thesaurer lord thesaurer deput and cash keeper above named of the soume of nyn thousand fyve hundreth thretie two pound four shilling Scots As the difference found be the saids lords of the finnes of the mony coyned be them from the finnes of the indented standart plate appointed be his ma'tie from February 1m. vi c. six ventie four to August 1m. vi c. eightie two years and of the soume of aue hundreth fourtie three thousand aiven hundreth twentie six pound mony fors'd as the value of aue hundreth and eightie two ston two unces two drops of Cluswells beads sweeps and scraps Which the saids lords finds to be coyned be them without any assey since the act of indemnitie and of the soume of fyve thousand three hundreth eightie six pound mony fors'd as the profit arysing by the difference of the dean of Guilds weights made was of by them from the Scots pyll sent down by his ma'tie and of the soume of six thousand and six hundreth pounds for the remedies of weight of the silver coyned from the first day of September 1m. vic. seventie three years to the first day of September 1m. vic. eightie two years and in lyke maniner the saids lords decerns and ordains the said Charles earle of Lauderdale Richard lord Maitland generalls and sir John Falconer laite master of his ma'ties Mint 'singulos in solidum'

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to make payment to the said lord high thesaurer lord thesaurer deput and cash keeper above named for his ma'ties use and behoove of the soume of twelve thousand three hundredth sixtie eight pound thretin shilling four pennies Scots mony as the profite of the exalta'one by crying up of the mony arrysing from the bullion payed in by the marchands since the daite of the proclamations and not compted for And als of the soume of twelve hundredth twentie eight pound therteen shilling four pennies Scots as the profite of the exalta'one arrysing from the bullion and current mony belonging to his ma'tie and lying by them the tyme of the exaltatione And lykeways of the soume of fourtie three thousand two hundredth eightie six pound Scots as the twelve shilling upon the ounce of two hundredth and eightie one stone twelve pounds fifteen wuces and ten drops of dollers and doucatdous melted down from the sixtenteen day of January 1m. vi. c. sixentie three yeares untill the first day of January 1m. vi. c. eightie two yeares And lykeways the saids lords decernes and ordaines the saids Charles earle of Lauderdale and Richard lord Maitland generalls and sir John Falconer laite master of his ma'ties Mint singulos in solidum to make payment to the said lord high thesaurer lord thesaurer deput and his ma'ties cash keeper above named for his ma'ties use and behoove of the value of the ordinary a'rent of the fors'd soume of twentie thousand marks allowed and payed be his ma'tie to the saids generall and master of the Mint for buying in of bullion (and which was not accordingly done) and of the annual of the a'rent *pro rata* as follows viz. the said Charles earle of Lauderdale of the said a'rent of twentie thousand marks and annual for the said a'rent yearly after it becom due from the year 1m. vi. c. sixtie two yeares And that the stock was appointed by his ma'tie untill September 1m. vi. c. eightie two yeares extending to the soume of twentie fyve thousand six hundredth pound The said Richard lord Maitland the other generall of the Mint of the said a'rent of twentie thousand marks and a'rent of the said aren't yearly after it becam due since the twentie third day of September 1m. vi. c. sixtie eight yeares that he received his commissione And the said sir John Falconer laite master of the samen a'rent of twentie thousand marks and a'rent of the said a'rents after it becam due yearly since his entrie to the office of the master of the Mint And als the saids lords decernes and ordaines the saids Charles earle of Lauderdale one of the saids defenders to make payment to the said lord high thesaurer lord thesaurer deput and cash keeper above named for his ma'ties use and to his behoove of the forsaid soume of four thousand and nyu hundredth pounds received be him in double payment of his said three yeares sallarie with the value of the ordinar a'rent thereof forsaid extending in all to the soume of seven thousand nyu hundredth twentie one pound ten shilling Scots And of the forsaid soume of six hundredth pound

sterling contained in the ticket grantd be sir John Falconer to him with the a'rents therof from the first day of January 1m. vi. c. sixtie nyu yeares extending to eight thousand nyu hundredth twentie eight pound mony forsaid And the saids lords have remitted and heirby remitts the second article of the fors'd lybell anent the twelve shilling upon the ounce of bullione and the eight article anent the profits arrysing to the king by the bullione given in to the officers of the Mint yearly and not coynd to the lord high thesaurer the officers of the Mint being regularly and in course lyable to compt to him for the samen And als the s'ds lords have assolizied and heirby assolizies the said Richard lord Maitland and sir John Falconer from the points of the fors'd lybell in so far as concerns the first copper jurnay And assolizies the s'd lord Maitland from the a'rent of the kings stock of twentie thousand marks and the annual thereof for the yeares preceeding the twentie third day of September 1m. vi. c. sixtie eight yeares and lykeways the s'ds lords assolizies the s'd sir John Falconer from the s'd a'rent of the s'd twentie thousand marks and annually thereof for the yeares preceeding his entrie to the office of the master of the Mint And in lykemanner the saids lords have assolizied and heirby assolizies the haill defenders above named from the a'rents of the soume above decerned except as to the a'rent of the s'd stock of twentie thousand marks appointed by his ma'tie and four thousand nyu hundredth pound of double payment and the six hundredth pound sterling contained in sir John Falconer ticket to the earl of Lauderdale and decernes and declares the s'ds defenders quyt therof and free therfrae now and in all tyme coming Because the tyme of the first calling of the s'd action and cause in presence of the saids lords the said sir George M'kenzie his ma'ties advocat and sir Patrick Home advocats for his highnes interest haveing repeated the first article of the fors'd sumonds bearing that albeit by the comone law and laws of all nationes the coyning of mony without warrand is discharged especiallie copper or black mony and by the laws of this kingdome and particularly by the eighteen act parliament the third king James the third and that the kings ma'tie haveing since his resturation granted warrand for coyning of six thousand stone weight of copper at two severall limited tymes Yet the generall and master and other officers of the mint have coynd fourtie thousand stone weight of copper and every pound weight of copper haveing yielded to them thretie six shilling Scots of advantage they must be lyable 'singuli in solidum' to re-found to the king the some lybelled and declared his ma'ties advocat insisted for the fors'd the thretie four thousand stone of copper coynd by them at the tymes above mentioned more nor the six thousand stone allowed be the warrand extending to nyu hundred seventy nyu thousand and two hundredth pound Scots Against which it was alleadged by the s'd earle of Lauderdale and

lord Maitland ther pro'rs above named Primo that ther could be noe proces sustained ag't the lord Maitland becaus he being out of the kingdome the tyme of the raising of the sumonds was ceitted upon sixtie days and the day of compeirance is not yet come And for the earle of Lauderdale and oy' defenders above named denying the quantitie and excess of the copper lybelled and insisted for alleadged that the defenders ought to be assolzied Primo becaus the act of parliament founded one discharges only the coyning of black money by privat persones or incorporations the same haveing been practised by some townes wherof ther are peaces yet extaut And the act was made for the remedie of that abuse and was intended in favours of the officers of the Mint and not against them and it can not be instanced that ever the officers of the Mint ware called in questione for anie quantities of copper coyned nor did they compt for any profit and excess of the copper coyned the same being alwayes booked one a perquisit of ther office Secundo the king hes granted exonerationes to the generall and oy' officers of the Mint both of the first copper jurnay and the second Tertio the defe'rs are secured by the act of indemnitie siventie nyne wherby not only these are indemnified who ware in the rebellione but alsoe all persones in publick trust as to ther malversations or misdinans and any persuit against them either adventictam publicam or privatam is discharge To which it was replied be the said sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his highnes interest persewers that his ma'ties advocat insists primo loco ag't the earle of Lauderdale and the other defenders called and as to the other alleadgances the lybell stands relevant notwithstanding therof Because as to the first alleadgeance the power and priviledge of coyning is inter regalia and the same is of great importance both as to the king and the subjects and the act of parlia't maks noe distinctione but generally prohibits the coyning of black money without warrand And it is the publick interest of the kingdome the copper mony should not be coynd by the officers of the officers of the Mint at ther pleasure seeng by how much black money is increased so far as the silver coyn abbaied and it wold be of greater danger to allow libertie in this to the officers of the Mint then to other persones who wuder that pretext might coyne alsoe much black mony as they pleased to the prejudice of tred and ruine of the cuntry And it is a frivolous pretence to alleadge that the act of parlia't was only in relatione to townes or incorporations that did coyne black mony seeng the coyning of black mony is simply and absolutelie discharged And as a farder evidence that the officers of the Mint wold coyne noe black mony without warrand the earle of Lauderdale himselfe as generall of the Mint did procure one act of parliament in the year 1m vi c. sixtie one to warrand him and the rest of the officers of the Mint to coyne

three thousand stone of copper the first copper jurnay And one act of counsell in the year 1m. vi c. siventie three for coyning other three thousand stone the second coper jurnay And it can never be instructed that the former officers of the Mint did coyn anie coper without warrand and the reasones why they ware never persewed for exhibiting the warrands becaus they ware alwayes honest men and did not betray ther trust and abused the king and cuntry by coyning of more copper mony then was allowed by the warrands as the late officers of the Mint hes done And even the former officers of the Mint did not pretend to have the benefite of the copper coyne as a perquisit of ther office but only by a particular allowance or donatione from the king And the earle of Lauderdale himselfe knowing that the copper coyn was not a perquisite of ther office he procured a particular gift from the king of the benefite of the ane halfe of the copper that was allowed to be coyned by the warrands And therfor the defenders in swa farr as they have exceeded the warrands ought to be lyable to the king singuli in solidum and cannot belong to them as a perquisite of ther office And as to the second alleadgance founded upon the exonerationes it was replied that the exonerationes cannot liberat the defenders from the abuse and malversatione committed in relatione to the copper coyne at the last as to what was coyned more then what was allowed by the warrands becaus the exonerationes relats to the severall warrands granted for coyning of copper money the ane in the year 1m. vi c. and sixtie six years and the other in the year 1m. vi c. eightie years the first in the said year 1m. vi c. sixtie six relating to the act of parliament in the years 1m. vi c. sixtie one for coyneing three thousand stone of copper and the other in the s'd year 1m. vi c. eightie relating to the act of counsell for coyning oy' three thousand stone And albeit his ma'tie did ratifie and approve the quantities of copper already coyned or that should be coyned betwixt and the day therin mentioned and exhoners the officers of the Mint of ther wholl actings in ther rex'ive offices anent the premisses Yet that cane only be wuderstood of the coyning of the quantitie of copper contained in the acts and warrands granted for that effect to which these warrands docs particularly relsite but can never be extended to free and liberat them from the abuse and malversations in coyning more coper mony then they ware allowed and which is soe farr contrar to law in respect of the great prejudice that the cuntry sustaines by soe much copper mony is discharged by many acts of parliament even wnder the paine of death And it is very weil known to such exonerationes may be procured upon a misrepresentatione by the laws and customs of all nationes noe such gifts of exoneratione are sustained ' nise preces veritate in tantum' and therfor unless these exonerationes did bear expresly the particular abuses and malversationes committed

And that notwithstanding the kings ma'tie had exonered them 'ex certa scientia' no such generall exonerations can be sustained to operat any further then to exoner them as to ther acting in relatione to the six thousand ston allowed to be coyned by the warrands And in the caise of sir Walter Seatone who was tacksmen of his ma'ties custome house albeit he had compted to the excheq'r and obtained ane exonerations and discharge from the king under the great seall yet thereafter being called to ane account by vertue of a commissiōe from the king and it being found that the king was prejudged in the accounts made notwithstanding of the discharge he was necessitat to pay in to the king fyve thousand pound sterling At which tyme the lord thes'r deput was sent as ane of the commissioners and this same defence being proponed before the commissioners appointed by his ma'tie for tryall of the Mint They find that these exonerations did only relate to six thousand stone which was allowed by the acts of parliament and counsell to be coyned within the tyme contained in the warrands and prorogations men't in the exonerations And therfor was not ane exonerations as to what copper was more coyned then the quantities contained in the warrands to which they particularly relate as appears by the report which is approved by his ma'tie And as to the third alledgance founded upon the act of indemnite it was replied that the act of indemnite can not secure the officers of the Mint against the abuse and malversations committed by them Primo because it appears by the narrative of the act that the occasion of the making therof was twofold viz. The treasonable principles of some persons ag't the go'rment both in church and state and the rebellions and disorders that ensued upon the same one the one hand and one the other the humorous factions of discontented persons who under the pretence of grievances had misrepresented the publick judicatories and had thereby waikned his ma'ties authoritie represented in the same and that his ma'tie was graciously pleased to reclaime and secure both Therfor his ma'tie upon the narrative fors'd allenarly doth by the s'd act secure both the persons dissatisfied to the government and the governors and ministers under his ma'tie in mainer therein mentioned And lykways doeth indemnifie and secure his ministers and persons intrusted by him in relatione to any thing done by them in his majesties service and perswance of the same and asserting his ma'ties authoritie as appears both by the s'd act and a paper printed about that tyme intituled The Narrative of his Ma'ties Proceedings and Privy Counsell's Proceedings in Scotland which being the only designe of the s'd act and his ma'tie and the counsel having noe other thing in ther contemplatione It is unjust and inconsistent with honour of the counsell and counsellors that it should be stretched and extended to any other crimes and deeds that can not be said to have been done upon occa-

sione of the troubles and out of zeall against dissatisfied persons for maintaining his ma'ties authoritie and which he had connexous with or in relatione to the troubles But by the contrary was done against his ma'tie and to abuse him under trust such as the malversa'on in the matter of the Mint which being a part of his ma'ties stock and sourses for defraying the necessar charges of the government it at any tyme ought to be most faithfullie and honestly managed in tyme of troubles And therfor the statute part of the act can not be extended beyond the narrative and premise' therof which was the causa inductiva of his ma'ties granting the act of indemnite 2. These words that persons in a publick statione and trust should be indemnified and generally all such as are lyable to any persuite for any cause or occasion relating to anie publick administrations by contrivances actings oppositiones or oy'ways preceeding the daite of the s'd act ar 'verba hanonima' (*sic orig.*) and such words ought to be interpret and restricted secundam subjectum (*sic orig.*) materiam And therfor seeng in the latitude of the s'ds words they may be comprehensive of all th'is shirriff depute clerks commissars and all such persons which can not be denied in some sence to be in publick stationes and trust And it ware absurd to say that such persons were indemnified for ther unfaithfulness and malversations in ther stationes and trust the saids words can be no wayes understood but to secure officers of state and such persons as are in ther stationes as counsellors and officers or as members of the army be questioned as having any wayes overacted or done amiss in the tyme of troubles out of zeall and for promoting his ma'ties authoritie and service As also persons in publick trust according to the ordinarie acceptatione of the word are only to be understood such as are under his ma'tie and his interest and trust in the administratione of the government of the kingdome civell and militarie as the judicators and specially the counsell and officers of state and commanders of the forces seeng such persons hes only such publick administratione as the interest of his ma'tie and of the wholl kingdome directly and immediately and yet the officers of state who are indemnified by the said act as to ther publick actings in capacity of counsellors are not indemnified as to ther privat actings and malversations if they ware guilty of any relating onlie to his ma'tie and not to the troubles and publick And it cannot be said that either the commissioners of the thessaury or thessaurer deput or sir William Sharp cash keeper or any having interest in the Exchequer are by the act of indemnite secured and exempted from counting and malversa'one in their trust if any should appear 3. The act of indemnity bears this express clause yt' it should not be extended to such crimes as never wses to be comprehended under generall acts of indemnity But so it is the crimes and malversations committed by anie of the kings servants and offi-

cers especially in relatione to his ma'ties revenues and publict money such as the Mint is are not in vse to be comprehended under the acts of indemnitie For the act of oblivion and indemnitie by king James the fift parliament sixt caput nynty two and act of indemnity be queen Mary parliament nynty chapter the scaventhie seven relaits only to crymes committed dureing the troubles in the countrey and rebellions but not at all to abuses or malversations committed by the kings officers and servants in tyme of peace especially in relatione to the king's revenue publict mony or what concernes the Mint And the laist act of indemnity in the year 1m. vi c. sixtie two bears an express exceptione of all publict moneys introumitted with be any of his majesties officers for which they hade not dwely counted and received discharges therof by such as pretend to have authoritie for the tyme to doe the same By which it is evident that the crymes and malversations committed by any of his ma'ties officers or servants in relatione to his ma'ties revenues and publict mony such as the Mint is are never comprehend it wnder the generall acts of indemnity which doe only properly relate to the troubles in the cuntry 4^o The s'd act of indemnity as all former acts of indemnity bears an express exceptione of all privat crymes and albeit the officers of the Mint may pretend to be persones in publict stationes in a lairgessence as all persones wnder his ma'tie may be s'd as customers collectors and such lyke yet it can not be said to be in a publict statione relating to the government and a publict administratione of the kingdome wnder his ma'tie and to have been persewinge and promoting his ma'ties service is onlie meanced and intended by the s'd act seeing the said Mint and Mint house and officers of the same does not properly and immediatly concerne the government but only consequentially as to all his ma'ties other concernes for it is a particular interest of his ma'ties belonging to him by his prerogative and the officers therof ther malversations in ther respective stationes are not malversations in any publict statione or trust or administratione belonging to the wholl kingdome but privat delicts and such as have no relatione nather to the government but consequentially or to the troubles soe that they would have been whither ther had been any troubles or not and consequently as to all other privat crymes which are not occasioned by the troubles was ever excepted out of acts of indemnity And in speciall out of the s'd laite act the treacherie and malversations of the officers of the Mint in so' sence reason or justice can be thought to be idemified y'by 5^{to} The same defence being proponed by the officers of the Mint befor the commissioners appointed for tryall of the Mint as to which the commissioners ware of the oppinion that the act of indemnity being only granted to those that had acted in or against the publict government of the kingdome and not the deeds of malversations in any particular or peculiar statione

which hade no connectione with or in relatione to the troubles or disorders of the countrey in matters relating to the publict government of the kingdome as appears by the report which is approved by his majestie Whereinto it was duplyed by the s'ds earl of Lauderdale his pr'ors above named that this proces is not onlie of great import as to the persones conveyned but also as to the preparative if the kings repeated exonerations and ane act of indemnity doe not secure persones in publict offices as to ther malversations in ther offices And as to the act of parliament founded one Anss'rs it concernes not the subject of this article for ther was a kind of black mony which was not proper money 2^o Albeit the act ware to be understood of copper money yet it does not concernes the officers of the Mint who are the kings servants in that office but only privat persones or incorporationes coyning black mony without warrant and as is clear from the words of the act and from custome which is the best interpreter of the law For it cannot be instanced that any officer of the Mint was ever drawne in questione either as to a civell or criminall effect for exceeding in the quantitie of coynadge And the fors'd act of parliament grants power to shiriffs to convey the transgressors befor them which maks it evident that the act is not applicable to the officers of the Mint and the Mint of this kingdome is also exact in its constitutione as in any other nation for ther are journayes made of the silver coyn and accompt made therof to the exchequer But as to the coynadge of copper albeit ther be necessity of a warrant for the peaces to be coyned the character and impressione the extrinsick value at which the same is to pass and the tyme for coynadge yet ther is noe limitation as to the quantitie except the kingdome be overburdened with copper mony And in this caice the copper mony and quantitie therof coyned in the first journay was found too litle for the vse of the cuntry insoe far as the warrant granted by the counsell for the last copper journay proceeded upon ane representatione from the royall burrows who ware most concerned that the coynadge of more copper mony was for the advantage of the kingdome as appears by the act of counsell Tertio the generall of the Mint hes right to the half of the benefite of the half of the copper coyne by gift from his ma'tie and the rest of the officers of the Mint have right to the other half as a perquisit of ther office and since ever the king hade a Mint they never compted for the benefit arrysing from the copper coyne Secundo albeit the coynadge of more then was contained in the warrant ware a cryme yet the defenders are secured by two exonerations And wheras it is alleaged that the same can not be extended beyond the warrants to which they relait Anss'rs it is necessary that the exonerations should relate to the warrant because the king in the exonerat'one was to terminat the tyme of coynadge But after relatione of the warrant and terminatione of the tyme the exonerations run

on a distinct narrative viz. the kings ma'tie for farder incuradgement of the officers of the Mint in his service ratifies and approves all and whatsoever quantities of copper that were coyned or should be coyned betwixt and such a day and so the excesse albeit it had been contrar to law yet being befor the exoneratone and the same being conceived in the terms afors'd does fully secure the defenders ther being noe necessity to express the quantitie coyned And as to what is alledged that the exoneratones were procured by subreptione and obreptione Anss' red obreptione is not presumed unless the same be proven and subreptione is not relevant otherwayes not only this exoneratone but many other gifts granted by the king might be evacuat and wher grants from the king bear these words 'ex proprio motu ex certa scientia or explentudine potestatis' or wher ther is 'reiteratio actus' as ther is in this case ther is no ground to alleadge subreptione or obreptione and ther exoneratones are not of one unuswall stile but run in the ordinary stile of exoneratones granted formerly to the officers of the Mint after which non of them were ever called in questione And albeit the warrant be relaited in the Narrative yet therater his ma'tie ratifies and approves all and whatsoever quantities coyned and not restricting the same to the quantities coyned by vertue of the warrands and all exoneratones granted to persons in publick trust or employment most relate to the trust and employment but if the same should be restored in so far they walked legally the exoneratone would be of noe effect seeing the law secures them in soe farr as they have walked legally And as to what is alledged that in a remissione the speciall cryme must be exprest Anss'rs the case is different for in remissiones persones are considered only as criminally but exoneratones are of a mixt nature and considers the merits of the persones and ther mistakes or ciroues they are obnoxious unto and non are more obnoxious then the officers of the Mint Tertio albeit the excess in the quantitie of the copper coyned had been a crown it is taken off by the act of indemnitie and wheras it is alledged that the same is only as to publick crimes but not as to malversations by persones in ther offices Anss'rs the act of indemnitie is opponed which is a nationall secretie and ought not to be infringed and the main designe therof was for securing persones in publick trust for besides the publick rebellione the act enumerates vj' crimes viz. one of misrepresenting the publick iudicators and one other of malversations of persones in publick trust And as to this last the act is more full then as to any other it being declar'd that the act of indemnity should be also effectuell as if every delinquencie or misdemanour wer exprest and as if every persone had a speciall remissione past in ther favours And the act is most comprehensive in ther favours also extending the same to all who had advised any thing contrary to the laws that had malversed in any publick statione or trust and are

lyable to any persuite for any cause or occasione relating to any publick administratione by contrivances actings &c. And discharging them either to be persewed ad vendicium publicum or privatam and all judges are ordained to interpret the same with all possible latitude and favour And wheras it is alledged that albeit the defenders be secured by the act of indemnitie as to any punishment yet they must be lyable for dammage and interest Anss'rs this persuit not being founded one any right the king hes jure debiti but upon a cryme be excess of coyning of copper contrarie to warrant which infers confiscatone as the cryme of malversatione is extinguished by the act of indemnitie so that the dammage and interest arising therefrae is also taken away To which was triplyed by the s'd sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocats for his highness interest That they oppon ther former reply as to the exoneratone and act of indemnitie and it is cleared by the act of parliament that the coyning of black money without warrant is simply and absolutely discharged and that wuder the paine of death And the law make noe distinctione whether the same be done by the officers of the Mint or oy' persones but all persones whatsoever are discharged to coyn black money and 'non est distinguendum ubi lex non distinguit' And the reason why non of the former officers of the Mint hes been called in questione for exceeding the quantitie of copper money allowed to be coyned hes been because it seems they were alwayes honest men and hes not exceeded the warrands Neither can it be instructed that if they did exceed and being convened that they were assolzied upon that pretext that they were the kings officers of the Mint who certainly as they have the greater trust so they ought the more to be severly punished if they transgress And albeit shurriffs and bailies of borrows by the act are appointed to make inquisitione if any such striking be made yet it does not follow that the act should be therefore understood of privat persones or incorporatones that stricks black money but because the coyning of black money is so great a prejudice to the cuntry and tread Therfor the shurriffs and bailies of borrows are appointed to take inquisitione therof that the strickers be brought to the king and punished whither they be officers of the Mint or oy' persones And in soe farr as the officers of the Mint exceeds ther warrands they are but as private persones and ought to be punished accordingly and the reason why formerly ther had been no compt made to the exchequer of the copper coyn was because privat persones alwayes gott a right to what was allowed to be coyned who darst not exceed ther warrands but certainly if they had exceeded ther warrands they were alwayes comptable to the king for the same And in the coyndage of copper ther is an essey for a warrant of the peeces to be coyned charecter impressione and intrinsick value at which the same is to pass So much more as to the quantity that the cuntry

be not overburdened with such baize money which is only allowed for convenience of change and for the benefit of poor people but not to be made use of as to the ordinary change of trade and commerce the extrinsick value being so far below the true value of money and albeit the generalls of Mint have right to the halfe of the copper by a gift from his ma'tie And that the officers of the Mint have right to the other half as a perquisit of ther office yet that can only be understood of what is allowed to be coyned by the warands viz. that the six thousand ston as to which they are not now called in questione But that can never be extended as to what was coyned more then was contained in the warands for if that were sustained then the generalls of the Mint needed not to have given a warrant for coyning any copper as also if they had libertie to coyne more nor was contained in the warrant Then as they coyned therty or fortie thousand stone more so by the same reasone they might have coyned ane hundredth thousand ston more and by this account ther should have been nothing but copper money in the country which was absurd And seeng his ma'tie was graciously pleased to allow the generalls and officers of the Mint to coyne six thousand at two severall journeyes which was a very considerable gift they ware in *pessimo dolo* so far to abuse his ma'ties goodness to coyne more then was allowed by the warrands And the exonerationes alledged upon does relate particularly to the quantitie mentioned in the warrands als well as the tyme within which the same is allowed to be coyned and the prorogatione of the tyme mentioned in the warrands was onlie for clearing the house of the remanders of the copper that was uncoyned which is ordinar to be granted in such cases but need not to allow any greater quantitie to be coyned then was contained in the warrands as is clear from the severall prorogationes and exonerationes And albeit the exonerationes had been never subreptiones or obreptiones as certainly they were yet seeng they relate only to the warrands they can be no farther extended and for what the defender coyned more then was allowed by the warrands the defenders can never be secured by the act of indemnity for the reasones above mentioned which his ma'ties advocat and sir Patrick Home advocat for his highnes intrest here repeats seeng it is evident that the act of indemnity relates only to the troubles in the country and mi-representing the judicatur and malversations committed by his ma'ties officers in the administratione of ther publict offices relating to the government as to which it is provyded by the act of indemnity that they shall not be persewed nather 'ad vendictam publicam vel privatam' but only to ther malversations in ther offices which does not relate to the publict government of the kingdome nor to privat crymes and particularly can never be extendit to the imbazling and inverting of the kings money which can never be comprehended under any acts of indemnity And albeit the act

of indemnity would free the defenders from the punishment justly due by the law to such gross crymes and malversations as hes been committed by them preceeding the act of indemnity as truly it can not for the reasones fors'd yet that can never liberat them from restitutione of the valwe and profite which belongs to his ma'tie upon the account of right without respect to the cryme or deed of malversa'one Wherunto it was quadruplyed by the s'd earle of Lauderdale his pro'sr above named that he adhered to his former alledgances and duply and wher as it is alledged that the kings interest here arises upon the nature of the rights and not upon the cryme The same is of noe weight for the defenders haveing his ma'ties command for coyning of the copper and the tyme therof what ever quantitie was coyned the profits therof belong to the defenders themselves the officers of the Mint haveing ever been in use to compt for the same to the exchequer And 'reus potest allegare contraria' and so if the king have ane interest in the benefit of the copper coyn he hes granted the halfe y'of to the earle of Lauderdale and the rest of the defenders have right to the other halfe as perquisit of ther offices and if the excess of coyning was a cryme then it being extinct by the act of indemnity anie interest arrysing upon a cryme being in *modum opene* it is also extinct and by the act of indemnity not only are all persones indemnified 'quo ad vendictam publicam' but also 'quo ad vendictam privatam' which takes off all damnage and interest And when ane cryme is abolished by ane act of indemnity no intrest arrysing therupon as ane effect of the cryme can subsist otherwayes acts of indemnity would prove a seed of plees and ther can not be a more full one then that 1m. vi c. siventie nyn And farder repeated and alledged that the earle of Lauderdale hes this generall defence that as generall of the Mint he is not lyable and craved to be heard therupon now or that it may be reserved to him to be heard upon befor conclusion of the cause Whilk alledgances above written made and proponed for the s'd dese'rs reply dwly triply and quadruply a'mentioned made therto with the fors'd summons Being all at lenth read heard seen and considered be the saids lords and they therwith being weil and ryply advysed The s'ds lords repelled the fors'd first alledgance bearing that the profit of the copper coyne is a perquisite of the defenders office And als repelled the fors'd second alledgance founded one the exonerationes and ffand that the exonerationes extends na farder then to the quantitie allowed by the warrands and the malversations in relatione to the quantitie And lykewayes repelled the third alledgance founded one the act of indemnity and ffand that the same can not secure the defenders from being lyable in restitutione of the value of the copper coyne more nor was contained in the warrands And admitted the s'd first article of the lybell anent the copper coyned to the s'd persewers probatione and for proveing therof the s'ds lords assigned to the s'd ar

George M'Kenzie his ma'ties advocat and sir Patrick Home advocat to have letters direct at his instance for summoning of such witnesses and probatione and als to produce such writts rights reasons and documents as he had or would use for proving therof against the s'd day with certifica'one c. Theratier it was farther allledged by the s'd defe'r's pro'r's above named that the defender can not be lyable for the profits of the copper coyn he's been possess by the officers of the Mint as a perquisite of ther office which immemoriall possessi'one most secure the defenders these profits being 'bona fide percepti fructus et consumpti' and ther was never any count made of the copper coyne 2o Esto the profits of the copper coyn which exceed the warrands should belong to the king yet the defenders can not lose the copper which was coyned nor the workmanship therof ther being onlie ane access as to the quantity in the ordinary administrati'one of ane office and if they should not have allowance of the copper and workmanship it would be a confiscati'one arrysing upon a delinquencie against which the defenders is secured by the act of indemnity To which it was replied by the s'd sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his highnes interest that ther is no law or custome allowing copper coyne to the officers of the Mint as perquisite due to ther office farther then what is allowed by warrant to be coyned and the proffits arrysing therby cannot be s'd to be 'fructus 'bona fide percepti et consumpti' for seeing they knew that ther was only six thousand stoue allowed to be coyned by the warrands They ware in *peccato dolo* to coyne more then was allowed and the defenders cannot have allowance for the value of the copper or expenss of the workmanship that was coyned more then was contained in the warrands For what was coyned more being unwarrantable coyned it most belong to the king 'quia versabantur 'in re licita' and they wer in *peccato fide* being the kings servants and intrusted by him to apply the kings jrons and impressi'one to anie more copper then was allowed by the warrands And the act of indemnity as it does not secure the defenders from the cryme for the reasons above mentionat farr less from the restitu'one of the valve of the copper that was coyned more then was allowed by the warrands and that without deduc'one of any thing upon the r count of the price of the copper or expensses of the workmanship which they aught justly to louse being in *re licita* And oppones the former interloquitur wherin this is already decided Wherunto it was duplyed by the s'd defenders pro'r's above named that the fors'd allledgeance stands relevant notwithstanding of the ans'r for *inscificati'one* (*sic orig.*) wher the species is reduceable to the former matter The right of the species belongs to him who had right to the mat and albeit in this caice copper money be reduceable to its first mass yet in respect of the publict interest it must remaine also currant money but the common ground of law still

holds that since the copper was imported by the officers of the Mint and the king by the act of indemnity haveing pardoned the cryme albeit in respect of the impressi'one the moay belong to the king Yet it must be with deducti'one of the value of the copper and workmanship for the cryme being pardoned the law makes noe distinctione whither the acquisitione was *bona* or *mala fide* especuallie wher the species is reduceable to the first mass and the defe'r's to have allowance of expenss of the workmanship because the work was profitable to the king seeing the extrinsick value of the copper coyned is near double the extrinsick value thercof Lykenas the defenders employed many other people in the work about fourtie or therty heyns the servants in the Minthouse It was triplyed be his ma'ties advocat and sir Patrick Home advocat for his highnes interest that the king does not pretend right to the copper that was coyned more than was allowed by the warrands by vertue of the specificati'one but by vertue of accessi'one That the copper which is the matter should follow the king's stamp and impressi'one as being the more precious and is that which makes the coyne to pass at such ane rate worth and value As in the case of a pictur drawn upon ane wy' mans cloath and table the cloath and table will alwayes follow the pictur as the more precious 'Libro secundo de institutione 'de acquirenda rerum domini.' page thirty four 'Si quis in aliena tabula pinxerit' And the defenders can not have allowance for the mass of the copper seeing they ware in 'peccata fide' to coyn more then was allowed by the warrands and what ever right have been pretended if the copper had been brought in by a stranger and that the officers of the Mint had adhibit the kings stamp or impressi'one to it without the owners knowledge that in that caice the owners might have craved allowance from the mass of the copper But that can never be pretended in this case wher the copper was brought in and coyned by the officers of the Mint themselves And seeing that they knew ther was noe more allowed to be coyned but the six thousand stoue so that they willingly and wittingly have coyned more then was contained in the warrands allowed by the law They ought to have noe allowance for workmanship upon the same ground as also they being the kings servants and haveing salaries they ought to have noe allowance for workmanship And if it ware otherwayes sustained it would be a way to incurradge the officers of the Mint in tyme comeing to commit the greatest abuises imaginable for they would alwayes coyn more then was allowed by warrant if they knew they ware to have allowance for the value of what was coyned more then was allowed and ther dwes of coynadge albeit therafter should be discovered so they should lose nothing but the profits that they designe to get to themselves And this war to incurradge the abuises and malversati'ones in relatione to the Mint instead of sup-

pressing and punishing the same and seeng 'nemo debet lucrari ex suo dolo' even in cases betwixt privat parties much less in matters relating to the Mint Wherunto it was quadruplyed be the defenders pro'rs a'named (adhering to their former alledgeance and duply) that they are not here in the case of accessione. And that instance of one picture to which the matter did rede was a singullar disicione inconsequentiall to other laws and the ground of it was the excellencie of the picture and it does not *quo ad* that with the present case. To which it was quadruplyed by his ma'ties advocat and sir Patrick Home for his highness intrest That this was cleare in the case of accessione which by the law was one of the wayes of acquiring the right and dominion of a thing and ther was noe singularety in the case instanced. It being a certaine principle in law and the opinion of all the lawers that hes written upon that subject. Whilk alledgeance abovewritten and proponed for the saids defenders replies duplyes triplyes quadruplyes and quintuplyes above mentioned made therio. Being all at lenth heard red seen and considered be the saids lords and they being therwith weil and ryplye advysed. The saids lords sustained the forsaidd alledgeance as to the deductione of the pryce of the copper bought by the defenders (more nor the six thousand stone allowed) preceeding the act of indemnity. They alwayes condescending upon and proving the quantities of the said copper and the pryce they bought the same at betwixt and a certaine day now by gane. Which the saids lords assigned to the saids defenders and ther pro'rs above named for that effect with certifica' ne c. reserving to his majesties advocat to be heard against the probations but refused to allow the defenders the pryce of any copper coyned by them since the act of indemnity and also refused to allow any expens of workmanship done by the officers of the Mint or servants wnder them in the Minthouse. But declaired if any thing be dwe and resting to extrinsick workemen upon that account they will allow the same out of the first end of the soumes to be recovered from the defenders. Therafter the said sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his ma'ties interest declared they insisted upon the second article of the forsaidd lybell viz. for payeing of the forsaidd soumes of twelve shilling Scots for each unce of bullione payed in be the marchants yearly the years above mentionat extending to the soume of three hundred and eightie four thousand pound Scots mony. Against which it was alledged be the said earle of Lauderdale defender his pro'rs above named that the master of the Mint is the persone lyable for the bullione and he is not compeiring and the generall is not lyable for the bullione but the master as appears by the act of parliament which bears that the officers of the Mint shall be comptable conformo to ther receipts and the master receives the bullione from the marchants and grants receipt y'of. And holds

compt to the exchequer for the same. And the king hes taken particullar security from the master of the Mint as appears by a band produced granted be sir John Falconer and another be his ffather wherin they have found cationne. And not only did sir John Falconer as master of the Mint make compt formerly to the exchequer but his compts are now at this present tyme before the exchequer. Wherunto it was replied be the said sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his highness interest that by the act of parliament in the year 11. vi c. sixtie nyme concerning the bullione. It being therby left in the optione of the marchants inporters of the goods therin mentioned either to pay bullione in specie or to pay mony for the same at the rate of twelve shilling per ounce. And the mony so payed is appointed to be delivered to the generalls and master of the Mint by the tacksmen and collectors. And the generalls and master are obliged to import the stock of bullion themselves and to coyn the same so that it is clear by that act that the generalls as well as the master is comptable for the twelve shilling payed in for every ounce of bullione and not only is the generall lyable in this particullar case and all other things relating to ther own offic as generalls, but are lyable in *solidum* for all the abuses and malversations committed by any other officers of the Mint. And that for these reasons. *Primo* They are lyable *virtute officii* by vertue of the office as generalls who is his ma'ties supream officers in the Mint especially seeng that by ther gift they have power to comptroll and redargwe all other officers of the Mint. And with an ample power to hold courts and to punish delinquents which clearly evinces that not only the generalls hes the supream power and superintendence over all the rest of the officers of the Mint but also ought to have a particullar care and see every man performe his office faithfully and in case they doe not to punish them accordingly and to represent to his ma'tie if any of them malverse in ther office that they may be received (sic.) and others more faithfull and dilligent put in ther place. And yet notwithstanding the generalls did not only grossly malverse in things relating to ther own office but ware altogether carles and supin negligent in seeng the other officers of the Mint discharge ther office faithfully and in many particulars ware shairers with them in ther unjust profits. And first to the copper coyn. Albeit his ma'tie allowed only six thousand stone to be coyned at two copper jurnayes. Yet ther was neir fourtie thousand stone coyned so that y' was thretie four thousand stone coyned without a warrand contrar to express laws discharging the same under the severall punishments by which the country was abused with copper mony. Ther being almost noe mony left in the country but copper mony which was an infinit prejudice to the cuntry and ruine of trade. For the tyme that they should have spent in coyning of bullions for

his ma'ties use and the use of the marchants was for many years spent only in coyning of copper mony for their own advantage off which the generalls did take the greatest part of the benefit to themselves. Nixt wheras his ma'tie appointed twentie thousand marks as a stock for buying of bullione which might have been coyned and changed twenty tymes in a year and which the generalls should have seen done yet ther was noe bullion bought with that stock of mony. Albeit the generalls and master did most unjustly exact the a'rcnt of the twentie thousand marks from his ma'tie as if the stock had been employed yearly for buying of bullion. As also albeit by the act of parliament the twelve shilling payed in by the marchants in place of every ounce of bullione should have been employed for buying of bullion. Yet notwithstanding the generall and master did not imploy it for buying of bullion but applyed it to ther own pryvat use. And albeit by the laws of this kingdome the mony is appointed to be of equall weight and finness with the mony of England yet notwithstanding it had been minted farr below the finness of the standart. And albeit the officers of the Mint ware only allowed to work upon the remedies in case of casualety. Yet they have alwayes industriously wrought upon the remedies so that the Scots mby is less then the intended standart plat above two graines. As also albeit (sic.) be contrary to law and the nature of all Mints that any money should be coyned without essay. Yet notwithstanding the greatest part of the money coyned in this kingdome under the pretence of chisselbeads swips and scraps has been coyned without any ppyt essay which is the occasion that ther is so much base mony in the kingdome. As also albeit his ma'tie for security of the weight of the mony coyned in this kingdome had sent down a pyle of weights from England. Yet notwithstanding the officers of the Mint made use of the dean of Guilds weights for receiving in of bullions from the marchants which is four in the hundred heavier then the Scots pyle of weights by which they troned the peaces so that they made use of different and false weights in receiving in with one weight and giving out with another. And the lord Maitland one of the generalls albeit he received the English pyle at London by warrabd from the king. Yet he would never suffer it to be made use of in the Mint but one the contrary when the Scots pyle was reduced to the true English pyle of weight he caused transforme them and bring them up to the dean of Guilds weights and continued in making use of these weights before the year 1m. vi. c. eightie two that the officers of the Mint came to be challenged for ther malversations. As also albeit the profit of the exaltatione mony did belong to the king yet the officers of the Mint did take it to themselves. As also albeit ther was a considerable quantitie of bullion yearly lying by the officers of the Mint uncoyned the profit thereof should have belonged to the king. yet not-

withstanding they applyed it to ther own privat use. And albeit by the law the melting down of the current mony of the kingdome is discharged under very severe penalties yet notwithstanding the officers of the Mint did melt down many thousand of rex and leg dollers and doucatdouns to the great prejudice of the kingdome and ruine of trade so that it is almost a wonder ther should be any mony in the kingdome. All which abuses and malversations the generalls of the Mint by vertue of ther officis should have looked to and rectified and punished the transgressors which they were so far from doeing that almost in all the fore'd particulars they ware sharers with the officers of the Mint themselves in the unjust gain and profite that did aryse by these abuses and malversations. And to all these gross abuses and malversations the earle of Lauderdale superaded the unjust acting of new payment of the same years sallarie and brybery in taking six hundred pound to get sir John Falconer's unjust and exorbitant accompts from the exchequer. he being then ane officer of state his ma'ties thesaurer deput and ane of the commiss'rs of the thesaurie. And oppression in extorting bands from the other officers of the Mint for casualtyes that did no wayes belong unto him but to his ma'tie and did so far abuse his ma'ties authority for his unjust ends as that he threatened them that if they would not yeild to his desyre that he would persew them befor his ma'ties privy councill of designe to palliat and cover his extortione under the pretences of shadow of law. And therfor the generalls not only for the acts and deeds of malversations done by themselves in relatione to ther own officis but also for neglect to see the other officers of the Mint doe ther officis as is clear from the common Law Digest tit. de administratione rer. ad civitat. pertinent. l. ego nynth par. eight Item rescriptum curatorem etiam nomine collegi tenere si intervenire et prohibere dam potuit. 2. They wer oblidged ex contractu vis. ex mandato which in law is defined to be contractus in quo ipsius bona fide negotium aliquod alteri gerendum comittit alter vero gratuito suscript' but if the mandator have allowances or sallarie for his paines then tenetur ad exactissimam diligentiam et de levisima culpa as is clear lege thirteenth Cod. mandati libro quarto tit. threthie fyfth a procuratore dolosa et crimina culpam non etiam improvisum casum prestantur esse juris autoritate manifeste declaratur. And Cicero in his oratione pro Murena, in privatis rebus in quibus rem mandatam non modo malitiosius gesserit sui questus aut commodi causa verum etiam negligentius admittit summum dedecus quid enim recipis mandata si aut ad commodum conversurus aut neglecturus es cur mihi te offers ac meis commodis officio simulate offers et obitas. In private charges sayes he if he that has undertaken a commission or mandat does not only malitiously cary himself or execute the commission for his own gaine and profite, but also does it negligently it is a great disgrace to him. For why did

he receive a mandat if he was only to make use of it to his own privat gaine and neglect or why did he offer himselfe or obstruct his constituents gaine or profite by making a shew to doe him service when in the mainetye he was doing all for his own profite and gaine which does vary lively represent this case The generalls under the pretence of servinge the king and performinge ther offices as they were obliged by ther commissione either converted the profits arrysing by the Mint to ther own use or otherwayes neglected to see the other officers of the Mint doe ther duetie in ther rex'ive offices according to the power and trust committed to the generalls by ther gift As also they are lyable ex contractu locationis et conductionis which in law is defined to be contractus bonae fidei quo prestatur usus rei et opera certa mercede constituta So that the conductor who getes allowance and sallarie for his pains and work is lyable ad exactissimam diligentiam as is clear from lege vigesimo octavo Cod. de locat. et conduct. libro quarto titulo sexagesimo quinto in iudicio tam locati quam conducti dolum et custodiam non etiam casum cui resisti non potest venire constat so that both in the case of a mandator or conductor operatum They are lyable for exact diligence in so farr as the law only excepts casus fortuitos. Tertio as they are lyable ex officio and ex contractu so lykewayes they are lyable ex quasi contractu as negotiorum gestores they beinge intrusted by his ma'tie with the managment of the Mint who by the law are lyable to the exactest diligence Iustitit. libro tertio par. primo titulo vicesimo octavo quo casu ad exactissimam quique diligentiam compellitur reddere rationem nec sufficit talem diligentiam adhibere qualem suis rebus adhibere solet si modo alius diligenter (eo) commodius administraturus esset negotia Which is clear in this case seeng the king would have gotten fyve thousand in Scotland who would have discharged this office more diligently and faithfully then they have done As also it is clear from these titles in the law de actione exercitoria et institoria that the exercitor Navis the master of the ship or the master who is proposed to be the manadger and overseeng of any particullar effair who are not only lyable for the exactest diligence but are lyable in solidum lege prim' id est de exercitor' action' par' finali libro decimo quarto titulo primo si plures navem exercient cum quolibet eorum in solidum agi potest. Quarto; they are lyable ex delicto vel ex quasi delicto vel ex lege Aquilia vel in factum for makinge up the loss and prejudice that any part hes sustained through an others default as also wher ther are many parties concerned therein they are liable in solidum as is cleare titulo eodem lege quinquagesima prima par. in fine cum plures trabem alienam furandi causa sustulerunt quam singuli ferre non possunt furti actione omnes teneri existimantur quamvis subtili ratione dici possit neminem eorum teneri—neminem vero trabem sustulisse As also this is farder cleared in the case of thift wher many persons are con-

curring to the committing of a thift they are lyable in solidum lege sexta digest arbor. furtum cersarum si plures eandem ac arborem surtum ceciderint unum singulos in solidum agetur as also they are lyable ex crimine peculatus for abstracting of the pubbet mony which ware the profits of the Mint belonging to the king and converting the same to ther own privat use As also they are lyable ex crimine de residuis by wittering the same as publict money and not employing the same as they ought to have done And this is clear lykwayes in the case of apulies and wrongous intrusions wher the parties are not only lyable for restitutione of the thing taken away but also are all lyable in solidum To which it was duplyed by the earle of Lauderdale's pro's above named that the king havinge secured himselfe by takinge cation from the master of the Mint the generall at most can be but lyable only subsidarie after the master is discust and this of the bullion is counted for the Exchequer And the counts lying befor them and what ever the lords may doe to clear things for the futur it war hard to make the generall lyable for bygains To which it was triplyed by sir George M'kenzie his ma'ties advocat and sir Patrick Home advocat for his highnes interest that albeit the Exchequer hes taken cautions from the master of the bullion for the kings farder securitie Yet that does not liberat the generalls who are lykewayes lyable to the king by the law and what bullion they have counted for to the Exchequer shall be deduced Which second article of the lybell above written repelled and insisted upon by his ma'ties advocat alledgeances proponed for the s'd earle of Lauderdale against the samen reply duply and triply above written made ther to being all at leath read heard seen and considered be the s'ds lords and they being therwith weill and rpyly advised they repelled the fors'd alledgeance proponed for the earle of Lauderdale generall of the Mint in respect of the reply and triply made ther to and stand that the generall of the Mint is comptabl to the king for the bullion and the profits arrysing therfrac reserving to the generall his relief against the master and other officers of the Mint as accords of the law And admitted the fors'd second article of the lybell to the perrewers probations and for proveing thereof the s'ds lords assigned to the said sir George M'kenzie his majesties advocat and sir Patrick Home advocat for his majesties interest a certaine day now by gaine with certificatione Therafter the said sir George M'kenzie his ma'ties advocat repeated the third article of the fors'd lybell viz. That ther being allowed by the king to the generall and other officers of the Mint the a'rent of twentie thousand marks yearly as a stock to have been employed by them for the buying of bullione and coyning the same and which might have been exchanged in gold and mony twentie tymes in a year And yet they have not employed the stock for the use above mentioned and declared

his ma'ties advocat insisted for payment of the fors'd soume of one hundred and eightie thousand and six hundred pounds as the benefitt that hath or would have arisen from the coyning and exchange of the fors'd stock the years above mentioned Against which it was alledged by the s'd earle of Lauderdale his pror's above named that the master of the Mint being particularly concerned in the article they must intreat the persuite to him And alledged that ther was noe act of parlia't that makes the defender lyable for employinge the stock of twentie thousand marks in mainer forsaid and the receaving of the a'rent can not make him lyable for twentie thousand marks remanes alwayes in the Mint as a stock for buying of bullione in case of interruptione of trad and for defraying the medeat charges of the Mint And whereas the summons bears that the bullione to be bought with the forsaid stock might have been coyned and exchanged in gold and mony twentie tymes in the year It is a great mistake it not being possible to doe the same six tymes in the year and the a'rent of the twentie thousand marks would not have defrayed the expenses of importing the bullione the exchange in some years being so high as it did exceed the a'rent of the s'd soume Wherunto it was replied be the s'd sir George McKenzie his majesties advocat and sir Patrick Home advocat for his highnes interest that his majestie out of his princely care for the good of his subjects increas of mony in the kingdome and for advancing his own renew by the Mint having appointed twentie thousand marks as a stock yearly to be employed for buying of bullione to be coyned and exchanged for his ma'ties use and accordingly his majestie having allowed to them in ther accounts the a'rent of twentie thousand marks yearly They were in pessima fide to take allowance of the a'rent of twentie thousand marks yearly and yet not employ it for buying of bullione as was destined by his majestie and y'for they ought to be lyable for that profit might have arisen to his ma'tie if that stock of mony had been employed for the buying of bullione which might have been coyned and exchanged twentie tymes in a year as hes in use to be done in former tymes And not only ther was alwayes a stock of mony in the Mint appointed for buying of bullione to be coyned for his majesties use but particularly in the year 1m. vi. c. sixtie another is ane express act of parlia't appointing this stock of mony to be employed in mainer fors'd Which third article of the lybell above written repeated and insisted in alleadgeances above mentioned made against the same and reply made ther to being all at length read heard seen and considered be the saids lords and they therwith being well and rply advysed They befor ans'r ordained the compt books relating to the stock allowed by his ma'tie for coyning of bullione to be produced for clearing how often the bullione that should have been bought with the said stock of twentie thousand merks hath been coyned and exchanged in the year and for

that effect the said lords assigned to the s'd sir George McKenzie his majesties advocat and sir Patrick Home advocat for his highnes interest a certaine day now bygain for producing the count books relating to the stock and allowed his ma'ties advocat letters of incident diligence for recoverie y'of with certificatione c. Therafter the said sir George McKenzie his majesties advocat and sir Patrick Home advocat for his highnes interest repeated the fourth article of the said lybell viz. that whereas the mony of this kingdome is ordained to be of equal finnes with that of England yet it is two grains less then the standert of England ther being ane indented plate of silver cutted in the two pairte wherof ane halfe lyes in the Tour of London and the other was sent down hither and it being hard to be exact in observing the same finnes in the coyne ther was two grains of remedie allowed upon the unce of silver And the defenders having alwayes coyned at two grains less of every ounce and therby purposely imbasled the standert and these two grains amounting to twelve shilling upon the pound of silver they ought not to have applied the same to their own use but must be comptable for the same to the king And in England the remedies doe belong to the king and declaired his ma'ties advocat for his highnes interest insisted for payment of the fors'd soume of one thousand nyu hundreth and twentie pounds yearly the years above mentioned of the profit arysing by the difference of the coyne from the finnes of the indented standert plate with the benefit of the remedies being twelve shilling upon the pound of silver extending the years lybell to the soume of twentie four thousand pounds Against which it was alledged be the s'd earle of Lauderdale his pror's above named that the master of the Mint is chiefly concerned in this article and he is not compeiring 2do That the two grains in every unce allowed to the defender as a remedie The kings advocat cannot subsume against him if he have not exceeded the allowance 3tio That ther could be noe damnage sustained against the earle of Lauderdale upon the fors'd account that the money is not of sufficient finnes because ther being a comission granted by the king in anno 1m. vi. c. sixentie four for trying of the coyne It was found by the persones comissiond ther report that the silver coyne of this kingdome was above eleven pennie fyne and so above the standart as the comissionne and report produced bears which report was approved by the king And therfor the defender ought to be assolized as to what was coyned befor that tyme Lykeas ther being tryall taken by the laite comissionne the coyn was found in finnes to be above the standert Wherunto it was replied by his ma'ties advocat and sir Patrick Home advocat for his highnes interest that the earle of Lauderdale and lord Maitland generalls of the mint are also much concerned and most be lyable to the king for this and all other articles of the lybell as the minister or other officers of the Mint 2o Albeit ther was two

grains of remedie allowed in caise of casualtie in caise the finness fell to be over or vnder yet that was no warrand for the officers of the Mint to coyn constantly upon the remedies as they did but whatever be the remedies of finness whither casual or industriously done yet the samen alwayes belongs to the king & to As to the discharge granted be the king as to the finness of the coyn from the year 1m. vi. c. sixtie four to the year 1m. vi. c. siventie three It cannot be extended to the subsiquent years nather aught it to liberat the officers of the Mint even for these years mentioned in the discharge because the tryall upon which it proceeded was altogether insufficient and by a meer mistake in swe far as it is positivly offered to be proven that the tryall was after this mainer viz. At every melting ther being a pease of mony coyned cutt in two peices wherof one of the peaces being but [pnt] in the pipe when the tryall was made some of these peaces being melted down together they ware found of sufficient fynnes But the fallacie lay in thize that (a small melting they would a coyned a far greater quantitie may be ten or twelve stoné which was not neer so fyn as the standart) and of this they put noe more in the pype but the halfe of the silver coyned of that melting so that albeit ther was a far greater quantitie of baize mony joyned then fyne mony Yet ther was a like peaces of both put in the pipe so that when the outter fyn and the under fyne peaces came to be melted down together in a lignet it proved to be of standart fynnes so that at that tryal the lignet found to be finner then that standart which is not to be imagined it would have been if ther had been some cheat in it for if the mony coyned ware alwayes finner then the standart it wold certainly destroyed the officers of the Mint in place of making any gaine But the cheat was in this that albeit ther was the lyke peaces putt in the pipe of the coynadge of counter finnest silver and the coynadge of the best mony which being melted together will be sure to make the lignet of sufficient fynnes yet ther being a far greater quantitie coyned at the melting of the baize mony then at the meltings of the utter finnes silver Its evident that albeit the lignet made up of the pease in the pyx was of standart fynnes yet the greatest part of the mony of Scotland might have been baize mony As *de facto* it is so in effect upon the maitter this was no tryall at all and for the farther evincing of this it has been tryed that albeit some mark peices bei of sufficient fynnes yet wher three or four hundred of them is taken together and melted down in a lignet it would be found to be very far short of the standart as to the finness And as for evidence of the insuffitencie of this tryall ther was no tryall at all taken as to the weight of the mony which was also maeriall as the finness Whilk the fourth article of the lybell repeated and insisted upon alleidgeances made against the same and reply above specified with the fors'd exonerat'one produced being all at leath red heard seen and con-

sidered be the s'ds lords They being therwith weill and ryply advysed they in respect of the exonerat'one produced assolized the defenders as to the years preceding the s'd exonerat'one granted by his ma'tie in anno 1m. vi. c. siventie four Therafter his majesties advocat and sir Patrick Home advocat for his highness intrest insisted for the profits above lybelled arrysing by the difference of the coyne from the finness of the indented standart plate with the benefite of the remedies being twelve shilling upon the pound of silver yearly since the year 1m. vi. c. siventie four And offered to prove that the mony was coyned constantly upon the remedies As to which the s'd earle of Lauderdale's pro'rs above named alledged the master was only lyable and took instruments in the clerks bands upon his intimatione of this persuite to the s'd sir John Falconer master present at the barr was lyable to rceive the generall of the Mint To which it was ans' red be the s'd sir John Falconer that he declaires he declynes to defend in this cause so farr as the king is concerned and desyres what he now propones may be received as a representa'one and net as defence in the cause except quoad his releif And as to the copper coyned in the first juruey he represents that he is not lyable because he was then his ffather's servant and compted to him And as to the second copper jurnay what he did therein was in obediance to the generall under whose jurisdictione he was and that he reclaimed severall tymes and repeats his depositions taken befor the commissione as to this point And as to the a'rent of twentie thousand marks he ought to be free of the a'rent of the half y'of for which he is only lyable becaus he had the mony in readines and employed it in buying of bullion as appears by his counts And if it was not mad use of in coynadge it was because they had so much bullion brought in to them by the merchants that they could not make use thereof and hes counted for the wholl bullion from 1m. vi. c. siventie fyve to the year 1m. vi. c. eightie Which compt ar befor the Exchequer and propones this for his releif and farther represents as to that article anent the finnes of the money and working upon the remedies that ther being noe injunct'one of the suprem officer viz. of the generall of the Mint to work conforme to the indented standart he is not lyable to relieve the generall He acknowledges that ther was some coyned under the standart and some above the standart and nothing can be sustained upon the account of the remedies becaus ther was als much coyned above the remedies as above [sic] the same To which it was replied besir George M'Kenzie his ma'ties advocat and sir Patrick Home advocate for his highness interest that in so far as what is alledged by sir John Falconer as a defence against the king It is answered that he ought lykewayes to be lyable for the copper coyne for the first copper jurney more then was allowed by the warrands because he was conjunct master with his father As also he did exerce the office of master at that tyme and uplifted the

profits and was obliged to know and did know that ther was more copper coyned then was allowed by the warrands so that he is lyable to his ma'tie also weill as the generall and the king is not concerned q't compts and transactions was betwixt him and his father and it can not be made appear that ther was any part of the twentie thousand marks employed for buying of bullione they did imploy it for coyning of copper for the greatest part of that tyme for ther own use and the greatest part of which they did coyne as bullione is now not allowed for bullione so that they had abundance of tyme not only to coyn the bullione brought in by the marchands but also that bullion that should a been bought with the kings stock and what the s'd sir John can clear by his accounts have been payed to his ma'tie of the bullione shall be allowed as callumnies to alledge that ther was also much coyned above the standert as below the standert seeing it will appear by the books of coynadge And its positively offered to be proven that they alwayes coyned upon the remedies and below the standert Which alledgeance and reply being all at length read heard seen and considered be the s'ds lords They befor ans'r allowed a conjunct probatione for clearing how much has been coyned below the standert and how much above the standert since the year 1m. vi c. seventie four And for that effect the saids lords assigned to either parties pro'rs above named a certaine day now bygaine and ordained either partie to have letters direct at ther instance for summonding of such witness and probatione And also to produce such writts rights reasons and documents as they had or would use in the said matter against the said day with certifica'um &c. And also the s'ds lords ordained the wairden and counter wairdens books to be produced and granted dilligence to the s'd sir George M'Kenzie his ma'ties advocat against the wairden and counter wairdens for that effect Therafter his ma'ties advocat and sir Patrik Home advocat for his highnes interest repeated the fifth article of the fors'd summons bearing that a considerable part of the silver coyne of this kingdome under the pretence of silver called chisell heads scraps and sweeps has been melted and printed without any essey and so ought to be confiscat to the kings use and declaired his ma'ties advocat insisted for payment of the fors'd soume of nyn hundredth and sixtie thousand pound coyned without any essey and thereby confiscat in mainer above lybelled Against which article it was represented and alledged by the said sir John Falconer that it had been alwayes the custome of the Mint that the chisell heads and scraps which ware a part of the pots befor ware melted againe in presence of the wairden And it was thought that ther was as great securitie in that as if ther had been any essey and when any tryall was demanded he was alwayes ready to give the same And als it was alledged be the s'd earle of Lauderdale his pro'rs above named that as to the other officers of the Mint they

had ther commissions from the king And th generall could not invade any other offices and seeing sir John Falconer who was maister withdraws from defending in the cause An informs against the earle of Lauderdale th earle can not be liable for his malversations lyke as ther are two esseyes viz. the pott essey which is only taken for privat knowledg And ano other essey which concernes the publick and which is taken after the peaces has gotten the impressiōne and wherein ther can not be fellaxior and this article is but small extending to ten stone or thereby To which it was replied be sir George M'Kenzie and sir Patrick Home advocat for his highnes interest that the forsaid fyfth article stands relevan notwithstanding of the ans'r because it being clear by the law that no money should be coyned with essey if contrar to the lawis it be unwarrantable coyned it must belong to the king And for the greater securitie ther be nae money coyned without the essey and that the cuntry be not abused with base money ther are two esseyes used in the Min viz. the pott essey and the essey used at the printing and both cheeff esseyes must be used and if any money be coyned without these esseyes it must belong to the king as being coyned without essey And therfor the chisell heads swips and scraps not being esseyed a the pott essey which is the first essey and great security against the coyning of base money was femented they might have melted als much allei with it as they pleased and which is the great occasiōne of so much base money that has been coyned in this kingdome so albeit it be pretendit that ther was ano essey made thereof at the printing yet that can be no security because at that essey ther is only a peace taken out of a whole trogh full which may be is of ano other melting which of purpose is made of standert finness yet the mass part of all the rest of the peices in the trogh which is coyned of the chisell heads and sweeps which they doe not suffer the pott essey at the melting and so may be mixed with als much allei as the officers please, may be al base money And it is not a small quantitie that has been coyned after this mainer for it is offered to be proven that neir a third part of the money coyned in Scotland these years by pas has been coyned without essey While fifth article of the lybell above written repeated and insisted upon alledgeances above mentioned made for the s'd master and generall and reply above specified made therto being all at length read heard seen and considered be the s'ds lords they notwithstanding of the former alledgeances stand the s'd fyfth article of the lybell relevant and admitted the same to the persewers probatione And for proving therof assigned to the said sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his highnes interest a certaine day now bygaine and ordained his ma'ties advocat for his ma'ties interest to have letters direct at his instance for summonding of such witness and

probatione and also to produce such writts rights reasons and documents as he had or would use for proving thereof against the s'd day Therafter the said sir George M'kenzie his ma'ties advocat and sir Patrick Home advocat for his highness interest repeated the fors'd sixth article of the fors'd lybell bearing that ther war different weights made use of in the coynie house in swafar as his ma'tie in anno 1m. vi. c. sixtie two having a pyll of weights by contract with the master of the Mint of England they sent down that pyll of weights to the earle of Lauderdale with a copie of the s'd contract which weights ware in his keeping and yet the bullione was taken with the dean of guild of Edingburgh his weights and the mony was troned with the fractions of the kings weights And the s'd earle is lyable having the fors'ds weights in his keeping and having the advantage of four in the hundreth by using the fors'd different weights and declared his Ma'ties advocat insisted upon the fors'd sixth article of the lybell for the fors'd soume of fourtie thousand pound: as the four of the hundreth of the bullione lybelled that the dean of guilds weights ware heavier then the pyll in the coynsie house for which the defenders are lyable aganst which it was alledged be the s'd earle of Lauderdale his pro'rs above named That he denyed that article in swa far as concerns the earle that he made use of different weights and as to the rest of the officers of the Mint the earle cannot be lyable for them in this for the law having allowed the marchants either to bring in the bullione to the Mint but* to pay so much mony the generall was not concerned whow sir John Falconer made his bargan Wherunto it was ans'rd and represented by the s'd sir John Falconer that the looking to the weights is incumbent first to the warden and then to the generall And he knew not of the first pyll of weights sent down untill the fourth day of Feb'ry last and never had any order or intimatione from the generall to make use of these weights To which it was dnyed by the earle of Lauderdale's pro'rs above named that he knew not of the standert till the year 1m. vic. sixtie siven and then they ware sent down and the mony troned with these weights But how or with what weights the master received the bullione he was not concerned it not being under the cognisance of the generall or wairden to look to the weight until the money be coyned and its ordinar to receive in the bullione without weighting the same for where the bullione was payed in ryalls they ware considered by the peace and not taken by weight and if the bullion was any thing baiste ther was so much abaited of the pryce and the bullione arose accordingly to the goods imported And the generall not having received the bullion nor being obleyged to receive the same but the master by the act of parliament is allowed either to receive the bul-

lione or mony for the same and if he exceed his warrand he ought to ans'r for the same And the clerk was also a check upon him so that this debait is unnecessary It's ans'rd be his ma'ties advocat and sir Patrick Home advocat for his highness interest that the king was not concerned what was betwixt the generall and the maister but both of them ought to be lyable to his majestie in solidum and its positively offered to be proven that the officers of the Mint received in the bullion with the dean of guilds weights which is four of the hundreth heavier then the Scots pyll of weights and that they againe troned the peaces with the fractions of the kings weights Whilk sixth article of the lybell repeated and insisted oue alleigeances made for the earle of Lauderdale generall and the ans'r made by the master and duply made therto together with the ans'r above written made be his ma'teis advocat to the hail Being all at length read heard and seen and considered be the s'ds lords they repelled the fors'd alleigeance made for the s'd generall and maister of the Mint in respect of the lybell and reply bearing that the officers of the Mint received in the bullione with the dean of Guild of Edinaburgh his weights and troned the mony with the fractions of the kings weights whilk the s'ds lords stand relevant to be proven 'pro ut 'de jure' And for proving therof and of the quantitie of the bullione lybelled in the s'd sixth article the saids lords assigned to the s'd sir George M'kenzie his ma'ties advocat and sir Patrick Home advocat for his highness interest ane certaine day now by gaine and ordained his ma'ties advocat persever to have letters direct at his instance for summondng of such witnesses and proba'one and also to produce such writts rights and documents as he had or would make use of for proving therof against the s'd day Therafter the s'd sir George M'kenzie his majesties advocat and sir Patrick Home advocat for his highness interest repeated the fors'd seventh article of the lybell anent the profit of the exaltatione of the mony and coyne since the proclamation wherby the mony was cryed up being three shilling two pennies one the unce and the profit of exaltatione as to the bullione which was in the Mint the tyme of exaltatione and declared his ma'ties advocat insisted for the s'ds profits of the exaltatione lybelled extending to the s'd soume of sixteen thousand and two hundred pounds And the profit of two hundreth ston of silver lying in the Mint house the tyme of the exaltatione amounting to eight thousand pound for which they are lyable to his majestie Against which article it was alledged be the s'd earle of Lauderdale his pro'rs above named that wher the marchants payed in money in place of bullion there is noe place to crave the benefite of the exaltatione seing he payed in only twelve shilling Scots in place of the ounce of bullione And in that case the officers of the Mint provyded by the bullione and wher the marchants gave in the bullione he had the

* So in the original.

benefite of the exaltatione as is clear by the proclamations crying up the money for the marchants being backward in giving in bullione to the Mint to incurralge them therto it was appointed that they should have the benefite of exaltatione and so wheras befor the proclamations they got fiftie fyve shilling eight pennies for the ounce of bullione afterward they got fiftie eight shilling ten pennies for the ounce And therfor the defender cannot be found lyable in the exaltatione money unless it could be alledged that the same was reclaimed as the marchants by the officers of the Mint and as to any bullion imported and bought by the officers of the Mint they ought also to have the benefite of the exaltatione in regard of the hazard of the exchange and others which they can* To which it was replied be sir George M'kenzie his majest's advocat and sir Patrick Home advocat for his highness interest that seeng by the fors'd act of parliament anent the bullione the marchant men were allowed to pay in twelve shilling for the ounce of bullione which the generalls and master of the Mint having employed for bullione and to coyne the same for his majestie† use the king ought to have the benefite of the exaltatione of the bullione imported by the marchants seeng they bought the bullione at so casie and raite since the proclamations for crying up of the money as befor And it is positively offered to be proven by the earle of Lauderdale and lord Maitland generalls in ane compt betwix them and sir John Falconer they craved payment of the exalt'on money and that by the same reasons they craved payment thereof from the maister by that same reasons it must be due be them to the king non of them can pretend right therto but the benefite thereof must belong to the king And albeit the marchants should have the benefite of the exaltatione yet the officers of the Mint can not make it appear that they payed it to the marchants and they have noe right to retain it themselves and therfor they ought to pay it to the king Which seventh article above written and alledgeances made against the same and reply above specified made therto being at lenth read heard seen and considered be the s'ds lords they find that the profite of the exaltatione as to any bullion and coyned mony lying by the officers of the Mint the tyme of the exaltatione belongs to the king As also as to any bullione imported by the officers of the Mint since the crying up of the money that the profite of exaltatione lykeways belongs to the king and as to the bullione sold and delivered be the marchants in weight to the officers of the Mint The benefite of the exaltatione belongs to the marchants conforme to the act of counsell viz. three shilling and two pennies upon the ounce And therfor the s'ds lords assolyed the officers of the Mint as to the exaltatione of the bullione sold and delivered in

weight by the marchants in swe far as concerns the kings interest and assigned to his majesties advocat for his highness interest a certaine day now bygaine for proveing the quantitie of the bullione and cuyned mony lying by the officers of the Mint the tyme of the exaltatione fors'd and of the bullion imported by the officers of the Mint since the crying up of the mony and ordained his majesties advocat to have letters direct at his instance for summonding of such witnesses and probation and also to produce such writts rights reasons and documents as he had use of for proveing thereof against the s'd day Therafter the s'd sir George M'kenzie his majesties advocat and sir Patrick Home advocat for his highness interest repeated the eight article of the above written lybell anent the yearly interest and profite arrysing by the bullione payed into the officers of the Mint by the marchants and lying in ther hands yearly the years above mentionat and not cuyned And also the nyth article of the s'd lybell anent the melting down of the leg dollors and doucatdouns since they were current in the kingdome and which current mony being melted down is not to be considered as bullione But the defenders notwithstanding thereof must be comptable for the twelve shilling Scots which they received from the marchants for the ounce in place of bullione seeng they ought to have bought bullione with the same and not melted down the current mony of the kingdome wherby the king and his subjects received noe advantage but lose And declared his majesties advocat insisted for his highness interest upon the s'ds two articles for payment of the soumes above written therein contained conforme to the summons Agains which it was alledged by the earle of Lauderdale his pr'ors above named Primo That the generall of the Mint is not concerned in the nyth article but only the master Secundo By the hundreth fourtie nyth act fyfteenth parlia't king James the sixth forraigne coyne may be melted down And also the s'd sir John Falconer compeired and acknowledged the melting down of foragne coyn current in this kingdome because he found noe standing law against it and that it had been the practis of the Mint formerly which considerations made him to doe it Wherunto it was ans'd be the pro'r above named for the s'd earle of Lauderdale that they desyred it might be marked that the master acknowledges he had noe warrant from the generall for melting down the currant mony of the kingdome To which it was replied by his majesties advocat and sir Patrick Home advocat for his highness interest that as to the profite of the bullione imported by the mer'ts and not coyned yearly by the officers of the Mint and as to the melting down of the dollors ducatdouns and other current money the g'erall master and other officers of the Mint being conscious to the same are lyable to the king in solidum It being expressly provjed by the fiftie nyth

* So in the Original.

† So in the Original.

act parlia't thirteenth king James the second that the coyners coyn noe money that's cryed to have course in the land under the paine of death And more fully by the sixtie fyve act parlia't eight king James the third by which its provyded that in respect when mony is melted down it is diminished wasted and destroyed in the translatione by the fire to the great prejudice of the kingdome Therfor noe mony that is current in the kingdome should be melted down for bullione without special licence and charge from the king And by the sixteenth act parlia't first king James the sixth the melting down of current mony is discharged under the paine of escheat with the half of ther mov'ls for the first falt And of the haill mov'ls for the second falt against the owner and melter which does not derogat from the act of parlia't king James the second dischargeing. the same under the paine of death which is lykewayes agreeable to the common law by which it is provyded that the melting down clipping diminishing or otherwayes altering the current mony of any natione is punishable with death and if punishable with death much more aught the mony so melted down be confiscat to the king Albeit the melting down of the current mony had been only simply discharged and no punishment at all ejected but only that the same had been discharged by the law It wares a naturall and just punishment to punish the contraviners of the law by confiscating the subject by which they contraveen the law And albeit this punishment wares not exprest but here there can not be the least doubt or questione because by the last act the melting downe of the current mony is discharged under the paine of confiscatione of halfe of the move'ls for the first falt and of the haill moveables for the second falt and the defenders hes not only committed one falt by one melting down of the current mony but all this whyll bypast for many years together did lykewayes melt down the dollars and doucatdouns and other current mony in place of bullione to the infinit prejudice and trade and impoverishing of the kingdome which is the great reasone ther is so litle money in the cuntry And ther hes been much of the forraigne coyne that is current in this kingdome melted down and noe bullione brought in as it ought to have been that it is almost a wonder ther should be any mony remaining in the cuntry And seeng by the law the melters down of the current mony was to be punished with the confiscatione of the haill moveables much more with the confiscatione of the money itself melted down being so expressly contrar to the law and these laws are not altered by the two hundreth fourtie nyynth act parlia't fyfteenth king James the sixt allowing the forraigne coyne to be brought in to serve as bullione to his majesties counzie house becaus that act is only as to the forraigen coyn that is not to have course in the kingdome As to which it was most just and reasonable that it should be melted down for

bullione but that cannot be extendit to forraigne coyne that is appointed to have course as to which former laws dischargeing melting down therof stands yet jnteer And as this is clear by the law so the reasone of the law is most just and equitable For when forraigne coyne is appoynted to have course in the kingdome its noe more looked upon as forraigne but our own coyne it being appointed to pass as our own coyn by his ma'ties warrant so that as the melting down of our own coyne would be a contraventione of these laws by that same reasone the melting down of forraigne coyne that's appointed to have course in the kingdome as our own And if the defenders had melted down our own coyne as that would have been confiscat to the king so by the same reasone the dollers and doucatdouns which wares current mony being melted down contrar to express laws under so severe punishment aught lykewayes to be confiscat to the king without allowing the same as bullione or any thing upon the accompt of dewes of coynadge for the reasones fors'd and others above mentioned relaiting to the copper coyne Whilk eight and nynt articles of the s'd lybell repeated and insisted upon alledgeances proponed for the earle of Lawderdale declaratione of the said master of the Mint and answer above written being all at lenth heard read seen and considered be the saids Lords they ffind the fors'd eight article of the s'd lybell anent the yearly interest and profite arryng by the bullione payed in to the officers of the Mint by the marchants and lying in ther hands yearly and not coyned in due time relevant and admittit the same to the persewers probatione And also ffind that the melting down of the dollers the same being current mony in the kingdome and the doucatdouns since the tyme they wares current in the kingdome cannot be allowed to the defenders as bullione but that notwithstanding they are comptable for the twelve shilling Scots which they received from the marchants for the ounce in place of the bullione And admittit the said nyynth article to the persewers probatione and for that effect the saids lorts assigned to the said sir George M'Kenzie and sir Patrick Home advocat for his majesties interest a certaine day now bygainne for proving of the said eight and nynt articles And ordained his majesties advocat to have letters direct at his instance for summonding of such witness and probatione and also to produce such writts rights reasones and documents as he had for proving therof against the said day Therafter sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his highness interest repeated the forsaid tenth article of the said lybell That the earle of Lauderdale received double payment of three years sallarie as master of the Mint viz. one out of the excise of Ed'r by a precept from the king And lyke wayes sir John Falconer who* is

* So in the Original.

offered to be proven and he ought to refund one of the soumes payed being four thousand nyn hundreth pound Lykwayes repeat-d the eleventh article of the above written lybell viz. that the defender got six hundreth pound sterling as a bud or bryb from sir John Falconer to obtaine his accounts allowed by the exchequer And also repeated the last article of the above written lybell viz. That the earle of Lauderdale defender extorted a soume from the wairden for the third part of the remedies of weight alle't due to the counter wairden wheras the generall of the Mint being the kings comptroller and these remedies belonging to the king to whose use he should have seen the samen applyed and yet he caused the many due for these remedies to be payed to himself Against which it was alledged be the said earle of Lauderdale his pro'rs abovenamed (denying the said tenth and eleventh articles) that the said eleaventh article was calumnious and the earle is content to find the samen relevant to be proven *prout de jure* And as to the last article alledged that the remedies of the weight by immemorial possessions belonged to the wairden and counter wairden and ther is nothing in the lybell as to the remedies of weight and if these belong to the king then this article will not have place To which it was replyed by his ma'ties advocat and sir Patrick Home advocat for his majesties interest that the remedies of weight are only allowed to coyn upon and to save them from hazard when they are not without the remedies But they must not work industriously upon the remedies to the prejudice of the countris which if they doe the remedies belongs to the king and not to the defenders or to the wairden or counter wairden the same not being in itself allowable and nothing being due to them by ther ordinarie fees And it is offered to be proven that the officers of the Mint wrought industriously upon the remedies which were due to the king and the persewer needs say noe more but that the defenders her transacted upon that which belongs to the king Wherunto it was duplyed be the said earle of Lauderdale defender his pro'rs abovenamed adhearing to ther former alledgements that his majesties advocat sought to lybell the last article thus that in troning the peaces coyned albeit they were not found of sufficient weight yet that they were stamped and vented which consisted in the generall's knowledge But if after the troning and stamping the peaces be found not full weight it is nothing to the defender To which it was triplyed be the said sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his majesties interest That they opposed their former replies that the officers of the Mint did industriously tron the peaces upon the remedies and the officers of the Mint did so malverse as to the particular that wher a peace came to be troned of a just weight they did throw it back and caused sheive it downe to the remedies So they constantly and in-

dustriously tronned the peices upon the remedies Which three articles of the lybell above written repeated and insisted upon alledgements made against the same reply and duply above specified made therto being all at length heard seen and considered be the saids lords They stand the forsaide tenth article of the said lybell aenst the earle of Lauderdale his receivinge double payment of his three years sallarie above mentioned relevant to be proven *scripto* And als stand the forsaide eleventh article of the said lybell aenst the earle receivinge a bud or bryb of six hundred pound sterling from sir John Falconer to obtaine his accounts allowed in exchequer relevant to be proven *prout de jure* And before answer to the last article of the said lybell the saids lords allowed a joynt probations viz. to the persewer to prove that the officers of the Mint did work industriously upon the remedies of weight which are due to the king and the quantitie of the remedies and the wairden and counter wairden to prove it by custome of the Mint ther was any thing due to them out of the remedies of weight for ther office And reserved the considera'ne of that point aenst the a'rents until the conclusions of the cause And the saids lords assigned to his majesties advocat and sir Patrick Home advocat for his majesties interest a certaine day new bygaine for provinge of the forsaide tenth and eleventh articles of the said lybell and als that member of the forsaide interloqueur upon the last article of the said lybell appointed to be proven be the said persewer And also the saids lords assigned the samen day for the pro'rs of the wairden and counter wairden above named for provinge the other member of the forsaide interloq'r upon the last article of the said lybell and ordained either partie to have letters of diligence direct at ther instance for summoning of such witnesses and probations and also to produce such writts rights reasons and documents as they had or would make use of in the said matter against the said day reserving to either partie to object *contra producenda* and against witnesses *in termino* as accords Therafter the said sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his majesties interest insisted against the said Mr. James Falconer as representing the said deceist John Falconer his father laite wairden upon the passive titles and particularly as successor to him *titulo lucrativo* for his malversations in relatione to the copper coynes and other articles abovementioned and for payment of the soumes of money arryving therby as also against Archbald Falconer late counter wairden for the abuses and malversations comitted be him in relatione to the article abovementioned It was alledged by the said Mr. James Falconer for himselfe That he has ane dispositione from his father for onerous' caus' and the same is with the burden of his debts and this lybell being for vast soumes of mony he desyres a tyme may be allowed to him to advise what answer he will make therto And also it was

alleged be the said Mr. James Falconer as pro'r for the said Archbald Falconer That the said Archbald ought to be absolved because his gift is but late being granted after the deeds of malversations lybelled To whilk it was replied be his majesties advocat and sir Patrick Home advocat for his highness interest that as to the alledgeance proposed be Mr. James Falconer for himselfe that the dispositione being granted by the father to his sone after the father became debitor to his majestie by the abuses and malversations committed by him mentioned in the above written articles and as was lyable for the sounes abovesentioned to him he must instruct the onerous cause of the disposition and albeit he should instruct the onerous cause thereof Yet notwithstanding he must be lyable to his majestie for the dispositione being granted by the father to the said Mr. James Falconer daring his trust the tyme he was in the office Its presumed in law the same has been granted of purpose to defraud his majestie The father being conscious to himselfe that by the acts and deeds of malversations above mentioned he would be lyable to the king in much more then he is worth And as to the alledgeance proposed for Archbald Falconer his gift ought to be produced that it may be cleared whither the deeds of malversations was befor or after the gift Whilk alledgeances above written proposed for the s'ds Mr. James and Archbald Falconers and reply above written made thereto being all at length red heard seen and considered be the s'ds lords they befor ans'r ordained the s'd Mr. James Falconer to produce the dispositione granted to him by his father and instruct the onerous cause thereof As also befor ans'r ordained Archbald Falconer to produce his gift and for that effect the s'ds lords assigned to the said Mr. James Falconer a certayne day now bygone for producing the s'd dispositione and to instruct the onerous causes thereof As also to produce the s'd Archbald Falconers gift with all other writts rights reasons and documents he had or would make use of in the s'd matter for instructing the onerous cause of the s'd dispositione reserving to his majesties advocat to object *contra producenda* Thereafter the s'd actione and cause being agane called in presence of the s'ds lords his ma'ties advocat and sir Patrick Home advocat for his ma'ties interest declared they insisted ag't Richard lord Maitland as conjunct generall of the Mint being conjoynd in the commissione with his father that he may be found lyable for all the abuses and acts and deeds of malversations committed either in relatione to his own office as generall or in relatione to the other officers of the Mint And for restitutione and payment of the sounes of mony contained in the articles lybelled and reported the fers'ds interloq'rs given by the s'ds lords against the earle of Lauderdale his father the wy' conjunct generall and craved that the articles lybelled against the lord Maitland as the other conjunct generall of the Mint might

be admitted to probatione As to which it was represented by the s'd lord Maitland that he was minor when he was joynd in the commissione with his father anno 1m. vi c. sixtie eight And this being ane actione at his majesties instance against him he would nether employ nor allow ane advocat to debate for him but desired ther lo'ps to be informed that he was minor when he was joynd in the commissione with his father as s'd is And that he medled not in the second copper jurnay that being trusted to particular persons by his ma'tis and also by a pass under his majesties royall hand *pre [sic orig.] vis cum senis* to goe and reside abroad without any limited tyme he was out of the kingdome for the most part since the year 1m. vi c. siventie that he had no benefit nor sallerie nor any of the perquisites of the Mint and that ther was no particular warrant for processing him his ma'ties warrant and naming all the officers of the Mint that ware to be perceived wheria he is not named which his ma'tis signified he did knowing his innocence and therfor of knowledge his majestie ordered his name to be left out and not insert in the letter And albeit he might ans'r to the lybell yet he is resolved to propose noe defences but humbly submitts himselfe to the kings majestie Wherunto it was ans'rd be sir George M'kenzie his ma'ties advocat and sir Patrick Home advocat for his highness interest That albeit the lord Maitland had been minor when he was conjoynd with his father in the office yet he ought to be lyable for any abuses and malversations committed in that office by the other officers of the Mint seeing he was the supream officer of the Mint conjoynd with his father and had power to controll all the officers of the Mint and to hold courts and punish delinquents or any of the officers of the Mint that hade malversed in ther office So that he was *[sic orig.]* one of the generalls of the Mint *ratione officii* was ans'rabl for all the abuses committed by the other officers seeing he ought to have inquired into the coynage and seen that ther had been no abuses nor malversations committed in relatione thereto And if any of the officers had malversed he as one of the generalls ought to have punished them wy' wayes acquainted his majestie that he might have removed them from ther offices and repeats the former grounds upon which the earle of Lauderdale his father was found lyable to his majestie And wheras it is alledged by the lord Maitland that he was minor when he was conjoynd in the office and that he was out of the kingdome since the year 1m. vi c. siventie It is ans'rd if a minor accept ane office if he committ any abuse or acts of malversations his minority will not excuse him nor free him from the restitutione of the dammage and prejudice sustained especially seeing he did exercepe the office with his father and counted with the other officers for the profite And his ma'ties advocat took instraments upon the lord Maitlands acknowledgment that he did not attend his office in the year 1m. vi c. siventie which is also great ans

act of malversation as can be for if a man accept of ane office of trust especially of great trust as to have inspectione of the Mint and coynadge which is of so great a concernment to his ma'tie and the wholl kingdome and who by the nature of his office was to redargue and controll the other officers and punish them when they committ faults if any man in such a trust should be negligent and desert his office he aught not only to be lyable for these things that are incumbent to his own office but for the abuses and malversations committed by the other officers under his power and jurisdictione And albeit ther was no particular warrand from his majestie for persewing the lord Maitland with the other officers of the Mint it does not import for this being only a process for a civell effect of the restitutione the kings advocat is sufficiently warranted by vertue of his office to persew all civill actiones wherin the king may be concerned without anie speciall warrand from his majestie and all that can be alledged for the lord Maitland is already proponed for his father and repeats the former interloq'r ag't his father Which summonds above written repeated and insisted upon against the lord Maitland alleigances proponed for him and ans'rs above written made therto being all at lenth read heard seen and considered be the s'ds lords And they therwith weill and ryply advysed they ffind that the lord Maitland being joynted with his ffather in the commissione that the proces most also goe one against him although he declynes to propone any defence in the cause And therfor the saids lords admitted the lybell against him to the said pers'rs probatione And for that effect assigned to his ma'ties advocat and sir Patrick Home advocat for his ma'ties interest a certane day now by-gaine And ordained the s'd persewer to have letters direct at his instance for summonding of such witness and probatione and also to produce such writs rights reasones and documents as he had or could use for provinge the points of the fors'd lybell against the s'd day with certificatione. c. as ane act made be the s'ds lords extant in proces bears At and after the whilk terme sua assignd the s'd actione and cause being againe called in presence of the s'ds lords the s'd sir George M'Kenzie his ma'ties advocat and sir Patrick Home advocat for his highnes interest sfor provinge of the severall points and articles of the fors'd lybell ffound relevant and admitted to his ma'ties probatione in mainer above specified craved that the lords might grant warrand for transmitting of the books and papers produced befor the comissioners appointed by his ma'tie for examining the Mint And depositions of the officers and others taken by the s'ds comissioners y'ant lying in the hands of James Johnstone writter to his majesties signet clerk to the s'd comissionone which being considered be the s'ds lords They ordained the said James Johnstone to transmitt and deliver to sir A. Gibson clerk to the proces all the books papers and depositions lying in his hands relating to the Mint con-

forme wherunto the s'd James Johnstone produced the books papers and depositions following viz. Inprimis Ane unsubcryved compt of copper bearing that the weight past was twelve thousand four hundreth and nyntie three stons three pound printed value is two hundreth nyntie four thousand four hundreth fiftie fyve pound four shilling counccills warrand is two hundreth sixtie six thousand fyve hundreth and twenty ane pound six shilling eight pennies Remedies light is twentie seven thousand nyn hundreth thertie four pound siventeen shilling four pennies just halfe is threttein thousand nyn hundreth sixtie six pound fifteen shilling four peanics As the s'd accompt containing ane poscript one the end therof subcryved be Alexander Maitland bearing that he being called and compeirand befor the committie and interrogat whose hand writt the above written account or paper was declared he belives the same to be hand writing of David Maitland his brother bears Item two leaves toren out of book containing the accompt of the copper coyned in the months of January February March Aprill May June July September October November and December 1m. vi c. siventie nyn January and February 1m. vi c. eightie subcryved one every page by Archbald Falconer Item ane count from the exchequer containing the compleit charge of bullione arrysing both upon the export and import of his majesties kingdome staited together with the accounts of the particular ports and precincts and collectors counts therof both fitted and unfitted And also bullione that does arryse from them what they have payed and what is yet resting both in the tyme of the severall tacksmen and general collectors betwixt the first of November 1m. vi c. sixtie ane years And the first of November 1m. vi c. siventie three perused and calculat by William earle of Dundonald twentie fyfth of February 1m. vi c. siventie four And bearing that the charge of the bullione which the master of the Mint hes receaved from the severall collectors and marchants the tyme of the accompt extended to the weight of one thousand two hundreth fiftie eight stone fourteen pound one ounce at eleven denire fine and also containing the account of discharge And in one of the articles therof bearing that the s'd sir John Falconer compter discharges himself with payed to my lord Haltoune generall of his majesties Mint for his fees ordinary and extraordinary being per annum two thousand six hundreth sixtie and one pound six shilling eight pennies wherof four hundreth pound per annum as the generall halfe of the stock to the Mint conforme to the act of parliament is a parte and included in the s'd yearly sallerie which being resting since December 1m. vi c. sixtie years he say he payed to his lo'p for twelve years viz. from December 1m. vi c. sixtie till December 1m. vi c. siventie two years exclusive conform to his receipts And in all extends to thertie one thousand nyn hundreth and eightie six pounds Scots money as the s'd

accounts containing severall other articles and upon the end containing ane poscript subscribed be John duke of Lauderdale his ma'ties commissioner for the tyme John earl of Rothess lord high chancellor and William earle of Dundonald lords commissioners of his ma'ties thesaure And als by sir John Falconer himselfe dated the 16th day of March 1m. vi c. seavinty four years bearing the s'd account of the charge and discharge to be examined perused and calculat by them at more lenth bears Item two letters subscribed by Archbald Falconer direct for sir John Falconer one daited the thirteenth day of August 1m. vi c. seaventie nyn years and the oy' daited the sixt o' September 1m. vi c. seaventie nyn years Item ane other misivive letter subscribed by Archibald Falconer and David Maitland direct for sir John Falconer daited the third day of September 1m. vi c. seavinty nyn years acquainting him that the day befor the lord Haltoun being in town gave orders by David Maitland to fall to printing with all expeditions containing severall other particulars Item ane other letter subscribed be David Falconer daited the tenth day of September 1m. vi c. siventy nyn years direct to sir John Falconer shewing him that Master Maitland was at the couynzie house one Saturday befor who at ther desyre spoke to master Weightman for furduring of the work And that the lord Haltoun was there yester day a considerable space of the forenoon being very weil pleased with ther expeditione and containing severall other particulars Item ane unsubscryved letter from my lord Haltoun daited the eight day of December 1m. vi c. seavinty nyn years direct to sir John Falconer desiring him to shew David Maitland his precepts and receipt given by him for mony gotten since ther last account and with him to prepar the account for the lord Hattoune to shorten the tyme which he knew he could not spare for other busines And shewing him he referred to David Maitland to tell him his thoughts Item ane other letter subscribed by my lord Hattoun daited the twelft day of February 1m. vi c. and eightie years direct to sir John Falconer desiring sir John to shew the bearer thereof not only his receipts but all that he had to say as to the s'd lord Haltouns part of the expens' great and small and telling him that he knew the bearer was trusted by him And so he behooved to prepar all the accounts Item ane receipt be the s'd Charles Maitland lord Haltoune daite the fourth of January 1m. vi c. siventy nyn years Wherby he grants him to have received from sir John Falconer master of the Mint compleit payment of the equall half of the profit of all copper coyne coyned betwixt the fors'd day of June 1m. vi c. siventy seven and the first day of January 1m. vi c. siventie nyn Item ane other receipt be the s'd Charles Maitland dated the twelft day of May 1680 wherby he grants him to have then and of befor to have received full payment and satisfactione from sir John Falconer master of his ma'ties Mint. of the profits of the last copper

journey commensing from the first of May 1m. vi c. seaventy seven years to the conclusion therof being the tenth day of February 1m. vi c. eightie years being the free profit of the equall half therof conforme to his majestes gift Item three litle papers or general scroll anent the divisione of the copper remedies Item ane cancelled contract betwixt Charles Maitland of Haltoune generall of the Mint and sir John Falconer dated the twentie eight of March 1m. vi c. seavinty seven years wherby the s'd generall assigned to the said sir John Falconer the equall half of the twelve shilling to been [*sic orig.*] paid in by the marchants for each unce of bullione in place of the said bullione and that of the said year viz. from the first of February 1m. vi c. siventy seven to the first of February 1m. vi c. seavinty eight with all soumes of mony that should aryse therby or should be payed in place of the bullione for the s'd year for payment to the s'd generall of two thousand marks in lew and satisfactione of his trwe and lawfull profits of furnishing the s'd bullione and containing ane discharge upon the back y'of subscribed be the said Charles Maitland daited the fourth of January 1m. vi c. siventie nyn wherby he grants him to have received full payment of the contents of the s'd contract as also of the like soume of two thousand marks for the subsequent year from the first of February 1m. vi c. seavinty eight to the first of February 1m. vi c. seavinty nyn conforme to the s'd sir John Falconers band of the daite the fourth of August 1m. vi c. seavintie seven years Item ane other receipt subscribed be the said Charles Maitland wherby he grants him then and of befor to have received from the s'd sir John Falconer master of his majesties Mint the soume of two thousand marks in full payment of his part of furnishing the half of the bullione not payed in specie by the marchants at twelve shilling per ounce conforme to the prin'll act of parlia't and that from February to February conform to the fors'd contract and agreement made betwixt the said sir John Falconer and him and acknowledging him to be satisfied therof to the first of February 1m. vi c. eighty years as the s'd receipt bears Item the coppie of ane order superscryved by his ma'tie and subscribed by ——— Coventrie secretary dated the twenty seavint of August 1m. vi c. siventy fyve authorizing and requiring the wairden of the Mint in the Towr of London to deliver ane of the pyls of Scots weights unto Richard Maitland esquir ane of the generalls of the Mint in Scotland to be caried into Scotland by the s'd generall and to remain ther with the officers of the Mint in the s'd kingdome as the said copy attested by the said Richard Maitland and bearing the samen to have been compaired with the originall which was given to him by master Slingsby master of the Mint of England and which attestatione is daited the fourth of February 1m. vi c. eightie two years Item ane copy of the comparisone of the Scots and English weights from great to small Item

the s'd Charles Maitland his claimer and his protections in furnishing the half of the billions containing the depositions of sir John Falconer Archibald Falconer and James Farquar one the end and back thereof taken by the commission appointed by his majestie for the Mint with sir John Falconer his ans'rs thereto and reply for the said lord Haltone and Richard Maitland lord justice clerk to the said ans'rs containing the depositions of sir John Falconer sir William Sharp and James Farquar on the end thereof taken by the s'd commissioners for the Mint Item are order or precept subscribed by his majestie and subscribed by John earle of Lauderdale secretary daited the fourth of June 1m. vi. c. sixtie three years requiring the thes'r prin'll thes'r deput and collector of his majesties grace to pay to the s'd Charles Maitland of Haltone or any having his order four hundred and therteen pounds sterling as certain bygone fees resting to him as generall of the Mint of Scotland and that out of the first and readiest excheq of this kingdome with the lord Ballanden his order one the back thereof to Thomas Moncrieff for payment of the s'd four hundred and therteen pounds sterling And the s'd Charles Maitland his discharge daited the fyfth of Juni. 1m. vi. c. sixtie four years granting the receipt of the s'd soume from the said lord Ballanden lord thes'r deput for the tyme Item are mutuall discharge betwixt Charles Maitland of Haltone generall of the Mint and sir John Falconer maister daited the twentie eight of March 1m. vi. c. seaventy seven Item are cancelled ticket granted be sir John Falconer to the s'd Charles Maitland (therin designed lord thes'r deput) daited the third day of Aprill 1m. vi. c. siventie seven years for payment of six hundred pound sterling viz. the one halfe at Lambas and the other half at Candlmiss thereafter containing sir John Falconer's oath one the back thereof taken before the commissioners for examining the mint Item two unsubscrived accompts of debitor and creditour betwixt the generalls and master of the Mint the one daited the first day of January 1m. vi. c. siventie nyn and the other the first day of August 1m. vi. c. siventie nyn years Item are cancelled band granted be sir John Falconer to Charles Maitland of Haltone daited the fourth of January 1m. vi. c. siventie nyn for the soume of fourtie four thousand marks of principall payable as follows viz. fourteen thousand marks at Candlmiss 1m. vi. c. siventie nyn fifteen thousand merks at Whitsunday thereafter and other fyfteen thousand merks at Lambas thereafter with a thousand pounds for each termes failzie and a'rent after the rex'ive termes of payment thereof. To which band sir William Sharp and David Maitland are subscriyving witnesses Item are account of copper coyn stated and abbreviated from the rex'ive books of buying and working till the first of January 1m. vi. c. seaventy nyn betwixt the lord Haltone and sir John Falconer unsubscrived Item are other unsubscrived account of copper janny counted from the first of Ja-

nary 1m. vi. c. seaventy nyn till the tenth of February 1m. vi. c. eightie years. Item are abreviat of the bullions furth of the books of exchequer from November 1m. vi. c. sixtie one to November 1m. vi. c. eightie years Item are compt book of the cuyne house containing the accounts of Thomas Achisone master coynor both charge and discharge from the seaventh day of Aprill 1m. vi. c. eightie two to the first of August 1m. vi. c. and six * years Item the count and register of the silver called the four mark peeces two mark peeces and half mark peeces past his majesties irons from the twentie two day of July inclusive 1m. vi. c. sixtie four to the fourth day of December 1m. vi. c. siventie three Item are account of silver past his majesties irons from the seaventh day of Aprill 1m. vi. c. siventie four to the twentie third of December 1m. vi. c. eightie one years Item are account of silver past his majesties irons from the seaventh of Aprill 1m. vi. c. seaventy four to the twentie one of October 1m. vi. c. eighty one with one page containing one account of silver coyned in December 1m. vi. c. eighty one January February and May 1m. vi. c. eightie two Together with one leaf of paper containing one account of silver past his ma'ties irons frae the eight day of May 1m. vi. c. eightie two to the fourth of August the said year Item are account of bullione containing the compleit charge of bullione arrysing both upon the export and import of the kingdome of Scotland stated together with a particular account of the precincts and ports and collectors accounts thereof both fitte and uplifted And also bullions q't does arryse from them what they have payed and who is yet resting both in the tyme of the severall tackmen and generall collectors betwixt the first of November 1m. vi. c. sixtie one and the first of September 1m. vi. c. siventie three with the accounts of discharge thereof fitted and subscribed be John duke of Lauderdale his majesties commissioner for the tyme John duke of Rothes lord high chancellor and William earle of Dundonald commissioners of his majesties thes'rie Item are book of accounts anent the bullione containing charge and discharge from January 1m. vi. c. seaventy four to November 1m. vi. c. seaventy fyve Item are other book of accounts anent the bullione containing charge and discharge from the first day of January 1m. vi. c. siventie seven to August siventie seven years Item two abreviats of the bullions accounts from November 1m. vi. c. sixtie one to November 1m. vi. c. eightie one years Item are melting register beginning the tenth of January 1m. vi. c. siventie three years and ending the fourt of December 1m. vi. c. siventie three Item are jurnall book of silver melting beginning the twentie sixt of March 1m. vi. c. siventie four years and ending the twentie sixt of November 1m. vi. c. siventie six containing in the end thereof one account of bullions Item are new melting jurnall beginning the sixtent day of February 1m. vi. c. siventie seven inclusive

* So in the original.

and ending the twente day of October 1m. vi. c. eightie one years. Item ane melting book beginning the twentie sixt of Aprill 1m. vi. c. eightie two years and ending the third day of August 1m. vi. c. eightie two years Item ane account of copper proceeding the twenty sixt of December 1m. vi. c. sixtie three Item account therof from the twentie eight of the s'd December to the eighteen of Aprill y'after Item ane account of the same from thence to the thirteene of August thereafter Item account of copper from thence to the twentie of October thereafter Item account of the same from thence till the twentie one of December thereafter Item ane account theroffrom thence to the fyfteenth of March y'after Item ane account therof from thence to the first of October thereafter Item ane account therof from thence to the first of January y'after Item ane account therof from thence to the fyfteen of Aprill thereafter Item account therof from thence to the first of Aprill y'after Item ane account therof from thence to the fourteen of November thereafter Item ane account therof from thence to the twentie third of Aprill thereafter Item ane account therof from thence to the twentie of June thereafter Item ane account therof from thence till the thirteene of September thereafter Item ane account therof from thence till the first of December y'after Item ane account therof from thence till the fyfteen of January thereafter Item ane account therof from thence till the first of March thereafter Item ane account therof from thence till the first of May thereafter Item ane account from thence till the first of June y'after Item ane account therof from thence till the first of June thereafter Item account therof from thence till the first of July thereafter Item account therof from thence till the seventeen of July 1m. vi. c. sixty eight years Item a cancelled contract betwixt sir John Falconer Baillie John Hall and George Galbreth daited last of March 1m. vi. c. sevinty seven Item ane cancelled contract betwixt the said sir John and John Coutts provest of Montros and James Mures dated the twentie eight of January 1m. vi. c. sevinty nyne Item ane other cancelled contract betwixt the said sir John and David Mudie daited the day of 1m. vi. c. siventie eight all anent copper Item ane account of depurements in building of the new mill and forging the Mint beginning the fourteenth of July 1m. vi. c. sevinty four Item ane book concerning the Mint beginning the tent of March 1m. vi. c. siventy six Item ane other book concerning the Mint beginning the tent of November 1m. vi. c. sevinty six Item ane other book concerning the Mint beginning in January 1m. vi. c. sevinty eight Item ane other book concerning the same beginning in December 1m. vi. c. sevinty eight Item ane other book concerning the same beginning in February 1m. vi. c. siventy nyne Item ane account of copper bought from and after the first of January 1m. vi. c. siventie nyn ending in December thereafter Item ane

account of the cunzie house made be John Falconer master therof betwixt the first of June 1m. vi. c. thretie nyne and the third of Aprill 1m. vi. c. fourtie one Item ane printing book of the Mint beginning the last day of July 1m. vi. c. sixtie three and ending in July 1m. vi. c. sixtie eight Item ane account of the counsiehouse made be George Foulis master coyuzier beginning the first of June 1m. vi. c. and cleaven and ending the first of May 1m. vi. c. and thirteene Item ane book anent the gold and silver of the Mint frae the first of February 1m. vi. c. fyfteen years to the first of July 1m. vi. c. and sixteen years Item ane other book therof from the twentie siventh of March 1m. vi. c. eighteen to the first of March 1m. vi. c. and twente years Item ane other book concerning the same from the twentie of March 1m. vi. c. and twentie two years till the twentie two of March 1m. vi. c. and twentie four Item ane other book concerning the same from the eight of Aprill 1m. vi. c. twenty four till the nynt of May 1m. vi. c. siventie sives Item ane other concerning the same from the first of September 1m. vi. c. and ten till the tenth of February 1m. vi. c. and cleaven Item ane other concerning the same from August 1m. vi. c. thretie four till November 1m. vi. c. thretie four Item ane other concerning the same from July twentie siven to December 1m. vi. c. and thretie four years Item the depositions of Archbald Falconer counter warden, Alexander Maitland one of the wairdens David Maitland deput to the lord Haldon in the Mint Mr. Henry Alwin essey master, John Falconer kate warden sir John Falconer James Farquar servitor to the lord Haldon Adam Foulis clerk of the bullione Hugh Sterrington writter Mr. James Falconer eldest laufull son to the decessit John Falconer late wairden Henry Lacer smith in the Mint Patrick Ogilvie servitor to sir John Falconer Thomas Murray miller in the Mint Walter Mitchell cutler in the Mint Thomas Ash only melter in the Mint Thomas Aislie one of the servants of the melting house taken befor the commissioners appointed by his majestie for examining of the state of the Mint Therafter the said sir George M'kenzie his majesties advocat and sir Patrick Home advocat for his highness interest declaired they repeated the compt compt books bands tickets receipts and other writs above mentioned and depositions of the persones above named taken befor the commissioners appointed for examining of the affairs of the Mint now produced for proveing the articles of the lyboll above written found relevant and admitted to their probations And for farther clearing of the lords an to the sers'd six hundredth pound sterling given as a bud or bryb to the said earle of Lauderdale by the s'd sir John Falconer to get his accounts allowed by the lords of the the'rie and exchequer and payment of his unjust ballance from his majestie craved that sir William Sharp of Stoniehill late cash keeper who was present at the comening betwixt the earle and sir John and a subscribing witness in

the ticket granted by sir John might be examined therant Which desyre of his maties advocat being considered be the s'ds lords they ordained sir William Sharp to be examined upon the points above mentioned and also the haill persons above named who formerly had deponed to be re-examined in presence of the s'ds lords upon the points wherupon they formerly deponed and granted warrant to cilt them all to that effect And accordingly the s'd sir William Sharp and haill persones abovenamed who formerly deponed being all law'lie sumond and the s'd sir William Sharp being personally present solemnly sworn and examined upon the points above written deponed and declaired as his oath and depositeone subscriyved with his hand extant in proces bears And also the said Archbald Falconer and Alex'r and David Maitlands Mr. Henry Alcorn sir John Falconer James Farquar Mr. James Falconer Henry Lucar Patrick Ogilvie Thomas Murray Walter Mitchell and Thomas Ash being all personally present solemnly sworn and examined ilk ane after ane other upon what they hade been formerly interogat and deponed befor the s'ds commissiouners appointed for examinatione of the state of the Mint They adhered all of them to ther former depositeones and deponed and declaired as ther s'ds oaths and depositeones extant in proces bears Therafter the s'd actione and cause being againe called in presence of the s'ds lords and the s'ds Charles earle of Lauderdale Richard lord Maitland sir John Mr. James and Archbald Falconers defenders ther pro'rs abovenamed rex'ive being oft tymes called required and wrged by ane macer at the barr as use is to exhibit and produce in presence of the s'ds lords all the writts and probatiounes they had for proveing the points of the act above written admitted to the probatione and allowed to be proven and instructed by them in mainer above specified and to satisfie the points of the s'd act as to ther pairts And lykwayes the s'd Mr. James Falconer for himselfe and as pro'r for Archbald Falconer being oft tymes called required and wrged to produce the dispositione alledged upon granted by his father to him with the s'd Archbald Falconer his gift and to satisfie the other points of the s'd act They and ilk ane of them failzied and succoumed in doeing therof as was weil known to the s'ds lords and therfor they circumduced the terme against all of the s'ds defenders Therafter the s'ds lords haveing all at lenth read heard seen and considered the fors'd libelld summonds and points and articles therof found relevant and admitted to his majestes advocats probatione compts compt books missive letters contracts bands tickets receipts and others above ment' produced and depositeones of the persones above named produced by his majestes advocat for proveing of the severall articles of the forsaid summonds found relevant in mainer above written And they being therwith and also with the writts above mentioned produced for the def'ers weil

and rply advised The s'ds lords stand it proven that Charles earle of Lauderdale ane of the generalis of the Mint did take up the accompts of the copper jurnays from the wairdens and that they war destroyed and that ther being a stop put to the coynadge of the copper in the year 1m. vi c. siventie nyn the allowance given by the counsill for the second juray being exceeded that by his ordor and warrant the officers of the Mint proceeded to the coyning of more copper then was allowed by the warrands And that he got the graitest shaire of the profits of the copper coyne and that ther was three thousand nyn hundreth nyntic nyn stone coyned after the act of the indemnitie and that he did not imploy the stock of twentie thousand marks appointed by the king for buying of bullione Albeit the earl and the master received payment and allowance of the a'raut of the s'd stock of bullione as if it had been imployed and that he was a sharer of the renucides of the silver coyne and that the dean of Guilds weights ware made use of in the Mint for receaving of the bullione And that the mony was troyed by the fractions of the king's weights and that when the weights war adjusted to the Scots pyle after the Scots standert weight was intimat to the officers of the Mint the earle caused deliver up the pyle to the wairdens and to sett by the adjusted weights and caused sett a new sett of weights adjusted to the dean of Guilds weights conform to which they did then work till the end of January 1m. vi c. eightie two years And that he neglected to cause essey the chisell heads sweeps and scraps and to see that the mony esseyed and coyned was of just weight and fynnes And albeit he did know the counterwairden did not attend his office yet he did not challenge him for it and neglected to hold compt and to punish the officers of the Mint for the neglect and malversations in ther offic which the earle as general of the Mint was impowred to doe by his commissioun and stand as to the lord Maitland conjunct general with his father that be a clame given in to sir John Falconer he required from sir John the master a shaire of the profits of the twelve shilling upon the wnces bullione and of the profits of the difference of the weights and of the profits of the exaltatione money And that albeit his majestic granted warrant to the maister of the Mint at the Tour of Londone to deliver a pyll of weight to the lord Maitland as ane of the generalis of the Mint of Scotland to be caried to Scotland which warand was daited in August 1m. vi c. siventie fye And accordingly the lord Maitland did receive and bring down the pyll of weights to be made use of in the Mint of Scotland Yet notwithstanding it was kept up and never intimat to the officers of the Mint to be made use of till February 1m. vi c. eightie years And when the weights formerly made use of ware reduced to the Scots pyll they being againe changed the officers of the Mint did make use of the dean of Guilds weights conforme to which they wrought till the end of

January 1m. vi c. eightie two years and that the lord Maitland lykwayes neglected to see the other officers of the Mint doe ther dwetie and to hold courts and punish delinquents which he was obleidged to doe by his commissione And the lords ffind that sir John Falconer late master did goe one in a coynadge of copper the second copper jurnay after the quantitie allowed by the counsaill was exceedit and that he had a share of the profits of the copper coynadge and that he did not imploy the kings stock for buying of bullione Albeit he got payment and allowance of the half of the a'rent therof as it had been employed and that a great part of the mony was coyned without essey and that he coyned the mony alwayes upon the remedies below the finnes of the standart plate and that he had a share of the remedies And the lords ffind as to the wairdens that they went one in the coynadge of copper after the quantitie allowed by the warrands was exceedit and got a shaire of the profits and particularly John Falconer the old wairden was a shairer of the profits of the copper coynadge and that the wairdens were alwayes shairers of the remedies and that they troned the peices alwayes with the remedies and that when they fand the peices equal to the just weight without the remedies they threw them back to the workmen to sheer them down and to bring them to the remedie and so alwayes troned the peices industriously upon the remedies And as to the first article of the lybell anent the copper coyne the saids lords ffind that ther was siventeen thousand stone of copper coyned the first copper jurnay beginning the twelft day of June 1m. vi c. sixtie one years and ending the first day of August 1m. vi c. sixtie eight and that ther was fourteen thousand stone coyned more that jurnay then was allowed by the warrands and that ther was twelve thousand four hundredth nyntie three stone of copper coyned the second copper jurnay beginning the first day of May 1m. vi c. siventie seven years and ending the tent day of Feb. 1m. vi c. eightie years and that ther was nyn thousand four hundredth nyntie three stone coyned the second copper jurnay nor was allowed by the warrands wherof ther was three thousand nyn hundredth nyntie nyn stone one pound coyned since the act of indemnitie and allowing twelve shilling for the pryce of every pound of mass and body of the copper and that ther was coyned thretie two shilling out of every pound of copper so that deducing the pryce of the mass and body of the copper ther will be twentie shilling of free mony of profit upon the pound which for the fourteen thousand stone coyned more then was allowed by the warrands the first copper jurnay will amount to the soume of two hundredth and twentie four thousand pound And ther being fyve thousand four hundredth fourtie four stone coyned more then is allowed by the warrands the second copper jurnay before the act of indemnitie at that same raite will amount to the soume of eighty seven thousand nyn hundredth

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and four pound and for the three thousand nyn hundredth nyntie nyn stone coyned since the act of indemnitie at thretie two shilling the pound the mass and body of the copper not being allowed amounts to the soume of one hundredth and two thousand three hundredth nyntie eight pound eight shilling Scots mony And as to the second article anent the twelf shilling upon the ounce of bullione and eight article anent the profits arrysing to the king by the bullione given in to the officers of the Mint yearly and not coyned The lords remitts these articles to the lord thes'r the officers of the Mint being regullarly and in course lyable to compt to the lord thesaurer for the same And as to the third article anent the profit of the stock of twentie thousand marks appointed by the king for buying of bullion yearly ffind that the generall and master of the Mint did get payment and allowance of the soume of twelve hundredth marks as the a'rent of the said twentie thousand marks yearly albeit the stock was not imployed for buying of bullion as was appointed by the king and therfor ffind the laite generall and master are lyable *singuli in solidum* viz. the earle of Lauderdale laite generall from the year 1m. vi c. sixtie two that the stock was appointed by the king as being *indebite solutum* and for the value of the ordinary annuall of the said a'rent *nomine damni* from the year 1m. vi c. sixtie two to the year 1m. vi c. eightie three being twentie years which extends in all to the soume of twentie fyve thousand and six hundredth pound Scots mony And sir John Falconer laite master from the tyme of his entrie to the said office which was the first of January 1m. vi c. seventy one years And as to the fourth article anent the difference of the finnes of the mony from the indented standart plate ffind by the printing books that the officers of the Mint from February 1m. vi c. siventie four to August 1m. vi c. eightie two have alwayes coyned below the standart some at ten denire twentie two grains some tymes at ten denir twentie three grains which being all exactly calculat at the rex'ive finnes upon the bullione coyned within that tyme amounts to the soume of nyn thousand fyve hundredth thretie two pound four pennies mony forsaid And as to the ffith article anent the mony coyned without essey ffind it proven that when the chissell-heads sweeps and scraps were melted allone ther was no essey taken and ffind be the melting books the quantitie of the chissell heads sweeps and scraps melted and coyned from the first day of September 1m. vi c. siventie three to the first day of December 1m. vi c. eightie two (the former melting books being abstracted) extends to four hundredth sixtie nyn stone fyfteen pound therteen ounces And ffind that ther was a hundredth and eightie two stone two wnces and four drops coyned since the act of indemnity and that the value of the stone y'of is eleven hundredth eightie four marks six shilling eight pennies which for the forsaid hundredth eightie two stone two ounces

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and four drops coyned since the act of indemnitie amounts to the soume of ane hundreth fourtie three thousand seven hundreth twentie six pound mony forsaid And as to the sixt article anent the difference of the weights from the Scots pyll sand it proven that the officers of the Mint did make use of the dean of Gulds weights in receaveing of the bullione and that they troned the peaces by the fractions of the kings weights and ffand it proven that the dean of Gulds weights are heavier then the Scots pyle two unces and eight drop upon the stone which after deduction of what was coyned of dollers and doucat douns these not being allowed for bullione that the difference of the weights from the first day of September 1m. vi c. sixentie three till the first day of September 1m. vi c. eightie two amounts to the soume of fyve thousand three hundreth eightie six pound mony forsaid And as to the seventh article anent the exaltatione mony ffand it proven by the printing books that the quantitie of bullione payed in upon the kings accompt and coyned since the daite of the counsills proclamatioune in March 1m. vi c. eightie ane was three hundred and therteen stous six pounds six unces fyfteen drop which at eleven hundreth eighty four marks six shilling eight pennies the stone the exaltatione being fyve per cent extends to twelve thousand three hundreth sixtie eight pound therteen shilling four pennies And haveing ordained sir John Falconer and Archbald Falconers to depon anent the quantitie of the bullione and coyned mony that was lying by them the tyme of the exaltatione and accordingly sir John Falconer and Archbald Falconer having deponed ffand that ther was thertie one stone one pound therteen unces four denires of bullione and current mony lying by them the tyme of the exalta'ne which at the forsaid raite of eleven hundreth and eightie four marks six shilling eight pennies upon the stone extends to twelve hundreth twentie eight pound therteen shilling four pennies Scots mony And as to the nynt article anent the melting down of the dollers and doucat douns ffand be the melting books from the sixenth day of January 1m. vi c. seavinty three to the first day of January 1m. vi c. eightietwo that ther was two hundre eightieane stone twelve pounds fyfteen ounces ten drop of dollers and doucat douns melted down the tyme forsaid which not being allowed as bullione at twelve shilling upon the ounce amounts to the soume of fourtie three thousand two hundreth eightie six pound mony fors'd And as to the tenth

article anent the earle of Landerdales receaveing double payment of four thousand and nyn hundreth pound for three years sallarie lybelled ffand the samed proven be the earles receipt to the lord Ballanden upon his majesties precept in the year 1m. vi c. sixte four and the fourth article of sir John Falconers compt of bullione fitted be the commissioners of the thes'rie in the year 1m. vi c. sixentie four and therfor ffand him lyable to refound the said soume and the value of the ordinar a'rent therof *nomine damni* from the tyme of the last payment made by sir John Falconer which was at Martimass 1m. vi c. sevinty two which in haill extends to the soume of seven thousand nyn hundreth twentie ane pounds ten shilling Scots And as to the eleventh article anent the band of six hundred pounds granted be sir John Falconer to the earle to get his counts allowed The lords in regard of the retired ticket produced the mutuall discharge betwixt the earle and sir John daited the twentie eight of March 1m. vi c. sixentie seven the currant account betwixt them and the other probatioune adduced as to that article ffinds that the forsaid band of six hundred pounds sterling is presumed to have been given for the said cause and so is the kings mony And therfor decerned the earle to refound the same with the value of the ordinary a'rent y'of *nomine damni* from the first of January 1m. vi c. sixentie nyne to the first of January 1m. vi c. eightie three extending in all to the soume of eight thousand nyn hundreth and twentie eight pounds Scots unles befor extracting the decret the earle can condescend and instruct that the fors'd ticket was granted for ane wy' cause then that condescended one in the lybell And as to the twelfth article ffand it proven that the officers of the Mint wrought industriously upon the remedies of weight and ffand these remedies at a grain in the mark peice of mony coyned since the first day of September 1m. vi c. eightie two did amount to six thousand six hundred pounds mony fors'd In respect wherof and that at nor befor the extracting therof the s'd earle of Lauderdale did not condescend nor instruct that the fors'd ticket of six hundred pound sterling was granted for ane other cause then that condescended and in the lybell The said lords gave and pronounced ther decret and sentance in the s'd matter decerning ordainiing assoltzng and declairiing in maner above written and ordains letters of horning one fyfteen dayes and necessary to be direct heirupon &c. *Extractum, &c.*

DA. DENHOLME.

350. Proceedings against SEVERAL PERSONS OF LANERKSHIRE, for
Treason: 33 CHARLES II. A. D. 1681.* [Now first printed
from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio Burgi de Edinburgh decimo quarto die mensis Martii, 1681, per honorabilis viros Willelmum Comitum de Queensberry, Justiciarium Generalem, Ritchardum Maitland de Duddop Justiciarie Clericum, Robertum Dominum de Nairne, Dominos Jacobum Foulis de Colintoun, Davidem Balfour de Forret, Davidem Falconar de Newtown, et Rogerum Hoge de Harcarss Commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

THE said day anent our soveraigne lords criminal letters of treason, raised, used and execut, at the instance of sir George Mackenzie of Rosehaugh, his majesties advocat, for his

* "March 17 & 18, 1681. At Criminal Court the heritors of Clidendale who were in the rebellion at Bothwell-bridge in 1679 being upon the pannel; It was alledged for Gavin Hamilton of Hill, son to Raploch, absent, that he could not be declared fugitive (what needs they both be declared fugitive, and a sentence of forfeiture likewise be pronounced against them? might not the last serve for both?) because having been in prison, the privy council had set him at liberty, to appear at a day not yet come. The Justiciars found, notwithstanding of that bond, that he ought to have appeared before them in this court. 2do, alledged, He was illegally summoned at his dwelling-house of Hill; whereas forty days before that his wife and family dwelt at Stratharen. Answered by the king's advocate, that no defence could be proponed for an absent traitor. Likewise, the forty days were introduced in favours of pursuers, that if a man had stayed 40 days in a place, though it was not his residence and domicil, yet the pursuer might convene him there, it founding *competentiam fori* against him; but *not vice versa*, that a citation should be unlawful if he were 40 days absent from his own house: "The criminal lords found no defence could be proponed for a traitor unless he were present." Some thought this hard, seeing though we cannot defend *in causa*, yet I may propone 'probabilem rationem et causam' absentie, an essonzie of sickness, or say that he is absent 'reipublice causa,' or not at all cited; now to be cited illegally at the wrong place, and not to be cited at all, are equipollent.

"Queritur, If a creditor of the rebels, whose debt is unconfirmd, may appear for an absent traitor, and produce his interest, 'videns rem suam agi,' so that he may lose his money; and if he will be admitted to object against the

highnes interest against John Wilson, wrighter in Lanerk, and heritor of Stainiepath: Mr. Thomas Pillans, in Lanerk. James Laurie, wrighter ther, William Dick ther, John Thomson, carpenter ther, Alexander Brown ther, Archibald Symson, ther, David Whytt smith ther, Thomas Lauchlan, merchand ther, William Ferguson, weaver ther, William Tweddale, son to Tweddale, late balyie ther, Gideon Weir, gunesmith ther, David Gibson ther, David Robieson ther, called Possie, James Bannatyne, wright ther, James Park, weaver ther, John Semple, mason ther, David Weir ther, aire to Hugh Weir ther, Hugh Ker, son to William Ker, in Badronald, Thomas Inglis, shoemaker in Lanerk, Robert Haddowe, younger therof, Mr. Robert Black, of Silvertounhill, John Buckle, younger,

relevancy and probation? Though it be very equitable, yet it was thought it would not be permitted, his being only a civil interest. See Gayl. lib. 1. de pace pub. c. 10. who proves that 'in criminalibus procurator non debet admitti,' but the guilty pannel himself must be personally present, seeing the judge may expiscate much from him, which cannot be done if he was allowed to appear only by a procurator.

"For others, viz. Muirhead of Bradisholm, &c. It was alledged, that it is true, 'advocatus fisci non presumitur calumniari,' yet gentlemens lives, estates, fortunes and reputations, ought not to be brought in question without he condescend on his informer, that he might subscribe 'in poena talionis,' both conform to the civil law, and the law and practice of all nations, and the act 1587; for the very pursuing leaves a stigma, though they be assoilzied l. 3. c. de generali abolitione. The advocate declared he had no informer, but the privy council and Exchequer having employed one to take up lists of all suspect persons, he, by the Council's warrant, now pursued them. "The justices found the council's warrant sufficient to liberate the advocate from condescending upon any other informer;" though this may evacuate the force of the said just act of parliament.

"Somerville of Urat was cleansed by the assize. Vide the assize pursued for it, 16th June 1681. [See the Case p. 75, of this Volume.]

"Then the advocat offering to continue the diet against the rest of the heritors, it was alledged, The diet was peremptory, and behoved either to be deserted, or else they immediately tried and put to the knowledge of an assize. "The lords found the advocate ought to insist

mason and wright in Lanerk, Alexander Balyie, smith ther, Alexander Anderson, lievetenant to captain Wilson, heritor ther, John Pumpray ther, Thomas Hinselwood ther,

against such whose witnesses in the list were all present; but as to these who were not in that case, continued them to June next, he peremptorily bringing in all his witnesses, and insisting then; otherwise the diet should be deserted."

"At this time, the criminal lords got a precognition what the witnesses could say with close doors, though not upon oath, yet caused them subscribe their declarations, that *quod* such as they found no probation against they might desert the diet; which abridged their labour, there being upwards of seventy or eighty on the pannel; but it was clearly 'proditio testimonii,' and a dangerous novelty engaging the witnesses to bide at what they say behind the pannel's back, and very irregular in the Criminal Court, where by act of parliament 1587, no probation can be taken, but in presence of the pannels and assize: And the use of these precognitions have only been assumed by the privy council. Some of them who were continued, or deserted, (seeing new letters might hereafter be raised against them,) desired their witnesses in defence and exculpation might be received, to ly 'in retentis ad probationem innocentie,' lest they should die *medio tempore*. This was refused, seeing the king ran the same risque with his; yet they had precognosed; but that declaration (if the witnesses died) would not prove." Fountainhall.

"Upon the 18th and 21st of March, I find, by the registers, great numbers of heritors in the shire of Lanerk are present, and called: I may class them in two branches; some of them make a resignation of their lands, and are dismissed; and others of them stand their trial, and are forfeited, many of them in absence. Of the first sort, John Williamson, son to Joseph Williamson heritor in Holl, John Spreul younger, writer in Glasgow, James Walker younger of Hacketburn, William Tweddale late Baillie of Lanerk, Hugh Weir merchant there, being pannelled, they have an offer made to them of the king's indemnity, and accept of it, and renounce and resign in favours of the king, commissioners of the treasury, and their donators, all lands and heritages fallen to them, or which they had a right to, before his majesty's act of grace, and as to them the lords desert the diet *in perpetuum*. This was a kind of composition by voluntary parting with that part of their heritage, which they had a right to in their own person, and then at the death of their parents they came in to the rest of the lands. Thus somewhat at least was preserved, but it was but few got this favour.

"The far greater number, who were, as the former, cited to this diet, and indicted in common form, as guilty of the rebellion at Bothwel,

James Muirhead, smith ther, John Jack in Nempfler, Robert Fram ther, William Padzeau, mason ther, Hew Somervail, of Wellfrada, John Hutchieson, of Hairlawe, Somer-

met with harder measures, as David White smith in Lanerk, and other forty six belonging to Lanerk shire, whose names are insert in the proclamation, of the date October 8. These had probation led against them in absence, and all that is proven against most of them is converse with rebels, when they were going up and down that shire, and lying in camp there, in which the whole shire was necessarily at that time involved; and they are all forfeited in common form, and ordered to be executed as traitors, when they shall be apprehended.

"A few others are brought off by the verdict of the assize, as not having their indictment proven against them: Indeed the probation against them who are forfeited is abundantly lame; but, it seems, the advocate would have all, who did not resign their lands, to be concluded under the same condemnation."

"June, 1681. It being represented to the council, that many persons in Kirkeudbright, Wigtoun, and Dumfries, who were in the late rebellion, continue in their houses, and intronit with their estates, the sheriffs and other magistrates are ordained to seize and present them to justice, and at the same time to secure their rents and lands for his majesty's use: It is likewise recommended to them to secure the country from field-conventicles, and punish such as are guilty, with certification, that if they fail, the council will send in forces.

"In a little time, those orders are more generally extended to the shires of Lanerk, Air, and Galloway, in a proclamation, which because I have not seen in print, and it contains a good many of such as were forfeited last year and this, I have given it here from the registers:

'Charles, &c. greeting. Forasmuch as the persons underwritten, are by decret of the lords commissioners of justiciary, forfeited in their lives, lands and goods, for their treasonable rising in arms in the late rebellion at Bothwel-bridge, viz. David White smith in Lanerk, Gideon Weir gunsmith there, David Gibson there, John Wilson writer there, Mr. Thomas Pillans there, James Lawrie writer there, Archibald Simpson there, Thomas Lauchlan there, William Fergusson there, John Semple mason there, Thomas Ingles there, Alexander Anderson there, John Pumpray there, John Jack in Neruplair, William Padzeau mason in Lanerk, Robert Lockhart of Birkhill, James Weir of Johnshilp, John Steil in Overwaterhead, John Haddow in Douglas, James White there, William Falconer in Hamiltoun, Arthur Tacket there, Gavin Wutherspoon of Heathric-know, John Eastoun portioner of Quarryneen, Robert Goodwine maltman in Glasgow, James Cuninghams merchant there, Isaac

vail of Yairdhouse, Luke Greinsheills of Hogscastle, Robert Lockhart of Birkhill, Gavin Hamilton of Hill, Gavin Hamilton, of Wewadows, James Weir, of Johnshill, James

M'Quharrie of Scoricholm, John Steill, in Overwatterhead, John Whyat, of Neak, Muirhead of Breidisholme, * John Haddowe, in Douglas, James Whytt ther, James Semple

Blackwel son to Thomas Blackwel there, William Riddel feuar in Rutherglen, Robert Fleming of Auchinfin, John Hamilton feuar in Rogertoun, Thomas Craig feuar in Jacktoun, John Miller feuar of Longcalderswood, John Wilson of Highfleet, Robert Steven feuar of Newland, John Steil of Windhill, John Cochran of Cragie, James Dykes portioner of Halburn, John Carduf feuar in Jacktoun, Thomas Paton at Old-kirk of Camnetan, John Whytlaw of Bothwel-sheil, John Paterson there, John White of Newk, Thomas Lin of Blairachin, John Weddale of Chindale, John Clyde in Kilbride, all in Lanerk shire; Gilbert M'lewrath of Dumchery, Thomas Macjarrow of Bar, John Macjarrow of Penjarrow, Henry Macjarrow of Athalbany, George M'chir of Beaman, Henry M'lewrath of Auchinfeur, John Alexander of Dumochry, — M'unken son to — M'unken in Hilkertoun, Alan Bowy son to Bowy of Drumley, James Wood in Air, Patrick M'dougal of Freugh, Mr. William and Alexander Gordons of Earlistoun, Mr. William Fergusson of Kaitloch, — Dunbar younger of Machirubir, John Bell of Whiteside, John Gibson of Auchischera, — Gibson younger of Inglistoun, — Gordon of Dendeuch, — Grier of Dalgonar, — Smith of Kikroach, — M'ellan of Bar-magechas, — Gordon of Craigie, — Lennox of Irelandoun, — Gordon of Barharra, John Fowberton of Auchinchrie, David M'ulloch son to Ardwell, William Whitehead of Milnhouse, John Welch of Coraley, — Neilson of Corsack, Robert M'ellan of Baracob, Samuel M'ellan his brother, — Fullartoun of Nethermill, George Mackartney of Blacket, — Gordon of Garrery, — Gordon of Knockgray, — Herron of Little-park, — Gordon of Holm, — Gordon of Overbar, John M'naught of Cnlgad, — Murdoch, alias laird Murdoch, Andrew Sword in Galloway, John Malcolm in Dalry, in Galloway. Which persons (as we are informed) do notwithstanding live and reside at or near their dwelling places, and, by themselves, or others, to their use and behoof, do uplift, possess, and enjoy their lands, rents and goods, as if they were our free and peaceable subjects, in high and proud contempt of us, our authority and laws: We therefore, with advice of our privy council, do hereby give and grant full power, authority and commission to the sheriffs-principal of the shires of Lanerk, Air, Dumfries, steward of the stewartry of Kirkudbright, sir Andrew Agnew of Lochnae, sheriff-principal of Wigtoun, and their deputies, to pass, pursue, take, apprehend, imprison, and present to justice the foresaid rebels and traitors, wherever they can be found in any part of their shire or ju-

isdiction; and, in case of assistance or hostile opposition, to pursue them to the death by force of arms, or drive them forth of the bounds of their shires and jurisdictions; and, if need be, are to call to their assistance such numbers of our good subjects, as they shall find necessary for their assistance, who are hereby ordained to concur with, fortify and assist our commissioners foresaid in this our service, as they will be answerable at their utmost peril. And if, in prosecution of the said rebels and traitors, any of them shall be mutilate or slain by any of our said commissioners assisting them, we declare that they shall never be pursued or called in question therefore, but that the same shall be reputed and esteemed good and acceptable service to us. Given under our signet, at Holy-rood-house, the 8 day of October, 1681, and of our reign the 33 year. Subscribed ut in Sedecunt." 2 Wodrow, 159.

* Wodrow gives the following account of this and some subsequent proceedings against "that religious and worthy gentleman the laird of Bradisholm in the shire of Lanerk," from original papers, furnished by the laird, "of whom," proceeds Wodrow, "I would say more if his modesty did not forbid me."

"James Muirhead of Bradisholm, had been still a countenancer of Presbyterian ministers; and before the rising at Bothwel, by several summons and other papers before me, I find he was brought to much trouble before the privy council and other courts, and paid considerable sums of money for hearing the gospel preached by Presbyterian ministers. He was further charged and fined for harbouring Presbyterian ministers in his house, and because they prayed in his family, when they came to visit him, he was made guilty of a house conventicle, and underwent several arbitrary fines.

"In the year 1679, at the rising at Bothwel, his house being within two miles of the place of engagement, he carried with all the caution he was capable of, and retired from his own dwelling for several weeks; yet he was indicted before the circuit 1681, as being in the rebellion, though without the least shadow of truth. His indictment is in my hands, and runs in the common form above insert. After the examination of a prodigious number of witnesses, and nothing being proven, and when he had given in a representation against some of his pursuers for suborning of witnesses, and offered to prove it, the matter was hushed up, and by an order of court just now before me, all further prosecution of him was discharged.

"When he was, as he thought, secure, he is again put into the porteous roll, and before

maltman in Hamiltoun, James Lockhart called laird Lockhart, in Hamiltoun, William Falconar ther, Arthur Tarbet ther, William Pollock, smith ther, John Scotts, elder and

younger, Udingstoun, James Corss ther, Alexander Corss his son, James Rae, son to John Rae, fewer ther, John Wilkie, son to John Wilkie, in Knowhead, John Scott, in Kenmuir,

this circuit at Glasgow receives a new indictment, which being but short, I insert from the original. ' James Muirhead of Bradisholm ' younger, you are indicted for the crime of ' high treason and rebellion in joyning with ' the rebels June 1679, and being in their ' company with arms at the Schawhead-muir ' Hamiltoun, Hamiltoun-muir, and several ' other places, aiding and assisting them, ' giving and sending out meat to them, or ' otherwise supplying them, sending out ' horses and servants to them, countenancing ' and favouring of rebels, accessory to the late ' rebellion, harbouring and resetting of them ' in your house, upon the ground of your land ' as tenants, receiving mail and duty from ' them, conversing and intercommuning with ' them, particularly you reset and kept Robert ' Turner in Goodochill upon your lands, as ' your tenant, and receives mail and duty from ' him; for all which crimes you are to underly ' the law.'

"To say nothing of this informal and general libel, when he appeared with other gentlemen he was continued till the 25th of July at Edinburgh, where I find by a signed extract of the act of adjournal he was liberate from prison. The act itself, containing his petition, and a short hint of his strange usage, deserves a room here.

Apud Edinburgh, 25 die mensis Julii, Curia legitime affirmata.

' The whilk day aenent a petition presented ' to the lords by James Muirhead of Bradisholm ' younger, shewing. That he being formerly ' (1681,) convened before the said lords for his ' alledged being in the late rebellion at Both- ' wel, and exact trial made, and seven hundred ' witnesses or thereby being examined against ' him, nothing of guilt could be made appear, ' and the petitioner having then pressed to go ' to trial, and having an act of council for that ' effect, the lords at that time deserted the ' diet simpliciter, and discharged all new letters ' and dittays, except by a warrant in præ- ' sentia: And yet, without any such warrant, ' he was put in the porteous roll, appeared at ' Glasgow, urged a trial, and was continued ' to Edinburgh, where he offered of new to ' abide a trial, but was committed to prison. ' Therefore craving, that seeing the petitioner ' hath been so oft troubled, and always appeared ' and is now ready to pass to the knowledge of ' an assize for clearing his innocence, and is ' ready presently to exculpate himself by fa- ' mous witnesses, that he be ordained to be set ' at liberty, and the diet deserted simpliciter. ' The lord justice clerk and commissioners of ' the judiciary, having considered the said ' petition, do ordain the petitioner to be set ' at liberty. Extracted forth of the books of

' adjournal, by me, Mr. Thomas Gordon clerk ' to the justice court.' THOMAS GORDON.

"At this time there was no security for any body who had ever favoured Presbyterians, and so, notwithstanding of this second absolviture by the criminal court, next year at the circuit he is again put into the porteous rolls for the same pretended accession to Bothwel; and when he would not purge himself by taking the test, he is remitted to Edinburgh, when he is libelled before the council for reset, converse, keeping conventicles and other points, and his oath is taken upon the articles of the libel. And because in his deposition, he acknowledges his having had four times Presbyterian ministers in his house since the indemnity, and that they went about family-worship, with not above six present more than his family, he is found guilty of keeping house-conventicles, and fined, according to a wrong account given in of his valuation, as an heritor, in four thousand merks, and was kept in prison about fourteen months at Edinburgh. All this I have given the more distinctly, because every part of it is vouched by principal papers before me. And this was the case of a great many other worthy gentlemen next year and this."

With respect to the great number of witnesses examined, Wodrow says, as a Note, "Because this may appear strange to such as know not the methods of this time, it would be noticed, that in the year 1681, many more witnesses than 700 were cited in to Edinburgh from the West-country against the gentlemen then indicted, and they were all interrogate with respect to each gentleman who stood his trial."

It farther appears from Wodrow, Vol. 2, p. 428, "that in December 1684, a decret was passed by the council against James Muirhead of Bradisholm, and others: their libel was mere non conformity, and alledged reset, and converse, and refusing the oath of allegiance with the king's prerogative annexed, which they did not reckon themselves obliged in law to take;" whereupon the council fined them in different sums; Muirhead's fine was 4,000 merks. It seems that Muirhead was afterwards imprisoned; for, Wodrow notes, under date September 11, 1685, that Muirhead, of Bradisholm, was liberate under a bond of 4000 merks to re-enter October 12. In treating of the proceedings of the circuit courts, held in different parts of the country in the year 1683, Wodrow says, that the porteous roll for the shire of Air, so far as he could guess, when he folded it out, "consists of upwards of 300 sheets of paper; that of the shire of Lanerk is upwards of 200 sheets, and contains the whole gentry of that shire almost without exception." Vol. 2, pp. 316, 317.

John Scott, his son, Robert Corss, wodsetter in Udiagstoun, John Corse, in Clydsminn, James Thomson, portioner of Garnquhen, John Thomson his son, George Robertsons, elder and younger, in Easter Glentorie, John Russill of Eastfield, Gavin Weatherspone, fewar of Heathericknowe, William Wallace, portioner of Mainhill, James Gray, elder, of Chyrstoun, Gray his son, John Easton, portioner of Garnquhen, James Gray, of Berrieknowe, Walter Donaldson, portioner, of Rabrestoun, Mr. John Spreull, of Blairquham, wrietter in Glasgowe, John Spreull his son, John Spreull, apothecary ther, Gavin Wood, wright ther, Robert Goodvin, maltman, James Cunningham, merchant in Glasgow, Isack Blackwell, son to Thomas Blackwell, callander ther, John Govan, portioner of Shetlestoun, Alexander Wardrop, portioner of Midlequarter, John Robieson, weaver and portioner, of Shetlestoun, William Riddell, fewar and mason, in Rutherglen, John Brown taylor and fewar ther, Hugh Ker, of Bowehouse, Robert Fleyming, of Auchinfine, William Park, fewar of Lairfald, John Hamiltoun, fewar of Rogertoun, Thomas Craig fewar of Jackstoun, David Lindesay portioner thereof, John Millar younger, fewar in Long Catherwood, John Wilson, in Highblett, James Reid, fewar in Kittochsyd, Robert Steiven, fewar in Newland, John Steill of Windhill, John Cochrane, of Craig, John Cochrane, portioner of Chappell, James Young, of Peilhill, Thomas Leper, portioner of Fieldhead, James Dycks, portioner of Halburne, John Carnduff, fewar in Straven, James Hamilton, elder, in Pryorhill, Richard Meikle, in Tweidiesyd, James Walker, younger, of Halketburn, Thomas Patton, at the old kirk of Camnethan, John Gray of Dargavill, Robert Steill, in Stanie, John Whitlawe, in Bothwelsheills, John Paterson ther, William Wardroper, portioner of Easter Catherhead, John Catherhead, younger, portioner of Windieedge, Robert Russill, portioner therof, John Millar, of Wattershaugh, John Nimmo in the forth, John Whytt younger, of Stockbridges, Thomas Linn, of Blairreckoning, George Muirhead, of Steinstoun, Archibald Cleiland, of Knowoblehill, James Hamilton of Halsyd, James Hamilton, of Stonehall, Thomas and James Alstouns, of Maines, John Marshall, fewar in Hamilton, William Dycks, of Lambhill, Robert and William Gilmours, portioners of Priestgill, Alexander Murray, of Uistounhead, and Dycks Gavin Semple, portioner of Kirkwood, Thomas Brownlie, portioner of Curfett, Thomas Leper, portioner of Feildhead, John Holmes, of Newtown, James Aikenhead, in Kittochsyd, James Wilson in Rigehead of Carduff, John Grainger of Flackfield, John Wattther, James Dyck, in Kitchosyd Rob. Russill, portioner of Windiedges, Henry Boswell, portioner of Dunsystoun, John Wardroper, portiober of Denishill, James Meik, younger, portioner of Fartisset, Archibald Pretinse in Shine, John Weir, in Strangelench, Thomas Robertson portioner of Hisildan, John

Haddock, in Easterseat, John Williamson, younger, heritor of the lands of Holl, and John Williamson, son to Robert Williamson, called lord of Shotcleucgh, makand mention that wer notwithstanding be the common lawe, lawe of nations, lawes, acts of parliament of this kingdom, and constant practice therof, The ryseing of his majestie's subjects, or any number of them, the joyning and assembling together in armes without and contrair to his majesties command, warrand and authoritie, and the abaiting, assisting, receiving, intercommuning and keeping correspondence with such rebells, and supplying of them with levies of men, horse, money, armes, and furnishing them with meat, drink, powder, ball, and other munition bellicall, are most detastable, horrid, hynous and abominable crymes of rebellion, treason and lese majestie, and are punishable with forfeiture of lyff, lands, heritages and escheat of ther movables, and be the third act of the first parliament of king James the first, It is statut and ordained, that no man oppinlie nor nottoriouslie rebell against the king's person under the paine of forfaiting lyff, land and goods: and be the threttie sevinth act of the second parliament of king James the First, it is statut, that no man wilfullie receipt, mantaine, or doe favour to oppin or manifest rebells against the king's majestie or common lawe under the paine of forfeiture; and be the fourteint act of the sext parliament of king James the second, it is statut, that no man rebell against the king's person or authoritie, or make ware against the king's leidges, and whoso does in the contrair to be punished efter the qualitie and quantitie of sick rebellion, and be the twentie fyft act of his sext parliament, it is statut, that if any man committ or doe treason against the king's person, or ryse in fear of wear against him, or receipts any that has committed treason, or supplies them in help, redd or councill, shall be punished as traitors; and be the hundreth fourtie and fourth act of the twelfth parliament of king James the sixt, It is statut, that wherever any declared traitors repairs in any part of this realme non of his majestie's leidges shall presume to receipt, supplie or intercomon with them, or give them any releiff or comfort, and that immediately upon knowledge of ther repairing in the bounds, all his majestie's obedient subjects doe ther exact dilligence in searching and apprehending the saids traitors and rebells, and that with all speed they certifie his majestie, or some of his privie councill, or some persons of authoritie or credit within the shyre, that such rebells are within the same, under the paine that the saids traitors and rebells ought to sustaine if they wer apprehendit and convict be justice; lykeas be the fyft act of the first scssion of his majestie's first parliament, it is declared, that it shall be hyc treason to the subjects of this kingdome, or any number of them, more or lesse, upon any ground or pretext whatsoever, to ryse or continue in armes, to make pease or ware, or

to make any treaties, or leagues with forraigne princes, or estates, or amongst themselves without his majestie's speciall authoritie and approbation, first interponed therto, and all his majestie's subjects are discharged upon any pretext whatsomever to attempt any of those things under the paine of treason; and be the eleventh act of the first session of his majestie's second parliament, it is statut and ordained, that in tyme coming in all cases of treasonable ryseing in armes, and oppin and manifest rebellion against the king's majestie, his hynes advocat for the tyme may and ought to insist againest, and prosecut such persons as he shall be ordored be his majestie or his privie councill to persewe; and if they be cited and doe not appeir, the justices, notwithstanding of their absence, may and ought to proceed to consider and give ther interloquitor upon the tybell, and if it be found relevant to admitt the same to the knowledge of ane assyse, and upon the verdict of the inquest finding the same to be proven, the doom and sentance of forfaiture ought to proceed, and be given and pronounced in the same maner as if the persons accused had compeired and wer present; Nevertheless it is of veritie, that the saids John Wilson, Mr. Thomas Pillans, and the other persons above-named, and ther associats and accomplices, shacking off all fear of God, conscience and sense of duty, aleagance and loyaltie to the king's majestie, ther sovaraigne and native prince, most perfidiouslie and treasonable presumed in cold blood, and in the night time, upon the day of Apryll, 1679, to murder and kill ———, a soldier in captain ——— company, and left another of the saids souldiers for dead, and John Balfour, of Kinloch, David Hackstone, of Rathillet, and others, having upon the third of May, the said year, killed and murdered his grace James late arch-bishop of St. Andrews, they to escape justice and involve others in ther guilt, went unto the western shyres, and most treasonable joyned in armes, wth the persones above named and others, ther dissolut and flagitious accomplices, under the command of Robert Hamilton, brother to the laird of Prestoun, and upon the twentie nyth day of the same moneth of May, a day appoynted for a solemne thanksgiving for his majesties restauration to the royall government of this kingdome, did goe to the burgh of Rutherglen, and ther most proudlie and treasonable, having read acts of ther own coyning, they most treasonable and wickedlie burnt several acts of parliament asserting his majestie's prerogatives, and establishing the government of the church, drowned out bonefyres sett on in commemoration of that day, and thereafter they and ther rebellious associates, to the number of fyve or sex hundreth, did waylay a small and fewe number of men under the command of the laird of Claverhouse, and did most treasonable and cruellie kill and murder some of his majestie's souldiers under his command; Lykeas upon day of June thereafter, they did most treasonable attacke and assault a small

partie of his majesties forces within the town of Glasgowe, under the command of the lord Rosse and laird of Claverhouse, be whose prudence and government these oppin, nottar and manifest rebels wer repulsed; and yet being encouraged with promises of levies of men, horse, money and armes, from others of ther treasonable accomplices, they did swell and growe to the number of ten or twelve thousand, and they, and the persons above named, marched up and down the counirey, throwe the shyres of Lanerk, Aire, Renfrew, Dumbarton and others, in wartlike and military powster, robbing and pillageing his majestie's good subjects, searching for horse, armes, powder, ball, and other instruments of warr, quartering upon and oppressing his majestie's ledges and people, and they and their accomplices did maintaine, supplie, comfort and defend Mr. John Welsh, Mr. Samuel Arnot, and other forfaitured and declaired rebels for the rebellion 1666, did supplie, shelter, and protect the impious, horrid, and sacraldigious murderers of the late archbishop of St. Andrews, and they and ther accomplices, to the number of nyn or ten thousand, march towards Bothwell-bridge and Hamiltoun-muire, where they did take the boldnes to issue proclamations and print declarations bearing the treasonable grounds of ther rebellion, and not content therwith, they and ther rebellious accomplices presumed to modell themselves and take the name of ane army, forming and framing themselves in troups, companys and regiments, nancing collonells of regiments, captaines of companys, commanders of troups, and other officers, under the command of the said Robert Hamiltoun, John Balfour, of Kinloch, the deceast David Hackstone of Rathillet, and others, the impious and bloodie murderers of the late arch-bishop of St. Andrews and they and ther accomplices did incamp themselves at Hamiltoun-Muir for severall dayes together in June 1679, and obstinatie continued in armes, making detachments for rifleing and plundering of the counirey to make provision for ther rebellious camp, and notwithstanding of ane proclamation issued furth by our privie councill declairing the s'd insurrection to be ane horrid and manifest rebellion and hie treason, and commanding these rebels to desist and lay down ther rebellious armes, yet they did most treasonable continue and abyd in armes, did beat parlies be drum, and did take the boldnes and presumption to send ther commissioners to our royal camp, and treasonable did requyre the subversion and overturning of the government of the church; proudlie and insolentlie boasting of ther treasonable and (as ther commissioners wer pleased to call them) formidable armes, in which they most treasonable continued until the twentie second day of the s'd moneth of June 1679; that his ma'ties forces did attacke and assault them at Bothwell-bridge, wher by God's blessing on his ma'ties armes and be the valour and conduct of James duke of Buckleugh and Monmouth, his majesties generall, and officers and souldiers under him,

ther numerous and rebellious army was dissipat, routed and vanquished, and yet the persons above named having fled and made ther escape, they and the bloodie and sacraleigious murderers of the late arch-bishop of St. Andrews, marched in parties and in warelike powater up and down the countrey, in the shyres of Dumfries, Wigtoun, Aire, and Stewartrie of Kirkcudbright, quartering upon and oppressing his majesties good subjects, robbing and risfeing ther goods and houses; and upon the twenty second day of June last, they and the deceast Mr. Richard Cameron, had the boldness and confidence to come to the burghe of Saquhar, and at the marcat croce of the same, efter singing of psalmes, did declare the king's majestie ane usurper and tyrann, did declare and denunce ware against him and all who serve under or yeald any obedience to him, and did most treasonable forme, dewise, contrive and disperse, a most treasonable paper called "the Fannatics Newe Covenant;" which was taken from Mr. Donald Cargill, at Queensferrie, and is nowe printed and published, and herein holden as repeited, and was tykewayes present at the treasonable and execrable excommunication used by Mr. Donald Cargill, at Torewood, upon the day of last, against the king's most sacred majestie, and upon the day of July theratter, the persons above named and ther accomplices, did atataque and assault a small partie of his majesties forces at Aires Mosse, under the command of the laird of Earleshall, did feight, resist and oppose them, killed and woundit several of them, untill at length they wer dissipat and defate, the s'd Mr. Richard Cameron being killed upon the place, and David Hackstoun of Rathlet, and others, taken prisoners: In doeing wherof or ane or other of the s'ds deeds, the saids John Wilson, Mr. Thomas Pillans, and the other persons above-named, have committed and incurred the crimes and paine of treason above mentioned, and are actors, airt and part therof, which being found be ane assyse, they ought to be punished with forfaitur of lyff, land and goods, to the terror of others to committ the like her-ester.

Persewer.—Sir George M'Kenzie of Rosehaugh our sovraign lord's advocat.

Warrant for Advocats to compeir for the Defenders.

The Lords Justice Generall, Justice Clerk, and Commissioners of Justiciary, did authorise and empower sir George Lockhart, Mr. William Hamilton, and Mr. Colin M'Kenzie, advocats, to compear and plead the innocencie of such of the rebels heritors in Lanarkshyre as shall compeir before them to underlye the lawe for treason and rebellion at this dyet.

Rebels declared Fugitives.

The said day John Wilson, wrietter in Lanerk, Mr. Thomas Pillans ther, James Laurie, wrietter ther, William Dick ther, Archibald

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Symson ther, Thomas Lauchlan ther, William Ferguson, weaver ther, Gideon Weir, gunsmith ther, James Park, weaver ther, John Semple, mason ther, Hugh Ker, son to William Ker, in Bedronald, Thomas Inglis, shoemaker in Lanerk, Robert Haddowe ther, John Buckle, younger, mason and wright ther, Alexander Balyie, smith ther, Alexander Anderson ther, John Pumpray ther, Thomas Hinselwood ther, John Jack, in Nemppler, William Padzean ther, Hugh Somervail, of Urrats, John Hutcheson, of Harelawe, Robert Somervail, of Yairdhouse, Luke Greinshills, of Hogscastle, Robert Lockhart, of Birkhill, Gavin Hamilton, of Hill, James Weir, of Johnshill, James M'Quharrie, of Scorieholme, John Steill in Overwaterhead, John Whytt, of Neuk, John Haddowe, in Douglas, James Whytt ther, William Falconer in Hamilton, Arthur Tarbet ther, John Scott, younger, in Udington, James Carse, in Udington, Alexander Corse, his son, James Rae, son to John Rae, fewar ther, John Wilkie, son to John Wilkie, in Knowhead, John Scott, son to John Scott, in Kenmuir, Robert Corse, wadsetter in Udington, John Thomson, son to James Thomson, portioner of Garnquein, George Robertson, elder and younger, of Easter Glenlore, John Russill, of Eastfield, Gavin Weatherspoon, fewar, in Heatherknowe, James Gray, elder, of Chrystoud, John Easton, portioner of Garnquein, James Gray, of Berrieknowe, Walter Donaldson, portioner of Rabiestoun, Mr. John Spruell, wrietter in Glasgowe, Gavin Wood, wright ther, Robert Goodwin, maltman ther, James Cunningham, merchand ther, Isack Blackwell, son to Thomas Blackwell, calendar ther, John Govan, portioner of Shetlestoun, William Riddell, fewar and mason in Rutherglen, John Brown, taylor and fewar ther, Hugh Ker, of Bowhouse, Robert Fleyning, of Auchinfine, William Park, fewar of Lairfad, John Hamilton, fewar of Rogertoun, Thomas Craig, fewar of Jacktoun, John Millar, younger, fewar of Long Catherwood, John Wilson, of Highflet, James Reid, fewar of Kitchochsyd, Robert Steivin, fewar in Newland, John Steill, of Windhill, John Cochran, of Craig, John Cochran, portioner of Chappell, Thomas Leper, portioner of Feildhead, James Dykes, portioner of Halburne, John Carnduff, fewar in Straven, Rithard Meikle, in Twediesyd, Thomas Patton, at the Old Kirk of Cambusnethan, John Gray, of Dargavill, Robert Steil, of Stain, John Whitlawe, in Rothwelsheills, John Paterson, ther, William Wardroper, portioner of Easter Caklerhead, John Catherhead, younger, portioner of Windie-edge, John Whytt, younger, of Stockbridges, Thomas Line, of Blairreckoning, William Dykes, of Lambhill, Gavin Semple, portioner of Kirkwood, Thomas Brownlie, portioner of Turfet, James Aikenhead, in Kitchochsyd, James Dykes ther, John Grainger, of Flackfield, John Watt, ther, John Weir of Strangcleugh, Thomas Robertson, portioner of Hisledean,

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John Haddock, in Easterseat, being oftymes called to have compeired befor the Lords commissioners of justiciary this day and place, in the hour of cause to have underlyen the lawe for the crymes of hie treason and rebellion, committed be them in coming to the burgh of Rutherglen, upon the twentie nyth day of May, 1679, and proclaiming acts of ther own coynng at the marcat croce therof, and drown- ing out bouefires, sett on in commemoration of his majestie's happie restauration to the royal government of this kingdom, assaulting and attacking a partie of his majestie's forces at Loudounhill, under the command of the laird of Claverhouse, killing and murdering severall of his majesties souldiers then march- ing to the burgh of Glasgowe, and attacqueing a partie of his majestie's forces within the same, under the command of the lord Rosse and laird of Claverhouse, marching up and down the country with the murderers of the late archbishop of St. Andrews, and others ther accomplices, to the number of nyn or ten thousand, quartering upon and oppressing his majestie's good leiges and people, robbing and rifling ther goods and houses, publishing and printing the treasonable grounds of ther rebel- lion, beating parties be drums, sending ther commissioners to the royal camp, treasonably requirring the subversion of the government of the Church, resisting feighting and oppos- ing his majestie's forces at Bothwelbridge, under the command of the duke of Buccleugh and Monmouth,* untill the saids rebels were

* Of the procedure of Monmouth against the Scots insurgents, Algernon Sidney in suc- cessive letters writes thus:

"No man doubts of the truth of the news brought hither by an express on Saturday morning; which is, that the conventicle-men in the county of Glasgow are in arms; that one captain Grimes coming something too near them, with his troop and other forces, was beaten back, with the loss of his cornet and fourteen troopers; which according to the posture he found them in, he was persuaded to content himself with, rather than to press farther. The council was called upon this occasion on Saturday last, but nothing (as I hear) resolved until they hear more, some doubting whether it be a laid business, or a sudden tumult raised by accident. I know not the truth of this, but the discourses I have heard very often of late, of those who every day expected some such thing, persuades me to believe it is not fallen out by chance. Though no resolution was taken at council upon this matter, it is said, that private orders are given out to severall officers of the late disbanded troops, to get their men again together; and to others, upon the most plausible pretences that they can invent, to delay their disbanding as much as may be. These suspicions go too far, and already reach some of your friends and mine, to such a degree, that counsellors are rather said to be changed than councils; and

defate, and committing the severall other acts and deeds of hie treason and rebellion, at length mentioned in the criminal letters raised at his Majestie's advocats instance against

if they do not find a way to cure that sore, at the next meeting of parliament, they will be looked on as their predecessors. If nothing from Scotland hinders, the court will go to Windsor to-morrow."

"The Scotch news that I mentioned to you last week, doth still possess the minds of all men here; but all relations that come from Scotland are so imperfect, that no man knows what to make of them; and those that come to court being more particularly so than others, no men are thought to understand less of the business than privy counsellors. This is attributed to Latherdale; and though it be concluded, that what he says is not true, some think the business worse, others better, than it is represented. The fact, as far as I hear, is, that the earl of Lithco with above five and twenty hundred horse and foot did come within a few miles of the conventicle-men, and find- ing them in such a posture, as he did not think it prudent to charge them, he concluded the best was to let them take Glasgow, where they are said to have found good store of arms, am- munition and some cannon, and having left so many men in the town as are thought sufficient to guard it, they march with four pieces. They are said to encrease in number every day, but we know nothing of them certainly, unless it be that they have no landed men amongst them, nor any gentlemen, but a younger brother to a knight of the Hamilton family. The last week we heard of nothing but raising of great forces to subdue these rebels. The dukes of Monmouth, Albemarle, and lord Garret were to have regiments of horse, Feversham one of dragoons and grenadiers, the lord Cavendish, Grey of Werk, Mr. T. Thynne, and some others, regiments of foot; but that heat seems to be something abated. The lord Grey gave up his commission, Mr. Thynne refused to take any; Cavendish doth not raise any men upon his, and Garret swears he will not be at a penny charge to raise a man, but if the commissioners for the treasury will raise him a regiment, and provide money to pay it, he will command it. Whilst ways were sought to remove these difficulties, the Scotch lords that are here endeavoured to persuade them that the business may be ended by far more certain and less chargeable ways, in as much as these men having been driven into a necessity of taking arms, by the extreme pressure suffered from those that did abuse the authority his majesty had trusted them with, the people being eased of those burthens, the persons removed that had caused them, and such men placed in the government, as were acceptable to the nation, they durst undertake that all may be composed without blood. This was not (as I hear) disliked, but another point was started, that doth yet more incline the court to

them, ther, anent as they who wer lawfullie cited be George Ogilvie, Albany herault, by sound of trumpet, with displayed coat, and other solemnities requisit to have found caution and sovertie acted in the books of adjournal for

mild courses ; which is in the year 1641 acts of parliament were made in both kingdoms, making it treason for any person belonging unto either to make war upon or invade the other, without the consent of parliament. And though one or two of the judges say, that the acts being reciprocal, the Scots having rescinded theirs, ours falls of itself ; or though it did not, the act forbidding an invasion, no ways toucheth such as by the king's command should go to subdue rebels ; others say, that what the Scots did might indeed give unto the parliament of England a just ground of annulling their act also, but not having done it, no man can doubt but it remains in force ; and whosoever marcheth against Scotland incurs the penalties of treason denounced by it. And some that were present at the making of it, are so far from approving the distinction between invading and subduing rebels as to say, that the parliament then finding they had been upon the like pretence engaged against Scotland in 1638 and 39, made this act expressly to hinder any such business as that which is now depending ; and to take care that England should never be again engaged against Scotland, without the consent of the parliament ; which was also the reason why the act was continued in force on our side, though it was dissolved on theirs. This renders men of estates unwilling to engage ; and hereupon the duke of Monmouth was sent away yesterday in such haste, as to carry no more company with him, than could go in one day to your good town of Newark, where he was to lodge the last night. He is furnished with powers of indulgence to compose rather than destroy ; and the lord Melvin (who is thought well enough inclined to non-conformists, and well liked by them) is sent with him, as being thought a fit minister of a good agreement. The foot that was embarked in the Thames is gone for Berwick, where it is to stay to secure the town, and the other forces, that are newly entertained, are to continue only for a month. This looks as if your friend Latherdale may within a while be left as naked as the earl of Danby. The army is almost every where disbanded, unless it be these that upon this occasion are again taken into pay, and the countries almost every where express the utmost hatred unto them, as soon as they have laid down their arms. Douglas's regiment now in Ireland, as is said, hath orders to march into Scotland, which giving people occasion to talk of that country, they say that the king having lately placed the greatest powers in the three kingdoms in the hands of the three worst men that could be found in them, can never be at ease until they are all sacrificed, to expiate the

ther appearence before the saids lords, this day and place in the hour of cause, to have underlyen the lawe for the crymes forsaid, lawfull tyme of day bidden, and they nor non of them compeirand, the Lords Justice Generall, Justice

faults of the government, and appease the discontents of the nation.

" I told you in my last, that the duke of Monmouth was gone towards Scotland, since which time reports have been so various, that no man well knows what to make of that business ; and the cause of this uncertainty is imputed to the diligence of the king's officers, who intercept and keep all letters directed unto persons any ways suspected, so that no more is known, than they think fit to divulge. An express arrived here on Saturday night from Edinburgh, and brought news that the duke of Monmouth arrived there on Wednesday : that he had been received with great joy, and as much honour, as those that were there could shew unto him ; that the council having been immediately called, he exposed unto them his commission, which was very well liked ; that the chancellor invited him to supper that night, and that he was the next morning to go to the army, having first sent an express to the lord Lithco, that commands it, no ways to engage in any action before he comes. Some think that he hath the conventicle-men at an advantage, and will pursue it to their destruction. Others say, that upon the extreme aversion that is shewn all over England to a war in Scotland, and the little probability yet appearing of the parliament's being any ways engageable in it, he hath received much more gentle instructions, and intends by the help of the lord Melvin, to compose those businesses if he can ; and if he can accomplish it, will certainly render himself very popular in England and Scotland."

" The duke Hamilton and some other Scotch lords having let his majesty know that the disorders in Scotland proceeded only from the extreme pressures the people were brought under, by those who, contrary to law, abused the power his majesty had trusted them with, did undertake to finish all without blood, if he would be pleased to ease them of those pressures, and, removing those who had caused them, put the government of the kingdom into the hands of such persons as were well-pleasing unto the nation. This having been taken into consideration for some days, the duke Hamilton with the rest, and one Lockhart, were sent for by the king, who told them, the points formerly spoken of did relate unto his prerogative, which in three points he would not suffer to be touched : 1st. That he having a right of disposing of all places, might incapacitate such persons as he should think fit : 2dly, That it belonging to him to prevent conspiracies, he might secure and imprison suspected persons ; and that there was no such thing as a Habeas Corpus in Scotland, nor should be as long as he lived : 3dly, That it being his part to prevent or to quell rebellious,

Clerk, and Commissioners of Justiciary therfor, be the mouth of James Henryson, macer of court, decerned and adjudged them, and ilk one of them to be outlaws and fugitives frae

he might raise such forces as he pleased, quarter them where he thought fit, and employ them as occasion should require. To which Lockhart replied, that the places in question were those belonging to counties and corporations, which had ever been chosen by the people respectively according to their charters. And as to what concerns conspiracies and rebellions, he thought he could prove, that what his majesty did assert did neither agree with the laws of Scotland, nor any other law, nor the ends for which that, or any other government was constituted.

“The next point in discourse was concerning some articles exhibited against Latherdale; in which it is said, that “his majesty for several years passed had been utterly misinformed, and never known the truth of any thing relating unto Scotland, but been guided by such reports as best suited with Latherdale’s interests.” That he had been thereby induced to bring down the last year that army of barbarous highlanders, upon pretence of mutinous and seditious field-conventicles; whereas such meetings as had been, were modest and quiet; and quartered them in those countries where there never had been any at all. Several other misdemeanors are said to be mentioned, and amongst others that of Michell, who had been put to death after having had a promise of life and limb, by false oaths made by Latherdale and some others of the privy council. The conclusion was, the king commanded the duke, that these articles should not be made public. In which he excused himself, forasmuch as having done nothing in the dark, several copies had been taken, which were not in his power. Some say, we shall this day see them in print, with the declaration of the conventicle-men, printed at Glasgow, which is very well worth seeing. The forces of these conventicle-men, or as they call themselves, the western army, are variously reported. Some say, they have 14,000 or 15,000 men; others, that this day was a sennight they had, not far from Sterling, between two and three thousand horse, well armed and mounted, with about the like number of foot; that a brother of the earl of Galloway was coming to them, and within three hours march, with above four hundred horse and foot, and that they had parties of good strength in several other places.”

“A Courier arrived the last night from Scotland, who brings word, that the duke of Monmouth had attacked the conventicle-men, and easily forcing a little barricado they had made to defend a bridge, had utterly defeated them. Some letters say, two thousand are killed upon the place; but my lord Sunderland tells me there is only some hundreds slain, many taken, and the whole party dissipated and destroyed;

his majesty’s lawes, and ordained them to be putt to his highnes home, all ther movable goods and gear to be escheat and inbrought to our sovereign lord’s use for ther contempcion

by which means it is said, that the duke of Monmouth will have made himself as popular in England and Scotland as the duke of York. Men here will be startled at present, but that will not hold. The Scotch lords here have been so wise as to leave their countrymen to be cut in pieces, but (as some believe) not enough to keep themselves so free from corresponding with them, as not to leave that, which being well followed may bring their heads to the block.”

“The news concerning the Scots, mentioned in my last, is confirmed by several expresses, and all shew their defeat to have been entire, the party dissipated, and those who escaped the fury of the sword remain exposed to the discretion of their conquerors. I find men’s judgments as various, as to the use which will be made of this advantage, as of the duke of Monmouth’s action in what is passed. Some did think that they being a poor people, brought into despair by the most violent persecution, pitied by all both in England and Scotland, helped by none, without head or conduct, were to be spared; and that in doing so, he might have made himself very popular in both kingdoms, (which he is thought with reason much to desire) and bent to have provided for the king’s interest. Others, who look upon it as a fine thing to kill a great many men, and believe monarchies are best kept up by terror, extol the action, and say there is no other way of suppressing old rebellions, or preventing new ones, than by force and rigour; looking upon Caligula as a great statesman, and *oderunt dum metuant* as a good maxim. Some think that the duke of Monmouth’s first instructions were according to the first of these ways, but that he was followed by others, which savoured much of the second; those that were of the first opinion, do now think the best way were to compose things there, and by shewing indulgence not only in sparing those that are obnoxious, but in giving them such indulgence in matters of conscience, as may satisfy them, prevent the like, and please the body of the English nation, which hath given many tokens of being much concerned for them. On the other side, those are not wanting who think the best way to bring that stubborn people into subjection, and keep them, as they call it, in peace, free from rebellions, is to use the utmost rigour upon those that are in their power, and to discover who did in any measure assist or abet them; and in order thereunto the prisoners are used most cruelly, and it is said, that at the least forty of the most noted men amongst them shall be put into the boots my lord of Latherdale hath brought into fashion, to make them discover what correspondences the great men held with them. I know not how far this may concern some that are, or lately have been here,

and disobedience, which was pronounced for doom. William Pollock, smith, in Hamilton, John Milner, of Watersbaugh; Gavin Hamilton, of Meadows; John Gray, son to James Gray elder, of Chrystoun; and John Spreull, apothecary in Glasgowe, who are contained in the lybell, wer not cited, the said John Gray was alleadged to be dead, and John Spreull being a prisoner, was continued till the sext of June.

Dyct continued till the 19th inst.

17th March, 1681.

The said day compeired George Ogilbie, Albany herald; John Goodaile, Robert Leckie, William Reid, John Scott, and James Smith, witnesses, insert in his execution, and made faith upon the truth and veritie of the execution, given in against the rebell heritors in Lanerksyre, in all poynts.

His majestie's advocat took instruments upon production and verification of the executions, and that the letters wer execut against the defenders at the marcat croce of Edinburgh peir, and shore of Leith, upon threescore dayes warning; and at ther dwelling-houses, and the marcat croce of the headburghs of the shyre,

but it is probable enough they may have the fortunes that ordinarily accompanys them that pretending to be very subtle and keep well with both sides, ever to do too much or too little; and that whereas they might have prevented all tumults, if they had endeavoured it, by denying all manner of favour to the discontented people; or reformed the state of that kingdom, if they would have taken the conduct of them, and very well provided for their own interest by either way, may have ruined these poor people by stirring them up, and leaving them to themselves; brought the whole nation under the power of their enemy, and given such advantages against themselves, as may be their ruin, if they are pursued; that is, to perish or be saved by the mercy of him they profess to abhor. Duke Hamilton complains he is ruined by this business, and that not only all the provisions of victuals and corn and grass upon the ground is destroyed, but that there is not a cow, one horse or sheep left upon his whole estate; and his own house had been plundered, if the duke of Monmouth had not sent an officer to preserve it. But Latherdale says, he cannot believe that Hamilton's friends, tenants, and servants, would so far forget their dependence, obligations and good manners, as to deal uncivilly with him. Such as are near unto those who manage businesses may speak positively of them, but I must as you see suspend my judgment, until the duke of Monmouth comes back, which is expected in a few days."

"If you confess you did not know what to make of the Scotch business before you had my letters, I may conclude you were as much in the dark afterwards, for I could not make

stewartrie, regalitie and other jurisdiction wher they live, upon fourtie dayes by a herald with displayed coat of armes and by sound of trumpet, leaving and affixing at the saids respective places full doubles of the letters, word be word, with lists of the hail assayers and witnesses names to be adduced against the defenders, and using the other solemnities requisite.

Mr. David Thoris, for Gavin Hamilton, of Hill, one of the defenders mentioned in the criminal letters raised ag't the rebell heritors in Lanerksyre, alleadges, that he cannot be declared fugitive upon the execution produced, because being prisoner within the Tolbuith of Edinburgh, and for fourtie dayes befor he ought to have been cited at the Tolbuith and personallie.

2. Takes instruments upon the execution, which bears only dwelling house in general, and upon the herald executer his judicall declaration, that he did cite him only at his dwelling house of Hill, and it is denied, that the said Gavin or his familie lived ther the tyme of the citation, but that then and for a verie considerable tyme befor his wyff and familie lived at Straven, which is offered to be proven.

you understand that which I am ignorant of; and to say the truth, I am so; a great part of our modern prudence being to suppress informations of the truth, which I take to be as great a point of subtilty as that of one of our friends, who concealed a misfortune befallen him in the first acquaintance he had with a woman, until he was like to fall into pieces. Some think the great lords will be found to have incited the poor people, and then endeavoured to value themselves at court upon the power they had of appeasing them; and if that prove true, they may have the fortune that ordinarily accompanys those that do too much or too little, and my lord Latherdale's boots will be a powerful means of discovering whether this be so or no."

"The duke of Monmouth, before he came from Scotland, had taken care that the Scotch prisoners should be used with more humanity than they found amongst their countrymen, and since his arrival here, orders are sent to enlarge the indulgence granted unto the non-conformists in their meetings. The result of that business, as far as I understand it, is, a great many fools have been killed; their blood lies upon Latherdale; their folly and the cruelty shewed unto them hath gained a great deal of compassion for those that remain of their party, which probably will persuade those in authority here to proceed more gently; and that which is reasonable in itself, will be rendered absolutely necessary, if the parliament be suffered to sit; for unless they prove to be of a temper very different from what is expected, they will suffer nothing like unto that which hath been."

His Majesty's Advocat replies, That 1. he oppons the execution, nor was the king to take notice of his being prisoner for a cryme, it being sufficient to the king to consider his dwelling house. 2. This resolves in a defence, because it is ane exception upon the nullitie of the execution, and consequently cannot be proponed for ane absent. 3. In fortification of the execution, offers to prove his familie lived at Hill a quarter of ane year befor.

The Lords finds that this defence for Gavin Hamilton, of Hill, resolving in ane nullitie of the execution, and not being ane essonie or excuse, cannot be received unlesse the partie wer present.

Intran'

Robert Frame, in Lanerk
John Scott, elder, in Kenmuir
John Corse, in Clydsmilne
James Thompson, portioner, of Garnquen
Alexander Wardroper, in Shedetoun, portioner of Midlequarter
David Lindsay, portioner of Jacktoun
John Nimmo, in the Forth
George Muirhead, of Steinstoun
Archibald Cleiland, of Knowenoblehill
James Hamilton, of Halsyd
James Hamilton, of Stonhall
John Holmes, of Newtoun
Robert Russill, portioner of Windie-edge
Henry Boswell, portioner of Dunsystoun
John Wardroper, portioner of Denishill
James Meik, portioner of Fartisset
Archibald Prentise, in Staine
James Muirhead, of Breidisholme
Mr. Robert Black, of Silvertounhill

Indyted and accused for the crymes of treason and rebellion at lenth mentioned in ther dittay.

Persewer.—Sir George M'Kenzie, of Rosehaugh, our soveraigne lord's advocat.

Pro's in defence.—Sir Geo. Lockhart, Mr. Wm. Fletcher, Mr. William Hamilton, Mr. John Kincaid.

Sir George Lockhart as procurator for Breidsholme and the other defenders craves they may be putt to a present tryall, and that his majestie's advocat may condescend upon ane informer in regard that the persuit being for treason the act of parliament is most clear and positive, that whoever accuses any person as guilty of treason, in case he succumb in the probation he is lyable to the paine of treason, and a commission from the councill or thesaurie in generall termes is not sufficient.

His Majesty's Advocat declaires James Sommervail had commission from the lords of the thesawrie to go unto the cuntry, and take information against the pannall.

The Lords Justice Generall and Commissioners of Justiciarie, find that his majesties ad-

vocat * being warrandit by the lords of his majestie's privie councill or thesaurie to persewe the pannalls, he is not obliged to condescend upon ane informer, and find that he

* Mr. Hume, in different parts of his Commentaries, treats copiously of the powers and duties of the king's advocate. The following passage will furnish some insight into the History of the proceedings of that officer as public accuser.

“ Let us now attend to the circumstances of a prosecution at instance of the lord Advocate, the public accuser, who insists in the name of the king, and for his majesty's interest in the execution of his laws, and in the tranquillity and welfare of his people. This office, though it probably existed at an earlier period, is not however, much taken notice of before the beginning of the 16th century; and the common account is, that it was first raised to its present high privilege with respect to the prosecution of crimes, by the stat. 1587, c. 77, which declares “ That the thesaurer and advocate pursue slaughters and utheris crimes, althocht the parties be silent, or wald utherwayes privily agree.” But, that this is not quite an accurate state of the case, may be inferred from a former statute, 1579, c. 78, which fixes the penalties of calumnious prosecution, and provides particularly for the case of process at instance of the lord Advocate only. “ And gif the kingis majestie's advocat be onlie pursower, (says the act) his informer to pay the paine foresaid.” And indeed it is obvious with respect to crimes of a public nature, such as treason, sedition, blasphemy, and many others, for which no private individual ever had right to prosecute, that there must always have been some regular course and method of complaint, wherein the offenders in that sort might be brought to justice. But farther, with respect even to crimes injurious to individuals, if they were also of an interesting nature to the public, his majesty, in our practice and constitution, seems always to have been esteemed a competent accuser. The statute 1436, c. 140, has these words for title. “ Trespassours may be accused at the king's instance allenarly;” and it ordains generally, “ That all maires and serjeandes arrest at the schiriffis' bidding, albeit that na partie follower be, all trespassoures, and that the said schiereffe follow the said trespassoures in the king's name, gif na partie follower apperis.” And again, a still more ancient statute, 1424, c. 20, entitled, *Of Mureburning*, has this express provision, after fixing the penalty of the trespass. “ And gif the lord of the land raisis not sik pain, nor punis his not sik trespassoures, as is befor said, the justice-clerk, be the inditement, sall gar sik trespassoures be corrected befor the justice, and punished as said is.” In these words, we have a hint of the course in which this sort of business was then prepared, and which according to the whole series of our statutes of the fifteenth, and part

ought to insist against all such of the pannalls, whose whole witnesses contained in their lists are all presents and compeiring.

The Lords Justice General, Justice Clerk, and Commissioners of Justiciary, of consent of his majestie's advocat, and for severall other causes and considerations moveing them, deserted and be thir presents deserts the dyet simpliciter as to the saids Robert Frame, John Scott, John Corse, and remnant pannalls above named, and discharge the raising or outgiving of any newe letters against them for the crymes above specified, except be ane expresse warrand from the saids lords *in presentia*, wherupon the defenders and ther procurators above-named, asked and took instruments, and protested for ther cautioners relieff, and craved ther bonds of caution might be delyvered up, which protestation went the cautioners relieff, the saids lords admitted, and herby admits, and ordaines ther saids cautioners bonds to be given up.

His *Majestie's Advocat* declaires he shall not insist against any of the defenders as to whom the dyet is deserted without a speciall warrand from the privie councill, condescending upon ther names, surnames, and designations, wherupon sir George Lockhart and Mr. William Fletcher, advocats, asked and took instruments.

The Lords continue the dyet against James Bannatyne, wright in Laurck, John Robertson, weaver and portioner, of Shetlestoun, Alexander Murray, of Westounhead, and James

of the sixteenth century, appears to have been thus: that after information had been taken up in the several counties, under the brieve of dittay in the manner formerly detailed, the justice-clerk, at the command of the justiciar, made up from those materials, what was then called the Portuous Roll, and Traistis; that is a roll of the names of the delinquents, and a file of indictments against them, accommodated to their respective cases. And with the same officer it lay also, to expedite the necessary precepts towards the trial of those charges, and to issue his orders to the crowners (for we too had this office formerly though now long disused) to arrest the delinquents and put them in ward, or take surety from them for their appearance. Now, in performing this service, whether with a view to the stated justice ayres, or the trial of speciall crimes in particular diets at Edinburgh, the justice-clerk acted, substantially, for his majesty's interest, and that of public justice and example. It is true, that in framing the indictment, he did not insert the name of his majesty, nor of the lord advocate, nor of any other person, as accuser; for such continued to be the style of indictment down to the end even of the seventeenth century, as appears from the record, and indeed from the very styles of indictment, which Mackenzie has given us in his treatise. [See part 2, tit. 21, § 4.] But it is no less certain on the other side, that in the trial of all such charges, after

Wilson, in Ridgehead of Caruduff, who are indyted for the said rebellion, till the second Monday of June next, and continues the dyet against James Lockhart, in Hamilton, called laird Lockhart, till the sext day of Apryll next, and ordaines them to find caution for ther appearence at these dyets, under the paines contained in the newe acts of parliament.

A DEBATE.

Sir *George Lockhart*, for the pannalls, alleadges, that they having adduced a great many witnesses for proving of the grounds of ther exculpation, and the dyet being continued so that the pannalls most compeir or undergoe the certification of lawe, they therfor crave according to the opinion of lawyers, and particularlie Mathews in his title de probationi Innocentiae, Clarus, Quest. 53, and others, that the witnesses of ther exculpation may be examined to lye in 'retentis ad futuram rei memoriam.'

Mr. *William Fletcher* craves the like for Knoweoblehill and others, as to whom the dyet is deserted upon the grounds forsaid.

The Lords delay the examination of the witnesses of the exculpation till the dyet of continuation come, and refuse to examine witnesses wher the dyet is deserted.

The said day James Semple, maltman, in Hamilton, gave in presence of the saids Lords ane Petition signed be him, Showeing that he was deeplie sensible of his high misfortune in

they had been brought into court, it was the duty of the lord advocate to insist upon, support, and bring them to an issue; on which account, even in the oldest books of adjournal, he is marked in the *partibus* as counsel for the crown (for the *Persewar, Advocatus*.) in like manner as was practised with respect to the counsel for the accused. In effect, therefore, though not formally stated as such in the charge, the lord advocate was prosecutor for his majesty's interest, and was master of the instance, which he might desert, or restrict, or bring to an issue, as he saw cause. And thus, upon the whole, I think it probable, that the abovementioned act of James 6, which allows the lord advocate to pursue though the party injured be silent, is to be understood of that form of prosecution only, wherein the individual must have insisted; namely by summons or criminal letters, wherein the name of a complainer is engrossed, and citing the accused to a particular day of trial. But whether I am right in this conjecture or not, certainly that statute must have added to the weight and consequence of this officer, who now openly sustained the person of his majesty, and wielded the law in this interesting department: It is said accordingly, that soon after this period, viz. in the trial of Arnot of Woodmilln, Nov. 3, 1598, is the first instance of his being marked in the record under the title of *Lord Advocate*, which he has ever since retained."

having wandered from the road of his loyaltie and duty towards his soveraigne, in being led on to a rebellion against the king and his authoritie, and for which he confesses he deserveth the greatest severity the lawes can inflict upon such ane delinquent, and as he hath a true sense of his cryme, so he does ingenuously declare howe long he continued in it, which was from the sabbath night efter Drumclogie untill that rebellious attackue upon Glasgowe; and having that same day returned to Hamilton he did present his majestie's proclamation, requyreing the rebels to lay down ther armes, and did detaste and abhorre the cryme as much as his misfortune, and as to which he pleads his guilt and not his innocencie, and throwes himself upon his majestie's clemency and mercy; and as to his future carriage, dureing that horrid rebellion, he did demaine himself peaceable, and followed his ordinary busienes, which he is able to make appear by the most famous and loyall persons within the toun of Hamilton, and as to which he hath cited witnesses, and he is content, as a farder proof of his sinceritie and devot resolutions, to live loyallie, to take such tests as the lawe requyrs of good and faithfull subjects; therfor craveng, that if the saids lords examine witneses, they would examine them as to his guilt efter the attackue at Glasgowe. The whilk petition is subscribed thus: "James Sempl."

The said *James Semple* being entered on pannall declares that the Petition above written, presented in his name, is subscribed by him, and he acknowledges the lybell, and comes in will, and declares his sorrowe for his cryme, and is content to subscribe the declaration and to take all the tests requyred of the king's subjects.

Sic Subscritur, JAMES SEMPLL.

The Lords continue the dyet against the said *James Sempl* till to-morrow.

The said day *William Wilkie*, commissar of Lanerk, and *Thomas Stodhart*, commissar clerk ther, being oftymes called to have entered and presented *David Whitt*, smith in Lanerk, and *David Gibson* ther, befor the saids lords this day and place, in the hour of cause ther, to have underlyen the lawe sbr ther ryeing and joyning in armes with the rebels in the moneths of May and June 1679, burning his majesties laws and acts of parliament at the marcat croce of Rutherglen, drowning out bonafyres, sett on in commemoration of his majesties happie restauration; resisting, feighting, and opposing his majesties forces at Loudoun hill, Glasgowe, and Bothwel-bridge, and committing the severall other acts and deeds of hys treason and rebellion, at length mentioned in the criminall letters raised at his majesties advocats instance against them, and severall other persons thereon, as they who became cationers and severie acted in the books of adjournal, conjunctie and severallie,

for entering and presenting the saids *David Whytt* and *David Gibson* to the effect forsaid lawfull tyme of day hidden, and they not entered nor present, and the saids persons nor yet they compeirand; the lords justice clerk and commissioners of justiciary therfor, be the mouth of *John M'kenzie*, macer of court, decerned and adjudged the saids *William Wilkie* and *Thomas Stodhart*, cationers forsaid, to be in ane unlawe and americiament of fyve hundreth merks for not presenting ilk ane of the saids *David Whitt* and *David Gibson*, and also decerned and ordained the saids persons to be outlawes and fugitives frae his Majesties lawes, and to be putt to the horne, and all ther moveable goods and gear to be escheat and in brought, to our soveraign lords use, for ther contempion and disobedience, which was pronounced for doom.

Hamilton and Thomson delayed.

The Lords Justice Clerk and Commissioners of Justiciary for severall causes moving them, delay the tryall of *James Hamilton*, of Pryorhill, and *John Thomson*, carpentair in Lanerk, who are indyted for being accessorie to the late rebellion.

The said day ane Petition presented to the said lords in name and behalf of *Alexander Brown*, in Lanerk, makeand mentioone, that wher the supplicant being chalenged for being at Bothwel-bridge, and cited to compeir befor the saids lords in ane court holden at Glasgowe, in October, 1679, he did compeir personallie, and entered himself on pannall, and declared he was readie and willing to abyd ane legall tryall, at which tyme the saids lords in respect of his majesties iudemantie, and of ane declaration under the lord Carnwaths hand, bearing the supplicant to have taken the bond, deserted the dyet simpliciter against the supplicant, as the act of the said court, under the hand of the clerk therof, given in with the petition, bears; notwithstanding wherof, the supplicant in a short tyme thereafter was apprehendit be *Mr. William Ferguson* (allegding him to be ane heritor) imprisoned, and his goods seized upon, and disposed of at pleasure; wherupon the supplicant having made application to the counsell, the lords of counsell did recomend to the earle of Glencairne or lord Rosse, or any one of them, to make tryall of the supplicants condition, and if he was ane heritor; and the lord Rosse having accordingtie made tryall, the lords of counsell upon his report did grant order and warrand to the magistrates of Lanerk to sett the supplicant at libertie, as the act of counsell made thereanent produced with this petition testifies, yet nevertheless upon some misinformation or rather mistake, he is yet farder troubled and convinced befor the saids lords upon ane citation at his dwelling-house, the supplicant himself being absent and abroad, and knoweing nothing of the affair, conceaving himself in securitie upon the forsaid act of counsell, which proceedit upon the lord Rosse his report, craveng

therfor the saids lords would be pleased to take the premises to consideration, and lykways consider the condition of the supplicant, his wyff and numerous familie, who is nowe travelling abroad to make up that losse he has sustained already, and to satisfie his creditors, wherin he is so much engagel, and that he cannot but be utterlie ruined if the dyet be not deserted, or the supplicant absolved, as in justice he ought to be.

The Lords Justice Clerk and Commissioners of Justiciary having considered this petition with the act of councill and act of adjournall above mentioned, they therfor of consent of his majesties advocat excuse the petitioner's absence, and deserts the dyet simpliciter, and discharges all newe letters, except be a warrand *in presentia*.

Intrau'

John Williamson, son to *Mongo Williamson*, heritor of the lauds of *Holl*.

John Williamson, son to *Robert Williamson*, called lord *Shortcleugh*.

John Spreull, son to *Mr. John Spreull*, writer in *Glasgowe*.

William Twedale, son to *William Twedale*, late *Balyie* of *Lanerk*.

David Robertson ther, called *Possie* by nickname.

David Weir, son to ——— *Weir* ther.

James Walker younger of *Halketburne*.

Indyted and accused for the crymes of treason and rebellion, at length mentioned in ther ditty ut in die precedentis.

Persever.—Our sovereign lord's advocat.

Mr. Colin M'Kenzie, advocat, as procurator for *John Williamson* son to *Mongo Williamson*, heritor of the lauds of *Holl*, alleadges, that he cannot goe to the knowledge of ane inquest, being but only the eldest son of ane heritor, who has taken the benefit of his majesties gracious act of indemnitie, and his father is alive; and repeats the same defence for *John Williamson*, son to *Robert Williamson*, in *Shortcleugh*, and for instructing of his defence, produced certificats under the hand of the earle of *Carnwath*, who was commissionat by the lords of his majesties privie councill, to take the bond appointed by his majesties indemnitie, from such persons as live within the shyre of *Lanerk*, and wer engagel in the late rebellion, the whilk certificats are of the date the 15th of September 1679. *Mr. Colin M'Kenzie* repeats the same defence for *James Walker*, younger, of *Halketburne*, and produced ane testificat therupon, under the hand of *Mr. William Paterson*, clerk to his majesties privie councill, dated the eight of February last, bearing that he had taken the bond before *sir John Harper*, of *Carnbusmethan*, sheriff deput, of *Lanerk*, upon the twentieth nyth of December last.

Mr. John Kincaid, advocat, repeats the same defence for *John Spreull*, pannall, and produces the act of councill, dated the 18th of Septem-

ber, 1679, bearing that he had bound obleidged and macted himself, that herefter he should not take up armes against his majestie nor his autoritie, conforme to the indemnitie, and that he was therupon sett at liberty by order of the privie councill.

Mr. John Menzies, advocat, repeats the same defence for *David Robertson*, *William Twedale*, and *David Weir*, pannalls, and produced ane testificat, under the hand of *William Wilkie*, commissar of *Lanerk*, and ane of the sheriff deputs therof, certifieing and declairing that the said *David Robertson* did, upon the 18th day of February last, compeir before him and declair, that he was sorie that he was engagel in the late rebellion, and humble craved the benefit of his majesties gracious indemnitie, and did signe the bond never to lift armes against his majestie or his autoritie in tyme coming, which certificat is dated the said 18th day of February, 1681. And also produced another certificat, under the hand of the s'd *William Wilkie*, dated the 17th of March last, bearing that upon the last day of February last bypast, the said *William Twedale*, pannall, compeired personallie before him and declaired that he was sorie that he was engagel in the late rebellion, and humble craved the benefit of his majesties gracious indemnitie, and did signe the bond never to ryse in armes against his majestie or his autoritie in tyme coming. And also produced another testificat, under the hand of *sir John Harper*, of *Cambusmethan*, knight, shirriff deput of *Lanerk*, certifieing and declairing that *David Weir*, son to the deceast *Hugh Weir*, maltman, burges of *Lanerk*, did upon the 28th day of February last bypast, compeir befor *William Wilkie*, commissar of *Lanerk*, commissionat be him to the effect underwritten, and declaired that he was sorie that he was engagel in the late rebellion, and humble craved the benefit of his majesties gracious indemnitie, and did signe the bond never to lift armes against his majestie or his autoritie in tyme coming, as the samen certificat of the date the nyth of March last bypast in itself at length bears.

His Majestic's Advocat of consent, finds the defence relevant, the defenders renouncing ther heritage in favours of his majestie, as well wherof they had actual right, the tyme of the rebellion or the right of apparancie.

Mr. Colin M'kenzie replies, that the defence stands relevant, in respect of his majestic's indemnitie, which provyds that all persons, except these that are actual heritors, should be indemnified and remitted, and for the farder securitie of his leidges, speciallie provyds and commands that his judges should not stretch the same to their prejudice; but ought and should interpret the same in ther favours in the most favourable way, so that from the verie propriatie of the word heritor, ane heritor is understood to be he who is infett and sained, which is not the case of the pannalls.

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His Majestie's Advocat duplys, that the designe of the proclamatione, and the words of it does expresslie includ appeirand aires, whose right when the case of their succession does exist makes them 'onam et eandem personam' with the defu: et and *ipso jure* continues the fathers possession in them, and since they are to renunce all right they have to heritage, they must renunce ther right of appeirance, and as to the effect of the a, peirance that most be debated *suo loco*, but is not competent in this place. The Lords Justice Clerk and Commissioners of justiciary find, that the pannalls ought only to renunce the benefitt of all lands and heritages befallen to them befor his majesties act of grace, and not what did befall to them be decess of any of ther predicessors efter the said act.

18th March, 1681.

Intran'

James Muirhead, smith in Lanerk.
James Semple, maltman in Hamilton.
John Scot, elder portioner of Udingstoun.
William Wallace, portioner of Mainhill.
John Marshall, sewer in Hamilton.
James Young, of Peilhill, prisoner.

Indyted and accused for the crymes of hye treason and rebellion mentioned in ther dittay, which is booked the 14th instant.

Persecr.—Sir George M'Kenzie, of Roseghat, our Sovereigne Lord's Advocat.

Procurators in Defence.—Sir John Lauder, Mr. Colin M'kenzie, Mr. John Menzies, &c.

The said Advocats, as procurators for the said James Young, of Peilhill, declaired, That he being apprehendit and committed to prisone within the Tolbuith of Glasgowe, and thereafter transported prisoner to the Tolbuith of the Cannogat, wher he has lye for a long tyme, though he be altogether innocent of the crymes above specifit laid to his charge, he offered himself now readie and willing to abyde ane legall tryall therfor, and dissented frae all farther continuation of the dyet.

The Lords Justice Clerk and Commissioners of Justiciary, of consent of his majesties advocat, and for severall other causes moving them deserted, and be thir presents deserts the dyet simpliciter, and discharges the raising or out-giving of any newe letters against the defender for the crymes above specifit in tyme coming, except be ane expresse warrand in presentia, and ordaines the said James Young, of Peilhill, pannall, to be sett at liberty without caution. Whereupon his procurators above named, asked and took instruments.

The Lords deserts the dyet as to John Wilkie, elder, portioner of Udingstoun, who compeired and entered the pannall upon some mistake and misinformation to have underlyen the lawe for the crymes of treason and rebellion, mentioned in the dittay raised against the rebell heritors in Lanerkschire, his majestie's

advocat having past from him judicallie, he not being in the letters nor in the executions.

John Marshall, writer, in Hamilton, pannall, judicallie consents, that all of the witnesses to be adduced aginest any or all of the pannalls be adduced against him, as well as these contained in his list.

Sic Subscribitur JO. MERSHALL.

The Lords Justice Clerk and Commissioners of Justiciary find the dittay relevant, and remitted the same to the knowledge of ane assyse, as to the saids James Muirhead, James Semple, John Scott, William Wallace, John Marshall, nowe on pannall; as also as to the remnant persons mentioned in the dittay, whose names wer contained in a roll given in to the assyse, and are mentioned in ther verdict.

ASSISA.

Alexander Blair, merchant.
Lewes Johnstoun, merchant.
Thomas Noble, merchant.
Captain John Binning, vintner.
Alexander Bothwell, of Glencorse.
James Balyie, merchant.
Mr. Andrew Temple, of Ravelrige.
James Baird, of Saughtounhall.
Gavin Weir, of Dalrymilne.
Robert Sandielauds, merchant.
John Lindsey, taylor.
Robert Eliot, wright.
Alexander Henryson, of Newhaven.
James Gray, of Warriestoun.
John Dundas, of Harviestoun.

The Assyse lawfullie sworne, no objection in the contrair,

His Majesties Advocat takes instruments upon swearing of the assyse, and for probation adduced the witnesses efter deponing, and aginest the said James Semple adduced his judicall confession emitted yesterday in presence of the lords, which he this day reiterats and renews in presence of the assyse, and comes in his majesties will and begs mercy.

James Hamilton, in Hamilton, called Nepos, aged fourtie-four years, unmarried, purged and sworne, depons he sawe John Wilson, portioner of Staniepath, wreitter in Lanerk, with the rebells severall tymes in armes, ryding on horseback, with a sword and case of pistolls, and that he was called a commander, and this he sawe betwixt the first of June and the defate of the rebells at Bothwel-bridge; depons he sawe Mr. Thomas Pillans, in Lanerk, in armes with a troupe of the rebells that day the infall was at Glasgow; and at severall other tymes dureing the rebellion, depons he sawe Robert Lockhart, of Birkhill, in the toun of Hamilton, with a small sword about him, going up and down the toun with others of the rebells dureing the tyme forsaide; and the same tyme and place he sawe Gavin Hamilton, of Hill, in company with the rebells, in armes; depons he sawe James Weir, of Johnshill, come alongst with a

partie of the rebells, who brought a cannon from Douglas, and sawe him with that partie of the rebells that took down the rebells heads at Hamilton, and depons the said James Weir discharged a pistoll upon the deponent; depons he sawe John Haddowe, in Douglas, severall tymes, in armes, with the rebells the tyme forsaide, and that he was called a captain; depons he sawe James Whytt, in Douglas, twentie tymes in armes, ryding with the rebells that tyme; depons he sawe William Falconar, in Hamilton, walking severall tymes in rank and file with the rebells, and he had a black fringed ielt; depons he sawe Robert Fleyning, of Auchinfin, many tymes with the rebells on horseback, with bulster, pistols, and other armes, and sawe John Cochran, of Craige, lykways in company with the rebells in armes, and John Carduff, in Straven, and John Whitlawe, of Bothwelsheills, in armes, with the rebells severall tymes, and all this he sawe betwixt the tyme forsaide, and knowes the persons he has deponed against particularlie, and this is the truth as he shall answer to God.

Sic Subscritur, JA. HAMILTON.

William Hamilton, vintner, in Hamilton, aged fourtie-four years, married, purged and sworne, depons he knowes that John Wilson, younger, of Stoniepath, wreitter in Lanerk, was in company in armes with the rebells, and that he was a captain, and sawe him severall tymes; and sawe Mr. Thomas Pillans, in armes, severall tymes with the rebells; and sawe Robert Lockhart, of Birkhill, in armes with the rebells in Hamilton, and sawe Gavin Hamilton, of Hill, in armes with the rebells, and that he was at the deponent's house severall tymes with others of the rebells; depons he sawe James Weir, of Johnshill, in armes with the rebells many tymes, and that he brought the cannon from the marques of Douglas house, and that he took down the rebells heads at Hamilton, and took one horse from the deponent's stable the sabboth night that the king's forces wer assaulted at Drumclog, and that the same John Haddow, in Douglas, in armes, with the rebells, at Hamilton, and that he was a captain and commandit a company; depons he sawe Robert Fleyning, of Auchinfin, and John Carduff, in Straven, in armes with the rebells severall tymes; depons he knowes all the persons forsaids, and the tyme that he saw them was dureing the rebellion, betwixt the first and twentie second of June; and this is the truth as he shall answer to God, and the place wher he sawe them was Hamilton.

Sic Subscritur, WILLIAM HAMILTON.

John Wilson, wreitter, in Hamilton, aged twentie nyn years, married, purged and sworne, depons he sawe John Wilson, wreitter, in Lanerk, Mr. Thomas Pillans, Robert Lockhart of Birkhill, Gavin Hamilton, of Hill, James M'Quharrie of Scorieholme, all in armes with the rebells at Hamilton and Hamilton Muir, and James M'Quharrie was ryding on a black horse with the rebells, and depons he sawe

John Haddowe, in Douglas, ryd like a captaine upon the head of a troupe of the rebells severall tymes, and sawe James Whytt in Douglas and William Falconar in Hamilton in armes with the rebells, and sawe Arthur Tarbet exercised by the rebells and in ther company, and sawe Robert Fleyning of Auchinfin severall tymes in armes with the rebells, and depons he sawe the persons forsaids with the rebells in armes at Hamilton and Hamilton Muir, betwixt the first and twentie second of June 1679, and James M'Quharrie was in armes with the rebells, and this is the truth as he shall answer to God.

Sic Subscritur, JO. WILSONE.

Thomas Steintoun, in Hamilton, aged twentie four years, unmarried, purged and sworne, depons he sawe James Weir of Johnshill, and John Haddowe in Douglas, in armes with the rebells at Hamilton many tymes, and sawe William Falconar and Arthur Tarbet in armes with the rebells, depons he sawe Thomas Patton at the old Kirk of Cambusnethan in armes with the rebells at Hamilton. Depons he sawe John Whitlawe in Bothwelsheills and John Paterson, ther in armes with the rebells at Hamilton muir. Depons he sawe these persons in armes with the rebells, betwixt the first and twentie second days of June 1679, and knewe them particularlie and this is the truth as he shall answer to God.

Sic Subscritur, THO. STIVENSONE.

James Tod, in Hamilton, aged fourtie five years, married, purged and sworne, depons he sawe James Laurie wreitter in Lanerk in the deponents house, in Hamilton in company with two of the rebells drinking the Satterdayes night befor the defate at Bothwelbridge, depons he sawe Thomas Lauchlan, merchant in Lanerk severall tymes in armes with the rebells in Hamilton, and sawe Alexander Anderson, shoemaker in Lanerk, severall times in armes with the rebells at Hamilton and sawe Hugh Somervail of Errats, and John Hutchison of Harelawe, severall tymes in armes with the rebells at Hamilton and saw John Haddowe, and James Whytt in Douglas Lockhart of Birkhill Robert Fleyning of Auchinfin and John Cochran of Craige, lykways in armes with the rebells, depons he sawe all the forsaide persons in Hamilton betwixt the first of June that Drumclog was fought and the twentie second of June, that the rebells wer defate at Bothwelbridge and knewe them particularlie, but knowes not if James Lawrie hade armes, and this is the truth as he shall answer to God.

Sic Subscritur JAMES TOD.

John Leckie, messenger in Hamilton, aged fourtie three years married, purged and sworne, depons he sawe Thomas Lauchlan, Alexander Anderson, shoemaker in Lanerk, in armes with the rebells severall tymes at Hamilton, and that Alexander Anderson was a lieutenant, and sawe James Whytt ryding in John Haddowes troupe, and sawe John Steill of Windhill at Hamilton and Hamilton-muir in

arnes with the rebels and saw John Carnduff in Straven, and Robert Steill in Staine, in arnes with the rebels at Hamiltoun and Hamiltoun-muir, depons he sawe them betwixt the first and twentie second dayes of June 1679, and knewe them particularlie and this is the truth as he shall answer to God.

Sic Subscritur, JO. LECKIE.

Roger Cleiland, in Lanerk, aged fourtie years, married, purged and sworne, depons he sawe Archibald Symson in Lanerk, David Whytt smith ther, Wm. Ferguson ther, Gideon Weir ther, David Gibson ther, Thomas Inglis, shoemaker ther, all in arnes with the rebels, Alex. Balyie, in Lanerk with the rebels once but not in arnes, and sawe Alexander Anderson in Lanerk, John Pumphray ther, John Jack, in Nemphler, in arnes with the rebels, and depons he sawe one who was called Hugh Somervail of Urrats in arnes with the rebels, and sawe John Whytt of Neuk in arnes with the rebels and that he sawe them at Lanerk, Hamiltoun and Hamiltoun-muir betwixt the first and twentie second dayes of June 1679, and this is the truth as he shall answer to God, depons he cannot writt.

Sic Subscritur, R. MAITLAND. I. P. D.

Gavin Mont, in Lanerk, aged fourtie years, unmarried, purged and sworne, depons he sawe William Dick in Lanerk, with the rebels in arnes in or about Glasgowe and sawe Archibald Symson in Lanerk, and David Whytt smith ther, Thomas Lauchlan ther, William Ferguson ther, Gideon Weir ther, James Park ther, John Semple, mason ther, Hugh Ker, son to William Ker, of Bedronald, Thomas Inglis, shoemaker in Lanerk, Robert Haddowe younger in Lanerk, John Buckle ther, and John Pumphray all in arnes with the rebels betwixt the first and twentie second dayes of June 1679, depons he sawe Thomas Hinselwood in Lanerk, and William Padzean, mason ther, Luke Greinshiells of Hogscastle all in arnes with the rebels and knewe them particularlie, and this is the truth as he shall answer to God.

Sic Subscritur, GAVIN MONT.

Archibald Hinselwood, in Lanerk, aged fourtie eight years, married, purged and sworne, depons he sawe William Dick ryding out of the town of Lanerk, with arnes at that tyme the rebels wer in arnes in the West and he sawe Archibald Symson ryding with arnes at that tyme; depons he sawe John Buckle greuing from the town of Lanerk with arnes the tyme forsaid, depons he sawe John Hutcheson of Harelawe, ryding with arnes from the West homewards the tyme the rebels wer in arnes, and this is the truth as he shall answer to God.

Sic Subscritur, ARCHIBALD HINSELWOOD.

Mark Clifford, in Lanerk, aged threttie three years, married, purged and sworne, depons he sawe David Whytt, in arnes with the rebels, in Lanerk, and sawe William Ferguson, John Semple, mason, in Lanerk, Thomas In-

glis, shoemaker ther, all in arnes with the rebels, at Lanerk, the tyme of the late rebellion.

Sic Subscritur, M. CLIFFORD.

James Crawford, balyie of Lanerk, aged fyftie-fyve years, purged and sworne, depons that the day that Bothwel-bridge was fought, he sawe David Whyt, smith in Lanerk, in arnes with the rebels, in Lanerk, efter the defate; depons he sawe Thomas Lauchlan, and William Ferguson, in Lanerk, severall tymes in arnes with the rebels, betwixt the first and twentie-second dayes of June, and sawe John Semple, mason, and William Padzean, mason, in Lanerk, in arnes with the rebels, severall tymes the place and tyme forsaid; and this is the truth as he shall answer to God.

Sic Subscritur, J. CRAWFORD.

James Heastie, in Lanerk, aged fyftie-six years, married, purged and sworne, depons he sawe Gideon Weir, guie smith, in Lanerk, with horse, arnes and ane carrabin, in company with the rebels; depons he sawe Robert Haddowe, youngest son to Robert Haddowe, shoemaker, with a sword coming back to Lanark on the sabbath day the rebels wer defate at Bothwel-bridge; and this is the truth as he shall answer to God.

Sic Subscritur, JA. HAISTIE.

William Twedale, late balyie of Lanerk, aged fourtie eight years, married, depons he sawe John Jack, in Nemphler, in company with some of the rebels in Lanerk, in arnes the tyme of the rebellion 1679.

Sic Subscritur, WILLIAM TWEDALE.

John Allan, in Hamilton, aged threttie eight years, married, purged and sworne, depons he sawe William Park, fewart of Lairfad, in arnes with the rebels, within the town of Hamilton.

Sic Subscritur, JOHN ALLANE.

William Heastie, in Lanerk, aged twentie four years, married, purged and sworne, depons he sawe William Dick, in Lanerk, on horseback, with a sword about him, ryding, with the rebels, and sawe David Gibson, in Lanerk, ryding on horseback with the rebels, and sawe James Park, weaver, with the rebels in arnes, on foot, and sawe Thomas Inglis, in arnes with the rebels ther, and sawe John Buckle, Thomas Hinselwood, John Jack, in Nemphler, William Padzean, mason, in Lanerk, all in arnes with the rebels, within the town of Lanerk, in June 1679; and this is the truth as he shall answer to God.

Sic Subscritur, WILLIAM HISTIE.

James Sliman, in Lanerk, aged threttie nyn years, married, purged and sworne, depons he sawe James Lourie, wreitter in Lanerk, ryding throws the town of Lanerk in comany with the rebels, and a sword about him, and sawe Hugh Ker, son to William Ker, of Bedronald, ryding with the rebels in arnes, in the town of Lanerk, the tyme of the rebellion in June

1679; and this is the truth as he shall answer to God.

Sic Subscribitur, JAMES SLIMAN.

James Watson, taylor, in Lanerk, aged fourtie-three years, married, purged and sworne, depons he sawe David Gibson, in Lanerk, in armes with the rebells, ryding throwe Lanerk in June 1679, and sawe Archibald Sympson lykways in armes with them the said tyme and place; and this is the truth as he shall answer to God.

Sic Subscribitur, JAMES WATSONE.

James Whytt, in Lanerk, aged threttie sex years, married, sworne, depons he sawe William Dick, in Lanerk, in armes in his returne from Bothwelbridge the day the rebells wer defate ther; and this is the truth as he shall answer to God.

Sic Subscribitur, JAMES WHYTT.

Jeremiah Coupur, messenger, in Kilbryd, purged and sworne, depons he sawe John Hamilton, of Rogertoun, ryding, with the rebells throwe Kilbryd, and a sword about him, efter the confictat Drumcloge, and sawe John Wilson, of Highflett in armes with them the same tyme and place, and sawe Robert Steivin, fewer, in Newland, in armes with the rebells, on Thursday efter Drumcloge in June 1679, and this is the truth as he shall answer to God.

Sic Subscribitur, JEREMIE COUPAR.

William Pollock, in Hamilton, aged twentie eight years, married, purged and sworne, depons he sawe James M'Quhairy, of Scorieholme, in armes with the rebells, in Hamilton, and sawe Arthur Tarbet, in Hamilton, and Gavin Weatherspoon, of Heatherie knowe, Robert Goodwine, in Glasgowe, a horseman, all in armes with the rebells at Hamilton-muir, and sawe John Grey of Darnagavil, and John Whitlawe of Bothwelsheills, William Ward-ropor of Wester Calderhead, all in armes with the rebells, in June 1679; and this is the truth as he shall answer to God, and depons he knowes nothing as to John Marshall, in Hamilton.

Sic Subscribitur, WILEM POLOK.

Robert Thompson, millar, in Lesmehago, aged twentie four years, married, depons he sawe John Whytt, of Neuk, in armes with the rebells, betwixt Lesmahago and Hamilton, the tyme of the rebellion, betwixt the first of June and twentie second day therof; and this is the truth as he shall answer to God, depons he cannot wreitt.

Sic Subscribitur, JA. FOULIS.

John Weir in Abaygrein aged twentie four years, married, purged and sworne, depons he sawe John Pumphray, Gideon Weir, John Whyt, of Neuk, John Cochran, of Craige, all in armes with the rebells, in June 1679; and this is the truth as he shall answer to God.

Sic Subscribitur, J. WEIR.

William Wharrie, in Scorieholme, aged fourtie years, married, purged and sworne, depons he sawe John Steill of Overwaterhead, comeing and goeing to the rebells befor the defate at Bothwel-bridge, and sawe him efter the break at Bothwel-bridge, wher he was skulking, and this is the truth as he shall answer to God: the deponer was purged of partiall council.

Sic Subscribitur, WILLIAM QUHARIE.

William Weir, of Clerkstoun, aged threttie-six years, married, purged and sworne, depons he sawe John Whytt, of Neuk, Thomas Linn, younger, of Blairachining, and James Whytt, in Douglas, all in armes, with the rebells, in June 1679; and this is the truth as he shall answer to God.

Sic Subscribitur, WILL. WEIR.

Andrew Robertson, in Belshill, aged fourtie-four years, married, purged and sworn, depons he sawe Luke Greinsheills, of Hog's-castle, in armes, with two troups of the rebells, at the Shawehead-Muir, on Sunday befor the break at Bothwel-bridge; and this is the truth as he shall answer to God.

Sic Subscribitur, ANDREWE ROBERTSON.

John Hamilton, in Lowe, watter, aged twentie-six years, married, purged and sworn, depons he sawe Arthur Tarbet in Hamilton, in armes with the rebells, in June 1679; and this is the truth as he shall answer to God, and depons he cannot wreitt.

Sic Subscribitur, R. MATTLAND, I. P. D.

Robert Weir, in Hamilton, aged fourtie years, married, purged and sworn, depons nihil novit.

John Millar, of Milnheugh, aged threttie-six years, solutus, purged and sworn, depons he sawe John Millar, younger, in Long Catherwood, with the bodie of the rebells, and a gune on his shoulder, eight dayes efter the confict at Drumcloge; depons he sawe John Wilson, of Highflett, ryding throwe the Kirktoon of Blantyre, with a sword about him, towards Hamilton-Muir, wher the rebells then wer, but depons ther was no person in his company; and this is the truth as he shall answer to God.

Sic Subscribitur, JOHN MILLAR.

John Millar, in Kenmuir, married, purged and sworne, depons he sawe James Corse in Udingatoune, ryding by the toune of Kenmuir, in the road to Glasgowe, they day the rebells entered Glasgowe, and that he hade a sword, but there was no person but another man in his company; depons that William Riddell, fewer, in Rutherglen, was in armes with sevin or eight others of the rebells, and that that partie offered to search the deponent's house for armes, and that the said William Riddell being of the deponent's acquaintance, he dealt with the partie to spare the deponent's house, and depons it was betwixt the confict at Drumcloge and the defate at Bothwel-bridge; and this is the truth as he shall answer to God.

Sic Subscribitur, J. MILLAR.

Robert Scott, in Hamilton, aged fourtie years, married, purged and sworne, depons he sawe William Park, of Lairfudd, severall tymes in company with the rebells at the deponent's house, betwixt the first of June and the twentie second day thereof; depons he sawe Thomas Whitlawe with the rebells, tyme and place forsaid, and sawe Gavin Paterson lykways with the rebells tyme forsaid; and that they wer both in armes on the Calsey of Hamilton, and that the said William Park was in armes, and this is the truth as he shall answer to God; depons he cannot wreitt.

Sic Subscibitur, R. MAITLAND, I. P. D.

John Marshall, messenger, aged threttie-fyve years, married, purged and sworne, depons he sawe Gavin Hamilton, of Hill, in Glasgowe, efter the infall ther, in armes, and sawe Robert Goodvin, maltman, in Glasgowe, ryding in armes with the rebells, carying the Paisley collors the tyme forsaid; and sawe lykways James Cuninghame, merchant, in Glasgowe, and Wm. Riddell, fesar in Rutherglen, John Cochran, in Craige, John Carduff, in Straven, Thomas Whitlawe, of Bothwelsheills, all in armes with the rebells, within the toun of Glasgowe, the time of the late rebellion in June 1679; and this is the truth as he shall answer to God.

Sic Subscibitur, JOHN MARSHALL.

Mathew Braithwood, in Udingstoun, aged sextie years, married, purged and sworne, depons *nihil novit* as to any of the rebells mentioned in the dittay.

James Alexander, saidler, in Hamilton, aged fourtie-two years, married, purged and sworne, depons he sawe Hugh Souervail, younger, of Urrats, James M'Quharrie, of Scoriebolme, Jn. Whitlawe, in Bothwelsheills, and John Paterson, in Bothwelsheills, all in armes with the rebells, within the toun of Hamilton betwixt the conflict at Drumcloge and the defeat at Bothwel-bridge; and this is the truth as he shall answer to God.

Sic Subscibitur, JAMES ALEXANDER.

Robert Alexander, in Nethertoun, of Hamilton, aged fourtie years, married, purged and sworne, depons he sawe John Gray, of Darn-gavill, going up from the toun to the Muir of Hamilton, wher the rebells wer, on horse back, with a gune like a blunderbush; and this is the truth as he shall answer to God.

Sic Subscibitur, ROBERT ALEXANDER.

George Peir, cordoner, in Glasgowe, depons he sawe James Cuninghame, merchant, in Glasgowe, ryding up and doun Hamilton-Muir, with another man, and that he was amongst the rebells; and this is the truth as he shall answer to God.

Sic Subscibitur, GEORGE PEIRS.

John Drewe, son to Walter Drewe, maltman, in Glasgowe, aged twentie three years, married, purged and sworne, depons he sawe Gavin Weatherspoon, of Heatherie, knowe in arma

with the rebells at Glasgowe, and that he came with some of the rebells to the deponent's father's house to search for armes; depons he sawe Isack Blackwell, son to Thomas Blackwell, keeper of the calendar ther, in argies with there bells at Hamilton-Muir; and this is the truth as he shall answer to God.

Sic Subscibitur, JOHN DREW.

John Arneill, merchant, in Glasgowe, married, purged and sworne, depons he sawe Isack Blackwell son to Thomas Blackwell, keeper of the calendar in Glasgowe, in armes with the rebells in June 1679, in Hamilton-Muir; and this is the truth as he shall answer to God.

Sic Subscibitur, JOHN ARNEILL.

James Strang, of Corsehille, aged fourtie-four years, married, depons he sawe Thomas Craig, sewer in Jackstoun, upon the fyft of June 1679, comeing from a partie of the rebells to Kilbrydkirk, and sawe him ryd back to the partie, depons he had a sword and a carrabin; and this is the truth as he shall answer to God.

Sic Subscibitur, JA. STRANG.

Andrew Fleming, in Langland house, aged fyftie three years, married, purged and sworne, depons he sawe John Millar, younger, in Longcatherwood, in company with the rebells in commissar Fleymings park; and this is the truth as he shall answer to God.

Sic Subscibitur, ANDREW FLEMING.

William Dune, in Robicstoun, being sworne, depons *nihil novit*.

John Anderson, in Chrystoun, being solemnlie sworne, depons *nihil novit*.

Thomas Bowis, in Todhill, purged and sworne, aged fourtie five years, depons he sawe John Hamilton, of Rogertoun, in Hamilton-Muir, standing in rank and fyle with the rebells; depons he sawe Thomas Craig, fesar in Jacktoun, ryding from Kilbryd towards Hamilton-Muir, wher the rebells wer; depons he sawe Thomas Craig, fesar of Jacktoun, ryding from Kilbryd towards Hamilton-Muir, wher the rebells wer; depons he sawe John Millar, of Long Catherwood, in armes with the rebells, in Hamilton-Muir, depons he sawe John Wilson, of Highflett, in armes with the rebells, at Evundale, and heard him give commission to poynd for not giving horse to cary ther bag-gadge, and this is the truth as he shall answer to God. Depons he cannot wreitt.

Sic Subscibitur, R. MAITLAND, I. P. D.

Robert Lindsay, in Kilbryd, aged tyftie two years, purged and sworne, depons he sawe Thomas Craig, fesar of Jacktoun, in armes with the rebells in commissar Fleymings park, and sawe Robert Steivin, of Newland, in armes with the rebells at the said place, efter Drumcloge and befor Bothwelbridge; and this is the truth as he shall answer to God.

Sic Subscibitur, ROBERT LINDSAY.

David Donaldson, smith, in Udingstoun, aged fourtie-eight years, depons *nihil novit*

as to any of the rebels mentioned in the dittay.

Andrew Scott, at the castle of Bothwell, aged twentie fyve years, unmarried, purged and sworne, depons he sawe John Weatherspoon, of Heatherie, knowe in armes amongst the rebels in June 1679; and depons that this is the truth as he shall answer to God, and that he cannot writt.

Sic Subscritur, R. MAITLAND, I. P. D.

John Robertson, in Little Earnock, aged twentie sivin years, unmarried, purged and sworne, depons he sawe John Scot, sou to John Scot, in Udingstoun, conversing with some of the rebels at Shawe-Head-Muir, but knowes not if he hade armes; depons he sawe William Park, fesar of Lairfadd, John Cochran, of Craig, John Cochran, of Chappell, and James Dykes of the Rutzeonall, in armes with the rebels in Hamiltoun-Muir, in June 1679, and sawe Thomas Robertson, portioner of Hisledean, in armes with the rebels tyme and place forsaid; and this is the truth as he shall answer to God.

Sic Subscritur, JOHN ROESONE.

Thomas Watt, in Blantyre, aged fourtie years, married, purged and sworne, depons he sawe James Corse in Udingstoun, in armes with the rebels at Shawehcad-Muir, and sawe him ryd throwe Blantyre immediately efter the break at Bothwelbridge, and sawe James Rae, son to John Rae, in Udingstoun, lykways in armes with the rebels, at the Shawehcad-muir; depons that he sawe John Millar, in Long Catherwood, in armes with the rebels, and sawe John Paterson, in Bothwelsheills, in armes with the rebels, at Shawehcad-Muir in June 1679, and this is the truth as he shall answer to God, depons he cannot writt.

Sic Subscritur, R. MAITLAND, I. P. D.

John Gray, in Bedley-mill, aged twentie years, unmarried, depons he sawe John Eastoun, portioner, of Garnquein, and James Gray of Berrieknowe, walking in the streets of Glasgowe, and swords about them, on a marcat day, when the rebels were in the toun; and this is the truth as he shall answer to God; depons he cannot writt.

Sic Subscritur, R. MAITLAND, I. P. D.

William Mastertoun, in Lanerk, aged fyftie two years, married, purged and sworne, depons he sawe James Park in company with the rebels within the toun of Lanerk, but cannot be positive if he hade armes or not; depons he sawe Robert Haddowe, in Lanerk, in armes with the saids rebels, in Lanerk, in June 1679, the tyme of the late rebellio; depons he sawe John Hutcheson, of Harelawe, in armes with the rebels tyme and place forsaid; and this is the truth as he shall answer to God; depons he cannot writt.

Sic Subscritur, R. MAITLAND, I. P. D.

Robert M'Ghie, in Lanerk, aged fyftie years, married, purged and sworne, depons he sawe

Thomas Hinselwood, in Lanerk, goe alongst with the rebels, and a staff in his hand; and this is the truth as he shall answer to God.

Sic Subscritur, ROBERT M'GIE.

John Lindsay, shoemaker, in Lanerk, aged fourtie years, married, purged and sworne, depons he sawe Alexander Balyie, smith in Lanerk, in company with the rebels, carrying a musket, at Hamiltoun, in June 1679, and sawe Thomas Hinselwood, in Lanerk, in company with the rebels with a sword; depons he sawe James Muirhead, smith in Lanerk, standing at the syd of the streit, and some women about him, and that he had a sword, but was not in company with any of the rebels nor went not out of the toun with them, nor did he see him converse with any of them; depons he sawe John Jack, in Nemphler, in armes with the rebels, within the toun of Lanerk, with sword and pistols, in June 1679; and this is the truth as he shall answer to God.

Sic Subscritur, JOHN LINESAY.

Andrew Weir, merchand, in Lanerk, aged threttie-six years, purged and sworne, depons he sawe James Muirhead, smith, in Lanerk, with a sword in his hand, in company with the rebels, within the toun of Lanerk, and that he sawe no other of the citizens who wer regular in ther company, and never knew nor heard that he was out of the toun the tyme of the rebellion; and this is the truth as he shall answer to God.

Sic Subscritur, ANDREW WEIR.
R. MAITLAND.

James Selkirk, mason and wright, in Lanerk, aged threttie one years, purged and sworne, depons nihil novit.

David Caldwell in Monckland, aged threttie years, married, purged and sworne, depons he sawe John Thomson, son to James Thomson, portioner of Garnquein, in armes with the rebels, on Hamiltoun Muir, in June 1679, and sawe George Robertson, younger, of Glentore, in armes with the rebels, on Hamilton-Muir, with a pistoll in his hand, and sawe John Russell, of Eastfield, ryding with the rebels severall tymes, in Hamiltoun-Muir, but knowes not if he hade armes; depons he sawe John Eastoun, of Garnquein, going up and down with the rebels on Shawehcad-Muir, and sawe him at other places with the rebels in armes; depons he sawe Robert Goodvin, maltman, in Glasgowe, in a house of Glasgowe, with severall of the rebels, and that he was armed and hade pistols; depons he sawe James Dycks, portioner, of Halburne, and William Wardroper, portioner, of Easter Catherhead, in armes with the rebels on Hamiltoun-Muir, in June 1679, and this is the truth as he shall answer to God.

Sic Subscritur, DAVID CALDWALLE.

John Smith, maltman, in Hamiltoun, purged and sworne, depons he sawe Robert Goodvin ryding in to Glasgowe the tyme the rebels

wer up, but ther was no person in his company, and depons he sawe — Robertson, of Glentore, in armes with the rebells in Glasgow, in June 1679.

Sic Subscritur, JOHN SMITH.

Robert Twedale, in Lesmahago, aged threttie years, unmarried, purged and sworne, depons he sawe John Steill, of Overwaterhead, in company with the rebells at Lesmahago, with a sword and pistolls, in June 1679.

Sic Subscritur, ROBERT TWEDELL.

John Barre, in Galrigie, aged fourtie years, married, purged and sworne, depons he sawe John Steill, in Overwaterhead, in armes with the rebells, at Hamiltoun, in June 1679.

Sic Subscritur, JOHN BARR.

George M'Wharrie, in Boigysd, aged twentie-four year, married, purged and sworne, depons he sawe Thomas Linn, younger, of Blair-ockoning, in armes with the rebells, in Hamiltoun, in June 1679.

Sic Subscritur, GEORGE M'QUHARY.

George Fairie, elder, in Rutherglen, aged threttie three years, married, purged and sworne, depons he sawe William Riddell, sewar, in Rutherglen, in company with the rebells at Rutherglen, with sword and pistolls, in June 1679, and sawe John Hamiltoun of Rogertoun, and Robert Fleyming, of Auchinfine, in armes with the rebells, upon the 29th of May, 1679, when the rebells burnt his majestie's acts of parliament at the croce of Rutherglen.

Sic Subscritur, GEORGE FAIRIE.

John Dalzell, in Evarthill, aged thrittie-eight years, married, purged and sworne, depons he sawe William Wardroper, portioner, of Wester-Calderhead, with four or fyve of the rebells come by the deponent's house, and depons he had a sword; depons he cannot writt.

Sic Subscritur, R. MATTLAND, I. P. D.

John Rae, in Udingstoun, aged sextie years, purged and sworne, depons he knowes nothing.

Troyolus Balyie, of Southerhouse, aged fyftie two years, married, purged and sworne, depons he sawe James Gray, of Chrystoun, with fourtie or fyftie of the rebells, at the Sighthill, of Glasgowe, all in armes upon the Monday efter Drumclog.

Sic Subscritur, TROYOLUS BAILLIE.

Claud Riddell, smith, in Rutherglen, aged fyftie four years, married, purged and sworne, depons he sawe James Gray, younger, of Chrystoun, in company with the bodie of the rebells, at Rutherglen; depons he sawe James Cuninghame, merchand, in Glasgow, the forsaid place, in armes in company with the rebells, and with Robert Hamilton, generall, in June 1679; depons that William Riddell, sewar, in Rutherglen, was in armes with the rebells on horseback, the tymes forsaid.

Sic Subscritur, JA. FOULIS.

John Wilkie, in Udingstoun, sworne, depons he knew nothing.

John Murray, portioner of Daldowie, *nihil novit* as to any of the rebells mentioned in the dittay.

William Cassills, at the New Kirk of Monkland, aged threttie four years, married, depons he knowes nothing as to any of the rebells mentioned in the dittay.

Robert Scott, in Rutherglen, aged fyftie years, married, purged and sworne, depons that efter Drumclog, and befor the defate at Bothwelbridge, John Millar, younger, in Long Catherwood, did invit the deponent to goe out to the rebells, and told the deponent he himself was goeing, and that he went from home the tyme of the rebellion, but did not see him amongst the rebells.

Sic Subscritur, R. SCOTT.

James Hamilton, in Maines of Neilslan, aged threttie two years, married, purged and sworne, depons that he sawe Thomas Patton, at the Old Kirk of Cambusnethan, in armes, carying a halbert, in company with the rebells, at Hamilton-Muir the week befor the defate.

Sic Subscritur, JAMES HAMILTON.

William Jamieson, in Dewishill, aged fourtie years, married, purged and sworne, depons he sawe James Dycks, portioner, of Halburn, in armes in company with ten or twelve of the rebells, about a myle from Hamiltoun, the tyme of the late rebellion, betwixt the first and twentie second dayes of June 1679; depons he cannot writt.

Sic Subscritur, JA. FOULIS.

Gavin Wood, taylor in Hamiltoun, aged twentie years, unmarried, sworne and purged, depons *nihil novit*, as to John Marshall, in Hamiltoun, except that he thinks he sawe him at Hamilton that night Drumclog was fought, but cannot be positive, because it was night.

John Hamilton, son to Gilbert Hamilton, in Hamiltoun, depons *nihil novit*.

James Murwood, in Belshill, married, aged fyftie years, purged and sworne, depons he knowes nothing.

James Jack, in Udingstoun, aged fourtie years, married, purged and sworne, depons he sawe James Wilkie, son to John Wilkie, in Udingstoun, in armes, having a sword, in the toun of Udingstoun, when considerable numbers of the rebells went throwe the toun, but did not see him joyn in armes with the rebells, but that it was the fame of the countrey and of his neighbours that he was in the rebellion, depons he sawe John Eastoun, of Garnquein, in armes, marching throwe the toun of Udingstoun, with about ane hundreth of the rebells, efter Drumclog and befor the defate at Bothwel-bridge; depons he sawe Gavin Weatherspoon, sewar, of Heatherie, knowe in

arnes with the rebels, the tyme and place forsaide.

Sic Subscritur, JAMES JACK.

John Frame, in the Blackwardrawe, aged fyftie years, married, purged and sworne, depons he sawe John Wilson, of Highflett, in arnes with the rebels, some tymes with the number of six and sometyme with the number of twelve, and that they went to the Flatmuir to the randevouze Thursday efter the attacque at Glasgow; depons he gave Thomas Craig, portioner of Jacktoun, lykeways with the rebels, in arnes, tyme and place forsaide; depons he cannot wreitt.

Sic Subscritur, JA. FOULIS.

John Leper, in Strathven, aged threttie years, unmarried, purged and sworne, depons he sawe John Steill, of Windhill, in company with the rebels, but knowes not whither he hade arnes or not; and that it was betwixt Drumecloge and Bothwelbridge, and depons that John Steill said to the deponent, that he was thef seeking hack his horses which wer taken by the rebels; depons he sawe John Cochran portioner, of Chappel, the day that Drumecloge was foughten, in company with the rebels, and particularlie with Burghlie, within the toun of Straven; depons he sawe James Dykes, portioner, of Halburn, in company with the rebels, in arnes near Hamiltoun; depons he sawe one called Paterson, in the deponents mother's house, with the rebels, but knowes not if he was called John or Gavin Paterson, and that the said John Cochran was armed.

Sic Subscritur. JOHN LEFER.

James Naesmith, balye, of Hamiltoune, purged and sworne, depons he knowes nothing.

James Naesmith, servant to Mr. Robert Black, aged threttie sex years, unmarried, purged and sworne, depons he sawe John Steill of Windhill, in arnes, with a company of the rebels at Silvertounhill, and that they were all horsemen, and hade a standart, and this was on Saturday befor the defate at Bothwel-bridge, depons he cannot wreitt.

Sic Subscritur. JA. FOULIS.

James Brown, wreitter, in Hamiltoun, aged threttie years, unmarried, purged and sworne, depons that James Lourie, wreitter, in Lanerk, went in company with Robert Lockhart, of Birkhill, to Hamiltoun-muir to the rebels camp, and ther communed ane hour with the rebels, and returned to the toun of Hamiltoun, and particularlie James Lowrie communed with John Wilson, in Lanerk, who was a captain to the rebels, and Lockhart, of Birkhill communed with Mr. John King, depons James Lourie and Robert Lockhart hade arnes, and that it was upon the twentie one of June, about eleven a clock at night.

Sic Subscritur. JA. BROWNE.

The Court continued till tomorrow the 19th.
VOL. XI.

The Persewer and Pannalls compeiring personallie 'ut in die precedente.' His majestie's advocate for farder probation against them and the other rebels, in Lanerk shyre, remitted to the assyse, adduced

Robert Scott, in Rutherglen, who formerlie depons, being re-examined, depons, that John Brown, taylor, in Rutherglen, went away to the rebels the Sabboth day of the rout at Bothwel-bridge, and that the deponent advised him not to goe, and notwithstanding he went forward, and that the said John Brown told the deponent that he was taken and caryed in prisoner to Edinburgh, knowes not whither he hade arnes or not.

Sic Subscritur. R. SCOTT.

John Wallace, in Douglas, being interrogat as to ——— Patton at the old kirk of Cambusnethar, depons he knowes not the man.

John Wilkie, in Udingstoun, aged fourtis fyve years, married, purged and sworne, depons he sawe John Scott elder portioner of Udingstoun the day that the rebels went to Glasgowe goe to the west end of the toun of Udingstoun, on horseback, with a sword, which way is the way to Glasgowe, wher the rebels wer, but was distant fyve myles therfrae. Depons he came home the same night to his own house; knowes not if he went to the rebels thereafter, depons he sawe John Scott, younger, ryd from his father's house over the Croft towards the west-end of the toun of Udingstoun, the way towards the rebell army, which lay on the south syd of Clyd; knowes not howe fare distant they wer from the syd of Clyd; depons he hade a sword; knowes not if he entered the rebels camp or not, and that the premises wer betwixt the first of June and twentie two day therof, 1679; depons that the day of the attacque at Glasgowe, he sawe James Corse, in Udingstoun, in Carmyle, with a sword about him, and that thereafter he told the deponent that he had bein at Glasgowe with the rebels; depons he knowes nothing as to Alexander Corse his son.

Sic Subscritur. JOHN WILKIE.

John Hamilton, of Fairholme, aged fourtie years, married, purged and sworne, depons he sawe John Carduff, fewar, in Straven, about four or five days befor the break at Bothwel-bridge, come with a sword about him, the way from Hamiltoun wher the rebels lay towards Silvertoun-hill, and ther was another person called Arkhill with him, lykeways in arnes.

Sic Subscritur. JO. HAMILTON.

His Majestie's Advocat adduced Troyolus Balye, of Southerhouse, a witness against William Wallace, portioner, of Mainhill, on pannall.

Mr. Robert Main, advocat, as procurator for him, alleadges, that the said Troyolus Balye could not be admitted a witness against

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him, because ther wer *inimicitia capitales* betwixt him and the said Troyolus, which he offered him to prove by the witnesses efter mentioned, viz. Thomas Donald, smith, in Dyke head, and James Pettiegrew, in Balgedie, who being sworne, deponed that they heard the said Troyolus declaire that he repented he hade not sticket the said William Wallace.

The Lords having considered the witnesses depositions, they repell Troyolus Balyie from being a witness against the said William Wallace.

James Marwood, in Belshill, being sworne a witness against the said William Wallace, and purged, depons he knowes nothing of William Wallace in Mainhill his being accessorie to the late rebellion, only Troyolus Balyie told the deponent that the pannall was in armes with the rebels the tyme of the late rebellion.

The bail coupeiring witnesses wer sworne and examined in presense of the inqueit, and ther depositions recordit, except these who deponed they knewe nothing, or deponed only as to such ag't whom ther is a full probation led.

The Lords ordaine the assyse to inclose and returne ther verdict.

His Majestie's Advocat protests for ane assyse of error against the inqueist in case they assolye.

Eodem Die.

Intran'

John Hamilton, of Stonhall.

Thomas and James Alstouns, of Maines.

Robert and William Gilmours, portioners, of Prestigill.

Indyted and accused for the crymes of treason and rebellion mentioned in ther dittay recordit the 14 instant.

The Lords Justice Clerk, and Commissioners of Justiciary, of consent of his Majestie's Advocat, and for severall other good causes and considerations deserted, and be thir presents deserts the dyet as to the saids John Hamiltoun, of Stonhall, Thomas and James Alstouns, and Robert and William Gilmours, *simpliciter*, and discharges all new letters to be raised or given out against them, for the crymes above specifit in tyme coming, except be ane express warrand from the saids lords in *presentia*, wherupon the saids defenders asked and took instruments and protested for thir respective cautioners releiff, which protestation the saids lords admitted and hereby admitts, and orlaines the saids cautioners bonds to be delyvered up.

March 21, 1681.

Intran'

James Scemple, maltman, in Hamilton.

John Scott, elder, portioner of Udinstoun.

James Muirhead, smith in Lanerk.

William Wallace, portioner, of Mainhill.

John Marshall, fewer and wretter, in Hamiltoun.

John Williamson, son to — Williamson, heritor of the lands of —.

John Williamson, son to — Williamson, called lord Shortcleugh.

John Spreull, younger, son to Mr. John Spreull, writer, in Glasgowe.

William Twedale, son to William Twedale, late balyie of Lanerk.

David Robieson ther, called Possie by nickname.

David Weir, son to — Weir ther.

James Walker, younger, of Halketburne.

Indyted and accused for the crymes of treason and rebellion at lenth mentioned in ther dittay.

The saids John Williamsons, James Walker, John Spreull, William Twedale, David Robieson, and David Weir, and ther procurators, gave in renunciations *subscribit* be them of all ther heretage preceding the rebellion, wherof the tenor followes:

Be it kend to all men be thir present letters, We John Williamson, son to Robert Williamson, called lord Shortcleugh, John Williamson, son to Mongo Williamson, heritor of the lands of Holl, David Robieson, in Lanerk, called Possie by nickname. Forsameikle as we are persewed as heritors to underlye the lawe for our being in the late rebellion in June 1679, and that we did defend ourselves upon our taking the bond not to ryse in armes against the king's majestie or his authoritie, as not being heritors, and therby have the benefitt of his majestie's gracious indemnitie, and it being found be the lords justice clerk, and commissiouners of justiciary, that we ought only to renounce the benefitt of all lands and heretages befallen to us befor his majestie's act of grace, Therfor we be thir presents renounce and resigne in favours of the king's majestie and commissiouners of his hynes thesawrie, and his donators, all lands and heretages befallen to us, and wherunto we hade right befor his majestie's act of grace, and binds and obliges us to denude ourselves therof *omni habili modo*, at the seight of the lords of thesaurie, and be the adwise of his majestie's advocat consenting to the registration hereof in the bookes of adjournall, that letters and executiorials needfull may be direct thereupon in forme as effeirs or that the same may be registrat in any bookes competent within this realme, and for that effect constitutes Mr. Colin M'kenzie and Mr. John Menzies, advocats, our procurators. In witness wherof thir presents (written be John Anderson, servitor to Mr. Robert Martin, clerk to the justice court) are subscribit with our bands at Edinburgh the 18th day of March 1681 years, befor thir witness George Monro writer in Edinburgh and the said John Anderson

Sic Subscribitur JOHN WILLIAMSON,
JOHN WILLIAMSON, DAVID ROBIESONE,
GEO. MONRO, witness.
JO. ANDERSON, witness.

Be it kend to all men be thir presents letters me John Spreull younger wretter in Glasgowe

forsameikle as I am persewed as ane heritor to underlye the lawe for my being in the late rebellion in June 1679, and that I did defend myself upon the taking the bond not to ryse in armes against his majestie nor his authoritie as not being ane heritor, and thereby have the benefit of his majestie's gracious indenmitie; and it being found be the lords justice clerk and commissioners of justiciary, that I ought only to renounce the benefit of all lands and heretages befallen to me befor his majestie's act of grace, therfor I be thir presents renounce and resigne in favours of the king's majestie and commissioners of his highnes thesaurie, and his donators, all lands and heretages befallen to me or wherunto I hade right befor his majestie's act of grace, and binds and obliges me to denude myself therof *omni habili modo*, at the sight of the lords of thesaurie, and be the adwise of his majestie's advocat consenting to the registration hereof, in the bookes of adjournall, or any judges bookes within this nation, that letters executorialis needfull may be direct hereupon in forme as effeirs and constituts master John Kincaid advocat, my procourator. In witnes wherof I have subscribit thir presents (written be John Anderson, wrietter in Edin'r) with my hand at Edinburgh, the 18th day of March, 1681 years, befor thir witnesses, George Monro, wrietter in Edinburgh, and the said John Anderson.

Sic Subscribitur

JO. SPREULL.

GEO. MONRO, witness.

JO. ANDERSON, witness.

Be it kend to all men be thir presents letters, me James Walker, younger of Halkwoodburne, forsameikle as I am persewed as ane heritor to underlye the lawe for my being in the late rebellion in June 1679, and that I did defend myself upon my taking the bond not to ryse in armes against the king's majestie nor his authoritie, as not being ane heritor, and thereby have the benefit of his majestie's gracious indenmitie, and it being found be the lords justice clerk and commissioners of justiciary that I ought only to renounce the benefit of all lands and heretages befallen to me befor his majestie's act of grace, therfor I be thir presents renounce and resigne in favours of the king's majestie and commissioners of his highnes thesaurie, and his donators, all lands and heretages befallen to me, or wherunto I hade right befor his majestie's act of grace, and binds and obliges me to denude myself therof, *omni habili modo*, at the sight of the lords of thesaurie, and be the adwise of his majestie's advocat consenting to the registration hereof, in the bookes of adjournall, or any judges bookes within this realme, that letters of horning and other executorialis needfull may be direct thereupon in forme as effeirs, and constituts Mr. Colin M'Kenzie, advocat, my procourator. In witnes wherof, thir presents (wrietten be John Anderson, servitor to Mr. Robert Martin, clerk to the justice court) are subscribit with my hand, at Edinburgh, the 18th day of March,

1681 years, befor thir witnesses George Monro, wrietter in Edin'r and the said John Anderson.

Sic Subscribitur,

JA. WALKER.

GEO. MONRO, witness.

JO. ANDERSON, witness.

Be it kend to all men be thir present letters me William Twedale, son to William Twedale, late balyie of Lanerk, forsameikle as I am persewed as ane heritor to underlye the lawe for my being in the late rebellion in June 1679, and that I did defend myself upon the taking ane bond not to ryse in armes against his majestie nor his authoritie, as not being ane heritor, and thereby have the benefit of his majestie's gracious indenmitie, and it being found be the lords justice clerk and commissioners of justiciary that I ought only to renounce the benefit of all land and heretages befallen to me befor his majestie's act of grace, therfor I be thir presents renounce and resigne in favours of the king's majestie and commissioners of his highnes thesaurie, and his donators, all lands and heretages befallen to me or wherunto I hade right befor his majestie's act of grace, and binds and obliges me to denude myself therof, *omni habili modo*, at the sight of the lords of thesaurie, and be the adwise of his majestie's advocat consenting to the registration thereof, in the bookes of adjournall, or any judges bookes within this nation, that letters and executorialis needfull may be direct hereupon in forme as effeirs, and constituts master John Menzies, advocat, my procourator. In witnes wherof thir presents written be John Anderson, servitor to Mr. Robert Martin clerk to the justice court are subscribed with my hand at Edinburgh, the 18th day of March, 1681 years, befor thir witnesses, George Monro, wrietter in Edinburgh, and the said John Anderson.

Sic subscribitur,

WILLIAM TWEDDALE.

GEO. MONRO, witness.

JO. ANDERSON, witness.

Be it kend to all men be thir present letters me David Weir, son to Hugh Weir, merchand in Lanerk, forsameikle as I am persewed as ane heritor to underlye the lawe for my being in the late rebellion in June, 1679, and that I did defend myself upon the taking ane bond not to ryse in armes against his majestie nor his authoritie, as not being ane heritor, and thereby have the benefit of his majestie's gracious indenmitie, and it being found be the lords justice clerk and commissioners of justiciary, that I ought only to renounce the benefit of all lands and heretages befallen to me befor his majestie's act of grace, therfor I be thir presents renounce and resign in favours of the king's majestie and commissioners of his highnes thesaurie, and his donators all lands and heretages befallen to me, or wherunto I hade right befor his majestie's act of grace, and binds and obliges me to denude myself therof, *omni habili modo*, at the sight of the lords of thesaurie, and be the adwise of his majestie's advocat, consenting to the registration hereof in the bookes of ad-

journal, or any judges books within this realme, that letters and executorialis needfull may passe therupon in forme, as effeirs and constitutes master John Menzies, advocat, my procurator. In witness wherof, thir presents (wreitten be John Anderson, servitor to Mr. Robert Martin, clerk to the justice court) are subscribed with my hand, at Edinburgh the 18th day of March, 1681 years, before witnesses George Munro, wreitter, in Edinburgh, and the said John Anderson.

Sic Subscribitur, DAVID WEIR.

GEO. MUNRO, witness.

JO. ANDERSON, witness.

The Lords Justice Generall, Justice Clerk, and Commissioners of Justiciary, in respect the saids John Williamson's, James Walker, John Spreull, William Tweddale, David Robieson, and David Weir, have accepted the benefitt of his majestie's gracious pardon and indemnitie, and have renounced and resigned in favours of the king's majestie and commissioners of his hynes thesaurie, and his donators, all lands and heritages befallen to them, or wherunto they hade right, before his majestie's act of grace deserted, and be thir presents deserts the dyet in *perpetuum*, and discharges the raising or outgiving of any newe letters or dittays against the defenders for the crymes above specifit in tyme comeing: whereupon they and thir procurators asked and took instruments and protested for thir cautioners relief, and craved thir bonds might be delyvered up, which the saids lords admitted and ordained.

The said day the persons who past upon the assyse of James Semple, John Scott, James Muirhead, William Wallace, and John Marshall, above designed, and the remnant persons remitted to them, returned ther Verdict in presence of the saids lords, whereof the tenor follows: The Assyse be pluralitie of votes, by the mouth of James Baird, of Saughtounhall, ther chancellor, finds the sufficiencie of the probation led against the persons underwreitten conforme to the depositions of the witnesses adduced, to witt, against David Whytt, smith in Lanerck, Gideon Weir, gunesmith ther, David Gibson ther, John Wilson, wreitter ther, Mr. Thomas Pillans, James Laurie, wreitter in Lanerck, Archibald Symson ther, Thomas Lauchlan ther, William Ferguson ther, John Semple, mason ther, Thomas Inglis ther, Alexander Anderson ther, John Pumpray ther, John Jack, in Nemppler, William Padzean, mason, in Lanerck, Robert Lockhart, of Birkhill, Gavin Hamilton, of Hill, James Weir, of Johnshill, John Steill, in Overwaterhead, John Haddowe, in Douglas, James Whytt ther, William Falconer, in Hamilton, Arthur Tairbet, Gavin Weatherspoon, of Heatherie-knowe, John Easton portioner of Garnquein, Robert Goodvin, maltman, in Glasgow, James Cunningham, merchant, ther, Isack Blackwell, son to Thomas Blackwell ther, William Riddell, sewar in Ruther-

glen, Robert Fleymyng, of Auchinfine, John Hamilton, sewar of Rogertoun, Thomas Craigie, sewar of Jacktoun, John Millar, portioner of Long Catherwood, John Wilson, of Highflett, Robert Steivin, sewar of Newland, John Steill, of Windhill, John Cochrane, of Crige, James Dycks, portioner of Holburn, John Carduff, sewar in Jacktoun, Thomas Patton, at the Old Kirk of Cumnethan, John Whitlawe, in Bothwelsheills, John Patterson ther, John Whytt, of Neuk, and Thomas Linn, of Blairachin, and finds the pannalls above wreitten guilty of ryseing and being in the rebellion 1679, with the rebels, in armes; and also, Assolyies James Muirhead, smith, in Lanerck, John Wilkie, in Udingstoun, William Wallace, portioner of Mainhill, John Scotts, elder and younger, in Udingstoun, William Dick, in Lanerck, James Park ther, Hugh Ker, son to William Ker, of Bedronald, Robert Haddowe, ther, John Buckle ther, Alexander Balyie ther, Thomas Hinselwood ther, Hugh Somervail, of Uratts, James M'Quharie, of Scoricholme, James Carse, in Udingstoun, Alexander Corse, his son, James Rae, son to John Rae, in Udingstoun, James Gray, elder of Chrystoun, James Gray, of Berrieknowe, John Brown, in Rutherghlen, Hugh Ker, of Bawchouse, William Park, sewar of Lairdfadd, James Reid, of Kittochayd, John Cochran, portioner of ChapPELL, John Hutcheson, of Hairlawe, Luke Greinsheills, of Hlogscastle, John Gray, of Darrigavill, John Marshall, wreitter in Hamilton, George Robertson, elder and younger, in Glentore, William Wardroper, portioner of Wester Catherhead.

Sic Subscribitur.

JA. BAIRD, Ch.

Efter oppining and reading of the whilk verdict of assyse, The Lords Justice Generall, Justice Clerk and Commissioners of Justiciary, Therfor be the mouth of Andrew Cunningham, Dempster of court, decerned and adjudged the said David Whytt, smith, in Lanerck, Gideon Weir, gunesmith ther, David Gibson ther, John Wilson, wreitter in Lanerck, Mr. Thomas Pillans, James Laurie, wreitter ther, Archibald Symson ther, Thomas Lauchlan ther, William Ferguson ther, John Semple, mason ther, Thomas Inglis ther, Alexander Anderson ther, John Pumpray ther, John Jack, in Nemppler, William Padzean, mason in Lanerck, Robert Lockhart, of Birkhill, Gavin Hamilton, of Hill, James Weir, of Johnshill, John Steill, in Overwaterhead, John Haddowe, in Douglas, James Whytt ther, William Falconer, in Hamilton, Arthur Tairbet ther, Gavin Weatherspoon, of Heatherieknowe, John Easton, portioner of Garnquein, Robert Goodvin, maltman in Glasgow, James Cunningham, merchant ther, Isack Blackwell, son to Thomas Blackwell ther, William Riddell, sewar in Rutherghlen, Robert Fleymyng, in Auchinfine, John Hamilton, sewar of Rogertoun, Thomas Craige, sewar of Jacktoun, John Millar, portioner of Long Catherwood, John Wilson, of Highflett, Robert Steiven

sewar of Newland, John Steill, of Windhill, John Cochran, of Craige, James Dycks, porticoer of Halburne, John Carduff, sewar in Jacktoun, Thomas Patton, at the Old Kirk of Cambuanethan, John Whitlawe, in Bothwell-sbeills, John Paterson ther, John Whytt, of neuk, and Thomas Lin, of Blairachin, and ilk one of them to be execut to the death, demeaned as traitors, and to underlye the paines of treason and utter punishment appoynted by the lawes of this realme when they shall be apprehendit, at such tymes, places, and in such maner, as the lords justice generall, justice clerk and commissioners of justiciarie shall appoynt, and ther names, memorie, and honours to be extinct, and ther armes to riven furth: and delate out of the bookes of armes, suse that ther posteritie may never have place nor be able herefter to bruik or joise anie honours, offices, or dignities within this realme,

in tyme comeing, and to have forfait ammitted and tint all and sundrie ther lands, heretages, tenements, annual rents, offices, titles, dignities, tacks, steading, roumes, possessions, goods, and gear, whatsoever pertaining to them, to our sovereign lord to remain perpetuallie with his highness in property, which was pronounced for doom: Whereupon his Majesties advocat asked and took instruments.

The Lords continue the pronouncing of doom and sentance against James Semple, maltman, in Hamiltoun, who is found guilty of treason and rebellion, and is come in his majestie's will, and has confessed the cryme, and begs pardon till the fift day of April nixt.

N. B. The diet against James Semple is continued from time to time, and at last drops out altogether.

331. The Trial of the Lady ALICE LISLE,* at Winton, for High Treason: 1 JAMES II. A. D. 1685.

August 27, 1685.

Cl. of Ar. ALICE Lisle, hold up thy hand. [Which she did.] Thou standest here indicted by the name of Alice Lisle, of the parish of Ellingham in the county of Southampton, widow; for that thou, as a false traitor against

the most illustrious prince, James the Second, by the grace of God, of England, Scotland, France, and Ireland, king, thy supreme and natural lord, the fear of God in thy heart not having, nor weighing the duty of thy allegiance; but being moved and seduced by the instigation of the Devil, the love and true, due

* Mr. Justice Foster calls her (more properly as it seems) Mrs. Lisle. She was widow of John Lisle who had been one of the Judges of King Charles the First; (See vol. 4, of this Collection p. 1052—1133;) but I find not his name among those who signed the Warrant for Execution. (See vol. 4, pp. 1134, 1135.) He had afterwards, in the Protectorate of Oliver Cromwell, been Lord President of the High Court of Justice. (See in this Collection the Cases of Gerhard and others, vol. 5, p. 517; of Sir Henry Slingsby, vol. 5, p. 871; of Dr. Hewet, vol. 5, p. 883, and of Mr. Mordant, vol. 5, p. 907.)

The following particulars of the death of Lisle, are related by Ludlow, his friend and associate, and a partner of his expatriation:

“ Mr. Lisle having received advice from the lieutenant Balival, that a certain Frenchman, who used to engrave upon seals and dishes at Vevay, Lausanna, and other places, had informed these Savoyards of the way they should take for the execution of their wicked design, procured an officer of justice to demand him at his lodging in Lausanna; where being informed that he was gone to Vevay, a message was dispatched to me, that I might cause him to be seized. Accordingly the bailiff, at my request, granted a warrant for taking him into custody. But he having heard how things had passed at

Lausanna, and supposing the alarm to be over, was returned thither. Of which the government of the town having advice, they caused him to be seized, and carried before the burgo-master; who, after a slight examination, contented himself with banishing him from their jurisdiction. And now Mr. Lisle began to think, that he had not much better provided for his security by abandoning Vevay.

“ On the Wednesday of the same week, two men in the habit of grooms, mounted upon good horses, came to lodge at an inn in Vevay. Of which our landlord having received notice, (according to an order of the bailiff and chate-lain formerly signified to all innkeepers), he went to the house where they were; and, upon examination, was assured by them, that they belonged to a German count, who was then at the baths in the Pais des Vallées; that they were by his order come to this place to wait his return, and that they had already sent a messenger to acquaint him with their arrival. Being not able to draw any more from them, he came home; and, having acquainted me with what had passed, earnestly desired, that I would be upon my guard. In the mean time these pretended grooms continued at Vevay till the Thursday in the following week; when one coming from the baths before mentioned, assured, that no such person as these fellows described, had been there: which added to a

and natural obedience, which a true and faithful subject of our said lord the king, towards him our said lord the king, should, and of right ought to bear, wholly withdrawing, and with all thy might intending the peace and common tranquillity of this kingdom of England to disturb, and war and rebellion against our

threatening message sent by our landlord to the innkeeper for entertaining such rogues, they hastened away, and went to Lausanna.

“On Thursday the 11th of August 1664, one Mons. Longeon of Lausanna brought me the sad news, that Mr. Lisle going that morning to hear the sermon in the church that stood near the town-gate, was shot dead by a person on foot, who had a companion waiting for him on horseback, with a led horse in his hand; which the murderer having mounted, and cried *Vive le Roy*, they immediately rode away together towards Morges. Soon after this barbarous murder was committed, we understood from Lausanna by the description of the persons, their cloaths and horses, that they were the same that had lodged at Vevay. They had continued for a week in Lausanna before they found an opportunity to put in execution their detestable plot, and had carried themselves with such indiscretion, that divers persons suspected them to have a design against the English. Of which Mr. Lisle being informed, he sent his landlord twice to try what he could draw from them. But they had so well contrived their story, that he could find no colour to remove them. Many persons upon suspicion of these fellows had desired Mr. Lisle to be upon his guard, and to forbear going to the church he used; because it lay so near the town-gate, that if any persons should make an attempt against him, they might with little difficulty escape by that way. Our countrymen also who were with him, performed the same office. But he would by no means hearken to their advice; saying, he was in the hands of God, and had committed himself entirely to his protection; adding to this answer, that my life was his defence, and that till our enemies had dispatched me, he assured himself they would not think of him. The villain that murdered him had waited his coming at a barber's shop, where he pretended to want something for his teeth; till seeing Mr. Lisle at a distance, he stepped out of the shop, and as he came by, saluted him. Then following him into the church-yard, he drew a carabine from under his cloak, and shot him into the back. With the recoil of the piece the villain's hat was beaten off; and he himself falling over a piece of timber, dropped his gun, which he left behind him; and as soon as he had recovered himself, running to his companion who held the led horse, he mounted, and made his escape. Thus died John Lisle, esq. son to sir William Lisle of the Isle of Wight, a member of the great parliament, one of the council of state, commissioner of the great seal, and one of the assistants to the lord president in the

said lord the king, within this kingdom of England to stir up and move, and the government of our said lord the king, within this kingdom of England to subvert, and our said lord the king from the title, honour and regal name of the imperial crown of this his kingdom of England to depose, cast down, and de-

high court of justice that was erected for the trial of the late king.”

Burnet, after mentioning the military cruelties of Kirk to the partisans of Monmouth, and the savage and shameless behaviour of Jeffreys, (for which, see vol. 9, pp. 936, 7.) writes thus of the proceedings against lady Lisle, and those against Mrs. Gaunt. (See the next Case.)

“Two executions were of such an extraordinary nature, that they deserve a more particular recital. The king apprehended that many of the prisoners had got into London, and were concealed there. So he said, those who concealed them were the worst sort of traitors, who endeavoured to preserve such persons to a better time. He had likewise a great mind to find out any among the rich merchants, who might afford great compositions to save their lives: For though there was much blood shed, there was little booty got to reward those who had served. Upon this the king declared, he would sooner pardon the rebels, than those who harboured them.

“There was in London one Gaunt, a woman that was an anabaptist, who spent a great part of her life in acts of charity, visiting the jails, and looking after the poor of what persuasion soever they were. One of the rebels found her out, and she harboured him in her house; and was looking for an occasion of sending him out of the kingdom. He went about in the night, and came to hear what the king had said. So he, by an unheard of baseness, went and delivered himself, and accused her that harboured him. She was seized on, and tried. There was no witness to prove that she knew that the person she harboured was a rebel, but he himself: Her maid witnessed only, that he was entertained at her house. But though the crime was her harbouring a traitor, and was proved only by this infamous witness, yet the judge charged the jury to bring her in guilty, pretending that the maid was a second witness, though she knew nothing of that which was the criminal part. She was condemned, and burnt, as the law directs in the case of women convict of treason. She died with a constancy, even to a cheerful-ness, that struck all that saw it. She said charity was a part of her religion, as well as faith: This at worst was the feeding an enemy: So she hoped she had her reward with him, for whose sake she did this service, how unworthy soever the person was, that made so ill a return for it: She rejoiced that God had honoured her to be the first that suffered by fire in this reign; and that her suffering was a

prive, and our said sovereign lord the king to death and final destruction to bring and put, the 28th day of July, in the first year of the reign of our said sovereign lord James the Second by the grace of God of England, Scotland, France, and Ireland, king, defender of the faith, &c. at the parish of Ellingham

martyrdom for that religion which was all love. Pen the Quaker told me, he saw her die. She laid the straw about her for burning her speedily; and behaved herself in such a manner, that all the spectators melted in tears.

"The other execution was of a woman of greater quality: The lady Lisle. Her husband had been a regicide, was one of Cromwell's lords, and was called the lord Lisle. He went at the time of the restoration beyond sea, and lived at Lausanne. But three desperate Irishmen, hoping by such a service to make their fortunes, went thither, and killed him as he was going to church; and being well mounted and ill pursued got into France. His lady was known to be much affected with the king's death, and not easily reconciled to her husband for the share he had in it. She was a woman of great piety and charity. The night after the action, Hicks a violent preacher among the dissenters, and Neltharp, came to her house. She knew Hicks, and treated him civilly, not asking from whence they came. But Hicks told what brought them thither; for they had been with the duke of Monmouth. Upon which she went out of the room immediately, and ordered her chief servant to send an information concerning them to the next justice of peace, and in the mean while to suffer them to make their escape. But, before this could be done, a party came about the house, and took both them, and her for harbouring them. Jefferies resolved to make a sacrifice of her; and obtained of the king a promise that he would not pardon her. Which the king owned to the earl of Feversham, when he, upon the offer of 1,000*l.* if he could obtain her pardon, went and begged it. So she was brought to her trial. No legal proof was brought, that she knew that they were rebels: The names of the persons found in her house were in no proclamation: So there was no notice given to beware of them. Jefferies affirmed to the jury upon his honour, that the persons had confessed that they had been with the duke of Monmouth. This was the turning a witness against her, after which he ought not to have judged in the matter. And, though it was insisted on, as a point of law, that till the persons found in her house were convicted, she could not be found guilty, yet Jefferies charged the jury in a most violent manner to bring her in guilty. All the audience was strangely affected with so unusual a behaviour in a judge. Only the person most concerned, the lady herself, who was then past seventy, was so little moved at it, that she fell asleep. The jury brought her in not guilty. But the judge in great

aforsaid, in the county aforsaid, well knowing one John Hicks, of Keinsham, in the county of Somerset, clerk, to be a false traitor, and as a false traitor traitorously to have conspired and imagined the death and destruction of our said lord the king, and war, rebellion and insurrection against our said lord the king,

fury sent them out again. Yet they brought her in a second time not guilty. Then he seemed as in a transport of rage. He upon that threatened them with an attain of jury. And they, overcome with fear, brought her in, the third time, guilty. The king would shew no other favour but that he changed the sentence from burning to beheading. She died with great constancy of mind; and expressed a joy that she thus suffered for an act of charity and piety."

Ralph, vol. 1, p. 889, seems to infer, from the goodness of Mrs. Lisle's defence, that the anecdote of her sleeping upon her trial is not true.

The Proceedings in the West of England against the adherents of Monmouth, of which this Trial of Mrs. Lisle seems to have been the commencement, are related by the different historians with different degrees of circumstantiality, and more particularly in the "Western Martyrology" and the "Life of Jefferies." The friends of James have endeavoured to palliate his guilt in these transactions, but I think I have somewhere read, though I recollect not distinctly where, that Jefferies declared he had been reprehended by king James for not exercising still greater severity.

And Oldmixon tells us, that Kirke being upbraided with his cruelty at this time, protested his commission went further, and that he had put a restraint on the power and the instructions which were given him, vol. 1, p. 705. See also, to the like effect, Echard, Kennett, R. Coke, and Rapin.

In what Macpherson calls, "The Life of James the Second written by himself." [as to which see, in this Collection, vol. 6, pp. 297, et seq.] it is noticed, that imprudent zeal or as some said avarice carried him [Jefferies] beyond the terms of moderation and mercy, and he drew great obloquy upon the king's clemency, not only in the number but in the manner, too, of several executions and in shewing mercy to so few, particularly to [such is the expression] an old gentlewoman one Mrs. Alice Lisle who was condemned and executed only for harbouring one Hick and Nelstrop both ill men enough indeed, and the latter in a proclamation; but as she pretended was ignorant of it, and therefore, perhaps, might suffer for a common act of hospitality; but this severity was contrary to the king's intentions.—The king questioned the Chief Justice, but he palliated his severities with the pretence of necessary justice, which the king knew not how to contradict, since he had the precaution not only to send four other judges as his assistants along with him, but Mr. Pollexfen likewise in quality

within this kingdom of England traitorously to have levied and raised: Thou the said Alice Lisle afterwards, to wit, the same 28th day of July, in the first year of the reign of our said

of his Solicitor; who being a known favourer of the presbyterian party he hoped would moderate the Chief Justice's heat. This made the king acquiesce in what had been done, though it was of great disservice to him at bottom. The cruelties of Kirke were still more inexcusable than the severities of Jefferies: he caused many to be hanged more out of a bloody disposition and to satisfy his own brutal passions, than love of justice or his master's service. It is not improbable, that he had it then in his view to draw an odium on the king." Vol. 1, p. 145.

And sir John Dalrymple (*Memoirs of Great Britain and Ireland*, part 1, book 2, vol. 1, p. 82, 4to ed. of 1771) among other matter in extenuation of James's share in the cruelties of this horrible expedition, says, "It is certain that when lord keeper North made complaints of what Jefferies was doing, James gave orders to stop them" [the cruelties I suppose]: and for this he cites the *Life of lord Guildford*, or, as he calls him, North, p. 260. (Hume, too, on the same authority insinuates the same matter.)

In that work R. North expresses himself thus:

"After he [the duke of Monmouth] was beaten at Selgmere the lord chief justice Jefferies performed his memorable expedition in the West, armed not only with a commission of Oyer and Terminer but also an authority to command the forces in chief as general of the West, for so he was styled. Upon the news returned of his violent proceeding, his lordship [the lord keeper Guilford] saw the king would be a great sufferer thereby, and went directly to the king and moved him to put a stop to the fury which was in no respect for his service, but in many respects for the contrary. For though the executions were, by law, just, yet never were the deluded people all capitally punished; and it would be accounted a carnage, and not law, or justice; and, thereupon, orders went to mitigate the proceeding; but what effect followed, I know not. I am sure of his lordship's intercession to the king on this occasion, being told it, at the very time, by himself." *Life of Lord Keeper Guilford*, vol. 2, p. 200, 8vo ed. of 1808.

But in this account there must, as it seems, be some mistake. It appears from North's own representation, that very shortly after the accession of king James, the Lord Keeper fell into the sickness, which terminated in his death, (vol. 2, p. 201.); that at the time of the Coronation (April 23d, 1685) he was so ill, that "his bearing the long fatigue of that ceremony and walk was really a wonder;" (p. 205.) that "in his state his lordship took a resolution to quit the great seal and went to my lord Rochester to intercede with his majesty to accept it," (p. 207); that "lord Rochester put him off, desiring his lordship might continue keeper and

sovereign lord the king that now is, at the parish of Ellingham aforesaid, in the county aforesaid, the said John Hicks in thy dwelling-house, situate at the parish aforesaid, in

be a screen to him in staving off the Popish work" (p. 207. 342); that the keeper persisted, and on June 11th, wrote to Rochester a letter, by means of which leave was obtained that the keeper might retire with the seal into the country, in the hope of recovering his health against the next winter; and that in consequence of this permission he went first to Astrop Wells, and from thence (after the doctors threw up as Roger North expresses it) to his house at Wroxton in Bedfordshire, where he continued in melancholy and fretful moribundity, till his death in September* (pp. 207, et seq. 343).

Now this account seems to be utterly inconsistent with what North relates of the lord keeper's going directly to the king and moving him to put a stop to the fury and violent proceedings of Jefferies. It appears that Jefferies first opened his commission at Winchester, where Mrs. Lisle was tried on the 27th of August; and I recollect not to have found any other person named as having been tried there upon that occasion. In the "*Impartial History of the Life and Death of George lord Jefferies late lord chancellor of England*," (which from the Dedication to Jefferies, and from the conclusion of the *Life* itself appears to have been written and probably first published while Jefferies was in the Tower,) only Mrs. Lisle's case is mentioned as having been tried at Winchester, and then it is said, "their other prisoners were carried to Salisbury; and this was the most remarkable thing at that assizes. From thence they set forward for Salisbury, where were many prisoners that had been picked up and down the country then in the gaol, the which with those that were brought from Winton were ordered to be carried to Dorchester, there not being evidence enough to accomplish what was then designed by my lord." With this agrees Roger Coke, who mentions only Alicia Lisle as tried at Winchester, and then says "Jefferies and his brethren make haste to proceed in their commission, and from Winchester by Salisbury on the 3d of September ——— arrive at Dorchester." Kennett, after relating the conviction and execution of Mrs. Lisle at Winchester, omits all mention of Salisbury, and merely says the judges went to Dorchester, and with this agrees Echard's relation. Oldmixon and Rapin are silent as to the successive stations at which Jefferies and his associates executed their commission.

Ralph says "at Winchester he opened his commission:" and (after relating with some circumstantiality the case of Alice Lisle, and

* Collins says that Lord Keeper Guildford died on September 5th.

the county aforesaid, secretly, wickedly and traitorously didst entertain, conceal, comfort, uphold and maintain; and that thou the said Alice Lisle then and there, for the comforting,

noticing the fates of Nelthorp and Hicks) continues "from Winchester with a train of guards and prisoners at his heels, which he had gleaned up at different places on his way, Jefferies proceeded on to Salisbury, and from thence, having there also enlarged his collection, to Dorchester; where he hoisted his bloody flag, and made it first apparent, that he resolved to give no quarter."

Hume, though he afterwards gives some particulars of lady Lisle's case, loosely says Jefferies began at Dorchester; and this, though not strictly true, yet concurs with the other testimonies, that at this place was begun that abundant effusion of blood, of which North writes, that "though the executions were, by law, just, yet never were the deluded people all capitally punished; and it would be accounted a carnage, and not law, or justice."

In the "Impartial History of the Life and Death of George lord Jefferies" &c. it is circumstantially related, that at Dorchester the commission was read on Thursday the 3d of September, the judges attended church on the next morning, and in the evening the chief justice gave his charge and then adjourned to the following morning, when a bill was found against thirty persons charged for high treason; and with this account Ralph agrees, and also, as to the arrival at Dorchester on the 3d of September. Roger Coke, having abridged Roger North's circumstantial account of the bad health and rural abode of the lord keeper from the month of June to the time of his death, it was scarcely necessary that I should be thus particular in order to shew that there must be some mistake in that same historian's representation that "upon the news returned of Jefferies's violent proceeding the lord keeper went directly to the king and moved him to put a stop to the fury," &c. but it was perhaps worth while to shew that no such "just executions by law," as according to North "might be accounted a carnage" could possibly have taken place before September 5th, because on that day the lord keeper Guilford's long and severe illness was terminated by death. I do not indeed find the day of his death specified in the 8vo edition (1808) of North's 'Life,' but in Collins (art. lord Guilford vol. 4, p. 342, edition of 1735) he is stated to have died on September 5th, with which account agrees Ralph, (vol. 1, p. 893, Note) who omits not to notice that the lord keeper's reported intercession is proved by that fact to have been impossible.

In this part of Roger North's representation there is indisputably some mistake; the operation probably of an indistinct memory, a feeble attention, or a dull understanding. It is not perhaps with equal facility to be explain-

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upholding and maintaining of the aforesaid John Hicks, meat and drink unto the said John Hicks then and there maliciously and traitorously didst give and deliver, and cause to

ed how this writer, the lord keeper's brother,—who arrogates to himself the character of a critical historian, who as one of the king's counsel had been actively employed in the conduct of numerous state prosecutions, (See in this Collection the cases of Colledge, vol. 8, p. 550, of lord Russell, vol. 9, p. 695, of Sacheverel and others, vol. 10, p. 30.)

Nay, in the prosecution of persons who were executed for their participation in these very treasons of Monmouth's adherents, (see in this volume the Cases of Fernley, King and Gaunt)—should be so ignorant as he tells us, he was whether any effect had been produced by the orders which he would have us believe were at the intercession of the lord keeper issued by the king to stop the cruelties of Jefferies.

Most certainly, Roger North is an author upon whom reliance cannot safely be placed. I will take this opportunity of correcting an error into which I (after Ralph) have been misled by him. In vol. 10, p. 233, of this Collection, is cited a passage from Ralph, alledging, that the first Protest with Reasons was admitted in the House of Lords upon the rejection of the impeachment of Fitzharris. Ralph asserts this on the authority of North, whose words (Part 1, ch. 2, s. cli.) are:

"The king, in his declaration of reasons, &c. blames the Commons, at the Oxford parliament, for having impeached a traitor (Fitzharris) only to take him out of the hands of the law, after he was ordered to be prosecuted. So it stood with the Commons. The Lords, by their order, had left him to be prosecuted at law, notwithstanding the impeachment. So the court party, in the House of Lords, made a recovery of that matter against the Commons. They thundered in votes against the Lords, and were proceeding to demand conferences, and to urge reasons. The earl of Shaftsbury, and those in the House of Lords with him, after they could not hinder that vote for the common law against the impeachment, desired, as the course allows, that they might enter a protestation of their dissent to that vote. That was not denied, but they urged farther, that they might enter also the reasons of such their dissent. By this they intended to aid the Commons, who were coming with their reasons; and, probably, the earl was preparing for a sharp reflection upon the court lords, under cover of this protest, to be printed and made public; for so he had been used to cook up his matters for the press, as was observed. But the point of admitting these reasons, to be entered, occasioned much debate; it was objected that it was not equal, for the reasons on one side to appear on record, and not those on the other side; and, which was worst of all, the side of the order had not reasons, and the side against the order had; as if provision was

X

be given and delivered, against the duty of thy allegiance, against the peace of our sovereign lord the king that now is, his crown and dignity, and against the form of the statute in that case

made to shew to posterity, that the orders of the House were unreasonable. But many lords thought it might be an useful privilege, and so it was carried for the reasons; which was the beginning of protesting with reasons in our days. The author [Kennett] takes no notice of this point of the reasons, which was the only matter considerable; for what signifies an ordinary protest, which every lord demands as he pleases? It is probable that no great court was made by pushing these reasons; but, that being a matter of form in the House of Peers, and that fell under their debate and decision, should be a reason to indict a peer of high treason, I think none, but the author, could affirm."

But this is a gross and disgraceful misrepresentation. The admission of protests commenced in the year 1641, and had been regularly continued. Lord Clarendon (1 Hist. of the Rebellion, 407,) thus writes concerning the commencement of the practice:

"When the House of Commons found that none of their extraordinary ways would thoroughly subdue the House of Lords, but that, though they had very sturdy champions there, the major part, albeit the bishops, and all the recusant lords were driven from thence, still opposed them, whereby neither the bill for the taking away the bishops' votes, nor about pressing, could pass, and that they peremptorily still refused to join in the business of the militia; they found a new way, as unpractised and as unnatural as any of the former, whereby they would be sure to have an influence upon the House of Peers. It is an old custom, and privilege of that House, that upon any solemn debate, whosoever is not satisfied with the conclusion and judgment of the House, may demand leave to enter his protestation, which must be granted. The original of this was in jealous times, when men desired, for avoiding the ill consequence of any act there, that their dissents might appear; and was very seldom practised, but when they conceived religion, or the crown, trenced upon; insomuch as you shall not find, in the journals of many parliaments, one protestation entered; and when there was any, there was no more in the records, than after the resolution of the House is entered, that such a lord desired that his protestation or dissent might be entered, and oftentimes when several have dissented from the general opinion, not above one or two have entered their protestation. But since this parliament, as they altered this custom from cases of high concernment to the most trivial debates, the minor part ordinarily entering their protestation, to the end that their opinions might be taken notice of, and who were opposite to them, whereby the good and bad lords

made and provided. How sayest thou, Alice Lisle, art thou Guilty of the high-treason contained in this indictment or Not Guilty?
Lisle. Not Guilty.

were known and published; so they altered the form, and instead of short general entries, caused the matter of debate to be summed up, and thereupon their protestation, that they were not to be answerable for any inconveniences or mischiefs, that should befall the commonwealth by reason of this or that resolution. So that from an act for the particular indemnity of the person that made it, it grew sometimes to be a reproaching and arraigning the sense of the House by any factious number that disagreed. Then because the House of Peers is a court of record, they concluded, that any man upon any occasion might peruse the journals; and so every night the House of Commons could see how the debates had been managed and carried all the day, and take public notice, and make use of it accordingly, which they could not do of those discourses they received from their confidants; for supplying whereof this unjustifiable method was found out. For though it is a court of record, the highest court, and the acts and judgments of parliament are records, to which the subject may upon all occasions resort, yet they ought not to make use of that liberty in order to question any words spoken, or acts done, and remembered there; of which if the Lords are not the only judges, their privileges are much less than the Commons in truth have, and may justly claim."

The following is the first Protest which I have found in the Journals:

"Die Jovis, 9 Septembris, 1641. It being in debate concerning the printing and publishing of an order touching divine service; it was resolved, upon the question, by the major part, that this House will vote the printing and publishing of the order made the 16th of January, 1640, concerning divine service, before this House desires a conference with the House of Commons concerning that particular.

"Lords dissenting and making protestation against the vote, having demanded their right of protestation, of the House, before the putting of the question so to do: Comes Bedford, Warwicke, Clare, Newport: Ds. Wharton, Kymbolton.

"The Protestation:

"After the debate about the printing and publishing of the order of the 16th of January last, viz. 'That the divine service be performed as it is appointed by the acts of parliament of this realm; and that all such as shall disturb that wholesome order shall be severely punished, according to law; and that all parsons, vicars, and curates, in their several parishes, shall forbear to introduce any rites or ceremonies, otherwise than those which are established by the laws of this land:' It

Cl. of Ar. Culprit, by whom wilt thou be tried?

Liste. By God and my country.

Cl. of Ar. God send thee a good deliverance.

Then Proclamation was made for the jurors impannelled to try the issue between our sovereign lord the king, and the prisoner at the

being put to the question, whether the Lords would order that it should be voted, that the said order of the 16th of January should be printed and published, before a conference desired with the House of Commons about it; we, whose names are underwritten, did dissent; and having, before the putting of the question, demanded our right of protestation, did accordingly make our protestation, that we held it fit and necessary to have the consent of the House of Commons in those things which concern so nearly the quiet and government of the church; and therefore we desired to have a conference with the House of Commons before any conclusive order were printed or published herein, especially the House of Commons having but lately brought to us, and desired the consent of our House unto, certain votes of theirs against innovations in or about the worship of God lately practised in this kingdom, without warrant of law; and therefore, to acquit ourselves of the dangers and inconveniences that might arise by the printing and publishing of the said order of the 16th of January as binding to the whole kingdom, without desiring the consent of the House of Commons, we do protest our dissents to this vote, and do thus enter it as aforesaid: Comes Bedford, Warwicke, Clare, Newport; Da. Wharton, Kimbolton."

Lord Mountmorres (Hist. of the Parliament of Ireland, vol. 1, p. 402.) says, that the first protest with reasons in the House of Lords of Ireland, occurs under date September 1st, 1662.

Sir John Dalrymple at the end of part 1, book 2, of his Memoirs, 4to edition of 1771, tells us that the king's enemies reported that he called this circuit "Jeffreys's Campaign." If the contents of sir John's Appendixes are genuine, he needed not to rest the fact that James gave this appellation to Jeffreys's bloody progress, for he has inserted in his Appendix to part 1, two letters from king James to the prince of Orange, one dated September, 1685, containing this clause, 'Lord chief justice is making his campaign in the west,' and the other, dated the 24th of the same month, containing these expressions, 'Lord chief justice has almost done his campaign. He has already condemned several hundreds, some of which are already executed, more are to be, and the rest sent to the plantations.' Accordingly, in the subsequent 8vo edition of the Memoirs, sir John says of this report, that it was too true. The brutality of calling Jeffreys's circuit a Campaign, is, perhaps, some-

bar, to appear. And the prisoner desiring, by reason of her age and infirmities (being thick of hearing) some friends of her's might be allowed to stand by her, and inform her of what passed in the court; one Matthew Browne was named, and allowed of by the court to give her all assistance that he could in that matter. Then the names of the jurors were called over,

what extenuated by a fact related by historians that the chief justice had upon that occasion a military commission. See Ralph, 888.

In the "Impartial History of the Life and Death of George Lord Jeffreys," it is said, that 'he was lieutenant-general, and gave daily the word and orders for going the rounds,' &c. It is moreover observable, that in the very paragraph to which sir John Dalrymple refers as his authority for the story, that James upon the interposition of the lord keeper, checked the carnage of Jeffreys, North says, that 'the chief justice for this expedition was armed not only with a commission of Oyer and Terminer, but also an authority to command the forces in chief, as general of the west, for so he was styled.' This union of military and judicial power had been in the preceding year practised in Scotland, as appears by the following passage in Fountainhall: "Dec. 4, 1684. The privy council grants a commission of justiciary to lieutenant general Drummond, to take a part of the forces with him to the western shires, and to hang, draw, and quarter, by the military law, all that refuse to own the king's authority." See, also, 2 Wodrow, 401. 2 Crookshank, 269.

In the "Impartial History of the Life and Death of George Lord Jeffreys," are given the names of two hundred and fifty one persons, who were condemned and suffered in the west, in the year 1685, under his sentence.

The following passage in Wodrow, (vol. 2, p. 250.) relates to Jeffreys: "I shall shut up my accounts of this year [1684], by noticing the close correspondence betwixt our managers [he is speaking of the privy council] at Edinburgh, and bloody Jeffreys in England. Birds of a feather flock together. Only Jeffreys was tied down by the English laws, far less sanguinary than ours at this time. However, he went as far as he could to stretch the laws, and some farther, and offers his service to our people at Edinburgh. Accordingly, Dec. 3rd, the advocate representing how ready judge Jeffreys was to join with the council for support of the government, it is recommended to him to signify to the judge, the great resentments the council had of his kindness towards this kingdom, in giving his concurrence against such pernicious rogues and villains, who disturb the public peace; and desiring he may cause apprehend the persons of hiding and fugitive Scotsmen, and deliver them securely on the Scots' border, to such as shall be appointed to receive them."

and the appearance recorded: And it being a cause of great expectation and moment, the lord chief justice ordered the sheriff to take care, that a very substantial jury should be returned, of the best quality in the county.

Then Proclamation for Information and Evidence was made in usual manner, and the prisoner was bid to look to her challenges, and the jury was sworn in this order.

Sworn: Gabriel Whistler, Henry Dawley, Francis Morley, Francis Pawlett, Richard Godfrey, Thomas Dowse, Dutton Gifford, esquires.—Challenged: Robert Barton, Godson Penton, William Taylor, Thomas Wavell, Anthony Yalden.—Sworn: John Cager.—Challenged: Robert Forder, Thomas Lloyd, Thomas — Philip Rudsby.—Sworn: Thomas Crop, Richard Suatt.—Challenged: Lawrence Kerby, John Fletcher, William Clarke, John Haily, Richard Sutton, Richard Snatt, Robert Burgess.—Sworn: Matthew Webber.—Challenged: George Prince, Stephen Steele, Thomas Merrot.—Sworn: John Feilder.

So the twelve sworn were these: Gabriel Whistler, Henry Dawley, Francis Morley, Francis Powlet, Richard Godfrey, Thomas Dowse, Dutton Gifford, John Cager, Thomas Crop, Richard Suatt, Matthew Webber, John Feilder.

Cl. of Ar. Alice Lisle, hold up thy hand. You Gentlemen of the Jury that are sworn, look upon the prisoner and hearken to her charge: She stands indicted by the name of Alice Lisle, &c. Upon this indictment she hath been arraigned, and upon that arraignment she has pleaded thereunto, not guilty; and for her trial has put herself upon God and the country, which country you are; Your charge is to enquire, whether she be guilty of the high treason whereof she is indicted in manner and form as she stands indicted, or not guilty: If you find her guilty, you are to enquire what goods or chattels, lands or tenements she had at the time of the high-treason committed, or at any time since: If you find her not guilty, you are to enquire whether she did fly for it; if you find that she did fly for it, you are to enquire what goods or chattels she had at the time of the flight, as if you had found her guilty. If you find her not guilty, nor that she did fly for it, you are to say so, and no more, and hear your evidence.

Mr. Mundy. May it please your lordship, and you gentlemen that are sworn, This is an indictment of high-treason against Alice Lisle, the prisoner at the bar; and the indictment sets forth, that she, as a false traitor against our sovereign lord king James the second, her supreme and natural lord, not having the fear of God in her heart, nor regarding the duty of her allegiance, but being moved and seduced by the instigation of the devil, and withdrawing the love and true obedience which she owed to him as a sovereign, and intending, as well as in her lay, to disturb the peace of the kingdom,

and to depose the king and put him to death, the 28th day of July, in the first year of this King, well knowing one John Hicks*, late of

* "This Hicks was a dissenting minister, and hanged afterwards at Glassenbury." Former Edition. In the "Western Martyrology, or Bloody Assizes," are printed some Letters, which were written by Hicks shortly before his Execution; and also his Dying Speech as follows:

"I suppose the spectators here present may expect I should speak something before I leave this sanguinary stage and passage through my bloody sufferings, by which my immortal spirit will be speedily transported into an invisible and eternal world, and I conclude that they have different resentments hereof. Some resent them with much joy, high exultation and triumph, others with equal grief and sorrow; that to the one I am a most pleasant spectacle, that they behold me with high complacency and delight; but to the other I am a mournful and unpleasant one, and they behold me with no less pity and compassion. Concerning the first, I can say, I freely and heartily forgive them, and heartily pray that God would most mercifully and graciously prevent their mourning through misery, not only here, but eternally hereafter. Concerning the other, I will say, weep for your own sins, and for the sins of the nation, for the highest rebellions that ever were committed against the great and eternal God; lament bitterly for those sins that have been the meritorious cause of the late terrible judgment, that which I fear will cause God to break in upon this nation with an overflowing deluge of judgments, which are far more tremendous and dreadful. As for sympathizing with me, in drinking this bitter cup appointed for me, I return you most humble and hearty thanks, earnestly desiring God to come unto you, and fill your souls with all celestial comforts and spiritual consolations. Something I must say to purge and clear myself from a false accusation laid to my charge; as that I was engaged with colonel Blood in rescuing col. Mason near Boston, when he was sent down with a guard from London to York, to be tried for high treason; and that I was the man that killed the barber of that city; and that also I was with him when he stole the crown. Now as I am a dying man, and upon the very brink of a very stupendous eternity, (the truth and reality whereof I firmly believe) without any reservation or the least equivocation, I do declare in the presence of the all-seeing God, that impartial judge, before whom in a very little time I must appear, I never saw nor conversed with Mr. Thomas Blood, from 1656, till after he stole the crown, which was in 1671 or 1672, nor was ever engaged with him in any of his treasonable plots or practices. It is true, I being involved in great trouble of another nature, (of which I have given to the world; a Narrative, and which is notoriously known in the country where I then lived, by

Keio-sham in the county of Somerset. clerk. to be a false traitor, and to have raised war and rebellion against the king, she did then at Ellingham in this county, in her dwelling-house

some that were enemies to me for my preaching) I was persuaded to apply myself to Mr. Blood, to procure by his intercession his late majesty's gracious favour: Accordingly he brought me into his royal presence; while I was there, his majesty carried it with great clemency, without expressing one word of that which I am now charged with. Mr. Blood continued with his majesty a little longer than I did; then he told me that he had granted me a pardon, which I did thankfully accept of, knowing it would free me from all penalties and troubles that I was obnoxious to, and were occasioned to me by my non-conformity. Then engaging him to take out my pardon; he told me, 'That he got it out with several others 'that had been engaged with him in several 'treasonable designs and actions;' at which I was troubled, supposing it might be imputed to me thereby; yet, God knows, I have often since reflected upon it with great regret and dissatisfaction. If Mr. Blood did inform the late king to make himself the more considerable, and to bring as many of his party as he could to accept of their pardons, that he might be rendered utterly incapable of plotting any further mischief against his government, or any otherways that I was engaged with him in any of his treasonable attempts; I now appeal to God, as a dying man, concerning it, that he hath done me an irreparable wrong. I also in the same manner do declare, that I was never engaged with any party in plotting or designing, or contriving any treason or rebellion against the late king, and particularly, that I was altogether unconcerned in, and unacquainted with that for which my lord Russell and others suffered, and as much a stranger to any against the present king. And whereas it is reported of me, that at Taunton I persuaded the late duke of Monmouth to assume the title of king; I do once more solemnly declare, that I saw not the said duke, nor had any converse with him till he came to Shipton-Mallet, which was thirteen days after he landed, and several days after he had been at Taunton. And it is as false that I rid to and fro in the West to stir up and persuade men to go into his army, and rebel against his present majesty; for I was in the east-country when the duke landed, and from thence I went directly to him when he was at Shipton-Mallet, not one man accompanying me from thence. But hitherto as I lived, so now I die, owning and professing the true reformed Christian (commonly called the Protestant) religion, which is founded on the pure written word of God only, and which I acknowledge likewise to be comprehended in the articles of the doctrine of the church. This religion I have made a reasonable and free choice of, and have heartily embraced, not only as it protests

traitorously entertain, conceal, and comfort the said John Hicks, and for his maintenance and comfort then gave him meat and drink. This is laid to be against the duty of her alle-

against all Pagan and Mahometan religion, but against the corruption of the Christian; and I humbly and earnestly pray to God that by his infinite wisdom and almighty power, he will prevent not only the utter extirpation but diminution thereof, by the height and influence of what is contrary thereto; and for that end the Lord make the professors of it to live up more to its principles and rules, and bring their hearts and conversations more under the government and power of the same. I die also owning my ministry, non-conformity, for which I have suffered so much, and which doth now obstruct the king's grace and mercy to be manifested and extended to me: For as I chose it not constrainedly, so I appeal to God as a dying man, not moved from sullenness or humour, or factious temper, or erroneous principles of education, or from secular interests, or worldly advantages, but clearly from the dictates of my own conscience, and as I judged it to be the cause of God, and to have more of divine truth in it than that which is contrary thereto; so now I see no cause to repent of it, nor to recede from it; not questioning but God will own it at the last judgment-day. If no more had been required after the late king's restoration to qualify ministers for public preaching, than was after the first Restoration from the time of Charles the 1st, probably I might have satisfied myself therewith, and not scrupled conformity thereto; but the terms and conditions thereof, by a particular law made in 1662, being not only new, but so strict and severe, that I could never have satisfaction in my own conscience, after all endeavours used for a compliance therewith, and a conformity thereto: To say nothing of the covenant, which I never took, but the giving my assent and consent, have been too difficult and hard for me to comply with. And I very well remember, that about 14 years ago, entering into a discourse with Mr. Patrick Heldore, an Irishman, who was contemporary with me in Dublin, concerning conformity, which he much endeavoured to persuade me to; I urged the severity of the forementioned conditions against it, and after some debates and reasons with him, I told him I did believe they were contrived and designed on purpose to prevent our public preaching, and to keep us out of the church: to which he ingenuously replied, 'He judged 'it was so: For, said he, a bishop in Ireland ' (whose name I have forgot) told me the 'very same.'

"But though I could not wade through, and conquer this difficulty, yet I censure not those that did it; and I believe after all the hottest disputes, and most vehement debates, and violent contests between conformist and non-conformist, there are of both parties will be glorified in heaven hereafter. According to the

grance, against the peace of the king, his crown and dignity, and against the form of the statute in that case made and provided: To she has pleaded not guilty; if we prove this fact, you must find her guilty.

29th article of the church of England, a visible church is a congregation of faithful men, in the which the pure word of God is preached, the Sacraments of the Lord duly administered, according to Christ's ordinance, and all those things that of necessity are requisite and necessary to salvation; so with such a church have I held the most intimate communion, and with such (did I live) could hold it: I would not therefore be so incorporated with any church, as to exclude me from, and render me incapable of holding communion with other churches: I was never strongly bound up to any form of ecclesiastical government, but that under which a pure and undefiled religion doth flourish, and that which contains and really practises holiness, and advances the kingdom of God in the world, that can I approve of, and willingly live under, were I to live.

"I did approve of the ancient and present form of civil government, English monarchy I am fully satisfied with, and do also declare, that it is not warrantable for any subject to take up arms against, and resist their lawful sovereigns and rightful princes: And therefore had I not been convinced by several things that I have read and heard to believe that the late duke of Monmouth was the legitimate son of his father Charles the 2nd, I had never gone into his army, judging that without this I could not be freed from the guilt of rebellion, which I always resolved to keep myself clear from: And though his father denied he was married to his mother, I thought it might be answered with this; that kings and princes, for state-reasons, often cannot be fathomed by their subjects, affirming and denying things which otherwise they would not do, and make even their natural affections to truckle and stoop thereto. I exhort all to abhor all treasonable plots, and pretences of all rebellion, with the highest detestation and to take the plain text of sacred scripture to walk by, in honouring and obeying and living in subjection to rightful kings, and not readily to receive, or suddenly to be impressed with evil reports and defamations of them, also not rashly to be propagators of the same.

"I desire God to forgive all my enemies, and to give me an heart to forgive them, which are many, some mighty, and all most malicious: Particularly Barter of Lisnel, who betrayed me, and proved such a traitor to James duke of Monmouth his old and intimate friend. I am grievously afflicted that I should prove the occasion of the great sufferings of so many persons and families: but this hath fallen under the just and wise ordering of Divine Providence, as David's going to Abimelech, when he proved the occasion of the death of all the persons, men, women, and children in the city:

Mr. *Pollerjen*. May it please your lordship, and you gentlemen of the jury, I am of counsel in this case for the king. The prisoner that stands now at the bar, Alice Lisle, is the widow of one Lisle, who was in his life time suf-

But who shall say unto God, What doest thou? The care of my most dear wife and a great many children, I cast upon God, who I hope will be better than the best of husbands unto her, and the best of fathers unto them: God knows how just and legal right my wife hath unto her estate; to him therefore I commit her, to defend her from the violence and oppression of men, particularly from a most inhumane and unnatural brother: But no wonder if he will lay violent hands upon his sister's estate, that hath so often laid them on his own father. I die a deeply humbled, self-judging, and self-condemning sinner, loathing and abhorring my many and great iniquities, and myself for them, earnestly desiring full redemption from the bonds of corruption, under which I have groaned so many years, longing for a most perfect conformity to the most holy and glorious God, the only infinite pure Being: thirsting for a perfect diffusion of his grace through all the powers and faculties of my soul, panting after perfect spiritual life and liberty, and a consummate love to my dearest Jesus, who is an all-comprehensive good, and to be satisfied with his love for ever: A vigorous and vehement zeal for the Protestant religion, with a belief I had of the duke's legitimacy, hath involved me in this ignominious death; yet blessed be God, that by sincere repentance and true faith in the blood of Jesus, there is a passage from it to a glorious eternal life, and from these bitter sorrows to the fulness of sweetest joys that are in his presence, and from these sharp bodily pains to those most pure pleasures that are at his right hand for evermore: And blessed be God, that such a death as this cannot prevent and hinder Christ's changing of my vile body, and fashioning it like his glorious Body, in the general Resurrection-Day.

"I am now going into that world, where many dark things shall be made perfectly manifest and clear, and many doubtful things fully resolved, and a plenary satisfaction given concerning them; all disputes and mistakes concerning treason, rebellion, and schism, shall be at an end, and cease for ever: Many things that are innocent, lawful, and laudable, which have foul marks and black characters stampt and fixt upon them here, they shall be perfectly purified and fully cleansed from there; where at one view more shall be known of them, than by all wrangling debates and eager disputes, or by reading all polemical books concerning them here. I greatly deplore and bewail the greedy appetite and insatiable thirst, that professing Protestants have after the blood of their brethren, and the high pleasure they take in the effusion thereof. But what will

ciently known : The person mentioned in the indictment to be entertained and concealed by her, John Hicks, is a conventicle preacher, and one, that for bringing the traitorous purposes intended in this late horrid rebellion to effect,

not men do, when they are either judicially blinded, or their secular worldly interest insensibly insinuates and winds itself into their religion, is so twisted and incorporated with it, that it animates and acts it, is the life and soul, the vital form and power, and made wholly subservient thereunto?

“ I bless God for all my sufferings, and particularly for this last ; for the benefit and fruit of it, by God's sanctifying of them to me, have been great ; hereby I have been effectually convinced of the vanity of the world, and my own sinfulness by nature and practice, and to see that to be sin which I never saw before ; and to be more thoroughly humbled for what I know to be sin, not only of commission, but of omission also : Hereby I have been brought to a more thorough, deep, inward sense and feeling of the absolute necessity of the righteousness of Christ to justify me, and he hath been made much more dear and precious to my soul, than ever he was before. Hereby my soul hath been more refined from the dross of sensuality, wrought into a more heavenly frame, raised up to a higher pitch of spirituality ; hereby I am made more meek and humble, and so judge more charitably of others that differ from me in opinion and judgment : So though by God's most righteous judgment I have been apprehended and most justly and deservedly undergo this suffering for my sins, yet I hope they have wrought for me a far more exceeding and eternal weight of glory, fitting and preparing me, making me a better qualified subject for, and far more meet to be a partaker of the same. By the grace and strength of God, I will not purchase my life by the death and blood of my Protestant brethren, but chuse to die rather than be a betrayer of them ; the impetuous and violent assault of this I dreaded more than death itself. Blessed be God I was not exposed unto it, and conquered by it, as some have been : Having such full bodily vigour and strength, being in such perfect health, notwithstanding my age, predominating in me, it hath made it more difficult to die, than if I had been clogged and incumbered with infirmities, made to bow and stoop under them by prevailing diseases and distempers, gradually worn out therewith, which many times make men weary of life, and to desire to die ; and this in conjunction with many things (which I forbear to mention) highly gratifying and pleasing to sense, which I must leave for ever, strengthens and heightens the difficulty, and begets a greater regret and reluctance in my will, to have the earthly tabernacle of my body dissolved, and my soul to dislodge and quit the same. But now when the black and gloomy shades of death do overspread me, I can say to the glory of God's

was one of the greatest and most active instruments ; for he was personally in this rebellion, and did persuade and exhort some loyal persons, that happened to have the misfortune of being taken prisoners by that rebellious

most free and powerful grace, true faith in some measure hath changed the difficulty into a facility and easiness of dying : It hath very much subdued the reluctancy of my will against it ; for it makes future things present, and invisible things visible, and doth realize and substantiate the same to me ; and as by it I penetrate and pierce into eternity, and behold invisible and immortal things, so hereby, blessed be God, I have obtained a greater victory over sense : The world is crucified to me, and I to the world, and all the most pleasant and delightful objects therein, all finite, fading creatures, comforts and enjoyments, are become minute and small, despicable and contemptible to me, in comparison thereof, being infinitely contained and comprehended therein ; Shall my soul clasp and cling about these mortal and perishing things ? Shall it cleave and be glued to them ? Shall it be confined and captivated into what is kept in the narrow bounds of time, and in this lower world ? Shall it earnestly desire and thirst for muddy streams, yea rivers of flesh-pleasing good ; when by an eye of faith I can look into the indeficient, inexhaustible, purest fountain ; the immense, immensurate ocean of divine good ; hoping to drink thereof, to swim and bathe my soul therein for ever and ever ? And when I consider how long my ears have been bound up, and tied to their innumerable and horrid oaths, and cursed blasphemies, and mine eyes to see the prophanation of the day of God ; and when I beheld such an overflowing flood of most prodigious impiety, such an inundation of most monstrous iniquity, and so much hell upon earth, and that there is so much decay of holy zeal, and true piety, and Christian religion, amongst the professors of it, such seeming incurable breaches and divisions, such expiring love, and charity, and partings amongst them ; it hath powerful influence on my soul to reconcile it more to death, and makes it electively, and from choice, to leave this present world, and to take up my abode in that which is unseen and future, where there shall be nothing but perfect love and holiness ; a sinless state, and serving God with all unweariedness and perfection, with the highest complacency and delight that immortal souls can be capable of : There is perfect peace and concord, the innumerable company of angels, and the spirits of just men made perfect, all fastened together with indissolvable and uninterrupted chains of most pure love, and all continually wrapt up in, and transported with the highest admiration of God's love, his infinite and incomprehensible excellencies and perfections, singing Hallelujahs to him without ceasing, and triumphing in his praise for ever and ever. The consideration also, that I know so little of these sublime

crew, to quit their duty and allegiance to the king, their sovereign lord, and become partakers with them and the rest of his traitorous accomplices, in taking arms under their

profound, and divine mysteries; of the most glorious mystery of salvation by Jesus Christ; that I am so incapable to fathom the depth of the providences of God, whose ways are in the sea, and whose paths are in the deep waters, and whose footsteps are not known, and particularly in the late stupendous and amazing one; and that I am so ignorant of the nature of angels and spirits, with their offices and operations, and of their high and glorious excellencies; and that I am so little acquainted with the nature of my own soul, as at present dwelling in, and united to my body, and as disunited and separated from it; how without corporeal organs it shall most vivaciously and vigorously perform all its proper functions and offices, and more than ever strongly and indefatigably serve the Lord Jesus, most fervently and abundantly love him, and delight in him every way, much more obtain the supreme and highest end of its creation and being; and this makes me much more willing to die, that I may have the knowledge thereof, with innumerable other things; that I am now either ignorant of, or do but imperfectly know, and so be made happy by a plenitude of fulness of injoying intellectual pleasures, which are of all other most suitable, sweet, and satisfactory to immortal souls. And also I see that he that departs from iniquity makes himself a prey; and so many plunging themselves into the ways of iniquity, lest they should be accounted odious and vile, which makes them so much degenerate not only from Christianity, but from humanity itself, as if they were scarce the excrement of either; containing even that most noble, generous, heroic spirit that dwelt in many heathens, who accounted it most honourable and glorious to contend for their rights and liberties, yea, to suffer death, and the worst of deaths, in defence of the same; and judge them accursed and most execrable in the world that do so; and not only so, but for their own profit and advantage, have many of them enslaved their posterity by it, and are most industrious and laborious, most fierce and furious to destroy them, whereby they are become as unnatural as children that seek the ruin of their parents that begot them, and brought them forth; or them that lay violent hands upon themselves, dashing out their own brains, cutting their own throats, hanging and drawing themselves, ripping up their own bellies, tearing out their own bowels, they being in different senses children and members of that body politick they design and attempt the destruction of; and when I know not how long the duration and continuance of these things shall be, or a conclusion or end by God shall be put thereto, who by Divine and unerring wisdom governs the world; why shall my soul be unwilling to take its flight into the unseen and eternal world? Where no

false pretended prince. This, my lord, we shall prove to you by plain, evident, and undeniable testimony of those very persons whom this seducer thus applied himself to. Gentle-

sullied, sordid, or impious thing, most incongruous and unbecoming nature, shall be seen and found, and where I shall behold no narrow, conclusive, contracted soul there, habitually preferring their private before a public good, but all most unanimously and equally center in one common, universal good, and where the sighs, and groans, and cries of the afflicted and persecuted shall be heard no more for ever.

"I earnestly exhort all most highly to prize and value time, and diligently improve it for eternity; to be wise, seriously and seasonably to consider of their latter end: For by the irrepeatabe and irreversible law of heaven we must all die, yet we know not how, where, or when. Live with your souls full of solicitude and care, with a most deep concernedness and most diligent industriousness, whilst you have time and opportunity, and the means of grace, health, and strength, make sure of these two great things, viz.

"1. What merits for you a right and title to eternal life and glory, and the future unchangeable blessedness, as the Redeemer's most precious blood and righteousness; that thereby a real application and imputation may be unto you by sincere believing.

"2. That that which makes you qualified subjects for it, is the great work of regeneration, wrought in your souls, being renewed in the spirit of your minds, the Divine Nature being impress upon them, repairing of the depraved image of God in you; that being transformed into his own likeness, thereby in the world you may mind and favour more the things of the spirit than the things of the flesh, celestial and heavenly more than terrestrial and earthly, superior more than inferior things; and therewith have a holy life and conversation conjoined, that results and springs from the same, as fruit from the root, and acts from the habits. Let all, in order thereto, seriously consider these few texts of sacred scripture, let them predominately possess you; let them be deeply and indelibly transcribed upon your souls; let them be assimilated thereunto, and made the written epistles, the lively pictures thereof, Mat. v. 8. 20. "Blessed be the pure in heart, for they shall see God." Ver. 29. "For I say unto you, Except your righteousness exceed the righteousness of the Scribes and Pharisees, ye shall in no case enter into the kingdom of heaven." John iii. 3. "Jesus answered and said unto him, Verily, verily, I say unto thee, except a man be born again, he cannot see the kingdom of God." 1 Cor. vi. 9, 10, 11. "Know ye not that the unrighteous shall not inherit the kingdom of God," &c. Gal. v. 19, 20, to 23. "Now the works of the flesh are manifest, which are these, adultery," &c. James i. 18. "Of his own will begat he us with the word of truth, that we should be a

man, after it pleased God, by his blessing on the victorious arms of the King, that the rebels were defeated, their pretended prince and head with some of the chief of his accomplices, were taken prisoners, and that in a place near the house where the prisoner lived, when all the country was full of hurry in pursuit after those wicked rebels, thus, by God's blessing and providence, dissipated, and forced, like vagabonds, to skulk up and down: then does this Hicks, having got from the battle as far as Warminster in the next county, send a messenger, one Dunne, to the prisoner's house, to desire her and request her, that she would receive and harbour him and his friend (who that was, will appear by and by). Mrs. Lisle returns an answer by the messenger, that she would receive him, but does withal give particular direction, that the time when they did come should be late in the evening. Accordingly he comes in the beginning of the night, at 10 of the clock, hooted and spurred, and brings with him another arch rebel, one Nelthorp, that stands outlawed for a most black and horrid treason. When they came to the prisoner's house, they turn their horses loose at the gate, for the danger was so great, and their apprehensions of being taken so urgent upon them to conceal and shift for themselves, that they thought it convenient to let their horses go where they would. When they

kind of first-fruits of his creatures." 1 Pet. i. 3. "Blessed be the God and Father of our Lord Jesus Christ, which according to his abundant mercy hath begotten us again to a lively hope by the resurrection of Jesus Christ." Ver. 13. "Wherefore gird up the loins of your mind," &c. Coloss. iii. 1, 2. "If ye then be risen with Christ, seek those things that are above: set your affections on things above, not," &c. Gal. v. 24. And they that are Christ's have crucified the flesh with the affections and lusts," &c. Eph. ii. 1. "And you hath he quickned, who were dead in trespasses and sins." Rev. xx. 6. "Blessed and holy is he that hath part in the first resurrection, on such the second death hath no power. Rom. viii. 1. "There is therefore now no condemnation," &c. 1 Pet. i. 15. "But as he that hath called you is holy, so be ye," &c. Ver. 23. "Being born again, not of corruptible seed," &c. Psal. iv. 3. "But know that the Lord hath set apart him that is godly for himself," &c. I shall mention now no more, the whole Bible abounds with these texts, with what a renovation and change of our carnal and corrupt hearts and natures, there must be, with holiness of life and conversation, before we can be capable of a future and blessed immortality, and of inheriting the kingdom of God for ever and ever. Amen."

He was brother to Dr. Hicks, dean of Worcester (the author of *Jovian*) a man of some note, of whom it is related that, being urged to intercede in behalf of this brother, he sagaciously replied, 'I cannot speak for a fanatic.'

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came there, the messenger, as we shall prove by himself, was conveyed away to a chamber: but Mrs. Lisle causes meat and drink to be set before Mr. Hicks and Nelthorp, and they supped with her, and afterwards they were lodged by her particular order and direction. The next morning colonel Pennruddock, who had some intimation, in his search after the rebels, that some persons lay concealed in Mrs. Lisle's house, comes thither, and tells her, after he had beset the house, 'Madam, you have rebels in your house, I come to seize them, pray deliver them up.' She denied that she had any in her house; but upon search Hicks, and Nelthorp, and that other fellow, the messenger, were all found there, and she thereupon secured with them. The method wherein we shall give our evidence, will be this; we shall first begin with this piece of evidence, that we shall prove, that Hicks was actually in the army, and in the rebellion; and then we shall prove the several subsequent facts as have been opened. We desire Mr. Pope, Mr. Fitzherbert, and Mr. Taylor may be sworn.

Lisle. My lord, as for what is said concerning the rebellion, I can assure you, I abhorred that rebellion as much as any woman in the world.

L. C. J. (Lord Jefferies.) Look you, Mrs. Lisle, because we must observe the common and usual methods of trial in your case, as well as others, I must interrupt you now: you shall be fully heard when it comes to your turn to make your defence, but any thing you say now beforehand is altogether irregular and improper. You, it may be, are ignorant of the forms of law, therefore I would inform you: you are first to hear what your accusation is; you shall ask any questions of the witnesses that you will, after the king's counsel have examined them, as they go along; and when all their testimony is delivered, you shall be heard to make your own defence, and have full scope and liberty to enlarge upon it as long as you can: it is a business that concerns you in point of life and death; all that you have or can value in the world lies at stake, and God forbid that you should be hindered, either in time or any thing else, whereby you may defend yourself; but at present it is not your turn to speak, for the forms of law require your accusers first to be heard; and it is absolutely requisite, that the usual forms and methods of law be invariably observed, and be sure it does the prisoner no injury that the law is kept strictly to; and we have that charity, as well as justice, that it becomes, and is not below all courts to have for persons in your condition; and we are obliged to take care, that you suffer no detriment or injury by any illegal or irregular proceedings. For though we sit here as judges over you by authority from the king, yet we are accountable, not only to him, but to the King of kings, the great Judge of heaven and earth; and therefore are obliged, both by our oaths, and upon our consciences, to do you

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justice, and by the grace of God we shall do it, you may depend upon it. And as to what you say concerning yourself, I pray God with all my heart you may be innocent. Pray call your witnesses.

Mr. Pollexfen. Swear Mr. Pope, Mr. Fitzherbert, and Mr. Taylor. [Which was done.]

L. C. J. Who did you begin with?

Mr. Pollexfen. Mr. Pope, pray will you tell my lord and the jury, what you know concerning this Hicks? Pray tell your whole knowledge.

Mr. Pope. My lord, I had the misfortune to be taken prisoner by Monmouth's army, going about some business of my own; and after I had been taken some few days, we happened to be brought to Keinsham, and we were put into sir Thomas Bridges's stables, and kept under a guard there. Whilst we were there, I did see that gentleman that goes by the name of Mr. Hicks, who is now in Salisbury gaol, and there I saw him yesterday; he came and asked for the prisoners, which were about four or five in number, and he asked them, how they did? They made him little reply. Then he desired to know how we were dealt with, whether we were kindly used or no? I replied, no, for we had but a piece of bread these two days. He made me answer, that he was sorry for that, for it was otherwise intended. And there was with him another gentleman that was called the king's chaplain, that is, the duke of Monmouth's, and afterwards he pretended he would do us a kindness in speaking to the king (as he called him) for us. He talked with us some little time, and by and by he began to ask us, what was the reason that we were there? We told him we were taken prisoners, upon which, saith he, this king (meaning, as I suppose, the late duke of Monmouth) is a good king and a Protestant; and a great deal to that purpose, with some reflecting words on the government, and upon the person of the king; and he told us, he wondered what we had to say for ourselves, being Protestants, that we did what we did in serving a Popish prince, and not obeying a protestant one. This is the substance of what I have to say upon this matter.

L. C. J. Though you were pleased to phrase it, Sir, in the beginning of your testimony, a misfortune that you were taken prisoner by the rebels; yet, I suppose, you could not be without the consolation of a good conscience, that you suffered in the way of doing your duty.

Pope. My lord, I am very well satisfied I did suffer in a good cause.

L. C. J. There is one piece of happiness in it; that by that means you are able to give this testimony this day, and do the king this piece of service. But pray, Sir, let me ask you this question: are you sure the man you saw yesterday at Salisbury is the same man that you spoke with at Keinsham, that goes by the name of Hicks?

Pope. Yes, my lord; and when I was there yesterday with him, I asked him, whether he knew me; and told him, said I, you may well

remember you saw me at Keinsham. Saith he, I do not remember that ever I saw your face before. Said I, you remember sir Thomas Bridge's stables there? Said he, I remember I did see some prisoners. Said I, was not it there you saw me, and had such a discourse with me? He seemed to deny it, but I told him, a man of your coat should not tell untruths, you cannot but remember you saw me there. Saith he, I will recollect my memory if I can; and he afterwards sent to the George in Salisbury for me, and then he told me, he did recollect that he saw and talked with such a person there.

Mr. Rumsey. Sir, I would ask you this one question; did you see him in the army about the time of the fight?

Pope. I think I saw him about a day or two before.

L. C. J. Had he any weapon on?

Pope. I think not, my lord.

Mr. Pollexfen. Our next witness is Mr. Fitzherbert. Pray, Sir, will you give an account to my lord and the jury, what you know of this Hicks?

Fitzherbert. My lord, during the time that I was a prisoner with this gentleman at Keinsham, the 25th of June, I saw this man, John Hicks, who held a discourse with Mr. Pope near an hour's time, disparaging the government and his majesty, and extolling the duke of Monmouth, what a brave prince, and how good a protestant he was.

L. C. J. Then he was among them, was he?

Fitzherbert. Yes, my lord, he was, and I saw him yesterday at Salisbury.

L. C. J. Is that the same man that you saw in Monmouth's army?

Fitzherbert. Yes, he owns himself to be the same man.

Mr. Pollexfen. How often did you see him there besides that time when he discoursed with Mr. Pope?

Fitzherbert. I saw him sometimes out of the town, but I never discoursed him.

L. C. J. Did you see him there before or after that discourse?

Fitzherbert. It was after.

L. C. J. Would the prisoner ask this witness, or the other, any questions?

Lisle. No, my lord.

Mr. Pollexfen. Then Mr. Taylor, what say you to the matter?

Taylor. My lord, I saw him at the same time that these gentlemen speak of at sir Thomas Bridge's, at Keinsham.

Mr. Pollexfen. Were you a prisoner there, Sir?—Taylor. Yes, I was.

Mr. Pollexfen. What place was it you saw him in?

Taylor. It was in the stables the first time that I saw him.

L. C. J. What discourse had you with him? What did he say to you?

Taylor. He said, he wondered at us, that we should take up arms against so good a prince,

and a Protestant as the duke of Monmouth, and against the Protestant religion, and hold up with Popery: Saith he, York is but a Papist; and a great many such words.

L. C. J. Did you see him afterwards?

Taylor. Yes, my lord; but I cannot tell particularly the time and place; up and down the army.

L. C. J. Did you see him at Salisbury?

Taylor. Yes.

L. C. J. Is that the same man?

Taylor. Yes, it is.

Mr. Pollexfen. Next, my lord, we come to prove the message and correspondence between this same Hicks, and the prisoner Mrs. Lisle.

Mr. Jennings. Swear Mr. James Dunne. [Which was done.]

Mr. Pollexfen. If your lordship please to observe, the times will fall out to be very material in this case: the battle at King's-Edgmore was the 6th of July; three or four days after was the taking of Monmouth, and my lord Grey at Ringwood; upon the 26th of July, ten or twelve days after the taking of Monmouth, was this message sent by Dunne to Mrs. Lisle: so we call Dunne to prove what message he carried upon the 26th, and what answer was returned; he will tell you, that Tuesday was the time appointed for them to come, in the night, and all the other circumstances. But withal, I must acquaint your lordship, that this fellow, Dunne, is a very unwilling witness; and therefore, with submission to your lordship, we do humbly desire your lordship would please to examine him a little the more strictly.

L. C. J. You say well: Hark you, friend, I would take notice of something to you by the way, and you would do well to mind what I say to you. According as the counsel that are here for the king seem to insinuate, you were employed as a messenger between these persons, one whereof has already been proved a notorious rebel, and the other is the prisoner at the bar, and your errand was to procure a reception at her house for him.

Dunne. My lord, I did so.

L. C. J. Very well. Now mark what I say to you, friend: I would not by any means in the world endeavour to fright you into any thing, or any ways tempt you to tell an untruth, but provoke you to tell the truth, and nothing but the truth, that is the business we come about here. Know, friend, there is no religion that any man can pretend to, can give a countenance to lying, or can dispense with telling the truth: Thou hast a precious immortal soul, and there is nothing in the world equal to it in value: There is no relation to thy mistress, if she be so; no relation to thy friend; nay, to thy father or thy child; nay, not all the temporal relations in the world can be equal to thy precious immortal soul. Consider that the Great God of Heaven and Earth, before whose tribunal thou, and we, and all persons are to stand at the last day, will call thee to an account for the rescinding his truth,

and take vengeance of thee for every falshood thou tellest. I charge thee, therefore, as thou wilt answer it to the great God, the judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretence whatsoever: For though it were to save thy life, yet the value of thy precious and immortal soul is much greater, than that thou should'st forfeit it for the saving of any the most precious outward blessing thou dost enjoy; for that God of Heaven may justly strike thee into eternal flames, and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth, and nothing but the truth. According to the command of that oath that thou hast taken, tell us who employed you, when you were employed, and where? Who caused you to go on this message, and what the message was? For I tell thee God is not to be mocked, and thou can'st not deceive him though thou may'st us. But I assure you, if I catch you prevaricating in any the least tittle (and perhaps I know more than you think I do; no, none of your saints can save your soul, nor shall they save your body neither) I will be sure to punish every variation from the truth that you are guilty of. Now come and tell us, how you came to be employed upon such a message, what your errand was, and what was the issue and result of it?

Dunne. My lord, there came a man to my house, and desired me to go of a message to my lady Lisle's.

L. C. J. Prithee tell me when it was? and what hour of the day?

Dunne. What, when the man came to my house?

L. C. J. Yes.

Dunne. That I will, my lord.

L. C. J. Be sure you do, and do not speak one word but what is true, and let the truth come out of God's name.

Dunne. It was Friday night.

L. C. J. What day of the month was it?

Dunne. Truly, my lord, I cannot exactly tell that.

L. C. J. Was it after the fight at Weston, or before?

Dunne. It was after the battle, my lord.

L. C. J. How many days after was it?

Dunne. I cannot exactly tell.

L. C. J. Was it the Friday seven-night after the fight?—*Dunne.* No, it was not.

L. C. J. What was desired of thee at that time?

Dunne. He desired me to go of a message to my lady Lisle's.

L. C. J. Dost thou know what man it was that came to thee, and desired thee to go on this message?

Dunne. My lord, I can tell what manner of man he was.

L. C. J. Give me a description of the man.

Dunne. He was a short black man.

L. C. J. You say he was a short man.

Dunne. Yes, he was so, my lord.

L. C. J. Was he a swarthy, or a ruddy complexioned man?

Dunne. He was not ruddy but swarthy.

L. C. J. And what did he say to thee?

Dunne. He desired me to go to my lady Lisle's for him, for one Mr. Hicks; and I went accordingly.

L. C. J. What were you to say when you came there?

Mr. Pollerfen. What reward were you to have?

Dunne. That man that came to me, promised me that I should be well rewarded for my pains.

L. C. J. Where do you live? (by the way.)

Dunne. In Warmiester parish.

L. C. J. How far is it from my lady Lisle's?

Dunne. Six and twenty miles, or thereabouts.

L. C. J. You did go, you say, when?

Dunne. Upon the Saturday.

L. C. J. Well, we are got thus far; you went to my lady Lisle's upon the Saturday, and from one Mr. Hicks: what was your errand?

Dunne. To know of my lady Lisle, whether she would entertain Mr. Hicks.

L. C. J. Well, now go on.

Dunne. When I came to my lady Lisle's house, I went to the bailiff that belonged to my lady Lisle.

L. C. J. Ay, who was that bailiff? tell us his name? I love to know men's names.

Dunne. His name is Carpenter, I think.

L. C. J. Well, and what did you say to him?

Dunne. I asked him, whether my lady would entertain one Hicks, or no? he told me, he would have nothing to do with it, but sent me to my lady, and to my lady I went; and when I came, I asked my lady, whether she would entertain one Mr. Hicks, or no? she said, she did not know but she might.

L. C. J. Well, what then?

Dunne. My lord, I will tell you.

L. C. J. Ay, prithee take time to recollect thyself; but be sure thou speak nothing but the truth. What said my lady to thee?

Dunne. My lady said, they might come to her house: and upon those terms I went away home again, and returned that answer to the messenger that came to me. I came home on the Sunday night, and that message I delivered unto him, and told him, that upon Tuesday night they might come to my lady's.

L. C. J. You told him, you say, they might come on Tuesday?

Dunne. Yes, my lord, I did.

L. C. J. Therefore I would fain know from you, how you came to tell him, they might come upon Tuesday? for you said just now, my lady's answer was, that she did not know but she might entertain him. Had you any such direction from Carpenter, or any one else, to tell him, that they might come on Tuesday?

Dunne. I had such directions from my lady.

L. C. J. Very well; then let us know what were the particular directions she gave? Tell

us, what further directions you had from her?

Dunne. I will, my lord, presently, when I have recollected myself.

L. C. J. Ay, prithee compose thyself, recollect thyself. [Then he paused for a good while.]

L. C. J. Come now, tell us, did she give you any directions what time of the day they might come thither? remember yourself well, and tell us what she said to you?

Dunne. My lord, I will, as near as I can, speak the truth.

L. C. J. Ay, in God's name, let us have the truth, whatsoever comes on it?

Dunne. I will, my lord.

L. C. J. Come then, what time did she give directions that they should come?

Dunne. On Tuesday in the evening.

L. C. J. Upon your oath, did she say Tuesday in the evening?

Dunne. Yes, my lord, she did.

L. C. J. What time in the evening, early or late?

Dunne. She did not give any directions at all about that, but only in the evening.

L. C. J. What else did she say to you, tell us all the discourse that passed between you?

Dunne. She said nothing else that I remember, my lord.

L. C. J. Prithee, how did she say she would receive him? tell us what words she used, for thou must needs imagine, we do suppose there must needs be some longer discourse between you, than what you talk of.

Dunne. All that she said was, she would entertain him.

L. C. J. Him? Who?—*Dunne.* Mr. Hicks.

L. C. J. Just now you talked of them, and they: did you mention nobody to her but Mr. Hicks?

Dunne. My lord, I was sent to see whether she would receive Mr. Hicks.

L. C. J. Prithee, friend, mind what thou hast said, and recollect thyself, I will repeat it to thee, because thou shalt see that I remember it all very well. It seems that a man, a short black man, came to your house in Warmiester parish to get you to go for a message to Mrs. Lisle's, to know whether she would entertain one Hicks; and that you went upon the Saturday, and first you met with Carpenter, and asked him that question, whether his lady would entertain one Mr. Hicks? and he told you he would have nothing to do with it; and thereupon you went to Mrs. Lisle, and asked her the question, and she told you that you should tell the man that they should come the Tuesday following, and come in the evening, and she would entertain him: Is not this what you have said?—*Dunne.* Yes, my lord, it is.

L. C. J. Well then, now let us know what other discourse you had with her?

Dunne. My lord, I do not remember any thing more.

Mr. Pollerfen. Pray, Mr. Dunne, did she ask you any questions, whether you knew Mr. Hicks or no?

Dunne. Nothing at all of that, that I remember.

Mr. Coriton. Did she believe that you knew Mr. Hicks?—*Dunne.* I cannot tell, my lord.

Mr. Coriton. Do you believe that she knew him before?

Dunne. I cannot tell truly.

L. C. J. Why, dost thou think she would entertain any one that she had no knowledge of merely upon thy message? *Mr. Dunne,* Mr. Dunne! have a care, it may be more is known of this matter than you think for.

Dunne. My lord, I tell you the truth.

L. C. J. Ay, be sure you do, do not let me take you prevaricating!

Dunne. My lord, I speak nothing but the truth.

L. C. J. Well, I only bid you have a care, truth never wants a subterfuge, it always loves to appear naked, it needs no enamel, nor any covering; but lying and snivelling, and canting, and Micksing, always appear in masquerade. Come, go on with your evidence.

Dunne. My lord, I say I went back again and returned my answer to the same man that brought the message to me.

L. C. J. Pray let me ask you one question; were you got to your house before you found him, or was he waiting there for you?

Dunne. He came to my house after I came home.

L. C. J. It was the same man, you say?

Dunne. Yes, it was.

L. C. J. Had he no company with him neither time?—*Dunne.* No.

L. C. J. Well, and what answer did you return him?

Dunne. I told him, my lady said she would entertain Mr. Hicks; he asked when he might come up; I told him upon Tuesday, and upon Tuesday they came to my house.

L. C. J. What time did they come to your house?

Dunne. About seven of the clock in the morning.

L. C. J. What day of the month was it?

Dunne. Truly, my lord, I cannot readily tell what day of the month it was.

L. C. J. Was it one or two that came to thy house?

Dunne. My lord, there were three in all.

L. C. J. Who were those three, prithee?

Dunne. My lord, there was the little black man, that brought the message, and two other people.

L. C. J. Prithee describe what two other people these were?

Dunne. One was a full fat black man, and the other was a thin black man.

L. C. J. Who was that thin black man?

Dunne. My lord, I did not know him.

L. C. J. Did you not fancy which was Hicks?

Dunne. My lord, I never knew any of their names.

L. C. J. How long did they stay at your house?—*Dunne.* About three hours.

L. C. J. When did you go away from thence?

Dunne. About eleven of the clock.

L. C. J. Which way did you go then?

Dunne. We went through Deverel, and from Deverel to Chilmark, and from Chilmark to Sutton, and from Sutton to the Plain, and then one Barter met me; I knew the way no further, and he was to shew me the way from thence.

L. C. J. Prithee hold, before thou goest any further, I desire to be satisfied about a question or two: dost thou say thou didst not know the way?

Dunne. No, my lord, after I came to the Plain.

L. C. J. How didst thou find the way when thou wentest on thy message first?

Dunne. My lord, after I came to Salisbury-Plain, I met with one Barter, and he showed me the way.

L. C. J. Where is that Barter?

Mr. Pollexfen. My lord, we have him here; we shall examine him by and by, there he stands.

L. C. J. Sure that was not the little man thou spokest of. [Being a very lusty man.]

Dunne. No, my lord.

L. C. J. Prithee let me understand thee then, if I can. Thou didst say at first there was only a little man with a black beard, that was concerned with thee about that message; now thou talkest of some guide that thou hadst, prithee who did guide thee, let us know?

Dunne. My lord, I say I went so far as Fovant, and so to Chalk, but when I came upon the Plain, I did not know my way to my lady Lisle's house at Moyle's Court; I asked twenty people in the street which was my way, but nobody would tell me; at last I spoke to one John Barter to go with me to my lady Lisle's, and he and I did agree to go together, and he showed me the way and carried me to the house.

L. C. J. Thou shouldst have told us this before, man, that we might have understood it. Where did you lie upon the Saturday night?

Dunne. At Fovant.

L. C. J. I thought you had said, you had come to Mrs. Lisle's on Saturday?

Dunne. Yes, my lord, I did so, and came back to Fovant that night.

L. C. J. And where did you lie on Sunday night?

Dunne. I lay at my own house on Sunday night.

L. C. J. And Barter came along with you when you came on Tuesday?

Dunne. Yes, my lord.

L. C. J. And did you go the same way upon the Tuesday that you went upon the Saturday?

Dunne. Do you mean, my lord, the same way I came at first?

L. C. J. Ay.

Dunne. No, my lord, we came to Sutton, not to Fovant.

L. C. J. Why did not you go the same way

upon the Tuesday that you went upon the Saturday?

Dunne. Because I had appointed to meet him at such a place.

L. C. J. Come, prithee answer me freely and according to truth: Who did desire thee, or order thee to go another way than that thou went'st at first? How came it to pass? Let us know the truth?

Dunne. My lord, I did count that to be the nearer way, and therefore I went that way.

L. C. J. That cannot be the reason, for thou would'st have gone the nearest way at first, I believe; come, tell us truly?

Dunne. My lord, I know no other reason.

L. C. J. Come, tell us what towns and villages you did go through then upon Saturday?

Dunne. My lord, I went through several, Chilmark and Fovant.

L. C. J. And what villages did you go through upon the Tuesday?

Dunne. I went through most of the same towns.

L. C. J. What, and at noon-day too?

Dunne. Yes.

L. C. J. And how chanced when you went that way, that you appointed Barter to meet you in another place at Fovant?

Dunne. Because I did not know the way afterwards.

L. C. J. Then let me ask you another question: Did you go the same way from Fovant to my lady Lisle's as you went before?

Dunne. No, we did not.

L. C. J. How came that to pass?

Dunne. I would have went the same way, but they would not.

L. C. J. Which way did you go then?

Dunne. We went through Chalk, and so through Rocksborne, and from Rocksborne to Fording-bridge, and so to Moyle's court.

L. C. J. How far is this about now?

Dunne. Truly, my lord, I cannot readily tell.

L. C. J. How many miles is it from Fovant to my lady Lisle's?

Dunne. My lord, it is about 14 or 15.

L. C. J. How many miles was it the way that you went upon the Tuesday?

Dunne. It might be twenty, my lord, for aught I know.

L. C. J. What was the reason that Barter went that way?

Dunne. Truly, my lord, I cannot tell.

L. C. J. Pray let me ask you another question then; What discourse had you with Barter? Or what bargain did you make with him for shewing you the way? for you would not ask him to go with you without promising him some reward.

Dunne. My lord, I asked him to shew me the way to my lady Lisle's house, and told him I was going for one Hicks; and so he took his horse and went with me.

L. C. J. What reward did you promise him?

Dunne. Half-a-crown, my lord, and half-a-crown I gave him.

L. C. J. Well, that was the first time; and what did you promise him the second time.

Dunne. The second time one of the two men gave him five shillings.

L. C. J. What man was it?

Dunne. It was the black man.

L. C. J. What was his name? It was not the little black man that came first to desire you to go on the message, was it?

Dunne. No, my lord, it was not he that spoke to me first.

L. C. J. Did not that little man that spoke to you first promise you a reward for your pains?

Dunne. No, my lord, that man never promised me any thing.

L. C. J. Did he go along with you?

Dunne. No, my lord, he did not.

L. C. J. Who were the two men that went with you?

Dunne. Hicks and Nelthorp.

L. C. J. Which of them two was it that gave Barter five shillings?

Dunne. It was Nelthorp that gave him five shillings.

L. C. J. How do you know his name was Nelthorp?

Dunne. At my lady Lisle's, after he was taken, I knew his name to be Nelthorp.

L. C. J. What name did he go by before?

Dunne. Were I to die presently, my lord, I cannot tell it.

L. C. J. Well, you went so much about: What time did you get to my lady Lisle's upon the Tuesday?

Dunne. About nine or ten of the clock at night, my lord.

L. C. J. Let us consider a little; you say you went from your house about eleven o'clock: What time did you get to Fovant?

Dunne. About two or three of the clock, my lord.

L. C. J. Where did you stay by the way?

Dunne. No where, my lord.

L. C. J. Did you ride on still?

Dunne. Yes, my lord.

L. C. J. Was it before nine, or after nine that you came to my lady Lisle's?

Dunne. I believe it was rather after nine, my lord.

L. C. J. Who came first to my lady Lisle's, prithee tell us frankly?

Dunne. My lord, we came all three together to the gate.

L. C. J. Who knocked at the gate, you or Barter, or who else?

Dunne. Barter, my lord, was discharged before we came near the house, about eight miles from it.

L. C. J. Sayest thou so? How came you then to know the way without him?

Dunne. My lord, I will tell you; they lost their way, and they sent me down to Marton, and there I went to a man, my lord, and told him one Hicks desired to speak with him.

L. C. J. Thou sayest well, now must I know that man's name.

Dunne. The man's name that I went to at Marton, my lord?

L. C. J. Yes, and look to it, you tell me right, for it may be I know the man already, and can tell at what end of the town the man lives too.

Dunne. My lord, I cannot tell his name presently.

L. C. J. O! pray now, do not say so, you must tell us, indeed you must think of his name a little.

Dunne. My lord, if I can mind it I will.

L. C. J. Prithes do.

Dunne. His name, truly, my lord? I cannot rightly tell for the present.

L. C. J. Prithes recollect thyself; indeed thou canst tell us if thou wilt.

Dunne. My lord, I can go to the house again if I were at liberty.

L. C. J. I believe it, and so could I; but really neither you nor I can be spared at present, therefore prithes do us the kindness now to tell us his name.

Dunne. Truly, my lord, I cannot mind his name at present.

L. C. J. Alack-a-day, we must needs have it! Come, refresh your memory a little.

Dunne. My lord, I think his name was Fane.

L. C. J. Thou sayest right, his name was Fane truly, thou seest I know something of the matter: Well, what didst thou say to him?

Dunne. I told him I came from one Mr. Hicks.

L. C. J. And what didst thou desire of him?

Dunne. I told him that one Mr. Hicks desired to speak with him; and when he came out to Mr. Hicks, Mr. Hicks did desire him to shew him the way to Mrs. Lisle's.

L. C. J. Now tell us what kind of man that was, that desired this of Mr. Fane?

Dunne. My lord, it was the full fat black man.

L. C. J. Now we have got him out, now we know which was Hicks: Now go on.

Dunne. My lord, this man went and rid along with them as far as the new house that is built there, within a mile of that house Fane went along with us; and afterwards, whether Hicks or Nelthorp, or who knew the way, I cannot tell, but to my lady Lisle's we went.

L. C. J. Who directed you the way when Fane left you?

Dunne. My lord, I cannot tell; For my part I did not know the way.

L. C. J. Who went with you?

Dunne. None but Hicks and Nelthorp.

L. C. J. How far from my lady's house was that place where Fane left you?

Dunne. My lord, I cannot directly tell.

L. C. J. Then Hicks knew the way, it seems, from thence?

Dunne. So he might, my lord, for aught I know, for I did not.

L. C. J. Thou art strangely stiff; but now we are come thus far with you, tell me what entertainment you had at my lady Lisle's, and look to it that you be sure to tell me truth, for I know it to a tittle, I can assure you that.

Dunne. They went in before me, my lord.

L. C. J. Who went in before you?

Dunne. Hicks and Nelthorp.

L. C. J. But the door was shut when you came, was it not?

Dunne. My lord, I cannot tell truly.

L. C. J. Then tell me what entertainment you had there?

Dunne. For my own part my lord, I carried a bit of cake and cheese from my own house, and that I eat.

L. C. J. What became of your companions Hicks, and Nelthorp, I pray you?

Dunne. I never saw them again till after they were taken.

L. C. J. How is that, prithes recollect thyself?

Dunne. Sure, my lord, I did not see them till then.

L. C. J. Who came to the door to you?

Dunne. A young girl, my lord, I knew not who nor what she was.

L. C. J. Did they go directly into the house?

Dunne. It was dark, my lord, I did not see what they did.

L. C. J. Was there never a candle there?

Dunne. No, my lord.

L. C. J. It was dark, very dark, was it not?

Dunne. Yes, my lord, it was so.

L. C. J. Was my lady stirring then?

Dunne. I did not see her.

L. C. J. And this is as much as you know of the business?

Dunne. Yes, my lord, this is all that I remember.

L. C. J. Well; and what badst thou for all thy pains?

Dunne. Nothing but a month's imprisonment, my lord.

L. C. J. Thou seemest to be a man of a great deal of kindness and good-nature; for, by this story, there was a man that thou never sawest before (for I would fain have all people observe what leather some men's consciences are made of) and because he only had a black beard, and came to thy house, that black beard of his should persuade thee to go 26 miles, and give a man half a crown out of thy pocket to shew thee thy way, and all to carry a message from a man thou never knowest in thy life, to a woman whom thou never sawest in thy life neither; that thou shouldst lie out by the way two nights, and upon the Sunday get home, and there meet with this same black bearded little gentleman, and appoint these people to come to thy house upon the Tuesday; and when they came, entertain them three or four hours at thy own house, and go back again so many miles with them, and have no entertainment but a piece of cake and cheese that thou broughtest thyself from home, and have no reward, nor so much as know any of the persons thou didst all this for, is very strange.

Dunne. My lord, the man that came to desire me to go on this message, said that Hicks should reward me, and pay me for my pains.

L. C. J. But why wouldst thou take the word of a man thou didst not know?

Dunne. I was forbid to take his word at that time, my lord.

L. C. J. There was no necessity for that neither; no body could force thee to do it. Alack-a-day! Thou seemest to be a man of some consideration: I mightily wonder thou shouldst be so kind to people thou didst not know, without any prospect of recompence whatsoever.

Dunne. All the reason that induced me to it was, they said they were men in debt, and desired to be concealed for a while.

L. C. J. Dost thou believe that any one here believes thee? Prithee what trade art thou?

Dunne. My lord, I am a baker by trade.

L. C. J. And wilt thou bake thy bread at such easy rates? Upon my word then, thou art very kind: Prithee tell me, I believe thou dost use to bake on Sundays, dost thou not?

Dunne. No, my lord, I do not.

L. C. J. Alack-a-day! thou art precise in that; but thou canst travel on Sundays to lead rogues into lurking-holes: It seemeth thou hast a particular kindness for a black beard, that is all thy reason for undertaking all this trouble. Thou hast told me all the truth, hast thou?

Dunne. I have, my lord.

L. C. J. But I assure thee, thy bread is very light weight, it will scarce pass the balance here.

Dunne. I tell the truth, and nothing but the truth.

L. C. J. No doubt of that; but prithee tell me, whose horse didst thou ride when thou wentest first?

Dunne. The man's horse that came to me to desire me to go on the message.

L. C. J. How came he to trust thee with his horse?—*Dunne.* The Lord knows, my lord.

L. C. J. Thou sayest right, the Lord only knows, for by the little I know of thee, I would not trust thee with two-pence: whose horse didst thou ride the second time?

Dunne. My own, my lord.

L. C. J. And where didst thou put thy horse when thou comest to my lady Lisle's?

Dunne. In the stable, my lord.

L. C. J. Where did they put their horses?

Dunne. They left them without the gate, I think, my lord; I did not see them take them in.

L. C. J. No, thou saidst it was so dark thou couldst not see any thing: Pray were you with the two men when they did alight?

Dunne. We did all three come together.

L. C. J. What did you give Fane for his pains in showing you the way?

Dunne. He had nothing that I know of.

L. C. J. Well, you are the best-natured and kindest-hearted people that ever I know: Whereabouts do you live?

Dunne. At Warminster, near my lord Weymouth's.

Mr. Pollexfen. Pray, Mr. Dunne, Will you answer me one question: Was not there

searching at that time up and down the country for rebels that were fled from the battle?

Dunne. I did hear there was, some were taken.

Mr. Pollexfen. But did you hear there was searching at that time for other of the rebels?

Dunne. I did not hear of any near me, but there were in other places.

L. C. J. Then it being such a suspicious time, when that little man with the black beard came to thee, didst thou not ask what that Hicks was?—*Dunne.* No, my lord, I did not.

L. C. J. And when Mr. Hicks and the other man that is called by the name of Mr. Nelthorp came to thy house, didst not thou ask their names?—*Dunne.* No, my lord.

L. C. J. Nor didst not thou ask upon what occasion they were to be conducted to my lady Lisle's?

Dunne. No, my lord: Hicks, the fat man, told me they were in debt.

L. C. J. Did not the man that first came to you, and employ you to go on this message; did not he know Hicks?

Dunne. I cannot tell, my lord.

L. C. J. Did not he tell you, Hicks desired you to go, and that he was in debt, and therefore desired to be concealed?

Dunne. Yes, my lord, he did.

L. C. J. How came you to be so impudent then, as to tell me such a lye?

Dunne. I beg your pardon, my lord.

L. C. J. You beg my pardon! That is not because you told me a lye, but because I have found you in a lye. Come, Sirrah, tell me the truth; what did Hicks and Nelthorp with their horses, when they came to my lady Lisle's?

Dunne. My lord, I cannot tell.

L. C. J. Why you impudent rascal, did not you tell me just now that they left them at the door?

Dunne. My lord, I said I believed they might, but cannot directly tell what they did with them; I know not but one or other might have them away, but I did not see it.

Mr. Pollexfen. Prithee, friend, tell the truth; what did become of the horses?

Dunne. I cannot tell truly, my lord; if any body had them away, I did not see them.

L. C. J. Where didst thou lie that night?

Dunne. In one of the chambers.

L. C. J. Who shewed thee the way to thy lodgings?—*Dunne.* The girl.

L. C. J. Who else didst thou see in the house?—*Dunne.* I saw no body at all.

L. C. J. Then who shewed thee the way to the stable, and helped thee with horse-meat?

Dunne. No body helped me to horse-meat.

L. C. J. Why, thy horse did not feed on thy cake and cheese, did he?

Dunne. There was hay in the rack, my lord.

L. C. J. Was the stable-door locked or open?

Dunne. The stable door was latched, and I plucked up the latch.

L. C. J. How came you to know the way to the stable then?

Dunne. Because I had been there before, my lord.

L. C. J. Thou hadst need to know it very well, for it seems thou wentest without a candle or any thing in the world, and put in thy horse. Didst thou see that man Carpenter the bailiff that thou spokest of?

Dunne. Mr. Carpenter gave my horse hay.

L. C. J. Was there any light in the stable?

Dunne. Not when I put in my horse first.

L. C. J. Who brought the light thither?

Dunne. Goodman Carpenter.

L. C. J. Did not he give thy horse hay?

Dunne. Yes, he did.

L. C. J. And did he not give him oats too?

Dunne. No, my lord, he did not.

L. C. J. Did not he conduct you into the house?—*Dunne.* Who, my lord?

L. C. J. That same Goodman Carpenter.

Dunne. No, my lord.

L. C. J. Did you see any body else but that girl you speak of?

Dunne. My lord, I did see the girl there.

L. C. J. But, you blockhead, I ask you whether you did see any body else?

Dunne. I do not know but I might see Goodman Carpenter.

L. C. J. Why thou saidst he brought thee light, and gave thy horse hay; but I see thou art set upon nothing but prevarication: Sirrah, tell me plainly did you see nobody else?

Dunne. No, my lord.

L. C. J. Not any body?

Dunne. No, my lord, not any one.

L. C. J. Did you not drink in the house?

Dunne. No, my lord, not a drop.

L. C. J. Did not you call for drink?

Dunne. No, my lord, I did not, I had nothing but my cake and cheese that I brought thither myself.

L. C. J. Who went up to the chamber with you?—*Dunne.* The girl, my lord.

L. C. J. And no body else?

Dunne. No, my lord.

L. C. J. Was the bed made?

Dunne. Yes, my lord, it was.

L. C. J. You eat nothing in the house you say?

Dunne. Nothing but my own cake and cheese, my lord.

L. C. J. But you did not drink in the house at all?—*Dunne.* No, my lord, I did not.

L. C. J. Did you drink at Marton, where you did call upon Fane?

Dunne. Yes, I did, but not afterwards.

L. C. J. Did you see any body there the next morning before they were taken?

Dunne. No, my lord; but after the house was beset, I saw my lady and Mr. Hicks, and I think I saw Goodman Carpenter.

L. C. J. They and you were taken there together, were not you?—*Dunne.* Yes.

L. C. J. Did you see Carpenter's wife, upon your oath, that night?

Dunne. My lord, I did not.

L. C. J. Nor no woman kind besides the girl you speak of?—*Dunne.* No, my lord.

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L. C. J. Nor no man besides Carpenter?

Dunne. No, my lord.

L. C. J. You are sure of this?

Dunne. I am so, my lord.

L. C. J. You are sure you did not drink there?—*Dunne.* I am, my lord.

L. C. J. And you say he brought the light into the stable, and gave your horse hay?

Dunne. He did, my lord.

L. C. J. Now prithee tell me truly, where came Carpenter unto you? I must know the truth of that; remember that I gave you fair warning, do not tell me a lie, for I will be sure to treasure up every lie that thou tellest me, and thou may'st be certain it will not be for thy advantage: I would not terrify thee to make thee say any thing but the truth; but assure thyself I never met with a lying, sneaking, canting fellow, but I always treasured up vengeance for him: and therefore look to it, that thou dost not prevaricate with me, for to be sure thou wilt come to the worst of it in the end.

Dunne. My lord, I will tell the truth as near as I can.

L. C. J. Then tell me where Carpenter met thee.

Dunne. In the court, my lord.

L. C. J. Before you came to the gate, or after.

Dunne. It was after we came to the gate, in the court.

L. C. J. Then tell me, and I charge you tell me true who was with you when Carpenter met you?

Dunne. Hicks and Nelthorp.

L. C. J. Was there any body else besides them two in the court?

Dunne. There was nobody but Hicks and Nelthorp, and I and Mr. Carpenter.

L. C. J. You are sure of that?

Dunne. Yes, my lord.

L. C. J. Consider of it, are you sure there was no body else?

Dunne. Truly, my lord, I did not mind that there was any body else.

L. C. J. Recollect yourself, and consider well of it.

Dunne. Truly, my lord, I do not know of any body else.

L. C. J. Now upon your oath tell me truly, who it was that opened the stable-door, was it Carpenter or you?

Dunne. It was Carpenter, my lord.

L. C. J. Why thou vile wretch, didst thou tell me just now, that thou pluckedst up the latch? Dost thou take the God of heaven not to be a God of truth, and that he is not a witness of all thou sayest? Dost thou think because thou prevaricatest with the court here, thou canst do so with God above, who knows thy thoughts? And it is infinite mercy, that, for those falshoods of thine, he does not immediately strike thee into hell! Jesus God! there is no sort of conversation nor human society to be kept with such people as these are who have no other religion but only in pretence.

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and no way to uphold themselves but by countenancing lying and villainy! Did not you tell me that you opened the latch yourself, and that you saw no body else but a girl? How durst you offer to tell such horrid lies in the presence of God and of a court of justice? Answer me one question more: Did he pull down the hay, or you?

Dunne. I did not pull down any hay at all.

L. C. J. Was there any hay pulled down before the candle was brought?

Dunne. No, there was not.

L. C. J. Who brought the candle?

Dunne. Mr. Carpenter brought the candle and lanthorn.

L. C. J. It seems the saints have a certain charter for lying; they may lie and cant, and deceive, and rebel, and think God Almighty takes no notice of it, nor will reckon with them for it: You see, gentlemen, what a precious fellow this is, a very pretty tool to be employed upon such an errand, a knave that no body would trust for half a crown between man and man, but he is the fitter to be employed about such works; what pains is a man at to get the truth out of these fellows! and it is with a great deal of labour, that we can squeeze one drop out of them! A Turk has more title to an eternity of bliss than these pretenders to Christianity, for he has more morality and honesty in him. Sirrah, I charge you in the presence of God, tell me true, What other persons did you see that night?

Dunne. My lord, I did not see any more than what I have told you already.

L. C. J. Then they went out and brought word that thou wert come, and so he came out to meet thee. Very well; I would have every body that has but the least tang of saintship to observe the carriage of this fellow, and see how they can cant, and snivel, and lye, and forswear themselves, and all for the good old cause: They will stick at nothing, if they think they can but preserve a brother or sister-saint forsooth; they can do any thing in the world but speak truth, and do their duty to God and their governors: I ask you again, Did not Carpenter meet you before you left Hicks and Nelthorp?

Dunne. No, he did not.

L. C. J. Then I ask you again once more, did not Carpenter ask you to drink?

Dunne. No, he did not.

L. C. J. Did not he light you with a lanthorn and candle into the house?

Dunne. I went into the house.

L. C. J. Dost thou believe we think any body thrust thee in? Did he light thee in, I ask thee?

Dunne. I went in along with Mr. Carpenter.

L. C. J. What room did he carry you into?

Dunne. My lord, he carried me into no room, the young woman shewed me into a room.

L. C. J. What room was it?

Dunne. Into the chamber.

L. C. J. Was not thou in the hall or kitchen?

Dunne. No, my lord.

L. C. J. It is hard that thou hadst not one cup of drink to thy cake and cheese.

Dunne. My lord, I had never a drop.

L. C. J. No, nor did nobody ask you to eat or drink?—*Dunne.* No, my lord.

L. C. J. Thou art the best natured fellow that ever I met with, but the worst rewarded. Come, I will ask thee another question: When was the first time thou heard'st Nelthorp's name?—*Dunne.* Not till he was taken.

L. C. J. What name did the fellow with the black beard tell thee he had?

Dunne. My lord, he never told me any name.

L. C. J. Didst thou never ask him his name?

Dunne. No, my lord, that man that was afterwards found to be Nelthorp, I did not know to be Nelthorp till he was taken, nor what his name was, nor any name he had.

L. C. J. No, prithee tell the truth, did not Nelthorp go by the name of Crofts?

Dunne. He did, my lord.

L. C. J. Then prithee, when did he first go by that name in thy hearing?

Dunne. My lord, I only heard Hicks say he went by the name of Crofts.

L. C. J. When was that?

Dunne. When they were taken.

L. C. J. Did you not hear him called by that name any time of the journey?

Dunne. I cannot recollect, my lord, that I ever did.

L. C. J. Thou can'st recollect nothing of truth: Is this as much as you can say?

Dunne. It is, my lord.

Mr. Jennings. You say Carpenter met you very civilly, and took care of your horse: Did he make no provision for Hicks and Nelthorp's horses? What became of them?

Dunne. I cannot tell, my lord.

Mr. Rumsay. Did you see their horses afterwards?—*Dunne.* No, my lord, I did not.

Mr. Rumsay. When they alighted from them, were they tyed fast to the gate, or how?

Dunne. They were not tyed at all, as I know of.

Mr. Jennings. Did you tell Carpenter that their horses were there?

Dunne. I did not tell him any such thing.

L. C. J. Thou art a strange prevaricating, shuffling, sniveling, lying rascal.

Mr. Pollexfen. We will set him by for the present, and call Barter that is the other fellow.

L. C. J. Will the prisoner ask this person any questions?—*Lisle.* No.

L. C. J. Perhaps her questions might endanger the coming out of all the truth, and it may be she is well enough pleased to have him swear as he does; but it carries a very foul face upon my word. [Then Barter was sworn.]

L. C. J. Is this Barter?

Mr. Pollexfen. Yes, my lord, for his part we have his examination before two justices of peace; but we hope he is an honest fellow, and will tell the truth.

L. C. J. That is all one whether you have

his examination or not; I expect he should tell me the truth, and the whole truth here. Friend, you know your soul is at pawn for the truth of what you testify to us; the other fellow thou seest has been prevaricating with us all this while, and swearing off and on, and scarce told one word of truth, I know very well: Now I know as much of thee as I do of him, therefore look to thyself, and let the truth and nothing but the truth come out.

Barter. May it please your honour, my lord, this man Dunne came to my house upon the Saturday, and spoke to me to ride along with him to Moyle's court, where my lady Lisle lived; and I having no other business at that time, did go along with him; He had a letter in his pocket, and I saw him produce the letter to my lady's bailiff, Mr. Carpenter, but he would not meddle with it, so I suppose he went in with it to my lady; and while I was in the kitchen, my lady came thither, and asked me, said she, what countryman art thou? Said I, madam, I am a Wiltshire man. Saith she, do'st thou make bricks? No, said I, madam, I cannot, I can help in husbandry-work. Saith she, if thou could'st make bricks, I will give thee ten acres of ground in such a place. I told her no I could not: and then she goes to this man Dunne, and there she was laughing with him, and looked upon me; and afterwards when we were going along, I asked him what she laughed at?

L. C. J. Ay, and now tell me what he said to thee about it?

Barter. He told me, my lord, my lady asked, whether I knew any thing of the concern? And that he answered her, no; this the fellow told me was that she laughed at. After this, I could not eat nor drink, nor sleep for trouble of mind, till I had discovered this to some justice of the peace; and I resolved at last to go to col. Penruddock, and consult him about it; so I went over and told him of it.

L. C. J. What did you tell colonel Penruddock, let us hear?

Barter. Where I had been the Saturday before, and where I should meet them again upon Salisbury-Plain upon the Tuesday, for I did expect to meet them there according to appointment, and we did agree he should come and take them there; but afterwards missing them there, or for some other reason, I do not know what, his mind altered, and he came to take them in the house: So when I met them, we rode on about ten miles, and they would have had me to have led them a private way over the fording bridge towards Moyle's-court, but I told them, in case they intended to have me for their guide, they must go the way that I could tell; but they would go that private way, and so lose their way; then they sent back this Dunne to Marton to one Fane, that was the fat man that sent him: but I finding that I was of no more value then, rode away from them, and having a relation that lived on that side of the country, I went to let colonel Penruddock know that they were at the house.

But before I went away from them, Nelthorp gave me five shillings, half a crown, and two shillings and a six-pence.

L. C. J. Now thou sayest Nelthorp did: Didst thou hear his name named?

Barter. I never could find any of their names till they were taken.

Mr. Pollexfen. Pray, Barter, what discourse had you with Dunne the first time you were going to and from my lady Lisle's concerning the men that he was to bring thither, and what estates they had?

Barter. My lord, he said they had half a score of thousands of pounds a year a-piece.

Mr. Pollexfen. Did he tell you they were to come to my lady's?

Barter. Yes, he told me they were to come upon the Tuesday, and they were to come such a way, and were to come to my lady's in the evening.

L. C. J. What wer't thou to have for thy pains?—*Barter.* I made no bargain, my lord.

L. C. J. You are all very free, kind-hearted people, I say that for you.

Mr. Pollexfen. What did Dunne say about his gains?

Barter. He told me he had a very fine booty for his part, and that he should never want money again, and that I should be very well paid, and gave me half a crown.

L. C. J. Then let my honest man, Mr. Dunne, stand forward a little. Come, friend, you have had some time to recollect yourself; let us see whether we can have the truth out of you now: You talked of carrying a message from Hicks to my lady Lisle; did not you carry a letter?—*Dunne.* No, my lord, I did not.

L. C. J. Did not you shew a letter to the bailiff, Carpenter?

Dunne. No, my lord, I did not.

L. C. J. What say you, Barter, to that?

Barter. My lord, I did see him produce the letter to the bailiff.

L. C. J. Then I will ask you another question: Did you not tell Barter that you should be at Salisbury-Plain, with two people, upon the Tuesday?

Dunne. No, my lord, I said between Compton and Fovant.

L. C. J. Did not you tell him, that they were brave fellows, and had God knows how many thousand pounds a year a-piece?

Dunne. No, my lord, I did not.

L. C. J. Then one thing more: Did not you tell him, that you told my lady, when she asked whether he was acquainted with the concern, that he knew nothing of the business?

Dunne. My lord, I did tell him so.

L. C. J. Did you so? Then you and I must have a little further discourse: Come now, and tell us, what business was that? and tell it us so, that a man may understand and believe that thou dost speak truth.

Dunne. Does your lordship ask what that business was?

L. C. J. Yes, it is a plain question; What was that business that my lady asked thee,

whether the other man knew; and then you answered her, that he did know nothing of it?

—[Then he paused a while.]

L. C. J. Remember, friend, thou art upon thy oath; and remember withall, that it is not thy life, but thy soul that is now in danger: therefore I require from thee a plain answer to a very plain question: What was that business my lady enquired after, whether the other fellow knew, and thou toldest her, he did not?—[Dunne made no answer, but stood musing a while.]

L. C. J. He is studying and musing how he shall prevaricate; but thou halst better tell the truth, friend: remember what thou hast said already; thou hast said, that thou didst tell that man, that the lady asked you, whether he knew any thing of the business, and thou toldest her, he did not? Now I would know what that business was.—[Still he made no answer but seemed to muse.]

L. C. J. Look thee, if thou canst not comprehend what I mean, I will repeat it to thee again; for thou shalt see what countryman I am, by my telling my story over twice: therefore I ask thee once again. Thou sayest thy lady asked thee, whether he knew of the business; and thou toldest her, he did not. Now let us know what that business was?

Dunne. I cannot mind it, my lord, what it was.

L. C. J. But mind me, prithee: Thou didst tell that honest man there, that my lady Lisle asked thee, whether he knew any thing of the business, and thou saidest no. What was that business?

Dunne. That business that Barter did not know of?

L. C. J. Yes, that is the business; be ingenuous, tell the truth: Oh! how hard the truth is to come out of a lying Presbyterian knave. Prithee, friend, consider the oath that thou hast taken, and that thou art in the presence of a God that cannot endure a lie, nor whose holiness will not admit him to dispense with a lie: Consider that that God is an infinite being of purity, holiness, and truth; and it would be inconsistent with his being to dispense with the least untruth; and thou hast called him to witness, that thou wouldest testify the truth, the whole truth and nothing but the truth. I charge thee, therefore, as thou wilt answer it to that God of truth, and that thou mayest be called to do, for ought I know, the very next minute, and there thou wilt not be able to palliate the truth; what was that business you and my lady spoke of?—[Then he paused for half a quarter of an hour, and at last said;

Dunne. I cannot give an account of it, my lord.

L. C. J. Oh blessed God! Was there ever such a villain upon the face of the earth; to what times are we reserved! Dost thou believe that there is a God?

Dunns. Yes, my lord, I do.

L. C. J. Dost thou believe, that that God can endure a lie?

Dunne. No, my lord, I know he cannot.

L. C. J. And dost thou believe then that he is a God of truth?

Dunne. Yes, my lord, I do.

L. C. J. Dost thou think, that that God of truth may immediately sink thee into bell-fire if thou tellest a lie?

Dunne. I do, my lord.

L. C. J. Dost thou believe, that he dost observe every thing that thou thinkest, sayest, or doest; knows the secrets of thy heart, and knows whether thou tellest a lie or not, though perhaps it may be hid from us; and knows whether thou dost prevaricate or not?

Dunne. I know, the Lord does know all things.

L. C. J. Dost thou believe, that he knows the business that you and my lady the prisoner were talking of, as well as you do; that he hath an almighty power over all his creatures, an all-piercing eye, that looks into the hearts of every one of them, and from which nothing can be concealed? Dost thou believe it possible to conceal that very discourse of yours from the knowledge of that infinite Being?

Dunne. My lord, I do believe that there is a God above.

L. C. J. I ask thee then again; dost thou believe, that that God above, who is a God of truth himself, is omniscient, omnipresent, to whom all truth is naked and open, that he knows every thing that is either thought, said, or done by any of his creatures, sees and knows the hearts of all men; dost thou believe all this?—[He stood silent for a good while.]

L. C. J. Friend, deceive not thyself; the great God does observe and know the secret workings of thy thoughts now, and how truth struggles to get out, but baseness and villainy keep it in: All the private imaginations of thy heart are not only known to him, but registered by him, and thy conscience will bear witness to thy accusation when thou art called to answer for them, and answer for them thou must; for the scripture, that is the word of God, tells us, 'That every vain thought we must account for.' Dost thou then believe, that any dissimulation is course between you, though never so private, private from the Almighty, All-knowing God?

Dunne. My lord, I know it is not, nor cannot be.

L. C. J. I therefore once more adjure thee, as thou wilt answer it to that God, that is the Searcher of the hearts and trier of the reins, to whom all hearts are open, and from whom no secrets are hid, that thou make me a plain answer to my question; and as thou hast called God to bear witness to the truth of the evidence thou givest here in this court, so I charge thee, in his name, to declare the truth, and nothing but the truth. Now tell us what was the business you spoke of?

[But he made no answer.]

L. C. Baron. [William Montague, Esq.]

Friend, mind what my lord says to you, and consider, how easy a thing it is for a man to speak truth, and give a plain answer to a plain question. You cannot but understand what my lord asks of you; you said even now, that you did tell the other witness, Barter, that my lady asked you, whether he knew any thing of the business; and you told her, he did not. Now my lord would have you tell us, what that business was?

[He seemed to turn his head on one side, but returned no answer.]

L. C. J. He is going to ask that man there whether he shall tell the truth.

Dunne. No, my lord, I ask no man any such question.

L. C. J. Prithee tell us the truth then now; Thou art to know, that thou standest in the presence of the God of truth, and hast called him to witness; that thou wouldst tell the truth.

Dunne. My lord, I do tell the truth, as far as I can remember.

L. C. J. Then what was that you told my lady Lisle, Barter did not know?

Dunne. What Barter did not know, my lord?

L. C. J. Ay, is not that a plain question? Of all the witnesses that ever I met with, I never saw thy fellow.

[He stood a good while, and made no answer.]

L. C. J. I hope, gentlemen of the jury, you take notice of the strange and horrible carriage of this fellow; and withal, you cannot but observe the spirit of that sort of people, what a villainous and devilish one it is: good God! that ever the thing called religion (a word that people have so much abused) should ever wind up persons to such a height of impiety, that it should make them lose the belief that there is a God of truth in Heaven, that sees and knows, observes and registers, and will punish and take vengeance of falsehood and perjury. It may well make the rest of mankind, that have any sort of faith in a Deity and a future life, to abhor and detest both the men and their religion, if such abominable principles may be called so. A Turk is a saint to such a fellow as this, nay a Pagan would be ashamed to be thought to have no more truth in him. O blessed Jesus! What an age do we live in, and what a generation of vipers do we live among? Sirs, Is this that you call the Protestant religion! Shall so glorious a name be applied to so much villany and hypocrisy? Is this the persuasion you hope to live, and die, and find salvation in? Will any of you all, gentlemen, be contented to die with a lye in your mouth? Do not you all expect, according to the orthodox doctrine of the true Church of England, that eternal damnation will be the portion of liars? And thou wicked wretch, how durst thou appear to give testimony before even an earthly tribunal with so much impudence and falsehood, when every lye will cost thee so dear, except a sincere and hearty repentance, and

the infinite mercy of the great God interpose? I charge you once more, as you will answer it at the bar of the great Judge of all the world, that you tell me what that business was you and the prisoner talked about: do you consider what a condition thou bringest thyself into by all this shuffling and prevarication, even as to any thing of mercy in this life; for indeed it is not fit thou shouldst have the least hopes of mercy on this side eternity, and truly there is no man can imagine less than infinite mercy can pardon so flagitious a sin, one that so impudently tells and stands in a lie.

[Still he would make no answer.]

L. C. J. Jesus God! Was there ever such a fellow in the world as thou art? Prithee let me ask thee once again. Dost thou believe that there is a God, that this God is spotless truth and purity itself? Dost thou believe thou hast a precious and immortal soul, that is to live in everlasting bliss or eternal misery after this life, accordingly as thou carriest it here; if thou dost believe it, ought not the concerns of that precious and immortal soul of thine to be much dearer to thee than ten thousand worlds? Does not the blessed word of truth tell thee, What will it profit a man to gain the whole world, and lose his own soul? or what shall a man give in exchange for his soul? Is not this the voice of scripture itself? And wilt thou hazard so dear and precious a thing for a lye, and an unprofitable lye too? Thou wretch! all the mountains and hills in the world heaped upon one another, will not cover thee from the vengeance of the great God for this transgression of false witness-bearing; What hopes can there be for so profligate a villain as thou art, that so impudently stands in open defiance of the omnipresence, omniscience, and justice of God, by persisting in so palpable a lye? I therefore require it of you, in his name, to tell me the truth.

Dunne. I cannot tell what to say, my lord.

L. C. J. Good God! Was there ever such an impudent rascal! Well, I will try once more, and tell thee what I mean; you said you told that honest man (for truly he seems so to be) that my lady asked you whether he knew of the business; and you told her, he did not: prithee be so free as to tell us what that business was?

[Dunne paused and would make no answer.]

L. C. J. Prithee what didst thou mean, or thy lady mean, by that business?

[He paused again, but would make no answer.]

L. C. J. Why, prithee, dost thou think thou dost her a kindness by this way of proceeding? Sure thou canst not think so; for such a sort of carriage were enough to convict her, if there were nothing else.

Dunne. Truly, my lord, I do not think to do her any kindness at all.

L. C. J. Then prithee let me persuade thee to have some kindness for thyself; look to thy own soul that is in great peril of everlasting

ruin and destruction by these means; dost thou call this religion? It is a prodigious piece of religion! Come, pray tell me what business it was you talked of? You should not have asked me a question so often, but I would have given you a plain answer, though I were not under the obligation of an oath, as you are.

Dunne. My lord, pray ask the question over again once more and I will tell you.

L. C. J. I will so, and I will ask it you with all the calmness, and seriousness, and candour, that I can; if I know my own heart, it is not in my nature to desire the hurt of any body, much less to delight in their eternal perdition; no, it is out of tender compassion to you that I use all these words: I would have the to have some regard to thy precious and immortal soul, which is more valuable than the whole world; reflect upon that scripture again which I mentioned before, which must be true because it is the words of him that is truth itself: What shall it profit a man to gain the whole world, and lose his own soul? or what shall a man give in exchange for his soul? If that soul of thine be taken away what is the body fit for, but, like a putrid carcase, to be thrust into and covered with the dust with which it was made: therefore I ask you, with a great desire that thou may'st free thyself from so great a load of falshood and perjury, tell me what the business was you told the prisoner, the other man Barter did not know?

Dunne. My lord, I told her, he knew nothing of our coming there.

L. C. J. Nay, nay, that can never be it, for he came along with thee.

Dunne. He did not know any thing of my coming there till I met him on the way.

L. C. J. Prithee mind my question; sure enough thou hadst told him whither thou wert going, or else he could not have been thy guide; so that he must needs know of thy coming there: but what was the business that thou told'st her, he did not know?

Dunne. She asked me whether I did not know that Hicks was a nonconformist?

L. C. J. Did my lady Lisle ask you that question?

Dunne. Yes, my lord; I told her I did not.

L. C. J. But that is not my question: what was that business that he did not know?

Dunne. It was the same thing: whether Mr. Hicks was a nonconformist.

L. C. J. That cannot be all; there must be something more in it.

Dunne. Yes, my lord, it is all; I know nothing more.

L. C. J. What did she say to you when you told her, he did not know it?

Dunne. She did not say any thing, my lord.

L. C. J. Why, dost thou think, that after all this pains that I have been at to get an answer to my question, that thou can'st banter me with such sham stuff as this? Hold the candle to his face, that we may see his brass face.

Dunne. My lord, I tell you the truth.

L. C. J. Did she ask thee whether that man knew any thing of a question she had asked thee, and that was only of being a nonconformist?

Dunne. Yes, my lord, that was all.

L. C. J. That is all nonsense; dost thou imagine that any man hereabouts is so weak as to believe thee.

Dunne. My lord, I am so baulked, I do not know what I say myself; tell me what you would have me to say, for I am cluttered out of my senses.

L. C. J. Why prithee, man, there is nobody baulks thee but thy own self; thou art asked questions that are as plain as any thing in the world can be: it is only thy own depraved naughty heart that baulks both thy honesty and understanding, if thou hast any; it is thy studying how to prevaricate, that puzzles and confounds thy intellect: but I see all the pains in the world, and all compassion and charity is lost upon thee, and therefore I will say no more to thee.

Mr. Pollexfen. My lord, because he pretends to ignorance what Hicks was, I desire to ask Barter one question: pray, what did he tell you concerning his carriage towards these people?

Barter. My lord, he told me that he had concealed them in his house ten days before.

Dunne. That I never did in my life.

Barter. I know not whether you did or no, but you told me so; and I made answer to him again, my lord, I wonder how he were able to keep them without being discovered, there being such search; and he answered, he did keep them in a chamber all day, and then they walked out at night; for the searches of the houses were usually at night.

Dunne. My lord, I can bring testimony to the contrary.

L. C. J. But really I believe it will be no strange thing for me to say, I do believe him rather than thee; I would I had half as much reason to believe thee as I have to believe him: I would fain have thee speak truth, if I could. What say you to the question I asked you.

Dunne. I cannot tell what to say, my lord.

L. C. J. Say the truth, man.

Dunne. I do, as I hope for mercy, my lord.

L. C. J. Dost thou hope for mercy? Thou hast very little reason for it I assure thee. Well, I will try thee with another question: didst thou tell that man, that it was the best job thou ever hadst in thy life?

Dunne. No, my lord, I did not.

L. C. J. Nor nothing to that purpose?

Dunne. No, my lord.

L. C. J. What say you, Barter, did not he tell you so?

Barter. Yes my lord, he did; and that he should never lack money again as long as he lived.

L. C. J. Then I ask you one question more, Barter; did you tell this to col. Fenrud deck?

Barter. Yes, I did, my lord.

L. C. J. Then that will fortify his testimony; therefore swear him, because I would make these concealed wretches (for in my conscience I know there are some such in the bottom of this business) know, that the truth will out one way or other. And as for this fellow, I expect it from all you gentlemen of the king's counsel, and others that are concerned, that you take notice and remember what has passed here, and that an information of perjury be preferred against this fellow.

[Then Col. *Penruddock* was sworn.]

L. C. J. Col. *Penruddock*, upon the oath you have taken, did that man, *Barter*, come to you; and what did he say to you?

Col. Penruddock. My lord, that man, *Barter*, came to my house in the morning, upon Monday, and told me, he had been with one *Dunne*, upon a journey to Mrs. *Lisle's* house, to get entertainment for some people; and that they had appointed to meet him the Tuesday following, between nine and eleven, upon *Salisbury-Plain*, and there if I pleased, I might take them. I ordered him to go according to the appointment, and withal, I sent a servant of my own to watch when they came by; but it happened, I suppose, by their taking another way, that he missed of them: but *Barter* left word, that in case he did not find them there, we must conclude, that he was gone with them to my lady *Lisle's* house; and he told me withal, says he, I believe they are rebels, because he that desired me to be their guide, said the same to me. So early the next morning I took some soldiers with me, and beset my lady *Lisle's* house; it was a pretty while before I could get any body in the house, to hear: at length that man that they say was the bailiff, *Carpenter*, came out; and I said to him, Friend, you had best be free and ingenuous, and discover who are in your lady's house, for I am sure there were some strangers came hither last night; let me know who they are, and shew me what part of the house they are in. He did confess to me there were strangers in the house, and pointed to such part of the house; but pray, says he, do not tell my mistress of it. Accordingly we went in, and immediately we took Mr. *Hicks*. and this same *Dunne* in the malt-house.

L. C. J. Was *Dunne* taken in the malt-house?

Col. Penruddock. Yes, he had covered himself with some sort of stuff there.

L. C. J. Well, what did you do then?

Col. Penruddock. My lady afterwards coming to us, I told her, madam, you have done very ill in harbouring rebels, and giving entertainment to the king's enemies. Saith she, I know nothing of them; I am a stranger to it. Pray, said I, madam, be so free and ingenuous with me, and so kind to yourself, as if there be any other person that is concealed in any part of your house, (for I am sure there is some body else) as to deliver him up, and you shall

come to no further trouble. She denied it, and said, I know nothing of them: But we went on, and searched, and at last discovered the other man, *Nelthorp*, hid in a hole by the chimney.

L. C. J. *Dunne*, how came you to hide yourself in the malt-house?

Dunne. When I heard the stir and bustle, I went through the chamber where I lay, and came into that room where I was taken.

L. C. J. When thou heard'st a stir and a bustle, why wert thou afraid of any thing?

Dunne. My lord, I was frightened at the noise.

L. C. J. *Prithee*, what need'st thou be afraid, for thou didst not know *Hicks*, nor *Nelthorp*; and my lady only asked thee, whether *Hicks* were a nonconformist parson: Thou art a very innocent soul, and surely needest no occasion to be afraid. I doubt there was something of that business in the case that we were talking of before, if we could but get out of thee what it was.

Dunne. My lord, I heard a great noise in the house, and I did not know what it meant; and so I went and hid myself.

L. C. J. Alack-a-day! That is very strange, that thou should'st hide thyself for a little noise, when thou knewest nothing of the business, nor wert acquainted with any thing of the matter at all. But col. *Penruddock*, I would ask you one question more: Did that honest man tell you, that *Dunne* had told him, that it was the best job that ever he had in his life, and that he should want no money?

Col. Penruddock. I cannot tell that truly, my lord; I do not remember that: but he said, he apprehended them to be rebels, and that *Dunne* told him as much.

L. C. J. What do you say to that, *Dunne*? It seems you told *Barter*, that you apprehended them to be rebels?

Dunne. I apprehend them for rebels, my lord?

L. C. J. No, no, you did not apprehend them for rebels, but you hid them for rebels. But did you say to *Barter*, that you took them to be rebels?

Dunne. I take them to be rebels!

L. C. J. You blockhead; I ask you, did you tell him so?—*Dunne.* I tell *Barter* so!

L. C. J. Ay, is not that a plain question?

Dunne. I am quite cluttered out of my senses; I do not know what I say.

[A candle being still held nearer his nose.]

L. C. J. But to tell the truth, would rob thee of none of thy senses, if ever thou hadst any; but it should seem that neither thou, nor thy mistress the prisoner had any, for she knew nothing of it neither, though she had sent for them thither.

Mr. Pollexfen. Pray, col. *Penruddock*, did you tell her you came to search for rebels?

Col. Penruddock. Yes, Sir, I told her as soon as I saw her; but we had a good while beset the house before any body answered us; at length, there were some ladies, or gentlewomen, I imagined them to be her daughters,

that upon our noise looked out at the window; and I told them there were rebels in the house, and I required them in the king's name to be delivered to me; but I saw not my lady till after I had brought out Hicks and Dunne.

L. C. J. What said she to you?

Col. Penruddock. She said, she knew nothing of their being in the house; but I told her there was some body else besides, and she would do well to deliver him without trouble: but she denying of it, we searched further, and found Nelthorp, as I told you.

L. C. J. But she denied it first, it seems?

Lisle. My lord, I hope I shall not be condemned without being heard.

L. C. J. No, God forbid, Mrs. Lisle; that was a sort of practice in your husband's time; you know very well what I mean: But God be thanked, it is not so now; the king's courts of law never condemn without hearing. *Col. Penruddock,* have you any more to say?

Col. Penruddock. No, my lord; but here is one Mr. Dowding, that was with me when I searched the house.

L. C. J. Swear him. [Which was done.]

Mr. Pollexfen. Mr. Dowding, pray did you go with col. Penruddock to Mrs. Lisle's house?

Mr. Dowding. Yes, my lord: We came to the house, and beset the house round, some to the back gate, and some to the fore gate; we called almost half an hour before we got in; and had found two, and we came to my lady; she said, she knew nothing of any body being in the house—

Lisle. My lord, this fellow that now speaks against me, broke open my trunk, and stole away a great part of my best linen; and sure, my lord, those persons that rob me, are not fit to be evidences against me, because it behoves them that I be convicted, to prevent their being indicted for felony.

L. C. J. Look you, friend, you say you went with col. Penruddock to search the house, did you find any body there?

Dowding. Yes, my lord, I found this same Dunne in a little hole in the malt-house.

L. C. J. Was he covered, or not?

Dowding. He had taken some stuff or other to cover him.

L. C. J. Did you find Hicks there?

Dowding. Yes, my lord, we did find one that said his name was Hicks.

L. C. J. Is that the same Hicks that is in Salisbury gaol?

Dowding. Yes, my lord, it is; I saw him yesterday at the George in Salisbury, when he had that discourse with those other gentlemen.

Mr. Pollexfen. Swear Carpenter and his wife. [Which was done.]

Dowding. My lord, Hicks acknowledged before me, that he was at Keinsham, in the duke of Monmouth's army.

Mr. Pollexfen. Come, Mrs. Carpenter, tell my lord and the jury, did you know the time when these men came to your lady's house?

L. C. J. Is this the bailiff's wife?

Mr. Pollexfen. Yes, my lord, it is.

L. C. J. Well then, what say you to the question? Do you know the time when they came?

Mrs. Carpenter. Yes, my lord, they came at night.

L. C. J. Did you see them there?

Mrs. Carpenter. Yes.

L. C. J. Were they lodged there?

Mrs. Carpenter. Yes; but I never made the bed.

L. C. J. Who did?

Mrs. Carpenter. My lord, I cannot tell.

L. C. J. Had they any supper or victuals there?—*Mrs. Carpenter.* Yes, they had.

L. C. J. Who dressed it?

Mrs. Carpenter. I did.

L. C. J. By whose order did you dress it?

Mrs. Carpenter. By my lady's order.

L. C. J. Prithee where did they eat their meat?

Mrs. Carpenter. In the chamber, my lord, where they lay.

L. C. J. Who was with them?

Mrs. Carpenter. My lord, I cannot tell, for I did not stay in the room.

L. C. J. Didst thou see them when they came into the room?

Mrs. Carpenter. My lord, I dressed the meat, and carried it within the door, and my husband set it upon the table.

L. C. J. Prithee tell me who was with them? Was thy lady there?

Mrs. Carpenter. My lady was in presence there then.

L. C. J. How long did they stay below stairs before they went up?

Mrs. Carpenter. Truly, my lord, I cannot tell.

L. C. J. Did your lady use to sup below stairs or above?

Mrs. Carpenter. She used to sup below, my lord.

Mr. Pollexfen. My lord, if your lordship please, this woman and her husband are both unwilling witnesses; but we will examine the husband, and see what we can get out of him. Hark you, Carpenter, did you meet with this fellow, Dunne, at his first coming to your lady's house?

Mr. Carpenter. Yes, my lord, I did see him there on the Saturday.

L. C. J. Well then, let me ask you a question; and be sure you tell me the truth, for it may be I know it already; did he offer you a letter to be delivered to your lady?

Mr. Carpenter. No, my lord.

L. C. J. What do you say, Barter?

Barter. I saw him produce it to Mr. Carpenter, but he refused to meddle with it.

Mr. Carpenter. My lord, he asked me, if my lady would give entertainment to one Hicks, and another person, but he did not know who that person was.

L. C. J. Did he speak of another person?

Mr. Carpenter. Yes, he did.

L. C. J. Who was that other person?

Mr. Carpenter. I did ask his name, but he said, he did not know him.

L. C. J. Well then, when they came there on the Tuesday-night, how did you receive them?

Mr. Carpenter. I did not receive them.

L. C. J. Did not you light the candle, and bring it in a lanthorn, to light him into the stable?

Mr. Carpenter. My lord, that was afterwards.

L. C. J. Did not you bring the men into the house?

Mr. Carpenter. No, my lord, indeed I did not.

L. C. J. Did not you see them all night?

Mr. Carpenter. Yes, my lord.

L. C. J. Then where did you see them first?

Mr. Carpenter. In the room where they supped and lay.

L. C. J. Did not you meet them in the court-yard.—*Mr. Carpenter.* No, my lord.

L. C. J. Who gave you directions to light Dunne into the stable?

Mr. Carpenter. They told me his horse was out in the yard.

L. C. J. Who told you so?

Mr. Carpenter. The men did.

L. C. J. Where did they sup?

Mr. Carpenter. In the room above stairs.

L. C. J. Who supped along with them?

Mr. Carpenter. I cannot say any body supped with them.

L. C. J. Was not my lady there?

Mr. Carpenter. She was in the room, but I did not see her eat any thing.

L. C. J. What time of the night did they come?

Mr. Carpenter. About ten of the clock.

L. C. J. And where did they lie?

Mr. Carpenter. In the room where they supped.

L. C. J. Who lay there?

Mr. Carpenter. Hicks and Nelthorp lay there.

L. C. J. Was Nelthorp named there?

Mr. Carpenter. No, I never heard of his name till after he was taken.

L. C. J. What kind of man was he?

Mr. Carpenter. A tall, thin, black man.

L. C. J. Well, what can you say more?

Mr. Carpenter. My lord, this person has swore, that a letter was offered me, but I refused it: but I assure your lordship I never saw any letter.

Barter. I am sure he met you, and, as I remember, there was a letter produced.

L. C. J. Thou shouldest not be angry with him, for he spoke very kindly of thee, that thou refused'st to meddle in it, and thereupon Dunne went in to thy lady and delivered his message to her.

Mr. Carpenter. That, my lord, I acknowledge.

L. C. J. Then, prithee let me ask thee another question: Did you carry any beer up into the room?

Mr. Carpenter. My lady gave order for the provision.

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L. C. J. Did you make Dunne drink?

Mr. Carpenter. No, I did not.

L. C. J. Did you offer him any drink?

Mr. Carpenter. My lord, I did not see him drink at all.

L. C. J. What say you, good woman; Did not your lady sup there?

Mr. Carpenter. My lord, my wife was little there at all.

Mr. Rumsey. Now, my lord, Dunne says he will tell all, whether it make for him or against him.

L. C. J. Let him but tell the truth, and I am satisfied.

Dunne. Sure, my lord, I never entertained these men a night in my house in my life; but this Hicks sent that man to me, to go to my lady Lisle's, to know whether she would please to entertain him; And when I came, my lady asked me, whether he had been in the army or no? I told her, I could not tell, I did not know that he was. She then asked me, if he had nobody else with him? I told her, I believed there was: This is the very truth of it, my lord. I asked her, might the men be entertained? She said they might. So when we came to my lady Lisle's on the Tuesday night, somebody took the two horses, I cannot tell who, if I were to die; the two went in; and after I had set up my horse, I went in along with Carpenter up into the chamber to my lady, and to this Hicks and Nelthorp; and when I came there, I heard my lady bid them welcome to her house; and Mr. Carpenter, or the maid, I cannot tell which, brought in the supper, and set it on the table.

L. C. J. And didst thou eat or drink with them in the room, or not?

Dunne. My lord, I will tell every thing that I know; I confess I did both eat and drink there in the room.

L. C. J. I pity thee with all my soul, and pray to God Almighty for thee to forgive thee, and to the blessed Jesus to mediate for thee; and I pray for thee with as much earnestness, as I would for my own soul; and I beg of thee once more, as thou regardest thy own eternal welfare, to tell all the truth.

Dunne. My lord, I did never know these men were in the army when I carried the message to my lady Lisle's, nor never did entertain them in my house in my life-time, so much as one night.

L. C. J. Prithee, I do not ask thee what thou didst not, but what thou didst?

Dunne. My lord, I will tell all I know.

L. C. J. What discourse had you that night at the table in the room?

Dunne. I cannot tell what discourse truly, my lord, there was.

L. C. J. Was there nothing of coming from beyond seas, who came from thence, and how they came? Come, I would have it rather the effect of thy own ingenuity, than lead thee, by any questions that I can propound; come, tell us what was the discourse?

Dunne. I do not remember all the discourse.

L. C. J. Pritheet let me ask thee one question, and answer me it fairly; Didst thou hear Nelthorp's name named in the room?

Dunnc. My lord, I cannot tell whether he were called Nelthorp, but it was either Crofts or Nelthorp, I am sure one of them.

L. C. J. Prithee be ingenuous, and let us have the truth on it.

Dunnc. My lord, I am ingenuous, and will be so.

L. C. J. I will assure you, Nelthorp told me all the story before I came out of town.

Dunnc. I think, my lord, he was called Nelthorp in the room, and there was some discourse about him.

L. C. J. Ay, there was unquestionably, and I know thou wert by, and that made me the more concerned to press upon thee the danger of forswearing thyself.

Dunnc. My lady asked Hicks who that gentleman was, and he said it was Nelthorp, as I remember.

L. C. J. Very well, and upon that discourse with Nelthorp, which I had in town, did I give particular direction, that the outlawry of Nelthorp should be brought down hither, for he told me particularly of all the passages and discourses of his being beyond sea, and coming from beyond sea*: I would not mention any

* In the 'Western Martyrology' is given the following account of Mr. Rd. Nelthorp:

"His name is often enough met with in West's and Rumsey's plot, and good reason too, he being not near to answer for himself. As to what he was accused, out-lawed, and executed for, his being concerned in a design for the assassination of the king and duke, he solemnly avers as may be seen below in his speech, [That he was always highly against it, and detested any such thing, was never in the least concerned in it, neither in purse or person; never knew of any arms bought for that intent, nor did believe there was any such design.] Than which, what words could be more full and satisfactory? He went away in the heat of swearing, and returned with the duke of Monmouth, thinking it his duty as he says, to hazard his life for the preservation of the Protestant religion and English liberties; but as to the duke of Monmouth's being declared king, he was wholly passive in it. He was at first committed to Salisbury prison, where he had several disputes with a learned and good man, whose opinion then differed from his, concerning the lawfulness of defending ourselves by arms against illegal violence, which was his firm judgment. Thence he was brought to London and imprisoned in Newgate. He rejected there, with scorn, some offers made him of saving his own life by taking away other mens; and though he was under inexpressible trouble during his close confinement there, which at length arose to distraction, and the impair of his reason; yet it is remarkable that he, as Bateman before him, before he came to die, after sentence, was very calm and lively again,

such thing as any piece of evidence to influence this case, but I could not but tremble to think, after what I knew, that any one should dare so much to prevaricate with God and man, as to tell such horrid lyes in the face of a court.

the entire exercise of his judgment and understanding returning, with more joy and comfort than he had before pain and misery. He writ one letter to his parents, another to his children, here inserted, together with his last speech at his execution the 30th of Oct. 1685. At 2 in the morning he wrote the letter to his parents, &c.

"Wherein he speaks much of his brother, and fellow-sufferer, Mr. Ayloff, if I mistake not, whom he says, [He could embrace with more joy in the field of suffering, than ever he could have done had he met him in the field crowned with victory and laurels.]"

The same book contains some letters written by him shortly before his execution, and also his last Speech as follows:

"The great and inexpressible trouble and distraction I have been under since I came into trouble, especially since my close confinement in Newgate, hath so broken my reason, that for many weeks last past, till the day my sentence was passed, I have not had any composure of mind, and have been under the greatest trouble imaginable: since my dearest wife hath had the favour granted her of coming to see me, I am at present under great composure of mind, through the infinite goodness of the Lord. As to what I stand outlawed for, and am now sentenced to die, I can with comfort appeal to the great God, before whose tribunal I am to appear, that what I did was in the simplicity of my heart, without seeking any private advantage to myself; but thinking it my duty to hazard my life for the preservation of the Protestant religion and English liberties, which I thought invaded, and both in great danger of being lost. As to the design of assassinating the late king, or his present majesty, it always was a thing highly against my judgment, and which I always detested; and I was never in the least concerned in it, neither in the purse nor person, nor never knew of any arms brought for that intent, nor did I believe there was any such design, or ever hear of any disappointment in such an affair, or time, or place, save what after the discovery of the general design, Mr. West spoke of, as to arms bought by him: and as to myself, I was in the North when the late king was at Newmarket, and the first news I had of the fire, was at Beverly in Yorkshire. As to my coming over with the late duke of Monmouth, it was in prosecution of the same ends; but the Lord in his holy and wise Providence hath been pleased to blast all our undertakings; though there seemed to be a very unanimous and zealous spirit in all those that came from beyond the seas; And as to the duke of Monmouth's being declared king, I was wholly passive in it, I never

Dunne. What does your lordship ask me?

L. C. J. Come, I will ask thee a plain question; was there no discourse there about the battle, and of their being in the army?

Dunne. There was some such discourse, my lord.

L. C. J. Ay, prithee now tell us what that discourse was.

Dunne. My lord, I will tell you, when I have recollected it, if you will give me time till to-morrow morning.

L. C. J. Nay, but we cannot stay so long, our business must be dispatched now; but I would have all people consider what a reason

having been present at any public debate of that affair, and should never have advised it, but complained of it to colonel Holmes, and captain Patchet. I believe the lord Gray and Mr. F—— the chief promoters of it. As to the temptation of being an evidence, and bringing either into trouble or danger the meanest person of his life, upon the account for which I suffer, I always abhorred and detested the thoughts of it, both when in and out of danger, and advised some very strongly against it, except when under my distraction in prison, that amongst other temptations did violently assault me; but through the goodness of my dearest God and Father, I was preserved from it, and indeed was wholly incapable, and could never receive the least shadow of comfort from it, but thought death more eligible, and was some time afore, out of my distracted and disquieted condition, wholly free from it; though not without other temptations far more criminal in the sight of men. I bless the Father of all Mercies, and God of all Consolations, that I find a great resignedness of my will to his, finding infinitely more comfort in death, than ever I could place in life, though in a condition that might seem honourable; every hour seeing the will of God in ordering this affair more and more cleared up to me. God hath given, God hath taken, blessed be his holy name, that hath enabled me to be willing to suffer, rather than to put forth my hand to iniquity, or to say a confederacy with those that do so. I am heartily and sincerely troubled for what hath happened, many mens lives being lost, and many poor distressed families ruined; the Lord pardon what of sin he hath seen in it. He in his wonderful providence hath made me and others concerned, instruments, not only for what is already fallen out, but, I believe, for hastening some other great work he hath to do in these kingdoms; whereby he will try and purge his people, and winnow the chaff from the wheat; the Lord keep those that are his, faithful unto the end.

"I die in charity with all the world, and can readily and heartily forgive my greatest enemies, even those that have been evidences against me; and I most humbly beg the pardon of all that I have in the least any way injured; and in a special manner humbly ask pardon of the lady Lisle's family and relations,

there is, that they should be pressed to join with me in hearty prayers to Almighty God, that this sin of lying and perjury may never be laid at thy door. What say'st thou? Prithee tell us what the discourse was.

Dunne. My lord, they did talk of fighting, but I cannot exactly tell what the discourse was.

L. C. J. And thou saidst thou didst eat and drink with them in the same room?

Dunne. I did so, my lord, I confess it.

L. C. J. And it was not a little girl that lighted thee to bed, or conducted thee in?

Dunne. It was not a little girl.

for that my being succoured there one night with Mr. Hicks, brought that worthy lady to suffer death: I was wholly a stranger to her ladyship, and came with Mr. Hicks; neither did she (as I verily believe) know who I was, or my name, till I was taken: And if any other have come to any loss or trouble, I humbly beg their pardon; and were I in a condition, I would, as far as I was able, make them a requital.

"As to my faith, I neither look nor hope for mercy, but only in the free grace of God, by the application of the blood of Jesus, my dearest and only Saviour to my poor sinful soul. My distresses have been exceeding great as to my eternal state, but through the infinite goodness of God, though I have many sins to answer for, yet I hope and trust, as to my particular, that Christ came for this very end and purpose, to relieve the oppressed, and to be a physician to the sick. I come unto thee, O blessed Jesus; refuse me not, but wash me in thine own blood, and then present me to thy Father as righteous; What though my sins be as crimson, and of a scarlet dye? Yet thou canst make them as white as snow. I see nothing in myself but what must utterly ruin and condemn me, I cannot answer for one action of my whole life, but I cast myself wholly upon thee, who art the fountain of mercy, in whom God is reconciling himself to the world, the greatest of sins and sinners may find an all-sufficiency in thy blood to cleanse them from all sin. O dearest Father of mercy, look upon me as righteous in and through the imputed righteousness of thy Son; he payed the debt by his own offering up himself for sin, and in that thy justice is satisfied, and thy mercy is magnified. Grant me thy love, O dearest Father, assist me, and stand by me in the needful hour of death, give thy angels charge over my poor soul, that the evil one may not touch nor hurt it. Defend me from his power, deliver me from his rage, and receive me into thine eternal kingdom, in and through the alone merits of my dearest Redeemer, for whom I praise thee; To whom, with thy self and Holy Spirit, be ascribed all glory, honour, power, might, and dominion for ever and ever, Amen.

"Dear Lord Jesus, receive my spirit, Amen.

"*Newgate, Oct. 29, 1685. R. NELTHORP.*"

L. C. J. Who was it then?

Dunne. It was Mr. Carpenter, my lord.

L. C. J. And why didst thou tell so many lyes then? Jesu God! that we should live to see any such creatures among mankind, nay, and among us too, to the shame and reproach be it spoken of our nation and religion: is this that that is called the Protestant religion, a thing so much boasted of, and pretended to? we have heard a great deal of clamour against Popery and dispensations; what dispensations, pray, does the Protestant religion give for such practices as these? I pity thee with all my soul, and pray for thee, but it cannot but make all mankind to tremble and be filled with horror, that such a wretched creature should live upon the earth: Prithee be free, and tell us what discourse there was.

Dunne. My lord, they did talk of fighting, but I cannot remember what it was.

L. C. J. Did you lie with them?

Dunne. No, my lord, I did not.

L. C. J. Well, I see thou wilt answer nothing ingenuously, therefore I will trouble myself no more with thee: go on with your evidence, gentlemen.

Mr. Jennings. My lord, we have done, we have no more witnesses.

L. C. J. Then you that are for the prisoner at the bar, now is your time to make your defence; you hear what is charged upon you, and what a kind of shuffling here has been to stifle the truth; and I am sorry to find the occasion to speak it, that under the figure and form of religion, such practices should be carried on. What have you to say for yourself?

Mrs. Lisle. My lord, that which I have to say to it, is this: I knew of nobody's coming to my house but Mr. Hicks, and for him I was informed that he did abscond, by reason of warrants that were out against him for preaching in private meetings, but I never heard that he was in the army, nor that Nelthorp was to come with him; and for that reason it was, that I sent to him to come by night: but for the other man, Nelthorp, I never knew it was Nelthorp, I could die upon it, nor did not know what name he had, till after he came into my house; but as for Mr. Hicks, I did not in the least suspect him to have been in the army, being a Presbyterian minister, that used to preach, and not to fight.

L. C. J. But I will tell you, there is not one of those lying, sniveling, canting Presbyterian rascals, but one way or other had a hand in the late horrid conspiracy and rebellion; upon my conscience I believe it, and would have been as deep in the actual rebellion, had it had any little success, as that other fellow Hicks; their principles carry them to it; Presbytery has all manner of villainy in it, nothing but Presbytery could lead that fellow Dunne to tell so many lies as he has here told; for shew me a Presbyterian, and I will engage to shew a lying knave.

Mrs. Lisle. My lord, I abhorred both the principles and practices of the late rebellion.

L. C. J. I am sure you had great reason for it.

Mrs. Lisle. Besides, my lord, I should have been the most ungrateful person living, should I have been disloyal, or acted any thing against the present king, considering how much I was obliged to him for my estate.

L. C. J. Oh then! Ungrateful! Ungrateful adds to the load which was between man and man, and is the basest crime that any one can be guilty of.

Mrs. Lisle. My lord, had I been tried in London I could have had my lady Abergavenny, and several other persons of quality, that could have testified how much I was against this rebellion, and with what detestation I spoke against it, during the time of it; for I was all that time at London, and staid there till after the duke of Monmouth was beheaded; and if I had certainly known the time of my trial in the country, I could have had the testimony of those persons of honour for me. But, my lord, I am told, and so I thought it would have been, that I should not have been tried as a traitor for harbouring him, till he was convict for a traitor. My lord, I would take my death of it, that I never knew of Nelthorp's coming, nor any thing of his being Nelthorp; I never asked his name, and if he had told it me, I had then remembered the proclamation. I do assure you, my lord, for my own part, I did abhor those that were in that horrid plot and conspiracy against the king's life; I know my duty to my king better, and have always exercised it; I defy any body in the world that ever knew the contrary, to come to give testimony.

L. C. J. Have you any more to say?

Mrs. Lisle. As to what they say of my denying Nelthorp to be in my house, I was in great consternation and fear of the soldiers, who were very rude and violent, and could not be restrained by their officers from robbery, and plundering my house. And I beseech your lordship to make that construction of it; and I humbly beg of your lordship not to harbour an ill opinion of me, because of those false reports that go about of me, relating to my carriage towards the old king, that I was any ways consenting to the death of king Charles I, for, my lord, that is as false as God is true; my lord, I was not out of my chamber all the day, in which that king was beheaded, and I believe I shed more tears for him, than any woman then living did; and this the late countess of Monmouth, and my lady Marlborough, and my lord chancellor Hyde, if they were alive, and twenty persons of the most eminent quality, could bear witness for me. And I do repeat it, my lord, as I hope to attain salvation, I never did know Nelthorp, nor never did see him before in my life, nor did I know of any body's coming, but Mr. Hicks, and him I did know to be a nonconformist minister; and there being, as is well known, warrants out to apprehend all nonconformist ministers, I was willing to give him shelter from these warrants. I was come down but that week into the country, when

this man came to me from Mr. Hicks, to know if he might be received at my house; and I told him, if Mr. Hicks pleased, he might come upon Tuesday in the evening, and should be welcome; but withal I told him, I must go away the Monday following from that place, but while I staid I would entertain him. And I beseech your lordship to believe, I had no intention to harbour him but as a nonconformist, and that I knew was no treason: It cannot be imagined, that I would venture the hazard of my own life, and the ruin both of myself and children, to conceal one that I never knew in my life, as I did not know Mr. Nelthorp, but had heard of him in the proclamation. And for what whiteheaded man that speaks of my denying them, as I said before, he was one of them that rifled and plundered my house, and tore open my trunk; and if I should not be convicted, he and the rest of them may be called to an account for what they did, for they ought not to have meddled with my goods: Besides, my lord, I have a witness that can testify what Mr. Nelthorp said, when he was examined before—

L. C. J. Look you, Mrs. Lisle, that will signify little; but if you have any witnesses, call them, we will hear what they say: Who is that man you speak of?

Lisle. George Creed his name is; there he is.

L. C. J. Well, what do you know?

Creed. I heard Nelthorp say, that my lady Lisle did not know of his coming, nor did not know his name, nor had he ever told his name, till he named himself to col. Penruddock, when he was taken.

L. C. J. Well, this is nothing; she is not indicted for harbouring Nelthorp, but Hicks: Have you any more witnesses?

Mrs. Lisle. No, my lord.

L. C. J. Have you any more to say for yourself?

Mrs. Lisle. My lord, I came but five days before this into the country—

L. C. J. Nay, I cannot tell when you came into the country, nor I do not care; it seems you came time enough to harbour rebels.

Mrs. Lisle. I staid in London till all the rebellion was past and over; and I never uttered a good word for the rebels, nor ever harboured so much as a good wish for them in my mind: I know the king is my sovereign, and I know my duty to him; and if I would have ventured my life for any thing, it should have been to serve him. I know it is his due, and I owed all I had in the world to him: But though I could not fight for him myself, my son did; he was actually in arms on the king's side in this business; I instructed him always in loyalty, and sent him thither; it was I that bred him up to fight for the king.

L. C. J. Well, have you done?

Mrs. Lisle. Yes, my lord.

L. C. J. Have you a mind to say any thing more?—*Mrs. Lisle.* No, my lord.

L. C. J. Then command silence. [Which was done by proclamation.]

Lisle. My lord, may I speak one word more? My lord, I beseech you afford me your patience and your advice; Keinsham, where Mr. Hicks is said to be in arms, does not lie in this county.

L. C. J. That is nothing: But the treason you committed was in this county.

Mrs. Lisle. But I assure your lordship I never knew he was in the army; and for any talk or discourse in private, about his or Nelthorp's being there, I never heard any; indeed one of them asked me, whether the duke of Monmouth was beheaded? And I told them, yes, for so he was before I came out of town: And that is all the discourse that I can remember, wherein he is concerned.

L. C. J. Well, have you any more to say now?—*Mrs. Lisle.* No, my lord.

L. C. J. Then, gentlemen of the jury: This is a case of very great example, and withal of very great weight and moment; wherein the interest of the public, and the life of a person of quality and fortune are put into your hands. And the great business which has detained both us and you so long, has been an endeavour (if it were possible) to find out the truth: which indeed is the business of all enquiries of this nature: we sit not here, nor are you there upon any other errand; nor is any thing desired by the court, or required of you, but that the truth may be made manifest. 'Tis that you are bound to, by the oaths you have taken in this service; and in that inquiry you are to be guided by the evidence that has here been given forth unto you; for your oath is, 'That you shall well and truly try, and true deliverance make, between our sovereign lord the king and the prisoner at the bar, according to your evidence, as you shall answer it to God.' So that, gentlemen, this oath of yours, being your direction what is your duty, and you being all persons of quality and reputation in your country, men of great understanding and known integrity, it is to be hoped, that not any thing can move you, either to compassion of the prisoner on the one hand, or her allegations and protestations of innocence; nor, on the other hand, to be influenced by any thing that comes from the court, or is insinuated by the learned counsel at the bar: but that you will entirely consider what evidence has been given to you, and being guided by that evidence alone, you that are judges of the fact, will let us know the truth of that fact, by a sincere and upright verdict.

And inasmuch, gentlemen, as the evidence has been long in giving (though the substantial part of it, perhaps, be in a narrow compass) I will repeat it to you, as near as I can, with all faithfulness and integrity, as I shall answer it to the Great Judge of heaven and earth, before whom you, and we, and all must stand to be judged; without any aggravation or alteration on the one side, and without any omission on the other: and I shall do it, purely to help your memories who are to determine the fact; and I do pray and adjure, that you would do

equally, according to the trust reposed in you, and according to the oath that you have taken. And I would repeat it once more, that you are not to be led by any insinuations of the prisoner, nor by any allegations from the learned counsel, whose business it is to open the fact; but that fact so opened, is no further to guide you in your enquiry than as it is proved.

Gentlemen, before I come to the particular evidence of this fact, I must crave leave to say something of a matter in general that is very well known. It was very well observed by that learned gentleman that opened the cause at the beginning, that we are all of us here unspeakably obliged to bless the great God of heaven, the Father of mercies, and praised for ever be his holy name, for his infinite goodness in preserving and protecting us from the imminent ruin which the late horrid and detestable rebellion would (had it succeeded) have inevitably brought upon us; had not he of his own infinite mercy and gracious goodness protected and delivered us from our enemies, they had undoubtedly swallowed us up quick: but as the attempts of our enemies were very malicious, so the preservation and deliverance of our good God was very great and signal.

And we have reason to bless that great God for many deliverances he has been pleased to give us: we are by no means to forget his mercy towards our late sovereign of blessed memory, and with him towards us, when he brought him out of exile and bondage, and us out of that state of confusion and misery, which our country had for many years groaned under: when all religion as well as sovereignty, and all obedience, duty and deference to superiors were quite lost, God of his infinite mercy, and of his own most gracious bountiful disposition brought our blessed sovereign (now in heaven), and his gracious majesty that now reigns, and all the royal family, after a long and tedious rebellion, into a quiet and peaceable possession of their undoubted rights and inheritances, and with him restored to us our religion, the best of religions, the true Protestant reformed religion, the religion established by law, which now is, and I hope will ever remain established among us, as now professed and practised in the Church of England: and when we reflect on that deliverance, we are to this circumstance to heighten both our admiration and our gratitude, that it was brought about without the least drop of bloodshed, by a miraculous Providence, and by the strength of an Almighty arm.

Besides, gentlemen, we cannot be sufficiently thankful to our God for the mercies we enjoyed under that blessed king; for we are to consider we lived in all the affluence of peace and plenty; we safely and uninterruptedly enjoyed our religion, the greatest blessing on this side immortality; our lives, liberties, and properties inviolably were secured; every man safe under the shadow of his own vine, and eat the fruit of his own labour; and while our neighbours suffered the calamities of war, we

were surrounded with all the blessings of peace, and slept securely under the government of a gracious and merciful king: every one of us had even what our own hearts could desire, and if we wanted any thing, it could be only thankful and dutiful hearts to our God and our prince, during whose life we continued in a happy state and condition.

But it having pleased God, the King of kings, the great Ruler both of heaven and earth, to take that blessed prince to himself, what thanks ought we to pay him for his gracious goodness, in leaving so great and so glorious a successor as his royal brother, our present sovereign, whom I pray Almighty God may long live and happily reign among us! This gracious prince, as soon as ever he came to the possession of his undoubted right and inheritance, upon his brother's death, in the imperial crown of this realm, to entitle himself to the good opinion of his people, and to engage them to the expression of that duty which the Christian religion, and I am sure particularly the religion of the true Church of England does oblige all its followers to; what does he? Even before he was asked, in the very first minutes of his reign, he begins with bounty to his subjects, and declares his resolution to preserve them safe in their dearest and most precious enjoyments, in their religion; and not only in that, but in the laws, liberties, rights and properties, with the most inviolable security to their lives, and all that is dear unto them: and this gracious declaration came from his royal mouth without any solicitation or any inducement, save only the generous and gracious inclination of his own royal heart: and to give it the greater edge, to the honour of the Church of England's religion be it spoken, he was pleased to tell what opinion he had of our religion and its true professors, that they were the true friends and faithful supporters of the government; an opinion which I hope every honest Church-of-England-man will endeavour to cherish by a suitable practice of what is certainly the doctrine of that religion, loyalty and obedience.

But alas! without horror and confusion, we cannot but remember, that instead of making good returns of respect and duty to so gracious a sovereign for his great bounty, faction and sedition, hypocrisy and malice had besotted and bewitched a great part of his subjects, and corrupted, blinded, and bigotted them to such an height of impiety, that a rebellion must begin his reign, and all the poisonous arts of disobedience are made use of to instigate the king's subjects, with all the rancour and vengeance in the world to rise against him.

Blessed God! What is the way that this devil of sedition comes to bewitch people to such a height, when Almighty God had so lately delivered us from the misery and confusion of a civil war? It is that way surely, we find it but too plain, which he had always found very successful, the pretence of saintship, conscience, and that glorious name, re-

ligion. What religion can it be? The Christian religion had this form of its great ruler; 'Render to Cæsar the things that are Cæsar's, and to God the things that are God's.' But these men act as though that were not scripture, when yet pronounced by our blessed Lord himself, and both joined in one sentence as indispensable duties; and they will hardly be brought to believe that rebellion is the sin of witchcraft, though the scriptures have directly given it that character. Good God! that we should live to such an age; when men can call God to assist and protect them in a rebellion: for not to reflect upon what was done in former times, it is late enough for us to remember, but not without horror, that men have been tyed by all the bonds and contracts hell could invent, in a combination and confederacy to murder both the late king and his present majesty, and all this while this must be sanctified with the name of religion. So that a man that is a murderer by the law of God, and an offender against the first precept that God Almighty enjoined, not to shed innocent blood, shall yet be a saint for an assassination upon the account of religion, and this shall be accounted a pious cause to obtain heaven.

Who did these miscreants, that were justly by law condemned for that barbarous conspiracy, when they came to die, invoke? The great God, to testify for them, that they died for the sake of religion. When they come to suffer for treason, they can bless God Almighty for the honour he does them in dying in his cause, and call themselves martyrs for it.

Nay, it is not yet more strange and horrid, that some men, who call themselves ministers of the gospel, shall come to be bell-wethers of rebellion, and cry out they are fighting the Lord's battle, when they are attempting to kill the Lord's anointed?

Jesus God! that ever we should have such a generation of vipers among us, that can plunge themselves into the most horrid impieties, and yet think to escape confusion here, and purchase a crown of glory hereafter!

When we consider, gentlemen, the ring-leader of this late rebellion, the center of all our trouble, the arch-rebel and traitor Monmouth I mean, should arrive to such an height of impudence and villany, as to bless God that he could with satisfaction reflect upon a two years life very regularly spent; but how? In manifest adultery and uncleanness; nor can it be spoke or thought of without inexpressible horror.

Alack! gentlemen, when we find religion made use of as a subterfuge and cloak for such impious practices, it gives too much occasion for our enemies to think us Atheists. The very Turks will hate us, and Pagans detest us, as the most irreligious, profane people in the world; when we who profess love and duty to Jesus Christ as our holy and blessed Redeemer, do these things, and even boast of them, whom they that deny him blush at the very thoughts

of, and never so much as name, much less act without horror and confusion.

Gentlemen, I do not speak this for the sake of speaking, but I would fain deliver my own soul and yours from having any hand in such horrible impieties, and that, by testifying our abhorrence of them, by publicly declaring ourselves to be enemies to those hypocrites, the non-conformist parsons; I mean, that pretend indeed pure religion to be their great aim and end, and through a scrupulosity of conscience, cannot conform to that decency and duty which is required of them in the church; but yet without remorse, can kill or be the occasion of the death of ten thousand people, as in the consequence of this late rebellion perhaps it may prove. For do but consider how many families by this means are utterly ruined, how many innocent babes starved, or exposed to the utmost penury and want; how many widows left in a distressed desolate condition, destitute of all manner of provision and maintenance; and all this by the instigation of these villains that have preached and prayed them into it, gilding the bait that had drawn them into it, by the specious pretence of religion and conscience!

Consider, gentlemen, this is that which has brought this poor unfortunate gentlewoman, the prisoner at the bar, into this deplorable condition: What could prevail upon her to run such a hazard as this, but only her affection and deluded zeal for that wretch, that had nothing but the name of religion; for his soul is blacker in the eyes of God, and the thoughts of all honest man, than ever his coat was? You see by the proofs what an impudent unsanctified villain he was; for when these gentlemen that have given evidence, were in the custody and under the power of the rebels, he must tempt and provoke them to leave off and forsake their duty to their natural lord and lawful sovereign the king, whom God had set over them, and submit to an usurper, a king of their own making; and such a king too, that I dare boldly affirm, the meanest subject within the kingdom that is legitimate, has a better title to the crown, than he had; and this all under the pretence of religion, and the Protestant religion too! And that same prince of theirs must have the title of a Protestant prince; and an excellent Protestant he lived and died, living in the open violation of the law of God, and in manifest rebellion against his lawful sovereign; and he died without any remorse for either, boasting of his own wickedness beyond the bounds of common modesty and humanity.

Gentlemen, let us all join in hearty prayers to our God, the God of infinite mercy, that as he has yet once more delivered our sovereign, and us with him, out of the jaws of these lions and ravenous wolves; so he would still please to preserve him and us from the hands of all our enemies; and I pray God it may have that good effect upon all of us, as to make us more careful and conscientious in our duty to him.

and his vicegerent the king. To him alone must all the glory be ascribed; it was not our hands or arms of the king, that could have saved or protected us, had not the special interposition of the Divine Power and goodness wrought this deliverance for us.

But now, gentlemen, to come to the particular case here before you; and the fact, upon the evidence, stands thus: It is very notorious this fellow Hicks was actually in this rebellion; you have it sworn by three several persons that saw him, and they particularized to you such tokens of their knowledge and remembrance, that sure, if any thing can, must make him blush at the repetition of them; for they tell you, when they were in prison he would have corrupted them from their duty; and yesterday they saw him in prison, and upon discourse of some circumstances, he could not deny but he was there.

This person, Mrs. Lisle, the prisoner at the bar, she is accused for receiving and harbouring this person: And, gentlemen, I must tell you for law, of which we are the judges, and not you, That if any person be in actual rebellion against the king, and another person (who really and actually was not in rebellion) does receive, harbour, comfort and conceal him that was such, a receiver is as much a traitor, as he who indeed bore arms: We are bound by our oaths and consciences, to deliver and declare to you what is law; and you are bound, by your oaths and consciences, to deliver and declare to us, by your verdict, the truth of the fact.

Gentlemen, that he was there in rebellion, is undeniably and unquestionably proved: That there are sufficient testimonies to satisfy you that this woman did receive and harbour him, is that which is left to your consideration; and, for that, the proof lies thus: And truly I am sorry to have occasion for repeating the circumstances of the proof; I mean, the great art that has been used to conceal it; how difficult a thing it was to come at it; what time has been spent in endeavouring to find out truth in a fellow, that in defiance of all admonition, threats and persuasion, would prevaricate and shuffle to conceal that truth; nay, lie and forswear himself to contradict it. But out of true Christian charity, as I told him, so I tell you I do heartily pray, and all good Christians I hope will join with me in it, to the God of infinite mercy that he would have mercy upon his soul, upon which he hath contracted so great a guilt by the impudence of his behaviour, and pertinacious obstinacy in those falsehoods which he hath made use of in this case.

Gentlemen, I would willingly forget all his prevarications, but I must take notice of them, in short, to come to the truth. First, he says, he came upon an errand from a man, he knows not whom, to my lady Lisle's house; and thither he is brought by one Barter; and when he comes there, he tells her, he comes in the name of one Hicks, who desired to be entertained there. Then she asks

the question, whether Hicks had been in the army; and he told her he did not know; and he swears now he did not: But at last it came out, that it was to entertain Hicks and another person; but it should seem that other persons was not named; and Barter tells you that Hicks and another person (who afterwards proved to be Nelthorp, are promised to be entertained, and ordered to come in the evening. But not to go backward and forward, as he has done in his evidence, denying what he afterwards acknowledged, that he saw any body besides a little girl; that he pulled down the hay out of the rack for his horse; that he eat any thing but cake and cheese that he brought with him from home; that he was ever made to drink, or to eat or drink in the house, or ever meddled or made with any body in the house: At last we are told that Carpenter met with him; and came out with a lanthorn and candle, took care of his horse, carried him into the room where Hicks and Nelthorp were, and the prisoner at the bar, Mrs. Lisle; there they all supped together; there they fell into discourse; there Nelthorp's name was named, and they talked of being in the army, and of the fight: and so it is all come out, and makes a full and positive evidence.

But then suppose there was no more than the other evidence, and that the fellow remain in an hard hearted obstinacy, then you are to consider the circumstances even from his first evidence, that this was after the rebellion was all over; for it seems during the rebellion she was in London, and it was notoriously known that the King's forces were in pursuit of the rebels, and this without any positive proof, would be in itself a sufficient testimony to convince any considerate person, that she was to conceal those she ought not to conceal; because she directed the particular time wherein they should come, and that was at night; and no prudent person would receive strangers in the night, and give such directions in such a season without some extraordinary ground for it. When they came there, she provided a supper for them; and you see what care is taken, that the woman only is permitted to bring that supper to the door, and the husband must set it on the table; no body is permitted to attend there but he. Works of darkness always desire to be in the dark: works of rebellion and such like are never done in the light.

But then comes that honest fellow Barter (I call him so because he appears so to be, and he ought to be remembered with a great remark for his honesty), he tells you, he conducted him to the house, and what discourse passed there in his hearing. The prisoner asked him, what countryman he was, and whether he was a brick-maker, and promised him so many acres of land in Carolina. The fellow, upon observation and consideration, found himself under a great load, could not sleep nor eat quietly, as men that have honest minds are uneasy under such things; falsehood, and treason, and hypocrisy are a heavy load; and, blessed be

God, things were by this means discovered : for he goes and tells Col. Penruddock ; and withal, Dunne swears to Barter, it was the bravest job that he ever had in his life ; whereas in the beginning of his story, he would have told you a strange story of a black beard and I do not know what, and that he got not one groat by it : that he gave the man half a crown out of his own pocket, and was so industrious, as when he knew the way no farther, that he would hire one himself to shew him the way, and all for nothing, but only for the kindness he had for a black beard.

Besides, gentlemen, I am sorry to remember something that dropped even from the gentleman herself ; she pretends to religion and loyalty very much, how greatly she wept at the death of king Charles the Martyr, and owns her great obligations to the late King and his royal brother ; that she had not had a being, nor any thing to maintain it for twenty years last past but from their bounty, and yet no sooner is one in the grave, but she forgets all gratitude, and entertains those that were rebels against his royal successor. I will not say that hand her husband had in the death of that blessed martyr,* she has enough to answer for of her own guilt ; and I must confess it ought not one way or other to make any ingredient into this case what she was in former times : and I told a relation of her's, Mr. Tipping by name, that came to me last night, to desire that she might not lie under some imputations that were gone abroad of her, that she rejoiced at the death of king Charles I. nor that any false report of that nature might influence the court or jury against her, that it should not : be the thing true or false, it is of no weight one way or other in the trial of this case, nor is she to be accountable for it.

But I must remember you of one particular, that is plain upon this evidence, and is of very great moment in this case ; that after all these private messages and directions given to come by night, and the kind reception they met with when they came, and after all this care to lodge them and feed them, when colonel Penruddock, after the discovery made by Barter, came to search her house, then she had no body in it truly, which is an aggravation of the offence testified by colonel Penruddock himself, whose father likewise was a martyr, and died for his fidelity to the crown ; and who was the judge of that father, we all very well know. †

* " This was an unjust insinuation, only to prejudice the jury, being, as the chief justice owned, nothing to the purpose ; for which reason it should have been let alone, and though he said, it ought not to influence the Case, yet he knew it was very likely to do so." Note to Former Edition.

† It appears, by the Report (Vol. 5, p. 767, in this Collection) of the Trial of Col. John Penruddock in 1655, that Lisle was one of the Commissioners of Oyer and Terminer, before whom that trial was had. See vol. 5, p. 775.

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God Almighty is a just God, and it may be worth considering (especially by her) how God has been pleased to make use of him as the instrument in this business ; and she would likewise do well to consider the finger of God in working upon the heart of that man Barter, who was employed in all this affair, and that all the truth has been told by Nelthorp, that blackest of villains Nelthorp, that would have murdered the late king and his royal brother ; that he was one of those barbarous, malicious assassins in that black conspiracy, and outlawed, should be harboured, by one that pretends a love for the royal family, and entertained and discoursed with at night about being in the army ; yet that he and that other villain Hicks, who pretends to religion and to be a preacher of the gospel, but is found in rebellion and in the company of traitors, should be denied the next morning.

I hope they themselves are all by this time satisfied truth will come out, and I hope you will not be deceived by any specious pretences. Our forefathers have been deluded, but the deception, I hope, is now at an end. And I must needs say, if all these witnesses that have freely discovered their knowledge, joined to that truth which is at length drawn from that Dunne, be worthy of any credit, it is as plain a proof as can be given, and as evident as the sun at noon day.

Gentlemen, upon your consciences be it : the preservation of the government, the life of the king, the safety and honour of our religion, and the discharge of our consciences as loyal men, good Christians, and faithful subjects, are at stake ; neither her age nor her sex are to move you, who have nothing else to consider but the evidence of the fact you are to try. I charge you, therefore, as you will answer it at the bar of the last judgment, where you and we must all appear, deliver your verdict according to conscience and truth. With that great God, the impartial judge, there is no such thing as respect of persons ; and in our discharge of our duty in courts of justice, he has enjoined us, his creatures, that we must have no such thing as a friend in the administration of justice, all our friendship must be to truth, and our care to preserve that inviolate.

Lisle. My lord, if your lordship please —

L. C. J. Mistress, you have had your turn, you cannot now be heard any more after the jury is charged.

Mrs. Lisle. My lord, I did not know Nelthorp, I declare it, before he was taken.

L. C. J. You are not indicted for Nelthorp, but we are not to enter into dialogues now, the jury must consider of it.

Jury-man. Pray my lord, some of us desire to know of your lordship, in point of law, whether it be the same thing, and equally treason, in receiving him before he was convicted of treason, as if it had been after.

L. C. J. It is all the same, that certainly can be no doubt ; for, if in case this Hicks had

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been wounded in the rebels army, and had come to her house and there been entertained, but had died there of his wounds, and so could never have been convicted, she had been nevertheless a traitor.*

Then the jury withdrew, and staying out a while, the lord Jefferies expressed a great deal of impatience, and said, he wondered that in so plain a case they would go from the bar, and would have sent for them with an intimation, that if they did not come quickly, he would adjourn, and let them lie by it all night; but after about half an hour's stay the Jury returned, and the Foreman addressed himself to the court thus:

Foreman. My lord, we have one thing to beg of your lordship some directions in, before we can give our verdict in this case; We have some doubt upon us, whether there be sufficient proof that she knew Hicks to have been in the army.

L. C. J. There is as full proof as proof can be; but you are judges of the proof, for my part I thought there was no difficulty in it.

* "With regard to a person knowingly receiving and harbouring a traitor, the learned judge [See 1 Hale's P. C. chap. xxii p. 238] in the place lately cited argueth, That though he is in the eye of the law a principal traitor and shall not be said to be an accessory, yet thus much he partaketh of an accessory, his indictment must be special of the receipt and not of the principal treason. If he is indicted by a several indictment, he shall not be tried till the principal be convicted; if in the same indictment with the principal, the jury must be charged to enquire first of the principal offender, and if they find him guilty, then of the receipt; and if the principal be not guilty, then to acquit both; for though in the eye of the law they are both principals in treason, yet in truth he (the receiver) is so far an accessory that he cannot be guilty if the principal be innocent.

"In the case of Mrs. Lisle, whose hard fate it was to fall into the hands of perhaps the worst judge that ever disgraced Westminster-hall, no regard was paid to this doctrine. I would not be thought to mention this case as an authority, upon which a doubt can at this day be possibly raised. I do it for the sake of what happened afterwards, which I take to be an authority with me. Her attainder was afterwards reversed in parliament; and the act reciteth among other hardships of her case, 'That she was, by an irregular and undue prosecution, indicted for entertaining and concealing John Hicks a false traitor knowing him to be such; though the said Hicks was not at the time of the trial attainted or convicted of any such crime.'" Foster, 345.

See also, 1 Hale's P. C. chap. 22. 2 Hale's P. C. chap. 28, p. 273. East's P. C. chap. 2, s. 35, 56, 62, chap. 3.

Foreman. My lord, we are in some doubt of it.

L. C. J. I cannot help your doubts: was there not proved a discourse of the battle and of the army at supper-time?

Foreman. But, my lord, we are not satisfied that she had notice that Hicks was in the army.

L. C. J. I cannot tell what would satisfy you; Did she not enquire of Dunne, whether Hicks had been in the army? And when he told her he did not know, she did not say she would refuse him if he had been there, but ordered him to come by night, by which it is evident she suspected it; and when he and Nelthorpe came, discoursed with them about the battle and the army. Come, come, gentlemen, it is a plain proof.

Foreman. My lord, we do not remember that it was proved that she did ask any such question when they were there.

L. C. J. Sure you do not remember any thing that has passed? Did not Dunne tell you there was such discourse, and she was by and Nelthorpe's name was named? But if there were no such proof the circumstances and management of the thing is as full a proof as can be; I wonder what it is you doubt of?

Mrs. Lisle. My lord, I hope—

L. C. J. You must not speak now.

Then the jury laid their heads together for near a quarter of an hour, and at length agreed; and being called over, delivered in this verdict by the foreman.*

* "It appears by the public prints, the Jury were so unsatisfied by the evidence, that they thrice brought her in Not Guilty, at last upon Jefferies's threats, they brought her in Guilty." R. Coke's Detection, &c. vol. 2, p. 339, edit. 1719.

"Though the Jury brought her in three times Not Guilty, yet Jefferies threats so far prevailed, that she was at last found Guilty." Kennett, vol. 3. p. 433, 2d ed. 1713.

"The Jury, not satisfied with the evidence, brought her in Not Guilty. But Jefferies in great fury sent them out again. They found her not guilty three times: but Jefferies threatening them with an attaind of Jury, she was brought in Guilty, and executed accordingly." Rapin, v. 2, p. 750, edit. of 1743.

"The Jury brought her in Not Guilty; but the execrable judge, in great fury, sent them out again, yet they brought her in a second time Not Guilty. Then he seemed as in a transport of rage, threatening them with an attaind of treason. Thus overcome with fear, they at the third time brought her in guilty." Oldmixon, vol. 1, p. 706, edit. 1730.

"Though the jury brought her in Not Guilty three several times, yet judge Jefferies' threats so far prevailed that at last she was found Guilty." Echard, p. 1068, fol. ed. of 1740.

Cl. of Ar. Alice Lisle, Hold up thy hand. Gentlemen of the jury, look upon the prisoner, how say ye? Is she guilty of the treason whereof she stands indicted, or not guilty?

Foreman. Guilty.

Cl. of Ar. What goods or chattels, lands or tenements had she?

Foreman. None that we know of.

Cl. of Ar. Look to her, jailor, she is found guilty of high treason; and prepare yourself to die.

Then the Verdict was recorded.

L. C. J. Gentlemen, I did not think I should have had any occasion to speak after your verdict, but finding some hesitancy and doubt among you, I cannot but say, I wonder it should come about; for I think in my conscience, the evidence was as full and plain as could be, and if I had been among you, and she had been my own mother, I should have found her guilty.

Then the Court adjourned till the next morning.

Dies Veneris 28 Augusti, 1685.

This day Alice Lisle was brought to the bar, and being asked what she had to say for herself, why judgment of death should not pass upon her, being convicted of high treason; but offering nothing, she was, with the rest of the prisoners that were to receive the sentence of death, condemned by the lord Jefferies, who passed sentence thus:

L. C. J. Alice Lisle and you the several prisoners now at the bar, you have been severally indicted, arraigned, and now stand severally convicted of crimes that by the laws of the land are to be punished with death; you stand convicted by your equals, by a jury of

“The jury were dissatisfied once and again, but my lord’s threats and other managery so disposed the jury that at last they brought the lady in Guilty.” *Life and Death of George Lord Jeffreys.*

Ralph (vol. 1, p. 889) states, that Mrs. Lisle’s last paper confirms the representations that Jefferies by menaces compelled the jury to declare her guilty, but I find nothing of this sort in the paper as printed in this report or as abridged by Ralph himself.

“Lord Bacon in his speech to sir Richard Hutton, upon his being appointed a judge of the Court of Common Pleas, told him that he should be a light to jurors, to open their eyes, but not a guide to lead them by the noses.”

Bacon’s Works vol. 2, p. 281, ed. of 1753.

See in vol. 10, p. 938, of this Collection, an instance of resistance to a judge by a Scots Jury. See too in vol. 6, the cases of Penn and Mead and of Bushell. See also in this volume p. 96, a case of a Scots assize remanded till they pronounced the pannall guilty.

your country, against whom you might have had, and were allowed to make (and one of you did make) what challenges you could: but upon full evidence, by that Jury of your own country men you have been found guilty of those crimes for which you are to die; and there remains now no more with the court but to perform their duty, which is to pronounce that sentence, that dismal sentence of death, which the law has provided for such offenders.

And sure I am, it cannot but be thought uneasy, and far from pleasant, not only to me, but to every body else that sees such a lamentable object, such a number of persons that might have acquired to themselves an honest livelihood by diligence in their lawful callings, being dutiful to God, and obedient to their sovereign and the laws of the land, who yet in defiance of all these, have brought themselves to a shameful untimely end by their own wicked courses.

Particularly, I cannot but lament the deplorable condition of you, Mrs. Lisle, a gentlewoman of quality and of fortune, so far stricken in years, therefore ought to have had more discretion: one, who all your life-time have been a great pretender to, and professor of, religion, and of that religion which bears a very good name, the Protestant religion; but that name has been perverted to very ill purposes by some people, who have had nothing but the name to protect themselves under.

There is no religion whatsoever (except that hypocritical profession of theirs which deserves not the name of religion, I mean the canting, whining, presbyterian, phantical profession, that gives the least countenance to rebellion or faction; and I cannot but lament to find you involved in that herd.

And I cannot but deplore it withal, as a most sad and dismal thing, that in this little case so many perjuries should be added to the crime of treason, such as for my part I cannot but tremble to remember; perjuries in defiance of all the instruction and admonition that christian charity could express, and in defiance of the omniscience and justice of the all-seeing God of truth: you ought to reflect upon whose account those perjuries were committed, and to lay them seriously to heart, for ere long, in a few hours (deceive not yourself) you are to give an account at a greater bar for all your thoughts, words, and actions.

You would likewise do well to bethink yourself with all seriousness and remorse, of your own false asseverations and protestations, that you upon your salvation should pretend ignorance in the business, when since that time, even since the last night, there has been but too much discovered how far you were concerned; no, it is not unknown who were sent for upon the Monday night, in order to have that rebellious, seditious fellow to preach to them, what directions were given to come through the orchard the back and private way, what orders were given for provision, and how the horses were appointed to be disposed of. I only speak

this, that you should bethink yourself in this short time that you have left here upon earth, to get these sins of your's duly repented of, and truly pardoned; and not only so, but consider you have it now in your power to make some recompence to the public justice of the nation, by discovering the truth in this matter, and all religion enjoins you to do what you can: for without the infinite mercy of the great God you are in a deplorable condition, and without true contrition and repentance, of which all the recompence you can make, both for public and private injuries, is a part, you can never hope for the mercy of that God to be extended to you.

Sirs; It is not in my province to advise you in your preparation for that eternity you are all suddenly to enter into: but out of pure charity, and hearty compassion to you, and the miserable condition you have brought yourselves into, and out of a tender regard to your precious immortal souls, I cannot but assure you of my own, and recommend you to the earnest and fervent prayers of all good Christians, to the God of infinite mercy, that he would be merciful unto you all.

And the great God of his gracious goodness grant, that all we that are here may learn such lessons, as are proper from such examples! From that woman the sad and dismal effects of disloyalty and treason; and from all the rest, the deplorable mischiefs that attend licentiousness and debauchery: for, by the course of nature, most of these might have lived a much longer time, and that with comfort to themselves and their relations; but now, to the anguish of their own hearts, and the unspeakable grief of all their friends, they have shortened their own days, and brought a dismal sentence upon themselves.

And I recommend them not only to myself and others, but chiefly and especially to the pious, orthodox and learned ministry, to give the best assistance they can, during the short remainder of their time; for their abode here upon earth is but short, and God grant they may meet with a blessed immortality.

There remains no more for me to do, I say, but to pronounce the sentence of the law, which is this; and the Court does award:

That you, Mrs. Lisle, be conveyed from hence to the place from whence you came, and from thence you are to be drawn on a hurdle to the place of Execution, where your body is to be burnt alive till you be dead. And the Lord have mercy upon your Soul.

The rest of the Prisoners had the usual judgment as in Cases of Felony.

L. C. J. Look you, Mrs. Lisle, when I left his majesty, he was pleased to remit the time of all executions to me: that where-ever I found any obstinacy or impenitence, I might order the executions with what speed I should think best: therefore, Mr. Sheriff, take notice, you are to prepare for the execution of this gentlewoman this afternoon. But withal, I give you, the

prisoner, this intimation: we that are the judges, shall stay in town an hour or two; you shall have pen, ink, and paper, brought you, and if in the mean time you employ that pen, ink and paper and this hour or two well, (you understand what I mean) it may be you may hear further from us, in a deferring the execution.

Then the prisoner was taken away. But afterwards, upon the intercession of some divines of the church of Winchester, she was respited till Wednesday the 2nd of September.

On Sunday the 30th of August, the following letter was sent to the right honourable the earl of Clarendon, Lord Privy Seal, at Windsor; [which the earl did then read to the king] who answered, That he would do nothing in it, having left all to the lord chief justice.

“ My Lord,

“ Understanding that Mrs. Lisle is condemned, and that many false things are reported of her, that may hinder the king from shewing her mercy; particularly, that she was an enemy to the king's friends in the time of the late wars: As to that, we can assure your lordship, that she was a favourer of them in their greatest extremities; and particularly of us, and of some others that are since dead: And for these late years we have often been in her company, and never heard her say any thing but what became a loyal subject. This we desire your lordship would be pleased to represent to the king, and to intercede for her reprieve; which will be a great obligation to your lordships humble servants,

M. St. JOHN.

E. ABERGAVENNY.”

On Monday the 31st of August the following Petition was presented to the King:

To the King's most excellent Majesty; The humble Petition of Alicia Lisle.

“ Humbly Sheweth;

“ That your Petitioner lieth under a sentence of death, for harbouring one John Hicks, and is sentenced to be burnt on Wednesday next.— That she is the daughter of sir White Beconsaw, descended of an antient and honourable family, and related to several of the best families of the nobility of this kingdom.— Wherefore your Petitioner humbly begs your Majesty, that execution may be altered from burning to beheading,* and may be respited for four days. And your Petitioner shall ever pray, &c.”

* As to this, See vol. 7, pp. 1539. 1562 et seq. vol. 9, p. 684, of this Collection. See, also, lord Coke's 3d Inst. chap. 7, chap. 101. 1 Hale's P. C. ch. 42. 2 Hale's P. C. chap. 47. s. 5. Blackst. Comm. book 4. ch. 32, vol. 4. pp. 404. 405.

“ Lord Hale hath treated this subject pretty much at large: and as it is not a matter of very general concernment, and as few questions are likely to arise upon it, I refer the reader to what

To which his majesty answered: 'That he would not reprieve her one day; but for altering the Sentence he would do it, if there were any Precedents for it.'

the learned judge hath said upon the subject. One of his rules indeed seemeth to want some explanation: that the execution ought not to vary from the judgment; for if it doth, the officer will be guilty of felony at least, if not of murder.

"This is a good general rule, but not universally true. If the officer of his own head, and without warrant, or the colour of authority, varieth from the judgment, he may be criminal to that degree the learned author mentioneth; for he wilfully and deliberately acteth in defiance of law, and in so doing sheddeth the blood of a man, whose person, till execution is done upon him in a due course of justice, is equally under the protection of the law with every other subject. But, if the officer hath a warrant from the crown for beheading a person under sentence of death for felony, or a woman for treason of any kind, and payeth obedience to it, this, I conceive, would not be criminal. Lord Coke indeed doth say, that a warrant from the crown for an execution totally varying from the judgment is illegal, because the king cannot alter the judgment, though he may, by his prerogative, remit one part, and leave the offender open to the other; as, saith he, in the case of high treason, decapitation being part of the judgment, the law is satisfied, the judgment is substantially executed, if that be done, though every other part is omitted; and Hale seemeth to agree with him.

"That the crown may remit part of the judgment is certainly true, and would silence every doubt in the case of high treason at least, if hanging and beheading were ingredients in every judgment for that offence: but in the case of women, beheading is no ingredient in the judgment; and yet ladies of distinction have been, for many ages past, by warrant from the crown, beheaded for that offence. The execution in this instance totally varieth from the judgment; and yet I do not know, that those executions have been esteemed illegal: nor can I recollect a single instance where a lady of distinction hath been burnt for high treason; and, with regard to those of inferior rank who have been burnt, it is well known, that they have generally been strangled at the stake by the executioner before the fire hath reached them, though the letter of the judgment is, that they shall be burnt in the fire till they are dead. This the sheriff doth, or knowingly permitteth, without warrant from the crown, custom alone having given a kind of sanction to a practice founded in humanity and not repugnant to any rule of substantial justice. I remember one and but one instance to the contrary, which will be mentioned in it's proper place. Beheading is likewise an ingredient in the judgment for felony; and yet persons of distinction have, for ages

Thereupon the following Precedents, for the altering of the Sentence, were offered to the king.

That execution may vary from the judgment,

past, been by the like warrants beheaded for that offence; and nobody hath complained or thought the execution illegal.

"The distinction therefore between a total alteration and a remission of part of the judgment will not wholly solve the difficulty, if any difficulty there be; though a partial solution may sometimes serve to save appearances. But this matter seemeth to lie in a very narrow compass. The king cannot by his prerogative vary the execution, so as to aggravate the punishment beyond the intention of the law. Thus far the rule, that the king cannot alter the judgment, is true: but it doth not follow from thence, that he, who undoubtedly can wholly pardon the offender, cannot mitigate his punishment with regard to the pain or infamy of it. Will it be said, that because the crown cannot go beyond the letter of the law in point of rigour, its mercy is likewise so bounded? By no means; for the law proceedeth in both cases with a perfect uniformity of sentiment and motive. The benignity of the law hath set bounds to the prerogative in one case, and the same benignity hath left it free and unconfined in the other.

"In the cases just mentioned it cannot perhaps be said, with strict propriety, that the judgment is substantially executed; but surely the ends of public justice are effectually answered if the offender suffereth death, the *ultimum supplicium*, though the circumstances of infamy or extreme rigour, which the judgment importeth, are dispensed with: and whenever that hath been done, it hath in all ages been esteemed a matter of royal grace, and granted at the prayer of the party or his friends.

"The writ of *escheat*, grounded on the common-law, in the case of an attainder for felony alledgeth, that the party was hanged, whether, say the books, he was beheaded or died before execution, which averment is not traversable. This, saith the note on the register, was adjudged in parliament in the 8th of Edw. III. And in the statute stiled *Articuli Cleri* one grievance complained of is, "That persons fleeing to sanctuary and abjuring" (a privilege never allowed but in cases of felony) "had been taken by force from the public highway and then hanged or beheaded." Lord Coke in his comment at the word [*decapitantur*] saith, "This is mistaken in the petition, for no man can be beheaded but for treason." The mistake, if any there be, was in a mere matter of fact of great and public notoriety at that time, and therefore, where the mistake upon the whole most probably lieth, whether in the petition or in the comment, the reader must judge.

"These authorities, in my opinion, prove to a demonstration, that in those early ages the

see the Register, fol. 165. in Felony, where the judgment always is *suspendatur per collum*; yet the party may be beheaded, which is no part of the Sentence [Parl. 8. E. 3.] So was the duke of Somerset in the time of Edw. 6. for felony: So was the lord Audley, 7 Car. 1. for felony (Rape.) Queen Katherine Howard for treason, Hen. 8. and Jane Gray *primo Marie*. The countess of Salisbury, being attainted for treason, Anno 1541, was beheaded 32 Hen. 8. See 3 Co. Inst. p. 211, 212.

Whereupon his majesty was pleased to sign the following Warrant:

“ J. R.

“ Whereas we are informed that Alicia Lisle has received Sentence of death for high treason at the sessions of Oyer and Terminer, and gaol-delivery, held at our city of Winchester, for harbouring of John Hicks a rebel, and that the sentence is to be executed upon her the second of September next, by burning her alive: And whereas the said Alicia Lisle has humbly petitioned us to alter the manner of the said execution, by causing her head to be severed from her body: We, being graciously pleased to condescend to her request, have thought fit hereby to signify our will and pleasure accordingly. And our further will and pleasure is, that you deliver the head and body to her relations to be privately and decently interred: And for so doing this shall be your warrant.—Given at our court at Windsor, the 31st day of August 1685, in the first year of our reign. SUNDERLAND.”

“ To our trusty and well-beloved the High-Sheriff of our county of Hants, and to all others whom it may concern.”

Which warrant being delivered to the Sheriff, she was, on Wednesday the second of September, in the afternoon, brought to execution; which was performed upon a scaffold erected in the market-place of the city of Winchester, where she behaved herself with a great deal of christian resolution. She then delivered a paper to the sheriff, a copy of which follows; and after some little time was executed, having her head sever'd from her body.

judgment for hanging was the legal ordinary judgment in the case of felony, and that execution was commonly done in that manner. They shew likewise, that beheading in some special cases upon a judgment in felony hath been practised in all ages.

“ I therefore conclude, till I shall be better informed, that the prerogative now under consideration, founded in mercy, and never in any age complained of, is part of the common law.

“ Lord Coke, in one of the passages I have cited, after admitting that in the cases he mentioneth the execution did vary from the judgment, concludeth, “ *Judicandum est legibus non exemplis.*” The rule is true, but the mis-

A Copy of the PAPER delivered to the Sheriff.

“ Gentlemen, Friends, and Neighbours,

“ It may be expected that I should say something at my death, my birth and education being near this place. My parents instructed me in the fear of God, and I now die of the reformed religion, always being instructed in that belief, that if Popery should return this nation, it would be a great judgment. I die in the expectation of pardon of my sins, and acceptance with the Father, by the imputed righteousness of Jesus Christ, he being the end of the law for righteousness to every one that believes. I thank God through Jesus Christ, I depart under the Blood of Sprinkling, which speaketh better things than the Blood of Abel, God having made this chastisement an ordinance to my soul.

“ I did as little expect to come to this place on this occasion as any person in this nation; therefore let us learn not to be high-minded, but fear the Lord: The Lord is a Sovereign, and will take what way he sees best to glorify himself by his poor creatures; therefore do humbly desire to submit to his will, praying him, that in patience I may possess my soul.

“ My crime was entertaining a nonconformist minister, who is since sworn to have been in the late duke of Monmouth’s army. I am told, if I had not denied them, it would not have affected me. I have no excuse but surprise and fear; which I believe my jury must make use of to excuse their verdict to the world.

“ I have been told, the court ought to be counsel for the prisoner, instead of which, there was evidence given from thence; which, though it were but hearsay, might possibly affect my jury. My defence was such as might be expected from a weak woman: but such as it was, I did not hear it repeated again to the jury. But I forgive all persons that have done me wrong, and I desire that God will do so likewise.

“ I forgive colonel Penruddock, though he told me, he could have taken those men before they came to my house.

“ As to what may be objected, that I gave it under my hand that I had discoursed with

take lieth in the application of it; for immemorial usage, founded in mercy and never complained of, is undoubtedly sufficient in this as in every other case, to determine what is or is not part of the common-law.” Foster, 267.

See too Enst’s Pleas of the Crown, chap. 5. s. 96. Roger Coke tells us “ that whether the sentence was just or not, the punishment was unjust, for though the king may pardon or mitigate the punishment of any crime against him, as to pardon treason or to mitigate the execution to beheading, which is part of the sentence, yet he cannot alter the punishment into any other than the law prescribes.” 2 Detection, 339, 340.

Nethorp, that could be no evidence to the court or jury, it being after my conviction and sentence.

"I acknowledge his majesty's favour in altering my sentence; and I pray God to preserve him, that he may long reign in peace, and the true religion flourish under him.

"Two things I have omitted to say, which is, that I forgive him that desired to be taken from the Grand Jury to the petty jury, that he might be the more nearly concerned in my death.

"Also, I return humble thanks to Almighty God, and the reverend clergy that assisted me in my imprisonment.

"Sept. 2, 1685.

ALICE LISLE."

Her attainder was afterwards reversed 1st of William and Mary.

Primo Gulielmi & Mariæ, A. D. 1689.

AN ACT for annulling and making void the attainder of Alicia Lisle, widow.

Whereas Alicia Lisle, widow, in the month of August, in the first year of the reign of the late king James the Second, at a session of Oyer and Terminer, and gaol delivery, holden for the county of Southampton, at the city of Winchester in the said county, by an irregular and undue prosecution, was indicted for entertaining, concealing and comforting John Hicks, clerk, a false traitor, knowing him to be such, though the said John Hicks was not, at the trial of the said Alicia Lisle, attainted or convicted of any such crime: And by a verdict injuriously extorted and procured by the menaces and violences, and other illegal practices of George lord Jeffries, baron of Wem,* then Lord Chief Jus-

* "Granger, in his Biographical History of England, vol. 4, p. 272, says that he had seen

tice of the King's-bench, and chief commissioner of Oyer and Terminer and gaol delivery, within the said county, was convicted, attainted, and executed for High Treason: May it therefore please your most excellent majesties, at the humble petition of Triphena Lloyd and Bridget Usher, daughters of the said Alicia Lisle, That it be declared and enacted by the authority of this present parliament: And be it enacted by the King and Queen's most excellent majesties, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present parliament assembled, and by the authority of the same, that the said conviction, judgment and attainder of the said Alicia Lisle be, and are hereby repealed, reversed, made and declared null and void to all intents, constructions and purposes whatsoever, as if no such conviction, judgment or attainder had ever been had or made; and that no corruption of blood or other penalty or forfeiture of honours, dignities, lands, goods, or chattels, be by the said conviction or attainder incurred: any law, usage or custom to the contrary notwithstanding.†

(in a book printed in 1687) a dedication to lord Jeffries, by the titles of 'earl of Flint, viscount Wycombe, and baron Wem.' But, as in this bill he is stiled lord Jeffries; it is certain he was never in full possession of those honours; though, perhaps, a patent for that purpose might have been preparing for him, when that dedication was published, just before the revolution. And yet, as late as the 8th day of June, 1688, in the warrant signed by him, and other privy counsellors, for committing the seven bishops to the Tower, he is only called George lord Jeffries, baron of Wem." Hatsell.

† As to the form of bills of attainder, see some observations in a note to vol. 9, p. 996, of this Collection.

332. Trials of JOHN FERNLEY, WILLIAM RING, ELIZ. GAUNT,* and HENRY CORNISH,† esq. at the Old Bailey, for High Treason: 1 JAMES II. A. D. 1685.

Monday, Oct. 19, 1685.

AT the Sessions-House, in the Old-Bailey, London, the court being met, and proclamation

* See what Burnet says of her in the Note to Lady Lisle's Case, p. 300, of this volume.

† See the Trial of him and others for a Riot, &c. vol. 9, p. 187, of this Collection.

"Some base men tried to save themselves by accusing others. Goodenough, who had been under-sheriff of London when Cornish was sheriff, offered to swear against Cornish; and also said, that Rumsey had not discovered all he knew. So Rumsey to save himself joined with Goodenough, to swear Cornish

made for attendance, the proceedings were as follow:

Clerk. Set John Fernley to the bar. [Which was done.]

guilty of that for which the lord Russell had suffered. And this was driven on so fast, that Cornish was seized on, tried, and executed within the week. If he had got a little time, the falshood of the evidence would have been proved from Rumsey's former deposition, which appeared so clearly soon after his death, that his estate was restored to his family, and the witnesses were lodged in remote prisons for their lives. Cornish at his death asserted his innocence with great vehemence; and with

Cryer. O yes, All manner of persons are commanded to keep silence, upon pain of imprisonment.

Cryer. John Fernley, hold up thy hand. [Which he did.] Thou standest indicted by the name of John Fernley.

“ *Middlesex.*

“ The jurors for our sovereign lord the king upon their oaths do present, That John Fernley, of the parish of St. Mary Matfellow, otherwise White-Chapel, in the county of Middlesex, barber, as a false rebel and traitor against the most illustrious and most excellent prince king James the second, by the grace of God of England, Scotland, France, and Ireland, king, and his natural lord, not having the fear of God in his heart, nor his due obedience any wise regarding, but being moved and seduced by the instigation of the devil; and his faithful duty and natural obedience which a true and loyal subject ought to have towards his said lord the king, and by law ought to observe, utterly withdrawing; and intending with all his endeavours the peace and tranquillity of this kingdom of England to disturb, and war and rebellion against our said lord the king to incite and move, and the government of our said lord the king in this kingdom of England to

some acrimony complained of the methods taken to destroy him. And so they gave it out, that he died in a fit of fury. But Pen, who saw the execution, said to me, there appeared nothing but a just indignation that innocence might very naturally give. Pen might be well relied on in such matters, he being so entirely in the king's interests. He said to me, the king was much to be pitied, who was hurried into all this effusion of blood by Jefferies's impetuous and cruel temper. But, if his own inclinations had not been biased that way, and if his priests had not thought it the interest of their party to let that butcher loose, by which so many men that were like to oppose them were put out of the way, it is not to be imagined, that there would have been such a run of barbarous cruelty, and that in so many instances.” Burnet.

“ July 20th 1685 Richard Goodenough, formerly under sheriff of London, outlawed for high treason on account of the fanatic conspiracy, and one of the rebels in the west, being taken in Devonshire, was this day brought to town; he hath been before the council, and duth, as is said, make a free and a large confession.

“ Nov. 28, 1685. Nathaniel Wade, Richard Goodenough and James Burton, were brought to the King's bench bar, and pleaded his majesty's pardon to them for their outlawry of treason, and all other crimes to the 4th of July last, which was allowed, and they remanded again to Newgate till his majesty's pleasure be further known.” Narcissus Luttrell's *M.S. Brief Historical Relation in All Souls Library.*

subvert, and our said lord the king from his title, honour, and regal and imperial crown of this his kingdom of England to depose and deprive, and our said lord the king to death and utter destruction to bring; the 20th day of August in the year of the reign of our sovereign lord James the second; by the grace of God of England, Scotland, France, and Ireland, king, defender of the faith, &c. the first, and divers other days as well before as after, at the parish of St. Mary Matfellow, otherwise called White-Chapel, in the county of Middlesex, falsely, maliciously, devilishly, and traitorously, with divers rebels and traitors to the jurors aforesaid unknown, did conspire, imagine, and intend our said sovereign lord the king, now his supreme and natural lord, not only of his royal state, title, power, and government of this his kingdom of England, to deprive and depose, but also the same lord the king to kill and murder, and the ancient government of this kingdom of England to change, alter, and totally subvert, and a miserable slaughter amongst the subjects of our lord the king throughout all this his kingdom of England to cause and procure; and an insurrection and rebellion against our lord the king to procure, promote, and assist: And the same his most wicked, most inhuman, and most devilish treasonous and conspiracies, purposes and traitorous imaginations to fulfil and to effect, he the said John Fernley, as a false traitor, then and there, viz. on the said 20th day of August, in the year of the reign of our said lord the king, the first as aforesaid, at the parish aforesaid, in the county aforesaid, well knowing one James Burton to be a false traitor, and as a false traitor traitorously to have conspired and imagined the death and utter destruction of our said lord the king, and war and rebellion against our said lord the king within this kingdom of England traitorously (with divers other rebels to the jury unknown) to have levied and stirred up; he the said John Fernley afterwards, viz. on the said 20th day of August, in the year of the reign of our said lord the king, no. the first aforesaid, at the parish aforesaid, in the county aforesaid, the said James Burton in the mansion-house of him the said John Fernley, situate in the parish and county aforesaid, knowingly, secretly, wickedly, devilishly, and traitorously, did harbour, conceal, comfort, sustain, and keep; and then and there, for the comforting, sustentation, and maintenance of the said James Burton, the said John Fernley meat and drink to the said James Burton maliciously and traitorously did give and deliver, and did cause to be given and delivered, against the duty of his allegiance, against the peace of our said lord the king, his crown and dignity, and also against the form of the statute in the like case made and provided, &c.”

Clerk. How sayest thou, John Fernley, art thou guilty of the high treason whereof thou standest indicted, or not guilty?

Fernley. Not guilty.

Clerk. Culpit, how wilt thou be tried?

Feralry. By God and my country.

Clerk. God send thee a good deliverance.

Set William Ring to the bar. [Which was done.]

William Ring, hold up thy hand. [Which he did.]

Thou standest indicted by the name of William Ring, of the parish of St. Clement's Danes, in the county of Middlesex, taylor.

Middlesex. The jurors for our sovereign lord the king do present upon their oaths, That William Ring, late of the parish of St. Clement's Danes, in the county of Middlesex, taylor, as a false traitor against the most illustrious and excellent prince James the second, by the grace of God of England, Scotland, France, and Ireland, king, and his natural lord, not having the fear of God in his heart, nor the duty of his allegiance any ways weighing, but being moved and seduced by the instigation of the devil, and the true, due, and natural obedience which true and faithful subjects of our said lord the king towards our said lord the king should and of right ought to bear, wholly withdrawing; and with his whole strength intending the peace and common tranquillity of this kingdom of England to disquiet, molest, and disturb, and war and rebellion against our said lord the king within this his kingdom of England to incite and stir up, and the government of our said lord the king in this his kingdom of England to subvert, and our said lord the king from his title, honour, and regal name of his imperial crown of this his kingdom of England to depose and deprive, and our said lord the king to death and final destruction to bring and put, the 20th day of July, in the first year of the reign of our sovereign lord James the second, by the grace of God of England, Scotland, France, and Ireland, king, defender of the faith, and divers other days and times, as well before as after, at the parish of St. Clement's Danes, in the county of Middlesex, falsely and maliciously, devilishly, and traitorously, with divers other rebel and traitors to the jurors unknown, did conspire, imagine, and intend, our said lord the king, our supreme and natural lord, not only from his state, title, power, and government of his kingdom of England to deprive and depose, but also our said lord the king to kill and put to death, and the ancient government of this kingdom of England to change and alter, and wholly to subvert; and a miserable slaughter among the subjects of our said lord the king throughout this whole kingdom of England to cause and procure; and insurrection and rebellion against our said lord the king to procure, move and assist: and his said most wicked and devilish treasons and traitorous conspiracies, compassings, imaginations, and purposes aforesaid to fulfil, effect, and perfect, he the said William Ring, as a false traitor, then and there, to wit, the said 20th day of July, in the said first year of the reign

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of our said lord the king that now is, aforesaid, at the parish and county aforesaid, well knowing Joseph Kelloway and Henry Lawrence to be false traitors, and as false traitors traitorously to have conspired and imagined the death and final destruction of our said lord the king, and war and rebellion against our said lord the king within this his kingdom of England, traitorously, with divers other traitors to the jurors unknown to have levied, and raised, and stirred up. And he the said William Ring afterwards (to wit) the said 20th day of July, in the first year of the reign of our said sovereign lord the king aforesaid, at the parish aforesaid, the said Joseph Kelloway and Henry Lawrence, in the dwelling-house of him the said William Ring situated in the parish and county aforesaid, knowingly, secretly, wickedly, devilishly, and traitorously, did harbour, conceal, comfort, sustain, and maintain; and then and there, for the comforting, sustaining, and maintaining of the said Joseph Kelloway and Henry Lawrence, he the said William Ring meat and drink to the said Joseph Kelloway and Henry Lawrence maliciously and traitorously did give and deliver, and did cause to be given and delivered, against the duty of his allegiance, against the peace of our said sovereign lord the king, his crown and dignity, and against the form of the statute in this case made and provided, &c.

How sayest thou, William Ring, art thou guilty of the high treason whereof thou standest indicted, or not guilty?—*Ring.* Not guilty.

Clerk. Culprit, how wilt thou be tried?

Ring. By God and my country.

Clerk. God send thee a good deliverance.

Set Henry Cornish to the Bar.

Henry Cornish, hold up thy hand.

Mr. Cornish. My lord, I have been confined without any notice given me until Saturday about noon of my trial. My lord, I do hope, seeing I appear before your lordships and this honourable bench who have known something of my conversation, that you will be pleased to consider me, and grant me what is customary, and commonly done to persons in my circumstances.

Mr. Jones. Mr. Cornish, if you please you shall have your time of speaking hereafter, but now you are only to plead without any more ado.

Cornish. My lord, I beseech you bear me a little; I have been so confined.

Lord Mayor. Mr. Cornish, you must observe the rules of the court.

Cornish. My lord, I hope I shall be allowed what is customary in such cases.

Lord Mayor. What is it you would have?

Cornish. My lord, I do desire, if your lordship will please to consider me—

Mr. Jones. Would you not be arraigned, Mr. Cornish? After you are arraigned and have pleaded, you may speak.

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Cornish. Let me tell your lordship what my case is: Is it reasonable not to have above half a day's time for preparation for my trial, and no counsel allowed me?

Recorder. (Sir Thomas Jenner.) Nor ought, without leave of the court, or by his majesty's special appointment.

Cornish. I have not had a friend to come to me, but in the presence of major Richardson.

Recorder. None have in your circumstances.

Cornish. My lord, ought not I to have a copy of the panel? It is a thing never denied.

Recorder. It hath been denied very often.*

Cornish. My lord, it is a matter wherein my life is concerned; and therefore I hope your lordship will hear me.

Mr. Jones. After you are arraigned you may speak, and put off your trial if you can.

Cornish. My lord, I cannot go from this before I possess your lordship with a right understanding of it; it is beyond precedent: no such precedent, that any man should be kept with that strictness I have been.

Recorder. Mr. Cornish, I wonder you will say so: I tell you there is no man accused of your crime but is so kept.

Cornish. If your lordship pleases to allow me a little time, I do not question but I can very well satisfy your lordship, and this honourable court, that I am a very innocent person.

Recorder. You will have your proper time for that, but now you must plead, that you may hear the particulars of your charge, and have an opportunity to make out your innocence; for we must keep the same method with you we do with all other persons in your circumstances; and therefore you must plead as other persons do.

Mr. Jones. Will you, or will you not, Sir, without any more ado? The law gives you advantage, you may challenge any body; there are fourscore returned, honest men, and you may challenge who you please.

Cornish. Alas! my lord, what can I do?

Counsel. He disputes out of time; he is to be arraigned.

Recorder. Come, Mr. Cornish, you must plead.

Cornish. I did understand last night his majesty was graciously pleased to refer these matters, as to my trial, to my lords the judges; and, my lord, I do hope that the judges, when they hear this matter, that I shall have some time allowed.

Recorder. Pray, Mr. Cornish, take the rule of the court, your business is now to plead; when you have pleaded, what you have to offer for the putting off your trial may be heard then.

* "It was indeed denied to Stephen Colledge, [See vol. 8, pp. 579, et seq. 587.] but it was allowed lord Russell." [See vol. 9, p. 587.] Note to former Edition. See, too, Algernon Sydney's Case, vol. 9, p. 834. But now as to this, See st. 7 W. 3. c. 3. 7 Ann. c. 21.

Clerk. Henry Cornish, hold up thy hand.

Cornish. My lord, I would do nothing that should be a dishonour to your lordship and the court.

Sir James Smith. You know the way of the court, Mr. Cornish; you must plead.

Mr. Jones. If you will not plead, I will move the court to record your standing mute.

Cornish. I have known that this court hath heard what the prisoner hath to say at the bar; and I have more to say, perhaps, than any man that ever stood at this bar.

Recorder. Mr. Cornish, when you have pleaded, you have time to speak for yourself.

Clerk. Henry Cornish, hold up thy hand. [Which he did.

Thou standest indicted by the name of Henry Cornish.

"That Henry Cornish, late of the parish of St. Michael Bassishaw, London, merchant, as a false traitor against the most illustrious prince Charles the Second, late king of England, Scotland, France, and Ireland, defender of the faith, then his natural lord, not having the fear of God in his heart, not weighing the duty of his allegiance, but moved and seduced by the instigation of the devil, and the cordial love, and true, due and natural obedience, which a true and faithful subject of our late sovereign lord the king towards our late sovereign lord the king should and of right ought to bear, altogether withdrawing; and minding, and with all his strength intending, the peace and common tranquillity of this kingdom of England to disquiet, molest, and disturb, and war and rebellion against our late sovereign lord the king, within this kingdom of England to stir up, move, and procure; and the government of our said late sovereign lord the king of this kingdom of England to subvert, change, and alter, and our said late sovereign lord the king from the title, honour, and kingly name of the crown imperial of this kingdom of England to depose and deprive; and our said late sovereign lord the king to death, and final destruction to bring and put: the 30th day of May, in the 35th year of the reign of our said sovereign lord the king, and divers other days and times, as well before as after, at the parish of St. Michael Bassishaw, London, falsely, maliciously, devilishly, and traitorously, with divers false traitors to the jurors unknown, did conspire, compass, imagine, and intend, our said late sovereign lord the king, his supreme and natural lord, not only of his kingly state, title, power and government of this kingdom of England to deprive and throw down; but also the said late king to kill and put to death, and the ancient government of this his kingdom of England to change, alter, and altogether subvert, and a miserable slaughter amongst the subjects of our late lord the king through this kingdom of England to cause and procure, and insurrection and rebellion against our said late lord the king to procure, promote, and assist:

And the same most wicked and devilish treasonous and traitorous compassings, imaginations, and purposes aforesaid to fulfil, perfect, and bring to effect, he the said Henry Cornish, as a false traitor, then and there, to wit, the said 30th day of May, in the year aforesaid, at the parish and ward aforesaid, falsely, maliciously, and traitorously, knowing James the late duke of Monmouth, William Russel, esquire, and Thomas Armstrong, knight, and divers other rebels and traitors, then lately before in the parish and ward aforesaid within the said city of London, falsely, unlawfully, devilishly, and traitorously, to have conspired the death and final destruction of our said late sovereign lord the king; he the said Henry Cornish, as a false traitor, then and there, to wit the said 30th day of May in the year aforesaid, within the parish and ward in the said city of London, falsely, unlawfully, wickedly, and traitorously, did promise to the said divers false traitors and rebels, then and there present, That he the said Henry Cornish would be aiding and assisting in the treasons aforesaid, to be done, perfected, and brought to effect, against the duty of his allegiance, against the peace, and against the form of the statute, &c.

Clerk. How sayest thou, Henry Cornish, art thou guilty of this high-treason whereof thou standest indicted, or not guilty?

Cornish. This is an heinous charge.

Counsel. Answer; you know you must answer.

Cornish. I am perfectly innocent.

Counsel. Are you guilty or not guilty? You must take the words.

Cornish. Not Guilty.

Clerk. Culprit, how wilt thou be tried?

Cornish. By the great God of Heaven, and my country.

Clerk. God send thee a good deliverance.

L. C. J. Jones. I do not know in what state things are here in the court; I cannot tell whether there be a jury returned or not.

Clerk. He is arraigned.

L. C. J. Jones. Why don't you go on with the jury?

Cornish. My lord, I humbly pray your lordship: I have some ground for it—

L. C. J. Jones. You shall be heard in good time, Sir.

Cornish. My poor children last night preferred a petition to his majesty, and he was pleased to refer it most graciously to my lords the judges; and I now make my application to your lordships.

L. C. J. Jones. Have you any answer to the petition from the king?

Cornish. It was referred to your lordships the judges, to consider my case.

L. C. J. Jones. We may hear more of your business anon, when Mr. Attorney and Mr. Solicitor do come: we will stay here till they come, to know whether there be any order from the king to them concerning you.

Cornish. My lord, I hope it will not be offensive if I should acquaint your lordships what

usage I have met with since I have been under confinement. I have been under very close confinement, I had no notice of my trial till about twelve o'clock on Saturday; no friend came to me till eight o'clock at night; and I had no time for preparation for my trial. My lord, these are hard things; but though I am denied counsel, I trust in God I shall not need counsel, for I hope, if your lordship pleases to allow me time, to clear myself of all matters; and I hope with such satisfaction to your lordships that you will acquiesce in whatsoever I shall lay before your lordships. I do not come to make an harangue and talk; my case was such, that I had neither pen, ink, nor paper.

Just. Withins. Mr. Cornish, Mr. Attorney and Mr. Solicitor will come, we must hear them.

L. C. J. Jones. You shall be heard in your proper time; it is a strange thing you will not be satisfied; you shall be heard, I tell you, in your proper time.

Mr. North. We have arraigned one Fernley, if you please to try him, who (with Ring) was brought to the bar.

Clerk. You the prisoners at the bar, those persons you shall hear called and appear, are to pass between our sovereign lord the King, and you, upon your several lives and deaths: if you will challenge them or any of them, your time is to challenge them when they come to the book to be sworn, before they be sworn.

Cryer. O-yes! All manner of persons are commanded to keep silence upon pain of imprisonment.

The Middlesex Jury: Nehemiah Arnold, Francis Stevens, Richard Fisher, John Howlet, John Viguers, Samuel Birch, William Thomson, William Read, Samuel Peacock, Richard Fitz-gerrard, Richard Bromfield, John Haynes.

Cryer. O-yes! If any one can inform my lords the king's justices, the king's serjeant, or the king's attorney, before this inquest be taken between our sovereign lord the king and John Fernley and William Ring, the prisoners at the bar, let them come forth, and they shall be heard; for now the prisoners stand at the bar upon their deliverance; and all persons that are bound by recognizance to give evidence against either of the prisoners at the bar, let them come forth and give their evidence, or else they forfeit their recognizance, and all jury-men of Middlesex that have appeared and are not sworn, let them depart.

Clerk. Set William Ring to the bar, and set by the other.

William Ring, hold up thy hand. You that are sworn, look upon the prisoner, and hearken to his charge; he stands indicted by the name of William Ring, &c. (*prout ante.*) Your charge is, to enquire whether he be guilty of the treason whereof he stands indicted, or not guilty, &c.

Mr. Phipps. You, the gentlemen that are sworn, the prisoner at the bar, is indicted for that knowing one Joseph Kelloway, and one Henry Lawrence to be false traitors, and to have levied war against the king; on the 20th of July, did harbour, conceal, and relieve those traitors, against the duty, &c. Upon this he hath pleaded, not guilty, &c.

Att. Gen. (Sir Robert Sawyer.) Gentlemen of the jury, the course of our evidence will be thus: Kelloway and Lawrence were in the late rebellion in the west, in the late duke of Monmouth's army; and after that battle when they were overthrown, they came up to London, and the prisoner at the bar received and comforted them, and not only provided a lodging, and meat and drink for them, but afterwards provides another lodging for them; for this he knew, for they were very merry, telling the whole story of the fight; and notwithstanding this he entertains them. We will first shew you the record of the conviction of Kelloway and Lawrence, and then call witnesses to prove the other things upon the prisoner. (The record produced) Mr. Harcourt sworn.

L. C. J. Jones. Is that a true copy of the record?

Mr. Harcourt answered yes: whereupon the clerk reads:

Joseph Kelloway stands indicted by the name of Joseph Kelloway of Taunton, in the county of Somerset, yeoman; and Henry Lawrence of the same parish and county, yeoman; with a great many others.

L. C. J. Jones. See what they have done.

Clerk. They are indicted of treason for levying war against the king, and they have confessed the indictment upon their arraignment; and the judgment upon the indictment, is, 'That the said Kelloway, and the rest of them there, should be led to the prison from whence they came, and from thence to be drawn to the place of execution, and upon the gallows there to be hanged, every one of them in the said indictment, and living to be cut down, and their entrails to be taken out of their bodies, their heads to be taken off from their bodies, and their bodies divided into four quarters.'

Att. Gen. This shews they were traitors. Now we will shew you, that in the mean time between their treason and conviction, this prisoner did receive them. Call Mr. Barrington. [Who was sworn.]

Mr. Jones. Mr. Barrington, what do you know concerning Mr. Ring?

Barrington. If it please you, my lord, on the 11th of July last I was abroad about my master's business, and in the mean time when I was absent, as I was informed, there came Mr. Ring, who lives in Wych-street at the sign of the Bible; and when I returned, I was told that Mr. Ring was at our house to speak with me, and that there was one Mr. Lawrence there at Mr. Ring's at the Bible in Wych-street; and when I came there, there was Mr. Lawrence at Mr. Ring's house; and when I came to the house on the right hand, there was his wife, as

I take it: I asked for Mr. Lawrence, and she was a little at a stand. Said I, I understand Mr. Ring was in such a place to inform me Mr. Lawrence desired to speak with me. Upon that he shewed me where he was: I went up to him, and he was laying upon the bed very weary and tired; and when I had been there a-while, there came in one Kelloway, and they said they came both out of the west country, and came on Friday night, and I saw them on Saturday. If it please your lordship, I called there after, and knocked at Mr. Ring's door, and there came a woman and made answer, that they were gone from thence both of them, and that they were to go on ship-board to see some friends; and I called there on Wednesday the 15th day at night, to see Mr. Lawrence at Mr. Ring's house, and Mr. Lawrence told me he was going to the Pewter-platter in St. John's; and when Mr. Common Serjeant came to examine me about these men, I made a true confession, that they were at Ring's and removed to the Pewter-platter: and when we came to search at the Pewter-platter, at first they did not know any such men, until we described them. Then they confessed there were such men there on Tuesday and Wednesday night, but not the night before, which was Thursday night. From thence we went without Temple-bar to Mr. Ring's, where they were at first; and Mr. Crisp and I went together to enquire fore these men, and there was a woman, which I think is Mr. Ring's wife, I cannot tell. I enquired for these men, and she made answer, that they were not there at present, and said she could not tell at present but that they lay there the last night, which was Thursday night; that was Ring's wife, I take it, should say they were there the night before, so after that she had owned that they lay there on the Thursday night, she asked me what this gentleman was; so I told her, a friend of mine. So afterwards we were at the Castle-tavern without Temple-bar by St. Clement's church, and Mr. Common Serjeant was pleased to send for Mr. Ring to examine him about these men, what lodgers he had in his house on Friday night, Saturday night, Sunday night, and Monday night. Mr. Ring knew nothing of any men that came out of the country; so upon that, he denying it, Mr. Common Serjeant ordered his house to be searched, and in searching, they found a paper upon the chamber-window, that was brought to the Castle-tavern, where Mr. Ring was, and the paper was produced, and Mr. Ring would confess nothing till such time as they found that paper.

L. C. J. Jones. See, is that the paper you speak of?

Barrington. That is all I have to say, if it please your lordship.

L. C. J. Jones. Did you see them in the company of Ring?

Barrington. I did not see him when I was at the house.

Sol. Gen. (Mr. Finch.) You say Mr. Ring would confess nothing till such time as the paper

was found; what did he say after the paper was found?

Mr. Jones. Ring was by, what did he say upon producing that paper?

L. C. J. Jones. Was the paper shewed to him?

Barrington. I think not; he would have seen it.

Justice Withins. You say he would confess nothing till that paper was produced.

Barrington. Truly, I can say no more of it.

Mr. Jones. When the paper was produced at the Castle-tavern, what did he say then?

Justice Withins. What did Ring say at the Castle-tavern?

Barrington. I cannot remember, but that he denied every thing.

Clerk. Call Mr. Barrow. [Who was sworn.]

Barrow. Sir, I heard Ring confess to my lord mayor in July last, that he lodged Lawrence and Kelloway, and that Lawrence and Kelloway did tell him, that they had been both in the late western rebellion in Monmouth's army; and that after that he had lodged them two or three nights; this I heard him confess.

Counsel. Pray speak it again.

Barrow. That Lawrence and Kelloway had told Mr. Ring, they had been in the late western rebellion in Monmouth's army, and that he had lodged them two or three nights in his own house.

Common Serj. What did you hear him say concerning Mr. Herle?

Barrow. There was some talk concerning Mr. Herle or Hurle.

L. C. J. Jones. Did he say he lodged them, after they had told him that?

Barrow. After that. That is all I can say.

Clerk. Call Mr. Crisp.—[Who was sworn.]

Counsel. Give my lord and the jury an account of what you know concerning Mr. Ring.

Crisp. I went to search Mr. Ring's house, my lord, and in the window there was that letter under Mr. Lawrence's own hand, sealed up and directed to Newberry for a horse which he had stole from his master, and left at Newberry, which letter I brought to the tavern; and when we came to the tavern, we examined him, and he denied every thing; but at last we shewed him the letter, and he owned he had such a cousin, and another that he did not know, but that he did not lodge there then. And when he came to the Sessions-house, Lawrence and Kelloway were produced before him, and were examined what account they had given to him, when they came to his house; they told him after the duke of Monmouth was beaten, they ran away to London, and Kelloway being his cousin, brought Lawrence with him; they told him the duke was beaten, and lay there Friday night, Saturday night, Sunday night, and Monday night.

Mr. Jones. He owned he knew Mr. Kelloway?—*Crisp.* Yes.

L. C. J. And that Kelloway had been in the duke's army, and that he was beaten?

Crisp. Yes.

L. C. J. What did Ring say upon it?

Crisp. Ring said nothing there to it; he confessed he lodged them two or three nights.

Counsel. Swear Mr. Hardisty. [Which was done.]

Att. Gen. Mr. Hardisty, pray will you give my lord and the jury an account of his examination?

Hardisty. I was directed to attend my lord mayor at the examination of Mr. Ring, the prisoner at the bar, above here in the room, and did accordingly; and upon examination, my lord, he did make this confession. This is the examination, and it is as he gave it himself, and signed by himself.

L. C. J. Jones. And read to him?

Hardisty. Yes, half a dozen times, I believe.

Common Serj. My lord, upon the appearing of Lawrence and Kelloway before him, then, he confessed all.

The EXAMINATION of WILLIAM RING, of the Parish of St. Clement Danes in the County of Middlesex, Taylor, taken before the Right Honourable Sir James Smith, Knight, Lord Mayor of the City of London, this 18th day of July, 1685, who being examined, saith as followeth:

“That Joseph Kelloway, and one Henry Lawrence, the said Kelloway's acquaintance, came to this examinant's house on Friday or Saturday last; that this examinant did ask of Kelloway (being this examinant's kinsman) what did drive them to town? That they told this examinant, that they went to Monmouth, that he was routed, and that brought them to town, or to that purpose: that they were in Monmouth's army. That night they came, he this examinant told them, he was unwilling to lodge them; that he this examinant did lodge them after this discourse, Saturday, Sunday, and Monday nights, and they dined twice with this examinant; that they were at his house on Friday morning; but where they lay on Wednesday and Thursday, saith he knows not. Saith, that Lawrence sent this examinant to a Glover in St. Bartholomew's Close, who was a journeyman in the house, as this examinant supposeth, and told the master of the house, that there was a kinsman of his journeyman's would speak with his journeyman. Saith, Kelloway and his acquaintance told this examinant, that they left their horses at Newberry. That a note being produced, directed to this examinant, to deliver several goods therein mentioned, and being examined upon the said note, this examinant saith, that he this examinant was sent for to the Castle-Tavern near Shoe-lane in Fleet-street, and one Bond brought this examinant the note above-mentioned, and now produced to him; believes the note to be the hand-writing of James Hooper. That this examinant was there to enquire of one Hearne, but expected to meet James Hooper, who formerly told this exami-

nant that he went by the name of Hearne. That being in discourse with James Hooper about the time of the late duke of Monmouth's landing, James Hooper told this examinant, that his the said Hooper's brother was with the duke of Monmouth, and that he the said James Hooper would go to him the said duke, or to that purpose. Further, this examinant saith, that about a fortnight ago he carried, according to a note from Hooper to that purpose, to a joiner's house in Ivy-lane, London, a cravat and a pair of cuffs, and then enquired for Hooper of a woman of the said house; and saith, that then he this examinant did speak with James Hooper who lay private there, because, as this examinant believes, the said Hooper was concerned in the rebellion. Saith, he hath not seen him the said Hooper this fortnight, nor heard from him otherwise than by the note now produced. WILL. RING.

"Taken before me Sir James Smith, Lord-Mayor."

Att. Gen. Call Mr. Richardson, to prove that these were the same men that were carried down. [Who was sworn.] Mr. Richardson, pray give an account, whether these were the men you carried down into the West.

Richardson. My lord, those two persons, that is, Joseph Kelloway and Henry Lawrence, that were committed for being in the late rebellion, I carried them both down into the west, where they were both convicted; one is executed, and the other has a reprieve.

Just. Withins. Henry Lawrence was captain Hunt's man.

Richardson. The same, he ran away with his horse and arms.

L. C. J. Can you tell these were the same men that were present at his examination?

Richardson. The very same men; they were committed at the same time; he was examined before them, for they were all committed at the same time together.

L. C. J. What do you say, Sir; you the prisoner at the bar, what do you say for yourself?

Ring. I did not understand what they were.

L. C. L. You knew the prisoners, one of them was your kinsman.

Ring. I did know him, but the other I did not know; I did not know what design they had been upon.

L. C. J. Your own examination says, you did.

Ring. Then my examination is wrong.

L. C. J. Hear, hear again: You did receive them, and then they told you that they were in Monmouth's army, and that Monmouth was beaten; and afterwards you continued to harbour them in your house three nights.

Just. Withins. And dined twice with them.

Ring. My lord, I never heard of it.

L. C. Baron. That gentleman heard you say, they had told you they had been in Monmouth's army, and you lodged them after.

Crisp. Yes, my lord; and when we were there, the woman would not own them.

L. C. J. Why did you hide them in your house, and not confess it?

Ring. At first I did deny it.

Counsel. Yes, and did deny it, till Lawrence and the other man were brought before you.

Ring. My lord, what I did was ignorantly done.

L. C. J. Did you hear your examination now read?

Ring. I heard most of it I believe.

L. C. J. Pray let it be read again.

Counsel. It was read over and over four or five times.

Hardisty. He was upon it, I believe, an hour together: it was taken first in parts, and as he recollected himself it was compared, and afterwards my Lord-Mayor desired him to consider with himself: and then the examination was written fair over, and he signed it, and it was read several times, six or seven times.

Ring. My lord, I do acknowledge I did lodge them, but I did not understand what design they had been upon.

L. C. J. But you see here you have acknowledged they said they were in the army, and you did lodge them afterwards; they were of Monmouth's party, they had told you so. Read that part again.

Hardisty. Joseph Kelloway, and one Lawrence the said Kelloway's acquaintance, came to this examinant's house on Friday or Saturday last; that this examinant did ask Kelloway, being this examinant's kinsman, what did drive them to town? That they told this examinant, that they went to Monmouth, that he was routed, and that that brought them to town.—*Ring.* I never said that word.

Just. Withins. It is under your hand.

Ring. If it be under my hand, I never said it,

Sol. Gen. Was that part read to him?

Hardisty. Yes.

L. C. J. Read on.

Hardisty. That they were in Monmouth's army; that the night they came, this examinant told them, he was unwilling to lodge them, and that this examinant did lodge them after this discovery, Saturday, Sunday, and Monday night, and they dined twice at this examinant's house.

L. C. J. What do you say now to this? Can there be any thing more plain?

Ring. I do acknowledge, my lord, I did lodge them, but I was not sensible what the issue of this business would be.

L. C. J. You did not know, that to harbour known traitors was High-Treason.

Ring. My lord, I don't know whether they came from Monmouth or no.

L. C. J. It is no great matter whether you do or no; they told you so.

Ring. I never heard such a word from them.

L. C. J. How came it to be put in your examination?

Ring. I don't know, my lord, when it was taken I was in a mass. I think the parish

knew well enough, that I never kept any such company, nor had any such design.

Just. Withins. He confesses it over night, causes it to be writ down next day, and sets his hand to it too: Nothing can be more plain.

L. C. J. That is a great argument you were not in such surprize, that you had not the use of your understanding; for you confessed the same thing over night, and you had time to consider of it all night, and you came the next morning, and then confessed as now it is written, and put your hand to it.

Ring. I was ordered to put my hand to it.

L. C. J. That is, if you acknowledged it to be true.

Ring. I did not know what was put down.

Just. Levins. The matter is so plain, that nothing can be more. When they came to you, they informed you where they had been, and afterwards you were unwilling to lodge them; you knew therefore they had been in the rebels army, and so the matter is plain: and for ought I can hear, this is not the first time you have harboured such men.

L. C. J. There is another thing touching one Hurle; but you are not charged with it in the indictment, and so we do not trouble the jury with any evidence concerning that? Have you any more to say?

Ring. I do acknowledge, my lord, that I lodged them; but I did not understand any thing else.

E. C. J. Why! did not you confess it?

Ring. I did not confess it.

Just. Withins. And you shifted lodging for them after they were known to you.

Ring. I did not.

L. C. J. Gentlemen of the Jury, the prisoner stands indicted of High-treason for receiving Joseph Kelloway and Henry Lawrence, who were traitors, and known to him to be traitors, and harbouring them in his house, and giving them entertainment and comfort: this, gentlemen, is clearly High-treason by law; and though this man himself were not in actual rebellion, yet if he do receive any that he knows to have been so, he is equally guilty; he is a principal traitor by the judgment of the law, and however he would now pretend his ignorance, that he did not know that they were in the army, or, if he did know they were in the army, that he had incurred so great a danger as the forfeiture of his life, which now he stands as well as he can to defend; yet it does appear plainly to you, not only by his own confession taken upon his examination, but likewise by the testimony of the witnesses, who were present at the time when he did confess that these men had discoursed with him, and acknowledged that they were in Monmouth's army, and that he was routed, and that yet he did entertain and receive them. The first witness indeed does not say the very thing, but it is very much inducing to the evidence that is given more expressly by the other witness: for he says that he was at his house, and he enquired for them there, though he did not see

him at all, but his people; and they not only did confess that they had lodged there, but that there was a lodging provided for them elsewhere: but however, if that were quite laid aside, and not taken at all into consideration, yet what is testified by the other witnesses, and upon his own examination, makes it as clear and plain as can be, that he did receive these persons into his house, and comfort them, and entertain them, knowing them to have been guilty of high treason, that is, to have been in the army of Monmouth, of that party, and that they came to London, and went away from the West because he was beaten; and there is an expression in the examination to that purpose: so that I take the indictment to be very full and clearly proved upon him; and it is not his ignorance of the law that will excuse him, that is, his ignorance of the danger that he hath incurred by entertaining these people; although you cannot but take notice, that he was in some dread and fear that it was an offence to do so: for at first he says, by his examination, that he did refuse to entertain them; which shews that he had some consideration of the danger that he might incur by receiving them: and yet after this plain discourse of theirs, that they were in the army, he entertains them. That they were the same men that were in the army, appears plainly: for though at first he did deny it, and did stand in it, before he was confronted by the men, they being present; yet afterwards he did confess, that they were the men that were entertained by him; and that they were the same men, doth appear by the testimony of captain Richardson who saw them, and afterwards caused them to be brought down to the West, where one of them was executed for treason. So I must leave it to you, gentlemen. I think it is a very plain case.

Ring. Here is abundance of these things that I know nothing of.

Counsel. Set John Fernley to the bar. [Which was done.]

Clerk. John Fernley, hold up thy hand. You that are sworn, look upon the prisoner, and hearken to his charge: He stands indicted by the name of John Fernley, &c. (*prout ante.*)

Mr. Phipps. This is an indictment of high-treason against John Fernley, the prisoner at the bar: it sets forth, that the said John Fernley knowing one James Burton to be a traitor, and to have conspired against the life of the king, did traitorously conceal the said Burton two days and two nights, and gave him meat and drink against the duty, &c.

Sol. Gen. May it please your lordship, and you gentlemen of the jury, this prisoner stands indicted of treason, for receiving and harbouring one James Burton who was guilty of treason, he knowing him to have been guilty of treason. And the course of our evidence will be this: we will prove that this James Burton stood

outlawed for treason before he committed a new treason, when he went into the West, and was there with Monmouth in the late rebellion; and though, gentlemen, the very outlawry against the said Burton is enough to satisfy any man, that this man could not be ignorant that he was a traitor, for no man can imagine, when a man stands out a process till he become outlawed for high-treason, that any should be ignorant that he is guilty of treason, and that it would be very dangerous to receive a man after that, without any more evidence: but this Burton, after he was out-lawed and fled, came again, and was in arms with Monmouth in the rebellion; and after their defeat he came up to town: and Fernley, knowing he had been then in the West with Monmouth, he received him, and harboured him; and this we will prove by witnesses. First, we will shew the record of the outlawry.

Clerk.—"An Indictment preferred against James Burton, and divers others for high-treason; for which the said Burton and divers others stand out-lawed, by the return of Samuel Dashwood, esq; and sir Peter Daniel, sheriffs." This is the record itself, my lord.

Counsel. Swear Mr. Ward. [Which was done.]

Just. Withins. Look upon it, Mr. Ward; is that the Record?

Ward. Yes it is, my lord.

Just. Withins. Pray see when the outlawry was.

Hardisty. Upon Monday next after the feast of St. Martin, Bishop, the said Richard Rumbold, Richard Goodenough, Francis Goodenough: [Here are the names of a great many then.]

Just. Withins. Is James Burton among them?

Hardisty. On Monday next after the feast of St. Michael, the said Richard Rumbold, James Burton, Richard Nelthorp, are out-lawed, and every one of them is outlawed—It is November was twelve-month.

Call James Burton. [Who was sworn.]

Mr. North. James Burton, stand up there; do you give my lord and jury an account concerning your being in the West, and your being entertained here at Mr. Fernley's house, with all the circumstances.

Burton. I came out of the West into London, on Wednesday night, from Monmouth's army.

L. C. J. What Wednesday night?

Burton. Truly I have forgot the day of the month, but it was about three weeks after the rout, and I came home to my wife and staid two nights, and she was not satisfied I should be there, and went to endeavour to get a lodging for me for two or three nights; and she went to get leave at Mr. Fernley's for me to be there two or three nights; and I went thither on Friday night, and on sabbath day in the evening I was taken there.

Sol. Gen. Speak aloud, say that again.

Burton. On Wednesday night I came out

of the country, after I had been in the army; I came home to my wife, and staid till Friday night, and on Friday night she got me a lodging at Mr. Fernley's; there I went about ten a-clock at night, and staid there till Sunday night, and I was taken.

Just. Withins. Did you see Mr. Fernley?

Burton. I saw him at dinner on Sunday, and not before.

L. C. J. What acquaintance had you before? He does not keep a public house, does he he?

Burton. I had been gone two years, or very nigh.

L. C. J. What was the occasion of your going?

Burton. My wife was acquainted there.

L. C. J. What was the occasion of your going away, and your absence for two years.

Burton. The occasion of my going then, was, I was in the proclamation for being with Rumbold at the Mitre-tavern within Aldgate.

Just. Levinz. Fernley knew you, before, did not he?—*Burton.* He knew me by sight.

Just. Levinz. Had you any acquaintance with him.

Burton. I lived pretty near to him for a while.

Just. Levinz. How near?

Burton. I lived within two or three doors of him.

Just. Levinz. Did he know you?

Burton. Yes, yes, he did know me.

Just. Levinz. You came to lodge at his house on Friday night?

Burton. Yes, an't please you.

Just. Levinz. Had you no discourse till Sunday you dined together?

Burton. No, not till Sunday at dinner.

Just. Withins. Tell your discourse at dinner.

Burton. My lord, I have forgot what altogether the discourse was; I had some discourse of the army; he knew I was in the army.

L. C. J. I would have you speak the sense, so far as you remember of the discourse at that time with him.

Burton. The sense as far as I remember, was, that the army was routed.

L. C. J. And that you were there?

Burton. He knew I was there.

L. C. J. How came he to know you were there?

Burton. I believe I told him so myself.

Mr. Just.—Upon your oath, did he know you fled upon the account of the proclamation before?

Burton. It is like he might know it by others but not by me.

L. C. J. When were you taken? What day?

Burton. I was taken on Sunday in the evening: I had been four days in London; two days at home, and two days at his house.

L. C. J. Did you not see him before Sunday at dinner?

Burton. My lord, he was in the shop all Saturday; he is a barber.

Just. Withins. You lay privately at his house all Saturday?

Burton. Yes, my lord, privately.

Council. Call Mary Burton. [Who was sworn.]

Mr. North. How came this man to lodge at Mr. Fernley's house, can you give an account? and why it was?

Mrs. Burton. Because I thought he was not safe at home; and having acquaintance with Mrs. Fernley, lodging pretty near, and she being a young woman, and having children, I had acquaintance, going to and fro; and we having a close house and no yard, I had the privilege of going to dry linen there, so that we had acquaintance, and a little familiarity; and being acquainted, I thought I might have entertainment there; that is all I can say.

L. C. J. Were you at dinner upon Sunday?

Mrs. Burton. Yes, I was at dinner.

L. C. J. What discourse had they had at dinner?

Mrs. Burton. Indeed I can't say they had any discourse, I was very ill, and laid me down upon the bed and fell asleep.

L. C. J. You are upon your oath.

Mrs. Burton. I know I am, Sir.

L. C. J. What discourse was at dinner?

Mrs. Burton. Whilst I was eating, I did not mind.

Just. Levins. You lived close by, why did you ask for a lodging there?

Mrs. Burton. We do not live close by now, I live with my daughter. I have no house now.

Just. Levins. She knew he was your husband, why should you lodge your husband at another house than where you lodged yourself?

Mrs. Burton. What was it you said, my lord?

Just. Levins. Sure you would give the woman some account, why you lodged your husband at another house than where you lodged yourself.

Mrs. Burton. She was not altogether a stranger, and upon the account of the proclamation there were none of them strangers.

L. C. J. For whom did you ask a lodging?

Mrs. Burton. For my husband.

Mr. North. Did you speak with Mr. Fernley himself?

Mrs. Burton. I did not speak with Mr. Fernley himself.

Mr. North. On Sunday you saw him at dinner?

Mrs. Burton. Yes, I saw him at dinner.

Just. Levins. Had you any discourse with them about the proclamation?

Att. Gen. About your husband's going away upon that proclamation?

Mrs. Burton. An't please you, my lord, my distress was so great, that I was hardly in my senses to discourse with any body; but, I

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thank God, I am now in my senses between whiles.

Att. Gen. Had you any discourse with your neighbours about that proclamation your husband went away upon?

Mrs. Burton. I had not, indeed.

Then Mr. Reynolds was sworn.

Mr. North. Mr. Reynolds, what do you know concerning Mr. Burton's being lodged at Mr. Fernley's house?

Reynolds. Towards the beginning of August last, hearing that there were several that were in the west lurked about Wapping, I took the Lieutenant of the Tower's warrant, and we had some intimation, that a suspected person lay at Mr. Fernley's house; I went on Sunday about eight o'clock at night, and took Mr. Burton in Mr. Fernley's house.

Just. Withins. You took him there, did you?

Reynolds. I took him there, my lord.

Att. Gen. Did you speak with Fernley before you took Burton?

Reynolds. I took Burton; and Mr. Fernley being master of the house, I wished the constable to secure him for harbouring him.

Att. Gen. What did Fernley say?

Reynolds. Says I, Mr. Fernley, how come you to harbour Mr. Burton that is in the king's proclamation? He is a traitor, you know. Says he, I did not know it was Mr. Burton; but my wife desired me to lie out of the chamber where I lay before, that a friend of hers might lie there for two or three days.

Att. Gen. Where did you find him?

Reynolds. He was in a room up one pair of stairs, up the chimney; and while we were there, he fell down the chimney, with all the soot about him; Mr. Fernley was then one pair of stairs higher; and I desired the constable to go up to see for him.

Att. Gen. Had you no discourse with him about the business of being in the army? With Fernley, I mean?

Reynolds. No, my lord.

L. C. J. Did you hear no discourse between Burton and him?—*Reynolds.* No, my lord.

Just. Withins. He was very friendly, to lie out of his own chamber for him.

Reynolds. They were put in two separate chambers, by the king's direction, till they were sent to Newgate.

Att. Gen. Did he tell you on Sunday night that he did not know it was Burton?

Reynolds. To the best of my remembrance, he did so, when I brought him to the Tower.

Att. Gen. And yet he dined with him on Sunday?

Reynolds. I looked upon it as an excuse.

Mr. North. What day was Burton taken?

Reynolds. It was Sunday.

Mr. North. What time on Sunday?

Reynolds. Sunday about eight o'clock at night. He had been in bed my lord, I believe; and before we could get open the door, I believe he got out of bed, and went to get up the chimney.

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Sol. Gen. Gentlemen, you observe in the course of the evidence the first we produce is James Burton; now James Burton stood outlawed for treason, and as he stands outlawed he is not a competent witness: but now to take off that objection which the prisoner ought to make, but we make it for him, we shew you here a pardon whereby that outlawry is discharged, so that he stands now a very legal witness.

Just. Withins. You understand, gentlemen, what Mr. Solicitor mentions?

[The Pardon produced and read.]

L. C. J. What say you?

Fernley. My lord, I am charged for entertaining Burton. My lord, I knew nothing of him when he came into my house till Sabbath-day at dinner. I asked my wife what time Burton came in; she told me he came on Friday night. Saturday was a busy day with me, my lord; on Sunday morning I got up and went to church; when I came from church, I went up to dinner; and when I came in and saw him, I asked him, what in the name of God brought him there? It hath pleased God, said he, to preserve me hitherto; and my wife interceded so far, as to procure me a night's lodging, which I hope may be no detriment to you. I wish it may not, said I; and at dinner I asked him, how he made his escape? And he told me how he did escape. Says I, What do you mean to do? Says he, Some friends will procure me a passage beyond sea. Upon this I considered with myself, and discoursed with him about the west, and his escape out of it; and about half an hour after we had dined, one knocked at the door.

Just. Levins. What day was this?

Fernley. Sabbath-day at noon, somebody knocked at the door, and they told me there was one would speak with me, and I came down, and there was one Gaunt in the shop; says he, is Mr. Burton within? May I speak with him? Yes, said I, up I went, and Gaunt with me; and when we came into the room they embraced one another, and were very glad to see one another; and Burton gave Mr. Gaunt thanks for a guinea he had sent him. Says Gaunt, Mr. Burton, I am glad to see you; I hope in a little time I shall have a passage for you beyond sea: says he, if you had been here a while sooner, you might have gone; there are some gentlemen went away a while ago. Says I to Mr. Gaunt, who were they? He told me it was major — and his son, and another. Says I to Mr. Gaunt, do you hear of Ferguson? No, says he, I hear nothing of him as yet, but in a little time I may hear from him; and Burton asked, when he thought he might be going? In a day or two's time, said he. Says Burton, I have no money nor no clothes. Says he, take no care for that; so he named some gentlemen that were to go: he told him of colonel Danvers and major Wildman. Upon this discourse, within myself I did consider what way I might do his majesty a piece of service: I thought it better to

forbear, and not to seize him presently, till I had acquainted some magistrate; and I did think in the morning to have gone to a justice of peace, and have had him apprehended: Burton, my lord, I knew was secure, for he could not escape my hands. I had no design of concealing him; I have several eminent gentlemen to testify for my loyalty. I thank God, I never had an ill thought against his majesty in my life, only this misfortune hath befallen me upon the account of my wife. I am as innocent as a child unborn, as to any thing against the king.

L. C. J. But he plainly told you, he came from the army?

Fernley. He did acquaint me, my lord, he did so; as soon as I saw him, I was startled; I did look upon it as a thing sent from God Almighty; for I knew, my lord, that there was 100*l.* for him; I knew there was a proclamation out against him; but as for the outlawry, I knew nothing of that: a proclamation I knew there was against him, and being a poor man, there was no obligation upon me to conceal him, and ruin myself and family.

L. C. J. What was the reason, you were so kind as to part with your own lodging to entertain him?

Fernley. My lord, I had quitted my chamber before he came to the house.

Just. Withins. It is proved you did it upon his account.

Fernley. My lord, no body will offer to say that.

L. C. J. That you quitted your lodging, and that he came into the same lodging is clearly proved.

Fernley. My lord, my chamber was flited above a week before he came, not knowing of him, for I had no thoughts of him.

L. C. J. Pray what servants have you?

Fernley. Only a boy, my lord.

L. C. J. Could not you have sent out your boy when he had discoursed thus treasonably with you, but keep him in your house seven or eight hours after you had entertained him at dinner.

Counsel. Are you a constable?

Fernley. I am a constable myself, and upon the account of my office I was the more secure. I was certain he could not escape my hands, and I thought to do his majesty more service.

L. C. J. How could you do his majesty more service?

Fernley. Gaunt told him, he would come again to him.

L. C. J. When did he come to you?

Fernley. About half an hour after dinner.

L. C. J. But you should have seized him immediately after dinner. How came this man to take so much freedom before you that were an officer, as to talk high-treason?

Fernley. My lord, I thank God, if I were to die this minute, I never harboured a thought against the king.

L. C. Baron. (William Montague, esq.) If

you had had a loyal heart, you should have kept Gaunt, if you had any thoughts to have done it.

Fernley. My lord, I will tell you why I let Gaunt go, because he promised to come again the next day.

L. C. J. Would you, being a constable, let a man go upon his word, that had confessed himself guilty of treason?

Fernley. My lord, if I did any thing, it was ignorantly. My lord, as for Gaunt, when I knew there was a proclamation out against Danvers and Wildman, I hearing Gaunt discoursing about their design, I thought (promising to come the next day) to know how they were to go.

Just. Levins. For God's sake, would you trust all this to your own breast! If you had had an honest intention, you would have gone to some officers, and acquainted them with it; some of the king's justices of the peace, or some of the privy-council, that such persons would be at your house the next day.

L. C. Baron. By your own discourse, after you had heard all this discourse, and after Burton had told you this, you could let him go quietly to his own chamber: If you had such a design, as you say, you should have first seized Burton.

Fernley. Another chamber; no, he dined in his chamber, my lord.

Just. Withins. You went into another chamber from him. Have you any witnesses?

Just. Levins. They had a confidence in you, otherwise Burton and Gaunt would not have talked so freely before you.

L. C. J. There was a great confidence in lodging him in your house, being a constable; no body would search a constable's house. Have you any witnesses to call?

Fernley. Mr. William Rush, captain Haddock. [Who were called.]

L. C. J. Did Burton's wife dine with you and him?—*Fernley.* Yes, my lord.

L. C. J. Where did you dine?

Fernley. In the chamber, my lord.

L. C. J. And was this discourse concerning Monmouth's being beaten in the West, at this time of dinner?

Fernley. The discourse of it? Yes, my lord, what discourse was, was at dinner.

Just. — Was Burton's wife at dinner, or was she upon the bed?

Fernley. She dined at the table, my lord. My lord, she went to sleep when Gaunt came in.

Just. Levins. Where did she go to sleep, in the same room?—*Fernley.* Yes, my lord.

L. C. J. Where do you use to dine at other times?

Fernley. In the kitchen, my lord. My lord, when I came from church, the dinner was sent up thither.

L. C. J. Woman, you are upon your oath, remember that you are obliged by your oath to confess the truth, let it concern whom it will; The discourse between your husband and this

man, you could not but be privy to; there was only you three at dinner, your husband, you, and Fernley, the prisoner, at the bar: All this discourse was at dinner-time, how is it possible that you should not hear it?

Just. Levins. Fernley himself owns he did discourse with your husband at dinner, that he came from the rebels in the West.

Mrs. Burton. An't please you, my lord, I did not hear. As I said before, I must say again, I did not hear.

Just. Withins. Nothing about Monmouth?

Mrs. Burton. No, not one word, if I were to die as I stand here.

Just. — You were at dinner?

Mrs. Burton. Yes, my lord.

Just. — And this discourse was at dinner-time?—*Mrs. Burton.* I did not hear it.

Just. Withins. What would you ask him, Sir?

Fernley. What account can he give of my life and conversation, how I have behaved myself, and carried myself.

L. C. J. What are you, Sir? What is your quality?—*Rush.* I am a distiller, Sir.

Just. Levins. Where do you dwell?

Rush. I did dwell two years ago in Wapping, but not now: I live now at Waltham-stow.—*Officer.* He is a very great Whig.

Just. Withins. If he be a Whig he cannot be a little one.

L. C. J. How long have you lived at Waltham-stow?

Rush. Two years and upwards, Sir.

L. C. J. That is long before any thing that this man is charged withal.

Rush. I formerly knew the man, he was a barber, and used to trim me: I always looked upon him to be a good sober man.

Just. Withins. A Wapping-man! a sober Wapping-man!

Rush. I hope there is a great many there.

L. C. J. That is all you say for him?

Rush. I have nothing to say to his fact. He demeaned himself always well among his neighbours; I know nothing of the fact for which he is here.

Att. Gen. Did you know Burton?

Rush. Yes, Sir.

Att. Gen. What was Burton? was he reputed an honest man?

Rush. I never knew him otherwise; I never was in his company; I know he dwelt close by where I lived.

L. C. J. And you took him to be a very honest man?

Rush. Before this: He has not been so lately, it seems. He is a person I never had any company or conversation with in my life.

Cryer. Captain Haddock.

Officer. He won't come in, my lord.

L. C. J. Well, well, let him stay there.

Cryer. Mr. Dove.

Officer. He won't come in, I can't make him come in.

L. C. J. Here are none that give any testimony for you, at least will. What are you?

Whittal. I dwell in Wapping, Sir.

Just. Levins. What trade are you?

Whittal. A plumber.

Just. Levins. Who knows you?

Whittal. I am well known there, Sir.

Just. Levins. Do you go to church?

Whittal. Here's Mr. Tanner knows me, the Clerk of the Peace.

Tanner. Yes, Sir, I know him.

Just. Levins. Do you go to church?

Whittal. Always went to church.

Just. Withins. There were a parcel of them that went constantly to church trimmingly.

L. C. J. Prisoner, what would you ask him?

Fernley. Only to give an account how I behaved myself.

Just. Withins. Well, Sir, what do you say?

Whittal. All I know is, he behaved himself very well, and went to church as other neighbours did; and I never heard him speak against the government.

Just. Withins. Did you know Burton?

Whittal. No, Sir, he was gone before I came to live there.

L. C. J. Have you any more to say?

Fernley. This, my lord, may give some account, that I had no design against the government. I am a poor man, my lord, and upon that account I owe a great deal of money: I knew there was 100*l.* for securing Burton, there was no gain by concealing him: he was not a person could requite me, that I should harbour him, and lose 100*l.* which was certain for taking him: which, my lord, shews I had no design.

L. C. J. No, this argues you to be a stronger confederate; and that you were so firm to your party, you would not gain 100*l.* though you might have it for doing your duty.

Fernley. My lord, I looked upon it as sure as if I had it in my pocket. I knew nothing of him till Sabbath-day at noon, and I did not design to conceal him afterwards, any farther than to serve the king.

L. C. J. You tell us a story of yourself; it is to no purpose to try any prisoner, if his saying must be taken for evidence: We will hear what witnesses you have to produce, or if you can object to the evidence that's against you.

Fernley. My lord, I own it to be true, I have declared more than the witnesses have said against me: but, my lord, I am innocent in it, God knows my heart, I had no design in it. It was but six hours I knew of him.

Just. Withins. You lay out of your bed before?

Fernley. My lord, not upon his account; I was a week before out of that bed, to prepare it for my wife to lie-in.

L. C. J. Is your wife delivered?

Fernley. No.

L. C. J. You made great haste?

Fernley. It was my wife's fault.

L. C. J. Gentlemen of the Jury, this prisoner stands indicted for harbouring and relieving one James Burton, knowing him to have committed treason. Gentlemen, you are to be

acquainted, that this James Burton was not only guilty of the late rebellion in the west, but he was likewise charged by process with being guilty of the plot at the Rye-house, and thereupon there were such proceedings by law, that he was outlawed, the record of which outlawry hath been produced to you: so that if there were no more, if you be persuaded that he is the person guilty, whether he were in the rebellion in the west or no, that may induce you to find this indictment, for the prisoner receiving him after the rebellion in the west, and knowing him to have committed treason, whereupon he was outlawed, it equally makes him liable to the offence wherewith he is charged. But, gentlemen, that is not all; you have express testimony from Burton himself, who it seems was acquainted with him, and who had fled from his neighbourhood, by the space of two years almost, and yet he receives this Burton into his house: I will not say, at the first time that he came into his house, it doth appear by any evidence, that he knew him to have been in the rebellion in the west; but when he came thither upon Friday, he was so kind to him as to leave his own chamber, and to let him have that for his lodging, although now he gives you another excuse plainly frivolous and false, that is, a pretence of making way for his wife to lie-in, who yet is not delivered. He lies there upon Saturday night, and dines with him upon Sunday. Saturday perhaps might be a busy day, and there is no testimony at all given by any evidence of any discourse that was between them upon that day; but upon Sunday, when they dined together, Burton swears, that he did tell him that he had been in the west in the rebellion there, and he came thither for shelter. This man being acquainted with this, allowed him to dine with him, and harboured him in his house for the space of seven or eight hours more, without bringing him before any justice of peace, or any magistrate who had authority to commit him, although he had a particular authority of his own (as he was constable) for the conservation of the peace; yet he forgets his oath as well as his duty and allegiance, and suffers him still to remain there. It is true, the wife of Burton dined with them, as Burton himself says, and the woman confesses; but she was so busy at her victuals, that she can remember nothing, she did not hear that there was any discourse concerning Monmouth. But lest you should want another witness, for Burton is but one witness to that particular, you have him plainly confessing it himself, which is above a thousand witnesses; you have him confessing that Burton did acknowledge he had been in the west, and that Monmouth was routed, and yet he continues him in his house; nay more, this man doth appear to be a person in whom there was that great confidence, that another person, Gaunt, came, and he bids him come into this house, and there he discoursed of some traitors, and the means of conveying away Burton, though he had confessed it him-

self. Gentlemen, what he tells you, is, that he did mean to discover; when did he intend to discover? He did not discover to any body, before the man was apprehended by an officer: he lets Gaunt, who plainly appears to be as arrant a traitor as could be in the world, to go away merely upon his own parole, without taking any course to apprehend him. He pretends he is a poor man, and he might have gained 100*l.* if he had discovered him, and surely he would have discovered him to gain 100*l.* But this is a strong argument, that he was deep in the rebellion himself, and one in great esteem with them, that being a poor man, he would not do his duty, for which he might have a reward of 100*l.* but suffers him to escape. This is the case, gentlemen, that is before you; if you believe he did knowingly, as he himself upon the matter doth confess, give any comfort or relief to Burton, knowing him to be a rebel, you ought to find him guilty.

Then the Jury withdrew to consider the evidence.

Clerk. Set Elizabeth Gaunt to the bar. [Which was done.] Elizabeth Gaunt, hold up thy hand. [Which she did.]

"Thou standest indicted by the name of Elizabeth Gaunt, wife of William Gaunt, of the parish of St. Mary White-Chappel, in the county of Middlesex, yeoman; as a false traitor against our late serene lord Charles the second, by the grace of God her then natural lord; not having the fear of God in her heart, nor weighing the duty of her allegiance, but moved and seduced by the instigation of the devil, and the true and natural obedience which a true and faithful subject of our said sovereign lord the king towards our said late lord the king of right ought to bear, withdrawing, and with all her strength intending the peace and common tranquillity of this kingdom of England to stir up and move, and the government of our said late sovereign lord the king in this his kingdom of England to subvert, and our said late sovereign lord the king from the title, honour, and kingly name of the Crown Imperial of this kingdom of England to depose and deprive, and our said late sovereign lord the king to death and final destruction to bring and put: the 24th day of September, in the 36th year of the reign of our said late sovereign lord Charles the second, and divers other days and times as well before as after, within the parish, &c. falsely, maliciously, devilishly, and traitorously, with divers rebels and traitors, to the jurors unknown, she did conspire, imagine, and intend our said late sovereign lord the king, her then supreme and natural lord, not only from his kingly state, title, power, and government of this kingdom of England to deprive and throw down; but also

our said late sovereign lord the king to kill and put to death, and the ancient government of this kingdom of England to alter and wholly subvert, and a miserable slaughter amongst the subjects of our said late sovereign lord the king throughout this kingdom of England to cause and procure, and insurrection and rebellion against our said late sovereign lord the king to procure and assist. And the said most wicked and devilish treasons and traitorous compassings, imaginations, and purposes aforesaid, to fulfil, perfect, and bring to pass, the said Elizabeth Gaunt, as a false traitor, then and there, to wit, the said 24th day of September, in the year aforesaid, at the parish and ward aforesaid, well knowing one James Burton to be a false traitor, and as a false traitor traitorously to have compassed and imagined the death and destruction of our said late sovereign lord the king, and war and rebellion against our said late sovereign lord the king within this kingdom of England, together with other traitors (to the jurors unknown), to have intended to be raised; she the said Elizabeth Gaunt afterwards, to wit, the said 24th day of September, in the year aforesaid, within the city of London aforesaid, the said James Burton, in a certain house of a person to the jurors unknown, knowingly, secretly, wickedly, devilishly, and traitorously, did entertain, conceal, comfort, sustain, and maintain, and then and there, for the comforting, sustenance, and maintenance of him the said James Burton, meat, drink, and 5*l.* in money for the maintenance and sustenance of him the said James Burton, unto the said James Burton, maliciously and traitorously she did give and deliver, and cause to be given and delivered, against the duty of her allegiance, and against the peace, &c. and against the form of the statute, &c."

Clerk. How sayest thou, art thou guilty or not guilty?

Mrs. Gaunt. I desire to have more time to consider of it.

L. C. J. You know whether you be guilty of this offence; what need you have any time of consideration for that?

Mrs. Gaunt. I do not know, Sir; I am ignorant in the law, and in things of that nature.

L. C. J. But this is not matter of law; it is, whether you did receive these traitors or no knowingly; this James Burton, knowing him to have committed treason: cannot you tell whether you did or no?

Mrs. Gaunt. Not Guilty.

Clerk. How wilt thou be tried?

Mrs. Gaunt. By God and my country.

Clerk. God send thee a good deliverance.

Then the Middlesex jury returning, Mrs. Gaunt was set aside, and Ring and Fernley brought to the bar, who were both brought in Guilty by the jury.

Clerk. Set Henry Cornish to the bar, and Elizabeth Gaunt. [Which was done.] You

the prisoners at the bar, these men that have been now called, and here appear, are to pass between our sovereign lord the king and you, upon your several lives or deaths: if you challenge any of them, you must speak as they come to the book to be sworn, before they are sworn.

Mr. Cornish. My lord, I must humbly beg leave of your lordship and this honourable court, that I may renew my request. The time of notice given me for my trial being so short, it hath no precedent, I think: I humbly pray your lordship I may have time allowed for my trial; I have had no counsel, no pannel, no help in the world; I had not pen, ink, nor paper, my lord; these are very hard things. My lord, his majesty was petitioned last night by my children, and he was graciously pleased to say, that he would refer it to my lords the judges. I only pray your lordships, that you would be pleased to allow me time: though here is a grievous indictment brought against me, yet I doubt not but to clear myself of what is alledged against me, if I have but time to prepare myself for it: therefore I humbly pray I may have time allotted.

L. C. J. You told us so before, that you had exhibited a petition to the king, and that the king did refer it to the judges; you shew us nothing of that.

Cornish. My lord, I can but only signify to your lordship what I hear; my children were with me, and told me they had petitioned the king, and his majesty was pleased graciously to receive it.

Att. Gen. The king left you to the course of the law.

Cornish. It is very hard measure; I have no preparation at all, no more than at the first moment; but I bless God, I hope I shall in time satisfy you of my innocency.

L. C. J. You were apprehended and seized upon Tuesday last, this is almost a week; you knew what you were charged withal.

Cornish. My lord, I did not know what I was charged withal, I had no liberty of friends to come to me; my wife at length obtained leave, but it was in the presence of major Richardson; I had no friend with my wife, no pen, ink, nor paper.

L. C. J. Was pen, ink, and paper denied you? Did you ask it?

Att. Gen. As soon as he petitioned for it, he had it.

Capt. Richardson. He had pen, ink, and paper.

L. C. J. When was that?

Capt. Richardson. On Saturday.

Cornish. My lord, it was eight o'clock at night.

Just. Levins. Mr. Cornish, I would not have you think you are used otherwise than other men are; for I must tell you, it is not usual to have pen, ink, and paper, without leave.

Cornish. I know it hath been allowed in the like case.

Just. Withins. Ay, upon petition, never else.

Just. Levins. There are many men, and of as good quality as you, tried for killing men: does any body give them notice? Is there any more necessity of notice in point of treason, than in point of murder?

Just. Withins. I told you what your offence was, when you were committed.

Cornish. My lord, I remember in my lord Russel's case, he had at least seven or eight days allowed him.

Just. Levins. It may be so; but it is not necessary. Prisoners that are tried here generally have no notice at all; if one man hath a singular favour, another man cannot claim it.

Cornish. My lord, I have a material witness above a hundred and forty miles off.

L. C. J. My lord's trial, I think, was put off but till the afternoon.

Cornish. With submission to your lordship, I think he had eight days assigned him. But, my lord, I humbly conceive I have a witness that is very material in my case, that is 140 miles out of town, in Lancashire; I humbly pray I may have time allotted me to send for him.

L. C. J. Why did you not set forth that in your petition to the king?

Cornish. My lord, I did not understand the case.

L. C. J. Were not you committed for high-treason?

Just. Withins. I told you so myself: I shewed you the commitment; therefore you cannot pretend you were ignorant of it.

Cornish. My lord, it did not mention this king or the last: and I am not a lawyer, I am not skilled in these things; I am very ignorant, and hope your lordship will consider me; my innocence will appear as bright as any man's that ever stood at this bar.

L. C. J. I do not believe you want that evidence a hundred and forty miles off. Is he the only man that can make your innocence appear?

Cornish. My lord, by what I apprehend he will be the most material witness I have. My lord, I shall desire nothing but with submission to your lordship and the bench; but I humbly conceive it is very reasonable I should have time, I humbly pray your lordship to consider it.

L. C. J. Mr. Attorney, have you any directions?—*Att. Gen.* No, my lord.

Cornish. I do not doubt, if I might have a little time, to make my defence.

Just. Withins. You should have applied yourself to the king, it does not lie in our power.

Cornish. My lord, I humbly pray you to consider my case.

Justice Withins. Mr. Bridgman here on the bench says, there was a petition before the king, for putting it off; and the king absolutely refused it.

Justice Levins. We have nothing to do, Sir; we are here by commission to try you.

Cornish. My lord, I have been denied a copy

of the pannel; I hope that is reasonable, I must desire a copy of the pannel.

Att. Gen. That is none of your right, Mr. Cornish.

Cornish. Mr. Attorney, with submission, I hope I ought to have it.

Att. Gen. No, you ought not to have it; you have your peremptory challenges, you may challenge thirty-five without cause.

L. C. J. You shall have a copy of the pannel here.

Att. Gen. Yes, here he may.

Cornish. It is a very hard case, when I have a material witness so far out of town, that I cannot have a little time allotted.

L. C. J. Cannot every man that comes here to be tried say the very same thing, that he hath a material witness in France, Spain, or any where else, and that when that witness comes, his innocence will be as clear as the sun?

Cornish. My lord, my witness is in Lancashire, I cannot help it; I beseech your lordship to consider me: I am apt to believe that he would so much vindicate my reputation in this matter; that it would be a very great satisfaction to your lordships; and I am sure you are not for oppressing any man.

L. C. J. No, Sir, that we are not.

Cornish. I am sure you are for the just vindication of the government, for executing of justice, and I will desire no other than that.

L. C. J. Mr. Attorney, if you pray he may be tried, we cannot deny it.

Att. Gen. Mr. Cornish, I cannot defer it; I have no authority; and why you should be in another condition than other prisoners, I do not know; you have not deserved so well of the government.

Cornish. I have not the names of the wards where these men live, and their trades.

Mr. North. He hath a copy of the pannel, and that is sufficient.

L. C. J. You may ask them where they live.

Cornish. I hope I may have pen and ink, my lord.

L. C. J. Ay, ay.

Then the Jury were called, and after Mr. Cornish had challenged 35 of them, the Jury sworn were as followeth: Thomas Rawlinson, Thomas Langham, Ambrose Isted, Thomas Pendenton, John Grice, Thomas Oneby, William Clowdesly, Richard Holford, William Longboat, Stephen Coleman, Robert Clavel, William Long.

Proclamation being made, "If any one can inform," &c. Mr. Cornish was set aside, and Elizabeth Gaunt at the bar.

Clerk. Elizabeth Gaunt, hold up thy hand. [Which she did.]—You of the Jury, look upon the prisoner, and hearken to her cause: she stands indicted by the name of, &c. (as before in the indictment.) Upon this indictment she hath been arraigned, and thereunto pleaded

not guilty, and for her trial hath put herself upon her country, which country you are. Your charge is to enquire, whether she be guilty of this high treason whereof she stands indicted, or not guilty. If you find her guilty, &c.

Mr. Phipps. May it please your lordship, and you gentlemen that are sworn, Elizabeth Gaunt the prisoner at the bar stands indicted, for that she knowing James Burton, together with other traitors, traitorously to have conspired the death of the late king, and to raise rebellion in this kingdom, did harbour the said James Burton, and give him five pounds in money.

Att. Gen. May it please your lordship, and you gentlemen that are sworn, the prisoner stands indicted for harbouring of Burton, who was a great traitor, and for procuring a way for his escape beyond sea, and also for giving him 5*l.* to bear his charges. In the former trial you had an account of her husband, and in this you will hear she and her husband were the great brokers for carrying over such traitors, as my lord Shaftesbury and others; these have taken care to convey them over at all times. We will produce our witnesses. Call Burton and his wife. [Mr. Burton sworn.]

Att. Gen. Do you know Mrs. Gaunt?

Burton. Yes, Sir.

Att. Gen. Pray give my lord and the jury an account how she harboured you, and all the passages that past between you and Mrs. Gaunt. Pray tell first, whether you were engaged in the matter of the Rye?

Burton. How I came concerned I will tell you, if it please you.

Att. Gen. Speak.

Burton. The first time I knew any thing of it, Mr. Keeling came to me one Saturday morning and asked me, if I was to go to London. I said, Yes, I was to go to the Exchange; and he desired me to meet him at the Mitre-tavern within Aldgate, and ask for number five. I came at the time, and nobody being there, I was going away, and met with a countryman, with a stick in his hand, that had but one eye; he came and asked for the same number: so the gentleman sent his boy after me, and told me one stayed for me. When I came, he asked me, if I asked for number five? and I said, Yes. By whose appointment? By Josiah Keeling's, said I. So he asked the man of the house to shew a room: he shewed a box; but he would have a room, and went up stairs, and called for pipes and a candle, and a pint of wine. In a little while Keeling came in, and brought Barber and Thompson, and nobody spake almost any thing but Rumbold, (that was Rumbold with one eye, for Keeling when he came in called him captain Rumbold) and Rumbold talked about privileges and such things at first, and he said his house was a convenient house, and there they might do the business: but before they had done, I found they designed to kill the king, but no thing troubled him but killing the postillion, to

kill a man in cold blood. But then says we, if you are for killing, we have done, and so broke up; that was the end of that. A while after Mr. Keeling went in, and made a discovery: I never came among them afterwards. So after Mr. Keeling had discovered, I was in the proclamation for being there at that meeting, and absconded myself, and lay hid. A matter of two months after, Mrs. Gaunt came to enquire of my wife where I was, to speak with me; she brought her to me. She told me, there were some persons about to make an escape, and would have me go along with them. I told her, with all my heart: so I asked her which way and how they intended to go. She told me, they had provided horses to ride down to Rochford-hundred, and there was a vessel to carry them over; and, says she, Be ready by such an evening, and I will call for you. Accordingly she did, and had me into Bishopsgate-street, and in Half-moon-alley in a little brew-house, up stairs in a chamber, there were both the Rumbolds; one of them did not go, and the other and I lay there all night; and in the morning a man came and called us away; and we went to White-chapel to take horse, to ride down to Rochford-hundred, and stayed for the vessel two days; and when we met the vessel, it was a small vessel, and bad weather, and the master of the vessel had but one hand and two boys, one a very little one; and we went down the creek, and I asked the man where he did intend to land us; and he told us, at Ostend. Said I, I understood we were to go for Holland to the Brill. Says he, My vessel is only able to go to Ostend or Dunkirk, either of them. Says Rumbold, I do not understand the sea. Says I, This is a very small vessel and leaky, and the man not able to manage it. Says I, I will go back again to London. Says he, I will do as you do; and we both parted at London, and I never saw him afterwards till I saw him at Amsterdam. I lay by a great many months after; then Mrs. Gaunt came to me again, and told me there were two other persons going, and I might have a passage if I would go: so she bid me be ready by such an evening, and I was ready; and a boat being ready at the water-side, carried me to Gravesend, where I went in a vessel to Amsterdam.

Att. Gen. Where were you?

Burton. I was with my wife at my daughter's: I had a daughter married, her husband was drowned.

Att. Gen. How came Mrs. Gaunt to take so much care of you? Give the court an account.

Burton. She might think I knew something of her husband, if I should be taken; I suppose that might be the chief thing.

Att. Gen. What had her husband done?

Burton. Her husband, I suppose, knew something of the business.

Att. Gen. What business?

Burton. About seizing the Tower: He came to me, and would have had me gone with him with capt. Walcot to the Tower, to see what

force there was of soldiers; and capt. Walcot said he had a design to take an house over-against the Tower, to put in some men there to break in upon the Tower; and Gaunt was with him.

L. C. J. What discourse had you with her about the plot?

Burton. Nothing with her.

Att. Gen. What was it she would help you away for?

Burton. I suppose this was the reason, because she knew I knew her husband was concerned.

Mr. North. Did she assist you with any money?—*Burton.* Yes.

Mr. North. How much?

Burton. She gave me a parcel of money just as I was going away; I put it among other money.

Mr. North. How much? 30 or 40s.?

Burton. More than that.

Sol. Gen. Were you gone from your own house when this woman came to you?

Burton. My own house was broke up a great while before.

Sol. Gen. Did you appear publicly when she came to you?

Burton. No, an't please you.

L. C. J. Had there been any search for you before?—*Burton.* Yes.

Mr. North. You were in the proclamation at this time?—*Burton.* Yes, an't please ye, Sir.

Att. Gen. Did she carry you to Rumbold?

Burton. Yes.

Att. Gen. Was there any discourse between Rumbold and her?

Burton. No; there was an elderly man in the house, I did not know him, carried me up to Rumbold, there was both of them.

Att. Gen. What money had you of her?

Burton. I believe about 5*l.* I told her I had lain a great while, and money was very bare with me; and she told me she would get me a little.

Att. Gen. Did she know what you were concealed for?

Burton. Every body knew that, because I was in the proclamation.

Mr. North. What directions did she give you, how you should behave yourself when she went with you to Bishopsgate-street? How did she say you must carry yourself?

Burton. Nothing there, she gave no order about that.

L. C. J. Did she tell you you were concerned in the plot with her husband?

Burton. She did not tell me so, Sir.

L. C. J. Did you tell her you were concerned in the plot with her husband?

Burton. I did not tell her so.

Att. Gen. Who were the two men that were prepared to go with you that time?

Burton. One Patchil.

Att. Gen. He was killed in the fight. Was Patchil in the fight?

Burton. Yes, an't please you he was killed.

Att. Gen. And who was the other?

Burton. The other was a man lived in South-work; I never saw him before.

Com. Serj. What directions did she give you about your own name, or any others, when you went into the boat?

Burton. If I knew any body, that I should not take notice I knew them.

L. C. J. You were not to take any acquaintance of any body in the boat?

Just. Withins. Hark you, Sir? You looked upon all those to be engaged in the plot? All that she endeavoured to save, were of the same level.

Burton. Rumbold was; Rumbold was in the proclamation.

L. C. J. Did she tell you, that you were in the proclamation?

Burton. No, an't please your lordship, she did not tell me so.

Mr. North. Did she never discourse of your being in the proclamation?

Burton. No, not as I remember; it was a general thing.

Just. Withins. But why should she come to you to transport you, if it were not for such a thing?

Burton. Her husband was with me about going to the Tower.

Att. Gen. Burton, pray thus; when you came from the West, what overtures were to help you here from her, or her husband?

Burton. Her husband was with me at Fernley's house, and he told me there were two or three persons to go in two or three days, and I should go with them.

Att. Gen. You named your daughter, what is her name?

Burton. Mary Gilbert. [Then Mary Gilbert was called and sworn.]

Att. Gen. Do you know Mrs. Gaunt?

Mary Gilbert. Yes, Sir, I know her, she was our neighbour.

Att. Gen. Then give an account of her coming to you about your father.

M. Gilbert. She came to our house that night my father went away. I never heard a word of the discourse that past, for I always went out of the way.

Just. Withins. Why did you go out of the way?

M. Gilbert. Because they were not willing I should hear the discourse.

Com. Serj. You are upon your oath, mistress, you must tell the truth.

M. Gilbert. I do, Sir; I will tell no more.

Sol. Gen. Did you see your father go away? Who did he go with? In what company?

M. Gilbert. I cannot tell.

Att. Gen. Did Mrs. Gaunt go with him?

M. Gilbert. I met my father and Mrs. Gaunt in Houndsditch, my mother and I were to meet them in Bishopsgate-street.

Com. Serj. Well, what was the reason why you did not meet?

M. Gilbert. We were to meet at seven o'clock, and we went to the house, and they were not come; and we were coming home,

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and met them in Houndsditch, and my father had Mrs. Gaunt under the arm, and went back to a house without Bishopsgate.

Sol. Gen. Did Mrs. Gaunt carry him thither?

L. C. J. Do you know why your father was to go away?

M. Gilbert. He went upon the account of the proclamation.

L. C. J. Then you knew of the proclamation?

M. Gilbert. Yes, Sir, I knew of the proclamation.

Com. Serj. Whose acquaintance was the man in Bishopsgate-street?

M. Gilbert. He was none of mine.

Counsel. When your father went up stairs into a room, did you see any body with him?

M. Gilbert. Yes, Sir, it was a man that had but one eye, a full set man, full of pock-holes; but I never saw him before, nor after.

Counsel. How came you to see him?

M. Gilbert. By going up stairs to see my father.

[*Mary Burton sworn.*]

Att. Gen. Do you know Mrs. Gaunt there?

Mrs. Burton. Yes, Sir.

Att. Gen. Pray will you tell the court, how she came to enquire after your husband?

Mrs. Burton. Yes, Sir, at my daughter's house.

Att. Gen. What discourse happened between you?

Mrs. Burton. No discourse; but she said if I was willing, my husband should go away, and she would take care.

Sol. Gen. But why should he go away?

Mrs. Burton. I do not know why, but only upon the proclamation.

Counsel. Woman, did she take notice your husband was gone from home, and had left his house?

Mrs. Burton. I knew myself, my Lord.

Just. Levins. Where did you go?

Mrs. Burton. My husband went out of doors by his own self, by appointment, and we were to meet, my child and I together, without Bishopsgate, by the Catharine-wheel.

Com. Serj. Who made that appointment?

Mrs. Burton. Mrs. Gaunt.

Com. Serj. Upon what account did she come to you to secure your husband?

Mrs. Burton. Upon the account he was in the proclamation, and I thought within myself, for fear my husband should know any thing against her husband; but I never said so, for I was glad my husband should be helped away, willing to save his life, for I knew it was death.

Just. Levins. And you took that to be the meaning of it in reference to the proclamation?

Sol. Gen. How far did you live from her?

Mrs. Burton. Formerly we dwelt pretty near one another, when Mrs. Gaunt kept a tallow chandler's shop.

L. C. J. Woman, do you verily believe she

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knew your husband was in the proclamation?

Mr. Just. — Did you never see the prisoner at the bar at any time in Holland?

Mrs. Burton. No.

Att. Gen. Nor her husband?

Mrs. Burton. Nor her husband.

Att. Gen. I ask you at this time when your husband went away, and his house was searched, how far did she live from you then?

Mrs. Burton. She had but lodgings; I do not know where her dwelling house was.

Att. Gen. Where were her lodgings?

Mrs. Burton. At the upper end of Old Gravel Lane, and my daughter in the middle of Gravel Lane, in Worcester street, as far as it may be to Newgate, thereabouts.

Att. Gen. Was it taken notice of all over the street that the house was searched, and your husband gone; Was that taken notice of in the neighbourhood?—Mrs. Burton. Yes, yes.

Counsel. Between the time your husband went first away, and the time she came to take care of him, had you no discourse about the reason of his going away, nor of the proclamation?—Mrs. Burton. No.

L. C. J. What say you, woman, to this evidence? Several witnesses say you were very busy in contriving the escape of Burton; what was the reason why you would send him away?

Mrs. Gaunt. I did not contrive to send him away.

L. C. J. The woman says so, Burton says so, the daughter says the same.

Mrs. Gaunt. Where, Sir?

L. C. J. At Bishopsgate, or Houndsditch.

Mrs. Gaunt. I deny it.

L. C. J. And you gave him money afterwards?

Mrs. Gaunt. Who saw me give it him?

L. C. J. He swears it.

Mrs. Gaunt. He was the more beholden to me.

L. C. J. Did you, or did you not?

Capt. Richardson. She says she is not come here to tell your lordship what she did.

L. C. J. Woman, did not you hear that Burton's name was in the proclamation about Rumbold's plot?

Mrs. Gaunt. It is like I might.

L. C. J. You might hear it!

Mrs. Gaunt. Yes.

L. C. J. And yet you would by all means help him to escape?

Mrs. Gaunt. I can say nothing against it, if they swear it.

L. C. J. Do you know what you are charged withal? You are accused for relieving and comforting Burton, whom you knew to have committed treason.

Mrs. Gaunt. My lord, he says so.

L. C. J. And for helping him to escape, and giving him money in order to it?

Mrs. Gaunt. He says so.

L. C. J. He swears so; What do you say?

Mrs. Gaunt. Is that sufficient?

Mr. Just. — Ay, and another swears it, that is sufficient.

Mrs. Gaunt. I have not heard any body else swear it.

Mr. Just. — Yes, his wife.

Mrs. Gaunt. Not about the money.

Mr. Just. — You came and solicited him to go several times.

Mrs. Gaunt. It is very untrue, my lord.

L. C. J. Did you know his house had been searched to find him?

Mrs. Gaunt. I did not know it a great while since, I might know.

[Here Burton's pardon was produced again.]
Just. *Withins*. It is a pardon for Burton, now he is a good witness,* gentlemen.

L. C. J. Have you any more, woman, to say for yourself? If you can tell us any other cause than that he was guilty of treason, wherein your husband was concerned.

Mrs. Gaunt. No, I deny that, that I knew my husband was concerned in any thing of that kind.

L. C. J. Wherefore then would you take so much care to send him away?

Mrs. Gaunt. I don't tell you, my lord.

L. C. J. You don't tell us, but the witnesses have sworn it.

Mrs. Gaunt. I must leave it to them.

L. C. J. Gentlemen of the Jury, this woman stands indicted for high treason, for concealing, comforting, and relieving one James Burton, a person that had committed high treason; and for endeavouring that he might make his escape, and giving him 5*l.* in money. Gentlemen, the evidence that is given is by Burton, his wife, and his daughter. Burton says, that this woman was very solicitous several times to help to send him beyond sea. He does tell you, that when there was a plot against the life of the king, wherein Rumbold was concerned, and one of the chief actors, that he himself was present at one of the consultations concerning it, and that afterwards he did withdraw himself from the company, as he says; but he says, that this woman's husband being likewise concerned in the plot, and this woman, as he believes, knowing that he was able to make some discovery concerning her husband, and knowing also his danger in respect of his own guilt, she endeavours to send him away first to Rochford, and so to go beyond sea. And afterwards, in another place in Houndsditch, and from thence he was to be conveyed beyond sea. It is true, there is no direct proof that there was any particular mention that Burton was in the Proclamation for that treason; but the woman says, and Burton himself says, that

* "Though it might make him a good witness, yet unless he had been attainted, it was not legal to try any for receiving or comforting him, for had he been convict, yet if he had had his clergy, the other, who is in nature of an accessory, is discharged thereby." Hale's P. C. p. 222.

they do both verily believe, that the prisoner at the bar did know he was in the Proclamation, and therefore there was no particular discourse concerning it; and she herself being examined, says, she might hear that his name was in the Proclamation, and she might hear that his house was searched, and that he could not be found; and yet notwithstanding all this, she endeavours to conceal him. What can be the meaning of all this in this woman, but that she was very zealous to maintain the conspiracy, and was a great assistant to all persons that were concerned in it? She will not tell you any other cause wherefore she should be concerned to convey this man beyond sea, and therefore in all reason you ought to conceive it was for this; it was a known cause, made known to all people by the king's Proclamation. If you believe she did know or believe Burton to have been guilty of that treason, and that she did help to convey him away, as the witnesses have proved that she did, by giving him money, and soliciting him several times to be gone, then you ought to find her guilty.

Then the Jury desiring to ask a question, Burton was called again; but being gone out of court, was sent for, and Mr. Cornish was set to the bar.

Clerk. Henry Cornish, hold up thy hand; you of the jury, look upon the prisoner, and hearken to his cause; he stands indicted by the name of Henry Cornish, late of the parish of St. Michael Bassishaw, in the ward of Bassishaw, London, merchant, &c. as before in the indictment. Upon this indictment he hath been arraigned, and thereunto pleaded Not Guilty, &c.

Mr. Phipps. May it please your lordship, and you, gentlemen that are sworn, Henry Cornish, the prisoner at the bar, stands indicted, for that he, knowing that the late duke of Monmouth, William Russell, esq. the late lord Grey, and other traitors, had conspired the death of the late king, and to raise rebellion in this kingdom, did promise to aid and assist them in compassing this wicked imagination, against the duty of his allegiance, &c. To this he hath pleaded Not Guilty, &c.

Cornish. I am innocent of the whole matter.

Officer. Burton is come.

L. C. J. Let us make an end of that first. In the evidence that you gave against Elizabeth Gaunt, you said that you did receive money from her, 5*l.* or some such sum.

Burton. Yes, an't please your lordship.

L. C. J. Did she owe you any money?

Burton. No, my lord.

L. C. J. Upon what account was it you received that money?—*Burton.* She gave it me.

L. C. J. Upon what account was it? To assist you in your escape?

Burton. She knew I was bare of money, and gave it me of her free will.

L. C. J. And it was at that time you went away?—*Burton.* Yes.

Just. Withins. It was to assist you in your escape?

Burton. Yes, I believe so.

Com. Serj. Who paid your boat-hire?

Burton. I paid none, I don't know, the waterman can tell.

Att. Gen. May it please your lordship, and you gentlemen of the jury, Mr. Cornish the prisoner at the bar, stands indicted for contriving the death of the late king, and for raising rebellion in the kingdom, and is charged that he did consent to be assisting to that rebellion that was then designed. It is not unknown to you, gentlemen, for there have been several trials of that conspiracy, that there was a great rebellion designed in England by the late duke of Monmouth, the lord Russel, and sir Thomas Armstrong; and particularly, gentlemen, there was a meeting (which already hath appeared in public,) at Mr. Sheppard's house, where the lord Russel, the late duke of Monmouth, sir Thomas Armstrong, Mr. Rumsey, and the late lord Grey, met to consider and adjust matters. At that meeting Mr. Cornish indeed came in very late, (for he was invited and knew their design then) he came in late, and so was not at the whole discourse; but there was a declaration framed to be put out when they should rise, and they did acquaint Mr. Cornish with it, and they read it to Mr. Cornish, and Mr. Cornish did like it very well, and promised he would be assisting, as we will prove to you, gentlemen. Another instance of Mr. Cornish's rebellion, for I need not tell you what part he acted when he was sheriff, and maintained that which was the ground-work of the rebellion, setting the commonalty against the government of the city: another instance we will give you is, his under-sheriff that was employed to divide the city, and to raise men within the city, having discourse with Mr. Cornish about settling that matter, he liked it very well, and promised he would be assisting to him; and you may easily presume Mr. Goodenough the under-sheriff was very privy to all the acts of Mr. Cornish at that time. We will call our witnesses. Mr. Rumsey.

Cornish. I desire the witnesses may be kept apart.

Att. Gen. They will prove it upon you at two times.

Cornish. You will find me guilty of neither; I am as innocent as any person in this court.

Att. Gen. So was my lord Russel to his death, Mr. Cornish: do you remember that?

Cornish. Mr. Attorney General, I speak in the presence of the great God, I am as innocent as any man in this court.

Att. Gen. Mr. Rumsey, pray will you give my lord and the jury an account of the insurrection that was to have been in England, in the late king's time, and what concern the prisoner had in that affair.

Rumsey. My lord, about the latter end of October, or the beginning of November, my

lord Shaftesbury desired me to go to Mr. Sheppard's house, where there was a meeting of those gentlemen that I did name before, the duke of Monmouth, my lord Russell, my lord Grey, sir Thomas Armstrong, and Mr. Ferguson, and Mr. Sheppard, and accordingly I went; I came late there myself, for they were just going away when I came in. I told them my message, and they told me they were disappointed by Mr. Trenchard. I had not been there a quarter of an hour, but we were going away, and Mr. Sheppard was called for by his man, and he went down stairs and brought up Mr. Cornish; and when he came into the room, he told the gentlemen there met, that Mr. Alderman Cornish was come; so as soon as Mr. Alderman Cornish came into the room, he made his excuse to the gentlemen that he did not come sooner, and that he could not stay with them; the reason why he could not stay with them; he told them was, that they were to meet that night about their charter, and there was never another alderman in town but himself, and therefore he could not stay, there was a necessity of an alderman to be there. And upon that Mr. Ferguson opened his bosom, and from under his stomacher he pulled out a paper; they told him they had that paper read, and desired to read it to him: Mr. Ferguson read it, and Mr. Sheppard held the candle all the while that it was reading; and after they had read it, they asked him how he liked it; and he did say he liked it very well.

L. C. J. What were the contents of that paper?

Rumsey. The first part of it was complaining of the misgovernment of the late king; there were two points in it that I do remember very well that they would declare for; one was liberty of conscience; and t'other was, that all those that would assist in that insurrection, that had any lands of the church, or the king's, in the late war, should have them restored to them.

L. C. J. Was there any thing in that paper that did engage any body to an insurrection?

Rumsey. I did not hear all the paper, nor did I take great notice of it; but those two points were in it, to engage them that would assist.

Att. Gen. What was the effect of the paper?

Rumsey. It was to be a declaration upon the rising; when the rising was to have been this was to have been dispersed abroad.

Att. Gen. Mr. Rumsey, was there a rising intended at that time?

Rumsey. Yes, and they met there for that purpose; and Mr. Trenchard was the man to manage the business about Taunton, and he disappointed them.

Att. Gen. What was your message from my lord Shaftesbury to them?

Rumsey. It was to know what issue they had come to about the rising, and to press them to it, for such a matter as that was not to be long

kept a-foot; either let them come to a resolution to rise, or let it fall for good and all.

Att. Gen. After Mr. Cornish had expressed his liking of this business and declaration, what followed?

Rumsey. He did say he liked it very well; and that poor interest he had, he would join with it.

Att. Gen. Speak that again.

Rumsey. Mr. Cornish did say, he did like the declaration, and with the small interest he had, he would appear to back it, or words to that effect.

Cornish. My lord, since he takes the freedom to charge me with these things, I never was at a consult in my days.

Justice Levins. You were not then at Mr. Sheppard's that night?

Att. Gen. Will you deny you were at Mr. Sheppard's that night?

Cornish. I do declare, I never was at Mr. Sheppard's in any consult in my life, as he declares; but I have had great dealings with Mr. Sheppard.

L. C. J. You shall be allowed your liberty; pray, Sir, be not transported with passion. I doubt, before this time, notwithstanding the confidence you seem to have, there are few believe you to be as innocent as any person present.

Att. Gen. You will hear more from his oracle.

Justice Levins. Were you there when my lord Russel was there?

Cornish. I was not there when my lord Russel was there, as I remember.

L. C. J. Were you present, hear, hear, Sir; were you present at Sheppard's when Ferguson was there?

Cornish. My lord, I have been at Sheppard's several times, but I never liked the man for his morals, and therefore never liked to be in his company.

L. C. J. He pulled the paper out of his bosom.

Cornish. It is as great an untruth as ever was told in the world; but, my lord, seeing he takes this freedom to charge me, I desire to know whether he stands here as a lawful evidence?

L. C. J. What is your exception?

Cornish. He stands charged guilty of treason.

L. C. J. That itself does not disable him to be a witness.

Cornish. Before he hath his pardon, my lord.

L. C. J. I do not know whether he hath his pardon or not.

Att. Gen. There is no indictment at all upon him.

Justice Levins. If he were convicted, or outlawed of treason, it were something; an innocent man may be charged.

Rumsey. My lord, Mr. Cornish and I have been very well acquainted these fourteen years or thereabouts, and have had great concerns

together; for during the time that I managed the king's customs at Bristol, six years, I was there collector, he did return between three and four hundred thousand pounds for me; he is a very honest gentleman, and I appeal to himself, whether I take delight to appear here to accuse him.

Cornish. But, Colonel, what is the reason that you have not accused me all this while?

Rumsey. Mr. Cornish, I hope that is not an objection; I think I suffer for it and not you; it was compassion, and the same compassion makes you deny it to save others; if you would deal openly, I make no doubt, but you might partake of the king's favour yet, as well as I have done.

Cornish. I do thankfully accept of his majesty's favour at all times, but I thank God I am innocent in this matter, and do not stand in need of it.

Rumsey. And you say I accuse you falsely; then Mr. Cornish you do not stand there nor I here.

Att. Gen. Pray, will you ask him any questions?

L. C. J. But pray do not enter into a long harangue.

Cornish. My lord, I do humbly conceive, that he does not stand here as an evidence.

L. C. J. You have the judgment of the court for that.

Cornish. Before he is pardoned?

L. C. J. I do not talk of a pardon; what record have you against him?

Att. Gen. You were present and heard that resolved before in my lord Russell's case.

Cornish. My lord, Mr. Rumsey did upon his evidence give in, and he was obliged by his oath to speak the whole truth—

L. C. J. Now you are making your speech, it is not your proper time; you should urge any thing against Mr. Rumsey's evidence, or the credibility of it when it is your time.

Cornish. My lord, I do here design it.

Att. Gen. Mr. Rumsey, pray recollect; had you never any discourse with him at other times?

Rumsey. We have had a long acquaintance, fourteen years; but, in my life, I never heard him speak any thing before or since that, to my knowledge.

Att. Gen. Mr. Cornish, will you ask him any more questions?

Cornish. I desire to know—

Rumsey. What would you know?

Cornish. Whether did you and I discourse of these matters at any other time?

Rumsey. No.

Justice Levis. You must not stand to dialogue between one another, but speak as we may hear you.

L. C. J. You shall argue if you will, when you come to make your defence in the proper time, the improbability of any thing that he hath said, or the impossibility, or repugnancy to any truth, or any evidence that you can give to the contrary; but, I say, this is not your time.

Cornish. I never was at any consult in my life.

Att. Gen. That is a name he gives it; was you never at a meeting about a rising?

[Mr. Goodenough sworn.]

Att. Gen. Mr. Goodenough, are you acquainted with Mr. Cornish?

Goodenough. Yes, Sir.

Cornish. My lord, I humbly conceive he is not a witness, he stands indicted upon an outlawry; I can produce it.

Att. Gen. We do admit it.

L. C. J. They admit your exception, and will answer it by producing a pardon.

Cornish. I need not say any thing against him, he is known well enough.

Justice Withins. He was your under-sheriff, Mr. Cornish.

Cornish. Much against my will; I opposed him to the utmost; and this is nothing but malice against me.

[Mr. Goodenough's Pardon read.]

Cornish. I do humbly conceive this cannot be done, but by a writ of error, or an act of parliament.

L. C. J. Cannot the king pardon an outlawry?

Justice Withins. That is no piece of law, I am sure of it.

Att. Gen. Goodenough, pray what do you know of a rising intended against the late king?

Goodenough. All that I have to give an account of, is a discourse—

Att. Gen. Answer what I ask you; what do you know of a rising by others?

Goodenough. I know nothing of that business of my lord Russell's; but there was a design to rise, Sir, in London; we designed to divide it into twenty parts, and out of each part to raise five hundred men, if it might be done, to make an insurrection.

L. C. J. What were these men to do when they were raised?

Goodenough. They were to take the Tower, and drive the guards out of town.

Att. Gen. Pray acquaint my lord and the jury what discourse you had with Mr. Cornish.

Goodenough. Before this was agreed to by us, I chanced to be at Alderman Cornish's; Sir, said I, now the law will not defend us, though we be never so innocent; but some other way is to be thought on. Upon this, said he, I wonder the city is so unready, and the country so ready. I said to him again, Sir, there is something thought of to be done here; but says I, in the first place the Tower ought to be seized, where the magazine is. Upon this he made a little pause, and said, I will do what I can, or what good I can. To this purpose he answered me; and about some time after, he met me upon the exchange, and asked me how affairs went? which I understood to be relating to what we discoursed; this is all that I can say. I never met after this, but only upon the exchange he asked how matters went.

Att. Gen. Was there any discourse about seizing the guards?

Goodenough. I have told you the whole discourse.

Att. Gen. Pray repeat it.

Goodenough. I told him, says I, Sir, now it is plain the law will not defend us, though we are never so innocent, or to this purpose.

Sol. Gen. Upon what occasion was that discourse?

Goodenough. Every thing going against us.

Sol. Gen. How?

Goodenough. This was in Easter term, as near as I can remember, 1683.

Att. Gen. Ay, 1683.

Goodenough. Therefore says I, something else is to be thought on, some course else is to be taken; to this purpose he answered me, I wonder the city is so unready, and the country so ready.

L. C. Baron. What country?

Goodenough. He had been in the country, as I understood before, that I do not know.

Cornish. What time was this, Sir?

Goodenough. In Easter term, or thereabouts, 1683. I told him then, Sir, there is something thought of to be done here in London to this purpose; but says I, in the first place, the Tower is to be seized, where the magazine is; so he answered me, after some pause (he paused upon it) says he, I will do what good I can, or what I can to this purpose.

Sol. Gen. Did he seem to dislike seizing the Tower at all?

Goodenough. Not at all, Sir, it did not appear so to me.

Sol. Gen. What discourses had you any other time?

Goodenough. I never had any discourse of this matter, or any thing relating to it at any other time, but only when I came upon the Exchange, how things went.

Sol. Gen. And did you give him an account?

Goodenough. I said, well. I gave him a general answer, for that was not a place to talk in, and that I apprehended of this discourse.

Sol. Gen. Had you any other matters?

Goodenough. I had some other matters of managing the riot, that was brought against him, and several others, and myself also.

L. C. J. Will you ask him any questions, Mr. Cornish?

Cornish. Whether his pardon be allowed?

L. C. J. We heard it read.

Cornish. This being a court inferior to the King's-bench—

L. C. J. Here is a pardon under the Great Seal, Sir, and here is a pardon of that offence which you charge him with, and which you take to be a sufficient exception against his being a witness; we are satisfied it is sufficient.

Cornish. Pray, my lord, is not this pardon special?

L. C. J. What do you mean by that?

Cornish. Because, my lord, he hath been in an act of treason since; therefore, my lord, if he be not pardoned of that—

L. C. J. No, no, he is not indicted for it; we cannot try him now for any treason of that nature.

Cornish. I humbly conceive he hath not had a pardon for his last treason.

L. C. J. I must tell you, if he be guilty of treason till he is tried and convicted, it doth not take off his testimony.

Cornish. Pray, Mr. Goodenough, remember all your tricks, whether or no, was there any body present when this discourse past between you and I?

Goodenough. No body but you and I.

Cornish. You were not so conversant in my house, I know.

Goodenough. Sir, I came to you about the business of the riot.

Cornish. How many times might you be at my house? Not three times, I believe.

L. C. J. You ask a question and answer it yourself.

Cornish. My lord, I desire to know, where it was these words were spoke?

Goodenough. Sir, in your lower room.

Cornish. In my own house?

Goodenough. Yes, Sir.

Cornish. And no company there?

Goodenough. And no company.

Cornish. That is very strange, and that afterwards you should meet me, and discourse this matter again.

Goodenough. No, Sir, all I say is this, you met me upon the Exchange and asked me how things went?

Cornish. That might be in reference to the suit you were managing for the rioters; I know of nothing else.

Justice Withins. And I tell you, Mr. Cornish, that was a branch of the plot; take that from me.

Cornish. My lord, he was attorney in that cause, and I might ask how matters went in reference to that trial; but I take God to witness, nothing else as I remember.

L. C. J. But here you say, it was a strange thing that Mr. Goodenough and you should be in a room alone, when you acknowledged him to have been the attorney in a cause of mighty consequence among you.

Cornish. He was concerned for all; and I stedfastly believe he was never with me twice about that suit; but he hath been at sir Thomas Player's; there he often went about that affair; and I do not believe that ever he came to me about that business.

L. C. J. Is that all you have to say to him, Sir?

Att. Gen. Will you ask him any more questions? if not, go on, we have done.

Cornish. My lord, colonel Rumsey is a person that hath acquainted the court, that there was a long acquaintance between him and me. I have served his majesty in my place, and do it to this day. My lord, it is a very improbable thing, that I should meet him at Mr. Sheppard's, where I saw such wicked horrible doings; and that he should never afterwards

speak to me about that affair. He came to my house, I remember, about the return of some monies for his own private use; for he was then out of his majesty's employment. He does declare here, he never said a word to me, never spake to me any thing of it but there. My lord, it is a very strange thing, that there should be such a contrivance to ruin the king and kingdom, and that I should be one in this business, this villainy, and not be consulted how to carry it on; it is very strange they should see me, and never say a word of it afterwards to me. My lord, I hope, and you gentlemen of the jury, that you will consider the improbability of it; it is as improbable as any thing in the world. I hope it doth appear to your lordship and this bench, that there is no probability in it; he owns we had a great deal of freedom; he owns we were acquainted for fourteen years together, and that I should be at such a wicked villainous place once, and see him so often afterwards, and never speak of it, and never say any thing of it; the Great God of heaven and earth, before whom I stand, knows that I know nothing of all that he hath sworn against me: He must swear these things to save his own life; if he will take away my life, he will take away many others, without question, if he can save his own. I should not urge this, but God is my witness, I never heard any thing of a contrivance or plot, till my lord Russel's trial: These are very strange things, if so be so good a government as we have, shall not protect such innocent men; truly my lord, I am as innocent as any man in this court, if I were to appear before the Great God in judgment this moment.

L. C. J. Look you, Mr. Cornish, I would with all my heart allow you all the liberty imaginable, to speak pertinently to your defence; but to oppose confidence, and very great assurance, upon your being in the presence of Almighty God, against express testimony, is the weakest defence that can be; if you have any witnesses, if you have any thing to urge against the testimony of any of these persons, besides the improbability of it, which you have often mentioned over and over again, you shall be heard with all patience; if you have witnesses that you will call, we will hear them likewise.

Cornish. My lord, I think his treason being confessed, and not being pardoned—

Just. Withins. Is that all you will say, Mr. Cornish?

Cornish. I hope you will bear a little with me, I am highly concerned.

L. C. J. You are so.

Cornish. I have had no help, and it is well known, I am not skilful in the law. I don't understand what you say, nor how to plead my cause, having no help, nor no assistance allowed me. My lord, it is a most improbable thing, that I should be at this place, where this horrible wickedness was, and that it should lie all this time never mentioned: I have been, my

lord, several times in prison this year, and I think my virtue will be so much the greater to be again and again purged, as I have been; that which hath pleased me very much, hath been my innocency: would any man in my circumstances have staid and continued in this nation, if he had not known himself perfectly innocent? Others have gone away, and I could as freely have gone, after I have been taken up four times.

L. C. J. I doubt there are a great many are not gone; Mr. Rumsey hath told you plainly it was compassion to you, though injury to himself, that he did not accuse you sooner.

Just. Levins. Here is Gaunt staid here till within this week or fortnight, and never stirred.

Just. Withins. Mr. Cornish, my lord hath put you in the right way for your defence, if you can invalidate the testimony, or call any witnesses, do it; but to talk at this rate, you may do it this month (for ought I know,) and it will signify no more than it hath done already.

Cornish. The improbability is so manifest.

L. C. J. Is it enough to say, improbability; improbability, improbability? Is that enough? Have you said any more?

Cornish. My lord, I have said this, that this gentleman that should be so conversant in the town, I in his company, and he in mine; is it not improbable?—

Just. Levins. Look you, Mr. Cornish, I will tell you what the method is, to give evidence first, and then apply it in summing up the evidence; if you were summing it up, the court hath all the reason in the world, to hear you; if you have evidence, the way is to give your evidence, and apply it if you can.

Just. Withins. Have you any witnesses?

Cornish. Against Mr. Rumsey?

Just. Withins. Against any body, Mr. Rumsey if you will.

Cornish. My lord, I humbly conceive that this witness, Mr. Rumsey, ought not to stand; if your lordship satisfies me, I shall be very much obliged to your lordship: He declared upon his oath, when he swore against my lord Russel, that he had nothing else to swear against any man.

Just. Withins. How does it appear?

Cornish. I will produce it, if your lordship please to give me time.

Just. Withins. But afterwards he discovered a great deal more.

L. C. J. Look you, Sir, if you have any exception against Mr. Rumsey's testimony, we will hear you; propound a legal exception.

Cornish. My lord, I humbly conceive, he not producing his pardon, his evidence is not good.

L. C. J. You have had the opinion of the court.

Cornish. If your lordship over-rule me.

L. C. J. We must over-rule you.

Cornish. If that will not be granted me.

L. C. J. Then you have no more to say?

Cornish. But for my innocency, for that (I know) I have enough to say.

L. C. J. That is in your own breast, the jury can't see that; will you call any witnesses?

Cornish. I have some witnesses to call here, as to Mr. Goodenough, my lord.

L. C. J. What is your exception against Mr. Goodenough?

Cornish. My lord, it was my most great unhappiness and misfortune that this Goodenough was admitted into the office of under-sheriff; and, my lord, that I might fully convince your lordship and this court, all that I desire is, some few men may be called; besides, I think there are a thousand, I may say, that will bear me witness, I did oppose him.

L. C. J. But pray, Mr. Cornish, is that an exception that he does not swear true because you would not let him be your under-sheriff?

Cornish. It looks like malice.

L. C. J. You did admit him to be under-sheriff, all the world knows that.

Cornish. But I can set forth that I did oppose him, and the reasons why I did oppose him.

L. C. J. You may, if you will, give evidence, what an instrument he was to you, and how he served you in your office, when you were sheriff: is this to the purpose?

Cornish. Yes.

L. C. J. It is not at all to the purpose.

Cornish. My lord, I was imposed upon by my partner.

L. C. J. You could not be imposed upon, you had equal power with your partner.

Cornish. If your lordship pleases to consider the temper of that man.

L. C. J. What man?

Cornish. Bethel, I mean, what an obstinate man he was. My lord, I hope I can purge myself greatly in these matters.

L. C. J. If you will, tell to what you will call them?

Cornish. The great aversion that I had.

Att. Gen. We will admit that he did oppose him, because he would have had more money.

Just. Withins. You have heard the opinion of the court.

Just. —. It is not material whether he came in with or without your consent.

Cornish. Mr. Gosfricht, will you be pleased to declare to my lord, how I was imposed upon by suffering Goodenough to be under-sheriff?

Gosfricht. My lord, after that Bethel and Cornish were chosen sheriffs, they had some meetings together concerning an under-sheriff; Mr. Bethel he named Goodenough, Mr. Cornish he named another; they could not agree, the difference did arise in three or four, or more days debate, as I remember, and Mr. Cornish did tell sheriff Bethel, he was resolved if Goodenough were under-sheriff he would fine, and not hold, and told him the reason why: he said he was a man that he would not trust a hair of his head with, and he had no

knowledge, he believed, of the business; but withal, he told him, he was a man obnoxious to the government, and he was an ill man, and had done ill things, and he would not trust his estate and his reputation in the hands of such an under-sheriff. Bethel he insisted upon it, and he was resolved he would have Goodenough, and Cornish's man should not be.

L. C. J. Who was Cornish's man?

Gosfricht. I know the man, but forget his name. — Millman.

L. C. J. Can you tell what Goodenough was to give for the under-sheriffwick?

Gosfricht. No, indeed.

L. C. J. Was there no discourse?

Gosfricht. Not in my hearing.

L. C. J. Was Goodenough under-sheriff to Cornish at last? — *Gosfricht.* Yes, Sir.

L. C. J. How did they agree?

Gosfricht. I believe the animosities were so great, that they were never reconciled; for Cornish had so bespattered Goodenough that he was so ill a man, that Goodenough, I believe, could never digest it well.

L. C. J. Did you hear any angry words after he was admitted to be under-sheriff?

Gosfricht. Truly, I never was at alderman Cornish's while he was sheriff: but I heard that character of him.

L. C. J. And what was the reason you did not go to Mr. Cornish's?

Gosfricht. No, I believe Goodenough never came there, but I was at neither of their houses.

Just. Levins. Pray, how many juries did you help him in?

Gosfricht. Truly I was so little acquainted, I could not help him.

Just. Levins. I hear other people say the contrary.

Gosfricht. I was but newly come into England, and could know no man.

Cornish. Alderman Love.

L. C. J. To what purpose do you call him, Sir? To the same?

Cornish. It is evidently to declare how much I was imposed upon.

L. C. J. Paha! I will tell the jury, I will do this for you, upon this man's testimony, that you were unwilling that Goodenough should be under-sheriff.

Cornish. My lord, there is a great deal more in it.

L. C. J. What is there more? He never heard an angry word between you during the time, he says, afterwards you admitted him to be under-sheriff.

Cornish. Mr. Love, will you please to declare to the court, what aversion I had to Mr. Goodenough being the under-sheriff.

Love. My lord, I did receive a subpoena last night, and I wondered at it, I confess; ever since I was so happy to get out of public employment, having applied myself to my private affairs, I never came to Guild-Hall. But all I can say, is this, that when it was publicly talked upon the Exchange, meeting Mr. Cor-

nish upon the Exchange, I did hear him inclined to have another man (one I do not know) to be his under-sheriff, and that he did not like Mr. Goodenough, but was inclined to another man: but it is so long ago, I believe I might persuade him, having been sheriff above twenty years ago, to Mr. Hastings, an honest man; I got my Quietus est, without trouble: but I must say this for the gentleman, I did hear him complain, that he was imposed upon to take this man.

L. C. J. How long was it after the time?

Love. It was before they had pitched upon a man, and he was much inclined to one Mr. Milbourne, or Millman, or some such name, that is all I can say.

L. C. J. Do you think we sit here to hear impertinencies? God forbid, Sir, I should hinder you from giving any evidence; but this is not at all material.

Cornish. If your lordship please to let Mr. Jekyl come, he will tell you what this man did declare, why I was against him.

L. C. J. If you had not entertained Mr. Goodenough, then there might be something of malice in it; but you did receive him.

Cornish. I had private covenants with Bethel, before I would let him come into the office. Mr. Jekyl, pray may you declare to my lord, and the jury what aversion I had against Mr. Goodenough's being under-sheriff?

Jekyl. Truly, my lord, alderman Cornish and I, living near together, I had occasion to go to him several times about bills of exchange; and he told me, when he was sheriff, how he was troubled with Bethel, because he would put Goodenough upon him; for I do not intend to have him, says he, for I know he is obnoxious to the king and government, and desired me to speak to Mr. Bethel about it; but I had no acquaintance with him till he was sheriff: and some came to me, to desire me to speak to alderman Cornish to receive Goodenough. Truly, says I, I find him so averse against him, that it is not for me to persuade him to take a servant he must put such trust and confidence in. For I saw alderman Cornish was so averse to it, that I would not do it.

Sol. Gen. Pray do you think in your conscience, he was more obnoxious to the government than his partner, sheriff Bethel, was?

Jekyl. I must confess, I have heard much of sheriff Bethel; but I never heard that Cornish was any disaffected man to the government.

Sol. Gen. But which was the most disaffected man to the government, Bethel, or Goodenough?

Jekyl. Truly, as I remember, he said, he would not have him, because he was obnoxious to the king and government.

Just. Withins. This gentleman was in a limb of the plot himself; as great a rioter, and as hot as any of them, this evidence that they call; I remember you, Mr. Jekyl, I'll assure you.

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Cornish. If sir William Turner be upon the bench, I desire him to speak.

L. C. J. We will hear sir William Turner any thing.

Cornish. I desire he would declare how I was used.

Sir W. Turner. I don't remember that ever I saw Mr. Goodenough's face before this time, so I have nothing at all to say against him, nor can I say any thing, but what Mr. Cornish told me; and that was, he once came to my house some time after he was chosen sheriff, and told me, that Mr. Bethel pressed very much for taking Goodenough to be his under-sheriff; that he had no mind to accept him, and he would propose another, and it caused a great difference; but it was at last composed, but how, I can't tell.

L. C. J. Now, Mr. Cornish, by my consent, if you will, call all the aldermen upon the bench; whether they will, or will not, say the same thing; for my part, I will agree, that they have given evidence (if they will be contented themselves) to the same purpose.

Cornish. My lord, I shall not give your lordship unnecessary trouble, but I think it is convenient to call some witnesses to prove the manner of my life and conversation.

L. C. J. Your life hath not been in the dark.

Cornish. The dean of Canterbury, Dr. Tillotson. (Who did not appear.)

L. C. J. Will any man attest your loyalty in London?

Cornish. The dean of Norwich, Dr. Sharp. Is the dean of Norwich here?

Officer. No, Sir.

Cornish. My lord, here is Mr. Lane, I desire he may be asked what he knows.

Lanc. Upon the trial of my lord Russel, according as Mr. Cornish desires I may be heard, it is with respect to colonel Rumsey's evidence; colonel Rumsey says, in my lord Russel's Trial, he did not hear the Declaration read, because it was read before he came there.

Mr. North. Were you present at my lord Russel's Trial?—*Lanc.* No, Sir.

Just. Levins. Sir, that signifies nothing.

Cornish. That is a very material thing, my lord.

L. C. J. What is? It is no proof at all.

Cornish. Not the printed trial?—*L. C. J.* No.

Cornish. It is by authority.

L. C. J. Any body that was present may swear it.

Cornish. My lord, I desire I may have the minister of the parish, Dr. Calamy, for my constancy at my parish church, and receiving the sacrament, according to the rites of the church of England, that I am, to all appearance, a person that does as well affect the government as any man.*

* See in this Collection the Case of Russell, vol. 9, p. 621; the Case of Hampden, vol. 9, p. 1099; the Case of Rosewell, vol. 10, p. 147. Hardy's Case, A. D. 1794, as referred to in the Notes to those Cases.

L. C. J. I doubt you are all appearance.

Dr. Calamy. My knowledge of Mr. Cornish hath been since I came to be minister of the parish, which is about two years, a little above two years; whenever he was in town he did use to come to church as constantly as any one, and come with his family to prayers, and did come to the sacrament, and he did not only come at Easter, to save himself from a presentment, but at our monthly communion; and since I have been minister of the place, I have often conversed with him: All that I can say, is, that I never heard him say a disrespectful word of the government.

L. C. J. I hope he took you to be a man of another kidney.

Dr. Calamy. I marked his words, because of the character I had heard of him.

Att. Gen. Pray, what was the character he had before those two years?

Dr. Calamy. That was what was public.

Cornish. Joseph Reeve, esq.

Mr. Reeve. My lord, I received a subpoena from the prisoner at the bar yesterday. I have been acquainted with him about fourteen or fifteen years, and had a considerable trade with him, and sometimes we had some conversation, and drank a glass of wine together; I thought he was always very loyal, and drank the late king's health, and this king's health, and all the royal family. I have no more to say.

Cornish. Mr. John Cook.

L. C. J. What do you examine this witness to?

Cook. My lord, I have dealt with him for these twenty years last past, I always found him a very honest man, and a just man, and very upright in his dealing, I always reckoned him a very honest just man: I have dealt with him for great sums, and always knew him very just and upright.

L. C. J. Your observation of him as to the government.

Cook. I never knew any thing to the contrary, but that he was always very loyal.

Cornish. Mr. John Knapp.

L. C. J. Mr. Cornish, it is not impossible for you to produce men enough, that shall say, they know nothing against you concerning the government; and that you have been a loyal man, sure those you chuse, will say so, you have chosen them; and, perhaps, if it were the business of the king's counsel, they could do contrary: you are not accused touching your general conversation, but concerning a particular fact.

Cornish. It is improbable I should be a person ever concerned in these matters; if you consider, you find Cornish mentioned only about being there.

L. C. J. Does not Mr. Rumsey tell you the meaning why?

Cornish. It is very strange a man should be at such an hellish meeting, and I see him over and over so many times, and never speak of it again.

L. C. J. Mr. Cornish, do not you know that

Goodenough could not be produced till the rebellion in the West?

Cornish. Is it probable that I should entertain any treasonable discourse with Mr. Goodenough, when I had so much opposed him in coming into the office?

L. C. J. But you let him in.

Cornish. It is known to hundreds in this town, that I was imposed upon by an unreasonable man; my innocency is as great as any man's, and my virtue should be considered, when I have been under these impositions: I have been loyal and dutiful to my prince, and faithful to the government in all respects; I have opposed all manner of heats, as much as any man whatsoever; I can bring hundreds to shew that where I heard heats I allayed them, and it is strange I should be such a man as I am represented here.

L. C. J. Have you done, Sir?

Cornish. My lord, I have thus much further to say, that I do think there is no probability that I could be at this meeting; though a man should have a care how he takes God's name in vain, I have said it, and I do in the presence of the great God of Heaven declare it, I was never at the debate about these affairs; I take the great God to witness, I would not do it for a whole world, if I were not innocent. My lord, it is most improbable what Mr. Rumsey says.

L. C. J. It is a probable thing that Rumsey should forswear himself; it is a probable thing that Goodenough should forswear himself, who have taken the great God to witness to the truth of what they swear against you; but it is improbable that Mr. Cornish should not speak the truth.

Cornish. I will call some other friends, if your lordship please to prove my loyalty.

Knapp. I ever found him a fair, good paymaster.

Att. Gen. He calls you for his loyalty. Did you never hear him speak any thing against the government?

Knapp. I have not been in his company but now and then.

Cornish. Did you ever know me speak any thing against the government?

Knapp. No, Sir.

L. C. J. I marvel that you who have been an alderman a great while, don't call some of the aldermen; you have called sir William Turner, a very worthy alderman, I wonder you don't call some others of your brethren, that are known persons.

Cornish. Mr. Carleton.

Carleton. I have been acquainted with my cousin Cornish ever since the year 1661, when, being a merchant, trading in cloth, I began my acquaintance with him, and afterwards he recommended me to the party I married, and being relations, we had great intimacy together; I have been several times at his house, he did always assure me of his loyalty; I have told him what I have heard people say abroad, but he did assure me he was loyal, and I do hope the very same of him.

L. C. J. But you remember you have heard that he was not a person of such eminent loyalty.

Carleton. That was upon the account, my lord, of his being in with Bethel; but he did always assure me of it.

Cornish. My lord, I hope your lordship will consider what temper the man was of that I was to be with, and how obstinate he was; and I hope I shall not answer for his crimes.

Mr. Just. — Mr. Cornish, Why did you qualify yourself to serve with him? for you were not at first qualified.

Cornish. I had been travelling up and down in the country.

Mr. Just. — At that time to qualify yourself to be an officer, then you could lay aside all your scruples, and receive the sacrament.

Cornish. Joseph Smart, esq.

Smart. I have known Mr. Cornish above these twenty years, and dealt with him considerably, I never knew him but a very fair dealer.

Cornish. Mr. William Crouch.

Crouch. I have had acquaintance a great while with Mr. Cornish, and have had several dealings; I found him a very honest dealer, and a good pay-master.

L. C. J. What know you of his loyalty?

Crouch. For his loyalty, I took it as the town did, though I never knew any disloyalty from him.

Cornish. Mr. James West.

L. C. J. Do you think you profit yourself with this testimony?

Cornish. I would not offend you.

L. C. J. No, no, you do not offend, I would gladly hear you, if there were any thing pertinent to your defence.

Just. Withins. Mr. Cornish, you have this happiness, that you will be tried by your fellow-citizens, of very good quality and understanding, I must needs tell you.

Cornish. I am satisfied I have appeared here with all the care and caution that becomes an honest man; I have spoke nothing but what I have considered as I have been in presence of the great God; I never was at any meeting, nor never heard any thing of this till the trial about my lord Russell, never heard one word.

L. C. J. Gentlemen of the jury, the prisoner at the bar, Mr. Cornish, is indicted, that knowing that there was an insurrection intended to be against the late king, of blessed memory, he did promise to be aiding and assisting in it; this is the substance of the indictment. There have been two witnesses produced, Mr. Rumsey and Mr. Goodenough: Rumsey's testimony (so far as I am able to remember, after so long a discourse, and so much time that hath been spent) was to this purpose; that the duke of Monmouth, the lord Russell, Ferguson, and others, being in Mr. Sheppard's house, there came at length Mr. Cornish, and excused himself for coming late, and said, that he was to depart from them very speedily, because he was to go to attend the business (as I take it)

of the charter, where the presence of an alderman was necessary, and none like to be there but himself; that Ferguson pulled a paper out of his bosom, so says Mr. Rumsey, and upon the desire of the company, it was read to Mr. Cornish, and Sheppard held the candle; there were these two points, Rumsey says, they had agreed on in that paper, when the rising should be, they would declare for liberty of conscience, and for the restitution of those lauds, bishops lands, and king's lands, to those persons from whom they had been taken after the king's restauration. This paper being read to Mr. Cornish, he said, he did like it very well (these were the very words of Rumsey), and with that poor interest that he had in the world, he would join in the assistance of them, for those ends and purposes that were mentioned in that declaration. Then comes Goodenough, and he tells you, that he came to him in his parlour, when he was sheriff; said, Now there was no safety, no defence at all by law, all was gone, there must be some other course taken, for the law would not sufficiently protect them. Why, says Mr. Cornish, I marvel they are so slow in the city, when they are so ready in the country. Ay, but says Goodenough again to him, there hath been something done in the city. This was after the time that the city had been put into several divisions. I do not see there is any testimony from Mr. Goodenough, that Mr. Cornish knew any thing of that; but says he, there is something done here, the Tower is to be seized, there is the magazine, and that is to be seized upon, and then we shall be able to do something: says he, I will do what good I can; or, says he, what I can; he is not confident whether of these expressions he did use, I will do what good I can, or I will do what I can. Afterwards he meets Mr. Cornish upon the Exchange: here, I confess, it is not so expressly to be applied to this purpose, that it doth fasten directly upon the point in the indictment; but says he, how do affairs go? how do our affairs go? says he, very well: this is the testimony given against him. If this be true, notwithstanding Mr. Cornish's protestations of his innocency, sure there is nothing doth more plainly prove this indictment than this testimony. He says it is improbable, very improbable that I in my circumstances, that I should say so; it is improbable, because Mr. Rumsey had acquaintance with me for fourteen years together, that I have dealt with him for vast sums, and that I should say it in his presence never but once; and that Rumsey does say, he never heard him speak any thing to that purpose, but that one time; and therefore it is mighty improbable I should say so. But what is the reason, says he, that this was not discovered before? To this Rumsey gives a positive answer, truly, says he, Mr. Cornish, I had more compassion for you than for myself, I have suffered for it, you have not suffered for my silence. Then, Goodenough ought not to be allowed to be a competent witness, because when Mr. Cornish and Bethel

were chosen sheriffs of the city, Mr. Cornish was much against receiving Goodenough to be his deputy, and Goodenough must say all this maliciously against him, because he so much opposed his being under-sheriff to him and Bethel. He hath produced several witnesses to that purpose, and they say there was some reluctancy in him to the receiving Goodenough to be his under-sheriff; but it is plain and clear to you all, gentlemen, and every body in the city knows that Goodenough was his under-sheriff, and how well he served him, and to what purposes I believe many of you very well know. Another improbability is, that he should admit Goodenough to come into his parlour alone, a man that he had so much displeas'd; but if so be he was once against him, he did afterwards take him not only to be his under-sheriff, but employed him to be his attorney, and then he might very well admit him into his parlour alone, to discourse of his business as an attorney; and this might fall in among other discourse. Gentlemen, there are several other witnesses produced concerning the honesty of his dealing, and the honesty of his conversation, that they have nothing at all to say against; but, gentlemen, in a popular city, where he is, and hath been so well known, it is a very easy matter to bring millions of men to give the very same testimony; and certainly he will bring none, having the choice of them, but such as shall speak in his favour; but he speaks in the presence of God, he speaks from the bottom of his heart, that he never had any such disloyal thought entered into his mind. Gentlemen, hath no body any sense of the presence of God but Mr. Cornish? Hath not Rumsey called God to be a witness to his oath? and Goodenough hath done the like? Why is it maliciously against the life of Mr. Cornish? For I don't know he does, in the least, object any thing against Rumsey, that there was ever any displeasure between them two? Why should he deliver this testimony, if it were not the testimony of his heart? and that which he says himself, he had too long concealed out of the compassion he had for him. Gentlemen, if a great many protestations and asseverations should make a man as innocent as confident, no man should die by the sentence of the law; it is an easy matter for any man to take up the same assurance and confidence that he hath done: And for his being such a churchman, as he now pretends himself to be; for that is one thing by which he would argue the improbability of the thing, and he would have you believe very much of his loyalty from it; Gentlemen, all the evidence he hath given, is but of two years standing, and since the trial of my lord Russel: and such a man as he, and many men that were conscious to themselves of their guilt, did think it very fit to purge themselves that way, to gain themselves a good opinion that they were loyal to the government. But it is not denied by Mr. Cornish, that before that time he did not frequent the church, nor receive the Sacrament.

Cornish. These seven years, my lord.

L. C. J. Who did say so? Sure no body said so yet. I repeat the evidence truly, all you said of that was out of the mouth of Dr. Calamy.

Cornish. Dr. Calamy came in but lately, and his predecessor Dr. Whitelcot is dead.

Just. Withins. Sir, you were not qualified for your office if you had not took the Sacrament.

L. C. J. You did lay aside all your scruples to qualify yourself to be sheriff by receiving the Sacrament, which otherwise you could not have been. Others that have spoken of your conversation likewise say, that the report was abroad, that you were not so loyal and firm to the government as you ought to have been. Gentlemen, you have heard the evidence; I have done my endeavour to repeat it faithfully; if you believe that he did promise to aid or join, or agree with that rebellion or insurrection, then you ought to find him guilty of this Indictment.

Cornish. I am as innocent as any mortal man.

Then the Jury withdrew, and after a considerable time returned.

Cornish. My lord, I hope I may have one word.

Just. Withins. No, not till your verdict.

Baron Gregory. No, no, Mr. Cornish, we can't.

Cornish. I had a witness more that was very material, but I would not offend your lordship: Mr. Rumsey said Mr. Sheppard held the candle.

Just. Withins. Why did not you call him? You called a great many impertinent witnesses.

Cornish. I was not come to him, I would have called them in order.

Baron Gregory. Why did not you produce him then?

Cornish. Because your lordship seemed to be angry.

Baron Gregory. No, not at all.

Cornish. I did forbear purely upon that account. I pray, my lord, let him be called.

Baron Gregory. Here were eight judges and my lord chief justice, and now here is only two: Do you think we will defer things of this nature? It is never asked. Apply yourself to the judges: It is a strange thing.

Just. Withins. This is only to delay time.

Baron Gregory. If he does so, the jury must go out again.

Just. Withins. After the jury hath been out an hour, we must have new allegations.

Cornish. I was tender of offending.

Just. Withins. That is a reflection upon the court; under favour, Mr. Cornish, I told you myself over and over to call your witnesses.

Clerk. Elizabeth Gaunt, hold up thy hand.

Mrs. Gaunt. My lord, I beseech you, hear me, you won't take advantage I hope of me.

Just. Withins. I declare my opinion freely, it ought not to be done.

Recorder. I think she ought to have it as well as t'other.

Baron Gregory. You call never a witness.

Mrs. Gaunt. No, Sir, I could not tell, I have some to call.

Just. Withins. I am of that opinion you ought to take the verdict.

The Judges came again upon the Bench, and the Jury found Mrs. Gaunt Guilty.

L. C. J. Is Rumsey come in?

Capt. Richardson. I have sent for him, he will be here presently.

Cornish. My lord, I must pray your lordship, to consider my tenderness in offending you, which made me omit calling Mr. Sheppard; I had him in my paper, he is in my paper.

L. C. J. Don't you begin your preface something untowardly, as though the court would not do you all the kindness possible? half a dozen times you were admonished to call for pertinent witnesses. You did call, I am sure, a great many impertinent witnesses. Had you Mr. Sheppard's name in your paper?

Cornish. Yes, my lord, but I was tender of offending; pray, my lord, be pleased to remember Mr. Rumsey's evidence.

L. C. J. Is Mr. Rumsey here? Sir, pray hold your tongue.

Att. Gen. I would acquaint you my lord, I sent a subpoena for Mr. Sheppard, but could not find him, but I understand that Mr. Cornish's son was with him yesterday, and he has absconded; this I will give an account of upon oath: This my lord, is a dangerous practice after examination, and after the jury is withdrawn.

Cornish. I pray do not aggravate the matter.

Att. Gen. I must do my duty for the king.

Cornish. My son went to him, and found him at church.

Att. Gen. Now Mr. Atterbury is gone. I desire you should have all your right, but not have tricks put upon the king's evidence.

Cornish. His evidence was, Mr. Sheppard's holding the candle.

Just. Levins. For God's sake, could you examine so many to your reputation, and forget an evidence that was material? But I must tell you, if you will bring Mr. Sheppard to be examined, sure it is requisite, that the witness that swears what you did there, should be face to face with him; therefore Mr. Rumsey should be heard certainly,

Just. Withins. It is fit to have Atterbury here, to enquire if he did abscond; if Mr. Cornish's son was with him, and he absconded upon that account, it is very material. This is a meer trick put upon the king's evidence.

L. C. Baron. Mr. Cornish, if you intend to produce Mr. Sheppard for that, to contradict Rumsey's testimony, I wonder that you should miss him, without you have had some notice since.

Cornish. My lord I was not come to him:

my lord, though I have such a vile charge, I am perfectly innocent.

Just. Withins. Now you may see what we have got.

Cornish. I beseech you, my lord, consider me, it is as improbable a thing as any in the world.

L. C. J. This is running over the same thing twenty times. Where is Sheppard?

Cornish. He was here within this quarter of an hour.

Just. Withins. Mr. Cornish, is this fairly done, when you said he was upon the spot?

Att. Gen. He was subpoena'd by you, he would not be found to be subpoena'd by the king.

Just. Levins. To make the court come down, and then to have no notice of the person at all; sure you may give the court leave to take notice, that they are not civilly dealt with.

L. C. J. Who told you he was here?

Cornish. This gentleman says, he saw him. Pray, my lord, do not be offended.

L. C. J. I never saw such a thing; the time was, you and your partner would not have allowed it.

Att. Gen. If he comes, I will give him his oath.

Cornish. My lord, here is major Richardson can bear witness, I said I must subpoena Mr. Sheppard; I named him before major Richardson again and again, and said, I must not omit him.

Just. Levins. Sir, I tell you what; you have not shewed so little skill to day here, but that you could maintain so long a discourse with Mr. Rumsey as you were allowed to do, and should not offer to call Sheppard to contradict him; you dwelt half an hour upon it.

Bar. Gregory. And relied only upon the improbability of the thing.

Rumsey. There is another gentleman in the Tower, the late lord Grey, that was in company when the declaration was read.

Bar. Gregory. Have you been in company at Sheppard's?

Cornish. I have been at Sheppard's very often. Pray, my lord, do not be offended, my life will do you no good, I do not know, but here is a gentleman that hath been in my company forty times over since that business.

Rumsey. Pardon me, Mr. Cornish, not above three times since, and then there was other company.

Just. Withins. It is impossible for any, but those that were complices with you, to give such evidence; and, because they were your complices, now you will not believe them.

L. C. J. Are you subpoena'd by Mr. Cornish?

Sheppard. I have a subpoena from the king.

L. C. J. But were you subpoenaed by Mr. Cornish?—*Sheppard.* Yes.

Att. Gen. When?

Sheppard. Last night; this morning I was not at home.

Att. Gen. Was Mr. Cornish's son with you yesterday in the afternoon?

Sheppard. Yes, Sir.

Att. Gen. And what discourse had you with his son?

Sheppard. He was very pressing and urgent with me to be here to day; and I told him I could not tell whether I could or not.

Att. Gen. Is there any account between you and Mr. Cornish?—*Sheppard.* Yes, Sir.

Att. Gen. To what sum?

Sheppard. We were always trading.

Att. Gen. That is very true, you were trading; to what value?

Sheppard. About one or two hundred pounds.

Att. Gen. Who is debtor?

Sheppard. I am debtor.

Sol. Gen. Mr. Sheppard, since when did you contract the debt?

Sheppard. Since when, Sir?—*Sol. Gen.* Ay.

Sheppard. I believe it was some six or eight months ago.

Sol. Gen. For what was it? Upon what account?—*Sheppard.* For cloth, Sir.

Sol. Gen. Was there no money lent?

Sheppard. Money lent me?

Sol. Gen. Ay, Sir.—*Sheppard.* No, Sir.

L. C. J. Is the debt due to Mr. Cornish?

Sheppard. My lord, the debt is due to him.

L. C. J. Or some body for whom he is a factor?

Sheppard. I am indebted to Mr. Cornish, for whom it is I cannot tell.

Sol. Gen. Did you leave word, whither you went, when you went out yesterday?

Sheppard. No, Sir.

Sol. Gen. Which subpoena was served first upon you?

Sheppard. Mr. Cornish's yesterday.

Sol. Gen. What time was it served upon you?

Sheppard. Presently after I came out of church in the afternoon, Sir.

L. C. J. What have you to say?

Cornish. My lord, Mr. Rumsey was pleased to give in his evidence, that I had been at a consult or meeting at Mr. Sheppard's house, where Mr. Ferguson should pluck out a declaration out of his bosom, and should read it by the candle, and Mr. Sheppard should hold the candle to him while he read it.

L. C. J. Do you remember Mr. Cornish was ever at your house?

Sheppard. At one of those meetings that was at my house, Mr. Cornish came into the house to speak a few words with the duke of Monmouth, or some other, I cannot be positive in that, it is so many years ago, and did not stay half a quarter of an hour in the house; I came up stairs, and went out with him, and there was not one word read, and no paper seen while he was there.

Just. Levinz. Was Mr. Cornish in the room with the duke of Monmouth and those others?

Sol. Gen. Mr. Sheppard, do you remember that the late duke of Monmouth, the lord Russel, the lord Grey, and sir Thomas Armstrong were there together, and the declaration read?

Sheppard. I remember there was a declaration read, Ferguson pulled out a declaration out

of his shoe, he pulled off his shoe, and pulled it out there.

Sol. Gen. Do you remember Mr. Cornish was by any time that night?

Sheppard. Truly I cannot say whether it was that night when the paper was read, but I do positively say that there was no paper read, for he was not looked upon to be of the company: Mr. Ferguson told me positively, there is the duke of Monmouth, my lord Grey, my lord Russel, sir Thomas Armstrong, col. Rumsey, myself, and you.

Sol. Gen. Who did Mr. Cornish come to speak with, when he came to your house?

Sheppard. Truly I do not know whether it was with the duke of Monmouth.

Sol. Gen. How came Mr. Cornish to know the duke of Monmouth was there?

Sheppard. Truly my memory will not call it.

Sol. Gen. Did his coach stand publicly at your door?—*Sheppard.* Whose coach?

Sol. Gen. The late duke of Monmouth's.

Sheppard. No, Sir, they all came private, there was no coaches at the door, as I saw, I let none of them in.

Sol. Gen. Was Mr. Cornish but once there when the duke of Monmouth was there?

Sheppard. But once.

Sol. Gen. Did he call the duke of Monmouth out to him?

Just. Street. How came you to carry him up to the duke of Monmouth, if he were none of the company?

Sheppard. Mr. Cornish did go up into the room and spake to the duke of Monmouth, or some other person, but I think the duke of Monmouth.

Sol. Gen. Do you remember he was there in company, when col. Rumsey was there?

Sheppard. No, I cannot remember that.

Rumsey. My lord, when I came to Mr. Sheppard's house, Mr. Sheppard came down and fetched me up, and I delivered my message I had to the duke of Monmouth, and to the company, and indeed I was not a quarter of an hour there, I believe; but by that time I had spoke my words, some-body knocked at the door, and Mr. Sheppard went down, and immediately brought up Mr. Cornish into the room, without asking a question of any body: and when he was come into the room, Mr. Cornish said, he could not come sooner, because he had business; and could not stay, because there was a committee for the management of the charter to meet that night, and there was a necessity of his being there, because there was never another alderman in town, and there must be an alderman there.

Att. Gen. Mr. Sheppard, do you remember any thing of that?

Sheppard. No, Sir, I do not remember it, I will assure you.

Sol. Gen. Did you let him in at the door?

Sheppard. No, Sir, I had word brought me up stairs, that alderman Cornish was below; and I went down, and brought him up.

Sol. Gen. Did you ask for Mr. Cornish to come up?

Sheppard. I do not remember I did: When Mr. Cornish was there, there was not above three persons.

Sol. Gen. Who were they?

Sheppard. There was the duke of Monmouth, and there was Mr. Ferguson, and truly I cannot tell whether the other was my lord Russell, or my lord Grey.

Just. Levins. You acknowledge now, Sir, you did carry the prisoner up to the duke of Monmouth and those persons. Did you use to carry all persons up there?

L. C. J. There was a cabal of rebels met together, and you go and bring up this man to them, without any leave or licence from them; which is incredible certainly, unless you knew him to be one of the company, and equally engaged with them.

Sol. Gen. Mr. Sheppard, you say, when Mr. Cornish came up, there was not half the company there. Had they been there, or were they not yet come?

Just. Withins. Look you, Sir, it is marvellous how Mr. Cornish, if he were none of the parties, should have notice that the duke of Monmouth was there, who came in privately at the back-door, and came to speak with him there.

Sheppard. My lord, I have no back-door.

Just. Withins. He came in privately.

Just. Levins. Mr. Sheppard, I think I heard you say, they came privately without their coaches.

Sheppard. Yes, Sir, they had no coaches.

Just. Levins. They came privately, I suppose, that no body should know they were there?—*Sheppard.* I suppose so, Sir.

Just. Levins. Why then did you carry Mr. Cornish up; if you were below in the house, he might come about your own business; but to be carried into the chamber where they were, looks as if it were about their business.

Cornish. I never heard any thing of the business; my lord.

Att. Gen. So far, gentlemen, you remember, he confirms what Mr. Rumsey says; that gentleman denied he was there with the duke of Monmouth.

Cornish. Pray, Mr. Attorney, do not strain, I have dealings with Mr. Sheppard, and have often been there, but never at any meeting.

Att. Gen. He says, you spake with the duke of Monmouth.

Cornish. I never saw the declaration, he declares it.

L. C. J. Had you any dealings upon account with the duke of Monmouth?

Cornish. Never for a farthing.

Just. Withins. What business had you with him then?

Cornish. I do not know but I might enquire for him in other places.

L. C. J. Your own witness carried you up.

Cornish. My lord, if he did, I did not stay; he says Mr. Sheppard held the candle.

Just. Withins. Mr. Cornish, he confirms great part of what Mr. Rumsey says.

Cornish. Not one tittle; for he declares I was not of the company.

L. C. J. He says no such thing.

Sheppard. My lord, to my knowledge, I can safely say, he knows nothing of it.

L. C. J. And yet you could bring him up among them?

Sheppard. My lord, I declare I never spake any thing to him in my life about the business, nor never in any company.

Just. Withins. It is plain, Mr. Rumsey says he was the man that brought you up: How should Mr. Rumsey know that?

Att. Gen. Mr. Sheppard, I will ask you this question: Had you order from that company not to bring up any person? Do you remember you swore so at a former trial?

Sheppard. I remember when I was there, they desired I would let none of my servants up, and that I would go down and fetch up what they wanted; and I fetched up wine and what they wanted.

Sol. Gen. Mr. Sheppard, why were none of your servants to come up?

Sheppard. Because they were in private, Sir.

Sol. Gen. Were strangers to come up therefore?

Sheppard. It is so long ago, I cannot remember.

Just. Levins. They came privately, without coaches, because none should know they were there, and you carry Mr. Cornish up to them.

Cornish. I think this witness is confronted.

L. C. J. Hold your tongue, Sir, he hath not done yet.

Rumsey. My lord, as soon as Mr. Cornish had made his excuse for his not coming sooner, and that he could not stay, I could not make that, and Mr. Cornish cannot say I would do any thing maliciously or spitefully against him; my lord; as soon as he had done, all the company went about him, and somebody did tell him, They would tell him what they had done: they told him the declaration had been read; that Mr. Ferguson had prepared it, and they said, look you, Mr. Cornish, you shall hear it read; and with that this gentleman, though he denies it, did take the candle, and held it: they did not come to the table, but the company stood round while Mr. Ferguson pulled it out of his bosom.

Just. Withins. Mr. Sheppard, you are very forward.

Att. Gen. My lord, I would ask Mr. Sheppard a question.

Rumsey. My lord, the declaration was read, and Mr. Cornish did approve of it, and did say, With that small interest, or little interest, or words to that effect, that he had, he would assist.

Att. Gen. I wonder why you did not give

me notice when you came in the morning. Why did not you give notice ?

Sheppard. I was here attending from eleven o'clock till half an hour after three.

Att. Gen. Did you send in any word ?

Sheppard. I could not tell who to send in : I was here expecting to be called.

Just. Street. You have had a favour that no man ever had.

Sol. Gen. Gentlemen, there hath been a very great indulgence given to the prisoner, and it is to shew you what tenderness a court of justice hath, and always will have, of the lives of the king's subjects : After a full evidence, though he had neglected his defence, yet you were again sent for into court, to hear what further evidence he had to offer to you. I cannot but observe, this looks like a subtle contrivance on the prisoner's part ; you see what endeavours have been made by Mr. Attorney-General to have had him here a witness for the king ; you have observed he told you he had a subpoena for him, but he was absent ; in what company he was absent yesterday he hath told you, with Mr. Cornish's son : this morning he was not to be found, after he had received this subpoena, and a subpoena from Mr. Cornish ; stays without, and gives no notice ; but when you are withdrawn, can send intelligence to Mr. Cornish, that he hath something to say, that he hopes will excuse him : now what that is, I must beg you a little to observe. Truly I am very glad for the satisfaction of all men, that Mr. Sheppard hath now been here, and he is so far from invalidating any one part of the testimony, that by all the circumstances you can collect from this evidence that is given, it is a corroboration of it. Mr. Cornish was accused of being present at consultations that have been held against the life of the king, and for raising rebellion at Mr. Sheppard's house ; his excusing his not coming there is a sufficient argument to prove he was privy to their meeting, he hath gone on further, and proved to you the reading the declaration. Now what says Sheppard to this witness ? Mr. Cornish, by the way, I must observe to you before he did deny his being there ; he had been sometimes in company with Ferguson, but he did not like the man, he says, because of his morals : now the witness he hath produced hath given you this testimony, that Mr. Cornish hath been there in that company, that he came in such a manner, that no man but must be satisfied he was privy to their designs, and did know of their meeting, for he comes when the duke of Monmouth, and the rest of the conspirators were there met in private, with a direct charge to Mr. Sheppard, that is the witness, that they should be so private, that no one servant should come up into the room : yet Mr. Sheppard tells you, that when Mr. Cornish came, he carried him up into the room, without so much as acquainting any one of the company that Mr. Cornish had a desire to come, but brings him up as if he were (and I make no doubt but you will imagine, he was) one of

the company. When he comes there, he says, his business is with the duke of Monmouth, the head of that conspiracy ; and he himself, tells you he never had any dealings with the duke of Monmouth in his life. What can a man imagine of that man that had no dealings with the duke of Monmouth, to find him out in a place, where no mortal could know, and none was to know, and coming to him at that time, and at that place, under those circumstances of concealment, no man almost but out of his own mouth must believe that he was privy to that conspiracy : therefore though this witness doth seem to forget some part of the evidence, the reading the declaration, and holding the candle ; yet these are such circumstances that in themselves do carry a proof of the charge, and do confirm all the rest that the witness hath said ; and this must be great satisfaction to you, that he was there present and privy to that design. And so I leave it to your consideration.

Then the jury withdrew for a short time, and returning, brought Mr. Cornish in Guilty, and found one hundred and forty pounds for the king in Mr. Sheppard's hands.

Clerk. Set Elizabeth Gaunt to the bar :

[Which was done.]

Cryer. O-Yes, all manner of persons are commanded to keep silence, whilst judgment is giving, upon pain of imprisonment.

Clerk. Elizabeth Gaunt, hold up thy hand. Thou standest guilty of high-treason, &c.

Recorder. You Elizabeth Gaunt, you have here been indicted for that great crime of high treason, and that particular part of it, for harbouring, and comforting, and assisting, and cherishing of traitors, more especially of one Burton ; you have had your trial, and a very fair trial, and upon that the jury have found you guilty : It is the duty of my place to pronounce the sentence the law hath provided for such high crimes as these are, and that is no other but this :

'That you are to be carried back to the
'place from whence you came, from thence
'you are to be drawn upon a hurdle to the
'place of execution, and there you are to be
'burnt to death ; and the Lord have mercy
'upon your soul.'

Mrs. Gaunt. I say that this woman did tell several untruths of me.

Recorder. Is that all you have to say ?

Mrs. Gaunt. I do not understand the law.

Clerk. Bring Henry Cornish to the bar. Henry Cornish, hold up thy hand, &c.

Cornish. My lord, now the law hath past upon me, I do humbly pray your lordship ; and this honourable bench, that you will be pleased to intercede for me with his majesty. I shall lead a peaceable, quiet, and dutiful life : and I hope, when you come to reflect upon what hath been said to-day, that perhaps you will be of another mind, and have more charity for me than you had upon my trial : for in the sim-

plcity of my heart, and in the presence of God, I do declare I am innocent: and if your lordship, and this honourable bench, intercede with his majesty, it will be an eternal obligation upon me, and I shall live faithfully, peaceably, and loyally as long as I live. I presume to beg this, and I promise myself, and hope it will stir up the hearts of some persons, that they will not leave me destitute of friends in such a case as this; having a wife and several childrep, it will be an act of charity.

Recorder. The court does give you your request, and if there be any misery brought upon your family, it is done by yourself.

Clerk. William Ring, hold up thy hand, &c.

Ring. I had no notice given me an't please your lordship.

Recorder. Where is the executioner, is he here?—*Executioner.* Yes.

Recorder. Why do not you do your duty to Mr. Cornish?

Clerk. John Fernley, hold up thy hand; thou standest convicted of high treason, for traitorously harbouring one James Burton; what canst thou say for thyself? &c.

Fernley. It is very hard measure I have had, I have nothing to say, but the king's mercy.

Recorder. Is that all you have to say?

Fernley. I have nothing but the king's mercy.

Recorder. Tie him up then, tie him up.

Cryer. O—Yes, all manner of persons are commanded to keep silence, whilst judgment is giving, upon pain of imprisonment.

Recorder. You the several prisoners at the bar, you have been severally indicted here of the high crime of treason. For you, Mr. Cornish, I apply myself first to you. Your crime is for treason that was committed in his late majesty's life time, being one of those notorious conspirators that designed to raise rebellion, and others some of them immediately designed the life of his majesty that then was, and his present majesty, that was the design of some of them; and others, they had another part, that was to raise rebellion, and particularly some of them in and about this city, and it was carried on some time before it was discovered, may be a year or more, under colour and pretence of law: For so did they invade the government, first of all by packing of juries, there was the foundation laid whereby to bring on that business, which they had at last designed when they could bring it to a ripe head. Too many persons in that business, I believe, were very busy, meddling with what they had not to do with; clubbing and caballing how to bring their designs about, in opposition to the government, not to support it in the least, but to overthrow it if it were possible: But then at last, they must take another course, for no longer could they carry it on by pretence of law, as you have heard to day: Now we must take other measures, and take downright Mows. This is the business, Mr.

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Cornish, that you have been indicted for; and, I must tell you, whatever apprehensions you have to the contrary, and may please yourself in, I am sorry to see such a sort of pleasure in your countenance, as if you had had no favour shewed you. I believe the court hath shewed you more favour, and had more patience with you, than ever any man that stood in your place had; for calling a witness after the jury hath been out, is a thing I never saw a precedent for: And I am glad it was done, for I think it hath cleared the thing beyond all manner of contradiction: before it looked something dark for want of Sheppard, and so it is a happiness that that man was called to convince you of many things that you protested solemnly against, which I am sorry to see in you, in this condition that you are, to make such solemn protestations, and afterwards call a witness to confront you in them. For the other two, here is Mr. Ring is very notorious for harbouring a couple of traitors knowing from whence they came; and if it were not for such persons as these are, that do harbour them when they fly, it may be there would not be so many bold attempts to commit such crimes as these are: To provide for them, and nourish them, and comfort them, after they have committed their villainies, this does encourage them to commit their villainies as they do, and so I reckon harbourers to be worse than traitors themselves; they are like receivers to thieves. There would not be so many traitors, if there were no harbourers. You have been convicted of these great crimes; it is too late, and not fitting to spend time any longer, but to pronounce the several sentences against you, which is this:

' You must, every one of you, be had back
' to the place from whence you came, from
' thence you must be drawn to the place of
' execution, and there you must severally be
' hanged by the necks, every one of you by
' the neck till you are almost dead; and then
' you must be cut down, your intrails must be
' taken out and burnt before your faces, your
' several heads to be cut off, and your bodies
' divided into four parts, and those to be dis-
' posed of at the pleasure of the king; and the
' Lord have mercy upon your souls.'

Fernley * and Ring were reprieved, but Cornish and Gaunt were ordered for execution; accordingly four days after, viz. October 23, Henry Cornish † was drawn on a sledge to

* Fernley was afterwards executed at Tyburn.

† Of the fate of Cornish, Echard (p. 1069.) says:

"It is not to be doubted but this gentleman had great hardship, and unworthy usage in his imprisonment, trial and condemnation, and that he suffered upon wretched evidence: But at the same time it is not to be forgotten what encouragement he gave to such sort of evi-

King's-street end, in Cheapside, where a gibbet was erected on purpose, at which place he spoke as follows:

"I am come here this day condemned to die; but God is my witness, the crimes laid to my charge were falsely and unaliciously sworn against me by the witnesses; for I never was at any consult, nor any meeting, where matters against the government were discoursed of: I never heard nor read any Declaration, nor never acted wilfully any thing against the government. I confess, through the justice of God, my private sins have brought me to this infamous end; yea, it were just with God, not only to deprive me eternally of his presence, but to condemn me to eternal torments; but through Christ I hope to be eternally blessed: Yet, as to the crimes for which I suffer, on the word of a dying man, I am altogether innocent. I bless God I was from my younger years brought up in, and have for some years continued a Protestant, in the communion of the church of England; in which communion I now die. I have often partaken in the ordinances, the blessed effects and comfort thereof I now feel in this my agony. I bless God I was born under a government, in the constitution of which I did ever acquiesce, and in which I was once a member; at which time I did, according to the best of my under-

dence in the Popish Plot, and how active he appeared towards the shedding of the blood of the lord Stafford; in whose case he was so zealous, that, being sheriff at that time, he was unwilling to allow him the common favour shewn to the nobility of being beheaded. He now met with a full retaliation; perhaps more from Heaven than from men; and he could not so much as obtain the same favour himself; but on the 23d of October he was hanged and quartered in Cheapside, the heart of the city, and his head fixed upon Guild-hall. Before he went out, he was extremely urgent with the worthy Dr. Benjamin Calamy, who had attended him to the last, to go with him to the place of execution; but that good man had such compassionate tenderness in his nature, that he excused himself, saying, he could as soon die with him, as bear the sight of his death. At his execution, he shewed all the marks of a pious christian prepared for death, and did several times assert and protest his innocency as to those crimes for which he stood condemned: And it is said that king James himself not long after expressed some regret, as if he believed he had had measure; however, his quarters were ordered to be taken down, and delivered to his relations to be decently interred, as they were in St. Laurence church by Guild-hall."

Oldmixon, in consideration of Echard's words 'Retaliation from Heaven,' prays God that "the dreadful judgments [see vol. 6, p. 198,] he has called down on so many innocent persons be not 'retaliated' on his own soul."

standing"—[Here he was interrupted by the Sheriff.]—"I bless God I was born in a land of light, where the gospel hath been preached in power and purity; he might have brought me forth in a land of darkness and ignorance; but blessed be God for Jesus Christ."—Then he entreated the Sheriff to intercede with his majesty to be kind to his poor wife and children: The Sheriff promised him to wait on his majesty the next day about it. He replied, "Mr. Sheriff, I thank you, the Lord reward you a thousand fold; the Lord put it into the hearts of you to be kind to the widows and fatherless; it is your duty: The Lord put it into the hearts of all good people to pray for me."

More could not be taken, by reason of the noise of the people, and interruption of one of the Sheriffs.

When he had made an end of speaking, the executioner did his office; his head was afterwards fixed upon the Guild-hall. His attainder was reversed by act of parliament, 1st of Will. and Mar. and the witnesses lodged in remote prisons.

The same day Elizabeth Gaunt was executed according to her Sentence. She left the following Paper:

Newgate, 22 October, 1685.

"Not knowing whether I should be suffered or able, because of weaknesses that are upon me, through my hard and close imprisonment, to speak at the place of execution, I write these few lines, to signify I am well reconciled to the way of my God towards me, though it be in ways I looked not for, and by terrible things, yet in righteousness; for having given me life, he ought to have the disposing of it, when and how he pleaseth to call for it; and I desire to offer up my all to him, it being but my reasonable service; and also the first terms that Christ offers, that he that will be his disciple must forsake all and follow him. And therefore, let none think it hard, or be discouraged, at what hath happened unto me; for he doth nothing without cause, in all that he hath done unto us; he being holy in all his ways, and righteous in all his works; and it is but my lot in common with poor desolate Sion at this day: neither do I find in my heart the least regret of any thing that I have done, in the service of my Lord and Master Jesus Christ, in favouring and succouring any of his poor sufferers, that have shewed favour to his righteous cause; which cause, though it be now fallen and trampled on, as if it had not been anointed, yet it shall revive, and God will plead it at another rate, than yet he hath done, with all its opposers and malicious haters: and therefore let all that love and fear him, not omit the least duty that comes to hand, or lieth before them, knowing that Christ hath need of them, and expects that they should serve him. And I desire to bless him that he hath made me useful in my generation, to the comfort and

relief of many distressed ones; that the blessing of those that have been ready to perish, hath come upon me, and I have been helped to make the heart of the widow to sing; and I bless his holy name, that in all this, together with what I was charged with, I can approve my heart to him, that I have done his will, though I have crossed man's will; and the scripture that satisfied me in it is, the xvth of Isa. 3, 4. Hide the outcasts, betray not him that wandereth; let my outcasts dwell with thee. Obadiah, ver. 13, 14. Thou shouldest not have given up him that escaped, in the day of distress. But man saith, You shall give them up, or you shall die for it. Now whom to obey, judge ye. So that I have cause to rejoice and be exceeding glad, in that I suffer for righteousness sake, and that I am accounted worthy to suffer for well-doing, and that God hath accepted any service from me, that hath been done in sincerity, though mixed with manifold weaknesses and infirmities, which he hath been pleased for Christ's sake to cover and forgive. And now as concerning my fact, as it is called, alas! it is but a little one, and might well become a prince to forgive; but, He that sheweth no mercy shall find none: and I may say of it, in the language of Jonathan, I did but taste a little honey, and lo, I must die for it; I did but relieve a poor, unworthy and distressed family, and, lo, I must die for it. I desire in the Lamb-like will, to forgive all that are concerned; and to say, Lord, lay it not to their charge. But I fear and believe, that when he comes to make inquisition for blood, mine will be found at the door of the furious Judge [Withins,] who, because I could not remember things, through my dauntedness at Burton's wife and daughter's witness, and my ignorance, took advantage thereat, and would not hear me, when I had called to mind that which I am sure would have invalidated their evidence; and though he granted some things of the same nature to another, yet he granted it not to me. My blood will be also found at the door of the unrighteous jury, who found me guilty upon the single oath of an outlawed man, for there was none but his oath about the money, who is no legal witness, though he be pardoned, his outlawry not being recalled; and also the law requires two witnesses in point of life. And then about my going with him to the place mentioned, it was, by his own words, before he could be outlawed, for it was two months after his absconding; and though in a proclamation, yet not high-treason, as I have heard: so that I am clearly murdered by you. And also bloody Mr. Atterbury, who so insatiably hunted after my life; and though it is no profit to him, yet through the ill-will he bore me, left no stone unturned, as I have ground to believe, until he brought me to this; and shewed favour to Burton, who ought to have died for his own fault, and not have bought his life with mine. And lastly, Richardson, who is cruel and severe to

all under my circumstances, and did at that time, without all mercy or pity, hasten my sentence, and held up my hand that it might be pronounced; all which, together with the great one of all, (king James 2.) by whose power all these, and multitudes of more cruelties are done, I do heartily and freely forgive, as done against me: but as it is done in an implacable mind against the Lord Christ, his righteous cause and followers, I leave it to him who is the avenger of all such wrongs, and hath said, I have raised up one from the North, and he shall come upon princes as upon mortar, and as the potter treadeth clay, Isa. xli. 25. He shall cut off the spirit of princes, and be terrible to the kings of the earth, Psal. lxxvi. 12. And know this also, that though you are seemingly fixed, and because of the power in your hands, and a weighing out your violence, and dealing with despitiful hand, because of the old and new hatred, by impoverishing, and by every way distressing those you have got under you, yet unless you secure Jesus Christ, and his holy angels, you shall never do your business, nor your hands accomplish your enterprises; for he will come upon you ere you are aware, and therefore, O that you will be wise, instructed, and learn, is the desire of her that finds no mercy from you.

ELIZABETH GAUNT.

POSTSCRIPT.

"Such as it is, you have it from her, who hath done as she could, and is sorry she can do no better; hopes you will pity and cover weakness, shortness, and any thing that is wanting, and begs that none may be weakened or humbled at the lowliness of my spirit; for God's design is to humble and abase us, that he alone may be exalted in his day: and I hope he will appear in the needful time, and it may be reserves the best wine, till last, as he hath done for some before me; none goeth to warfare at his own charge, and the spirit bloweth, not only where, but when it listeth; and it becomes me who have so often grieved, quenched, and resisted it, to wait for and upon the motions of the spirit, and not to murmur: but I may mourn, because through want of it, I honour not my God, nor his blessed cause, which I have so long loved and delighted to love; and repent of nothing about it, but that I have served him and it no better."

At a Parliament begun and holden at Westminster, the 29^d of January, primo Gulielmi et Mariæ Regis et Reginæ, 1688. numb. 39.

An ACT for reversing the Attainder of HENRY CORNISH, esq. late Alderman of the City of London.

"Whereas Henry Cornish, esq. late Alderman of the City of London, was indicted of High-Treason, upon pretence, that knowing James late duke of Monmouth, William Rus-

ael, esq. and sir Thomas Armstrong, to be traitors, and to have conspired the death of the late king Charles the 2d, promised to be assisting to them in such treasons, to bring them to effect; and being thereupon arraigned at the sessions-house in the Old-Bailey, the 19th day of October, Anno Dom. 1685, although he was committed for the said pretended treason but the 13th of the same October, and had notice of his trial the 17th of the same October, and was kept close prisoner from the time of his commitment to the time of his trial, and could not possibly therefore prepare himself for his defence, neither would the court, which tried him, give him any longer time to prepare himself for his trial, although he very much pressed for longer time, having a material witness to send for, who was not then in town, and was above 140 miles off: and having pleaded Not Guilty to the indictment, he was presently tried and convicted on the single evidence of col. Rumsey, who swore the prisoner was in the room, at one Mr. Sheppard's house, in company of the duke of Monmouth, the lord Russell, the lord Grey, sir Thomas Armstrong, Mr. Ferguson, Mr. Sheppard, and the witness, when a paper was read, the contents whereof are a complaint of the misgovernment of king Charles the second, and declaring for liberty of conscience, and that all those who would assist in that insurrection, that had lands of the church, or of the king's, in the late wars, should have them restored; to which paper, as the witness swore, the prisoner expressed his liking: whereas the said Rumsey owned, when he gave his evidence, that he did not hear all the paper read, nor did take great notice of it, and therefore was not a competent witness of the contents of the paper. And whereas the said

col. Rumsey had, in the lord Russell's trial, expressly sworn that he was not in the room when the said pretended paper was read: and whereas col. Rumsey, in the same lord Russell's trial, expressly mentions the names of all the persons in the said room, in the said Mr. Sheppard's house, whereof the said Henry Cornish was none; and whereas Mr. Sheppard, whom Rumsey, in his evidence, owned to be in the room when the said pretended paper was read, expressly testified, that the said Henry Cornish was not in the room at the time of the reading the said pretended paper. For all which reasons, at the humble petition and request of Elizabeth Cornish, widow and relict, and Henry Cornish, eldest son of the said Henry Cornish; Be it enacted by the king and queen's most excellent majesties; and by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the conviction and attainder of the said Henry Cornish, deceased, for High-Treason, be hereby reversed, annulled and made void, to all intents and purposes whatsoever. And to the end that right be done to the memory of the deceased Henry Cornish aforesaid, be it further enacted, that all records and proceedings relating to the said Attainder, be wholly cancelled, and taken off the file, or otherwise defaced and obliterated, to the intent the same may not be visible in after-ages; and that at the next sessions of gaol-delivery, to be holden after the feast of St. Michael next, for the city of London, the said records and proceedings shall be brought into the court, and then and there taken off from the file, and cancelled.

Copia Vera "Jo. Brown, Cl. Parl."

REMARKS upon Mr. CORNISH'S Trial, by Sir JOHN HAWLES, Solicitor-General in the Reign of King William the Third.*

THERE yet remains two persons prosecutions to speak of; the one is Mr. Cornish, who was taken the of October, 1685, and was arraigned on a Indictment of High-Treason the Monday after, for conspiring to kill the late king Charles the Second; and knowing James duke of Monmouth, William Russell, esq. and sir Thomas Armstrong, to be rebels and traitors, promised to be assisting to them in their treasons. To which he pleaded not guilty. He desired to put off his trial, because he had no notice till the Saturday before at twelve o'clock, and he could get no friend to come to

him till eight o'clock at night; and then he was permitted to speak with nobody but in the presence of the gaoler: he had been allowed no pen, ink, or paper. He was told by the court he ought not to have it, without leave given on a petition preferred by him, and that he was taken Tuesday before, which to that time was almost a week. He said, his children had petitioned the king the night before to put off his trial, and it was referred to the judges: he did not know whether he was committed for high treason against the present or the former king, and he had a material witness an hundred and forty miles off: but was told by the court, they had no power to put off his Trial. It is true, they said the lord Russell's trial was put off till the afternoon, (which was not true), but that was a favour which could not be challenged by another as a right. He complained he had not a copy of the pannel, but was answered it was not his right to have it. Then the Attorney said, he had not deserved so well of the ge-

* See sir John Hawles's Remarks at the end of the Cases of Fitzharris, vol. 8, p. 426; Colledge, vol. 3, p. 723; Lord Shaftesbury, vol. 8, p. 835; the city of London, vol. 8, p. 1359; lord Russell, vol. 9, p. 578; Sidney, vol. 9, p. 818; sir Thomas Armstrong, vol. 10, p. 106; count Coningsmark, vol. 9, p. 1; and Bateman, p. 473 of the present volume.

verment as to have his trial delayed, and therefore he was presently tried.

Rumsey swore, that about the latter end of October, or beginning of November, the earl of Shaftesbury desired him to go to Mr. Sheppard's house, where was a meeting of the duke of Monmouth, lord Russell, lord Grey, Sir Thomas Armstrong, Mr. Ferguson, and Mr. Sheppard; he came late, and they were just on going away; he delivered the message, and they told him that Mr. Trenchard had disappointed them. He had not been there above a quarter of an hour, but Mr. Sheppard was called down, and brought up Mr. Cornish, and told them Mr. Cornish was come; who came into the room, and excused his not coming sooner, and that he could not stay, for he was to meet about the charter: whereupon Mr. Ferguson opened his bosom, and under his stomacher pulled out a paper: they told Mr. Cornish they had had it read, and desired to read it to him: Mr. Ferguson read it, Mr. Sheppard held the candle while it was reading, and afterwards they asked Mr. Cornish how he liked it: who said, he liked it very well. He remembered two points in it very well, the one was for liberty of conscience, the other was, that all who would assist in that insurrection, who had church or king's-lands in the late war, should have them restored to them. He did not hear all the paper, and observed only these two points; it was a declaration on a rising, and when the rising was to have been, it was to have been dispersed abroad: there was a rising intended at that time, and Mr. Cornish said, he liked the declaration, and what poor interest he had he would join with it. He had great dealings with Mr. Cornish, and Mr. Cornish was a very honest man, it was out of compassion he had not accused Mr. Cornish before.

Mr. Goodenough said, there was a design to rise in London, and for that purpose to divide the city into twenty parts, and to raise five hundred men out of each part to take the Tower, and to drive the guards out of town. Before that was agreed on, he being by chance at Mr. Cornish's house, said, The law will not defend us; some other way was to be thought on. Mr. Cornish said, he wondered the city was so unready, and the country so ready. Mr. Goodenough replied, there is something thought of to be done here; but in the first place the Tower must be seized, where the magazine is. Mr. Cornish paused a little, and said, I will do what good I can, or what I can, or to that purpose, he said.

He afterwards met Mr. Cornish on the Exchange, who asked him how affairs went; and this was in Easter-term 1683. He had some matters with Mr. Cornish about managing the riot, which was brought against him, Mr. Cornish, and others: He came to Mr. Cornish's house about the business of the riot, and no person was by at the discourse. Mr. Gosfright testified for Mr. Cornish, that he opposed Mr. Goodenough's being under-sheriff, and said,

he would not trust an hair of his head with him, he was an ill man, obnoxious to the government, and had done ill things, and he would not trust his estate and reputation in the hands of such an under-sheriff; and he believed Mr. Goodenough and Mr. Cornish were never reconciled. Mr. Love, Mr. Jekyl, and sir William Turner, testified to the same purpose: Mr. Lane spoke out of the printed trial of my lord Russell, and said, Rumsey in that trial said he did not hear the declaration read, for it was read before he came. Dr. Calamy said, Mr. Cornish did often come to church, and receive the sacrament. Mr. Sheppard said, he was subpoena'd by the king, and by Mr. Cornish the night before; and that Mr. Cornish's son was with him the afternoon of the day before, who prest him to be at the trial the next day; that there were accounts depending between him and Mr. Cornish; whereon there was about one or two hundred pounds due to Mr. Cornish, and Mr. Cornish's subpoena was served first upon him. At one of those meetings at his house, Mr. Cornish came to speak a few words with the duke of Monmouth, or some other, he could not be positive in that, it was many years ago: he did not stay above half a quarter of an hour in the house, Sheppard came up stairs, and went out with Mr. Cornish, and there was not one word read, nor no paper seen while Mr. Cornish was there: he remembered there was a declaration read, Ferguson pulled it out of his shoe: he could not tell whether Mr. Cornish was at his house the night the declaration was read, but he was positive no paper was read while Mr. Cornish was there, for Mr. Cornish was not looked on to be one of the company: he did not know who Mr. Cornish came to speak with, when he came to his house; Mr. Cornish was but once at his house when the duke of Monmouth was there: he did not remember that Mr. Cornish was in the company when Mr. Rumsey was there; he said, he had attended the court from eleven o'clock till half an hour past three.

This being the sum of the evidence given in the trial for and against the prisoner, let us see whether those inferences could be made from it as were made by the court and counsel? and whether, on the whole, an honest jury, though but of little understanding, could have found him guilty of the treason in the indictment?

It is agreed on all hands, that a petty jury may and must consider the credibility of a witness, (though in the lord Shaftesbury's case it was said a grand jury ought not so to do) and if so, surely Rumsey was not a credible, though he was not a disabled witness; no more than a man who owns himself to be a man of falshood, a profligate wretch, and perjured by his own confession, though not convicted of it: he had notoriously confessed himself guilty of high-treason, and of being in the design of an intended barbarous murder; he had sworn in the lord Russell's trial, he had named all the persons at the meeting he spoke of, of which Mr. Cornish was none; and being

taxed in this trial with it, he excuses his perjury with compassion to the prisoner, which was mean, foolish, and contradictory: he perjured himself to save the prisoner, and then swore truth to hang him. He had not presence of mind enough to excuse himself in the manner a witness in the lord Russel's trial did, that his God, his king, and his country, put him unwillingly to act that part. Besides that, in the lord Russel's trial, Rumsey swore he was not at the reading the declaration, and contradicted Sheppard who swore he thought he was there.

But that passage was proved only by a witness who had heard it in the trial, which, I confess, in strictness of law is not evidence; nor if the witness had said, he heard Rumsey swear so at the lord Russel's trial, it had not been evidence, unless a record of that trial had been produced in court, which was not done. But all those things being but mere circumstances, shew the injustice of speeding his trial, and denying him counsel: Would not any counsel have told him, that in strictness of law a passage in a printed trial was not evidence, and was it not easy for him to have got a witness to have said that he had heard Rumsey swear so at that trial? Were not all the judges who sat upon him, and all the king's counsel who were against him, present at the lord Russel's trial, and perfectly remembered what Rumsey then swore as to the pretended declaration, and might he not have subpoena'd them to have testified that matter? Nay, was it not their duty to have done it even without a subpoena?

To say it was against the king, and therefore they could not do it; or they were in the commission to try him, and therefore they could not do it; is neither law nor reason. Every man knows that a judge in a civil matter tried before him, and a counsel even against his client, has been enforced to give evidence, (provided it be not of a secret communicated to him by his client) for in that particular a judge ceases to be a judge; and is a witness; of whose evidence the jury are the judges, though he after re-assume his authority, and is afterwards a judge of the jury's verdict.

A judge may sue, and must be sued in his court, but in that case he ceases to be a judge and is a suitor, though he re-assumes his authority in all other matters: and if it be so in civil matters, let any man shew me a reason why the law is not so in criminal matters; there is no express law against it, and it will be absurd in reason to say the law is not so; for at that rate the king may put any witness, he knows the prisoner intends to produce for himself into the commission for trying him, and so deprive the prisoner of the benefit of his evidence; as in this case Sheppard, whose evidence ought to have been of great use (as shall be shewn) though it was not of any avail to the prisoner, might have been put into the commission to have tried Mr. Cornish, for he was as much qualified for it, as sir James

Smith then lord mayor, or any judge upon the bench. And if they might have been witnesses for the prisoner, if subpoena'd, they might have been witnesses for him even without asking; and it was a duty incumbent on them, though not as judges, yet as christian men, so to be.

Humanity commands the discovery of truths, which prevent the shedding innocent blood; and christianity commands a man to do as he would be done by. I think the question need not be asked, what they would have had done, if it had been their case?

The reason that all matters of law are, or ought to be transacted publicly, is, That any person, unconcerned as well as concerned, may, as *amicus curie*, inform the court better, if he thinks they are in an error, that justice may be done: and the reason that all trials are public, is, that any person may inform in point of fact, though not *subpœna'd*, that truth may be discovered in civil as well as criminal matters.

There is an invitation to all persons, who can inform the court concerning the matter to be tried, to come into the court, and they shall be heard. It is true, if the judges or any person had testified what Rumsey said at my lord Russel's trial, it had not been evidence without the record of the trial; and it is as true, that neither the record, nor a true copy of it could have been procured from Mr. Cornish's commitment, if it were on Friday (as I have heard it was) though the court said it was on Tuesday, much less before the notice of his trial, which was Saturday-noon, and the time of his trial, which was Monday-morning.

But then what justice was there in speeding his trial, so as to deprive him of the circumstances of his defence? For that was but a circumstance, and not an essential matter. And what account can be given why the court, when they were well satisfied that it was in the prisoner's power to procure such a witness, and such a record, did not stay till he did it? Or if it would be too long in doing, why should they not have put off the trial for that time, and given the prisoner a convenient time to do it?

The first, in civil matters, hath been frequently done, when a deed or witness hath been wanting, if it could be done in a convenient time, and a trial has been put off before it came on, though after it came on they have not done it, because there is no great mischief in that, for either party hath power to bring it about again; but not so in capital matters, and therefore juries in capital matters have been frequently discharged after sworn, where the evidence hath been defective.

It is true, my lord Coke saith, that a jury once charged with a prisoner, cannot be discharged, but must give their verdict; but it is as true that he says so in favour of the prisoner, that when the evidence against him appears defective, he shall not be continued a prisoner till more evidence can be found, or procured against him, though the practice of late days hath been quite contrary, viz. to discharge the

jury where the evidence against the prisoner hath been defective, but enforce them to give a verdict where the prisoner's defence hath been defective; though to their knowledge if he had longer time to do it, he had been able to produce the witnesses who could clear him: but by what law or reason I am to seek. Yet I confess, if Rumsey's owning his perjury in the lord Russel's trial, in the very point sworn against the prisoner, and so frivolously excusing it, would not discredit him, I know not that any record, witness, or evidence would have availed Mr. Cornish.

And add to Rumsey's contradicting himself, that Sheppard, who never contradicted himself, and had been a witness in both trials, agrees, that what Rumsey had sworn in my lord Russel's trial, as to Mr. Cornish's not being there, was true.

But admitting Rumsey had never perjured himself, but was of equal credit with Sheppard; yet when they contradicted each other in a point which carried no probability or improbability with it, in a capital matter, the jury ought to believe in *favorem vite*, for it makes the matter at least doubtful: and therefore the jury ought to have acquitted the prisoner, for a reason in law, and which was given in colonel Sidney's trial (though shewishly) by the court, viz. that it is better that twenty innocents should escape, than one innocent suffer.

But to pass from the credibility of the witnesses to the matter of his evidence, this was the second time that this sort of evidence in any case criminal or civil was permitted to be given in evidence; and there are the same exceptions to it, as are above assigned to the evidence of Sheppard. As to the declaration in my lord Russel's trial, if a true copy of part of a deed or writing was never yet permitted to be given in evidence, much less hath or ought the purport of part of a writing be given in evidence, especially when such a reason is given why the witness remembered but part of it, as is given by Sheppard in my lord Russel's trial, and by Rumsey in this trial, viz. that he did not hear all the paper read.

And surely Goodenough could no way fortify Rumsey's evidence, being clearly of another matter, and that so very uncertain, that no heed ought to have been given to it. When Goodenough told Mr. Cornish something ought to be done in the city, but in the first place the Tower ought to be seized; to which he answered, he would do what he could; or what good he could; these words may as well relate to Goodenough's present discourse, where he complains that the law would not defend them though innocent, as well as to the seizing the Tower; and if they should refer to the last, yet they may be well enough interpreted that he would do what he could, or what good he could, to prevent the seizing the Tower. And if they are capable of two senses, they ought to be interpreted in the best for the prisoner.

Besides, the words are spoken not as a thing

designed, but as a matter, without which all other matters were in vain, and might be mere matter of discourse, as was that between Blague and mate Lee about taking the Tower; and if there was such a design on foot, it doth not appear that Mr. Cornish was ever acquainted with it. The same may be said as to what he asked Goodenough, when he asked how matters went: may not those words well enough be applied to the business of the riot, Goodenough managed for Mr. Cornish and others? And if what Goodenough said was evidence of a design of seizing the Tower, that, as well as the treason against the Guards, was treason by the act of the late king, and not by the 25th of Edward the third, if it be true doctrine which was laid down in the charge to the earl of Shaftsbury's grand jury: and if so, he ought to have been prosecuted for it within six months, and indicted within three months, if the doctrine in Colledge's trial be true: and yet this design, if true, was in Easter-term, 1683, and the prosecution not till October 1685.

There was yet one piece of evidence urged against him, viz. of his own witness Sheppard, who positively testified for him as to the main, yet in a circumstance seemed to testify against him, which was Mr. Cornish's being at his house when the duke of Monmouth and the rest were there, when the declaration was read; and upon that piece of evidence, as if it had contradicted what Mr. Cornish said before, there was a mighty triumph: whereas, the most that could have been made of it was, that Mr. Cornish in part of his defence was guilty of an untruth. And even that was not so in fact; for being charged to have been at Sheppard's the night the declaration was read, he answered he was never at a consult in his life, he never was at Sheppard's in any consult, he never was there with my lord Russel, as he remembered; he had been at Sheppard's several times, but never liked Ferguson for his morals, and therefore never liked to be in his company, and he did not know but that he might enquire for the duke of Monmouth in other places, and this is all Mr. Cornish says to that matter.

Sheppard says, Mr. Cornish came into his house at one of the meetings to speak with the duke of Monmouth or some other, he could not be positive in that, it was so many years ago, and did not stay half a quarter of an hour: he could not say it was the night the declaration was read; he did not know whether Mr. Cornish came to speak with the duke of Monmouth or not; he could not remember whether Mr. Cornish was there in company when Rumsey was there; there were not above three persons there when Mr. Cornish came, which was the duke of Monmouth, Mr. Ferguson, and he could not tell whether the other was the lord Russel, or the lord Grey.

Now it would be hard to find out the contradiction between Mr. Cornish's sayings and Sheppard's evidence; both agree that Mr. Cornish hath been often at Sheppard's house,

and neither denies or affirms that he was or was not there the night the declaration was read, for a good reason; which was, that Mr. Cornish knew nothing of it, and Sheppard knew not which of the nights he was there. Mr. Cornish said he was not there with my lord Russel, as he remembered, and Sheppard doth not affirm he was there with the lord Russel. Sheppard says, that he was there when the duke of Monmouth was there, and Mr. Cornish doth not say that he was not there with the duke of Monmouth. Sheppard said, he spoke to the duke of Monmouth, or some other person, but he thought it was the duke of Monmouth, which is no direct affirmation that he spoke to the duke; and Mr. Cornish doth not say, he did not speak to the duke of Monmouth. So that if the account of the trial, set out by the authority of, and signed by, Thomas Jones, be true, I cannot see any manner of contradiction between Mr. Cornish and Sheppard: and therefore, as the court and king's counsel did infer, that Sheppard's evidence, who positively denies the truth of Rumsey's evidence, was so far from invalidating, that it corroborated Rumsey's evidence, and cleared the thing which was before somewhat dark, beyond all manner of contradiction, is a piece of effrontery. So admitting Sheppard had said Mr. Cornish was at his house the night the declaration was read, and had contradicted Mr. Cornish, is it a necessary consequence, that he heard the declaration read, and promised his assistance to it? Which must be the inference, if it must support Rumsey's evidence.

If it be not a necessary consequence, but a probable one, that ought not to weigh with a jury, to convict a person of a capital crime, especially not of treason. The statute of Edward the third says, probably convict; that is, says my lord Coke, convicted upon direct and manifest proof, not upon probable conjectural presumptions, or inferences, or strains of wit: and to say truth, when verdicts have been given on such evidence, they have been often faulty.

To give some instances of many, it is remembered in our time* where persons were convicted of the murder of a person absent, but not dead, barely by inferences upon the evidence of foolish words and actions: but the judge before whom it was tried, was so unsatisfied in the matter, because the body of the person supposed to be murdered was not to be found, that he reprieved the persons condemned; yet in a circuit afterwards, a certain unwary judge, without enquiring into the reasons of the re-

prieve, ordered execution, and the persons to be hanged in chains, which was done accordingly; and afterwards, to his reproach, the person supposed to be murdered appeared alive.

My lord Coke relates a story* in his time, of an uncle who beat his niece, that had an estate, which on her death would descend to him; the girl was heard to cry, 'Good Uncle, do not kill me;' after which she run away, and concealed herself some few miles from London. The girl being missing, and the neighbours remembering the cry of the girl, and tacking it to the probability that the uncle might be induced, for his advantage, to murder his niece, apprehended him, and he was indicted for it at the sessions; and the judges being unsatisfied in the evidence, by reason of the body of the supposed murdered girl did not appear, the uncle saying that she was run away, they gave him time to the next sessions to find her out, which he being not able to do, thought to defend himself by producing another girl very like his own niece, which he did accordingly; and being detected, it increased the suspicion, and by inferences from all those circumstances, he was convicted, and afterwards executed.

Some years after which, the girl appeared, and claimed her estate: and therefore it is a most dangerous and unwarrantable thing for a jury, in capital matters, especially in treason, to convict a person upon the evidence of probabilities.

As the evidence in this case against the prisoner was weaker than in any of the precedent cases, so the usage of the prisoner was more rigorous than in any of them: in all the other cases, the prisoners had more weeks allowed them to prepare for their trials, than this person had days; all the other persons, after notice of their trial, were permitted to have friends, nay, counsel, freely to come to them, and confer with them in private, without the presence of a gaoler, which was denied this person: all the others, except colonel Sidney, had soft words given them on their trials; but this person was rudely handled.

How often was he snubbed and bid hold his tongue? How often did he beg the patience of the court, to hear him and his witnesses? And when he was heard, how was all he said ridiculed? And if he said he was innocent, he was bid remember my lord Russel said so to his death: when he said he was as innocent as any person in the court, he was told, for all his confidence, few believed him. If he said the matter sworn against him was improbable (which hath been taken for a pretty good topic for the disbelief of a matter testified) how is it ridiculed by improbability, improbability, im-

* He seems to mean the Case of Joan Perry and her two sons, John and Richard Perry, who were executed at Gloucester Lent-Assizes, 1661, for the supposed murder of William Harrison, who had been conveyed into Turkey, and made a slave of for two years, and afterwards escaped, and came back to England.

* This was at Warwick Assizes, 8 Jac. 1, 3 Co. Inst. 232. By the Civil Law, unless there was direct and positive proof that the person was killed, no circumstances were admitted against the person accused of the murder. Digest. lib. 99, tit. 5. sec. 24.

probability? If he go to prove he is an honest man, he is told that is all appearance. If he says he employed Goodenough about the riot, he is told that is a branch of the plot. If he call Mr. Gosfricht as a witness for him, the witness is reproached with having helped the prisoner in packing juries; if he called one to prove he received the Sacrament, he is told, that was in order to qualify himself to be a sheriff; and such was his usage before, and at the trial, such was it afterwards: to order him to be tied when he was sentenced, was an indignity not used to persons of his quality & a thing indeed permitted, not commanded to be used, on boisterous criminals, who may be suspected to do a sudden mischief, if their arms were at liberty.

Of like kind was the reproaching him with the cheerfulness of his countenance at his con-

demnation, and that it might be all of a strain, his quarters were exposed, a severity used to none above-mentioned, but sir Thomas Armstrong; and in all these trials, Colledge made the best defence, and perhaps, circumstances considered, the best defence ever made upon an indictment of a capital matter, and Mr. Cornish's was the weakest, though it signified nothing: for I believe that none who reads his trial, but will plainly see he was so beset, that the defence, he, or any for him could make, would have availed him nothing, and no account can be given for the proceedings against Mr. Cornish, in the above manner, but that some of the judges, whereof three who were on the bench, had newly come out of the West, where they had been so flushed and hardened, that nothing seemed to them rigorous or cruel, and the rest seemed to vie with them in the practice.

393. The Trial of WILLIAM DISNEY,* esq. by the King's Special Commission of Oyer and Terminer, held at the Marshalsea in Southwark, for High Treason: 1 JAMES II. A. D. 1685.

A SPECIAL Commission of Oyer and Terminer for the county of Surrey, being appointed for the trying of Mr. Disney, before the Lord Chief Justice of England, and other his majesty's justices; he was brought before the king's commissioners at the Marshalsea, in Southwark, on June 21, in order to his trial upon an indictment for high treason: "For printing and publishing a most vile and traitorous Paper against his most sacred majesty and his government, intituled, 'The Declaration of James duke of Monmouth, and the Noblemen, Gentlemen, and others now in arms, &c.'" And being arraigned thereupon, he pleaded Not Guilty, and desired he might have counsel granted him, but was denied; the court telling him it was not allowable in capital cases: yet upon his farther request, he had leave to make use of what books he thought fit to prepare for his defence, and allowed till the 25th.

On Thursday the 25th, he was brought to his trial; when the messenger deposed, that

* "June 25th, 1685. Mr. William Disney was tried by a Special Commission of Oyer and Terminer for the county of Surry, upon an indictment of High Treason, for printing and publishing Monmouth's Declaration, and on a full evidence found guilty; and had sentence of death passed on him.

"29th. Mr. William Disney, lately condemned for treason, was executed at Kennington Common, in Surry, and his quarters are ordered to be fixed on the city gates." Narcissus Luttrell's Brief Historical Relation, MS. in All-Souls' College, Oxford.

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having a warrant for the apprehending of Wm. Disney, esq. he took some files of musqueteers, and two or three gentlemen to his assistance; when approaching to the house of one Tyrrel, a gardener in the parish of Lambeth, on Monday June the 15th, 1685, between twelve and one o'clock in the morning, he broke into the apartment of Mr. Disney; where entering his chamber, he found the prisoner in his shirt, who craved his breeches: but the messenger replied No, saying, if he had a night-gown he might put it on. Immediately after viewing his breeches, there was found a dagger in his pocket, and also some other things, likewise a brace of pistols, and a great hanger in the nature of a scimeter.

His maid Mary Allett was supposed to be in bed with him, by reason her cloaths were upon his bed; his daughter about eleven years of age or thereabout was in another part of the room a-bed alone. The messenger farther deposed, that getting into the printing-house, he there found the forms (as printers call them) of the traitorous Declaration in the printing-room, there being by computation about 750 of them printed on one side, and about five of the said traitorous Declarations perfect. Upon the messenger's questioning how they came there, he pretended ignorance.

The evidence appearing very plain, and he making little or no defence for himself, was found guilty of high treason; sentenced to be drawn, hanged, and quartered; which was accordingly done at Kennington Common in the county of Surrey, on Monday the 29th of June, 1685, and his quarters set upon the city-gates.

2 H

A true and full Account given by the Minister of St. George, concerning the Behaviour and last dying Speech of WILLIAM DISNEY, esq. June 29th, 1685.

Between nine and ten o'clock in the morning, I was sent for by the high sheriff of Surrey, to officiate as ordinary at the execution of the prisoner at the Marshalsea. Before he was brought out, a neighbouring minister and I (upon the sheriff's motion) went into the room where he was; when the reverend parson (having seen him the night before) asked him whether he had considered of those things which he had formerly offered him; and did very pathetically press him that he would give glory to God, by a full and ingenuous confession of his crime, intimating to him the fatal consequences that might have followed, if he had perfected that evil work: how many men's lives might have been lost in the quarrel; whose blood he was so far guilty of, as he contributed to the increase of the rebellion, by his printing the traitorous paper (or words to the same effect). To which the prisoner answered (with some signs of discontent) to this purpose; that he hoped (speaking to the minister) he did not come to press him to unburden himself now: that he had nothing to say that might bring any person into trouble, and his time was short, so he desired not to be troubled about any such matter: so that few words passed ere we parted. Finding him resolved not to make any discovery, I only told him, I did intend to meet him at the place of execution, and he thanked me.

When he came to the gallows, and was in the cart, I came to him and asked him, how he desired to improve those few moments of his life that were yet to come? He answered, in prayer. I asked him, Will you pray for yourself, or shall I pray for you? He answered, I will pray, and desire you to pray for me. Whilst the executioner was preparing the rope, I shewed him the Bible, saying, Sir, what comfortable sentence do you remember out of this word of God for your present use? He answered, Jesus Christ came into the world to save sinners, of whom I am chief. And then he proceeded in general terms to acknowledge himself a great sinner against God; but affirmed that he had made his peace with God, that he had confessed his sins with humility and

fervency, and had begged God's pardon; and did not doubt but God had for the merits of his Son Jesus Christ pardoned all his sins, and he was now under very comfortable hopes that he should soon be happy, not upon the account of his own merits, but the merits of Jesus Christ. I told him that this was very good, if his hopes were well grounded. He replied, His hopes were grounded on the Scriptures, which assured him that Christ died to save sinners. Whereupon I recounted to him some other gracious promises of God to true penitents; as that of Ezekiel, "If the wicked man turneth away from his wickedness, and doeth that which is lawful and right, he shall save his soul alive," &c. After which he made his address to God in prayer, that he would forgive him all his sins, and sanctify this his affliction to him; and prayed God to bless the king, and that he may be merciful and kind to his subjects, as well as just to his enemies: he farther observed, how gracious God was to him in giving him this admonition, (as he called it) for God might have taken him off by some sudden death, or deprived him of his senses; and then (he said) it must have been worse with me, but now God hath given me time to bethink myself; so that, though the dolour and the shame of this death, having so many spectators (upon whom he looked) may somewhat discompose me, yet I have peace and comfort within. Afterwards he desired me to pray with him, which I did briefly, according to his mind and present example: and closing with the Lord's Prayer, he answered every petition deliberately, and calmly: he declared that he lived in, and did now die in the Communion of the Church of England, which he repeated again in these words, the Protestant Church of England. After prayer, I asked him, whether he would sing some part of a Psalm? He answered No. Then I asked him, whether he had any thing more to do or say? He answered, I have nothing more but to return you thanks for your care of me. And I pray God bless you and hear your prayers for me, and mine for you, and our Saviour Christ for us both. And so I left him going to his long home.

This, according to the best recollection of my thoughts, is the sum, and, as near as I can remember, the words that passed between Mr. Disney and me.

ANDREW WESTON.

§34. The Trial of CHARLES BATEMAN, Surgeon, at the Old Bailey, for High Treason: I JAMES II. A. D. 1685.

THE Sessions of peace, Oyer, and Terminer, and gaol-delivery of Newgate, for the city of London and county of Middlesex, beginning at Justice-Hall in the Old Bailey, on the 9th of December, 1685; Charles Bateman, against whom an indictment of high-treason had been

found; for conspiring the death of the late king, &c. was brought in the custody of the keeper of Newgate in order to his arraignment; and being ordered to hold up his hand, he desired that he might first say something for himself, in order to put off his trial; but was told by

Mr. Recorder, (sir Thomas Jenner,) he must plead before he could be heard. Whereupon desiring to know whether he might have the same advantage after his pleading as before, as to gain longer time for his trial; and being answered he might, he held up his hand, and then the indictment was read.

Mr. Bateman pleaded not guilty, and desired his trial might be put off, saying, He was not prepared to make his defence, and therefore prayed a longer time, saying, he had been close prisoner for the space of ten weeks, and was over and above very much indisposed; and further alledged, he had had no notice nor pannell of the jury. As for notice of trial, he was answered, that it was not usual to give any in that court, but that he ought to have expected it, and prepared for it accordingly; and as for the pannell, it was not denied him. Then he prayed a copy of the indictment, but was told it could not be allowed; and upon his further alledging his unpreparedness and no notice of trial, and the like, the king's counsel urged that he had opportunity enough to take notice of his trial, for that it was upon an indictment of the precedent sessions. Then he asked, what time he might have between his arraignment and trial; and was answered, as much as would stand with the conveniency of the court: and after several hours respite, he a second time was brought to the bar, and then upon his humble request, pen, ink, and paper was allowed him, and his son to assist him; and then were sworn to try the issue, Richard Aley, esq., Richard Williams, John Cannum, Patrick Barret, John Palmer, James Raynor, Edward Rhedish, George Lilburn, Daniel Fouls, Peter Floyer, Lawrence Cole, John Cooper.

And he making no exceptions to them, then the indictment was read.

The Jurors, &c.

“ That Charles Bateman, late of the parish of St. Dunstan in the West, in the ward of Farringdon Without, London, surgeon, as a false traitor, against the most illustrious and excellent prince, Charles the second, late king of England, Scotland, France, and Ireland, defender of the faith, and his natural lord; not having the fear of God in his heart, nor weighing the duty of his allegiance; but being moved and seduced by the instigation of the devil, the cordial love, and true, due and natural obedience, which a true and faithful subject of our late lord the king, towards him should, and of right ought to bear, altogether withdrawing and practising, and with all his strength intending the peace and common tranquillity of this kingdom to disquiet and disturb, and war and rebellion against our late lord the king, within this kingdom to stir up, move, and procure; and the government of our late lord the king, of this kingdom to subvert; and our said late lord the king, from the stile, title, honour, and kingly name of the imperial crown of this kingdom to depose and deprive, and our said late

lord the king to death and final destruction to bring and put; the 30th day of May, in the 35th year of his reign, and divers other days and times, as well before as afterwards, at the parish and ward aforesaid, falsely, maliciously, devilishly, and traitorously, with divers other rebels and traitors to the Jurors unknown, did conspire, compass, imagine, and intend our said late lord the king, then his supreme and natural lord, not only of his kingly state, title, power and government of his kingdom of England to deprive and depose, but also our said late lord the king to kill, and to death bring and put, and the ancient government of this kingdom to change, alter, and subvert; and a miserable slaughter amongst the subjects of our said late lord the king to cause and procure, and insurrection and rebellion against our said late lord the king to procure and assist. And the same most wicked treasons and traitorous conspiracies, compassings, imaginations and purposes aforesaid to effect, and bring to pass, he the said Charles Bateman, as a false traitor, then and there (to wit), the said 30th day of May, in the 35th year aforesaid, and divers other days and times, as well before as afterwards, at the parish and ward aforesaid, falsely, unlawfully, most wickedly, and traitorously, did promise and undertake to the said other false rebels and traitors then and there being present, That he the said Charles Bateman would be assisting and aiding in the taking and apprehending the person of our said late lord the king, and in taking and seizing the city of London, and the Tower of London, the Savoy, and the royal palace of White-hall, against the duty of his allegiance, against the peace, &c. and against the form of the statute in this case made and provided, &c.

Mr. Phipps, counsel for the king, opened the nature of it, and was seconded by Mr. Serjeant Selby and Mr. Charles Moley, after which,

Mr. Josias Keeling was sworn, whose evidence was, that he had been at divers meetings and consults, where the methods had been proposed for the purposes aforesaid; and more particularly one time with Rumbold the Maltster, since executed for high treason; and that then, three papers were produced by Rumbold, and opened, containing the model of the design, to divide the city into twenty parts; and to raise five hundred men in each part, to be under one chief, and nine or ten subordinates whom he should appoint, the names of the lanes and streets of each division being likewise inserted therein; and at that time Rumbold proposed the business of the Rye-house, saying, He had a house very convenient to plant men in, to seize the king in his return from Newmarket, but that he somewhat boggled about the killing of the postillion, which had been proposed the better to stop the coach, because it looked too much like an exploit in cold blood. He further deposed that he had been at divers other places where it had been discoursed to

the same effect, and that Mr. Bateman was looked upon as a person sitting to manage one division in order to an insurrection, to seize the Tower, city, &c. This being the sum of Mr. Keeling's evidence; Mr. Bateman said, that what he had sworn, did not affect or charge any treason upon him; and was answered by the court that it did not, and bid the jury take notice, that what Mr. Keeling had sworn, was only to the conspiracy in general, and did not affect the prisoner in particular.

Then *Thomas Lee* was sworn, and gave evidence, That he being made acquainted with the design by Mr. Goodenough, &c. and how the city was to be divided into twenty parts and managed; and being asked, who was a fit man to manage one part, he nominated Mr. Bateman, and thereupon was desired to go to him, and speak with him about it as from Mr. Goodenough; and when he came to discourse him about that affair, he apprehended very plainly that he was no stranger to it, nor hoggled to give his assent, and seemed much desirous to speak with Mr. Goodenough about it: that he likewise went one day to the late duke of Monmouth's house with Mr. Bateman; and Mr. Bateman, after he had some discourse with one of the duke's servants, came to him and told him, the duke was willing to engage in the business, and assured him, that he had divers horses kept in the country, to be in a readiness when matters should come to extremity; and from thence he went with him to the King's-head tavern, and there had discourse to the same effect: and from thence they came to the Devil-tavern within Temple-bar, where Mr. Bateman proposed the seizing the City, Tower, Savoy, White-hall, and the person of the late king, and promised not to be wanting therein. At another time, he met him at the Half-moon tavern in Aldersgate-street, where discoursing about the conditions the conspirators were in, as to the intended insurrection, he said, If he could but see a cloud as big as a man's hand, he would not be wanting to employ his interest and that there were other discourses tending to the insurrection, but were broke off by the coming in of one John Almegeer, before whom Mr. Bateman would not discourse, because he knew not of his coming.

Mr. Lee being asked the design of that meeting, replied, it was upon the account of carrying on the conspiracy, and that Mr. Bateman had told him, that he intended to take a house near the Tower, to place men in, in order to surprise it, and that he had held divers conferences with some sea captains on that affair; and that he had been with them at coffee-houses, &c. at sundry other times; but there, to prevent discovery, they spoke of the design at a great distance.

To this evidence, Mr. Bateman objected, that if he had been conscious of what was laid to his charge, he was fit for Bedlam: saying, 'He wondered if he had heard him speak such words, he had not accused him sooner:' but was answered that Mr. Goodenough was not to

be had till after the rebellion in the west; and that Lee's single testimony in case of high treason, in so high a nature, was not sufficient.

Then Mr. *Richard Goodenough* was called, who being sworn, deposed, that being in company with Mr. Bateman (to the best of his remembrance) at the King's-head tavern in St. Swithin's-alley, near the Royal-exchange, and having some discourse about the intended insurrection, and of Wade and others that had engaged to promote it; Mr. Bateman not only approved of the design, but promised to use his interest in raising men; and not only to be assisting in the division allotted him, but in surprising the City, Savoy, &c. and in driving the guards out of town. To this he objected, that he was not at the King's-head with Goodenough; to which Mr. Goodenough replied, 'He had not sworn positive to the place, though he verily believed that was the place; but however, as to the discourse and words then spoken by Mr. Bateman, he was positive.'

The Evidence being thus full against Mr. Bateman, and liberty granted him to make what defence he could, he desired that sir Robert Adams might be heard, in relation to a false report the said Mr. Lee had raised of sir Robert and others; and sir Robert being in court, gave evidence, that there had been a report abroad, said to be raised by Mr. Lee, that he (viz. Mr. Lee) had beaten three knights, and that Mr. Lee came to him and asked his pardon, acknowledging the thing in itself was altogether false.

To the same purpose sir Simon Lewis was called, but appeared not.

Amos Child being called by Mr. Bateman, to testify his knowledge of Mr. Lee, and being asked what he could say against him, declared, that he knew nothing to the contrary but Mr. Lee was an honest man.

One *Baker* being called by Mr. Bateman, to testify that Mr. Lee would have suborned him against him to his prejudice, some years since, of which he had made an affidavit before sir William Turner, and the said Baker not then appearing in court, he desired sir William Turner to give some account of Baker's examination, which the said sir William had taken; but it being about two years since, sir William declared, He could not charge his memory with any of the particulars contained therein.

Mr. *Tompkins*, sir William Turner's clerk, being called, and asked what he could say concerning any examination of Baker's taken before sir William, that related to Lee; he said, there was an examination taken anno 1683, wherein Mr. Lee was mentioned; but to the best of his remembrance it was returned before the king and council, and he could not give any account of the particulars.

Then Mr. Bateman desired to know upon what statute he was indicted, and was informed by the court, That the treason wherewith he stood charged, was comprehended within the 25th of Edward 3, and the 13th of Car. 2, by

overt-act; and having little more to say in his own defence, after a favourable hearing of all he had materially to offer, and his son having been allowed by the court to assist him, in looking over his notes, and calling his witnesses, by reason he, through sickness, pretended himself incapable: Then the Lord Chief Justice of the King's-bench summed up the evidence at large, and omitted nothing that might be for the advantage of the prisoner, whereby the matter was fairly, fully, and clearly left to the jury; and thereupon Mr. Bateman was taken from the bar. After which the other prisoners being called and tried, and the jury ready to go forth to consider of their verdict, Mr. Bateman's daughter came in and besought the court, that Baker, whom she said she had found out, might be heard against Mr. Lee; but Mr. Lee being gone, and the trial already over, the king's counsel opposed it, unless Mr. Lee could be found (which he could not be at that time); and the court having delivered their opinion that it was not convenient to examine any witness after the jury had received their charge, it being a very ill precedent, and of dangerous consequence; yet some of the jury desiring it, the court, to prevent any objections that might be made, consented, and Baker had leave to speak: Whose evidence was, that being in company with Mr. Lee, some time in the year 1683, and discoursing about divers matters, he bid him go to the sign of the Peacock, and to the Angel and Crown, to a surgeon and a linen-draper, whom he named, the former of which he remembered to be the prisoner, and to insinuate himself into their company, and discourse them; and when he demanded of Mr. Lee to what end he should do it, or about what he should discourse them, he told him it might be about state-affairs, and by that means he would find a way to make him a great man; and when he excused his attempting to intrude into such company as was above him, he being but a shoemaker, Mr. Lee told him he knew that he kept company with such and such men, and why could he not as well do it with those he had mentioned. And of this, he said, his examination was taken before sir William Turner; but this being nothing to the purpose, but was rather looked upon as a design Mr. Lee had to make a dis-

covery of the conspiracy, if he could have procured further evidence to have corroborated his own, and Baker being looked upon as a broken fellow, and that he lodged near the Sessions-house, and yet came not in before, though often called; the consideration of the whole matter was left to the jury, and an officer being sworn to attend them, went out, and after about half an hour's debating that, and what else was before them, gave in their verdict, That Charles Bateman, then at the bar, was guilty of the high treason as laid in the indictment; which verdict was accordingly recorded, and the prisoner re-conveyed to Newgate: And being again brought to Justice-hall, on Friday the 11th of December, in order to receive sentence; and upon holding up his hand, being asked what he could say for himself, why the court should not give judgment against him according to the law; he desired to know whether Mr. Goodenough was fully pardoned, and was told, that as for the out-lawry he was pardoned, and that his pardon hath been allowed and approved of in that court, and in the court of King's-bench, and for any thing else he was not prosecuted. Then he said, his opinion was altogether for monarchy, and that he hoped he should have an advocate with the king; but had nothing more material to offer.

Then Mr. Recorder, after having spoke several things in aggravation of that great crime, whereof, after a fair and favourable trial, he was convicted, advised him not to flatter himself with hopes of life, and thereby delay his repentance necessary for his future happiness, and pronounced the sentence, which was, 'That he should return to the place from whence he came, from thence be drawn to the place of execution, there to be hanged by the neck, and whilst alive be cut down, and his bowels to be taken out and burnt; his head to be severed from his body, and his body divided into four parts, and that his head and quarters be disposed at the pleasure of the king.'

Upon this he prayed a divine might have leave to come to him, as likewise his relations; which being allowed, he departed the court, and was on Friday the 18th of December, executed at Tyburn according to the sentence.

REMARKS on the Trial of Mr. CHARLES BATEMAN. By Sir JOHN HAWLES, Solicitor-General in the Reign of King William the Third.

THE last person which concluded the tragedy,* was one Charles Bateman, a surgeon; his demerits were, that he had been, or at least was reputed to have been, surgeon to the earl of Shaftesbury, and one whom his lordship had a kindness for, and therefore, according to the cant of the time, he was called

a factions fellow; and he had revived the memory of his demerits, by attending when Oates came from his whipping, and letting him blood. Whether either of those circumstances were true or not, I know not, but they were believed: and therefore the 9th of December, 1685, he was indicted and tried for high treason. On his trial he seemed to be distracted, and therefore, out of abundance of charity, the

* See the Note at p. 455.

court appointed his son to make his defence for
...m.

The witnesses against him were Keeling, who only spoke of a design in general, without mentioning Bateman to be concerned in it. Thomas Lee and Richard Goodenough swore, at several times and places, his discourse to them severally, of seizing the Tower, City, and Savoy. Baker for the prisoner said, Lee in the year 1683, would have had him insinuated himself in the prisoner's company, and discourse about state-affairs, and by that he would find a way to make Baker a great man: upon the evidence the prisoner was found guilty. Against Goodenough's evidence, there is only this to be said, that he was pardoned, but so far only, as to qualify him to be a witness, though not a very credible one, not only the guilt sticking to him, but even the punishment of what he had then lately done, hanging over his head; and what was said for some time, of all the witnesses for the king, at that time, and for some time before, was true, they hunted like cormorants, with halters about their necks, though even that matter by one of the king's counsel was boasted to the jury, as a circumstance of more credibility; for he assured them there was not a witness which he produced had a pardon, as the witnesses in the Popish Plot had. 'Tis true, in the Popish Plot, upon very good reason the witnesses having confessed what they pretended to know, of matters in which they had an hand, it was not thought proper to use them as witnesses, though they had used them as informers, till they were pardoned, lest it might happen to be, or at least it would have been, suspected, that the terror of the punishment of the crimes confessed might influence them to swear falsely, to the jeopardy of other men's lives, to save their own; which, as the lord Howard truly said, was the drudgery of swearing. But to Lee's evidence, besides the evidence of Baker against him, that he would have procured Baker to have been a witness against the prisoner, and enticed him with the promise of making him a great man; and besides that, it appears in Rouse's trial, that Rouse and he were upon the trepan with each other, to bring each other into the pretence of a plot, in order to make some advantageous discovery of it, of which Lee got the start of Rouse; the objection which was made to his evidence, why Lee had not accused the prisoner sooner, there being near three years between the pretended design, and the discovery of it, was never satisfactorily answered. It was a foolish story, to say Goodenough could not be had before, and a single testimony in high treason was not sufficient; every one knows, that though a single witness is not sufficient to convict a man of high treason, yet a single person's testimony is enough to commit a person accused, and upon conviction on the testimony of a single witness, to make him a prisoner for his life, witness Mr. Hampden and others; besides the subjecting him to other corporal punishments, inflict-

ed at discretion, witness Mr. Johnson and Oates. And in 1683, when the words were pretended to be spoken, Bateman had not been spared, if accused; and though it be a good reason for the court to have given, why they did not proceed against the prisoner till that time, because there were not two witnesses against him; yet it was no reason for Lee, why he did not accuse the prisoner before that time, especially he having been several times before that time examined, not only of what he knew, but of what persons he knew concerned: but, to say truth, Lee, in the trial, did not pretend to answer the objection, but the court, in the manner before, endeavoured to answer it for him.

The last matter observable in this trial, was the permitting Bateman's son to make his father's defence, which was an extraordinary unparalleled favour; it was the first and last time that, or any thing like it, had been done; the lord Russel's lady, indeed was permitted to take notes at the trial for her lord, but he only was permitted to make use of them. Fitzharris's wife, when she but whispered her husband, or but told him what jurors he should challenge, and what not, was severely corrected, and threatened to be thrust out of court, for doing it in prejudice of the king. In Colledge's trial, he was told, that persons that advised a prisoner in treason, even before a trial, were guilty of a high misdemeanour; nay, a solicitor had been indicted of high treason for it: and therefore nothing can excuse the allowing the prisoner counsel in matter of fact, as was done in this case (it is not material, whether the son was a barrister at law or not) but the weakness of the prisoner, who to all appearance was moped mad.

But the court, by excusing their favour upon that account, incurred a worse censure; for nothing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it; and if he falls mad after judgment he shall not be executed: [3 Coke, Instit. p. 4. 4 Co. Rep. 124. b. Hale's H. P. C. Vol. 1. p. 35.] though I do not think the reason given for the law in that point will maintain it, which is, that the end of punishment is the striking a terror into others, but the execution of a madman hath not that effect; which is not true, for the terror to the living is equal, whether the person be mad or in his senses: and that is the reason of breaking the person executed for treason, and exposing his quarters, which is done rather to deter the living, than for punishing the dead. But the true reason of the law I think to be this, a person of 'non sana memoria,' and a lunatick during his lunacy, is by an act of God (for so it is called, though, the means may be human, be it violent, as hard imprisonment, terror of death, or natural, as sickness) disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence; and

that is the reason many civil actions die with the persons against whom they lay in their life-times; and that is the reason why in criminal matters, persons by ordinary course of law cannot be convicted after their deaths.

For in all civil actions there is as much reason for the person injured, to have satisfaction out of the estate of the person who injured him, in the hands of his heir or executor after his death as there was to have it out of the estate of the injurer, in his own hands in his life-time: and there is as much reason that the heir or executor of a person who hath committed a crime, which by law would have forfeited his estate if in his life-time he had been attainted of the same, should forfeit the estates they claim from him, as if he had been attainted in his life-time, which had prevented the said estates vesting in them. And it hath been sometimes practised, where the crimes of the persons deceased have been notorious, and without any doubt; as was the case of several persons mentioned in the act of pains and penalties: which act had example from many other acts of parliament in other reigns, where the persons were dead before punishment overtook them.

And though of late years it hath been pretended, that the king's safety depends upon the speedy trial and execution of a person guilty of high-treason; yet this was never thought so heretofore, nor in truth in itself is so: for it is plain, in reason as well as experience, that what is said of witches, is true of all malefactors, when once they are in custody, their power of doing mischief ceases.

The king is therefore no otherwise benefited by the destruction of his subjects, than that the example deters others from committing the like crimes; and there being so many to be made examples of, besides those on whom the misfortunes of madness fall, it is inconsistent with humanity to make examples of them; it is inconsistent with religion, as being against christian charity to send a great offender quick, as it is stiled, into another world, when he is not of a capacity to fit himself for it. But whatever the reason of the law is, it is plain the law is so; and for remedying it in high-treason, was the 33d of Henry the eighth made [cap. 20.] whereby it is enacted, That if a man fall mad after he hath committed high-treason, he shall notwithstanding be tryed in his absence; and if a man fall mad after he is attainted of high-treason, he shall notwithstanding be executed. Which statute extending only to high-treason, the law continued, and yet it is as it was at common law in all other capital matters; and even that statute [3 Cok. Instit. p. 6.] was called a cruel and inhumane law, and therefore lived not long, for it was afterwards repealed, [1 and 2 Phil. and Mar. cap 10.] so that the law, to this matter, when this man was tried and executed, was as it was at common law; and therefore if he was of 'non sanæ memoriæ,' he ought not to have been tried, much less executed.

I know it will be objected, that if this matter

of *non sanæ memoriæ* should be permitted to put off a trial or stay execution, all malefactors will pretend to be so: But I say there is a great difference between pretences and realities, and *sana* and *non sana memoriæ* hath been often tryed in [1 And. 107.] capital matters, and the prisoners have reaped so little benefit by their pretences, it being always discovered, that we rarely hear of it. In this case the prisoner might have been tried as well absent as present, according to that repealed statute, for any advantage he did or could reap by being present: and it seems very probable the court thought him distempered, for if he was of sane memory, his son ought not to have been permitted to make his father's defence; if he was distempered, he ought not to have been tried, much less executed. And this person being the last man, as far as I can remember, or can find by the printed trials, who suffered for the plot of high treason first set on foot by Fitzharris, and carried on against Colledge, and the other persons herein mentioned: and the design stopping here, I think fit to end my remarks on the proceedings of all capital matters with him. But I think it is fit for me to make some apology for the thing, and for myself, for taking on me to censure the opinions and actions of persons whose characters carried authority with them. I confess I never thought that either the great seal or a garment added to a man's sense, learning, or honesty; but he remained just such, as to those qualities, after his preferment, as he was before: and as to many of the persons reflected on in these remarks, the censure of colonel Sidney was true: and for the best of them, it is plain they not only varied from one another in their opinions, but even from themselves in the judgment of the same case, but always tending to the destruction of the person tried for his life; witness the opinion of the court in the challenge of jurors not having a freehold, and the designing to levy war, not treason within the statute of Edw. III. and forty other matters. And that not only gives a liberty to enquire, but naturally puts one upon the enquiry, which of the two opinions is right? Though it is impossible for one not to think meanly of the person, who, in so great a concern as a man's life, should be so rash as to give his opinion without consideration, or so unsteadily as to give different opinions in the same case: for if a man who tells history backward and forward, is justly suspected in point of truth, the knowledge and sincerity of a man, who gives different opinions in the same case, is justly suspected in point of law; which together with the fulsome, but injurious stuff vented for crown law, was the first matter which put me on considering and writing what I have done.

As for myself, if Tully thought it a reproach to his son if he did not abound with philosophy, having heard Cratippus for the space of a whole year, and that at Athens; surely one who hath had his education at one of the three

great schools for some years, and afterwards at the university, and lastly, twenty five years constant residence in an Inn of Court, and twenty years attendance at Westminster-hall, and not diverted by the usual employes of a

solicitor or attorney, may be allowed without the imputation of confidence to give his censure, upon consideration, on the extempore judgments or opinions of persons, though of greater standing and character than himself.

335. The Trial of JOHN HAMPDEN, esq. at the Old Bailey, for High Treason: 1 JAMES II. A. D. 1685.

December 30, 1685.

THIS day being appointed for the trial of Mr. Hampden, after the judges came to the court, and the court was called, the officer was commanded to proceed to call over the jury whilst Mr. Hampden was bringing down.

Cryer. O-Yes, you good men of the county of Middlesex, summoned to appear here this day, to try the issue which shall be between our sovereign lord the king, and the prisoner that shall be called to the bar, answer to your names as they shall be called, every one at the first call, upon pain and peril that shall fall thereon.

Clerk. Sir Hugh Middleton of Twittenham, bart.; Sir Richard Duntton of Thistleworth, sir John Berry of Stepney, sir Robert Clark, of Holborn, sir Thomas Roe of the Strand, sir John Friend of Hackney, sir Henry Johnson of Blackwall, knights; Richard Morley of Chelsea, John Shales of the parish of St. Martin's in the Fields, Robert Fosset of Marybone, Josias Clark of Chiswick, John Forster of Kensington, Jeffery Nightingale of Cripple-gate, William Cleave of the same, Charles Hinton of Covent Garden, John Stokes of Hatton Garden, Henry Hawly of Brentford, Thomas Cash of Bow, Andrew Lawrence of the parish of St. Martin's in the Fields, Nehemiah Arnold of Westminster, Simon Smith of the same, William Presgrave of the same, Nicholas Barter of the parish of St. Martin's in the Fields, Humphry Bradshaw of the Savoy, Gilbert Herring of the parish of St. Martin's in the Fields, Walter Bradall of the same, Thomas Elton of Stepney, Matthew Bateman of Whitechapel, Thomas Curtis of the parish of St. Clement Danes, Peter Lugg of the parish of St. Giles in the Fields, esquires; John Meridale of St. Giles in the Fields, James Supple of the parish of St. Martin's in the Fields, Thomas Whitfield of the same, Richard Cook of the same, George Clisby of the same, gentlemen; John Hains of the same; John Leeson of the same; Richard Bromfield of Holborn, Michael Dod of Clerkenwell, James Fern of the parish of St. Martin's in the Fields, Robert Brook of the same, John Viguers of Westminster, Edmund Aubrey of the parish of St. Martin's in the Fields, John Cannon of the parish of St. Giles in the Fields, gentlemen; John Baily of the same; Thomas Barnes of the same; Francis Edmunds of the same;

Robert Longland of the same; Edward Hamstead of the same; Thomas Hinton of the same, Joseph Blisset of Whitechapel, gentlemen; Zechariah Grant of the same; Richard Fitzgerald of the parish of St. Martin's in the Fields; Benjamin Boltby of St. Giles in the Fields; Richard Dorrel of the Savoy, gent.; Anthony Hall of the same; Stephen Phillips of the parish of St. Martin's in the Fields; William Stephens of the same; John Davis of the same; Richard Hutchinson of the same; Anthony Nurse of Fulham, Robert Moon of the parish of St. Clement Danes, Samuel Peacock of Westminster, gentlemen; Richard Boise of the same; Samuel Birch of the same; Peter Recve of the same; Thomas Hutchins of the same, John Hewlet of Westminster, John Towers of Covent Garden, Richard Aubrey of Whitechapel, John Wells of Marybone, William German of St. Clement Danes, Thomas Harris of Holborn, Bar. Parr of East Smithfield, John Cassels of the parish of St. Martin's in the Fields, Samuel Bishop of St. Clement's Danes, William Wheatly of the parish of St. Giles in the Fields, gentlemen; Christopher Chambers of the same; Samuel Brown of the same; Benjamin Dun of the Savoy; Samuel Jewel of the same; Hugh Hammersley of the same; Abraham Harrison of the Strand, Thomas Nichols of Pancras, William Dean of the parish of St. Martin's in the Fields, gentlemen; Thomas Parnel of the same; Matthias Couper of the same, William Marquant of the same, Richard Campion, of the same, Simon Smith of Wood-street, Westminster, Thomas Green of Westminster, gentlemen.

Clerk. Set John Hampden to the bar.

[Which was done.

John Hampden, hold up thy hand. [Which he did.]

Middlesex. The Jurors for our sovereign lord the king, upon their oaths present, that John Hampden, late of the parish of St. Giles in the fields, in the county of Middlesex, gent. as a false traitor against the most illustrious and excellent prince, our lord Charles the Second, late king of England, Scotland, France, and Ireland, defender of the Faith, thy natural Lord, the fear of God in thy heart not having, nor the duty of thy allegiance any ways weighing; but being moved and seduced by the instigation of the devil, the cordial love,

and true, due, and natural obedience, which a true and faithful subject of our said late lord the king, towards him our said late lord the king, of right ought to bear, wholly withdrawing; and imagining, practising, and with thy whole strength intending the peace and common tranquillity of this kingdom of England to disquiet, molest, and disturb, and war and rebellion against our said late lord the king, within this his kingdom of England, to stir up, move, and procure; and the government of our said late lord the king, of this his kingdom of England to subvert, change, and alter; and our said late lord the king, of the title, honour, and royal name, of the imperial crown of this his kingdom of England to depose and deprive: And him our said late lord the king, to death, and final destruction to bring and put; the 20th day of July, in the year of the reign of our said late lord the king, Charles the Second, of England, &c. the 35th, and divers other days and times, as well before as after, at the parish of St. Giles in the fields, in the county of Middlesex, falsely, maliciously, devilishly, and traitorously, with divers other false rebels and traitors unknown didst conspire, compass, imagine, and intend our said late lord the king, then thy supreme and natural lord, not only of his royal state, title, power, and government of this his kingdom of England, to deprive and cast down, but also our said late lord the king to kill, and to death to bring and put, and the ancient government of this kingdom of England to change, alter, and wholly to subvert; and a miserable slaughter amongst the subjects of our late lord the king, through his whole kingdom of England, to cause and procure, and insurrection and rebellion against our said late lord the king, within his kingdom of England to procure: And these thy wicked, abominable, and devilish treasons and traitorous conspiracies, compassings, imaginations, and purposes aforesaid, to fulfil, perfect, and bring to pass, thou the said John Hampden, as a false traitor, then and there, (to wit) the said 20th day of July, in the year of the reign of our said late lord the king, 35th aforesaid, and divers other days and times, as well before as after, at the parish of St. Giles in the fields, aforesaid, in the said county of Middlesex, falsely, unlawfully, wickedly, devilishly, and traitorously, with James late duke of Monmouth, and divers other false traitors unknown, did assemble yourself, meet together, and consult, and consent to move and procure divers great sums of money, and a great number of men armed, and war and rebellion against our said late lord the king, within this kingdom of England, traitorously to levy and make, against the duty of thy allegiance, and against the peace of our said late lord the king, and against our lord the king that now is, their crown and dignity, and against the form of the statutes in that case made and provided, &c.

Mr. Hampden. My lord, I perceive that I am here indicted for a fact, for which I was

indicted above two years ago, and I was convicted of it*, and did suffer imprisonment, in execution, upon the judgment that was given against me, and am still under execution for the fine that was set upon me by way of punishment for that fact. I think, my lord, I have as much to say in point of law for myself, as any prisoner that ever came before your lordship upon such an account, twice tried, twice convicted, and twice punished for the same fact, must be very extraordinary; but, my lord, I do pass by all pleas whatsoever, and cast myself wholly upon the king's mercy; that is my resolution, my lord.

L. C. J. (Sir George Jefferies) Then you must plead Guilty, or Not Guilty. But you say you have been tried twice for the same fact; Were you ever tried for high-treason before? The very punishment that you alledge to be inflicted upon you for it, is a plain proof that you were not tried for high-treason, for that is not usually punished by fine and imprisonment.

Hampden. My lord, I only insinuate that the fact is the same.

L. C. J. You must plead Guilty or Not Guilty.

Clerk. Are you Guilty or Not Guilty of the high-treason, whereof you stand indicted, John Hampden?

L. C. J. You must plead directly; say you are Guilty, or you are Not Guilty.

Hampden. My lord, I do plead Guilty to the Indictment. Will your lordship be pleased to hear me? My lord, I do confess my offence against the king is very great. I am very sorrowful for it. My lord, I know the king is the fountain of mercy as well as justice, an inexhaustible fountain of mercy; and if I may be so happy to obtain your lordship's intercession to his majesty on my behalf, I doubt not but that grace and goodness which hath been extended to others, may be bestowed upon me.

L. C. J. Mr. Hampden, as the king is the fountain of mercy, so it comes freely from him; I confess, as the circumstances of your case are, you have pleaded the best plea to find mercy; but how far the pleading guilty, when there is full evidence to prove you so, may move the king to have mercy upon you, I do not know; you must apply yourself to the king.

Hampden. I humbly beg your lordship's intercession I know none can do it better than your lordship.

L. C. J. You must record the plea.

Hampden. My lord, I humbly beg your lordship, that you would be pleased to represent to his majesty what my past sufferings have been, and how sorrowful I am for having offended his majesty, and that your lordship would be pleased to beg his majesty's gracious pardon in my behalf; I humbly beseech your lordship to do it, and it shall be the endeavour

* See the Report of the Trial, vol. 9, p. 1059.

of all my life to behave myself as dutiful and loyal a subject as any the king hath.

L. C. J. The king shall have an account of what you say.

Hampden. My lord, there is one thing I would humbly beg the liberty for; there are words in the indictment concerning the death of the king: my lord, what construction the law may put upon such an action, I am ignorant of; but for any direct intencion of taking away the life of the king, no man does abominate and abhor more than I have done.

L. C. J. Mr. Hampden, it is but a necessary construction that the law puts upon it, it is a construction confirmed by woful experience. We see that rebellion, let the beginning be what it will, never stops, unless by God's great mercy and the justice of the king's cause, but it will end in the death of the king, it hath a natural tendency that way: but however you are understood that you had not any thoughts of killing the king, but only to raise rebellion within the kingdom, which must necessarily end in the death of the king.

Hampden. My lord, no man doth abhor that more than I do.

L. C. J. You may ask Mr. Hampden if he hath any thing to say why sentence of death should not pass upon him.

Clerk. John Hampden, hold up thy hand. Thou standest convicted of high treason by your own confession, what can you say for yourself why sentence should not pass upon you?

Hampden. My lord, I humbly cast myself upon the king's mercy. My lord, I would humbly move your lordship in one thing, that I may have the liberty of my friends and relations to come to me in prison as they did before.

L. C. J. You must apply yourself to the king.

Hampden. Will your lordship be pleased to order it, my lord? I had two or three of my own relations the king was pleased to grant to come to me.

L. C. J. It is easy for you, Mr. Hampden, to make your application to the king, it will be better for you: I direct it as the better way to apply yourself to the king.

Hampden. I only beg it, my lord.

L. C. J. In the presence of a keeper I do not know why his relations should not come to him; but I think it had been better to apply yourself to the king.

Hampden. My lord, I have two or three near relations allowed to be without the presence of a keeper.

L. C. J. Mr. Hampden, that we cannot do, that was an extraordinary favour, and as that came from the king, so you must apply yourself to the king again; but in the presence of a keeper we grant it; we cannot grant it without a keeper, if you will apply yourself to the king for that, you may.

Cryer. Gentlemen of Middlesex, that have been summoned upon the king's service this day, the court discharges you.

Then after the Judges did withdraw, the clerk was commanded to proceed.

Clerk. John Hampden, hold up thy hand. You stand convicted of high treason by your own confession, what can you say for yourself, why the court should not pronounce sentence upon you?

Hampden. I only plead the king's mercy. I rely upon no other thing.

Cryer. O Yes, all manner of persons are commanded to keep silence whilst judgment is giving, upon pain of imprisonment.

Mr. Recorder. (Sir Thomas Jenner.) Mr. Hampden, you have been indicted for High Treason, and the Indictment hath been read to you, and whereupon, according as the law doth require, it hath been demanded of you, that you should plead to it, and thereupon you have pleaded Guilty to this indictment, which is recorded accordingly; and therefore I need not say any thing for to let you know the heinousness of this crime, for I perceive you are sensible enough of it yourself, and I do verily believe you have taken a very wise and discreet course to confess the truth, for you were brought hither to be tried for this crime, in case you had pleaded Not Guilty to this indictment, which now you have prevented by this your candid confession. However, it is the duty of my place to pronounce the judgment that the law hath provided for such crimes as these are, and that is this;

“ You must be had to the place from whence you came, and from thence you must be drawn to the place of execution, and there you are to be hanged by the neck, and whilst you are alive you must be cut down, and your entrails be taken out, and burnt before you; and your head must be cut off, and your body quartered, and your head and your quarters to be disposed of at the king's pleasure, and the Lord have mercy upon your soul.”

Hampden. My lord, I hope I shall have your lordship's intercession with his majesty.

Mr. Recorder. I do not doubt, Mr. Hampden, but you have used the best means to obtain so great a favour; and as it is the duty of my place to give an account of this to his majesty, so I shall truly and faithfully represent it with the advantages your demeanour this day hath deserved.

Hampden. My lord, I humbly beg the favour that my wife may come to me without the presence of a keeper.

Mr. Recorder. Mr. Hampden, it is too late for us to give any directions in this matter, because you asked this while the judges were here; but I do not doubt upon your application to his majesty, but you will have all things that you can reasonably desire, if you please to apply yourself to him for this, and what else you shall be advised may be fitting and convenient for you to beg.

His sbject submission did indeed procure him a pardon; but the shame of such a mean be-

haviour so sunk and disordered his spirits, that he was never quite right after it, and about ten years after he cut his own throat.*

The Indictment in Latin ran thus:

REX v. HAMPDEN, for HIGH-TREASON. 1 Jac' II. O. B.

Midd' ss. Dominus Rex mandavit Justic' suis ad inquirend' per sacram' probor' ac legal' homin' de Com' Midd', ac aliis viis, modis et mediis, quibus melius sciverint aut poterint, de quibuscunq; proditiōibus, misprisionibus, prodition', insurrectionibus, rebellionibus, contrafactur', tonsur', lotur', falsis fabricationibus et al' falsitat' monet' hujus regni Angliæ, et al' regnor', sive dominior' quorumcunq; ac de al' offens' et injur' quibuscunq; ac Justic' suis ad gaolam suam de Newgate de prisonar' in eadem existen', deliberand' assign', necnon custod' pacis suæ, ac Justic' suis ad divers' felon', transgr', et al' malefacta in eodem Com' perpetrat', audiend', et terminand' assign', et eorum cuilibet breve suum clausum, in hæc verba: Jacobus secundus, dei gratia, &c. Justic' nostris ad inquirend' per sacrament' proborum et legalium homin' de Com' Midd', ac aliis viis, modis et mediis, quibus melius sciverint aut poterint, de quibuscunq; proditiōibus, misprisionibus, prodition', insurrectionibus, rebellionibus, contrafactur', tonsur', lotur', falsis fabricationibus, et al' falsitat' monet' hujus regni Angliæ, et al' regnor' sive dominior' quorumcunq; ac de al' offens' et injur' quibuscunq; ac Justic' nostris ad gaolam nostram de Newgate, de prisonar' in eadem existen' deliberand' assign', necnon custod' pacis nostræ, ac Justic' nostris ad divers' felon', transgr', et al' malefacta in eodem Com' perpetrat', audiend', et terminand' assign', et eorum cuilibet, salutem.

* Burnet, vol. 1, p. 646, tells us, that he knew legal evidence would be brought against him, and so submitted to plead Guilty. The legal evidence was, it seems, the testimony of lord Howard confirmed by that of lord Grey, (see Ralph, 913) who had secured his life by payment of money and betraying of his associates. See more of Grey in this Collection, vol. 9, pp. 127, 361, 596, and in the case of the duke of Monmouth and Buccleugh, *infra*. Concerning Hampden, see also vol. 9, p. 934, 954, et seq.

" 1686. January. The Warrant for Mr. Hampden's execution was said to be signed, to be on the 8th instant, but he is reprieved, which many think will end in a pardon.

" 18th June. The attainder of Mr. Hampden was reversed for Error in the court of King's Bench, his majesty having allowed him the favour of a Writ of Error for that purpose." Narcissus Luttrell's MS. Brief Historical Relation, &c. in All Souls Library. He was grandson to the Hampden who resisted the levy of ship money. See vol. 3, p. 825. At the period of the Revolution he was a very active member of the Convention Parliament.

Volen' certis de causis record' conviction' Johannis Hampden, Gen', pro quibusdam aliis proditiōibus unde coram nobis indictat' est, et superinde convict' extitit, ut dicitur, coram nobis per vos mitti, vobis et cuilibet vestrum mandamus, quod record' præd', cum omnibus illud tangend', adeo plene et integre prout coram vobis jam residet, quocunq; nomine idem Johannes nuncupetur in eodem, coram nobis sub sigill' vestris, aut unius vestrum, a die Paschæ in quindecim dies ubicunq; tunc fuerimus in Angl' mittat', seu unus vestrum mittas, una cum hoc brevi, ut ult' inde fieri fac', quod de jure ac secundum legem et consuetud' regni nostri Angliæ fore viderimus faciend', T. E. Herbert, Mil', &c. Per Cur' Astræ.

Quod quidem breve et record' in eodem brevi mentionat', retornat', et certificat' fuit, prout acquitur: ss. Virtute istius brevis nihi et al' directis, record' conviction' infra nominat' Johan' Hampden, Gen', unde in isto brevi sit mentio, cum omnibus ea tangen', coram Dom' Rege huic brevi annex', mitto prout interius præcipitur: Respons' Roberti Jeffereys, Mil', Major' civit' London', ac un' Justic' infra script'. Midd' ss. Memorand' quod ad Session' Oyer et Terminer Dom' Regis, tent' pro Com' Midd' apud Hicks's Hall, in St. John's-Street, in Com' præd', die Lunæ, scil', 7. die Septemb', anno regni Dom' nostri Jacobi secundi, Dei gratia, &c. primo, coram W. Smith, Bar', J. Berry, Mil', et al' sociis suis, Justic' dicti Dom' Regis, per literas paten' ipsius Dom' Regis eisdem Justic' prænominat', ac quibuscunq; quatuor vel pluribus eor' sub magno sigillo dicti Dom' Regis Angliæ confect', ad inquirend' per sacrament' probor' et legalium homin' Com' Midd' præd', ac omnibus al' viis, modis et mediis, quibus melius sciverint aut poterint, tam infra libertat' quam extra, per quos rei veritas melius scir' poterit, et inquiri de quibusdam proditiōibus, misprision' proditiōibus, insurrectionibus, rebellionibus, contrafactur', tonsur', lotur', falsis fabricationibus, et al' falsitat' monet' hujus regni Angliæ, et al' regnor' sive dominior' quorumcunq; ac de quibuscunq; murdris, felon', homicid', interfection', burglar', rapibus mulierum, congregationibus et conventiculis illicitis, verbor' prolationibus et coadunationibus, misprisionibus, confederationibus falsis, alleganc', transgr', riot', rout', retentionibus, escapiis, contemptis, oppressionibus, ac de al' articulis et offens' in eisdem literis paten' dicti Dom' Regis specificat', necnon accessar' eorumdem, infra Com' præd', tam infra libertat' quam extra, per quoscunq; et qualitercunq; habit', fact', perpetrat', sive commiss', ac de al' articulis et circumstantiis præmiss' et eor' aliquo vel alit' qualitercunq; concernen' plenius veritat', et ad easdem proditiōes et al' præmiss' audiend' et terminand', secund' legem et consuetud' hujus regni Angliæ, assign', per sacrament' W. Wood, Ar' et 14 al' probor' et legalium homin' Com' præd', adtunc et ibidem jurat' et onerat' ad inquirend' pro dicto Domino Rege et corpore Com' præd', presentat' existit, modo et forma sequen', scil', Midd' ss. Jur'

pro Domino Rege super sacrament' suum presentant, quod Johannes Hampden, nuper de paroch' sancti Egidii in campis in Com' Midd', Gen', ut falsus proditor' contra illustrissimum et excellentissimum principem Dom' Carolum secundum, nuper Regem Angliæ, Sc. naturalem Dominum suum, timorem Dei in corde suo non habens, nec debet' ligeanc' suæ ponderans, sed instigatione diabolica mot' et seduct', cordialem dilection', et veram, debitam et naturalem obedienc' quas verus et fidel' subdit' dicti nuper Dom' Regis erga ipsum nuper Dom' Regem gereret, et de jure gerere tenebatur, penitus subrahens, et machinans, practicans, et totis virib' suis intendens pacem et communem tranquillitat' hujus regni Angliæ inquietare, molestare, et perturbare, et guerram et rebellion' contra dictum nuper Dom' Regem infra hoc regnum Angliæ suscitare, movere, et procurare, et gubernation' dicti nuper Dom' Regis hujus regni sui Angliæ subvertere, mutare, et alterare, et dictum nuper Dom' Regem a titulo, honore, et regali nomine, et corona imperiali regni sui Angliæ deponere et deprivare, et dictum nuper Dom' Regem ad mortem et final' destruction' adducere et ponere, 20 die Julii, anno regni dicti Dom' Caroli secundi, nuper Regis Angliæ, 35 et divers' al' diebus et vicibus, tam antea quam postea, apud paroch' sancti Egidii in campis in Com' Midd', falso, maliciose, diabolice, et proditorice, cum divers' al' falsis rebelibus et proditoribus jur' præd' ignot', conspiravit, compassavit, imaginat' fuit, et intendebat dictum nuper Dominum Regem, tunc supremum et naturalem Dom' suum, non solum de regali statu, titulo, potestat', et regimine regni sui Angliæ deprivare, et dejicere, verum etiam eundem nuper Dom' Regem interficere, et ad mortem adducere et ponere, et antiquam gubernation' hujus regni Angliæ mutare, alterare, et penitus subvertere, et stragem miserabil' inter subdit' dicti nuper Dom' Regis per totum regnum suum Angliæ causare et procurare, et insurrection et rebellion' contra dictum nuper Dom' Regem infra hoc regn' Angliæ procurare et auxiliari; et ad easdem nequissimas, nefandissimas, et diabolicas proditiou' et proditor' compassation', imagination', et proposita sua predict' perimplend', perficiend', et ad effectum redigend', idem Johannis Hampden, ut falsus proditor tunc et ibidem, scil', dicto 20 die Julii, anno regni dicti nuper Dom' Regis 35 supra dict', et divers' al' diebus et vicibus, tam antea quam postea, apud parochiam sancti Egidii in campis præd' in dicto com' Midd', falso, illicite, nequissime, diabolice, et proditorice, cum Jacobo nuper duce Monmouth, et divers' al' falsis proditor' jur' præd' ignot', se assemblebat, congregabat, consultabat, et consentiebat ad suscitand' et procurand' divers' magn' denar' summi et ingent' numerum homin' armat', ad guerram et rebellion' contra dictum nuper Dominum Regem infra hoc regn' proditorice levand' et faciend', contra debet' ligeanc' suæ, et contra pacem dicti Dom' Regis nunc, coron' et dignitat' suas necnon contra formam

statuti in Anjusrandi casu edit' et provis', &c. Per quod præcept' est Vic' com' Midd', quod non omitteret, &c. quin caperet eum ad respondend', &c. Ac quod ad deliberation' goal' dicti Dom' Regis de Newgate tent' pro com' Midd' præd' apud Justice-hall in le Oke Bailly in suburbiis civitat' London', die Mercur', scil', 9 die Decembr', anno regni dicti Dom' Regis Jacobi secundi nunc Regis Angliæ, Sc. primo suprad', coram Roberto Jeffereys Mil', Major' civit' London', Edwardo Herbert, Mi' Capit' Justice' dicti Dom' Regis, ad placitis eorum ipso Rege tenent' assign', et al' sociis suis Justice' dicti Dom' Regis ad gaolam suam de Newgate de prisonar' in eadem existent' deliberand' assign', ista gaolæ deliberatio adjornat' fuit per præfat' Justice' dicti Dom' Regis, ult' nominat' hic usque diem crastin', diem Jovis, scil', 10 diem ejusdem mensis Decembr', anno primo suprad', ad horam septimam ante meridiem ejusdem diei, apud Justice-hall præd' tenend' coram præfat' Justice' dicti Dom' Regis ult' nominat', ad faciend' ulterius prout cur' ibidem consideraret, &c. Et super eundem diem Jovis 10 diem ejusdem mensis Decembr', anno primo suprad', ista gaol' deliberatio tent' fuit per adjorn' præd' pro com' præd', apud Justice Hall præd', coram præfat' Justice' dicti Dom' Regis ult' nominat', ac attunc et ibidem præd' gaol' deliberatio dicti Dom' Regis ulterius adjornat' fuit per præfat' Justice' dicti Domini Regis ult' nominat' ibidem usque diem crastin', diem Veneris, scil', 11 diem ejusdem mensis Decembr', anno primo suprad', ad horam septimam ante meridiem ejusdem diei, apud Justice Hall præd' tenend', ad faciend' ulterius prout cur' ibidem consideraret, &c. Ac ad eundem diem Veneris 11 diem ejusdem mensis Decembr', anno primo suprad', deliberatio istius gaolæ tent' fuit per adjorn' præd' pro com' præd', apud Justice Hall præd' coram præfat' Justice' dicti Dom' Regis ult' nominat', ac attunc et ibidem præd' deliberatio goal' dicti Dom' Regis ulterius adjornat' fuit per præfat' Justice' dicti Dom' Regis ult' nominat' hic usque diem Sabbati, scil', 19 diem ejusdem mensis Decembr', anno primo suprad', ad horam septimam ante meridiem ejusdem diei, apud Justice Hall præd' tenend' coram præfat' Justice' dicti Dom' Regis nunc ult' nominat', ad faciend' ulterius prout cur' ibidem consideraret, &c. Ac ad eundem diem Sabbati 19 diem ejusdem mensis Decembr', anno primo suprad', deliberatio istius gaol' tent' fuit per adjorn' præd' pro com' præd' apud Justice Hall præd', coram præfat' Justice' dicti Dom' Regis ult' nominat', ac attunc et ibidem præd' deliberatio gaolæ dicti Dom' Regis ulterius adjornat' fuit per præfat' Justice' dicti Dom' Regis ult' nominat', hic usque diem Mercur', scil', 30 diem ejusdem mensis Decembr', anno primo suprad', ad horam septimam ante meridiem ejusdem diei, apud Justice Hall præd', tenend' coram præfat' Justice', dicti Dom' Regis ult' nominat', ad faciend' ult' prout cur' ibidem consideraret, &c. Ac ad eandem diem Mercur', 30 diem ejusdem

mensis Decembri anno primo suprad', Justico Hall præfat' coram præfat' Justic' dicti Dom' Regis nri nominat', et ad eundem diem Mercur' 30 diem ejusdem mensis Decembri anno suprad', ad dictam deliberation' gaol' dicti Dom' Regis adtunc tent' per adjornament' præd' pro com' præd', apud Justices Hall præd', coram præfat' Justic' dicti Dom' Regis nri nominat', præfat' Justic' dicti Dom' Regis per dietas literas paten' ipsius Dom' Regis, sub magno sigill' Angl', ut præfertur confect', per manus suas propr' delibaver' indictament' præd' hic in cur' de record', in forma juris terminand', &c. Ac superinde ad istam eandem deliberat' gaol' dicti Dom' Regis de Newgate tent' per adjorn' præd', pro com' præd', apud Justices Hall præd', præd' die Mercur' 30 die ejusdem mensis Decembri anno primo suprad', coram præfat' Justic' dicti Dom' Regis, ad præd' gaolam ipsius Dom' Regis de Newgate præd', de prisonar' in eadem existim' deliberand' assign', ven' præd' Johannes Hampden sub custod' Benjamin Thorowgood, et T. Linsey, Mil' Vic' Com' Mid' præd' in ejuis custod' ex causa præd' præntea commiss' fait, ad harr' hic duct' in propr' personis sua, qui committitur præfat' Vic', &c. Et statim de præmiss' in indictament' præd' specificat' et superius imposit', allocut' qualit' se velis inde acquietari, idem Johannes Hampden dic quod ipse non potest dedicere, quia ipse est culpabil' de alta prodicione præd' indictament' præd' spec' ei superius imposit' modo et forma præd' per indictament' præd' superius versus eum supponitur, et alta prodicione præd' in indictament' præd' expresse cognovit: Et statim quæsit' est de præfat' Johanne Hampden, si quid pro se habeat, vel dicere sciat, quare cur' hic ad judic' et execution' de eo super conviction' suam præd' et cognition' suam propr' alta prodicionis præd' indictament' præd' superius spec' procedere non debeat, qui nihil ulterius dic' præterquam nē prius dixerat, super quo vis', et per cur' hic intellectis omnibus et singulis præmiss' cons' est per cur' hic, quod præd' Johannes Hampden ducatur ad gaol' dicti Dom' Regis de Newgate unde ven' et ibidem super trabam ponatur, et ubinde ad locum execution' trahatur, et ibidem per collum suum suspendatur, et vivens ad terr' prosternatur, et quod secreta membra sua amputentur, et interiora extra ventrem suum capiantur, et in iguem ponantur, et ibidem comburentur, et quod caput ejus amputetur, quodque corpus ejus in quatuor partes dividatur, et quod caput et quarteria sua ponantur ubi Dominus Rex ea assign' voluerit: Et modo, scil' die Mercur' prox' post quinden' Paschæ isto eodem termino, coram Dom' Rege apud Westm' ven' præd' Johannes Hampden, juxta firmam recognition' per ipsum et pleg' suos in hac parte prius cognit' in propr' persona sua, qui committitur Mar', &c. et adtunc et ibidem per cur' dicti Dom' Regis hic quæsit' est de eodem Johanne Hampden, si quid pro se habeat' vel dicere sciat, quare cur' hic ad execution' super judic' præd' in forma præd'

reddit' procedere non debeat, qui statim die' quod dictus Dominus Rex nunc, ex gra' sua speciali, ac ex certa scienc' et mere motu suo, per suas literas paten' sub magno sigillo suo Anglie, geren' dat' apud Westm' 19 die Febr', anno regni dicti Dom' Regis nunc secundo, pardonavit, remisit, relaxavit ac per præsentos pro se, heredibus, et successoribus suis, pardonavit, remisit et relaxavit Johanni Hampden nuper de paroch' sancti Egidii campis in eod' Mid', Gen' seu quocunque al' nomine vel cognitione, seu addition' nominis vel cognitionis aut loci idem J. sciatur, censetur, vocetur, sive nuncupetur, aut nuper sciebatur, censebatur, vocabatur, sive nuncupabatur, omni et omnimod' prodicionem, misprision' prodicion', transgr', malefacta, crimina, et offens' quæcumque, per se solum, sive eum aliquis al' person' vel aliquibus al' person' contra dictum Dom' Regem, vel præcharissimam fratrem suum, Carolum secund' nuper Regem Anglie, &c. defunct' ante 25 diem Januar' nri, quædoeunque, qualitercumque, seu ubicumque fact', commissa, sive perpetrata, licet idem J. H. de præmiss', vel aliquo præmiss' indictat', arrestat', appellat', reetat' impetit', attingit', convict', condemnat', utlagat', sive adjudicat' existit, vel non existit, aut inde indictari, arrestari, appellari, reetari, impetiri, attingi, convinci, utlagari, condemnari, sive adjudicari, contigerit in futuro, ac omnia et singula indictament', judic'ia, condemnationes attingetur', executiones, fines, imprisonment', punition', pœnas mortis, pœnas corporales, et omni' al' pœn' et penalitat' quæcumque nuper vel versus præd' Johannem H. de, pro, sive concernen' præmiss' seu eor' aliquo habeat' fact', reddit', sive adjudicat', aut in posterum habend', fiend', reddend', sive adjudicand', necnon omnia et singula utlagari versus dict' J. H. ratione sive occasione præmiss', seu eor' aliquor' vel aliquis eor' promulgat', sive in posterum promulgand', ac omnia et omnimod' sect', querel', fines, forisfactor', impetitiones, seisuras, process', et demand' quæcumque, quæ dictus Dominus Rex versus ipsum ratione præmiss', seu eor' aliquis habuit, habet, seu in futuro habere poterit, aut hered' et successor' ejus ullo modo habere poterint in futuro, sectamque pacis suæ, quæ ad dict' Dom' Regem versus præfat' J. H. pertinent seu pertinere poterit, ratione præmiss', seu eor' aliquor' vel aliquis eor', et firmam pacem suam ei inde dedit et concess' per præsentos: Et idem J. H. profert hic in cur' literas paten' præd' præmiss' testificant', in hæc verba: Jacobus secundus, Dei gra' &c. omnibus ad quos præsentos literæ nostræ pervenerint, salutem. Sciatis quod nos de gra' nostra special', ac ex certa scienc' et mere motu nostro pardonavimus, remisimus, et relaxavimus, ac per præsentos pro nobis, hered', et successor' nostris pardonavimus, remittimus, et relaxamus J. H. de paroch', &c. Gen', seu quocunque al' nomine vel cognitione seu additione nominis, vel cognitione, aut loci idem J. sciatur, censetur, vocetur, sive nuncupetur, aut nuper sciebatur, censebatur, vocabatur, vel nuncupa-

batur, omn' et omnimod' proditio', misprision' proditio', transgr', malefacta, crimina, et offens' quæcunque per se solum, sive cum aliqua al' persona, vel aliquibus al' personis contra nos vel præcharissimum fratrem nostrum Carolum secund' nuper Regem Angliæ, &c. defunct', autè 25 diem' Januar' jam ult' claps', quoadcunque, qualitercunque seu ubicunque fact', commiss', sive perpetrat', licet idem J. H. de præmiss' vel aliquo præmiss' indictat', arrestat', appellat', rectat', impetit', attingit', convict', condemnat', utlagat', sive adjudicat' existit, vel non existit, aut iude indictari, arrestari, appellari, rectari, impetiri, attingi, convinci, utlagari, condemnari, sive adjudicari, contigerit in futuro, ac omnia et singula iudicament', judic', condemnationes, attingit', executiones, fines, imprisonment', punitio', pœnas mortis, pœnas corporal', et omnia al' pœnas et pœnalitat' quæcunque super vel versus præd' J. H. de, pro, sive concernen' præmiss' seu cor' aliquo habit', fact', reddit', sive adjudicat', aut in posterum habend', fiend', reddend', sive adjudicand', necnon omnia et singula utlagari versus dict' J. H. ratione sive occasione præmiss' seu cor' aliquor' vel alicujus cor' promulgat' sive in posterum promulgand' ac omn' et omnimod' sect', querel', fines, forisfactur', impetitiones, consuras, process' et demand' quæcunque; quæ nos versus ipsum ratione præmiss', seu cor' alicujus habuimus, habemus seu in futuro sectamq; pacis nostræ, quæ ad nos versus præfat' J. H. pertinet seu pertinere poterit ratione præmiss' seu cor' aliquor', vel alicujus cor' firmam pacem nostram ei inde damus et concedimus per presentes, nolentes quod idem J. H. per vicecom', justiciar', ballivos, aut al' ministros, hæred' seu successor' nostror' occasione præmiss' seu cor' alicujus molestetur, occasionetur, perturbetur, seu in aliquo gravetur, volentes quodq; hæc literæ nostræ paten' (quoad omnia et singula præmiss' superius mentionat') bon', firm', valid' et effectual' in lege sint et erint, licet crim' et offens' præd' minus certe specificat' existit: Quodque hæc parolatio nostra in omnibus curiis nostris et alibi interpretetur et adjudicetur in beneficentissimo sensu pro firmior' relaxatione, pardonatione, et exoneratione præd' J. H. ac etiam placitetur et allocetur in omnibus cur' nostris, absque aliquo brevi de allocatione in ea parte prius obtent' seu obtinend', non obstante aliquo defectu aut aliquibus defectibus in his literis patentibus content', aut aliquo statut', act', ordinatione, seu provisione, proclamatione, sive restriction', aut aliqua al' re, causa, vel materia quacunque; in contrar' inde in aliquo non obstante. In cujus rei testimon' has literas nostras fieri fecimus patentes. T. meipso apud Westm', 19 die Feb' anno regni nostri secundo. Quar' quidem literar' paten' pre-textu idem J. H. pet' quod ipse de præmiss' per cur' hic exoneretur. Super quo vis' et per cur' hic intellectis omnibus et singulis præmiss' cons' est, quod præd' J. H. eat inde siue die, &c. Et postea, scil', die Lunæ prox' post crastin' Ascension' Dom', isto eodem term', coram Dom' rege apud Westm' ven' præd' J. in prope' per-

sona sua, et profert hic in cur' quoddam breve Dom' Regis nunc clausum, Justic' suis hic direct', qui sequitur in hæc verba: Jacobus secundus, &c. Justic' nostris ad placita coram nob' tenend' assign', salutem. Quia in record' et process', ac etiam in redditione judic' cujusdam iudicament' coram Justic' nostris ad gaolam nostram de Newgate de prisonar' in eadem existen' deliberand' assign', versus J. H. de paroch', &c. in com' Midd', Gen', pro aliis proditioibus contra person' Dom' Caroli secundi nup' Regis Angliæ, fratris nostri præcharissimi, uide coram eis nup' attingit' fuit, ut dicitur, error interven' manifest', ad grave dampn' ipsius Johannis, sicut ex querela sua accepimus: Nos error' si quis fuerit, modo debito corrigi, et eidem Johanni plenam et celerem Justic' fieri volentes in hac parte, vobis mandamus, quod si judic' inde reddit' sit, tunc visis et examinat' record' et process' præd', quæ coram nob' certis de causis venire fecimus, et coram vobis jam resident, ut dicitur, ulterius inde pro errore ill' corrigend' fieri faciatis, quod de jure et secundu' legem et consuetud' regni Angl' fuerit faciend'. Test' in eipso apud Westm' 14 die Maii, anno regni nostri secundi'. Et sup' hoc idem J. H. dic', quod in record' et process' præd', necnon in redditione judicii attingitur præd' manifest' est errat' in hoc videlicet, quod ubi per iudicament' præd' mentionatur quod deliberatio gaole in recordo judicii, et attingitur præd' mentionat', ten' fuit pro com' Midd' apud Justice Hall in le Old Baily, in suburbiis civit' London', non apparet per record' præd' quod Justice Hall, nec le Old Baily, sunt in com' Midd', ideo in eo manifest' est errat'. Erratum est etiam in hoc, videlicet, quod iudicamentum præd' mentionatur fore capt' 7 die Decemb' in record' præd' mentionat', coram Justic' de audiend' et terminand' in recordo præd' mentionat', et per eos fore deliberand' Justic' ad gaol' deliberation' in eodem recordo specificat', 30 die Decembr' tunc postea in forma juris terminand', sed non apparet per record' convictionis præd', quod scisso de audiend' et terminand' habuit aliquod adjournament' vel continuation' usque dictum 30 diem' Decembr', ideo in eo manifest' est errat'. Erratum est etiam in hoc, quod verba vi et armis, &c. omituntur in iudicament' præd', ideo in eo manifest' est errat'. Errat' est etiam in hoc, quod constat per record' præd', quod process' et judic' præd' sunt intrat' et recordat' sup' record' Justiciar' de audiend' et terminand', et non super record' Justic' gaol' deliberand', ideo in eo manifest' est errat'. Errat' est etiam in hoc, videlicet, quod non apparet per record' præd', per qualem autoritat' Justic' ad gaol' deliberation' in record' præd' mentionat', process' et judic' præd' reddider' versus ipsum præd' J. H. sup' iudicament' præd', ideo in eo manifest' est errat'. Errat' est etiam in hoc, quod super redditione judic' in record' præd' mentionat' non apparet quis fuit, qui ex parte Dom' Regis pro eodem Dom' Rege pet' judic' sup' conviction' de materiis in iudicament' præd' mentionat', ideo in eo manifest' est errat'. Erratum est

etiam in hoc, quod in record' præd' dicitur, quod ad deliberation' gaol' Dom' Regis de Newgate, tent' pro com' Midd' apud Justice Hall in le Old Bailly in suburbis civit' London' die Mercur', scil', 9 die Decembr' coram Justice' gaol' deliberation' in eodem record' mentionat', quod ista gaol' deliberatio adjorn' fuit per præfat' Justice', ubi dici debuit adjornat' est, et non exprimi via recitationis in tempore præterit', et in alio loco record' mentionat' præd' dicitur, quod ista gaol' deliberatio tent' fuit, ubi debuit exprimi tent' est, et non quod tent' fuit, quia in tensu præterito est mera recitatio tenendi et adjornandi cur' ill' et non positivus actus cur' ill' gaol' deliberation' de determination' indictment' præd', ideo in eo manifest' est errat'. Erratum est etiam in hoc, videl', judic' præd' reddit' est pro Domino Rege, ubi reddi debet pro defend', et in eo manifest' est errat'. Et hoc parat' est verificare. unde pet' judic' et quod judic' et attinetur' præd' ob error' præd', et al' in record' et process' præd' apparen' compert' existen' revocetur, annulletur, et penitus pro nullo habeatur, et quod ipse idem J. H. ad communem et liberam legem hujus regni Angliæ, et ad omnia quæ ipse occasione judicii et attinc-

tar' præd' amisit restituatur, et quod ipse, tam de eadem convictione et atinctur', quam de indictment' præd' per cur' hic dimittatur et exoneretur, et quod cur' hic procedat ad examination' record' et process' præd', &c. et quia necessar' et expediens est, antequam cur' hio in hac parte procedat, quod tenentes terrar' et tenementor', quæ fuer' præd' Johannis 20 die Julii, anno regni dict' Dom' Caroli secundi, nup' Regis Angliæ, &c. 35. quo die alta proditio præd' fieri supponitur, vel unquam postea præsumantur essendi, coram dict' Dom' Rege nunc auditur' record' process' præd', si, &c. ideo precept' est vic' com' Midd' præd', quod per probos et legales homines de balliva sua, Scir' fac' separatim tenent' terrar', et tenementor', quæ fuer' præd' Johannis prædict' 20 die Julii, anno regni dicti Dom' Caroli secundi nuper Regis Angliæ, &c. 35 suprad' vel unquam postea, quod sint coram Dom' Rege in crastino sanct' Trinitat' ubicunque, &c. auditor' record' et process' præd', si, &c. idem dies dat' est præfat' J. Hampden, &c. et super hoc de gratia cur' special' præd' J. H. traditor in ball' H. A. de, &c. Arm' et W. J. de, &c. usque ad præfatum terminum, et sic, &c.

336. Proceedings against RICHARD BAXTER, Clerk, for a seditious Libel, at Guildhall, before Lord Chief Justice Jeffreys: 1 JAMES II. A. D. 1685. [Taken by the Prisoner's Friends. Calamy's Life of Baxter. Tremaine's Pleas of the Crown.]

THE INDICTMENT.

REX versus BAXTER.

Pasch. 1 Jacobi Secundi. Rot. 35.

London, ss. QUOD Richardus Baxter, nuper, de. &c. Clericus existens person' seditiosa et factiosa, pravæ mentis, impie, inquietæ, turbulent' disposition' et conversation', ac machinans, practicans et intendens, quantum in ipso fuit, non solum pacem et communem tranquillitat' dict' Dom' Regis infra hoc regnum Angl' inquietare, molestare et perturbare, ac seditiohem discord' et malevolent' int' ligeos et fideles subdit' dict' Dom' Regis movere p'curare et excitare, verum etiam sinceram, piam, beatam et pacificam Protestau' Religion' infra hoc regn' Angl' usitat', ac Prelat', Episcopos, aliosq' Clericos in Ecclesia Anglicana legibus hujus regni Angl' stabilit', ac Novum Testamentu' Dom' Salvator' nostri Jesu Christi in contempt' et vilipend' inducere et inutile reddere; quodq; p'd' R. B. ad nequissimas, nefandissimas et diabolicas intention' suas præd' perimplend', perficiend' et ad effect' redigend' 14 die Febr', anno regni dict' Dom' Jacobi Secundi, &c. primo, vi et armis, &c. falso, illicite, injuste, nequit', factiose, seditiose, et irreligiöse fecit, composuit, scripsit, impressit et publicavit,

et fieri, componi, scribi, imprimi et publicari causavit, quendam falsum, seditiosum libellosum, factiosum & irreligiösium librum intitulat' 'A Paraphrase on the Testament with Notes doctrinal and practical.' In quo quidem falso, seditioso, libelloso factioso & irreligiösio libro int' al' content' fuer' hæc falsæ, factiosæ, malitiosæ, scandalosæ et seditiosæ sententiæ de eisdem Prelat' Episcopis, aliisq' Clericis Ecclesiæ hujus regn' in his Anglican' verbis sequen', videl't, 'Note, Are not these Preachers and Prelates (Epo's aliosq' Clericos præd' Ecclesiæ hujus regn' Angl' innuend') 'then the least and basest that preach and 'tread down Christian love of all that dissent 'from any of their presumptions, and so 'preach down not the least but the great command?' Et ult' idem idem Attorn' dict' Dom' Regis nunc general' pro eodem Dom' Rege dat' Cur' hic intelligi et informari, quod in al' loco in p'd' falso, scandalosæ, seditiosæ & irreligiösio libro, int' al' content' fuer' hæc al' falsæ libellose, scandalosæ, seditiosæ et irreligiösæ sentent' sequen' de Clericis Ecclesiæ hujus regn', videl't, Note, 'It is folly to doubt whether there be devils, while devils incarnate live 'here amongst us,' (Clericos præd' hujus regni Angl' innuendo) 'What else but devils, 'sure, could make ceremonious hypocrites'

(Clericos pred' innuendo) 'consult with politic royalists' (figos et fidel' subdit' dicti Dom' Regis hujus regni Angl' innuendo) 'to destroy the Son of God for saving men's health and lives by miracle? Quere, whether if this wretched hand had been their own, they would have plotted to kill him, that would have cured them by a miracle, as a Sabbath-breaker? And whether their successors' (Prelat', Episcopos, aliosq; Clericos Ecclesie hujus regni Angl' qui deinceps fuerint innuendo) 'would silence and imprison Godly ministers' (seipsum R. B. et al' factiosas et seditiosas p'son' infra hoc regn' Angl' contra leges hujus regni ac Liturg' Ecclesie infra hoc reg' stabilit' p'dican' innuendo) 'if they could cure them of all their sicknesses, and help them to preferment, and give them money to feed their lusts?' Et ult' item Attorn' dicti Dom' Regis nunc general' pro eodem Dom' rege dat Cur' hic intelligi et informari, quod in al' loco in pred' falso, libelloso, scandaloso et irreligioso libro inter al' content' fuer' hæc al' falsæ, libellose, scandalosæ, seditiosæ et irreligiosæ Anglican' sentent' sequen' de et concernen' Ep'is p'd et Ministris Justitiæ hujus regn' Angl', videl't, Note, 'Men that preach in Christ's name' (seipsum R. B. et al' factiosas et seditiosas p'son' infra hoc regn' Angl' contra leges hujus regn' Angl' et Liturg' Ecclesie hujus regn' per legem stabilit' pred' innuendo,) 'therefore are not to be silenced, though faulty, if they (pred' male dispo'it' factiosas et seditiosas p'son' pred' iterum innuendo,) 'do more good than harm; dreadful then is the case of them' (Episcopos et Ministros Justitiæ infra hoc regn' Angl' innuendo) 'that silence Christ's faithful ministers' (seipsum R. B. et al' seditiosas et factiosas person' pred' innuendo.) Et ult' item Attorn' dicti Dom' Regis nunc general' pro eodem Dom' Rege dat Cur' hic intelligi et informari, quod ad excitand' popul' hujus regn' Angl' in illicit' Conventiculis convenire, et defamand' Justit' hujus regn' impediendo illicit' Conventiculis, in al' loco in pred' falso, scandaloso, seditioso, et irreligioso libro, int' al' content' fuer' hæc al' falsæ, scandalosæ, libellose, seditiosæ, et irreligiosæ Anglican' sentent', videl't, (1.) Note, 'It was well that they considered what might be said against them, which now most Christians do not in their disputes. (2) These persecutors, and the Romans, had some charity and consideration, in that they were restrained by the fear of the people, and did not accuse and use them as for Routs, Riots, and Seditions. (3) They that deny necessary premises are not to be disputed with.' Et ult' item Attorn' dicti Dom' Regis nunc general' pro eodem Dom' Rege dat Cur' hic intelligi et informari, quod in al' loco in pred' falso, scandaloso, seditioso et irreligioso libro, int' al' content' fuer' hæc al' falsæ, libellose, scandalosæ, seditiosæ et irreligiosæ Anglican' sententis sequen' de et concernen' Episcopis et al' Clericis hujus regn' Angl', videl't, 3.) 'Let not these proud hypocrites (Episcopos et

al' Clericos Ecclesie hujus regn' Angl' innuendo) 'deceive you,' (subdit' dicti Dom' Regis hujus regn' Angl' innuendo) 'who by their long liturgies and ceremonies,' (Liturg' et Cæremon' Ecclesie hujus regn' Angl' innuendo) 'and claim of superiority, do but cloak their worldliness, pride and oppression, and are religious to their greater damnation.' Et ult' item Attorn' dicti Dom' Regis nunc general' pro eodem Dom' Rege dat Cur' hic intelligi et informari, quod in al' loco in pred' falso, scandaloso, seditioso, et irreligioso libro, int' al' content' fuer' hæc al' falsæ, libellose, scandalosæ, seditiosæ, et irreligiosæ, sentent' Anglican' sequen' de et concernen' Clericis hujus regn' Angl', (2) Note, 'Priests now are many,' (Clericos Ecclesie hujus regn' Angl' innuendo) 'but labourers few; what men are they that have and do silence the faithfullest labourers,' (seipsum R. B. et al' factiosas et seditiosas p'son' pred' innuendo) 'suspecting that they are not for their interest?' (interesse Clericos Ecclesie hujus regn' Angl' innuendo.) Et ult' item Attorn' dicti Dom' Regis nunc general' pro eodem Dom' Rege dat Cur' hic intelligi et informari, quod in al' loco in pred' falso, scandaloso, seditioso et irreligioso libro, inter al' content' fuerunt hæc al' falsæ, libellose, scandalosæ, seditiosæ, et irreligiosæ, sentent' sequen' de et concernen' Clericis hujus regn' Angl', videl't, (3.) Note, 'Christ's ministers use God's ordinances to save men, and the devil's clergy' (Clericos Ecclesie hujus regn' Angl' innuendo) 'use them for snares, mischief and murder. (2.) They (Clericos Ecclesie hujus regn' Angl' innuendo) 'will not let the people (subdit' hujus regn' Angl' innuendo) 'be neutrals between God and the Devil, but force them (subdit' hujus regn' Angl' innuendo) 'to be informing persecutors.' Et ult' item Attorn' dicti Dom' Regis nunc general' pro eodem Dom' Rege dat Cur' hic intelligi et informari, quod in al' loco in præd' falso, scandaloso, seditioso et irreligioso libro, int' al' content' fuerunt hæc alie falsæ, libellose, scandalosæ, seditiosæ et irreligiosæ sententis Anglicanæ sequen' de et concernen' legibus hujus regn' Angl' contra illicit' Conventiculis et ad excitand' popul' convenire in illicit' Conventiculis, videl't (2.) Note, To be dissenters and disputants against error; and tyrannical impositions upon conscience' (leges et statuta hujus regn' Angl' contra person' factiosas et Liturg' Eccle' hujus regn' Angl' adversar', Anglice, 'against dissenters,' edit' et provis' innuendo) 'is no fault but a great duty.' In magna Dei omnipotent' displicent, in contempt' leg' hujus regn' Angl' manifest' in malum et perniciosissim' exemplum omnium al' in tali casu delinquent', ac contra pacem dicti Dom' Regis nunc, coron' et dignitat' suas, &c. Unde item Attorn' dicti Dom' Regis nunc general' pro eodem Dom' Rege pet' advisament' Cur' hic in premiis et tibi legis process' versus ipsum prefat' R. B. in hac parte fieri ad respond' dicto Dom' Regi de et in premiis, &c.

ON the 28th of February, 1684-5, Mr. Baxter was committed to the King's-Bench prison by the lord chief justice Jeffreys's warrant, for his Paraphrase on the New-Testament, printed a little before, which was called a scandalous and seditious book against the government. On the 6th of May, which was the first day of term, he appeared in Westminster-Hall, and an information was ordered to be drawn up against him. May 14th, he pleaded Not Guilty to the information. May 15th, he being much indisposed, moved by his counsel, that he might have farther time given him for his trial; but it was denied him; and Jeffreys* cries out in a passion, "I will not give him a minute's time more to save his life. We have had (says he) to do with other sort of persons, but now we have a saint to deal with; and I know how to deal with saints as well as sinners. Yonder (says he) stands Oates in the pillory, † (as he actually did at that very time in the New Palace-Yard,) and he says he suffers for the truth, and so says Baxter; but if Baxter did but stand on the other side of the pillory with him, I would say, two of the greatest rogues and rascals in

* "Before this magistrate was brought for trial, by a jury sufficiently prepossessed in favour of Tory politics, the Rev. Richard Baxter, a dissenting minister; a pious and learned man, of exemplary character, always remarkable for his attachment to monarchy, and for leaning to moderate measures in the differences between the church, and those of his persuasion. The pretence for this prosecution was, a supposed reference of some passages in one of his works, to the bishops of the Church of England; a reference which was certainly not intended by him, and which could not have been made out to any jury that had been less prejudiced, or under any other direction than that of Jefferies. The real motive was, the desire of punishing an eminent dissenting teacher, whose reputation was high among his sect, and who was supposed to favour the political opinions of the Whigs. He was found guilty, and Jefferies, in passing sentence upon him, loaded him with the coarsest reproaches and bitterest taunts. He called him sometimes, by way of derision, a saint, sometimes, in plainer terms, an old rogue; and classed this respectable divine, to whom the only crime imputed, was the having spoken disrespectfully of the bishops of a communion to which he did not belong, with the infamous Oates, who had been lately convicted of perjury. He finished with declaring, that it was public notoriety, that there was a formed design to ruin the king and the nation, in which this old man was the principal incendiary. Nor is it improbable that this declaration, absurd as it was, might gain belief, at a time when the credulity of the triumphant party was at its height." Fox's Historical work, p. 96.

† See his two Trials for Perjury, vol. 10, pp. 1079, 1227, of this Collection.

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the kingdom stood there." On May 30th, in the afternoon, he was brought to his trial before the lord chief justice Jeffereys at Guildhall. Sir Henry Ashhurst, who could not forsake his own and his father's friends, stood by him all the while. Mr. Baxter came first into court, and with all the marks of serenity and composure, waited for the coming of the lord chief justice, who appeared quickly after with great indignation in his face. He no sooner sat down than a short cause was called and tried; after which the clerk began to read the title of another cause: 'You blockhead you, (says Jeffreys) the next cause is between Richard Baxter and the king;' upon which Mr. Baxter's cause was called. The passages mentioned in the information, were his paraphrase on Matth. v. 19. Mark ix. 39. Mark xi. 31. Mark xii. 38, 39, 40. Luke x. 2. John xi. 57, and Acts xv. 2. These passages were picked out by sir Roger L'Estrange, and some of his companions: and a certain noted clergyman (who shall be nameless) put into the hands of his enemies some accusations out of Rom. xiii. &c. as against the king, to touch his life; but no use was made of them. The great charge was, "That in these several passages he reflected on the prelates of the Church of England, and so was guilty of sedition, &c." The king's counsel opened the information at large with its aggravations. Mr. Wallop, Mr. Williams, Mr. Rotheram, Mr. Atwood, and Mr. Phipps, were Mr. Baxter's counsel, and had been feed by sir Henry Ashhurst.

Mr. Wallop said,* "That he conceived, the matter depending being a point of doctrine, it ought to be referred to the bishop his ordinary; but if not, he humbly conceived the doctrine was innocent and justifiable, setting aside the *Innuendos*, for which there was no colour, there being no antecedent to refer them to (that is, no bishop or clergy of the Church of England named). He said the book accused, i. e. the Comment on the New Testament, contained many eternal truths: but they who drew the information, were the libellers, in applying to the prelates of the Church of England those severe things which were written concerning some prelates, who deserved the character he gave. My lord (says he), I humbly conceive the bishops Mr. Baxter speaks of, as your lordship, if you have read church-history, must confess, were the plagues of the church and the world." "Mr. Wallop, (says the lord chief justice) I observe you are in all these dirty causes; and were it not for you, gentle-

* "We could never find (though great inquiry has been made among the dissenters) that this trial was ever taken in short-hand, which is a great pity, because it must have been very curious; so have inserted this short account, which shews the temper of the chief justice, and the cruel usage of the prisoner, taken from Calamy's Life of Baxter." Former Edition.

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men of the long robe, who should have more wit and honesty than to support and hold up these factious knaves by the chin, we should not be at the pass we are at."—"My lord, (says Mr. Wallop) I humbly conceive, that the passages accused are natural deductions from the text."—"You humbly conceive, (says Jeffreys) and I humbly conceive; swear him, swear him."—"My lord, (saith he) under favour, I am counsel for the defendaut; and if I understand either Latin or English, the information now brought against Mr. Baxter upon so slight a ground, is a greater reflection upon the Church of England, than any thing contained in the book he is accused for." Says Jeffreys to him, "Sometimes you humbly conceive, and sometimes you are very positive: you talk of your skill in Church-history, and of your understanding Latin and English; I think I understand something of them as well as you; but in short must tell you, that if you do not understand your duty better, I shall teach it you." Upon which Mr. Wallop sat down.

Mr. Rotheram urged, "That if Mr. Baxter's book had sharp reflections upon the Church of Rome by name, but spake well of the prelates of the Church of England, it was to be presumed, that the sharp reflections were intended only against the prelates of the Church of Rome." The lord chief justice said, "Baxter was an enemy to the name and thing, the office and persons of bishops."—Rotheram added, "That Mr. Baxter frequently attended Divine Service, went to the Sacrament, and persuaded others to do so too, as was certainly and publicly known; and had, in the very book so charged, spoken very moderately and honourably of the bishops of the Church of England."—Mr. Baxter added, "My lord, I have been so moderate with respect to the Church of England, that I have incurred the censure of many of the dissenters upon that account."—"Baxter for bishops! (saith Jeffreys) that is a merry conceit indeed! turn to it, turn to it."—Upon this Rotheram turned to a place, where it is said, That great respect is due to those truly called to be bishops among us; or to that purpose.—"Ay, (says Jeffreys) this is your Presbyterian cant, truly called to be bishops; that is himself, and such rascals called to be bishops of Kidderminster,* and other such like places; bishops set apart by such factious, snivelling Presbyterians as himself; a Kidderminster bishop he means,

* After the Restoration, Baxter had been offered by lord chancellor Ciarendon, the bishopric of Hereford, which he refused, alledging in a letter his reasons of conscience, and he only requested permission to continue his ministry at Kidderminster, which was not granted. He had been episcopally ordained, but became a very open and steady dissenter. It is stated that his scruples were first excited by the famous *et cetera* oath. See more of him in Calamy and the Biographia.

according to the saying of a late learned author; and every parish shall maintain a Tythe-pig Metropolitan." Mr. Baxter beginning to speak again, saith Jeffreys to him, "Richard, Richard, dost thou think we will hear thee poison the court? Richard, thou art an old fellow, an old knave; thou hast written books enough to load a cart; every one is as full of sedition (I might say treason) as an egg is full of meat: hadst thou been whipt out of thy writing trade forty years ago, it had been happy. Thou pretendest to be a preacher of the gospel of peace, and thou hast one foot in the grave; it is time for thee to begin to think what account thou intendest to give: but leave thee to thyself, and I see thou wilt go on as thou hast begun; but by the grace of God I'll look after thee. I know thou hast a mighty party, and I see a great many of the brotherhood in corners, waiting to see what will become of their mighty Don; and a doctor of the party (looking to Doctor Bates) at your elbow; but by the grace of Almighty God, I will crush you all."

Mr. Rotheram sitting down, Mr. Atwood began to shew, that not one of the passages mentioned in the information ought to be strained to that sense, which was put upon them by the *innuendos*, they being more natural when taken in a milder sense; nor could any one of them be applied to the prelates of the Church of England, without a very forced construction: to evidence this, he would have read some of the text; but Jeffreys cried out, "You sha'n't draw me into a conventicle with your annotations, nor your snivelling parson neither."

"My lord, (says Mr. Atwood) I conceive this to be expressly within Rosewell's case, lately before your lordship." (Vide vol. 10, p. 147.)—"You conceive, (saith Jeffreys) you conceive amiss; it is not."—"My lord, (saith Atwood) that I may use the best authority, permit me to repeat your lordship's own words in that case."—"No, you sha'n't, (says he) you need not speak, for you are an author already, though you speak and write impertinently."—Says Atwood, "I cannot help that, my lord, if my talent be no better; but it is my duty to do my best for my client."

—Jeffreys thereupon went on, inveighing against what Atwood had published; and Atwood justified it to be in defence of the English constitution, declaring that he never disowned any thing he had written. Jeffreys several times ordered him to sit down, but he still went on. "My lord (says he), I have matters of law to offer for my client;" and he proceeded to cite several cases, wherein it had been adjudged, that words ought to be taken in the milder sense, and not in the strained, by *Innuendos*. "Well, (says Jeffreys when he had done) you have had your say."

Mr. Williams and Mr. Phipps said nothing; for they saw it was to no purpose. At length says Mr. Baxter himself, "My lord, I think I can clearly answer all that is laid to my

charge, and I shall do it briefly; the sum is contained in these few papers, to which I shall add a little by testimony."—But he would not hear a word:—At length the chief justice summed up the matter in a long and fulsome harangue.

"Tis notoriously known (says he) there has been a design to ruin the king and nation; the old game has been renewed, and this has been the main incendiary: He is as modest now as can be; but time was, when no man was so ready at, Bind your kings in chains, and your nobles in fetters of iron; and, To your tents, O Israel! Gentlemen, for God's sake, don't let us be gulled twice in an age, &c."—And when he concluded, he told the jury, "That if they in their conscience believed he meant the bishops and clergy of the church of England, in the passages which the information referred to, they must find him Guilty; and he could mean no men else; if not, they must find him Not Guilty."—

When he had done, says Mr. Baxter to him; "Does your lordship think any jury will pretend to pass a verdict upon me upon such a trial?"—"I'll warrant you, Mr. Baxter, (says he) don't you trouble yourself about that."

The jury immediately laid their heads together at the bar, and found him Guilty.

As Mr. Baxter was going from the bar, he told the lord chief justice, who had so loaded him with reproaches, and yet continued them, that a predecessor of his (meaning sir Matthew Hale) had other thoughts of him. Upon which the judge replied, "That there was not an honest man in England, but what took him for a great knave."

He had subpoena'd several clergymen, who had appeared in court, but were of no use to him, through the violence of the chief justice.

The Trial being over, sir Henry Ashhurst led Mr. Baxter through the crowd, (I mention it to his honour, says bishop Kennet) and conveyed him away in his coach. On June 29 following, he had judgment given against him; he was fined five hundred marks; to lie in prison till he paid it, and be bound to his good behaviour for seven years.

Mr. Baxter afterwards obtained the king's pardon, by the mediation of the lord Powis: His fine was remitted; and on Wednesday, November 24, sir Samuel Astry sent his war-

rant to the keeper of the King's Bench prison to discharge him; but he gave sureties for his good behaviour; his majesty declaring (for his satisfaction) that it should not in him be interpreted a breach of the good behaviour for him to reside in London, which was not allowable according to the Oxford act: And this was entered upon his bail-bond. Notwithstanding this, he continued some time after in the rules; and on February 28 following, removed to a house he took in Charter-House-Yard, where he preached to a separate congregation without interruption as long as he lived; his death happening after the Revolution, viz. December 8, 1691.

The defendant was found Guilty on this Information, and after exceptions taken in arrest of judgment and over-ruled, the court gave judgment and fined him 500*l.* and ordered him to give security for his good behaviour for seven years.

The Case is reported, 3 Mod. 68, as follows:

"Mr. Baxter was a nonconformist minister, against whom an information was exhibited for writing a book which he entitled, "A Paraphrase upon the New Testament."

"The crime alledged against him in the information was, That he intending to bring the protestant religion into contempt, and likewise the bishops (innuendo the bishops of England), did publish the libel, in which was contained such words, &c. setting forth the words. He was convicted.

"Mr. Williams moved in arrest of judgment, First, that the words in the information and "the bishops" therein mentioned were misapplied "to the protestant religion" and "the bishops of England" by such *innuendoes*, which could not support this charge against the defendant.

"Secondly, that the *distringas* and *habeas corpora* were *inter nos et Richardum Baxter*, which could not be, because the information was exhibited in the name of the Attorney General.

"But the court over-ruled these exceptions, and said, that by the word "bishops" in this information, no other could be reasonably intended but "the English bishops."

"The court thereupon fined him 500*l.*, and ordered him to give security for his good behaviour for seven years."

337. The Trial of ROBERT FRANCES, Gent. for the Murder of Thomas Dangerfield,* at Justice-Hall in the Old-Bailey, the 16th day of July, 1685, in the first Year of his Majesty's Reign, before the Right Hon. Sir James Smith, knt. Lord-Mayor of London, Sir Thomas Jenner, knt. Recorder of the said City, and one of his Majesty's Serjeants at Law, and others his Majesty's Justices.

London Jury.

Thomas Anger,	Stephen Coleman,
Philip Perry,	Henry Cremer,
Philip Stockes,	Stephen Gibons,
Luke Poe,	Simon Chapman,
John Wartfield;	Joseph Speed,
Christopher Johnson,	Richard Shaw.

ROBERT FRANCES, gent. was indicted for assaulting Thomas Dangerfield, in the parish of St. Andrew's, Holborn, London, with a bamboo cane, to the value of 6*d.* striking it into his left eye, of which wound the said Thomas Dangerfield is since dead.†

* "Though we have not been able to procure Dangerfield's trial for a libel; yet shall insert the trial of Mr. Frances for killing him, from the sessions-paper of that time, with his speech at Tyburn, as it will give some light to the history of that time." Former Edition. There is in 5 Mod. Rep. 68 the following short note of Dangerfield's case:

"The Defendant was convicted of publishing a libel, wherein he had accused the king, when duke of York, that he had hired him to kill the late king Charles, &c. And on Friday June 20, 1685, he was brought to the bar, where where he received this sentence, viz. That he should pay a fine of 500*l.* that he should stand twice in the pillory, and go about the hall with a paper in his hat signifying his crime; that on Thursday next he should be whipped from Aldgate to Newgate, and on Saturday following from Newgate to Tyburn; which sentence was executed accordingly.

"As he was returning in a coach on Saturday from Tyburn, one Mr. Robert Frances, a barrister of Gray's Inn, asked him in a jeering manner, whether he had run his heat that day? He replied to him in scurrilous words. Whereupon Mr. Frances run him into the eye with a small cane which he had then in his hand, of which wound the said Mr. Dangerfield died on the Monday following. Mr. Frances was indicted for this murder; and upon not guilty pleaded was tried at the Old Bailey, and found guilty, and executed at Tyburn on Friday July the 24th, in the same year."

† "Bishop Burnet, in his History of his Own Times, vol. 1, p. 637, says, "Dangerfield,

The witnesses against the prisoner were many, and most of them very positive; deposing, That they saw the said Robert Frances coming to the side of the coach in which Mr. Dangerfield was, and that there he thrust his said cane into his eye; after which, running into St. Thavie's-Inn, in Holborn, he was presently seized, and sent to Newgate; where when he went in, one of the retinue of the prison telling him that Dangerfield would die, he the said Frances replied, That if he should die, it would save the hangman a labour. Mr. Dangerfield, after he was carried to the gaol, cried out very much of the anguish of his eye, saying, Oh, my eye! Oh, my eye! Forbear

another of the witnesses in the Popish Plot, was also found guilty of perjury, and had the same punishment (as Oates); but it had a more terrible conclusion; for a brutal student of the law, who had no private quarrel with him, but was only transported with the zeal of that time, struck him over the head with his cane, as he got his last lash: This hit him so fatally, that he died of it immediately. The person was apprehended, and the king left him to the law; and though great intercession was made for him, the king would not interpose, so he was hanged for it."—The bishop here seems mistaken; for I do not find Dangerfield was convicted of perjury; or that he got his death on the last lash. Rapin, vol. II. 744, says thus, "The next victim to the catholics, not long after Oates, was Thomas Dangerfield, who discovered the pretended Meal-Tub plot, which he had laid to the charge of the Protestants. But afterwards not being able to maintain before the council what he had deposed, he confessed, he was persuaded to invent it by the countess of Powis, and the Popish lords in the Tower. Moreover, he had published a narrative of all the secret practices used as well to corrupt him, as to render the plot probable. As he owned he had received money from the late king and the duke of York, the last would never suffer such an offence to go unpunished, when he came to be king. Dangerfield therefore was committed to prison, and indicted for publishing a scandalous libel. He was tried, and brought in guilty by the jury; after which he received judgment at the King's bench bar, That he should stand twice in the

to make a noise. A physician being brought to give his advice, whether it was requisite to bleed him, he found him desperately ill, and vomiting extremely. The chirurgion being likewise sent for, probing the wound, found it to be mortal; and he, with others, did verily believe, that it occasioned his death. Mr. Frances, in his own defence, alledged, That coming to the coach, he asked Dangerfield, if he had not been heated? Upon which Mr. Dangerfield calling him 'son of a whore;' he, in his passion, gave him a slight blow with his cane, which he verily believed could not kill him; and that he did it out of no malice or hatred. He called several witnesses, who gave him a very good character, but spoke very little to the fact; whereupon he was found Guilty.—The reverend Mr. Samuel Smith, the ordinary of Newgate, gives this account of him:

"I went to Mr. Robert Frances his chamber, because he desired me to take a particular care of him; and found him in a serious, good frame and composure of mind; willing to resign himself to the allwise duction of God's spirit, and his determination for life or death.

pillory; that he should be whipt from Aldgate to Newgate on one day, and from Newgate to Tyburn on another; and should pay a fine of five hundred pounds. The scourging was executed with rigour, though with less cruelty than on Oates. The second day, Dangerfield, after the whipping was over, being in a coach against Hatton-Garden, Robert Frances, a harrister of Gray's-Inn, came to the coach side; and using some insulting expressions, Dangerfield returned a reproachful answer. [Francis said, How now, friend, have you had your heat this morning? Upon which the other, with two or three curses, called him Son of a whore.] Frances, having a small cane in his hand, thrust it into his eye with all his force, which in two hours put an end to his life. Frances was condemned to be hanged, and was executed accordingly; the king, though strongly solicited for a pardon, not thinking proper to leave such a crime unpunished."

"Sir William Williams,* who had been Speaker of the House of Commons, for publishing an infamous libel, (as Speaker, by order, of the House of Commons,) called Dangerfield's Narrative, was fined by the court of King's-bench 10,000*l.* but, upon paying 8000*l.* of it, satisfaction was acknowledged upon record, Easter Term, 1 Jac. II. K. B. 2 Shower 471.

"Upon an information against the defendant, (sir William Williams) for publishing a libel called Dangerfield's Narrative, he pleaded that he was at the time of publication Speaker of the House of Commons; and, as such, had a right to publish the votes and acts of the

First, I prayed with him, and then entered upon an inquiry into his life and conversation, precedent to the crime of killing Mr. Dangerfield. He was very free to give an account of himself. He said, that he was born of Protestant parents, and bred up in good literature; that twenty years since he was a student in Christ-Church college in Oxford; that afterward he went over sea with sir Joseph Williamson, his late majesty's ambassador, as an attendant on him; that for fourteen years last past he hath been of the society of Grays-Inn, and practised in the law; that he did not lead any extravagant life till this unhappy crime. He acknowledged that he saw Dangerfield in the pillory at Westminster; and that on the day in which he was whipped to Tyburn, Mr. Frances was with a friend at a coffee-house near to St. Andrew's church in Holborn; and thought not to have stayed there, because he was to dine that day with his friend, and was, in the afternoon, to have managed a cause for a client at Guildhall, so that he was going home from the said coffee-house: But a report coming thither that Dangerfield was in his return from Tyburn, and very near, he left his

House; and that the narrative was printed and published as parcel of the proceedings. The court would not debate the formality of such an idle insignificant plea (as they were pleased to call it), but gave judgment for the king, Easter Term, 2 Jac. II. 1686, K. B. Shower Rep. 471. pl. 436, Comb. 18. See Atkins's Power of Parliaments, &c. The King against Williams.—It is observable, that sir William Williams was not speaker of the House of Commons at the time this case was adjudged, though he was when the offence, of which he was accused, was committed.—The Lord Chief Justice Wright asked the defendant's counsel whether an order of the House of Commons could justify a scandalous, infamous and flagitious libel? 2 Shower 471." A Digest of Laws concerning Libels, 4to. p. 75.

"As the proceedings against sir William Williams were very extraordinary, so was the punishment: The fine was the heaviest that ever was imposed in any court for the like crime, sir Bartholomew Shower, one of the reporters of this case, says, sir William Williams being fined 10,000*l.* paid 8,000*l.* of the money, and thereupon satisfaction was acknowledged on record. I own when I find sir William Williams in this same reign most violently persecuting the seven bishops for a libel, in the character of solicitor-general, I am apt to think, that the fine was imposed in *terrorem* to others; and that the only purpose of suing sir William Williams, was to make a precedent of an insult upon the commons, whose privileges, if the designs then on foot had prevailed, must soon have fallen to nothing." Digest of the laws concerning libels, p. 118, 119. Note to Former Edition. See also, more particulars concerning Dangerfield and Frances in the third volume of Kennett's Complete History.

* See his Case (A. D. 1686,) in this Collection.

wife in his friend's hand, and went to meet the coach in which Dangerfield was, only out of curiosity (as he saith) to observe how he looked after his being whipped. He said, that the coach did not stop, but he went to the side of it, and said, have you had your beat to-day? How is it now with you? Dangerfield, upon those words, (he says) called him 'son of a whore,' and said, 'what have you to do with me?' Mr. Frances being asked by the ordinary, what moved him to kill Dangerfield, he replied, that his passion was stirred up at Dangerfield's reviling language, and said, that he only intended to beat him with a bamboo cane, which was furzed and worn out at the end of it: But the coach moving onward, the cane wounded Dangerfield in the eye; but he intended only to have thrust it at his breast. He also said, that he had a short sword, and yet used it not, because he did not design to kill Dangerfield.

"Mr. Frances being told by the ordinary, that the very thrust proved fatal, and was a very inhuman act toward a person in his distress; to this Mr. Frances replied, That he never bore any malice nor grudge to Mr. Dangerfield, nor was he moved to that act by any person whatsoever; only God left him to himself, for the punishment of his former sins, to run into this sudden effort of passion. Mr. Frances was much affected with my discourse, and wept in praying with him: he was very attentive to the sermons and prayers on the Lord's day, more than the other criminals; so he seemed very penitent, and I hope that this sentence of death on him did awaken him to a serious recalling to mind whatsoever former sins he might be guilty of, in order to make his peace with God, who is the searcher of all hearts, and only knows who are truly penitent."

The Dying Speech of ROBERT FRANCES, of Grays-Inn, Esq. July 24th 1685. Delivered by his own hand to the Ordinary, at the Place of Execution, desiring the same might be published.

I am heré by the divine permission and providence of God become a spectacle to God, angels, and men, for a rash, extravagant and impudent act, wherein I do confess, I have not only offended against the government and courts of justice, but against Christianity, and even the rules of morality itself: nevertheless, (I hope) not only the court, but all unbiassed men, from the several circumstances of the fact, are satisfied that I had no malicious intent of doing what fell out, nor had any grudge or personal prejudice to him upon any account whatsoever, more than what all honest and good men could not but have, that love the king and the government. The solemn truth of all which I have declared, not only upon the holy sacrament I received from Mr. Master, but also that I never knew nor saw him before that unhappy moment, save once at a distance in the pillory at Westminster, and do now, as a

dying man, solemnly avow and protest the same: and therefore I hope I may boldly say I am not conscious of any guilt before God as to the malice: However, God in his great wisdom has been pleased to suffer this great calamity to fall upon me: and I hope this his severe chastisement is in order to bring me to himself, when softer means had not sufficiently done it. All them that know me (I am sure) will do me that justice as to believe I am far from having done it either wilfully or necessarily (as most untruly is reported). And that these honourable persons are above the thoughts of such unworthy things, for which they have been as maliciously as falsely traduced upon my score; I beg their pardon for the scandal I have unhappily been the occasion of, and desire this acknowledgment may be by them accepted as a reparation, since to disown it at this time of my death, is all the satisfaction I am able to make them.

As to my religion, (however I have been represented) there are people that knew me at the university, and since that can be my witnesses, how obedient and zealous a son of the church of England (by law established) I have been.

And these worthy divines that did me the favour to visit me in affliction, will give the world an account (as occasion serves) of my integrity therein: and if I had been as zealous in the service of God, as my prince, he would not have left me so much to myself, as to have permitted me to have fallen into this unexpected extremity.

And as for my morals, the honourable society of Grays-Inn will answer for me, that in above these twelve years time, I have had the honour of being admitted a member of that society, I never had any quarrel or controversy with any member thereof; and all persons with whom I have had conversation, I question not, will give a good character of my innocent and peaceable behaviour.

I pray God Almighty preserve and bless his most sacred majesty, his royal consort queen Mary, Catharine the queen dowager, their royal highnesses, and all the royal family; and grant that there may never want one of that royal line to sway the scepters of these kingdoms as long as sun and moon endure. In the union and love of his subjects, strengthen him that he may vanquish and overcome all his enemies, which I am glad to have seen so much prospect of, and am only sorry I am cut off from seeing my so much desired satisfaction of those happy days all his good subjects will enjoy under his auspicious government. I pray God forgive me my sins, that have made me unworthy of that blessing.

Blessed be the Lord, that I have lived so as not to be ashamed to live, or afraid to die; though I cannot but regret my being made a sacrifice to the faction, who I am satisfied are the only people that will rejoice in my ruin; for there is no man that loves his prince, but will lament that nothing less than the blood of

an inoffensive man (save in this single extravagance) can satisfy them for the sudden interperate transport of zeal and passion against one so notoriously wicked and infamous; for I do protest before Almighty God, (before whom I shall immediately appear) that when I went to the coach-side, I did not intend so much as to speak to him, or believe I could have had opportunity of so doing, much less of doing him any harm. Neither is it probable I should with a small bamboo cane, no bigger than a man's little finger, without any iron upon it, much less a dart in it, as it was most industriously spread abroad to prejudice me in the opinion of the world: for, if I had had such a wicked design intentionally, I had a little short sword by my side much more proper for such a purpose. And further, if I had believed or known that I had done any harm to him, I had opportunity enough of escaping afterwards, which I never endeavoured. Now all these things being duly weighed with their several circumstances, I leave my sad case to the consideration of all sober and charitable men. However, I would not have this to be interpreted as a reflection upon the court, who I doubt not are by this time satisfied, (and Mr. Recorder did in open court declare) that in their consciences they did not believe I maliciously designed him the mischief that happened, but that it was purely accidental. But in the strict construction of law I was found guilty of murder.

But that which most sensibly afflicts me, and is worse to me than death, that I cannot suffer alone, but that they have not only raised scandals upon me in particular preparatory to it, but upon my poor innocent wife, as if my jealousy of her had been the reason of my animosity to Dangerfield; when I am morally certain she never saw him in her whole life, save that fatal moment; and no couple (as hundreds can witness) have lived in better correspondence.

And besides that, she is as virtuous a woman as lives, and born of so good and loyal a family, that if she had been so inclined, she would have scorned to have prostituted herself to such a profligate person: but, on the contrary, (God is my witness) I never had any such thoughts of her, and do as verily believe, as there is a God in Heaven, I never had any reason; she having always been the most indulgent, kind, and loving wife that ever man had, and in my conscience one of the best of women; nay, I am so far from suspecting her virtue, that she is the only loss I regret on earth, and can freely part with every thing else here below without repining, which in all my trouble I have owned before all people, and particularly Mr. Master, Mr. Ordinary, and Mr. Smithies of Cripplegate, who can all testify those tears and endeared expressions that have passed between us, when any of them did me the kindness to visit me in my distress.

And I do from the bottom of my heart freely forgive the witnesses that swore against me those words I never spoke; for, as I shall answer at the Great Tribunal, I said no other or more words than these; How now, friend, have you had your heat this morning? for all the ill they have done me, give them repentance, good God! even for these that have contributed to the shedding of my blood, I pray thee shed thy bowels of mercy.

I do heartily thank those noble and honourable persons, and all other my friends, that have so charitably interposed with his majesty on my behalf (though it hath proved unsuccessful). I pray God nevertheless to return their kind endeavours a thousand-fold into their own bosoms: Lord, return it to them and theirs!

Lord Jesus, receive my soul! Thy Will be done on Earth as it is in Heaven. Amen, Amen, Amen. ROBERT FRANCES.

338. The Trial of HENRY LORD DELAMERE,* in the Court of the Lord High Steward, at Westminster, for High Treason: I JAMES II. A. D. 1686.

January 14, 1686.

Cl. of Cr. SERJEANT at Arms, make proclamation.

Srj. at Arms. O-Yes, O-Yes, O-Yes! My Lord High Steward of England his grace doth

* He was the second lord Delamere (in which honour he had in August, 1684, succeeded his father, the celebrated royalist, sir George Booth) and first cousin to the earl of Stamford, against whom proceedings were had at this same time. Lord Delamere was a man of great talents, and had deeply studied important constitutional subjects. He was, while a mem-

straitly charge and command all manner of persons to keep silence, and to give ear to the king's majesty's commission to his grace my Lord High Steward of England, upon pain of imprisonment.

Then the Commission was read, his Grace and all the Peers standing up bare-headed.

ber of the House of Commons, a zealous and powerful supporter of the Bill of Exclusion. At the time of the Revolution, he early raised a large force in Lancashire and Cheshire, with which he joined the prince of Orange, and was deputed with Halifax and Shrewsbury upon the Message to king James for his removal from Whitehall. James, after his retirement

Then the Staff being carried between Garter King at Arms, and the Gentleman-Usher of the Black Rod, was with three reverences delivered upon the knees to his Grace, and by him re-delivered, to the Gentleman-Usher of the Black Rod, to hold during the service.

Cl. of Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O-Yes! His grace my Lord High Steward of England doth straitly charge and command all manner of persons here present, except peers, privy counsellors, and the reverend judges now assistant, to be uncovered.

Cl. of Cr. Make proclamation.

Serj. at Arms. O-Yes! My Lord High Steward of England his Grace straitly chargeth and commandeth all justices, commissioners, and all and every other person and persons to whom any writ or precept has been directed, for the certifying of any indictment or record before his grace my Lord High Steward of England, that they do certify and bring in the same forthwith, according to the tenor of the same writ and precept, to them or any of them directed, upon pain and peril shall fall thereon.

Then sir Edward Lutwyche, one of his Ma-

into France, said, that on this occasion lord Delamere, whom he had used ill, had treated him with much more regard than the other two lords to whom he had been kind, and from whom he might better have expected it. Yet Henry, earl of Clarendon, in his "Diary," expresses himself with some spleen of the intemperance with which Delamere supported the measure of the king's removal, and acted on some other occasions:

"1688, Dec. 17. My lord Halifax gave him" [the prince of Orange] "an account of the Resolution the Lords were come to, which was drawn up in writing, and being read, I said again, it seemed strange to me that the king should be, as it were, directed to go to Ham; that if, it were not safe for his majesty to be at London, why might he not be at liberty to go where he pleased? or be desired to go to some of his own houses, Hampton-court or Windsor, and to have his own guards about him. Upon which, lord Delamere very angrily (a little thing puts him in a passion) said, He did not look upon him as his king, and would never more pay him obedience, and that he ought not to be like a king in one of his own houses, and earnestly pressed that he might be directed to go to Ham.

"1688-9, Jan. 25. The House was called over according to order, which being done, the earl of Berkeley took notice that there was a peer there who had never been introduced, and so named my lord Griffin, who stood up in his place and said, he was created by the king a little before his going away, and had his writ to come to parliament, and his patent was at the door ready to be produced. Upon this grew a debate, that no peer could sit till he was introduced: it was alledged, that the in-

jury's Serjeants at Law, and Chief Justice of Chester, delivered in his Writ and Return at the Clerk's Table.

The Writ of Certiorari and the Return thereof was read in *hæc verba*.

L. H. Steward. (George lord Jefferies.) Call the lieutenant of the Tower to return his Precept, and bring his prisoner to the bar.

Cl. of Cr. Make proclamation.

Serj. at Arms. Lieutenant of the Tower of London, return thy Writ and Precept to thee directed, together with the body of Henry baron of Delamere, thy prisoner, forthwith, upon pain and peril shall fall thereon.

The Prisoner was brought to the Bar by the Lieutenant of the Tower: the Writ and Return thereof, together with his Grace's Precept, and the Return thereof, were read in *hæc verba*.

Cl. of Cr. Make proclamation.

Serj. at Arms. Sir Roger Harsnet knight, serjeant at arms to our sovereign lord the king, return the Precept to thee directed, together with the names of all the lords and noblemen of this realm of England, peers of Henry baron of Delamere, by thee summoned, forthwith, upon pain and peril shall fall thereon.

roducing contributed nothing to the right of peerage, and that those peers who had been created by the late king in the time of his exile, upon his majesty's Restoration came into the House of Lords without being introduced. The lord Delamere was most violent in opposing lord Griffin's being admitted; but on a sudden my lord Lovelace moved on his behalf, That he might be admitted, to the wonder of every body, and in the same instant he and my lord Delamere went from their places and introduced him; the first time, I believe, that ever a peer was introduced when the king's authority was pretended to be set aside, and the Lords did not pretend to be a parliament. I cannot imagine what made the turn about my lord Gritin, except it was that the violent party had no mind to lose my lord Carteret, who had never been introduced, and of whom I believe they were sure; the duke of Northumberland likewise had not been introduced before.

"Jan. 31. Lord Montague said he was so perfectly satisfied that the throne was vacant, that he had a dispensation within him without the help of one from my lord Jefferies or sir Edward Herbert, and therefore did declare, that from this day he looked upon himself to be absolved from all allegiance to king James, that he owed him none and never would pay him any, and if king James came again he was resolved to fight against him, and would die single with his sword in his hand, rather than pay him any obedience."

In the early part of king William's reign, lord Delamere held the office of chancellor of the exchequer for about twelve months, and upon quitting it was created earl of Warrington.—See, also, *Barnet*, vol. 1, p. 668.

The Serjeant at Arms delivered in his Precept and return at the clerks table.

L. H. Steward. Read the Precept and the return. [They were read in *hæc verba.*]

Cl. of Cr. Make an O-Yes.

Serj. at Arms. O-Yes! All dukes, earls, viscounts, and barons of this realm of England, peers of Henry baron of Delamere, who, by commandment of my Lord High Steward of England his grace, were summoned to appear here this day, and are now present in court, answer to your names, upon pain and peril will fall thereon.

The Peers summoned were called over, and those that appeared, standing up uncovered, answered to their names, each making a reverence to the Lord High Steward.

Cl. of Cr. Laurence earl of Rochester, Lord High Treasurer of England.*

* *Mr. Hatsell* (Precedents vol. 4, p. 345.) adverts to the number of great officers of the crown and others, devoted at the time to king James, who were summoned by Jefferies upon this Trial. The managers for the Lords in a Conference, in the year 1691, respecting a Bill for regulating Trials for Treason, [See 4 Hatsell, Appendix, No. 3.] after stating, that in this case of lord Delamere, a great many of the Lords then in town were not chosen, say, "It is a great question, whether that noble lord had come off as he did, if he had not received such notice from the grand jury, and every thing had not been made out so plain."

Indeed, lord Delamere must have expected the severest treatment from Jefferies, of whom he had spoken very sharply, in his Speech on the Corruption of the Judges. See lord Delamere's Works, p. 142, edition of 1694.

Of this trial sir John Kersey says: "My lord Delamere was this day tried by a particular commission, directed to the lord high steward and thirty other peers. The crime laid to his charge was conspiring to raise a rebellion, and to subvert the government, in conjunction with the duke of Monmouth and other false traitors, and so on. I happened to sit near the king during the whole trial; but the only positive evidence against his lordship was one Saxton, an obscure fellow, who swore that about the time of the duke of Monmouth's landing, he was recommended by the lord Brandon to the lord Delamere, and discoursing with him at his house in Cheshire, upon the 4th of June, sir Robert Cotton, and another gentleman being present; that their conversation was about assistance to be given to the said duke, and that his lordship should say, He was engaged to raise 10,000 men in his cause, but that he could not effect it so soon as he had promised, because of a present want he was under of money. What the other witnesses had to alledge, was all circumstance and hearsay: Some said the duke of Monmouth had told them, He depended upon help from lord

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L. H. Treas. Here.

Cl. of Cr. Robert earl of Sunderland, Lord President of his Majesty's Privy Council.

Lord Presid. Here.

Cl. of Cr. Henry duke of Norfolk, earl Marshal of England.

D. of Norf. Here.

Cl. of Cr. James duke of Ormond, Lord Steward of his Majesty's Household. [He did not appear.]

Cl. of Cr. Charles duke of Somerset.

D. of Som. Here.

Cl. of Cr. Christopher duke of Albemarle. [He did not appear.]

Cl. of Cr. Henry duke of Grafton.

D. of Graft. Here.

Cl. of Cr. Henry duke of Beaufort, Lord President of Wales.—*D. of Beauf.* Here.

Cl. of Cr. John earl of Mulgrave, Lord Chamberlain of his Majesty's Household.

Macclesfield, lord Brandon and lord Delamere, and that they would be ready to rise in Cheshire, as soon as he landed: Others swore that the duke had written and sent messages to his friends in London, to give notice to the lords to be ready, and that he was preparing for England. In the course of this trial, a point of law never before heard of, was started, by the lord high steward, and the solicitor general, namely, That though there were but one positive evidence, in a case of high treason, if the rest, though but circumstantial, concurred therewith, it was sufficient to find a prisoner guilty; for example, supposing one man should hear another say, he intended to kill the king, upon such a day, and that another swears he saw the party lie in wait to prosecute his intention, the evidence is sufficient. But whatever there might be in this law, it was by no means applicable to the prisoner; for he most convincingly disproved the main evidence, Saxton, and by the clearest testimony made it appear, that neither the two gentlemen nor himself were upon the spot upon the 4th of June; that two of them were then actually in London, and the other sixteen miles off: He urged also, that if the man had sworn nothing but truth against him, he could be no legal witness, being himself a prisoner, and taken in rebellion when Monmouth was routed, and consequently under a temptation to swear against him, to save his own life; upon the whole he was acquitted, every one of the peers declaring him not guilty. There were those who condemned the lawyers who had advised the king to bring a peer to trial upon so slender a foundation; while others observed, that as the king had committed him to prison, it was but fit he should be brought to a public trial, lest it should be said he had been detained when nothing appeared against him. But when all was over, I plainly saw the king was in great rage with Saxton, and the next day he declared, He should be first convicted for perjury, and then hanged for high treason."

- E. of Mulg.* Here.
Cl. of Cr. Aubrey earl of Oxford.
E. of Orf. Here.
Cl. of Cr. Charles earl of Shrewsbury.
E. of Shrews. Here.
Cl. of Cr. Theophilus earl of Huntingdon.
E. of Hunt. Here.
Cl. of Cr. Thomas earl of Pembroke.
E. of Pemb. Here.
Cl. of Cr. John earl of Bridgwater.
E. of Bridge. Here.
Cl. of Cr. Henry earl of Peterborow.
E. of Peterb. Here.
Cl. of Cr. Robert earl of Scarisdale.
E. of Scarisd. Here.
Cl. of Cr. William earl of Craven.
E. of Craven. Here.
Cl. of Cr. Richard earl of Burlington. [He did not appear.]
Cl. of Cr. Louis earl of Feversham.
E. of Feversh. Here.
Cl. of Cr. George earl of Berkeley.
E. of Berk. Here.
Cl. of Cr. Daniel earl of Nottingham.
E. of Notting. Here.
Cl. of Cr. Thomas earl of Plymouth.
E. of Plym. Here.
Cl. of Cr. Thomas viscount Falconberg.
L. Falconberg. Here.
Cl. of Cr. Francis viscount Newport, Treasurer of his Majesty's Household.
L. Newport. Here.
Cl. of Cr. Robert lord Ferrers.
L. Ferrers. Here.
Cl. of Cr. Vere Essex, lord Cromwell.
L. Cromwell. Here.
Cl. of Cr. William lord Maynard, comptroller of his majesties houshold.
L. Maynard. Here.
Cl. of Cr. George lord Dartmouth, master general of his majesty's ordnance.
L. Dartmouth. Here.
Cl. of Cr. Sidney lord Godolphin.
L. Godolphin. Here.
Cl. of Cr. John lord Churchill.
L. Churchill. Here.

Then his Grace the Lord High Steward addressed himself to the lord Delamere, the prisoner at the bar, in this manner.

L. H. Steward. My lord Delamere, the king being acquainted that you stand accused of High Treason, not by common report of hearsay, but by a bill of indictment found against you by gentlemen of great quality, and known integrity within the county palatine of Chester the place of your residence, has thought it necessary in tenderness to you, as well as justice to himself, to order you a speedy trial.

My Lord, if you know yourself innocent, in the name of God do not despond, for you may be assured of a fair and patient hearing, and in your proper time a free liberty to make your full defence: and I am sure you can not but be well convinced, that my noble lords that are here your peers to try you, will be as desirous and ready to acquit you, if you appear to be

innocent, as they will to convict you if you be guilty.

But, my lord, if you are conscious to yourself that you are guilty of this heinous crime, give glory to God, make amends to his vicerent the king, by a plain and full discovery of your guilt, and do not by an obstinate persisting in the denial of it, provoke the just indignation of your prince, who has made it appear to the world, that his inclinations are rather to shew mercy than inflict punishments. My lord, attend with patience, and hear the Bill of Indictment that hath been found against you, read. Read the Bill of Indictment to my Lord.

Cl. of Cr. Henry Baron of Delamere, hold up thy hand.

Delamere. My lord, I humbly beg your grace would please to answer me one question, whether a peer of England be obliged by the laws of this land to hold up his hand at the bar as a countenour must do? And I ask your grace this question the rather, because in my lord Stafford's case it was allowed to be the privilege of the peers not to hold up their hands.

L. H. Steward. My lords, this being a matter of the privilege of the peerage, it is not fit for me to determine it one way or the other; but I think I may acquaint your lordships, that in point of law, if you are satisfied this is the person indicted, the holding, or not holding, up of the hand is but a formality, which does not signify much either way.*

L. Delamere. I humbly pray your grace's direction in one thing farther, whether I must address myself to your grace when I would speak, or to your grace with the rest of these noble lords my peers?

L. H. Steward. You must direct what you have to say to me, my lord.

L. Delamere. I beg your grace would please to satisfy me, whether your grace be one of my judges in concurrence with the rest of the lords?

L. H. Steward. No, my lord, I am judge of the court, but I am none of your triers.† Go on.

Cl. of Cr. "Henry Baron of Delamere, thou standest indicted in the county palatine of Chester by the name of Henry Baron of Delamere of Mere, in the said county of Chester, for that thou as a false traitor against the most illustrious and most excellent prince James the second, by the grace of God of England, Scotland, France and Ireland, king, thy natural lord, not having the fear of God in thy heart nor weighing the duty of thy allegiance, but

* See Vol. 6, p. 1319, and the cases referred to in the note there.

† As to the difference between the course of proceeding in the Court of the Lord High Steward, and that in the Court of our Lord the King in Parliament, See the Case of Earl Ferrers, A. D. 1760, in this Collection, and the Report of the Conferences respecting the Bill for regulating Trials for Treasons.

being moved and seduced by the instigation of the devil, the cordial love, and true, due, and natural obedience which a true and faithful subject of our said late lord the king, towards him our said lord the king, should and of right ought to bear, wholly withdrawing; and contriving, practising, and with all thy might intending the peace and common tranquillity of this kingdom of England to disquiet, molest and disturb; and war and rebellion against our said lord the king, within this kingdom of England, to stir up, move and procure, and the government of our said lord the king, of this kingdom of England, to subvert, change and alter, and our said lord the king from the title, honour, and kingly name of the imperial crown of his kingdom of England to deprive and deprive, and our said lord the king to death and final destruction to bring and put; the fourteenth day of April in the first year of the reign of our said lord James the second, now king of England, &c. and divers other days and times as well before as after, at Mere in the county of Chester aforesaid, falsely, maliciously, devilishly, and traitorously, with divers other false traitors and rebels, to the jurors unknown, didst conspire, compass, imagine, and intend our said lord the king, thy supreme, true and natural lord, not only from the kingly state, title, power, and government of his kingdom of England to deprive and cast down, but also the same our lord the king to kill, and to death to bring and put, and the ancient government of this kingdom of England to change, alter, and wholly to subvert, and a miserable slaughter among the subjects of our said lord the king throughout his whole kingdom of England to cause and procure, and insurrection and rebellion against our said lord the king within this kingdom of England to procure and assist; and the same thy most wicked, most impious and devilish treasons and traitorous compassings, imaginings and purposes aforesaid to fulfil and bring to effect, thou the said Henry baron of Delamere, as a false traitor, then and there, to wit, the said fourteenth day of April in the first year aforesaid, and divers other days and times as well before as after, at Mere aforesaid, in the county aforesaid, falsely, unlawfully, wickedly, and traitorously with Charles Gerrard, esq. and other false traitors to the jurors unknown, didst assemble thyself, gather together, consult and agree to raise and procure divers great sums of money, and a great number of armed men, war and rebellion within this kingdom of England to levy and make, and the city of Chester, in the county of the same city, as also the castle of our said lord the king of Chester, at Chester in the county of Chester aforesaid, and all the magazines in the same castle then being to enter, take, seize, and surprise, and into thy possession and power to obtain: and that thou the said Henry baron of Delamere afterwards, to wit, the 27th day of May, in the first year aforesaid, falsely, unlawfully, wickedly, and traitorously didst take a journey from the city of London unto Mere aforesaid, in the county

of Chester aforesaid, thy traitorous purposes aforesaid to fulfil and perfect: and that thou the said Henry baron of Delamere afterwards, to wit, the fourth day of June, in the first year aforesaid, at Mere aforesaid, in the county of Chester aforesaid, in further prosecution of thy unlawful, most wicked and traitorous purposes aforesaid, divers liege people and subjects of our said lord the king, to the jurors unknown, with thee the said Henry baron of Delamere, and the aforesaid other false traitors to the jurors unknown, falsely, unlawfully, and traitorously, in the war and rebellion aforesaid, and in thy traitorous purposes aforesaid, to join and adhere, didst excite, animate, and persuade, against the duty of thy allegiance, against the peace of our said lord the king that now is, his crown and dignity, and against the form of the statute in that case made and provided. How sayest thou, Henry baron of Delamere, art thou Guilty of this high treason whereof thou standest indicted, and hast been now arraign'd, or Not Guilty?"

L. Delamere. My lord, I humbly beg the Indictment may be read again.

L. H. Steward. Let it be read again. [Which was done.]

L. Delamere. May it please your grace, I humbly beg the favour to be heard a few words before I plead to this Indictment.

L. H. Steward. My lord Delamere, I am very unwilling to give your lordship any interruption; but according to the methods of law, which must be observed in your case, as well as all others, you must plead to the indictment before you be heard to any thing else.

L. Delamere. May it please your grace, I have something to offer to your grace's and their lordships consideration which is a matter of law.

L. H. Steward. I know not what matter of law you have to offer: if you have a mind to demur to the Indictment, you may.

L. Delamere. Will your grace please to hear what I have to say? and then I shall submit it to your grace's judgment.

L. H. Steward. I would hear what you have to say, my lord, with all my heart if I could: but I must then pass by all the forms and usual methods of proceeding, and that without any advantage to you too, and that I suppose your lordship will not desire of me. Ask my lord, whether he be Guilty or Not Guilty.

Cl. of Cr. How sayest thou, Henry baron of Delamere, art thou Guilty of this High-Treason whereof thou hast been indicted, or Not Guilty?

L. Delamere. I beseech your grace to hear me what I have to say; I shall not detain your grace very long, but I beg your grace to hear me.

L. H. Steward. My lord Delamere, I must keep you to the known rules and methods of law: this is not your time to speak, but to plead in your proper time you shall be fully heard whatsoever you have to say.

L. Delamere. If your grace please, I have something to say which concerns all the Peers of England in point of right.

L. H. Steward. My lord, you must either plead, or demur to this indictment, that is the usual practice, before any thing else can be done.

L. Delamere. My lord, I have a plea to offer to your grace and my lords; and it is with reference to the privilege and right of peers of England.

L. H. Steward. If you any plea to offer, it must be received, my lord.

L. Delamere. My lord, amidst the hardships I have lain under by my frequent imprisonments and close confinement—

L. H. Steward. My lord Delamere, you must keep up to the legal method of proceedings; in cases of this nature I would, as far as is possible for me to do, indulge a person of your quality, and in your condition; but wistful I must do right to the court, and not permit any breach to be made upon the legal course of proceedings. You must plead, or demur to the indictment, before you are heard to say any thing.

L. Delamere. Will your grace be pleased to hear me tell you my reasons why I offer you a plea, of this nature to the indictment?

L. H. Steward. My lord, if you have any plea, put it in.

L. Delamere. Will your grace be pleased to accept it as I have done it? it may be it is not so formal, because I have had no counsel allowed me to peruse and sign it. But as it is I here offer it your grace's consideration.

L. H. Steward. Ay, put it in. [Then it was delivered to the Clerk.]

L. H. Steward. Read it.

Cl. of Cr. The humble Plea of Henry lord Delamere, to the indictment of High-Treason against him, now to be tried by the Lord High Steward and Peers here assembled.

"The said lord Delamere, saying to himself all benefit of advantage of any further or other matter of exception to the generality, uncertainty, or insufficiency of the said indictment, and all matters and things which do or may concern the same, for plea hereunto saith,

"That he was by his majesty's writ summoned to this present parliament, which began the 19th day of May last, and attended his duty there as a peer of this realm.

"That for high-treason supposed to be committed by him, during the sitting of the same parliament, he was the 26th day of July last committed by warrant of the earl of Sunderland, one of his majesty's principal secretaries of state, to the Tower of London.

"That the Peers in parliament assembled, taking notice by his petition of the 9th of November last, of his being absent from his attendance in parliament, sent a message to his majesty to know the reason why he the said Henry lord Delamere, a peer of that house, was absent from his attendance.

"Upon the 10th day of November last, the lord treasurer reported his majesty's answer to the said message, viz, That the said lord Delamere was absent from his attendance in parliament, because he stood committed for high-treason, for levying war against the king this last summer, testified upon oath, and that his majesty had given directions that he should be proceeded against with all speed according to law.

"The House of Peers not being satisfied with this answer, the debate thereof was adjourned till the Monday morning following.

"On which day the lords resuming the debate concerning the lord Delamere and the king's message; after some debate, the lord chancellor, by his majesty's command, gave the House an account what proceedings had been against the lord Delamere, since his majesty's Answer to their Address concerning his absence from the House; which was to this effect:

"That the king had given order for a speedy prosecution of him: That the treason whereof he was accused was committed in Cheshire; and that being a county palatine, the prosecution ought to be there, and not in the King's Bench; as it might be if the treason had been committed in another county: and that therefore his majesty had given order for a commission of Oyer and Terminer into Cheshire, in order to the finding of an Indictment against him for the said Treason. And that accordingly a commission of Oyer and Terminer was already sealed; and if the indictment be not found before the end of the term, the said lord Delamere's prayer being entered in the King's Bench, he should be bailed.

"All which proceedings do more fully appear in the Journals of the said House of Peers; to which the said Henry lord Delamere doth refer himself.

"Afterwards, that is to say, upon the [20th] day of [November] the said parliament was prorogued by his majesty unto the tenth day of February next, as by the said Journals it doth appear.

"Upon all which matters the said Henry lord Delamere doth humbly tender this his plea to the jurisdiction of your lordships in this cause, and doth humbly conceive your lordships ought not to proceed in the trial of him upon the indictment of high-treason now before you: And that for these following reasons.

"First, Inasmuch as it appears by the said petition of the said Henry lord Delamere, and the several orders of the lords, and the king's answer to the message of the lords thereupon; that the said House are already possessed of his said cause, which is the same supposed treason for which he was at first committed, and which is the same treason for which he now stands indicted before your lordships. And for this reason, your lordships, as he humbly conceives, by the law and custom of parliament, which is part of the law and custom of the land, ought not to proceed against him upon the said in-

dictment; but his said cause ought wholly to be determined and adjudged in the said House of Peers, and not elsewhere, as in like cases has been formerly done.

“*Secondly*, Whereas it is the right and privilege of the peerage of this realm, that no peer thereof ought to be tried or proceeded against for high-treason during the continuance of the parliament, except in the said House of Peers, and before the whole body of the peers there: And whereas the aforesaid parliament is now continuing in prorogation, until the tenth day of February next abovesaid, the said Henry lord Delamere humbly conceives that by the law and custom of parliament hitherto used, which is part of the law and custom of the realm, he ought not, nor can be tried before your lordships for the said treasons, because the said parliament is still continuing, and not dissolved.

“*And lastly*, The said Henry lord Delamere doth further say, That he is the same Henry lord Delamere mentioned in the commitment, petitions, messages, answers, and indictment now read unto him, and the said treason for which he was committed, it is the same treason mentioned in the commitment, petition, messages, answers, and indictment, as aforesaid.

“*To which said Indictment he humbly conceives he is not bound by law to make any further or other Answer.*”

L. Delamere. May it please your grace, and you, my noble lords, I do not offer this Plea out of any diffidence or distrust in my cause, nor out of any dislike I have to any of your lordships that are here summoned to be my triers; I cannot hope to stand before any more just and noble, nor can I wish to stand before any others: but your grace and my lords will pardon me if I insist upon it, because I apprehend it a right and privilege due to all the peerage of England; which, as it is against the duty of every peer to betray or forego, so it is not in the power of any one, or more, to waive it, or give it up without the consent of the whole body of the peers, every one of them being equally interested. This, my lord, I humbly demand as my right and privilege as a peer of England, and submit to the direction of your grace and my noble lords.

L. H. Steward. What do you say to it, Mr. Attorney?

Att. Gen. (Sir Robert Sawyer.) May it please your grace, this plea that is here offered by this noble lord, is a plea to the jurisdiction; but, with submission, it needs very little answer, for it has very little in it: The force of the plea is, that he ought to be tried by the whole body of the House of Peers in parliament, because the parliament is still continuing, being under a prorogation, and not dissolved; and because there was some agitation of the matter concerning this prosecution, upon his petition, in the House of Lords; and therefore it concludes, that he ought not to be tried by your grace and these noble lords upon this commission, but by

all the lords in parliament. With submission, my lord, this is contrary to all the ancient precedents, and against the known rules of law; for the law is, if the king pleases to try a peer in parliament, then the record may be brought into the House, and there they proceed as in other cases, and all the peers are judges. Thus it is in the time of a session of parliament; but if the parliament be prorogued, there are many instances (and indeed none to the contrary) that after a prorogation, the proceedings are before the High-Steward by commission. And as to the other part of the case, I have this to say to it, that there is nothing at all depending in the House of Lords that can oust this court of the jurisdiction; for there was not so much as any indictment returned there, no, nor so much as found during the session of parliament. All the agitation was only upon my lord's petition, and the king's answer; that he intended as speedy a prosecution as could be: Besides, my lord, your grace sees it is a plea in paper and in English, without any counsel's hand, and therefore I hope your grace does not expect that I should formally demur to a plea in this form, and that contains no more of substance in it. But I must desire your grace to overlook it, and that the prisoner may plead in chief.

L. Delamere. My lord, I humbly pray that I may have counsel assigned me, to put my plea into form, and to argue the matter of it.

L. H. Steward. My lord Delamere, I am sure I ought, and ever shall be as tender of the privileges of the peers of England, as any other person whatsoever: For I am concerned, as well in interest as inclination, so to be, having the honour to be one myself: But I know your lordship will not think the privilege of the peer is concerned in this matter; nor will your lordship, I dare say, insist upon matters that are purely dilatory, if your lordship be satisfied that they are so: And therefore give me leave, my lord, to mind you of a few things, whereby your lordship will easily see, that the chief things on which you insist, are grounded upon mistakes. First, you say, the House of Peers was possessed of the cause; which could not be, and I will tell you why; because there was no indictment ever removed thither or lodged there; which plainly proves that the lords were never possessed of the cause. Nor indeed was the bill found, upon which you are now arraigned, till after the prorogation of the parliament. So that they could never come to be possessed of this matter. These are mistakes in point of fact, and your lordship cannot but well know them to be so.—And there is a great mistake in the law, that during the continuance of a parliament (though it were prorogued, yet if not dissolved) a peer cannot be tried but by the House of Lords. This certainly is a very strange doctrine, and is not only against the reason and methods of law, but contrary even to your lordship's own experience: For your lordship cannot but very well remember, that during the continuance of the parliament, after a prorogation, the lord Cornwallis was tried

before the High-Steward, and such a number of peers as were then summoned, upon such a commission as I now sit here by.* But indeed during the sitting of the parliament then all the peers are both triers and judges, as was in the cases of my lord Stafford, † and my lord of Pembroke; ‡ they being a court of judicature, then actually sitting: and therefore this plea is grounded as upon mistake in fact, so upon a mistake in point of law. So that though, as I said at first, it is both my duty and interest to preserve the privileges of the peers, yet I must take care that no injury be done to the law, and truly I take this plea to be altogether dilatory, and I suppose your lordship is satisfied of it, and will not insist upon it.

L. Delamere. If your grace please, it was alleged and agreed in the case of my lord of Bristol, that the cause of a peer in time of parliament properly belonged only to the House of Lords; and that which possessed the House of Lords of his case, was, as I apprehend, no more than is in my case, a petition upon the account of being absent; and there the lords claim the cognizance of the whole cause, and nothing was done but in the House of Lords. And as to the instances your grace has mentioned of my lord Cornwallis (and there was another of them, my lord Morley §) this question was never under debate in those cases: therefore I suppose they cannot be admitted as precedents.

L. H. Steward. But, my lord, it would have been an error in the whole proceeding, if this court had not jurisdiction: And sure the judges, who are always called to assist in such cases; and who in matters of life, even in the cases of common persons, are so tender and careful that there be no irregularity in the proceedings, would not have let things pass in that manner had they been erroneous.

L. Delamere. My lord, I think no other precedents are produced but those two, and there the question was never debated.

L. H. Steward. I only put you in mind of those that were lately within memory; but no question of it, there are a great many more instances to be given.

Att. Gen. I pray your grace's judgment to over-rule the plea, and that my lord may plead in chief.

L. Delamere. I hope your grace will be pleased to assign me counsel to put my plea in form; and that I may have time for it, that they may be heard to make a solemn argument in law.

L. H. Steward. My lord, if you insist upon it, and think it worth the while to have counsel heard, we will hear them.

L. Delamere. I submit to your grace, I only offer it that I may not be wanting to the support of the peers privileges; I assure your

grace, I speak not to put off the cause, for I am willing to come to my trial, and I have reason so to be, for I question not but to make my innocence appear.

L. H. Steward. My lord, I tell you what my opinion of the plea is, but if you insist upon it to have your counsel heard, I will hear them.

L. Delamere. I have no counsel here, if your grace please to give me time to send for them, and that they may prepare to argue it.

Att. Gen. No, my lord, if your grace will hear counsel, I for the king must pray that it may be done presently; for a plea to the jurisdiction is never favoured, nor is the party to be allowed time to maintain it, but he must be ready at the time it is offered.

L. Delamere. Pray, my lord, how was it done in the case of Fitzharris*? His plea was a plea to the jurisdiction, and he had four days allowed him to put his plea in form, and to instruct his counsel.

L. H. Steward. I am not able at present to remember what was done in such or such a particular case: But according to the general method and course of law, the plea to the jurisdiction is not favoured, nor time allowed to it, but the party must be ready to maintain it presently.

Att. Gen. But, with submission, my lord, that case of Fitzharris is nothing to this noble lord's case neither: There was a formal plea put in writing, and drawn up in Latin, and a formal demurrer joined, and thereupon I did take time to speak to it. But, with your grace's favour, by the law, the prisoner must be always ready to make good his plea, if he will oust the court of their jurisdiction.

L. H. Steward. Mr. Attorney, if my lord Delamere does insist upon having his counsel heard, it is not fit for me to refuse hearing what they can say.

Att. Gen. But that must be presently then, my lord.

L. Delamere. It is my duty, my lord, to submit to what your grace and my noble lords shall determine: I would insist upon nothing that should offend your grace or them.

Att. Gen. If your grace pleases, you are the only judge in this case in matters of law: For these noble lords, the peers, are only triers of the fact. Therefore I appeal to your grace's judgment, and pray for the king, that this plea may be over-ruled; it being vitious and naught, both in form and substance.

L. H. Steward. My lord Delamere, I must acquaint you, that according to the constitution of this court matters of law are determined by me, as the sole judge, while I have the honour to act under this commission: But if your lordship insist upon it, to have your counsel heard, God forbid that I should deny it you. I will hear what your counsel will say; and afterwards I will, according to the best of my understanding, deliver my judgment.

* See his Trial, vol. 7, p. 143.

† See his Trial, vol. 7, p. 1293.

‡ See his Trial, vol. 6, p. 1309.

§ See his Trial, vol. 6, p. 769.

* See his Case, vol. 6, p. 243.

L. Delamere. My lord, I have never had any counsel assigned me.

L. H. Steward. My lord, if you have any counsel ready, we will hear them.

L. Delamere. If your grace please to assign me counsel, and give me time to send for them, and them time to prepare, I will obey your grace's directions; but I could have none here ready, because none were assigned me.

L. H. Steward. My lord, you cannot, by the course of law, have counsel allowed you in the case of a capital crime, till such time as the court, where you are called to answer, is apprized that there is some matter of law in your case, that may need counsel to be heard to inform their judgment, and which they may think convenient to hear counsel to: for if in any case, any prisoner at the bar shall before-hand be allowed to have counsel to start frivolous objections, such as this (we all know that there are some, who will be easily prevailed with to endeavour to pick holes where there are none) and to offer matters foreign from the things whereof the party stands accused and upon the prisoner's bare request, counsel must be heard to every trivial point, the courts of law would never be at an end in any trial, but some dilatory matter or other would be found to retard the proceedings: but it does not consist with the grandeur of the court, nor your lordship's interest, to let such a frivolous plea interrupt your lordship's trial. However, if your lordship has counsel ready, I will not refuse to hear them.*

L. Delamere. My lord, I hope the privilege of the peers of England is not frivolous. I assure your grace, I do not offer this matter, as if I thought it more conducing to my interest, than my trial now. No, my lord, it is not for myself, but for the whole body of peers, of which I have the honour to be a member: And if my lords here are satisfied it is not the right and privilege of the peers, I acquiesce.

L. H. Steward. Pray, good my lord, do not think that I should say any such thing, that the privilege of the peers is frivolous; for you do not bear me say, that this is one of their privileges. As I would not willingly mistake you, so I desire your lordship would not misapprehend or misrepresent me. I spoke not at all of the peers privilege, but of your plea: I tell your lordship, I think your plea is not a good plea, to oust this court of the jurisdiction of your cause. But if your lordship have a mind to have your counsel heard to it, in God's name let them come; they shall be heard: and when that is done, to satisfy you the more, I will advise with my lords the judges, that are there to assist, what they take to be the law in the case; and, upon the whole, I will deliver my judgment as well as I can.

L. Delamere. I hope your Grace will be pleased to advise with my lords the peers here present; it being upon a point of privilege.

L. H. Steward. Good my lord, I hope you that are a prisoner at the bar, are not to give me direction, who I should advise with, or how I should demean myself here.

L. Delamere. I beg your grace's pardon; I did not intend to give your grace any direction.

L. H. Steward. My lord, I shall take care to perform that duty that is incumbent upon me, and that with all tenderness to your lordship: and I assure your lordship, I will have as much care that I do not injure you, as I will that I do not wrong my own conscience; and I will endeavour to discharge my duty to both with the utmost fidelity.

L. Delamere. I humbly thank your grace; I question it not: but if your grace please—

L. H. Steward. My lord, you must pardon me; I can enter into no farther interlocutions with your lordship. If your lordship have any mind to have counsel heard, and your counsel be ready, we will hear them.

L. Delamere. If your grace require of me to produce counsel presently, and they to argue it immediately, I must acquaint your grace, I cannot do it: for I have none here.

L. H. Steward. My lord, I cannot tell how to help it: the plea must then be over-ruled and rejected.

Clerk of the Cr. Henry Baron of Delamere, art thou guilty of the high-treason whereof thou standest indicted, and hast been now arraigned, or not guilty?

L. Delamere. Not guilty.

Clerk of the Cr. Culpit, how wilt thou be tried?

L. Delamere. By God, and my peers.

Clerk of the Cr. God send thee a good deliverance. Serjeant at Arms, make proclamation.

Serjeant at Arms. O-yes! If any one will give evidence on behalf of our sovereign lord the king, against Henry baron of Delamere, the prisoner at the bar, concerning the high-treason whereof he stands indicted, let them come forth, and they shall be heard: for now he stands at the bar upon his deliverance.

Then his Grace gave the charge to the Peers triers in this manner:

L. H. Steward. My lords, I know you cannot but well remember, what unjust and insolent attempts were made upon the rightful and unalterable succession to the imperial crown of these realms, under the pretence of that which has been so often found to be the occasion of rebellion, I mean, the specious pretence of religion, by the fierce, froward, and phanatical zeal of some members of the House of Commons, in the last parliaments under the late king Charles the second, of ever-blessed memory. Which, by the wonderful providence of Almighty God, not prevailing, the chief contrivers of that horrid villany conspired together how to gain that advantage upon the monarchy by open force, which they could not obtain by a pretended course of law.

* See the Note to the Case of Don Pantaleon Sa, vol. 5, p. 466.

And in order thereto, it is too well known, how they had several treasonable meetings, made bold and riotous progresses into several parts of the king's dominions; thereby endeavouring to debauch the minds of the well-meaning, though unwary and ignorant, part of the king's subjects.

But these their evil purposes it pleased God also to frustrate, by bringing to light that cursed conspiracy against the life of his sacred majesty king Charles the second; as also, against that of our dread sovereign that now is, whom God long preserve.

These hellish and damnable plots, one would have thought, could not have survived the just condemnation and execution of some of the chief contrivers of them; especially considering, that after it had pleased Almighty God to take to himself our late merciful and dread sovereign, no sooner was his sacred majesty that now is, seated in the royal throne of his ancestors, but he made it his utmost endeavours, not only to convince the world that he had quite forgot those impudent and abominable indignities that had been put upon him, only for bring the best of subjects, and the best of brothers; but did also give forth the most benign assurances imaginable to all his loving people, that he would approve himself to be the best of kings.

And further to evince the reality of these his gracious and heroic resolutions, he immediately called a parliament; and therein repeated, and solemnly confirmed his former royal declarations of having a particular care of maintaining our established laws and religion: With which that wise, great, and loyal assembly were so fully and perfectly satisfied, that they thought they could not make sufficient returns of gratitude for such gracious and princely condescensions.

And yet, my lords, while the king and the parliament were thus, as I may say, endeavouring to out-do each other in expressions of kindness, that wicked and unnatural rebellion broke out; and thereupon the arch-traitor Monmouth was, by a bill brought into the lower house, and passed by the general consent of both houses, (and I could wish, my lords, for the sake of that noble lord at the bar, that I could say, it had passed the consent of every particular member of each house) justly attainted of High Treason.

My lords, what share my lord at the bar had in those other matters, I must acquaint you, is not within the compass of this indictment, for which you are to try him, as his peers; for that is for a treason alledged to have been committed by him, in his majesty's reign that now is.

Give me leave, my lords, to detain you but with a word or two more on this occasion; and that is, to let you know, that as my lord at the bar may, with great safety and security to himself, rely upon your lordships candour and integrity, that you will be tenderly careful, and ready to acquit him of the treason whereof

he is accused, if, upon the evidence that shall be given you, you shall find him innocent: So I must tell you, the king has an entire confidence in your resolution, fidelity, and good affections to him, that you will not, by reason of the prisoner's quality, and nearness to you, as being a peer of this realm, acquit him if he shall appear to be guilty.

My lords, I have one thing further to mind your lordships of, that, according to the usual forms of proceedings in these cases, if your lordships have any questions to propound, wherein you would be satisfied as to any matter, either of fact or law, your lordships will be pleased to put those questions to me, and I shall take care to give your lordships the best satisfaction I can.

L. Delamere. My Lord High Steward, I beg the favour of your grace, I may have one to write for me.

L. H. Steward. Ay, by all means. Let my lord have whom he pleases to write for him.

Mr. Recorder. (Sir Thomas Jenner.) May it please your grace, my lord High Steward of England, and you my noble lords, the peers of the prisoner at the bar: Henry baron of Delamere, the prisoner at the bar, stands indicted, for that he, as a false traitor against the most illustrious and most excellent prince, our sovereign lord the king that now is, not having the fear of God in his heart, nor weighing the duty of his allegiance, the 14th day of April last, at Mere, in the county of Chester, did maliciously conspire, with other false traitors, to the jurors unknown, the death and deposing of the king: And for the better and more effectual fulfilling of those his treasons, the said 14th day of April, at Mere aforesaid, did maliciously and traitorously assemble, consult, and agree with Charles Gerrard, esq. and other false traitors, to raise great sums of money, and procure numbers of armed men, to make a rebellion against the king, and the city and castle of Chester to seize, with the magazines there; and that afterwards, the 27th day of May last, he took a journey from London to Mere aforesaid, to accomplish his treasonable intentions. And further, that upon the 4th day of June, in further prosecution of his traitorous purposes, at Mere aforesaid, he did induce divers subjects of our lord the king, to join with him, and other false traitors, in his treason. And this is laid to be against the duty of his allegiance, against the peace of our sovereign lord the king, his crown and dignity, and against the form of the statute in that case made and provided. To this indictment, may it please your grace, and the rest of these noble lords, my lord Delamere, the prisoner at the bar, has pleaded Not Guilty; and for his trial, has put himself upon his peers. We shall therefore call our witnesses for the king; and if we prove him guilty, we do not question but your lordships will find him so.

All. Gen. May it please your grace, my lord High Steward of England, and you my noble lords the peers: My lord Delamere, the

prisoner at the bar, stands indicted for conspiring the death of his majesty, and in order thereunto to raise a rebellion in the kingdom.

My lords, in proving this charge upon him, we crave leave to give your grace and your lordships some short account, by witnesses that we have here, of a former design that was previous to this matter, for which this noble lord stands here accused: And we shall not trouble your grace, and your lordships, with any long evidence, because it has received many solemn and repeated trials; and, as to the proof of it, has been confirmed by as many verdicts. But we do it, rather to give some account, as an introduction to a material evidence, by shewing, that Cheshire, which was the province of this noble lord, was one of the stages where that rebellion was principally to be acted; and that, preparatory to it, great riotous assemblies, and tumultuous gatherings of the people, were set on foot by the conspirators.

We shall then shew, my lords, that after the late duke of Monmouth, (the head of the conspiracy) went beyond sea, (especially after the death of the late king) frequent messages, and intercourse of correspondency, were sent and held between him, and the rest of his accomplices abroad, and their fellow-conspirators here at home.

And particularly, we shall prove, that a little before the rebels came over last summer into the west, the duke of Monmouth did dispatch one Jones, (who was one of the most considerable agents in this contrivance) to come from Holland into England, to let his friends know, that though he had intended to go into Scotland, and begin his work there, yet now his resolutions were for England; where he hoped, his friends would be prepared for him. And with this message and resolution of his, Jones was to acquaint some lords, (who they were, the witness will tell your lordships, but) among others, this noble lord, the prisoner, was one: And to acquaint them, besides, that he would immediately set sail for England, whither he would come so soon as he could get. That he had a design to have landed in Cheshire, where he expected to be most readily received; but finding that inconvenient, they should have notice four or five days beforehand, of the place of his landing, which he intended should be in the west. And, among the directions that Jones had to give to those lords, one was, that they should immediately repair into Cheshire, there to wait for the news.

These instructions Jones had given him in writing, but sealed up, with an injunction not to open them till he came to sea; and then he was to peruse that writing, and deliver his message according to his instructions: And in that writing was the name of this noble lord, as one that was principally relied on to carry on the rebellion in Cheshire. And we shall give you an account, that the late duke of Monmouth did look upon Cheshire as one of his main supports, and upon my lord Delamere as a principal assistant there.

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My lord, this message was Jones to communicate to captain Matthews, and captain Matthews was to transmit it to this noble lord, and the other persons that were concerned with him. Jones arrived with this message here in England upon the 27th of May: [And I must beg your lordships to observe the time particularly.] But captain Matthews, to whom he was directed, was not to be found; nor major Wildman, to whom, in the absence of captain Matthews, he was to apply himself, as you will hear more fully from the witness's own mouth: Thereupon he sends for one Disney,* (a name which your lordships cannot but know, he being since executed for treason) and one Brand, whom your lordships will likewise hear of; and they meet with the same Jones, who communicates his message to them, and they undertake to deliver it to the persons concerned; captain Matthews being out of town, and major Wildman not to be found.

That very night, my lords, this same Brand and Disney they meet this noble lord, my lord Delamere, at the coffee house, and give him an account of the messages: And as soon as ever he had received the message, upon that 27th of May, at ten of the clock at night, does my lord Delamere dispatch out of town, with only one servant to attend him, and two other friends that he had picked up, or appointed to meet him, and go with him.

With all these hedges of plot and design, does my lord Delamere set out that night. It was the same night that Jones came to town: It was late at night. He changed his name, and went by the name of Brown. He chose to go all the by-roads, and would not keep the high common road; and went with great speed as we cannot but presume according to the message delivered by Jones, on purpose to repair into Cheshire.

And if your lordships please to observe, you will find several remarkable instances of plot and contrivance in the matter: First, That a nobleman, and one of so considerable a character in his country, as my lord Delamere, should make such haste out of town with so small an equipage as but one servant. Then, that he should go so late at night: Again, that he should go change his name; and that should prove to be a name not casually taken up, as the first name he could think of next his own; but a name of distinction, that he was known by among all his own party: For all the communications between the confederates and him, were managed, as to him, under the name of Brown. By that name several of the late duke of Monmouth's traitorous declarations were sent for; which were to be sent to him, or by him into Cheshire: And that alone, with submission, my lords, would be a shrewd circumstance of suspicion, that a noble lord, such a one as my lord Delamere, should assume the name of a commoner, and post out of town so ill accompanied, in a dis-

* See his Case p. 465 of this Volume.

guise, at that time of night; especially the parliament being then sitting, as it really was.

But besides all this circumstantial evidence, we shall prove, by positive testimony, what the hasty business was, that made my lord undertake this journey in this manner: For, having notice of the duke of Monmouth's intention to land speedily in England; when he comes into Cheshire, he actually sets about the work to put that county in a forwardness to assist in the rebellion; endeavoured to stir up the people to join with him; and acquaints one that he employed in that affair with the whole design, that he was engaged to raise so many thousand men, and so much money, to be ready by such a day.

Nor does my lord rest here: But after the duke of Monmouth was landed in the west, to corrupt the minds of the people, we shall prove what discourses he had, (and these will testify his inclinations to the cause) concerning the great victories he had obtained over the king's forces, and how he applauded his conquests.

My lords, we shall plainly shew you all this that I have opened in plain proof: And then, we shall submit to your lordships judgments, whether this noble peer be Not Guilty, as he has pleaded to his indictment?

L. H. Steward. Call your witnesses, Mr. Attorney: Who do you begin with?

Att. Gen. My lord Howard of Escrick: We desire he may be first sworn. [Which was done.]

L. H. Steward. Well, what do you ask my lord Howard?

Att. Gen. My lord, I call you to give an account what you know of a design of an insurrection that was to have been; and in what parts; and what share Cheshire was to have had in it, in the late king's time?

L. H. Steward. You hear the question; what say you to it, my lord?

L. Howard. My lord, I am to direct myself to speak to what was done in the late king's time: For as to that noble lord at the bar, I have nothing to say against him.

L. H. Steward. My lord Howard, if I apprehend Mr. Attorney aright, you are not called as a particular witness against my lord Delamere; but only to give an account, what was agreed upon in any consultations, where you were present, in the late king's time, about a conspiracy for an insurrection?

L. Howard. If so, my lord, then I am called not to be an evidence against my lord Delamere, but against myself; that is, to repeat what I have often delivered at several trials, in the courts of justice; and which I must always repeat, with shame and confusion for my guilt, as I cannot but always reflect upon it with sorrow and horror. But if it be for the service of his Majesty, and this honourable court, for me so to do, I shall endeavour to comply with it, and repeat it as well as I can, by the assistance of a broken memory; it being an account of things done several years past, and from a memory interrupted by such accidents as are very well

known, and as have disabled me to make a more distinct and particular relation before so great an auditory. My lord, I suppose, it will be expected, I should begin my account when the occasion and ground, and the time when those things happened.

L. H. Steward. Take your own method, my lord.

L. Howard. Truly, my lord, I am not able to fix the particular time, unless you will give me leave to reckon the years by the sheriffs of London, as the Romans used to do theirs by consuls; for I have no other means of computing the exact time.

L. H. Steward. Pray, my lord, tell the times as near as you can, and use what helps for your memory you think best.

L. Howard. My lord, it was in that year, when Mr. Shute and Mr. Pilkington were sheriffs for the city of London: And, at that time, it is well known how great heats did arise upon the contests that were in the city, about election of officers for the year ensuing—

Att. Gen. May it please your grace, my lord Delamere seems to be faint with standing. If your grace please a chair may be provided for my lord to sit in.

L. H. Steward. Ay, by all means: Let a chair be provided for my lord to sit down. Go on, my lord.

L. Howard. My lord, I was saying, that the contest about the disputed election of sheriffs, had occasioned such heats in the city of London, and other places, that it was even beyond the common expressions of discontent. I knew nothing of any particular design there was in hand till about six weeks after, when captain Walcot came to me, a person I had known some time before, and upon discourse, acquainted me, that he had found out that there were some persons engaged in a considerable action that was near its execution; and that in order to it, he had notice given him to make preparation, and thereupon he had thought fit, for that reason, to withdraw from the place where he did at that time lodge, (which was in Red-Lion Court, in Fleet Street, as I remember) and betake himself to a private lodging, that he might be the readier for action; and to put himself into a better equipage for joining in the enterprize, he had bought himself a horse, and sent his son into Ireland to turn all he could into ready money, and return it, that he might be the better able to go through with the undertaking. My lords, this was a great surprise to me; for though I knew, as all the rest of the world did, that there were great discontents, yet, till then, I never had any intimation of any particular design. I told him I was going into the country, but should be glad to know how things went, and desired him to write to me, and gave him a little cabala or cypher to disguise the matter he was to write about. And when I was in the country, I did receive several letters which intimated something of a design that was going on, and at last he writ with some warmth to me, of a necessity we

were under to enter into action, and of the readiness of my correspondents; (for the style of the letters was that of merchants, for so was the cant that I had given him:) But truly I was not over hasty in my return to London, because I rather chose to see what would be the issue of what was then projected, before I did intermeddle in such an affair, and so made use of all the delays I could to retard my return, and came not to town till that week which determined the long continued controversy in London: nay, and then also avoided meeting with any body in any set way, till I could better see how things were managed, and what event they would probably come to. Thereupon I would not go to my own house, but took up my lodging at Mile-end, and lay three or four days, till the day came for confirming the new elected sheriffs, and the election of a new lord mayor, which, as I take it, is on the day before Michaelmas-day, and Michaelmas-day. When that day was over, I could not find there was any intention of entering into any sort of action, I found indeed there were great murmurings in the mouths of all sorts of people, and very angry warm speeches, and nothing else: So I thought the business was over for that time, and thereupon away I went to my own house. This, my lords, was upon the Saturday, as I remember: Upon the Monday morning captain Walcot came to me, and desired that he might have some private discourse with me in my garden; and there he told me, my lord Shaftesbury had withdrawn himself, and that he did believe things were in a great preparation for action. I desired him to tell me what it was; he answered me, That he desired to be excused in that, for I must go to my lord Shaftesbury, who would give me an account of the whole: and withall he told me, my lord Shaftesbury had been much deserted and ill used by those lords upon whose concurrence he had relied, and that was the reason why he had withdrawn himself, and kept himself so private. I told him, I did not know my lord Shaftesbury had any desire to speak with me. Yes, he said he had, for he had sent him to me on purpose, and he was to bring back my answer, whether I would join or no. I told him if my lord desired to speak with me, I would wait upon him; and thereupon I went with him, and he carried me to a place where my lord Shaftesbury was retired into the city, somewhere about Foster Lane or Wood-Street, at the house of one Watson. When I came there, after salutation, my lord Shaftesbury began to make great reflections upon the misery and badness of the times, particularly upon the issue of that great affair, the election of the sheriffs, which had ended so unfortunately, to the terror of all good men: For whereas before, the great and sure resort of innocency was to the integrity of our justices, when returned by fair and equal sheriffs, they looked upon the eagerness of getting those persons sworn that were then in office to be a design to intrap the innocent, the elected

sheriffs being esteemed persons that would accommodate themselves to the humour of the court; and now every man must be run down for crimes that he was no way guilty of, if the finger of the court did but point him out to destruction. The apprehension of this, he said had made him withdraw himself, not knowing how soon he might be seized, should he have remained in public; and he thought the danger was as imminent upon, and likely to reach to others, as well as to him; and particularly to myself; and therefore, he said, the sense of this danger ought to put every Englishman, that had a value for his country, and any thing that was dear to him in it, upon using his utmost endeavours to give some prevention to those calamities which were impendent over us, and which threatened the destruction of all men that stood up for the rights of the people: and this he said was his resolution.

My lord, in order to this, he declared to me what preparations had been made for the raising of force for this purpose; he said, there were eight or ten thousand men (I cannot fix the particular number) that he was well assured to have ready in the city; that there had been divers horse (I think about fourscore or an hundred he named) that about a fortnight before, had been, by parcels, drawn into the town, without being observed; and these were in daily expectation to go into action; but through the unhandsome disappointment of the duke of Monmouth, and the other lords that adhered to him, who were to have joined in the action, and have set the wheels at work in other parts, he was left alone to do the whole in his province of London, they being not ready to concur according to their engagement: but as he should have the greater danger, so he should have the greater glory; and he resolved to go through with the attempt, or perish in the execution. To all this discourse I gave such an answer as the nature of the thing required: I told my lord Shaftesbury, I could not deny all those things to be true, as he had represented them in his discourse; and that I would not distrust his judgment so much, as to suppose he would enter upon such an affair, without due deliberation of all the circumstances requisite to it; and so I would not question, but there was such preparations, and that he had assurance of such a force, as he had spoke of, whenever they should begin any action. But I told him something stuck with me, and troubled me very much: that, in a time of such difficulty, when the convenient help of the nation was all little enough to join in the work, he should stand by himself, and engage in such an enterprise, in separation from those other lords, of whose help there would be so much need. He said, he could not help it, they had appointed this time and that, but now, when it came to the push, they were not ready to do their parts; but the people were now in such expectation of something to be done, especially in London, that it was impossible to restrain them, and as

impossible to get those lords ready to join with them. I told him, I was altogether unacquainted with the proceedings in this affair, and that all of it was wholly new to me: but pray, my lord, said I, give me leave to act that part in this business, that, I think, will most conduce to the successful issue of it, which is to be a mediator between you; and let me desire you to let things rest as they are, till I have endeavoured to create a better understanding between your lordship and those lords, of whose tergiversation you seem to complain. Upon this my lord was in a great heat, and expressed himself with great warmth; but at last, with much ado, he gave me permission to go to the duke of Monmouth, and assure him, and the rest of the lords that were concerned, and tell them from him, that if they would be ready to take the posts that were assigned them, according to their own former agreement, and immediately enter upon action, he would join with them; but if not, he was resolved to go on alone. This was, as I remember, upon Tuesday, the second of October: upon the Wednesday morning I went to find out the duke of Monmouth, but coming to his lodgings, he was gone to Moor-Parke, where when I came, I found several persons with him: but after a little time, I separated him from the company, and whispering to him, I gave him to understand, how great a disorder I found my lord Shaftesbury in, and how great a complaint he made of his being deserted by him, and the other lords engaged with him, and what resolution he had taken to set upon the work alone. "My lord, says he, I think the man is mad, his fear makes him lose his understanding; I do not know why he hides himself from his friends, that nobody can tell where he is; but as to that which he speaks of, of our forsaking him, and breach of faith, he is mistaken. For, it is true indeed, we are about doing the thing, that he is so eager for, but we are not for doing it so hastily, as his fears precipitate him to do; and he must excuse us, if we comply not with his humour, to hazard the whole undertaking by a rash beginning." Upon that, I said to him, My lord, I shall not discourse the particularities of the business with your grace; but this is all that I at present address to your grace for, to be a means, if I can, with your grace, as I have been with him, to procure a meeting between you, that you may settle it with one another. "With all my heart, says the duke, pray let it be so; for though my lord Shaftesbury is angry without a cause, yet I would not have him lose himself in a temerarious undertaking." My lord, said I, I will tell him what you say, and will see if I can work him to a compliance with the proposal. The next day, being Thursday, my lord, I went to my lord Shaftesbury again, and reported to him the discourse I had with the duke of Monmouth, and what answer he had given to his complaint of their deserting him. He replied, "It was false, they had positively engaged to be ready

by such a time, and had appointed the very day; but now they were off, and would not tell when they would be ready:" and withal, he told me, he greatly suspected the duke of Monmouth to have a secret correspondence with the king. I then desired him, That he would please to consent to the treaty that was proposed, and give the duke of Monmouth and the lords a meeting. He in great heat replied, no, he would come no more at them. It is strange, my lord, said I, that you should have such an opinion of these men, that they would go about to betray you; they are not men of that size: but he persisted in it, that they had dealt perfidiously with him: For after a positive agreement, when the thing was brought just to the birth, they withdrew their helping hand: but he was sure, in London, he could raise a sufficient force to do the work, and if he were but once set on horseback, he would head them himself: But yet he was willing to put it off for a fortnight, or three weeks longer, if they would be sure to keep pace with him. With this proposal I went the next day, which was Friday, to the duke of Monmouth, and had the same answer from him, that I had before; but withal, he bid me tell my lord Shaftesbury, That he did make it his earnest request to him, to give him and his other friends a meeting before he engaged in this business: For he found by his precipitation, he was about to destroy himself, and all that adhered to him. Thereupon, I came to my lord Shaftesbury again, upon the Saturday, and when I came there after a long and importunate urging all the arguments I could think of, I so far prevailed with him, that he agreed to give them a meeting, upon condition that it should be the next day: and because it should be so private, that no notice might be taken of it, he chose to have the meeting at his own house, where nobody would suspect him to be, and whither he would be conveyed under the disguise of a parson. I went back with this message to the duke of Monmouth, who did undertake, that the other lords should be there.

L. H. Steward. My lord Howard, not to interrupt you, did he name those other lords? If he did, pray acquaint my lords who they were.

L. Howard. My lord Shaftesbury named my lord Russel and my lord Grey, and a great many more that should bear their parts. I went to the duke of Monmouth, and told him of it, I say, and he engaged, that they should certainly be there: But, upon the Sunday morning, when I came to the Temple, there I found a message left for me, that my lord Shaftesbury had received an alarm, That there was some great Tories living near his house in Aldersgate-street, who were continually spying about; and so great a company might make their more than ordinary observation: That this gave him such a jealousy, as would not permit him to meet according to his appointment. Afterwards; I came to a better under-

standing of the reason of this, and found there was some finesse in it, which I could not comprehend before: But after this time, I never saw my lord Shaftesbury, for he removed then to other lodgings. So that what I now speak of him, is only what I had, by hear-say, from others: For I had no knowledge of what passed, as to him, but what I had from capt. Walcot: who told me, That after that, there were several days of meeting appointed, but still, from time to time, put off; but upon what reason, I cannot particularly remember.

This is all I know of my lord Shaftesbury; and the latter part is wholly by hearsay from Walcot. But by reason of this agitation we continued under expectation till such time as my lord Shaftesbury went into Holland; where he shortly after died. And truly, I thought, at that time, much of the design was quashed, and laid aside: But, soon after Ferguson came over; who when he came here, began to revive and quicken the business, and push it on to execution. I spoke with him at the One Bell in the Strand; and there he gave me an account of all the steps that had been taken: He told me what preparations had been made in the city, in general; what to seize the gates of the city; what to possess themselves of the Tower: what to attack the guards; and several other things, which I cannot now so well remember, the impressions of them being worn out of my memory, by length of time, and other accidents.

This, in general, is all that I can say, as to what was previous to the particular engagement wherein I was concerned: For, at last, after many discourses, the troubles and difficulties of the time increasing, and the dangers that threatened us, as we thought, growing higher and higher, this gave an occasion for our uniting counsels, and entering into a kind of Juncto; which, I suppose, is foreign to this affair before your lordships; and therefore, I suppose, would be likewise impertinent for me to trouble your lordships with.

L. H. Steward. Mr. Attorney, do you desire my lord Howard should give an account of the other meetings, and consultations, at which he was present?

Att. Gen. My lord, I think there will be no need of it; and I am unwilling to take up your grace's time to no purpose.

L. Howard. As for that noble lord at the bar, I know nothing concerning him.

L. H. Steward. Then, gentlemen, will you have him asked any questions?

Att. Gen. No, my lord.

L. H. Steward. My lord Delamere, will you ask him any more questions?

L. Delamere. No, my lord.

Att. Gen. Before my lord Howard goes, I would ask him one question in general, whether he knew of any design of a rising in Cheshire?

L. Howard. No, my lord, I knew of none at all.

Att. Gen. Then we desire my lord Grey may be sworn. [Which was done.]

Att. Gen. Pray, will you give his grace and my lords an account, what you know of any designs of an insurrection or rebellion, when you were beyond sea, or before? and who were engaged in it?

L. Grey. My lord, I am subpoena'd hither on behalf of the king; and I am also subpoena'd on behalf of my lord, the prisoner at the bar. I do not know any thing that I can speak of my own knowledge, against the prisoner; nor have I any thing to say, that I know of, that will be for his advantage. But I am here ready to answer such questions as shall be asked me, either of one side, or the other.

Att. Gen. My lord, the question I ask you, is, What do you know of any design of a rising in Cheshire, and when?

L. Grey. About the time of the election of sheriffs for the city of London; I mean, that memorable time of the contested election, which furnished the world with so much discourse, and was the occasion of such heats and animosities: About that time, the duke of Monmouth and my lord of Shaftesbury began to discourse about making use of that, as an opportunity to accomplish their design; for they thought the ferment was so high, that men would easily be disposed to an insurrection; and after many discourses to that purpose, they came to this resolution, that they would apply themselves to make what interest they would, to procure a rising in three several parts of the kingdom at once: one in Cheshire, whither the duke of Monmouth was to betake himself; and there be advised by my lord Macclesfield, my lord Brandon, my lord Delamere that then was, and the prisoner at the bar, what gentlemen were proper to apply to for joining in the design. The second was in London, which was assigned to be the province of my lord of Shaftesbury. And the third was in the west, which was committed to the care of my lord Russel. The duke of Monmouth did accordingly go his progress into Cheshire, as is very well known; and upon his return was taken into custody by the serjeant at arms: upon which, sir Thomas Armstrong was sent post to town, to get an Habeas Corpus; and, withal, to deliver a message to me, to be communicated to my lord Russel, and my lord Shaftesbury: which message as near as I can remember, was to this effect; That he had been kindly received by the gentlemen of the county, and had discoursed the matter with them, and found them all inclined very much to his satisfaction: That upon his being arrested, he had been advised to make his escape into Cheshire, and rise immediately; but that he would not do a matter of that great importance, without the approbation of his friends. This is all that I know of any thing that was designed in Cheshire.

Att. Gen. Pray, my lord, what do you know of any messages that captain Matthews or

Jones brought over from Holland and to whom, and from whom?

L. Grey. Sir, I will give the best account I can upon the sudden, for I am not prepared to give a particular distinct account, in regard I did not know it would be expected from me, nor indeed that it would affect the prisoner at the bar.

L. H. Steward. Pray, my lord, give my lords the peers as succinct and particular an account as you can.

L. Grey. My lord, soon after the late king's death, the duke of Monmouth was at Amsterdam with my lord of Argyle, where there was an account given of the design that was in hand, of an insurrection in Scotland, and the preparations that had been made in order to it; and at that time there came over to Holland Mr. Crag, that came as I was informed from major Wildman, and his errand was to promote and recommend a reconciliation between the duke of Monmouth and my lord Argyle, who till that time had acted in separate interests; and Crag then gave an account that means and money were prepared: he had no particular message to the duke, because he did not know of meeting him there at that time. The duke of Monmouth, upon this encouragement, did send captain Matthews into England, with a message to major Wildman, wherein he did desire him that he would procure a meeting with my lord Macclesfield, my lord Brandon, my lord Delamere, and I think Mr. Charleton, and acquaint them that he had received a full account of my lord Argyle's affair, and the preparations that had been made for it, and accordingly he had ordered his own affairs to join with him; he likewise sent Crag with a message to the same purpose to other friends in London, and he dispatched away one Batterscomb into the West, to prepare things there. When Crag returned back again to the duke, he gave him an account that major Wildman had procured a meeting with those lords and gentlemen, that I mentioned before, who were all of opinion, that the duke of Monmouth should go for Scotland, for they thought that his coming there, would be the best service he could do the interest at present, and they should know the strength of the enemy here, by their sending forces to suppress the rebellion there. There was likewise a particular message from major Wildman to the duke of Monmouth, that he desired he would bring over with him a broad seal to seal commissions with, and to take upon him the title of king. The other particular branches of the message I do not so well remember, but only this, he was particularly asked, whether the prisoner at the bar was there, and he said he was—

Att. Gen. Pray, my lord Grey, will you give an account what you know of Jones's coming over, and what errand he was sent of?

L. Grey. Jones came some time after Crag returned, and he gave an account of other things conformable to what Crag had said, and was sent back again to England by the duke

of Monmouth to give an account of his being ready to sail; he gave him also a letter, the contents whereof I did not see. I had some short account of it, but whether it were written to any particular person, I cannot tell; the sum of his message was, that he would land by that time he could get thither.

Att. Gen. My lord Grey, you had frequent discourse with the duke of Monmouth, and so I suppose you can give an account who he kept correspondence with, and upon whose assistance he relied.

L. Grey. I suppose few people will believe we were so weary of our lives, as to come and throw them away with threescore, or a very few more men, (for it was but a very small number we began with) except we had expectation of good assistance. This I am sure of, by all discourses with the duke of Monmouth, he did depend very much upon Cheshire, and was resolved to have landed and begun there; but afterward he considered of it, and thought better to send some sort of excuse for not landing in Cheshire; that the persons that were to be applied to there, being men of great quality and interest in their country, and able to manage it, without his assistance; but in the West, the friends he relied on, were not of that considerable quality, and therefore he chose to land there.

Att. Gen. What lords did he name, that he depended upon?

L. Grey. I did name them; my lord Macclesfield, my lord Brandon, and my lord Delamere; but I observed when the duke of Monmouth spoke of his friends in Cheshire, he did name my lord Macclesfield and my lord Brandon as persons.

E. of Nottingham. My lord Steward, I humbly pray this witness may be asked, to whom that letter was written, that he saith the late duke of Monmouth sent by Jones?

L. H. Steward. You hear my lord's question, who did Monmouth send that letter by Jones to?

L. Grey. My lord, I never saw the letter, nor do I know any directions that were upon it; I always looked upon it as a paper of instructions given to him about the time when, and the name of the place, where the duke was to land.

Att. Gen. We will give an account of that by Jones by and by, my lord. Now swear Nathaniel Wade. [Which was done.]

L. H. Steward. Well, what do you ask this witness.

Att. Gen. Wade, that which I call you for, is this, to give an account what you know of any design of landing in Cheshire, or elsewhere, and of Jones's coming over, and what errand he was sent upon?

Wade. My lord, I shall give an account as far as I know. After the death of the late king, captain Matthews came to Amsterdam, and gave an account there, that the duke of Monmouth intended to be there shortly to meet and consult with my lord Argyle, who, we un-

derstood then, was preparing for an expedition into Scotland; thereupon I was sent into Friesland to desire my lord Argyle to come to Amsterdam, which he did; and there the duke of Monmouth did consult with him, and they did agree together, that at the same time that my lord Argyle made an insurrection in Scotland, the duke of Monmouth should invade England, and to that end, that he should send those friends he had in England, to be ready to assist him when he came there; and in order to it, he did send captain Matthews, who, amongst other things, was to go to the duke's friends in Cheshire, and amongst them, my lord Delamere was named to be one, and the business was to desire them to be ready to assist him when he should land. Accordingly captain Matthews went; but a little after his going away, I think one Crag came over, and he came from major Wildman, and his business was to endeavour a good understanding between the duke of Monmouth and my lord Argyle, who were then at some difference; and to endeavour to make them act jointly by united counsel. A little after he was sent back again into England to major Wildman, to desire him to assist them with some money; he went back again, and returned, but brought no money: thereupon he was sent again by the duke of Monmouth, because the first time he was not sent by him. The sum demanded was 6,000*l.* or 4,000*l.* and at last he sent for 1,000*l.* Crag returned with this answer, that they could not assist them with money, for they did not know to what end they should have money but to buy arms, and for that the people were well provided enough already, and there was no need of money for that purpose. The duke of Monmouth a while after sent Mr. Crag, and pawned all the jewels he had to raise money, and fitted out three ships for this service, laden with ammunition; and because he had promised my lord Argyle to make a diversion in England, while he invaded Scotland, he resolved to go with that provision he had, and desired by Mr. Crag, that since those lords and gentlemen that were to assist them, had sent no money, as was desired of them, and expected from them, they should now trouble themselves with no further needless consultations; but should repair each man into his own country, where their interest was greatest, to be ready when he should come. And in order to this, the duke of Monmouth did set sail from Holland, and came to Lyme, and landed there; and did afterwards order his march so that he might most conveniently meet with his Cheshire friends; that is, towards Gloucester, and so to get Gloucester-bridge, that thereby gaining the command of the river of Severn, those of Cheshire, if they did, as was expected, make an insurrection at the same time, they might easily join together. In pursuance of this design we came to Keinsam-bridge, and there a party of the king's horse set upon us, and we took some prisoners, and thereupon thought it advisable not to let

the king's army join together, but to go back and engage those that were already come together; and that was the reason we did not go over the bridge.

Att. Gen. Do you know any thing of Jones's coming into Holland, and for what?

Wade. My lord, I had forgot that; a little before Crag's going last away, Jones came over, and his business was to know why we staid so long, for the duke of Monmouth's friends in England had expected him long before, and he was dispatched away quickly to acquaint them the duke was coming.

Att. Gen. Who was it he sent to, to acquaint with his coming?

Wade. To major Wildman, he was directed to major Wildman.

Att. Gen. Who else were to be acquainted with it?

Wade. Amongst the rest my lord Delamere, my lord Macclesfield, and my lord Brandon were to be acquainted that he was coming, and expected that they should raise what forces they could to assist him.

L. H. Steward. Will my lord Delamere ask him any questions?

L. Delamere. No, my lord, I never saw his face before, that I know of.

L. H. Steward. Who do you go to next, Mr. Attorney?

Att. Gen. Next we call Richard Goodenough: Swear him, [Which was done.] That which I would know of you, Mr. Goodenough, is, whether Jones were sent of any message, and about what?

Goodenough. My lord, I was beyond sea with the duke of Monmouth, and Mr. Jones was sent (among other persons) to my lord Delamere to give him notice that he should be ready against the time that the duke should land, and take care to secure himself, that he might not be seized here in town, for we were apprehensive such a thing would be attempted.

Att. Gen. What directions were given him what lords to go to?

Goodenough. My lord, we were informed in Holland, that my lord Delamere was one of those lords that had promised to draw his sword in his behalf.

Att. Gen. Had you any discourse with the duke of Monmouth about it at any time?

Goodenough. Yes, I have discoursed with the duke of Monmouth several times.

L. H. Steward. Ay, what did he say to you about it?

Goodenough. My lord, he said (among other things) that he hoped my lord Delamere would not break his promise with him.

L. H. Steward. My lord Delamere, will you ask him any questions?

L. Delamere. No, my lord. I never saw his face before, that I know of, I will assure you.

L. H. Steward. That is pretty strange, so famous an under-sheriff of London and Middlesex, as he was.

Att. Gen. Then swear Jones. [Which was

done.] Pray will you give an account what message you received from the duke of Monmouth upon your going over into Holland, and to whom you were to deliver it, and what became of it?

- Jones. My lord, I went to Holland about the latter end of April last; my going, as I have acquainted his majesty and the council, was not only about this affair, for I had other business that called me thither, which I shall not now take up your time, or trouble you with repeating of: but having some knowledge from Mr. Disney, that there were some intentions of doing something, though it was communicated to me but very darkly, and therefore that little I did know, made me the willingest to go for Holland so soon as I did: but before I went, I had a mind to understand something more of the design; and therefore the night before I went, I came to Mr. Disney, and acquainted him with my intended journey. Mr. Disney did persuade me against it, thinking that I had gone upon this account, but I told him the occasion, which he partly knew, why I went; but withal I told him, I did intend to see the duke of Monmouth, and if he had any message that he would have delivered to him, I would deliver it very safely. He told me all the message I should deliver to the duke of Monmouth, if I saw him, was to desire him to keep to the last conclusion, which he would find in a letter that had been sent to him, and that if he had not yet received the letter, it was to come by the crop-hair'd merchant, or the crop-eared merchant, I cannot say which, but I think it was the crop-hair'd. I asked him what that message was, lest the letter should miscarry; for I told him, if I should go to the duke of Monmouth, and refer him to a letter wherein a message was to be brought him, which he was to keep to, and that letter should miscarry, I should, in effect, bring no message at all to him. My lord, thereupon he told me, that I should acquaint the duke of Monmouth that his friends in England would not by any means have him come for England, but that he should continue where he was, and if he thought good to go for Scotland, they approved of it. This is the sum of what he said to me, as near as I can remember. When I came to Amsterdam, there was one Mr. ——— that was killed at Philips-Norton, went with me to the duke of Monmouth's, and when he came to him, I acquainted him, as Mr. Disney appointed me to do, that there was such a letter sent by such a person, and that such a message was included in it. My lord, he was in a great passion, I know not how to express it, and seemed to be very much troubled, and did reflect very much upon master Wildman, and said, that was Wildman's work; and he said, (as I think that was the word he used) Wildman was a villain, or to that purpose: but withal he said, it was too late to send such a message now, and that he was resolved to come for England; and he would make Wildman hang with him, or fight

for it with him: That Wildman did think by tying his own purse, he should tye his hand, but he should find it should not be so; and some other words of the like nature he used, but this is the substance of what he said. He gave some account what preparations had been made; he said money was very short, and he had been fain to pawn all he had, to raise what money was raised upon his own charge. He asked me if I did think to return to England shortly; I told him if he had any service to command me for England, I had some little business to do at Rotterdam, which I would dispatch, and then I would perform his commands. He told me, he would be glad I did return as soon as I could for England, and that this should be the message I should carry to Wildman, in answer to the message he had sent him, that he would come for England, and he should either fight with him, or hang with him; and that was all he had to say to him. I was coming away from him, but he stopped me, and told me he would not have me go out of town till he had spoke with me again; this was upon the Sunday: accordingly I did go in the evening to him, and when I came, he told me, he would have me stay till Tuesday morning, for he was going out of town, and intended to be back again at that time; but if not, I should receive from my lord Grey what he had to say to me. He did not come upon the Tuesday, but my lord Grey did come, and I think to the best of my remembrance Mr. Crag was with me; he told me all he had to say was, that the duke intended to be in England within nine days, and that upon the Thursday seven-night after I came away, the duke would be in England: and he bid me to remember to tell Brand, that when he heard the duke was landed, he should acquaint air Robert Peyton with it, but not till he was landed; for though they did think that he would join with them when the thing was begun, yet they ought to be careful who it was communicated to, for fear it should be discovered and disappointed: this was all that I had in command for my lord Grey. I came to Rotterdam, and dispatched my business there, and would have come away, but it happened there were no ships coming for England, nor would there be any in a fortnight's time; thereupon I returned to Amsterdam. When I came back, I went to see the duke, to give him an account how it happened that I was not gone for England. The duke told me he was glad I was not gone; for now he had a further message for me to carry, and he would have me stay two or three days in town for it. I staid three days, and came again to him, but he told me he was not ready for me yet; then I staid two or three days longer till the 21st of May to the best of my remembrance; it was upon a Thursday that he gave me the message that I was to bring into England. I came to him in the morning, and he told me I should come to him upon the evening of that day, and when I came, there was a paper lay before him on the table and he

took the paper and sealed it up; I cannot say he wrote all that was in that paper, but the paper that lay before him was not finished when I came in, and that he did not write while I was there, I am sure; but he took it up and sealed it before me, and when he had sealed the paper, he told me, I must, as soon as I came to London, see for captain Matthews, sir Thomas Armstrong's son-in-law, who lodged at Mr. Blake's in Covent Garden, and desire him to acquaint my lord Macclesfield, my lord Brandon, and my lord Delamere, with his design of coming for England, and that he was resolved to set out upon the Saturday morning after I came away, which was upon the Friday. He told me captain Matthews was to send one post to that place that was named in the note to receive intelligence of his landing, and that should be brought to his friends here immediately, (he designed it should be twenty-four hours before the court had notice of it in town,) and those lords were to be in readiness, that as soon as they knew he was landed, they might repair to their several posts to assist him. I told him that I would deliver what message he gave me, and asked him, what I was to do with the paper he put into my hands; thereupon, as near as I remember, he used these expressions to me; I do by you as princes do by their admirals, when they send them out upon any considerable expedition, which requires secrecy in the management of it; they have their commission delivered to them sealed, which they are not to break open till they are at sea. So here I deliver you your instructions sealed up, which you are not to open till you are at sea: and when you have opened them, and read what is contained in them, I would have you tear the paper, and throw it into the sea, or otherwise dispose of it, lest you be surprised and searched at your landing, and my papers found about you. My lord, I asked him, because I would be as punctual in my message as I could, what those lords were to do when they came out of town, whether they should come directly to him or no; he told me no, not but that they should go into the country, and secure their interest for him there. I asked him then, if captain Matthews be out of the way, and I be disappointed of meeting with him, shall I deliver this message to the lords myself? He told me no, by no means, for those lords were persons of quality, and that that was not a thing to be done by me. What shall I then do, my lord, said I, if captain Matthews be out of the way? You need not question that, saith he, but if you meet not with Matthews, speak to Wildman.

My lord, with these instructions (and this as near as I can remember is the sum of all he said to me) I came away, and came to sea; when I was out at sea, I broke open the letter that I had given me by the duke, and I will tell you as near as I can, what were the contents of it; there was written in it to this effect:

'Taunton in Somersetshire is the place to which all are to resort; the persons to be ac-

quainted with the time of landing, are the lord Macclesfield, the lord Brandon, and the lord Delamere; the place to send the coach to, is to Taunton, to Mr. Savage's house at the Red-lion. The place where the post was appointed to return, was captain Matthews's lodging, at Mr. Blake's, and he was to receive the message, or if he did not, he was to appoint one that should receive it; or if it were to return to any other place, that was left to him to do as he thought fit.'

And this was all as near as I can remember. When I had seen this, I came to London, and being very weary and tired, when I came home I went to bed.

Att. Gen. Pray tell the court as near as you can, what day it was you came.

Jones. I came out of Holland the 22d of May, I came home the 27th, and looking upon my Almanack, I find that it was the Wednesday fortnight before the duke landed, that I came. When I was come home, I sent for Mr. Disney, and he came to me immediately; I told him I had seen the duke, and desired that he would help me to the speech of captain Matthews. He told me he was out of town. Then I desired to speak with major Wildman; he told me he was gone out of town too. Then I told him I must deliver my message to him, and I told this message as I have told your lordships before, and therefore left it to him to convey it to the knowledge of those lords that were concerned; he did seem to be unwilling, and told me he did not know how to communicate it to those lords, and asked me why I would not deliver the message myself. I told him I did ask the duke of Monmouth that very question, whether I might; and he had forbid me, and ordered me to deliver it either to captain Matthews, or to major Wildman; and since they were absent, I knew not any to communicate it to but only to him, in order to their having notice of it. He told me he would do what he could.

Att. Gen. Pray who were present when you had this discourse with Disney?

Jones. There was none present but himself then, for it was the first time that I spoke with him after I came from Holland; I told him there was a post to go to receive intelligence which should bring notice of his landing twenty-four hours before it could be known at Whitehall, and therefore it were fit they should be in a readiness. He did scruple at it, and said he did not know where to get any one that could convey the message to them, but he would do what he could; and concluded to meet at night in Smithfield, and he did so: and there were two persons with him, Mr. Crag, and Mr. Lisle, and another, I think his name was Brand, and he took me and Brand aside, and did ask me where was the place that the post was to go. I told him where, and then he did discourse of the duke's coming over, but I mentioned not any thing of the lords, but only to Disney; and after an hour's talk or thereabouts, we parted. I saw

Mr. Disney once afterwards, but what he did with the message I cannot tell, he gave me no account of it; I did indeed before I went out of town see him at the Half-moon tavern in ——— I went out of town, and met the duke of Monmouth at Lyme where he landed; and when I came to him, I told him what I had done with my message, and how it happened that I could not deliver it to the persons that he had ordered. The duke told me that he was satisfied that I had done what I could, but seemed to be troubled that Matthews was out of town. And this is the sum of what passed in my knowledge, as near as I can remember.

Att. Gen. Had you no discourse with Disney what he had done with the message, when you met at Smithfield?

Jones. No, because those men were strangers to me, and I had never seen them before.

Att. Gen. But afterwards had you no discourse with Brand nor Lisle about it?

Jones. No, not at all: Brand I never spoke but once with, and Lisle would not own that he was the man that was there.

L. H. Steward. Have you any more questions to ask him, Mr. Attorney?

Att. Gen. No, my lord.

L. H. Steward. My lord Delamere, will your lordship ask him any questions?

L. Delamere. No, my lord, I never saw his face before this time, that I know of, in my life.

L. H. Steward. Then who do you call next, Mr. Attorney?

Att. Gen. The next witness that we call, my lord, is Story. [Who was sworn.]

L. H. Steward. Well, what do you ask him?

Att. Gen. Mr. Story, pray will you give an account what notice you had of Jones's message and what was done upon it, and what discourse you had with any body concerning my lord Delamere, the prisoner at the bar, and with whom?

Story. My lord, I had notice of it by one ——— that lived at Bishopsgate, who told me the 28th of May last, that Mr. Jones was returned home from Holland upon a message from the duke of Monmouth, and that he had agreed to go to Taunton, and there he expected Mr. Dare or Mr. Williams to bring an account that the duke was landed; and he said that Mr. Jones's message was delivered to Disney, in the absence of captain Matthews, who was out of town; that after Disney had received the message from Jones, he went and had some discourse with my lord Delamere, and that that night my lord Delamere went out of town with two friends, and went a by-way through Enfield chase, towards Hatfield.

Att. Gen. Pray when was it you went out of town, Story?—*Story.* The 28th of May.

Att. Gen. Who went out of town with you?

Story. Nobody, but I overtook Mr. Brand that evening.

L. H. Steward. Pray repeat what it was he acquainted you with.

Story. He told me that the day before, Jones was returned home with a message from Holland, which message was to be delivered to captain Matthews, but in his absence Disney received it; and that evening after he had discoursed with my lord Delamere, my lord that night went out of town, and two friends of mine he said went with him, and did convey him away by a by-way through Enfield chase towards Hatfield.

L. H. Steward. Have you any more questions to ask him, Mr. Attorney?

Att. Gen. Pray, Sir, had you any discourse with the late duke of Monmouth at Shepton-Mallet? and about what?

L. H. Steward. By the way, friend, where is that Brand you speak of?

Story. He is killed; I did not see him die; but he is said to be killed at Keisham bridge.

Att. Gen. Pray what discourse had you with the late duke of Monmouth about the prisoner at the bar?

Story. I heard the late duke of Monmouth say at Shepton-Mallet, that his great dependance was upon my lord Delamere and his friends in Cheshire, but he was afraid they had failed him, or betrayed him, or some such word he used; and he said he could have been supplied otherwise, but that he had a dependance upon them.

Att. Gen. Pray what office had you under the duke of Monmouth?

Story. I was commissary-general.

Att. Gen. Well, we have done with you.

L. H. Steward. Will you ask him any questions, my lord Delamere?

L. Delamere. If your grace please, I have a question to ask him.

L. H. Steward. Ay, with all my heart; what question you will, my lord.

L. Delamere. My lord, I desire to know whether he knows one Saxon?

L. H. Steward. What Saxon does your lordship mean, one that was in the army?

L. Delamere. Yes, one Thomas Saxon.

Story. Yes, my lord, I knew him a prisoner in Dorchester prison, where I was a prisoner myself.

L. H. Steward. Has your lordship nothing more to ask him but that?

L. Delamere. No, my lord.

Att. Gen. Now, my lord, we call some persons to prove, that that very night when Jones came to town, my lord Delamere the prisoner at the bar goes out of town without any servant, changes his name, and goes a by-way: Swear Vaux and Edlin. [Vaux was sworn.]

L. H. Steward. Well, what says this man?

Att. Gen. Pray give my lords an account whither you went out of town with my lord Delamere, and when?

Vaux. My lord, perhaps I may not remember the very words that I gave my evidence in before, but I will repeat the substance.

Att. Gen. It is not so long ago, but you may easily recollect yourself; pray what day was it that my lord Delamere sent for you?

Vaux. The 26th day of May, and I went out of town the 27th.

Att. Gen. You are upon your oath, and you must remember you are sworn to tell the truth, the whole truth, and nothing but the truth.

Vaux. Sir, I shall take care to do it as far as I can remember.

Att. Gen. Whither was it that he sent for you?

Vaux. To the Rummer tavern in Queen-street, and the next day I went out of town with him.

Att. Gen. What day of the month did you go out of town?

Vaux. It was the 27th day of May.

Att. Gen. What time of the night was it you went out of London?

Vaux. It was about nine or ten of the clock.

Att. Gen. What name did my lord Delamere then go by?

Vaux. He went by the name of Brown.

Att. Gen. My lord, I would acquaint your grace, that this is an unwilling witness, and we are forced to pump all out of him by questions.

Vaux. I do tell you the truth of all that I know.

Att. Gen. How far did you ride that night?

Vaux. To Hoddesdon.

Att. Gen. What time did you get thither?

Vaux. About twelve of the clock.

Att. Gen. Whither did you go then?

Vaux. We went to Hitchin, and I returned back again the next day.

Att. Gen. Whither was my lord Delamere going then?

Vaux. To see his son that was sick in the country.

L. H. Steward. What! he told you so, did he?—*Vaux.* Yes, my lord.

Att. Gen. What other company went with you?

Vaux. Two gentlemen, the one I knew, the other I did not.

Att. Gen. What was the name of him you did know?—*Vaux.* It was Edlin.

Att. Gen. Pray was that the direct road to Cheshire that you went?

Vaux. We made it our way.

Att. Gen. You made it your way; but I ask you whether it be the best way?

Vaux. It is the freest road from Just.

Att. Gen. But I ask you a plain question, upon your oath is it the best way into Cheshire?

Vaux. Truly, my lord, I do not know that.

L. H. Steward. Pray who gave you directions to call my lord Delamere by the name of Brown?—*Vaux.* Himself, my lord.

L. H. Steward. Was that the first time my lord went by that name, as you know of?

Vaux. Yes, my lord, I never heard that he was called by that name till that time.

L. Delamere. I was called by the name of Brown at that time, and I will give your grace an account by and by of the reason of it.

L. H. Steward. Has your lordship any question to ask him?

L. Delamere. No, my lord.

L. H. Steward. Then go on to the next.

Att. Gen. Our next witness is Edlin, pray swear him, [which was done.] Pray will you give my lords and the court an account whether you went with my lord Delamere out of town, and when?

Edlin. The 27th of May last, I was at the Custom-house, and there came Mr. Vaux, the gentleman that was here last, who told me he was going out of town as far as Hitchin, and asked me to go along with him; he said he was to go that evening. I asked him what time he intended to return? he told me, he was resolved to return the next day. I told him, then I would go along with him, and we appointed the place of meeting to be at the Bell-Inn in Coleman-street; when I came there, he said there was a friend that was going along with him, one Mr. Brown; we went as far as Hoddesdon that night.

Att. Gen. Pray, Mr. Edlin, will you look upon that gentleman that stands at the bar; is that he that went by the name of Brown?

Edlin. Yes, my lord, that is he.

Att. Gen. Well then, what time did you set out?

Edlin. It was very near nine of the clock.

Att. Gen. Pray when was it that Vaux met you at the Custom-house?

Edlin. It was about ten of the clock in the morning.

L. H. Steward. Pray did you hear or know upon the road, whether he was going?

Edlin. My lord, I did never see my lord Delamere before in my life.

L. H. Steward. But did not he tell you as he went along, whether he was going?

Edlin. He said he was going for Cheshire to see a sick child.

Att. Gen. You say, Sir, that you went first for Hoddesdon?

Edlin. We did so, my lord.

Att. Gen. Pray, Sir, how long were you riding that, from the Bell in Coleman-street to Hoddesdon?

Edlin. It was three hours I believe, or about three hours and a half.

Att. Gen. Then you rid hard out of town.

Edlin. My lord, it was towards nine of the clock when we got on horseback, and it was about twelve or a little more, when we came to Hoddesdon.

L. H. Steward. Well, Mr. Attorney, is that all you have to ask him?

Att. Gen. Yes, my lord.

L. H. Steward. Will you ask him any questions, my lord Delamere?

L. Delamere. No, my lord.

Att. Gen. Then, my lord, to confirm this evidence, and to explain it, I shall call you a couple of witnesses to prove that this gentleman went by the name of Brown in the case of those that were engaged in this business, that the name was known as his name by all the party, and called so constantly in their letters and messages. Swear Tracy Paunce.

ford, and Thomas Babington. [Which was done.]

L. H. Steward. Which will you begin with first?

Att. Gen. We begin with Paunceford. Pray will you give his grace and these lords an account what discourse you heard at Disney's concerning the prisoner at the bar, and what name was he usually called by, in your meetings.

Paunceford. My lord, I shall give as just an account as I can; I was acquainted with Mr. Disney, and the 14th of June I was at his house.

L. H. Steward. What June do you mean?

Paunceford. Last June, my lord, and there were three more besides, one Joshua Lock, and a country gentleman that I have understood since to be one Hooper, and there was one Halsey; and being there, Lock staid for some declarations.

L. H. Steward. What declarations were those you speak of?

Paunceford. The declarations of the late duke of Monmouth.

L. H. Steward. Were they printed at that time?

Paunceford. They were not ready at four o'clock in the afternoon: but about nine o'clock they were finished, and three were printed off, and were delivered to Joshua Lock, and when he had received them at that time, there was a discourse of having them sent into Cheshire to one Mr. Brown. After we had received them, we came over the water together, and we landed at Salisbury-stairs, and Lock was very earnest for going out of town that night, with those three declarations, which, as he said, were to be carried to one Mr. Brown: This was at nine o'clock, and so we parted.

L. H. Steward. Pray into what country was he to carry them?

Paunceford. A little way out of town he said.

L. H. Steward. Just now you said they were to go to Cheshire.

Paunceford. My lord, the discourse at Disney's house was, that they were to be sent into Cheshire; but when we came over the water, Lock said he was to go a little out of town to one Mr. Brown.

Att. Gen. Pray who was that Mr. Brown as they meant, as you apprehended?

Paunceford. I understood Mr. Brown to be my lord Delamere by some discourse.

L. H. Steward. Whose discourse did you understand it by?

Paunceford. The first time, my lord, that I heard of my lord Delamere's going by the name of Brown, was upon a discourse with one Edlin.

L. H. Steward. Prithce tell us what that discourse thou hadst with Edlin, was?

Paunceford. Mr. Edlin, about the latter end of May last, went out of town, as I heard, and when he came back again, I asked him whither he went? he said he was invited by a

friend to go with him out of town, and my lord Delamere went along with them, and went by the name of Brown.

Att. Gen. What discourse had you with Disney, or any body else about my lord Delamere's going by the name of Brown?

Paunceford. Mr. Disney did use to mention my lord Delamere by the name of Brown.

Att. Gen. Pray were you at any meeting with any body, and whom, at any tavern, and what tavern, where any such discourse was had?

Paunceford. My lord, I was at a meeting at the Castle tavern with Mr. Vermuyden, and my brother Babington, and one Manning; but there was no mention then of any Brown that I remember, nor of my lord Delamere, but only there was something in relation to the landing of the duke of Monmouth; the question was asked where he was to land, and Mr. Vermuyden made answer he did not know.

L. H. Steward. Will your lordship please to ask this witness any questions, my lord?

L. Delamere. Pray, Sir, did you ever know any body else that went by the name of Brown besides me?

Paunceford. May I answer this question, my lord?

L. H. Steward. Answer it! yes, you must, you are sworn to tell the truth, and the whole truth, man.

Paunceford. My lord, there was a discourse of Mr. Vermuyden's going by the name of Brown.

L. H. Steward. Will you ask him any more questions, my lord?

L. Delamere. No, my lord.

L. H. Steward. Then go on, Mr. Attorney.

Att. Gen. Pray, Mr. Babington, do you tell my lords what you know of my lord Delamere's going by the name of Brown.

Babington. My lord, I shall give an account. When I first knew any thing of the transactions, I was with my brother Paunceford, Mr. Vermuyden, and one Chadwick that went into the west, and there was a discourse of two gentlemen that went by names I did not know; Brown was one, and I was desirous to know who was meant by it: I was at that time but newly acquainted with the concerns of these people; and so I found they were fearful to entrust me: but afterwards I was at the Castle-tavern where my brother, and my uncle Vermuyden was, and in discourse of Mr. Brown, somebody happened to name my lord Delamere's name, but he was presently taken up; you mean Mr. Brown. Ay, saith he, I do.

L. H. Steward. About what time was this, pray you?

Babington. About the middle, or latter end of May last.

Att. Gen. Were you at Disney's when the declarations were printed there?

Babington. Mr. Attorney, I will give an account of that afterwards, but I have something else to say first. After this, I was dili-

gent to know of my uncle Vermuyden and my brother, who this Mr. Brown was: my uncle told me it was my lord Delamere, and desired me whenever I discoursed of him, to call him by that name, and I have very good reason to believe Mr. Vermuyden knew of the matter, because he was acquainted with a great many of that sort of people, and declared he had collected and knew of monies that were gathered for that purpose; and he had a good account of Monmouth's landing, and of the force he had in the west, and how long it was presumed that he could maintain that force without assistance from any body else; and so I presume he was very well acquainted with the whole transaction. Afterwards I happened to be at Disney's over the water, there was my brother Paunceford, Mr. Halsey, and myself.

Att. Gen. Tell what passed there at that time.

Babington. Disney shewed me a declaration that was not perfected quite, but after that we fell into a discourse about Mr. Brown, and afterwards my lord Delamere's name was named by somebody, that some of the declarations were to be sent to him; and I remember Mr. Disney said he was afraid my lord Delamere was not capable of doing that service that was expected from him in Cheshire for want of some of those declarations, which would be mighty useful to him to inform the people, they being Monmouth's declarations.

L. H. Steward. Had Lock any of those declarations away for that Mr. Brown you speak of?

Babington. I never knew Lock, my lord.

Att. Gen. What number of declarations did Disney print?

Babington. Disney told us he hoped in twenty four hours to have 500 printed, a good number of them were to be sent to my lord Delamere, and several of them were dispersed.

L. H. Steward. Have you any more questions to ask him, Mr. Attorney?

Att. Gen. No, my lord.

L. H. Steward. Will you ask him any questions, my lord Delamere?

L. Delamere. No, my lord.

Att. Gen. Then may it please your grace, the next witness we shall bring, shall be to prove that my lord Delamere took frequent journeys backward and forward, in a very little compass of time, and the same witness will likewise tell you what discourse he had with my lord during the very time of Monmouth's rebellion, to stir up the people to join with him.

Swear Hope. [Which was done.] Pray tell my lords what discourse you had with my lord Delamere, and when?

Hope. Upon the Sunday before the coronation, my lord Delamere came down post to my house, towards his own house in Cheshire—

L. H. Steward. Prithee where is thy house? For these noble lords do not know thee, perhaps, so well as I do; therefore tell us where it is?

Hope. My lord, my house is at the Three Tuns in Coventry.

L. H. Steward. Well, go on, tell what thou knowest.

Hope. —Some time after that he came down post again, and a little after he went up again post, and he told me he went down another way; and after that, the 21st of June, he came down post again, this was upon a Sunday, the Sunday seven-night after the duke of Monmouth landed.

Att. Gen. Had he any servant with him at that time?—*Hope.* Yes, he had.

L. H. Steward. Had he a servant with him every time he came down post?

Hope. No, he came over, I remember, without any servant, only with a post-boy.

L. H. Steward. Well, and what discourse had you with him at that, or at any other time?

Hope. My lord, that Sunday, the 21st of June, my house was very full of people to enquire news; it being in the time of the rebellion, every one was desirous to know how things went: and there was one Ingram in the house, that came to me, and asked what news from London, for they say, saith he, that the duke of Albermarle is killed, and his bears brought to Westminster Abbey. Thereupon I knowing my lord Delamere was come from London, I went into the room to my lord, and desired to know of his lordship what was the news in London. He told me he was little at court, and therefore could not tell much news.

I then asked him what he heard concerning the duke of Albermarle; said I, they say here he is killed. Saith my lord, I am sorry for it, if it be so, but I fear it is too true; but if he be killed, it is said he is killed by his own party. I asked him how? He told me, a party of the duke of Albermarle's men were commanded to fire at the duke of Monmouth's men, but instead of shooting at them, they shot into the ground, upon which they were very severely handled by their officers: which so enraged them, that they fired upon them, and killed several of them, and amongst others, the duke of Albermarle was killed; and he told me the duke of Monmouth had several field-pieces, and arms sufficient for near 30,000 men.

Att. Gen. Pray, did he shew you any places in any maps?

Hope. There was in the room Adams's map of England, and my lord Delamere shewed me which way Monmouth went, and pointed out such and such towns that he was possessed of; and withal said, he did fear there would be many bloody noses before the business was at an end.

Att. Gen. How many times do you think my lord did ride post to and fro?

Hope. About five times, I believe.

L. H. Steward. Within what space of time?

Hope. From the Sunday seven-night before the coronation, to the 21st of June following.

L. H. Steward. Have you done with him, Mr. Attorney?

Att. Gen. Yes, my lord.

L. Delamere. My Lord High Steward, with your grace's leave, may I ask this witness any questions?

L. H. Steward. Yes, my lord, what you please.

L. Delamere. Pray, did I go down post four or five times, do you say in that space?

Hopr. My lord, I say you did go so often backward and forward.

L. Delamere. What time was that, you say, I came without any servant, only with a post-boy.—*Hope.* I cannot tell.

L. H. Steward. Will your lordship ask him any more questions?

L. Delamere. No, my lord.

Att. Gen. Then, my lord, we desire Thomas Saxon may be sworn. [Which was done.] Pray, Mr. Saxon, will you give an account to his grace and my lords, what you know of my lord Delamere, the prisoner at the bar, concerning any insurrection or rebellion designed by him in Cheshire, and when?

Saxon. At the beginning of June last, I was sent for to Mere, my lord Delamere's house in Cheshire, where when I came I was conveyed into a lower room, where were my lord Delamere, sir Robert Cottou, and Mr. Crew Offley, and they told me I was recommended to them by my lord Brandon, who had said, I was an honest useful man, and they hoped I would prove so: for they had sent to the duke of Monmouth, who was in Holland, and received an answer by one Jones, and as soon as they had an answer, my lord Delamere came away post into the country under another name, and by being conveyed through Morefields, came down to raise 10,000 men for the duke of Monmouth in Cheshire, by the 1st of June; but now they had considered of it, and found they could not raise them till Midsummer, for they must have time to raise a sum of money, 40,000*l.* in that country, to maintain the men. They asked me, whether I would not undertake to carry a message to the duke of Monmouth? I told them I would, and I had there given me eleven guineas, and five pounds in silver for my journey, and I did hire a horse afterwards, and did deliver my message to the duke of Monmouth.

L. H. Steward. When was this, do you say?

Saxon. This was the beginning of June.

L. H. Steward. What day of June?

Saxon. I cannot tell to a day, what day in June it was, for I did not set it down; but I believe it was the 3rd or 4th of June.

L. H. Steward. How came you to be recommended by my lord Brandon to these gentlemen? were you acquainted with my lord Brandon?

Saxon. I was acquainted with him: the first time I was with him was at Over, the next time was at my lord's own house.

Att. Gen. Ay, pray tell my lord, how you came acquainted with my lord Brandon?

Saxon. Upon the Monday in Easter week last, being at Over, I was sent for by my lord Brandon to drink a glass of ale, and smoke a

pipe of tobacco with him; and when I came thither, my lord told me he had a desire to be acquainted with me; so we drank a considerable while; and he was attended at that time with one Holinshead, and one Mr. Lee. And after we had drank pretty smartly, and after some discourse, Lee and Hollinshead went forth, being called out to speak with somebody, about an estate or a tenement that they were concerned in. After they were gone out, my lord Brandon began to discourse about the elections of parliament-men, how unfairly they had been carried: he said, he stood both for the town and county of Lancaster, but had lost it by an unfair election; for the other party had made seven score freemen in one night in the town, and by that means had carried it against him; which had exasperated the country so much, that they were resolved to make it an occasion of raising up the country in arms, under pretence of maintaining the Christian English liberties; and that they had a design to send for the duke of Monmouth, and make him king, and that they must make use of such men as me, that were men of interest in the country, to stir up the people to rise in arms: and if I would come to Goaworth, his house, upon the Monday after, he would tell me more of that business. I went according to the time, and there he told me a great deal to the same purpose, and withal he shewed me a letter that he had written to the duke of Monmouth; which letter I afterwards saw at Bridgewater.

L. H. Steward. Have you any more questions to ask him?

Att. Gen. No, my lord; but if my lord Delamere please to ask him any questions he may.

L. Delamere. I humbly pray he may repeat the evidence he hath given against me, for I have not heard what he has said.

L. H. Steward. Turn toward my lord Delamere, and repeat the evidence that you gave against him, so as he may hear you. [Which he did to the same effect as before.]

L. H. Steward. Pray, from whom did you receive that money?

Saxon. I received it from my lord Delamere.

L. H. Steward. My lord Delamere, will you ask him any questions?

L. Delamere. Yes, may it please your grace.

L. H. Steward. Then the method you are to take, is this, you must propound your questions to me, and then I will propound them to the witness.

L. Delamere. I desire to know, may it please your grace, when was the first time that he declared this that he has now sworn against me?

L. H. Steward. My lord desires to know of you, when it was that you first made known this against him?

L. Delamere. And to whom, my lord?

Saxon. I suppose I told Mr. Storey of it first, my lord, at Dorchester, after I was taken prisoner for the rebellion.

L. Delamere. When did he tell it Storey, my lord?

Saxon. I think it was a fortnight after my acquaintance with him.

L. H. Steward. Were you then in the same prison with Storey?

Saxon. Yes, I lay with him in the same bed.

L. Delamere. If your grace please, I would ask him another question.

L. H. Steward. Ay, what you will.

L. Delamere. I desire to know, when was the first time that he made oath of this, and upon what occasion it was?

L. H. Steward. What say you to that?

Saxon. The first time I made oath of it, was when I lay sick.

L. Delamere. Will your grace please to ask him where that was, and when?

Saxon. It was before his majesty's counsellors, that were sent to take my examination in Newgate.

L. H. Steward. Prithce, I do not know when thou camest to Newgate, it may be thou hast been there oftener than once.

Saxon. I gave my first information immediately after I was brought to town, when I was removed from Dorchester gaol to Newgate.

L. Delamere. My lord, I desire your grace would ask him what time he came up?

Saxon. The beginning of the last term.

L. Delamere. Then I desire to know, my lord, whether he did remain a prisoner in the country till the other time?

Saxon. Yes, I did so, from the tenth of July, till the time that I was brought up to Newgate.

L. Delamere. My lord, I desire to know of him, whether I had ever employed him about any of my concerns, that should give me an occasion of trusting him with such secrets?

L. H. Steward. What business of importance had my lord Delamere ever employed you about before this time?

Saxon. I was never employed about any concerns of my lord Delamere's before that time, neither was I ever in his company, but only then, and then as recommended by him to him; for they said, they must make use of such as me to make their designs known to the country, for the accomplishing what they did intend.

L. Delamere. Recommended by him! who does he mean?

Saxon. By my lord Brendon.

L. Delamere. If your grace please, I desire to know what the business was that he was to do?

Saxon. I was to inform the country concerning the time of the rising, my acquaintance abounded that way, and by their discourse they had got men in every place to acquaint the country when they should rise.

L. H. Steward. Were you acquainted with any great number?

Saxon. My lord, I was a public tradesman in Middlewich, and much acquainted with the ordinary sort of people.

L. Delamere. My lord, he says he was sent

for to my house, I desire to know who was the messenger that was sent for him?

Saxon. My lord, I did ask him his name, but he would not tell it me; he told me he was but a tenant to my lord Delamere, and had been employed in such businesses for my lord Delamere's father, sir George Booth; he was a lame man in one arm, for he had his hand shot away at the siege of Nantwich.

L. Delamere. It was Tom Long the carrier, I suppose, or some such fellow or other, that I sent for him; my lord, I desire to know what time of day or night was it when he came to my house?

Saxon. It was just when it began to be dark, the messenger came to me in the afternoon to fetch me thither, and I sent for a man's horse that lived near me, and when it was brought me, he asked me what made me go so late; I told him I had occasion to go late, and I should return late, and the man staid at my house for his horse till it was late: but I not coming home, he left order for his horse to be brought to him.

L. Delamere. Next, my lord, I desire to know when he came to my house, whether he did alight from his horse at the stables which belong to the house or no?

Saxon. I did alight just at the old-buildings, and the man's horse that came with me and mine were taken into the stables.

L. Delamere. Pray, my lord, ask him who took his horse from him?

Saxon. The man that came with me, and he went into the house, and brought out a candle.

L. Delamere. My lord, I would ask him whether the door he was let in at, was that which was nearest the stable, or which door?

L. H. Steward. Do you know what door of the house you were let in at?

L. Delamere. My lord, I ask him whether it were the next door to the stable?

Saxon. My lord, I cannot very well give an account of that, for I never was at the house before.

L. Delamere. Pray, my lord, let him recollect, whether it were the door next the stable or not?

L. H. Steward. Ay, with all my heart, if he can.

Saxon. I did not see any other door but that I came in at, and therefore I cannot tell which door it was.

L. Delamere. These questions, my lord, I take to be proper for me to ask, and I believe I shall make it appear to your grace to be so by and by.

L. H. Steward. Good my lord, take your full liberty and ask what questions you please; for I know my lords here will be very well pleased that you have all the scope allowed you that can be.

L. Delamere. I humbly thank your grace; I desire to know of him, who let him into the house?

Saxon. The man that came with me went with me just to the door, and let me in within

the door, and I saw no other man but that man, till I came into the room where my lord and those two gentlemen were.

L. Delamere. Was there nobody else but we there?

Saron. No, you were so wise, you would let nobody be by.

L. Delamere. My lord, I shall trouble this witness no farther at present.

L. H. Steward. Then Mr. Attorney General, will you proceed?

Att. Gen. My lord, we will give no more evidence at present, but shall rest here till we see what defence this noble lord will make for himself.

L. H. Steward. Then my lord Delamere, your time is now come to make your defence, you have heard what has been evidenced against you, and my lords now expect to hear what you have to say for yourself.

L. Delamere. May it please your grace, a great part of the day is spent, and I would beg the favour of your grace, that I may have the favour till to-morrow morning to review the notes I have taken, and then I shall make my defence.

L. H. Steward. My lord Delamere, I had this very thing in my thoughts before I came hither this day, because I did foresee that this was likely to be a long cause, and the proceedings in it would take up much time: I have a little doubt, I must needs say, in my own mind, whether it may be done by law: I know very well if this were a trial in full parliament, there have been precedents to warrant the adjournment till another day, though it be in the midst of a trial; and in the middle of the evidence: But this court I take to be of the same nature, though of a degree higher, with the other ordinary courts of judicature; and whether it be not obliged and tied up to the same method of proceedings with those other courts, where all capital offences are tried, is a thing I am in some doubt about; In those courts it has not been usual to adjourn the court after evidence given; nay, it has been sometimes a question, whether the judges in those courts, after the jury are gone from the bar, to consider of their verdict, could adjourn themselves: I say, the judges have sometimes made a doubt of it, though I know the point is now settled, and the practice is, that they may, and do.* But this is most certain, after the evidence given, the jury cannot be adjourned, but must proceed in their enquiry, and be kept together till they are agreed of their verdict, † this has caused some hesitancy in me, what the law may be in this case; therefore I think it may be proper to consult with my lords the judges; for I desire the thing may be considered and settled.

L. Delamere. My lord, I humbly beg this

* See 4 Blackst. Comm. 361.

† That in some cases a Jury may adjourn, See the Trials for High Treason in 1794, in this Collection.

favour of your grace, but to adjourn till to-morrow.

L. H. Steward. With all my heart, my lord, if it may be done by law.

L. Delamere. I hope it may, my lord, and I beg that favour of your grace.

L. H. Steward. My lord, I should be very glad to comply with your lordship's desires; but truly I have considered it, and do doubt whether I can by law do it: In full parliament it is clear it may be done, but upon this commission, after my lords the peers are once charged, and the evidence partly given, whether I can then adjourn them till another day, is with me a doubt. My lords, if your lordships please, before such time as my lord, the prisoner at the bar, enters upon his defence, I will, with your leave, propound the question to my lords the judges, and hear their opinion what the law is.

L. Delamere. My lord, I shall hardly be able to finish all I have to say in any convenient time this day.

L. H. Steward. But, my lord, if an adjournment cannot be by law, I cannot help it.

L. Delamere. There has a great deal been said, and it will require a great deal of time to give it an answer.

L. H. Steward. Ay, but if it cannot be done as you would have it, we must be contented to stay the longer together; for I would not abridge you of your defence: therefore, my lords the judges, if you will please to go together and consider of it, and report your opinions, what the law is in this case, we will stay till you come again.

Then the Judges withdrew into the Exchequer Chamber.

E. of Nottingham. My Lord High Steward, I do humbly conceive this is a matter that concerns the privilege of the peers; and because it is a matter that doth so much concern the whole peerage, I think my lords here ought in some measure to concern themselves about it. Therefore, my lord, I have a short motion to make to your grace, that, considering the consequence, that the precedent of this case may draw with it, since my lords the judges are gone together to consult of this point, of which, I may say, they are not altogether the sole judges; we may also withdraw to consider of this matter with them, because it may not be proper for my lords in public here, to offer what they may have to say, to incline my lords the judges in their judgments one way or other.

L. Falconberg. My lord, I humbly offer this to your grace, upon the motion that this noble lord has made, That, with submission, I take this to be a thing that concerns the privilege of peerage only, and I conceive the judges are not concerned to make any determination of that matter. I think, therefore, my lords here ought to retire with them to consider of it.

L. H. Steward. My lords, I think, with submission to your lordships, that this is a question

naturally proper for my lords the judges to give their opinions in, Whether this court, as a court of judicature for the trial of this noble lord, may, in the midst of the trial, adjourn till another day? And the privilege of the peerage cannot at all come in question here, as I conceive.

L. Falconberg. My lord, that we conceive is a point of privilege, which certainly the inferior courts can have no power to determine.

L. H. Steward. If your lordships have a mind to withdraw, you may.

Lords. Ay, withdraw, withdraw.

Then the Peers withdrew, and after half an hour the Judges returned and took their places as before, and after about an hour the peers returned to their former places.

L. H. Steward. My lords the Judges, have you considered the matter that has been proposed to you, and what is your opinion?

L. C. J. Herbert. May it please your grace, the judges, in obedience to your grace's commands, have withdrawn, and considered of what your grace proposed to them, and with humble submission they take the question to be this.

Not, Whether your grace may adjourn your commission from one day to another, for that is clear you may, and has been practised, for that is the case of the earl of Somerset and his wife:

But the question is, Whether after the prisoner is upon his trial, and the evidence for the king is given, the lords being, as we may term it, charged with the prisoner, the peers triers may separate for a time, which is the consequence of an adjournment to another day.

And, my lord, the judges presume to acquaint your grace, that this is a matter wholly new to them, and that they know not upon recollection of all that they can remember to have read, that either this matter was done or questioned, whether it might or might not be done in any case?

My lord, if the matter had been formerly done, or been brought into question in any case where it had received a determination, and reported in any of our books of law, then it would have been our duty to contribute all our reading and experience for the satisfaction of this great court: But being, as it is, a new question, and a question that not only concerns the particular case of this noble lord at the bar, but is to be a precedent in all cases of the like nature for the future: All we can do is, to acquaint your grace and my noble lords, what the law is in the inferior courts in cases of the like nature, and the reason of the law in those points, and then leave the jurisdiction of this court to its proper judgment.

My lord, in the first place, where the trial is by a jury, there the law is clear, the jury once charged can never be discharged till they have given their verdict, this is clear; and the reason of that is, for fear of corruption and tampering with the jury. An officer is sworn

to keep the jury together without permitting them to separate, or any one to converse with them; for no man knows what may happen, for (though the law requires honest men should be returned upon juries, and without a known objection they are presumed to be *probi et legales homines*, yet) they are weak men, and perhaps may be wrought upon by undue applications.

This, my lord, it is said, fails in this case, because the lords that are to try a peer, are persons of that great integrity and honour, that there is not the least presumption of their being to be prevailed upon in any such way: and for that reason, because of the confidence which the law reposes (and justly) in persons of their quality, they are not sworn as common ordinary jurors are, but are charged and deliver their verdict upon honour.

My lord, in the case of a trial of a peer in parliament, as your grace was pleased to observe, and as is very well known by late experience, there the matter has been adjourned till another day, and for divers days; the evidence being in several parcels, and there the danger is as great (if any were to be supposed) of tampering: But whether the lords being judges in that case, and in this case only in the nature of a jury, makes the difference, though in both cases it is but like a verdict, for they give their opinions *seriatim*, whether the peer tried be guilty or not guilty, that they submit to your grace's consideration.

Upon the whole matter, my lord, whether their being judges in the one, and not in the other instance, alters the case, or whether the reason of law in inferior courts, why the jury are not permitted to separate till they have discharged themselves by their verdict, may have any influence upon this case, where that reason seems to fail, the prisoner being to be tried by his peers, that are men of unquestionable unsuspected integrity and honour, we cannot presume so far as to make any determination in a point that is both new to us, and of great consequence in itself; but think it the properest way for us, having laid matters as we conceive them before your grace and my lords, to submit the jurisdiction of your own court to your own determination.

L. H. Steward. My lords, I confess I would always be very tender of the privilege of the peers wherever I find them concerned; but truly I apprehend, according to the best of my understanding, that this court is held before me. It is my warrant that convenes the prisoner to this bar. It is my summons that brings the peers together to try him, and so I take myself to be judge of the court.

My lords, it is true, may withdraw, and they may call the judges to them to assist them, which shews they have an extraordinary privilege in some cases more before the high-steward, than juries have in inferior courts in cases of common persons: For, if it be in a common case no jury can call either counsel or judges to assist them, in the absence of the

prisoner; but if they will have advice, it must be asked in open court, in the presence of the party accused.

But now, my lords, if you have a mind to consult with me in private, as I now sit by virtue of this commission, which is his majesty's warrant for me to hold this court, I could not withdraw with you; but you must ask all your questions of me, in the presence of the prisoner in open court: whereas if it were in full parliament, as were the cases of my lord Stafford,* and my lord of Pembroke,† then he that was the high-steward might go along with you when you withdrew, and consult with you, and give his opinion, which I cannot do in this case; for I am bound to sit in court, while you withdraw to consider of the evidence, and am not to hear any thing said to me, but what is said in open court in the presence of the prisoner; except it be when you deliver your verdict.

This I confess, my lord, has a great weight with me, and I know your lordships will be very tender of proceeding in such a case any way but according to law: For though you are judges of your own privileges, yet, with submission, you are not judges of the law of this court; for that I take to be my province.‡

Why then, suppose, my lords, I should take upon me to do as my lord Delamere desires, and adjourn this court; and suppose the law should fall out to be that indeed I ought not so to have done; would it be any advantage to this noble peer if he should be acquitted by your lordships after such an adjournment? Might not the evil consequence of that be, that he might be indicted for the same crime, and tried again? For all the proceedings after that would be void, and liable to be reversed.

And if, on the other side, your lordships should think fit, upon the evidence you have now heard, and what he shall say for himself, to convict him, after I have adjourned as is desired, and I pass judgment upon him, as it will be a duty incumbent upon me to pass sentence on him, if you convict him; what will become of the case then? and how shall I be able to answer it, as having done my duty, when I pronounce a judgment notoriously erroneous and illegal? for so it will be, if the law prove to be against my adjourning. This, my lords, is a matter of great moment, and worth the consideration.

* See the Case, vol. 7, p. 1293, of this Collection.

† See the Case, vol. 6, p. 1239, of this Collection.

‡ See 4 Blackst. Comm. 263. Concerning the *Lex Parliamenti* and the Privilege of Parliament, see something in the Cases of *Skinner v. The East-India Company*, vol. 6, p. 709; *Barnardiston v. Soame*, vol. 6, 1063; *Shirley v. Fagg*, vol. 6, p. 1121; *lord Shaftsbury's Case*, vol. 6, p. 1269; *Richard Thompson's Case*, vol. 8, p. 1, *Fitzharris's Case*, vol. 8, p. 223.

But in the other case of a trial in full parliament, the lord that sits where I do, is only as the chairman of the court rather than judge, he gives a vote in such proceedings; and therefore, my lord, the prisoner did very well at the beginning to ask the question, whether I had any vote in his trial, as a peer, jointly with your lordships? If I sat in full parliament, I should without all question give my vote as well as any other peer; but sitting here by immediate commission from the king *pro hac vice*, high-steward; I acquaint you as I did him, I have no authority to give any vote: my business is to see the law observed and fulfilled as judge.*

Certainly, my lords, your lordships and I, and all mankind ought to be tender of committing any errors in cases of life and death, and I would be loth, I will assure you, to be recorded for giving an erroneous judgment in a case of blood, and as the first man that should bring in an illegal precedent, the consequence of which may extend I know not how far.

Att. Gen. Will your grace give direction for my lord to proceed?

L. H. Steward. Yes; he must proceed, I think.

L. Delamere. May it please your grace, and you, my lords, it is an offence of a very high nature, for which I am this day to answer before your lordships; yet, I thank God, I am not afraid to speak in this place, because I am not only certain and well assured of my own innocence, no such thought having as yet entered into my heart; but I am also well assured of your lordships wisdom and justice, which cannot be imposed upon or surprised by insinuations and florid harangues, nor governed by any thing but the justice of the cause.

My lords, I can with a great deal of comfort and satisfaction say, that these crimes where-with I am charged are not only strangers to my thoughts, but also to what has been my constant principle and practice; for I think that in matters relating to the church, and the things enjoined therein, few have conformed more in practice than I have done, and yet do I confess, and am not ashamed to say it, that I have always had a tenderness for all those who could not keep pace with me, and charity for those that have outgone me, and differed from me, though never so far; nay, though of a different religion: For I always thought religion lay more in charity than persecution.

While I had the honour to be a magistrate in my country, I did constantly, duly, and impartially execute the laws, and in every public trust I was very faithful in the discharge of it; for I never voted nor spoke in any manner but as my conscience and judgment did dictate to me. I have always made the laws the measure of my loyalty, and have still been as zealous and careful to give the king his prerogative, as to preserve to the people their properties, and

* See 4 Blackstone's Comm. 263.

have endeavoured, as far as in me lay, to live peaceably with all men.

This, my lords, was not only the dictates of my own inclinations, but it was the principle of my father, and the lesson that he taught me : I say my father, who was so greatly instrumental in snatching this nation out of its confusion, and restoring it to its ancient government, by settling his late majesty upon his throne, and consequently was the means of his present majesty, that now is, his coming so peaceably to the crown. And this I may the more boldly speak, because I speak it by good authority ; because in the patent that created my father a peer, his late majesty is pleased to say, his rising was mainly instrumental in his restoration. I beg the favour of your grace and my lords, that I may read you that clause in the preamble of the patent, which I have here ready to produce.

[Which was read, and then my lord proceeded as follows, viz.]

My lords, I suppose most of your lordships did know him ; and whosoever did so, I dare say, did believe him to be a good man ; For my part, I did not know a better copy to write after than his example, which I endeavoured always to imitate, and that I hope will go very far to vindicate me from the imputation of being inclined to any such crime as I stand charged with.

My lords, It is now late, and therefore I shall cut off a great deal of what I had intended to say to your lordships, that I may not take up too much of your time, and come immediately to my defence, as to what I stand accused of.

And first, my lords, I shall observe, that here have been a great many witnesses produced, and a great deal of swearing, but little or nothing of legal evidence to affect me ; for there is but one man that saith any thing home and positively against me (and whom I shall answer by and by) ; all the rest are but hearsays, and such remote circumstances, as may be tacked to any evidence against any other person, but are urged against me for want of greater matters to charge me with ; and therefore I hope the producing and pressing of these things against me, is rather a strong argument that I am innocent, and that there have been mischievous and ill designs of some against me, than that I am guilty ; for if they had had other and greater matters, your lordships would have been sure to have heard of them.

With your lordships leave, I cannot but observe to your lordships an excellent saying of that great man my lord of Nottingham, (whose name will ever be remembered with honour in our English nation) when he sat in the same place that your grace does now, at the trial of my lord Cornwallis, which I will read to your lordships. Speaking to the peers, he has this passage.

“ I know your lordships will weigh the

fact, with all its circumstances, from which it is to receive its true and its proper doom. Your lordships are too just to let pity make an abatement for the crime, and too wise to suffer rhetoric to make any improvement of it : This only will be necessary to be observed by all your lordships, that the fouler the crime is, the clearer and the plainer ought the proof of it to be ; there is no other good reason can be given, why the law refuses to allow the prisoner at the bar counsel in matter of fact when life is concerned, but only this, because the evidence by which he is condemned ought to be so very evident and so plain, that all the counsel in the world should not be able to answer it.”*

My lords, I think that the evidence that has been given against me this day does not come up to this. And I hope your lordships will regard this saying of my lord Nottingham's, as more worthy of your consideration, than the fine flourishings and insinuations of the king's counsel, which tend (if it be not so designed) rather to misguide your lordships, than to lead you to find out the truth.

My lords, I shall now tell you the method that I shall proceed in, in making my defence ; and I begin with Saxon ; for he, I perceive, is the great Goliath, whose evidence is to maintain this accusation, and if I cut him down, I suppose I shall be thought to have done my own business : therefore to that I shall apply myself first, and do if I can ; and will in the first place examine several persons that are his neighbours, and have conversed with him, what they have heard and know of him : and first I desire Richard Hall may be called.

L. H. Steward. My lord Delamere, if you begin that way to call witnesses against Saxon, it is fit he should be here to know what is said against him.

L. Delamere. Ay, with all my heart, my lord.

L. H. Steward. Then call Saxon again.— [Then Saxon and Hall came both in.]

L. Delamere. Pray Mr. Hall, tell my lords here what you know of Thomas Saxon ?

L. H. Steward. What is it you ask of this witness ?

L. Delamere. My lord, I desire him to give an account what he knows of a letter, that was forged by Saxon, in the name of one Hildage ?

Hall. About the 19th of December, in the year 1683, I received a letter by Thomas Saxon, from Richard Hildage, wherein he desired me to send him the sum of 6*l.* odd money which I owed him : I received the letter and paid the money, and to the best of my knowledge, some little time after I met with the said Hildage at Newcastle, who asked me to pay him the money I owed him. I replied I had paid the money according to his note ; but he said he never gave any such note, and threatened to sue me ; thereupon I sent one Lord to Hildage, that is here now in

* See vol. 7, p. 148.

the court, and desired Hildage's forbearance for a while, till I could get the money from Saxon back again, and afterwards he sent again for his money, and I sent to Saxon for it, but still the money did not come.

L. H. Steward. Did you ever speak with Saxon himself?

Hall. No, but with his wife, who came to me about it; but he acknowledged he wrote the letter before John Lord.

Saxon. Did not my wife tell you that Richard Hildage lent me the money?

L. H. Steward. Nay, you must not dialogue with one another, but if you have any questions, you must propound them to the court: My lord Delamere, have you any questions to ask him?—*L. Delamere.* No, my lord.

L. H. Steward. Then what is it you would have him asked, Saxon?

Saxon. I desire you would please to ask him, whether or no he did not lend me the money?

L. H. Steward. He! who do you mean?

Saxon. Richard Hildage did.

L. H. Steward. What say you, did Richard Hildage lend him the money?

Hall. No, my lord.

L. H. Steward. Look you, my lord Delamere, the objection carries a great deal of weight in it, to prove him a very ill man, if it be fully made out.

L. Delamere. My lord, if your grace please, I can prove that he owned the writing of the letter to another man.

L. H. Steward. My lord, he does own here, that he wrote a letter, and that he wrote it in Hildage's name, but he saith, the letter he so wrote in Hildage's name, was by Hildage's direction; and if so, that takes off the objection made against him.

L. Delamere. I must submit that to your grace, whether what he says in that matter be evidence?

L. H. Steward. What Hildage did, or did not, is the main turn of the question in this case; for he might lend him the money, and yet afterwards might say, when he thought he might lose it, that he did not send any such letter, and all this be true, and Saxon in no fault: I must confess, if Hildage were here himself, and should deny the lending of the money, or the giving him directions to receive it, you would have fixed a shrewd objection upon him; but otherwise hear-says and discourses at second hand are not to take off the credit of any man's testimony.

L. Delamere. But Hall says Hildage denied the receipt of the money, or any order for receiving of it.

L. H. Steward. That signifies nothing, being but by second-hand.

Saxon. If it please your grace, here is my brother in court will give you an account of it.

L. H. Steward. Well, well, hold your tongue; will your lordship please to go on?

L. Delamere. The next witness, my lord, that I shall call, shall be Francis Ling, [Who came in.]

L. H. Steward. What do you ask this witness?

L. Delamere. Mr. Ling, pray will you tell his grace, and my lords, what you know concerning Saxon's receiving any money in the name of Mrs. Wilbraham, without her order.

Ling. He called at this same Hildage's at Newcastle, and received twenty five shillings, and said it was for Mrs. Wilbraham, in her name; but she never received a penny of the money, nor knew of his having received it, till he came to pay another quarter.

L. H. Steward. Where is that Mrs. Wilbraham? Is she here?

Ling. No, my lord, she is a neighbour of ours, an ancient woman, fourscore years of age, and cannot come so far.

L. H. Steward. This is the same case with the other, you can never think to take off the credibility of witnesses by such testimony; for this is only a tale out of an old woman's mouth: What if that old woman told him a false story?

Ling. She said——

L. H. Steward. I care not what she said, this is no evidence at all.

L. Delamere. Then pray call Richard Shaw. [Who came in.]

L. H. Steward. Well, what says this witness?

L. Delamere. Shaw, can you tell any thing of Thomas Saxon's writing a letter, and sending it in the name of one Pangston a bayliff?

Shaw. He writ a letter, as I understand, concerning some money that I owed him; for I owed him a little money, and being I did not pay it, he does forge a letter and puts William Pangston's name to it, so I got up the other morning——

L. H. Steward. Where is Pangston? Is he here?

Shaw. No, my lord, he is not, but he told me he did not write the letter.

L. H. Steward. Why, this is just the same again, and we all know how easy a thing it is to hear a bayliff tell a lye.

Shaw. I cannot tell, but I called——

L. H. Steward. All that is nothing. It is a difficulter matter to hear such fellows speak truth, than any thing else, I am sure.

L. Delamere. The next witness that I shall call is Peter Hough. [Who appeared.]

L. H. Steward. There is your witness. What say you to him?

L. Delamere. Pray acquaint his grace, and my lords, what you know of Saxon's cheating you in the making of a bond.

Hough. My lord, he had six pound ten shillings in money, and ten shillings in work done, for which he was to give me a bond, and hereof he made the bond himself. I thought it had been right, and took it; but about the time when the money was become due, I looked upon it, and it proved to be but for 6*l.*

L. H. Steward. What should it have been for?

Hough. It should have been for six pounds

ten shillings in money, and ten shillings in work.

L. H. Steward. Did not he give thee a bond for all thy money?

Hough. It should have been so, but I never had it.

L. H. Steward. Had you never the money?

Hough. No, I never had the money.

L. H. Steward. What did he say the bond should be made for?

Hough. For seven pounds.

L. H. Steward. What say you to it, Saxon?

Saxon. My lord, I had five pounds ten shillings of him, and ten shillings in work, for which I gave him bond; there were the witnesses names at it, the bond was fairly read, and I sealed it, and he took it with him.

L. H. Steward. Ay, but he says it was to be for seven pounds.

Saxon. I never had any more of him than six pounds, and for that I gave him bond.

L. H. Steward. Was the bond read to you?

Hough. He read it himself, and he made it himself.

L. H. Steward. How did he read it? What did you apprehend by his reading it was made for?

Hough. I took it as he read it to be made for seven pounds.

Saxon. He may say what he pleases, but I had no more of him but six pounds; I was to give bond for no more.

L. H. Steward. Now the witnesses to this bond would be very proper to be produced here: For, if he did make the bond but for six pounds, when the debt that was to be secured was seven pounds, that is a sign that he had an intention to cheat him of the twenty shillings.

L. Delamere. That shews what a kind of man he is.

L. H. Steward. But this is but witness against witness, for he says, he owed no more, and was to make the bond for no more.

Hough. It was as I tell you, I assure you, my lord.

Saxon. I had no more of him than six pound.

Hough. Did not I ask you afterwards one question more, and told you it was a cheat, and you said it should be mended?

L. H. Steward. Well, my lords have heard it, they will consider what weight to lay upon it.

L. Delamere. Pray call Edward Wilkinson. [Who appeared.]

L. H. Steward. What do you ask him?

L. Delamere. Wilkinson, pray tell my lords, how Saxon dealt with you about your horse?

Wilkinson. My lord, he hired a horse of me for three days, and was to give me twelve-pence a day, but he never came again, nor had I any satisfaction for my horse; but I lost my horse by the bargain, and my money too.

L. H. Steward. How long ago was it since he hired your horse?

Wilkinson. My lord, it was the 23d of June, to the best of my remembrance.

L. H. Steward. Did he not agree with you for 12d. a day as long as he used your horse?

Wilkinson. I expected to have my horse in three days time.

L. H. Steward. But mind my question, did you agree that he should have him but three days? Or, was he to give you 12d. a day for so long as he kept him out?

Wilkinson. I was to have 12d. a day for him.

L. H. Steward. What! as long as he used him, or only for three days?

Wilkinson. He did agree with me to bring him again in three days.

L. H. Steward. I perceive by the time, he rid into the rebellion with his horse, and he was a very knave for so doing, upon my conscience.

L. Delamere. Call William Wright, [who came in.] Pray will you give my lords an account what reputation this Thomas Saxon is of in his country?

Wright. My lord, this Thomas Saxon came to live at Sambige, and I had some dealings with him as well as other men, and I never found him to perfect his word in any thing.

L. H. Steward. What didst thou never find him?

Wright. To perfect his word in any thing, my lord.

L. H. Steward. That is, make good his word, I suppose; but that is your Cheshire phrase.

Wright. Whereupon I met with him one evening after evening-prayer, and said to him, Thomas Saxon, if I cared no more for keeping my word than thou dost, it were no matter if I were hanged; for to be sure if thy mouth open, thy tongue lyes: and he turned away from me, and would not answer me a word; and since that he owed me some money, and when I asked him for it, he told me if I did trouble him for the money, it should be the worse for me; whereof all the town knows as well as I, that I cannot set him forth in words as bad as he is.

L. H. Steward. Can you instance in particular, friend, of any fraud, cheat, or cosenage, that he has been guilty of? For it is not what the town says, but what can be proved, that we must take for evidence; the town that thou livest in may reckon thee but an idle fellow, and yet thou mayest be a very honest man for all that.

Wright. I trust, my lord, I am so, and shall always prove so.

L. H. Steward. Well, what do'st thou know ill of him?

Wright. He did not keep his word with me.

L. H. Steward. Wherein dost thou mean?

Wright. As to money he owed me.

L. H. Steward. How much money did he owe thee?—*Wright.* He owed me a deal.

L. H. Steward. How much do'st thou call a deal?

Wright. I cannot tell how much exactly.

L. H. Steward. Does he owe thee any thing now?

Wright. Yes, but I cannot justly tell how much.

L. H. Steward. My lord Delamere, I would be very unwilling to interrupt the method of your defence, or abridge you in your evidence; but really this objection that you endeavour to prove by this witness, is not at all, as I conceive, for your lordship's service: for it is a very hard case, if any one that owes money and does not pay it, shall for that very reason lose the credit of his testimony; this rather gives a countenance to what he says, that you know no other objections but such trivial ones to make against him.

L. Delamere. Then, if your grace please, I will make short work of it, and spare your time; I shall pass over this part of my evidence, though I have more witnesses to this point, and come to other matters, to matter of fact, to encounter this positive proof that has been given against me. Your grace and my lords do observe, that this man Saxon has testified, that about the third or fourth of June last (for there he fixed the time) this man, as an extraordinary person that was fit to be trusted in an affair of this nature, being confided in, and recommended by my lord Brandon, was sent for by me to Mere, where he found me and sir Robert Cotton and Mr. Offley, who did employ him to transact the matter of stirring up the country in order to a rising and joining with the late duke of Monmouth: now I will first prove to your lordship in general, that sir Robert Cotton was not in Cheshire for many weeks, nay, several months both before and after the time he speaks of: and next in particular I shall prove as to the time that he has pitched upon, by divers persons that saw sir Robert Cotton here then in London, and give you particular reasons for it. First to prove, that he was here in town so long in general, I shall produce his servants that saw him every day: call ——— *Billing.* [Who appeared.] Pray Sir, will you give an account what time sir Robert Cotton came to London, when he went out of London, and whether you were frequently in his company and saw him here?

Billing. My lord, to the best of my remembrance, sir Robert Cotton came to town the 10th of April last, and I was with him here in town; at his house at the Horse-ferry, till the latter end of July, and saw him constantly more than once or twice every day for that time: I used to come into his chamber most mornings before he was up; I used to buy in his provision for his house, I saw him a-bed, or heard he was in bed every night.

L. H. Steward. Did you belong to him?

Billing. I am his servant.

L. Delamere. He lived with him in the house all the while, he says.

Billing. Then about the latter end of July he went out of town for three days to Epsom, and then he came to town again, and continued here till the time he was committed to the Tower, and never was in Cheshire since the 6th of April last.

L. H. Steward. How came you to remember so punctually when he came to town, and that he staid here all the while?

Billing. I know it by my accounts for the journey up, and by the tradesmen's bills for the provision of the house ever since.

L. H. Steward. In what capacity did you serve sir Robert Cotton?

Billing. I bought in all the provision for his house, and paid the tradesmen's bills.

L. H. Steward. Have you any papers in your pocket that will point to any particular time?

Billing. I have not the tradesmen's bills here, my lord, nor my own accounts; but I have looked upon them, and by that I am sure what I have testified is true.

L. H. Steward. Who do you call next, my lord?

L. Delamere. Call Margaret Davis. [Who appeared.] Pray will you give an account to my lord, what time sir Robert Cotton came to town, and to the best of your remembrance when he went out of town again?

Davis. He came to town upon the tenth of April last, or thereabouts, and he has not been out of town any night since, except it were in August.

L. H. Steward. What day did he come to town, do you say?

Davis. About the tenth of April.

L. H. Steward. And you say he did not go out of town till August?—*Davis.* No, my lord.

L. H. Steward. How do you know this?

Davis. I was constantly in the house with him.

L. H. Steward. But how came you to be so exact as to the time?

Davis. I saw him continually every day.

L. H. Steward. How came you to see him?

Davis. I live with him in the house.

L. H. Steward. Pray recollect yourself as to the time he went out of town, for I perceive the other man says it was the latter end of July.

Davis. It was in August certainly, my lord.

L. Delamere. My lord, the other witness saith it was the latter end of July, and that may be very well consistent, neither of them speaking to a day.

L. H. Steward. Well, are you sure he was in town all the month of June?

Davis. Yes, he was.

L. H. Steward. Well, who do you call next?

L. Delamere. Mrs. Sidney Lane. [Who appeared.]

L. H. Steward. What do you ask this gentlewoman?

L. Delamere. I examine her to the same point: and I question not but I shall make it out to your grace, and my lords, none of us all three that he has named were there at that time.

L. H. Steward. I shall be very glad of it, my lord.

L. Delamere. Pray, Mrs. Lane, will you give an account when it was sir Robert Cotton came to town, and how long he staid here?

Mrs. Lane. He came to town the April before the coronation, and never lay out of town I am sure all those three months of April, May, and June, after he came to town.

L. Delamere. This gentlewoman, my lord, lived in the same house with him.

Mrs. Lane. I did so, my lord, and saw him every night and morning.

L. Delamere. If your grace please, I have two or three more witnesses to the same purpose; but I would spare their lordships time, if this point be fully cleared.

L. H. Steward. Pray, my lord, do not abridge yourself, for I know my lords will not grudge the time, but are very desirous you should have full liberty in what is pertinent.

L. Delamere. Then I desire Charles Reeves may be called. [Who appeared.] I pray, my lord, that this man may give an account what time it was sir Robert Cotton came to town, and how long he staid here?

Reeves. If it please your lordship, he was in town before the coronation, and I saw him here every day from that time till after July once or twice every day.

L. H. Steward. Did you belong to him?

Reeves. Yes, and I do now.

L. H. Steward. In what capacity, friend?

Reeves. My lord, I am his footman.

L. Delamere. May it please your grace, the next witness I have to produce is Mr. Ashburnham; being he cannot easily remove, I beg he may be heard in the place where he is.

L. H. Steward. Ay, let him speak where he is, and let him speak out.

L. Delamere. Pray Sir, will you please to recollect yourself what time you saw sir Robert Cotton, and where, the last summer?

Ashburnham. My lord, I being at sir Robert Cotton's house at Westminster, he desired me to present a petition of his to the House of Commons for him, and it was about the latter end of the time allotted for petitions, I cannot exactly tell what day of the week or month it was, but I saw him that day I presented his petition, and I saw him at the Committee of Elections two or three days after.

L. Delamere. Sir William Twisden, I desire may be also heard what he has to say to the same point? [Who answered to the same effect.]

L. Delamere. Mr. Heveningham is my next witness, my lord; who I desire that he would please to give your grace and my lords an account, when he remembers to have seen sir Robert Cotton in town.

Mr. Heveningham. My lord, it was a more than ordinary occasion that makes me remember the thing and the time so particular. I was engaged in a dispute in the House of Commons about my own election, and that was upon the 2nd of June; then was a case debated in the House, whether a mayor that was elected a burgess for any town could sit upon his own return? It was then carried he should not. And the next day, which was the 3rd of June, another question came on, whether sir Joseph Williamson was

duly elected and returned? And I remember at that time I was walking with sir Robert Cotton in the Court of Requests, and Mr. Neal came out of the house and told me, that it was carried by five, that he was not; and then sir Robert Cotton was with me.

L. H. Steward. So you speak as to the 2nd and 3rd of June?

Heveningham. My lord, had it not been upon this particular occasion, I could not have remembered the time so exactly.

L. H. Steward. You give a very good token for your remembrance, and my lords hear what you have said.

L. Delamere. Will your grace please that the clerk of the House of Commons may be called, and examined to the Journal of that House, when it was sir Robert Cotton preferred his petition, and that will fix the time as to what Mr. Ashburnham and sir William Twisden have said?

L. H. Steward. Call whom you please, my lord.

L. Delamere. It seems he is not ready, but I hope I have given your grace and my lords sufficient satisfaction, that sir Robert Cotton was not there at that time that this fellow speaks of. I will now go on, and prove Mr. Offley was not there neither; and the first witness I call to that, shall be sir Willoughby Aston, whom I desire your grace will be pleased to hear speak in his place.

L. H. Steward. Well, what do you say, sir Willoughby?

Sir W. Aston. My lord, I desire to be guided in what account I shall give by the questions that shall be asked.

L. H. Steward. What is it you ask sir Willoughby Aston?

L. Delamere. Pray can you remember, sir Willoughby, what time it was, and whether about the latter end of May last, or when, that you know of Mr. Offley's being at your house, and how long he staid there?

Sir W. Aston. I can give an account of his motion for ten days together, but that perhaps may be more than is necessary.

L. H. Steward. It will not be improper, Sir, for you to give as exact and particular account as you can of the times.

Sir W. Aston. If your grace please, I will do it.

L. H. Steward. Pray do, Sir.

Sir W. Aston. Upon the 26th of May, which was Tuesday, at night, Mr. Offley and his lady, and some of their relations, came to my house; upon Wednesday the 27th of May Mr. Offley was so sick that he kept his chamber and his bed all day; upon the 28th of May, which was Thursday, he was so ill that he kept his chamber all day, and rose about five at night, and I then waited upon him, and sat with him three hours in his dressing room. On Friday the 29th of May he went to church, that day was employed a great part in devotion. Upon the 30th of May, which was Saturday, Mr. Offley and his lady went, and a great part of my fu-

mily went with them, to one Mr. Pickering's six miles off my house, there they dined, and returned at night to my house. Upon Sunday the 31st of May, I have a particular remark whereby I remember that Mr. Offley went to visit Mr. Needham. Upon Monday the 1st of June, Mrs. Offley and the women of my family went to visit my lady Brooks, but Mr. Offley not being well, staid at home. On Tuesday the 2nd of June he was still at my house, there was a great deal of company there, and he was in the company all the day long. On Wednesday the 3rd I fell sick in the morning about four of the clock, but Mr. Offley was in the house all the morning; but in the afternoon he went to make a visit two miles from my house, at a place called the Ware-house, where the ships ride at anchor: and upon Thursday morning, which was the 4th of June, he went from my house. Now, if your lordship desires to know any thing about any particular time about this compass, I'll give you the best account I can.

L. H. Steward. Can you tell me where he went when he went from your house?

Sir W. Aston. He went directly home, as he said.

L. H. Steward. Did you hear at any time that he staid by the way, between his going from you and coming to his own house?

Sir W. Aston. My son went with him two or three miles of his way, and I heard that at Middlewich he staid to speak with some of the Militia officers that he met with by the way there at a muster, and afterwards went directly home.

L. H. Steward. Pray is the usual way from his house to your's by my lord Delamere's?

Sir W. Aston. No, my lord, directly another way.

L. H. Steward. Will you ask sir Willoughby Aston any more questions?

L. Delamere. No, my lord.

Att. Gen. If your grace please, I would ask sir Willoughby Aston one question. Sir, I desire to know how far it is from your house to my lord Delamere's?

Sir W. Aston. Sir, it is about eleven miles.

L. H. Steward. Eleven miles you say, Sir?

Sir W. Aston. Yes, my lord, eleven of those northern miles.

L. Delamere. My lord, I have some more witnesses to examine to this point.

L. H. Steward. Call whom you please, my lord?

L. Delamere. I call Mr. Gregory next, my lord. [Who appeared.] Pray give my lord an account, when Mr. Offley went from sir Willoughby Aston's last summer, and whither he went?

Gregory. My lord, my master went from sir W. Aston's house—

L. H. Steward. Who is your master?

Gregory. Mr. Offley, my lord. It was upon the 4th of June at nine of the clock in the morning, and went from thence to Middlewich, and was at home at his own house about five

of the clock in the evening, as I was told, for I did not go directly home with him.

L. H. Steward. Was he at Mere that day at my lord Delamere's?

Gregory. No, not that I know of, I was not with him.

L. Delamere. Then pray call Thomas Kidd. [Who appeared.] Pray were you that day with Mr. Offley when he went from sir Willoughby Aston's?

Kidd. Yes, my lord, I was.

L. Delamere. What day was it?

Kidd. The 4th of June.

L. Delamere. Then whither went he?

Kidd. He went the direct road to his own house, I never parted from him, nor did he stop any where till he came to Middlewich, where the country Militia were exercising; and he just alighted off his horse, and spoke with major Minshaw and some of the officers, but never so much as drank by the way till he came to his own house.

L. H. Steward. What! To his house in Staffordshire?

Kidd. No, but to Crew-hall in Cheshire.

L. H. Steward. Does Mere lie in the road between sir Willoughby Aston's and Crew-hall, so that your master might be there within that time?

Kidd. No, that he could not do.

L. H. Steward. Were you with Mr. Offley the whole journey home?

Kidd. Yes, my lord, I was.

L. H. Steward. Were you no time from him?

Kidd. No, my lord, I was not.

L. H. Steward. What time did he come home?

Kidd. He came to his own house about four or five o'clock at night.

L. H. Steward. And did not he go from thence that night?

Kidd. No, my lord.

L. Delamere. Now, my lord, I will prove as to myself that I was in London at the time he speaks of. And first, I desire sir James Langham may be heard to that. [He appeared, but gave no evidence.]

L. Delamere. Pray call — Booth, [who appeared.]

L. H. Steward. What is this gentleman's name?

L. Delamere. He is my brother, my lord, his name is — Booth.

L. H. Steward. What do you ask him?

L. Delamere. Pray can you remember what time in June you saw me in town here?

Mr. Booth. My lord, I saw my brother here in town the 3rd, 4th, 5th, and 6th, and so on to the 10th of June, and the 10th of June I went out of town myself; I saw him sometimes twice or thrice a day in that time, for I did not lodge above half a score doors from him.

L. H. Steward. Where was that?

Booth. In Great Russel-street.

L. H. Steward. How come you to remember the time so particularly?

Mr. Booth. It was that day se'night before I went out of town, which was Wednesday the 10th of June, and had it not been for that particular circumstance, I had not remarked it so much as to be able particularly to remember it.

Att. Gen. Pray, Mr. Booth, did you know of your brother's going out of town the 27th of May?

Mr. Booth. I heard he was gone out of town about that time.

L. H. Steward. Why then, when came he hither to town again?

Mr. Booth. I cannot tell, but I saw him upon the 3rd of June in the evening.

Att. Gen. My lord, it is not possible for him so to do in that time, if he rode post.

L. H. Steward. He did make a great deal of haste backward and forward, that is certain.

L. Delamere. My brother does not know when I went, but as he heard, he says.

L. H. Steward. But pray, my lord, mind the objection that has been made, for it carries a great deal of weight in it. It is plainly proved by two witnesses, that you went out of town the 27th of May at nine of the clock at night, and rode to Hoddesdon, and the next day came to Hitchin about noon; then they left you and returned back again to London that night, and you told them you were going to see a sick child of your's in Cheshire; how came you to make such post haste back again, that he should see you here in London the 3rd of June?

Mr. Booth. My lord, I am certain I saw him that day in the evening, and so on to the tenth.

L. H. Steward. Did my lord then tell you how your friends did in Cheshire?

Mr. Booth. I cannot remember the particular discourse we had.

Att. Gen. Pray, Sir, when did he tell you he came to town?

L. H. Steward. You say you used to see him every day once or twice a day?

Mr. Booth. Yes, I did so.

L. H. Steward. Pray where was he the 2nd of June?

Mr. Booth. He was not come to town.

L. H. Steward. How long time was it before that, you had not seen him?

Mr. Booth. I had not seen him of several days before.

L. Delamere. If it please your grace, here is another brother of mine that saw me at the same time; and though he be my brother, I hope he is a good witness.

L. H. Steward. Ay, God forbid else; what is his name?

L. Delamere. George Booth.

L. H. Steward. Well, what say you, Sir?

Mr. G. Booth. My lord, I saw my brother Delamere here in town the 4th of June, by this particular circumstance which I cannot err in, that the next day, as I take it, I went down with him to the house of lords to hear my lord Macclesfield's cause, which was then there to be heard upon the appeal of Mr. Fitton; and my

brother was in the house of lords at that time which was the 5th of June.

L. H. Steward. My lord Delamere, I think it not amiss to put you in mind of one thing, which it is fit your lordship should give some answer to: does your lordship deny that you went out of town the 27th of May?

L. Delamere. No, my lord, I do not; I acknowledge I did so.

L. H. Steward. Then it will be fit for you to give an account where you were the 28th day of May, and so all along, till the 3rd of June?

L. Delamere. If your grace please, I hope I shall give you full satisfaction in that by and by; but I have one witness more to this point of my being in town, at such a time that I could not be in Cheshire, when this fellow says I was; and that is my lord Lovelace.

L. H. Steward. There is my lord Lovelace, what would you ask him?

L. Delamere. Whether he did not see me at the trial of my lord Macclesfield in the house of lords?

L. Lovelace. I was in the house of lords that day that my lord Macclesfield's trial was, and I remember I did see my lord Delamere there.

L. H. Steward. But we are as much at a loss now as ever we were, for what day that trial was does not appear: what day was my lord Macclesfield's trial?

L. Delamere. The Journal of the House of Lords proves that to be the 5th of June.

L. Lovelace. My lord stood just by the bar, and if I am not mistaken took notes.

L. Delamere. My lord, I hope now I have satisfied your grace, and the rest of my lords, that none of us three whom this fellow has mentioned were there at that time at Mere, when he says we were: For my own part, I do positively affirm, and I speak it as in the presence of Almighty God, that I have not seen sir Robert Cotton at my house that I know of these many years; and I believe Mr. Offley was never in my house since I was master of it: and I do likewise protest, that to my knowledge, I never saw the face of this man till now that he is produced as a witness against me; I am sure I never spoke with him in all my life, nor never sent for him to come to my house: and if your lordship please to consider the story that he tells, it will easily appear to be very improbable, for he neither tells you who the messenger was that was sent for him, nor the way that he came into the house; which any body that has ever been at the house could not mistake. For when I asked him what door it was he came in at, it was for this reason, because he must needs have gone a great way about, if he had not come in at the usual entry into the house, for I have but one door into my house except that by the stables, which is a great way off the house. And it being about that time of the year, if it were eight or nine o'clock in the evening he must needs discern which way he came in. And, besides, my lords, is it probable what he says,

that he should see nobody stirring about the house except it were this man without a hand, that he says was sent for him? I assure your lordships, I have not, nor had my father ever that I know of, any servant or tenant that was maimed in that manner that he speaks of. He saith, he was recommended to us by my lord Brandon: but he cannot tell your lordship any thing that ever he had done to recommend him either to him or us. I did ask him what important service he had ever done for me, that might give a credibility to my employing him in such a business as this. My lord, I cannot help it if people will tell false stories of me, but I hope your lordships will consider the credibility of it; is it to be imagined that I would take a man I knew nothing of, upon another man's word, into so great a confidence as to employ him about a business of this nature? I am glad that he was called in here again for your lordships to view him. I beseech your lordships to look at him; is this fellow a likely fellow to be used in such an affair? Does he look as if he were fit to be employed for the raising of 10,000 men? Does he seem to be a man of such considerable interest in his country? A fellow, that though it be not direct evidence, yet by several witnesses I have shewn to be a man of no reputation in his country, nay, of a very ill one; and could we have none else to employ in a matter of this moment, but such a fellow as his neighbours would not take his word for any thing? It is an improbable story upon these accounts, if I should say no more. Your lordships likewise see, that he is so well thought of, that he dare not be trusted out of Newgate, but is kept still a prisoner, and as such gives evidence here. and I know your lordships will not forget that he swears to save himself, having been a rebel by his own confession, and he would fain exchange his life for mine; till he has a pardon, which as yet, as I am informed, he has not. The objection will still lie upon him, that he swears to save himself, which will render his testimony not credible, and the law requires the witnesses in treason, to be credible ones: and yet, forsooth! this man, that nobody that knows him will believe a word he says, must be taken to be a man of integrity, zeal, and industry; the man of management and dispatch; the man of interest and authority in his country; that nothing can be done, but he must have a hand in it. My lords, I think I need say no more of him; your lordships time is precious, too precious indeed to be spent upon such a subject, and so I set him aside.

My lords, there is a thing that I perceive the king's counsel lay a great weight upon; and that is my going down upon the 27th day of May, and my frequent riding post to and fro. I shall now satisfy your lordships of the reasons of my journeys. The first time, which was betwixt the coronation and the sitting of the parliament, was upon this reason; I went down to take possession upon a lease of a considerable value which was renewed to me by

the bishop. I did not think of going down at that time so soon; but I had word wrote me out of the country that the bishop was ill, and that obliged me in point of interest to make haste down. And this I shall prove by one that was attorney for me, and another that was a witness of my taking possession: and for this, I first call Mr. John Edmonds. [Who came in.] Pray, Sir, will you tell his grace and my lords, w^hat you know of my coming down into the country in the beginning of May, and upon what account, and what time it was?

Edmonds. May it please your lordship, upon the fifth of May my lord Delamere did me the honour to come to my house, and he staid there a little while, and desired me to be a witness of his taking possession upon lease of my lord bishop of Chester's, and we went into the house that was next to mine, which was

and there did take possession.

L. H. Steward. Where is your house?

Edmonds. At Boden, in Cheshire.

L. H. Steward. When was this, do you say?

Edmonds. The fifth of May.

L. Delamere. Pray, Sir, will you satisfy my lord, whether the bishop was not ill at that time?

Edmonds. My lord, I had been a little before at Chester, and hearing my lord bishop was not very well, I went to Mr. Allen, and told him I was desirous to see my lord, and speak with him, if I might; he told me my lord was so ill, that he would speak with nobody.

L. H. Steward. Was it a lease for years, or a lease for lives?

Edmonds. It was a lease for lives.

L. H. Steward. Then that might require my lord's taking possession. Who do you call next, my lord?

L. Delamere. Mr. Henry.

L. H. Steward. What do you ask this man, my lord?

L. Delamere. Pray will you give his grace and my lords an account whether you were not attorney, and delivered me possession upon the lease of my lord bishop of Chester?

Henry. My lord, I was attorney by appointment, and the 5th of May last I delivered possession to my lord Delamere at one of the most remarkable places of the land that belonged to that lease of the bishop.

L. Delamere. My lords, I hope this is a satisfactory reason for my going down at that time, the bishop being ill, and the lease being worth 6 or 7,000*l.* The next time that I have to speak to, is, that of my going the 27th of May, and for that I give this answer; I did go out of town the 27th of May, the occasion of my going was, I had taken up a resolution before to go see my child that was not well, but I had not taken my journey so soon, nor with such privacy, but that I had notice, there was a warrant out to apprehend me; and knowing the inconveniences of lying in prison, I was very willing to keep as long out of custody

as I could, and therefore I went out of the way, and under a borrowed name. When I came to my house in Cheshire, there were not above five of my own servants that saw me all the while I was there, and I saw nobody but them; but while I was there, my wife sent me an express, that as to the warrant she hoped it was a mistake, and there was no such thing; but my eldest son was very ill, and if I intended to see him alive, I must make haste up: this was the occasion of my quick return, and I shall satisfy your lordships by proof, that I came thither in that manner to avoid the warrant, and for no other reason.

L. H. Steward. You say you went to see a sick child in the country.

L. Delamere. May it please your grace, my mother that is here, wrote me word that my child was not well.

L. H. Steward. Pray what made you come back so soon?

L. Delamere. Because I had an express sent me by my wife that my other son was like to die.

L. H. Steward. Call your witness, my lord.

L. Delamere. Mrs. Kelsey, [who came in.] Pray will you give an account what I said, when I came down, was the occasion of my coming so privately and changing my name?

Mrs. Kelsey. My lord heard, he said, there was a warrant for taking of him up, and he gave me that for a reason; besides his little son in the country was ill.

L. H. Steward. What, she lived in the country, did she?

Mrs. Kelsey. My lord, I was in the house with him.

L. Delamere. If your lordships please, my mother may be examined?

L. H. Steward. Yes, with all my heart. [She sat by him at the bar.]

L. H. Steward. Pray, madam, will you lift up your voice, that my lords may hear what you say.

Lady Delamere. My lords, this child of his that was in the country, was more than ordinarily precious to him, in regard it was born to him at that time, when he was an innocent honest man, (as he is now), a prisoner in the Tower for high-treason, above two years ago, and I think it increased his affection to the child, that God had given it to him when he was in that affliction. My lord, I knowing the affection that the father and mother both had to the child, my care in their absence I thought ought to be more exercised about him: the child suck'd, but I saw the child decline, and therefore I was of opinion that he should be weaned, and I sent up word that if they did not take care quickly, and look a little after him, I was afraid he would go into a consumption. Upon this, my son came down, I saw him not indeed, because he was very private all the while he was in the country; but while he was there, it pleased God to visit his eldest son with a dangerous distemper, upon which my daughter sent for him post, if he intended to see

his son alive. And thereupon I think he made what haste back again he could.

L. H. Steward. Were you in the same house with him, Madam?

Lady Delamere. My lord, I say, I did not see him all the time he was there, I only tell you what I heard.

L. H. Steward. How long was he in the country?

Lady Delamere. I cannot exactly tell that, I think he was not above two days.

L. H. Steward. He must be but one day by computation of time?

L. Delamere. Pray, my lord, I will satisfy you in that point presently: Mrs. Kelsey will give an account what time it was that I came down, and when I went away,

Mrs. Kelsey. My lord came down on the Sabbath-day night, and staid there Monday, and went away the Tuesday morning.

L. H. Steward. Look you, my lord, the 27th of May was upon a Wednesday, that night you went out of town, and went to Hoddesdon. Thursday, which was the 28th, you came to Hitchin at noon. Friday was the 29th. Saturday the 30th. Sunday was the 31st, then you came to your house; Monday the 1st of June, Tuesday the 2nd, then you came away, and upon Wednesday the 3d you were in town, so says your brother.

L. Delamere. It was so, my lord.

L. H. Steward. Which way did you come back?

L. Delamere. I came post through Coventry, my lord, and that was the time that Hope speaks of, that I told him I had come another way into Cheshire, when I came down.

L. H. Steward. My lord, you say you went down to secrete yourself from a warrant that you apprehended was out against you, and that made you go a by-way; how come you then to come so public back the ordinary post-road?

L. Delamere. If your grace please, I have told you I had an express came from my wife, that told me it was a mistake as to the warrant, but that my child was very ill, and I must make haste up.

L. H. Steward. Have you any more witnesses, my lord?

L. Delamere. Yes, my lord, I desire Mr. Kelsey may be called. [He came in.]

L. H. Steward. Well, what say you?

Mr. Kelsey. My lord came down upon the Sunday night at eleven of the clock, and staid at home all Monday; and on Tuesday morning at three of the clock in the morning, he took horse for London; and I have letters by me that are dated the 4th of June, which was Thursday, that told me my lord was come to town the night before.

L. H. Steward. Whose are those two letters?

Mr. Kelsey. They were from my lady and Mrs. Vere Booth, and both came by the same post.

L. Delamere. I shall call one witness more, my lord, to prove that my child was sick here in town, and the time; and that is sir Thomas

Millington, who was his physician. [Sir Thomas was called, and came in.]

L. Delamere. Pray, sir Thomas, can you recollect yourself what time my son was ill, last year?

Sir T. Millington. My lord, I was sent for to my lord Delamere's son upon the 28th of May, and I found him then very ill, and he continued so for two days, inasmuch as I told my lady Delamere, his mother, that I thought the child would not escape. I told it likewise to sir James Langham, who is my neighbour in Lincoln's-Inn-Fields; what they did upon it, whether they sent for my lord Delamere to town or no, I cannot tell, but I know punctually this was the time, by reason the bills I wrote are dated on that day, otherwise I could not have remembered the time; but the bills being sent me from the apothecary, I find that date to them.

L. H. Steward. Pray, Mr. Attorney, will you call Edlin again, or Vaux, either of them?

Att. Gen. Here is Edlin, my lord.

L. H. Steward. Where did you part with my lord Delamere, and when?

Edlin. Upon Thursday the 28th of May at Hitchin.

L. H. Steward. What time of the day was it when you parted?

Edlin. It was about ten of the clock.

L. H. Steward. He went forward post into Cheshire, did he not?

Edlin. He did not go post I suppose, for he went upon his own horse.

L. H. Steward. Did he go upon his own horse?

Edlin. It was the same horse he went to Hitchin upon.

L. H. Steward. Have you any more witnesses, my lord?

L. Delamere. No, my lord, I hope I have given their lordships satisfaction in all points, and need to give no further evidence.

L. H. Steward. Have you any thing more then to say, my lord?

L. Delamere. My lords, I acknowledge I did go at that time privately a by-road, and by the name of Brown; and as for Jones, who it is said came from Holland that day, I appeal to him himself, and I call God to witness I never saw the man before now in my life; nay, till after I was made a prisoner upon this account, I never so much as heard of his name: and your lordships see by the proofs, that all that has been said against me, except what this fellow Saxon has testified, is but hearsay, nay indeed but hearsay upon hearsay, at the third and fourth hand.

My lords, if people will make use of my name, and say tis, and that, and the other, and among themselves talk of messages sent to me; can I or any man in the world help it? At this rate who can be innocent, if a man must be guilty because others intend to draw him into treason? For there is no more in the utmost that this proof can amount unto. It is at the pleasure of any two men in the world

to take away the lives, honours, and estates of any of your lordships, if it be a proof sufficient to make you guilty of treason, for them to swear you were intended to be drawn into treason.

And, my lords, as to the truth of the thing itself, that there was any message or correspondence between the late duke of Monmouth and me, I call God to witness I have neither wrote nor sent letter or message to him, or received letter or message from him this three years: I cannot tell what expectation he might have concerning me or any body else. It is very probable he might have expectation of assistance from some body, and that without such expectation he would not have made the attempt he did: but, my lords, all that is nothing to me; I had no correspondence either by letters or messages with him; so that all that has been said upon that point of his expectations, and what he declared, I must give the same answer to, that I gave to the evidence about Jones's message, that admitting it to be true he did declare so, yet, no proof being made of an actual correspondence, it is no more but only an intention in him to draw men into commission of treason; and if that be allowed for proof of guilt, I must repeat it again, there's no man can be innocent.

Upon the whole matter, my lords, I must leave my case to the consideration of your lordships: I am not master of so much law or rhetoric as the king's counsel, to plead in my own cause, and I have had but little time to recollect and apply my defence to my accusation; but I hope what evidence I have offered, has given your lordships full satisfaction that I am not guilty of what I stand charged with.

And after all that has been said, my lords, I would beg your lordships to consider this, that if in case I were guilty of these things and were conscious to myself of having been engaged in an affair of this nature, can any man imagine I could have been so hardy as to have surrendered myself upon the king's proclamation: nay, if I with those other two gentlemen, that he has named, had had any transactions of this kind, with such a fellow as he has been made appear to be by his neighbours, (that must needs be thought a man of no faith because of no reputation, though he gives himself a great character as a man of great interest, of wonderful dispatch and dexterity in the management of such matters) so as at first sight to put this large confidence in him; can it be imagined I so little regarded my own life and all that is dear to me, as to have surrendered myself, were it not that I was certain of my own innocence and integrity? Life itself, my lords, is to be preferred above all things but honour and innocence; and Job saith, skin for skin, and all that a man hath will he give for his life: and why should I be presumed to have so little value for it, as voluntarily to deliver up myself to destruction, had I been conscious that there was any one, who could really testify any thing that could hurt me?

Besides, my lords, this very fellow Saxon* is but one evidence, and how far you will believe him, I must submit it to you: but surely one witness will never be sufficient to convict a man of treason, though thousands of hear-says and such trivial circumstances be tacked to it; especially when they are tacked to an evidence, which, I dare say, your lordships are far from thinking it deserves any credit.

My lords, I desire your leave to ask this one question; would not any of your lordships think himself in a bad condition as to his fortune, if he could produce no better evidence to prove his title to his estate, than what has been produced against me this day to take away my life? and if such evidence as this would not be sufficient to support a title to an estate, certainly it can never be thought sufficient to deprive a man of life, honour, estate, and all.

My lords, I am not the only man that has been, or may be falsely accused: God knows how soon the misfortune of a false accusation may fall to the lot of any of your lordships; I pray God it never may; but since that may happen, I question not but your lordships will be very cautious how, by an easy credulity, you give encouragement to such a wickedness; for knights of the post will not end in my trial, if they prosper in their villainy; and perhaps it may come home to some of your lordships, if such practices be encouraged, as I cannot but firmly believe they will not.

My lords, the eyes of all the nation are upon your proceedings this day; nay, I may say, your lordships are now judging the cause of every man in England, that shall happen to come under like circumstances with myself at any time hereafter; for accordingly as you judge of me now, just so will inferior courts be directed to give their judgments in like cases in time to come.

Your lordships very well know, blood once spilt can never be gathered up again; and therefore unless the case be very clear against me, you, I am sure, will not hazard the shedding of my blood upon a doubtful evidence. God Almighty is a God of Mercy and Equity: Our law, the law of England, is a law of Equity and Mercy; and both God and the law require from your lordships tenderness in all cases of life and death: and if it should be indifferent, or but doubtful to your lordships, (which upon the proofs that I have made, I cannot believe it can be) whether I am inno-

cent or guilty, both God and the law require you to acquit me.

My lords, I leave myself, my cause, and all the consequences of it, with your lordships; and I pray the All-wise, the Almighty God direct you in your determination.

L. H. Steward. Have you any thing more to say, my lord?—*L. Delamere.* No, my lord.

L. H. Steward. Then Mr. Attorney, and you that are of the king's counsel, what have you to say more?

Sol. Gen. (Mr. Finch.) May it please your grace, and you my noble lords the peers of my lord Delamere, the prisoner at the bar: the evidence that hath been given against the noble lord is of two natures, part of it is positive proof and part is circumstantial; and though it be allowed that there must be two witnesses in cases of treason, and that circumstances, though never so strong, and sufficient to fortify one positive proof, do not, nor can make a second positive witness; yet I crave leave to say, that there may be circumstances so strong and cogent, so violent and necessary to furnish a positive testimony, that will in law amount to make a second witness, such as the law requires.

My lords, I do not say every circumstance will do it, but such as is necessarily and violently tending to the same thing that was positively proved. As for example:

If a man comes and swears against another that he said he will go immediately and kill the king; and another man that did not hear those words, comes and testifies his lying in wait, that circumstance of lying in wait, that was an action indifferent in itself; yet, when applied to the positive proof, will be a second witness to satisfy the law, which requires two witnesses in treason.

I must confess, my lords, when we will make circumstances to be a second evidence, they must be such as are necessarily tending to fortify the positive evidence that was given by the single witness: Now whether that be so in this case, I must, as becomes me, leave to your lordships consideration. It is not my business to carry the evidence further than it will go, and I am sure it is not my duty to let it lose any of its weight; and if it have not that force it ought to have, I should be to blame, as not having done what belongs to me to do. I will therefore state the fact to your lordships plainly as it stands upon the proof, and submit the whole to your lordships determination.

My lords, our positive proof, with which I crave leave to begin, is but by one single witness, and that is Saxon, and his evidence is this, that being in Cheshire, where he lives, he was sent for about the third or fourth of June last to my lord Delamere's house at Mere; that there he was brought into a lower room, where he saw my lord Delamere, sir Robert Cotton, and Mr. Crew Offley: That my lord Delamere told him he had received a message lately by one Jouca,

* Among the testimonies of the cruelty of king James the second's disposition, the following relates to this man: "As for Saxton, which was the perjured witness against lord Delamere, I have ordered he shall be first prosecuted for perjury, that he may keep company with Oates; and then after he has stood in the pillory, to be tried for being with the Duke of Monmouth in arms." Letter from King James 3d, to Pr. of Orange, January 15, 1686, Appendix to Dalrymple's Memoirs part 1, p. 166.

that was sent from the duke of Monmouth, whereby he understood that the duke would speedily be in England, and that they must provide men and arms to assist him when he came; that he was a man recommended to them by my lord Branton, and that upon his recommendation they had thought fit to intrust him in the matter, and withal told him, they were to raise 40,000*l.* and 10,000 men in that county: He tells you likewise, these gentlemen gave him eleven guineas and 5*l.* in silver to go of an errand for them to the duke of Monmouth, which he undertook to do, and hired a horse to that purpose.

This, my lords, is the positive proof, and this, I must acknowledge, standing single and by itself, will make but one witness; but whether the circumstances that have been offered to your lordships by the other witnesses be such violent circumstances as necessarily tend to fortify and support that positive evidence, and so will supply the defect of a second witness, is the next question that I come to consider, and I shall take them into consideration in the same order that the evidence was delivered.

The first step, my lords, that was made as to any evidence that toucheth this noble lord at the bar, was what was testified by my lord Grey; for as to the other part of the evidence that related to the conspiracy in general, I need not trouble your lordships with the repetition of it, (that there was such an one, is notoriously known) but I say that part of the evidence in his history of the conspiracy, which my lord Grey brought home to my lord Delamere, was this:

That upon the first meetings and consultations, it was resolved upon, that the duke of Monmouth should go into Cheshire to make an interest there; and among the persons that he was directed to go to, and to apply for advice there as persons fit to be trusted, this noble lord was one.

That upon the duke of Monmouth's return out of Cheshire, he did give his confederates here in town an account, how well he had been received, and that he liked all things very well there. This, my lords, is the first circumstance that has been offered to you, to shew that he had a confidence in my lord Delamere, as a principal support of his designs at that very time.

The next thing that we offer, is this message of Jones's, and, for that, our evidence has fully and plainly made it out to your lordships, that Jones did go over into Holland, and his business there was an errand from Disney and major Wildman, and the confederates here. The effect of his message was, that it was their opinion, that the duke of Monmouth should go for Scotland and join with my lord Argyle; but upon the receipt of the message he being angry, said, it was too late for such a message now, and he would come into England, for he was ready to sail: and thereupon he did send this same Jones back again into

England upon a message, to inform the lords and others of his party, among whom my lord Delamere was one, that he would have them betake themselves into their several countries, and not stay to be taken or clapped up here, for that, he did understand, was the design: and this message was delivered in writing; (now that the duke of Monmouth did write a note, and give it to Jones is verified by my lord Grey's testimony too) and his sealed up and he was not to open it till he came to sea; and when he did open it, he found it contained a signification of the place where he was to land, and where he was to rendezvous, which was Taunton, and who were the persons that were to have notice of it, among whose names we find my lord Delamere is to be one: but he likewise tells you, he was not the man that was to carry the message to these persons, but he was to deliver it to Matthews or Wildman, and they were to transmit it to the other persons.

He tells you likewise that when he came to town which was the 27th of May, he met neither with Matthews nor major Wildman; whereupon being at a loss what he should do with his message for want of those other persons, he acquainted Disney, that was executed, with his errand, who promised to take care that it should be delivered.

This, my lords, is all Jones's evidence; for Jones does not say that he himself acquainted or that Disney did acquaint my lord Delamere with the message.

But here, my lords, is the main circumstance that renders the matter suspicious; that very night that Jones came to town, and Disney being acquainted with the message, had undertaken to get it delivered, does my lord Delamere at ten of the clock at night go out of town, in the company of two friends, under the disguise of the name of Brown, and a bye-road, and so goes down to his own house in Cheshire; this, I say, is the circumstance that renders the thing suspicious.

Now, my lords, if we do prove by such sufficient evidence, as may make the matter manifest to you, that my lord Delamere had notice of Jones's message, (for upon that point the case will turn, whether he had notice whether such a message was brought, that such things were in agitation, such preparations made, and that they were all to go into the country) then I say, his going down is a violent presumption he had an intent to comply with the message, and join in the design.

But now, my lords, comes the question, the main question, how is it made out that he had notice Jones brought such a message?

Jones indeed, my lords, does not say that he himself imparted it to him, or that Disney told him he had communicated it; but I think there is another witness, and that is Storey, who saith, that Brand, one that knew of the message, did acquaint him, that my lord had received it at the coffee-house, and that night went out of town.

It is true, my lords, this is but a hear-say,

but that which followed being matter of fact, my lord's going out of town that night, so late in the night, and in such an unusual suspicious manner, gives more credit to the relation, than a bare hear say could have of itself.

For unless there be some good account given of my lord's thus going out of town, it is a kind of necessary presumption, that he was acquainted with the message, part of which was that he should go out of town; and if so, it can have no other construction, with submission, than to be in pursuance of, and complying with, the directions that that message brought him from the duke of Monmouth.

My lords, to carry this a little further, there were two witnesses produced that went out of town with him: they seem indeed unwillingly to give their evidence, but I shall faithfully repeat what testimony they gave: Their names were Vaux and Edlin.

Vaux, he saith, he met my lord Delamere at the Rummer-tavern in Queen-street the 26th day of May, which was the day before Jones came to town, and that then he appointed to go out of town the next day, which was the 27th; and accordingly he did go.

Edlin, he saith he met Vaux at the Custom-house upon the 27th of May in the morning, and being desired by him to go with him out of town, he did so, and there was with him a gentleman whose name was Brown, and who now appears to be my lord Delamere; they went in company with him as far as Hitchin, where they left him upon Thursday the 28th at noon.

This evidence is produced to shew, that my lord did go out of town at that time, and in that manner as has been alledged, and that these persons went with him to conduct him to a private way, that he should not go the common road. Your lordships will consider what answer hath been given to this, and what account my lord Delamere has given of himself.

Another thing, my lords, that renders this matter suspicious, is the name which my lord was pleased to assume to disguise himself by, it being a name by which the party use to call my lord in their discourses of him; and to prove that, we have likewise produced two witnesses, Babington and Paunceford.

Babington, he says, That in their consultations there were discourses of my lord Delamere, under the name of Brown; and once at a tavern, when my lord Delamere was named by one in the company, he was presently catched up for it, and replied to, you mean Mr. Brown; and so it seems that was the canting name under which they discoursed of my lord Delamere.

The other witness Paunceford, he tells you, that being at Disney's house, and concerned with him in printing the late duke of Monmouth's declarations (for the printing of which Disney was executed) one Locke came for some of those declarations for Mr. Brown, and they were to be sent into Cheshire: So that though your lordships observe the witness saith, some body else was called by the name of Brown,

yet you have had no account given you, that there was any other Brown in Cheshire.

It is true, indeed, my lords, that these are only things that Disney said, and Locke said; but I must take leave to say, it is very suspicious, that if my lord went out of town into Cheshire under the name of Brown, and some persons shall, on the behalf of Brown, come for declarations to be sent into Cheshire, and my lord commonly in that party go by the name of Brown, that those declarations were for my lord, and that will be a great evidence of his correspondence with Monmouth.

But I confess, my lords, all this while our proof is circumstantial, and indeed there is no positive proof but that of Saxon, and in him our proof must center; for without him, I must acknowledge, nothing that has been offered will be proof against my lord upon this indictment: for bare circumstances, and bare suspicions will be no proof against any man, but such as are violent and necessary, and those joined to a positive proof, such as the law requires.

Now, then, my lords, I come to the consideration, of what weight and stress is to be laid upon this positive evidence of Saxon: and here I must confess there are objections made to this testimony, to which I cannot readily give an answer; for Saxon has sworn, that he was there at such a time, and that he was sent for; and entertained as a person recommended by my lord Brandon, as fit to be entrusted with the secret, and capable of being employed to stir up the country, in order to the prosecution of a design they had on foot to raise a rebellion; and he does charge sir Robert Cotton and Mr. Crew Offley to have been there at the same time.

The evidence, my lords, that has been produced to falsify this positive witness, in the point of sir Robert Cotton's being there, has been by five or six witnesses, who testify sir Robert Cotton's being in town, and not elsewhere, from the 10th of April to the latter end of July; and I do not see what we have to say, in answer to their testimony. I must agree the proof to be full in that point; and if the evidence they give be true, I cannot say that Saxon's evidence can be true in that point.

Likewise as to Mr. Offley, sir Willoughby Aston and others have testified that he was not at my lord Delamere's at the time Saxon speaks of: For he gives you an account where he was every day from the 26th of May to the 4th of June; and his own servants bring him to his own house upon the 4th of June in the evening, which is quite another way than from sir Willoughby Aston's to my lord Delamere's: If this likewise be true, what Saxon says cannot be true, I must agree to it.

There is another thing that is offered on my lord Delamere's part, that he was himself in town at that time that Saxon says he was at Mere: But here indeed the matter seems to be a little more strange and dubious, that my lord should make so much haste down, as to go out

late at night, and so cautiously, as to go by a wrong name, and yet to ride to town again the post-way, to be here just the third of June, when Saxon swears he was in Cheshire.

I must confess there is the proof of his two brothers, that say, they saw him in town the third and fourth of June: There is likewise some account given of his going out of town, that it was upon a message received from his mother, that his child in the country was sick; and indeed he did go a bye-way, and change his name for fear of a warrant in a messenger's hands that was out against him to apprehend him.

Now, my lords, I do not hear any thing that has been offered, that there was any such warrant, or any discourse to ground that apprehension upon: My lord had the first and only apprehension of a warrant; but upon what reasons he himself best knows: This apprehension made him go out of town so privately, he says, because he would not be prevented of seeing his sick child.

But how comes it to pass, that my lord makes such a speedy return? By the proofs, it appears he did not get there till Sunday night, and upon the Tuesday morning comes post for London.

The account that he gives of that, is this, his haste was to see another child that was here sick in town: For he had received an express from his wife upon the Monday, to acquaint him, that the coast was clear, and there was no warrant out against him; but if he intended to see his child alive, he must make haste up to town; and accordingly, upon the Tuesday morning early, he sets out, and upon Wednesday in the evening is here in town again.

But, with submission, my lords, there is no good account given by this noble lord, what reason there was for so many post-journies backward and forward, as, has been testified, he made within a very little compass of time; for besides this of his return post upon the second of June, there is only an answer given to one of the rest, which is that of the fifth of May, when he saith he went to take possession of the land that he held by a lease then renewed to him by the bishop, which being of some value and consideration to his lordship, and the bishop being sick, he thought it necessary to go down post himself, and would not be content to receive livery by attornment. This is the only answer that is given to all those times of his riding post that have been given in evidence.

These are matters of suspicion that are offered to your lordships; but I confess, matters of suspicion only, unless clear, positive, probable proof be joined with them, will not weigh with your lordships to convict a man of high-treason, where two witnesses are required. But whether these matters of suspicion be such violent and necessary presumptions as tend to fortify the positive testimony, I must leave that to the consideration of your lordships.

L. H. Steward. You do not call any more witnesses then, I perceive.

Sol. Gen. No, my lord.

L. H. Steward. My lords, it has not been usual of late, for those who have sat in the place where I now am, upon those occasions to give your lordships any trouble in repeating or observing upon the evidence. In this case the evidence that hath been given has been very long, and it would be too great a presumption in me, should I have any manner of doubt in the least, that either your lordships have not well observed it, or the learned counsel for the king have been defective in collecting or remarking upon it, so as to need my assistance.

But, my lords, I confess there is something I cannot omit taking notice of, not for your lordships sakes, but for the sake of this numerous and great auditory, that one mistake in point of law might not go unrectified, which seemed to be urged with some earnestness by the noble lord at the bar, That there is a necessity in point of law, that there should be two positive witnesses to convict a man of treason.

He seemed to lay a great stress upon that; but certainly his lordship is under a great mistake as to the law, in that point; for without all doubt, what was urged in answer to this objection by that learned gentleman that concluded for the king, is true, there may be such other substantial circumstances joined to one positive testimony, that, by the opinion of all the judges of England, several times has been adjudged and held to be a sufficient proof.

As for the purpose, in this case, suppose your lordships, upon the evidence that has been given here this day, should believe Saxon swears true, who is a positive witness, and shall then likewise believe that there was that circumstance of Jones's coming over from Holland with such a message upon the 27th of May (which is directly sworn in evidence, you are the judges of that evidence), and what the other witnesses have sworn likewise, and is not denied by my lord, the prisoner at the bar, that he went out of town that night, changed his name, and went in an indirect bye-road; certainly these circumstances, if your lordships be satisfied he went for that purpose, do necessarily knit the positive testimony of Saxon, and amount to a second witness.

That is, if Saxon's positive testimony be true; then suppose all these circumstances that gave the jealousy, do make up a strong presumption to join with the positive evidence of Saxon; then you have two witnesses, as the law requires, especially, if the answer given by the prisoner to those circumstances be not sufficient (as the slender account he gives of his so frequent journies in so short a compass of time), but that there still remains some suspicion. I could have wished, indeed, that matter might have been made somewhat more clear, that no shadow of suspicion might remain.

Your lordships are judges: And if you do

not believe the testimony of Saxon, whose testimony hath been so positively contradicted by divers witnesses of quality, the prisoner ought to be acquitted of this indictment. If your lordships please, you may go together, and consider of it.

Lords. Ay, withdraw, withdraw.

Then the peers withdrew in their order, according to their precedence, with the Serjeant at Arms before them.

L. H. Steward. Lieutenant of the Tower, take your prisoner from the bar.

The Prisoner was taken into the little room appointed for him at the entrance into the court.

The peers staid out about half an hour, and then returned in the same order that they went out in, and seated themselves in their places as before.

Cl. Crown. Serjeant at Arms, take the appearance of the peers. Lawrence, earl of Rochester, Lord High Treasurer of England.

He stood up uncovered, and answered,

Lord Treasurer. Here.

And so did all the rest.

L. H. Steward. My lords, are you agreed of your verdict?

Lords. Yes.

The Lord High Steward took their verdict *seriatim*, beginning with the puisne peer, in this manner.

L. H. Steward. How say you, my lord Churchill, is Henry, baron of Delamere, guilty of the High-Treason whereof he stands indicted, and hath been arraigned, or Not Guilty?

The lord Churchill stood up uncovered, and laying his hand on his breast, answered,

Lord Churchill. Not Guilty, upon my honour.

And so did the rest of the Peers.*

* "Lord Delamere was tried yesterday and quitted by his peers: he had good luck, as well as just judges, that the only positive witness which came in against him, was proven to have sworn falsely; for though the rest of the evidence against him was only hear-says, yet all the world was satisfied he did design to have risen with Lord Macklesfield and Lord Brandon." Letter from King James the Second to the Prince of Orange, January 15th, 1686. Appendix to Dalrymple's Memoirs, part 1, p. 166.

The following Record relating to Saxon's Case, is given by Tremain:

REX v. SAXON.

Hill. 1 et 2 Jacobi Secundi, Rot 5.

ss. Informari Quod per quandam inquisition' capt' apud Cestr' in Com' Cestr' die Veneris 11 die Decembr' Anno Regni Domini Jacobi Secundi Dei Gra' Angl' Scotie Franc' et Hibernie Regis fidei Defensor', &c. Primo coram Edwardo Lutwyche Mij' un' servien' dicti VOL. XI.

L. H. Steward. Lieutenant of the Tower, bring your prisoner to the bar.

The Prisoner was brought again to the bar.

L. H. Steward. My lord Delamere, I am to acquaint you, that my noble lords, your peers,

Dom' Regis ad Legem ac Justic' Cestr' Johanne Warre Ar' altero Justic' Cestr' Philippo Egerton Mil' et Petro Shakerley Ar' per literas Paten' ejusdem Domini Regis eis et aliis et quibuscunq; trib' vel plur' eor' inde confect' ad inquirend' per Sacrum p'bor' et legalium homin' de Com' Cestr' ac al' viis mediis et modis quib' melius scivissent aut potuissent tam infra libertat' quam extra per quos rei veritas melius sciri potuisset et inquir' de quibuscunq; proditionib' misprisionib' prodition' insurrection' rebellion' contofactor' tonsur' lotur' falsis fabricacionib' et al' falsitat' monet hujus Regni Angl' et al' Regnor' sive Dominior' quorumcunq; ac de quibuscunq; Mordis Felon' Homicid' interfectio' Burglar' raptib' Mulier' congregation' et conventical' illicit' verbor' prolationib' condonationib' misprisionib' confederationib' falsis alleganc' transgr' riotis routis retentionib' escapiis contempt' falsitat' negligenc' concealment' manutenen' oppressionib' cambiparcis deceptionib' et al' malefactis offens' et injur' quibuscunq; necnon accessar' eorundem infra Com' Cestr' pred' tam infra libertat' quam extra per quoscunq; et qualitercunq; habit' fact' commiss' sive p'petrat per quos vel per quem cui vel quib' quando qualiter et quomodo ac de aliis Articulis et Circumstanc' p'miss' aut eor' quodlibet seu eor' aliquid vel aliqua qualitercunq; concernen' plenius veritat' et ad eandem p'dition' et al' premiss' audend'r et terminand' secundum legem et cons' Regni dicti Domini Regis nunc Angl' Assign' per Sacrum 12 Jur' probor' et legalium homin' Com' Cestr' p'd' tunc et ibidem Jurat' et onerat' ad inquirend' pro dicto Domino Rege et Corpore Com' Cestr' p'd' existit presentat' Quod Henricus Baro de Delamere in Com' Cestr' ut falsus p'ditor contra illustrissimum et excellentissimum principem Dominum Jacobum Secundum Dei Gra' Angl' Scotie Franc' et Hibernie Regem fidei Defensor' naturalem Dominum suu' timorem Dei in Corde suo non habens nec debet' ligeanc' suam ponderans sed instigatione diabolica mot' et seduct' cordialem dilection' et veram debit' et naturalem obedient' quas verus et fidel' subdit' dicti Domini Regis erga ipsum Dominum Regem gereret et de Jure gerere tenebatur penitus subtrahens et machinans practicans et totis virib' suis intendens pacem et communem tranquillitat' hujus Regni Angl' inquietare molestare et perturbare et guerram et Rebellion' contra dictum Dominum Regem infra hoc Regn' Angl' suscitare movere et procurare et gubernation' dicti Domini Regis hujus Regni Angl' subvertere mutare et alterare et dictum Dominum Regem a titulo honore et Regali nomine Coron' Imperial' Regni sui Angl' deponere et deprivare et dictum Dominum Regem ad mor-

having considered of the evidence that hath been given, both against you and for you, after they were withdrawn, have returned, and agreed on their verdict, and by that verdict

tem et final' destruction' adducere et ponere 14 die April' Anno Regni dicti Domini Jacobi Secundi nunc Regis Angl' &c. Primo ac divers' al' dieb' et vicib' tam antea quam postea apud Mere in Com' Cestr' p'd' falso malitiose diabolice et proditorie cum divers' al' falsis proditorib' et Rebellib' Jur' pred' ignot' conspiravisset compassavisset et imaginat' fuisset et intendebat dictum Dominum Regem supremum verum et naturalem Dominum suum non solum de Regali Statu titulo potestat' et regimine Regni sui Angl' deprivare et dejicere verum etiam eundem Dominum Regem interficere et ad mortem adducere et ponere et antiquam gubernation' hujus Regni Angl' mutare alterare et penitus subvertere et stragem miserabilem int' subdit' dicti Domini Regis per totum Regn' Angl' causare et procurare et Insurrection' et Rebellion' contra dictum Dominum Regem infra hoc Regn' Angl' procurare et auxiliari et ad eandem nefandissimas nequissimas et diabolicas prodition' et p'ditor' compassation' imagination' et proposita sua p'd' p'implend' p'ficiend' et ad effectum redigend' idem H. Baro de D. ut falsus proditor adtunc et ibidem scil't dicto 14 die April' Anno 1 suprad' et divers' al' dieb' et vicib' tam antea quam postea apud Mere pred' in Com' pred' falso illicite nequissime et p'ditor' cum Carolo Gerard Ar' et al' falsis proditor' Jur' pred' ignot' se assemblebat congregabat consultabat et agreebat ad suscitand' et p'curand' divers' magn' denar' sum' et ingent' numeru' homin' Armator' ad guerram et Rebellion' contra dictum Dominum Regem infra hoc Regn' Angl' levand' et faciend' ac Civit' Cestr' in Com' ejusdem Civit' necnon Castrum dicti Domini Regis Cestr' apud Cestr' in Com' Cestr' pred' et omnes munition' bellicas Anglice vocat' the magazines in eodem Castro adtunc existen' intrare capere seire et prendere Anglice to surprise et in possession' et potestat' suas obtinere Ac Jur' pred' ulterius super Sacrum suum pred' tunc dixer' quod pred' H. Baro de Delamere postea scil't 27 die Maii Anno 1 suprad' falso illicite nequissime et p'ditorie iter fecisset a Civit' London' usq; ad Mere pred' in Com' Cestr' pred' ad proditoria proposita sua pred' p'implend' et p'ficiend' ac quod idem H. Baro de Delamere postea scilicet 4 die Junii Anno 1 suprad' apud M. pred' in Com' Cestr' pred' in ulterior' prosecution' p'd' illicite nequissimor' et p'ditor' propositor' suor' divers' ligeos et subdit' dicti Domini Regis (Jur' pred' Ignot') cum eodem H. Baro de D. et pred' al' falsis proditorib' (Jur' pred' Ignot') falso illicite nequissime et proditorie in guerra et Rebellion' pred' et in proditoriis proposit' suis pred' jungere et adherere excitavisset animavisset et persuasisset contra ligeancie sue debet' contra pacem dicti Domini Regis nunc Coron' et Dignitat' suas necnon contra formam Statuti in hujusmodi casu edit' et

have unanimously declared, that you are Not Guilty of the High-Treason, whereof you have been indicted, and this day arraigned, and therefore I must discharge you of it.

p'vis' Et ulterius idem Attorn' dicti Domini Regis nunc general' pro eodem Dom' Rege dat Cur' hic intelligi & informari quod postea scilicet 14 die Mensis Januar' Anno Regni dict' Domini Regis nunc primo suprad' Georgius Dominus Jefferyes Baro de Wem Dominus Cancell' Angl' et Vice Seneschallus Angl' virtute literar' dicti Domini Regis Paten' legitimo modo fact' & prefat' Georgio Dom' Jefferyes Baro' de W. tunc Domino Can' Angl' direct' Indictament' pred' coram eo apud Westm' in Com' Midd' in Magna Aula placitor' ibidem die Jovis 14 die Januar' Anno Regni dicti Domini Regis nunc 1 suprad' venir' fecit terminand', &c. Et quod postea scilicet dicto die Jovis 14 Januar' Anno Regni dicti Domini Regis nunc primo suprad' apud Westm' in Com' Midd' in Magna Aula placitor' ibidem coram prefat' Georgio Dom' Jefferyes Baro' de W. Domino Cancellar' Angl' tunc Seneschallo Angl' ven' p'd' H. Baro de Delamere sub Custod' Thome Cheek Ar' tunc locumtenen' Turris dicti Domini Regis London' virtute brevis Domini Regis de Habere Corpus ad subjiciend' ei inde direct' ad barr' ibidem duct' in propr' persona sua Et statim de premiss' sibi superius imposit' allocut' qualis se velit inde acquitari tunc dixit quod ipse in nullo fuit inde Cul' & inde de bono & malo tunc posuit se super Pares in qua quidem causa talit' p'cess' fuit quod exit' pred' sicut ut preferitur junct' postea scilicet dicto die Jovis 14 die Januar' Anno Regni dicti Domini Regis nunc primo suprad' apud Westm' p'd' in dicto Com' Midd' in Magna Aula placitor' ibidem coram p'fat' G. Domino Jeffereys Baro' de Wem Domino Cancell' Angl' et ea Vice tunc Seneschallo Angl' per pares debito modo triat' fuit super quam quidem triation' exit' pred' int' partes pred' sic ut preferitur junct' quidam Thomas Saxon nuper de Westm' in Com' Midd' Yeoman product' fuit testis in Causa pred' ex parte dicti Dom' Regis et adtunc et ibidem Jurat' fuit sup' sacrosancto Dei Evangel' ad veritat' tot' veritat' et nihil preter veritat' de et in premiss' pred' dicend' Et sic Jurat' existen' idem Thomas Saxon Deum pro oculis suis non habens sed instigatione diabolica mot' et seduct' et leges hujus Regni Angl' parvi pendens nec penas in eisdem content' aliquant' verens dicto die Jovis 14 die Januar' Anno Regni dicti Domini Regis nunc primo suprad' coram prefat' G. Dom' Jeffereys Baro' de Wem Domino Cancell' Angl' et ea Vice tunc Seneschallo Angl' apud Westm' pred' in dicto Com' Midd' falso voluntarie et corrupte per actum et consensum suum propr' et ex animo suo nequissimo super Sacrum suum pred' dixit deposuit juravit et parib' prefat' H. de Delamere adtunc et ibidem debito modo elect' ad triand' exit' pred' int' dictum Dominum Regem et prefat' H. Baro' de Delamere

L. Delamere. May it please your grace, I shall pray to Almighty God, that he will please to give me a heart to be thankful to him for his mercy, and my lords for their justice; and

I pray God deliver their lordships, and all honest men, from wicked and malicious, lying and false testimony; I pray God bless his majesty, and long may he reign.

modo et forma pred' junct' in evidence' dedit Quod in initio Junii tunc ult' ipse idem Tho. Saxon accersitus fuit Anglice *was sent for* ad Mere (dom' mansional' pred' H. Baron' de Delamere apud Mere in Com' Cestr' situat' innuendo) ubi quando ipse idem T. Saxon accessit conductus fuit in Romeam inferiorem ubi Dominus Delemere (prefat' H. Baron' de D. innuendo) Robertus Cotton Mil' et Bar' (quendam R. Cotton de Combermere in Com' Cestr' pred' Mil' et Bar' innuendo) et Magister Offsey (quendam Johannem Crew Offley de Crew in Com' Cestr' pred' Ar' innuendo) presen' fuer' et pred' Thomas Saxon tunc et ibid ad et super triation' pred' interrogat' existen' p' prefat' Georgiu' Dominum Jefferyes Baron' de Wem Dominum Cancell' Angl' et tunc ea Vice Seneschallo Angl' quo tempore in mense Junii fuit quando ipse idem T. Saxon fuit apud Mere pred' ipse pred' T. Saxon tunc et ibidem scilicet dicto die Jovis 14 die Januar' Anno, &c. primo supradict' apud Westm' pred' in Com' Midd' pred' falso voluntarie et corrupte dixit deposuit juravit respondit et super Sacrum suu' p'd' in evidenc' parib' prefat' H. Baron' de D. ulterius in evidenc' dedit quod ipse idem T. Saxon ad diem narrare non potuit quia ill' in Scriptis non posuit (Anglice *did not set it down*) sed credebatur quod fuit 3 vel 4 die Junii Et idem Attorn' dicti Domini Regis nunc general' ulterius dat Cur' hic intelligi et informari Quod pred' T. Saxon tunc et ibidem super triation' pred' falso injuste nequit et corruptive dixit deposuit juravit et super Sacrum suu' pred' p'd' paribus prefat' H. Baron' de D. in evidenc' dedit Quod pred' H. Baro de D. R. Cotton Mil' et Barr' et J. Crew Offley Ar' interrogabant seipsum T. Saxon utrum ipse idem T. S. susciperet portare missum Anglice *a Message* ab ipsis prefat' H. Baron' de D. R. C. Mil' et Bar' et J. C. O. Ar' Duci Monmouth (Jacobo nuper Duci Monmouth de alta prodicione nuper attinct' innuendo) quod ipse idem T. Saxon facer' suscipiebat et ibidem recepit undecim pec' Auri Guinnen' Anglice *Guincy Pieces of Gold* et quinq; libr' Argent' p' itinere suo (iter' p'd' T. S. ad p'd' Ducem Monmouth innuendo) et quod ipse idem T. S. tunc postea equum conduxit Anglice *hired a horse* et deliberavit missum Anglice *the Message* Duci Monmouth (prefat' nuper Ducem M. innuendo) Et quod p'd' T. S. tunc et ibidem sup' triation' pred' interrogat' existen' p' prefat' G. Dominum Jeffereys Baron' de W. Dom' Cancell' Angl' et tunc Seneschallum Angl' a quo ipse prefat' T. S. pred' Monet' recepit ipse pred' T. S. tunc et ibidem falso malitiose voluntarie et corrupte dixit deposuit juravit respondit et sup' sacrum suu' parib' p'fat' H. Baron' de D. in evidenc' ulterius dedit quod ipse idem T. S. recepit denar' pred' a Domino Delamere (prefat' H. Baron' de D. innuendo) ubi revera et in facto in

initio Junii tunc ult' preterit' p'd' T. S. non accersit' fuit ad Mere Et ubi revera et in facto pred' T. S. non conductus fuit in Romeam inferiorem apud Mere Et ubi revera et in facto pred' Dominus Delamere R. C. Mil' et Bar' et Magistr' Offley ibidem non fuer' presen' Et ubi revera et in facto pred' Dom' Delamere R. C. Mil' et Bar' et Magistr' Offley non interrogabant prefat' T. S. utrum ipse prefat' T. S. susciperet portare missum ab ipsis Duci Monmouth Et ubi revera et in facto pred' T. S. non suscipiebat il' facere Et ubi revera et in facto pred' T. S. nunquam recepit undecim pec' Auri Guinnen' Anglice *Eleven Guineas* nec quinq; Libr' Argent' pro itinere suo Et ubi revera et in facto pred' T. S. nunquam recepit denar' pred' a Domino Delamere prout pred' T. S. per falsum et mendax testimon' suu' pred' falso malitiose voluntar' et corrupte per actum et consensum suu' p'pr' sup' sacrum suu' pred' dixit deposuit narravit et parib' prefat' H. Baron' de D. in evidenc' ad et sup' triation' pred' dedit Et sic pred' T. S. pred' die Jovis 14 die Januar' Anno Regni dicti Domini Regis nunc 1 suprad' apud Westm' pred' in Com' Midd' pred' coram prefat' D. Domino J. Baron' de W. Domino Cancell' Angl' et tunc Seneschallo Angl' per actum et consensum suu' p'pr' et ex animo suo nequissimo modo et forma pred' falso malitiose voluntarie et corrupte super sacrum suu' pred' commisit voluntar' spontan' et corrupt' perjur' in magn' Dei Omnipotent' displicenc' in contempt' legum hujus regni Angl' manifest' in malum et p'nitiosum exemplum omn' al' in tali casu delinquent' Et contra pacem dicti Domini Regis nunc Coron' et Dignitat' suas, &c. Unde idem Attorn' dicti Domini Regis nunc General' pro eodem Domino Rege pet' advisament' Cur' hic in premiss' et debet' legis process' versus prefat' T. S. in hac parte fieri ad respondent' dicto Dom' Regi de et in p'miss', &c. Et modo scil't die Sabbati p'x' post Octab' Sancti Hillar' isto eodem Termino coram Domino Rege apud Westm' ven' pred' T. S. in propr' p'sona sua sub Custod' Willielmi Richardson gen' custod' Gaol' Domini Regis de Newgate Et habito auditu information' pred' dic' quod ipse non est inde Culpabil' et de hoc pon' se sup' patriam et R. S. Mil' Attorn' Domini Regis nunc general' qui p' eodem Domino Rege in hac parte sequitur similiter, &c. Ideo ven' inde Jur' coram dicto Domino Rege in Cur' ipsius Regis coram ipso Rege apud Westm' die Lune prox' post crastinum Pur' beate Marie Virginis p' quos, &c. et qui nec, &c. ad' recogn', &c. quia tam, &c. idem dies dat' est tam prefat' R. S. Mil' qui sequitur, &c. quam pred' T. &c. Ad quem quidem diem Lune prox' post crastinum Pur' beate Marie Virginis coram Domino Rege apud Westm' ven' tam prefat' R. S.

L. H. Steward. And I pray God continue to him his loyal peers, and all other his loyal subjects.

Cl. of Cr. Serjeant at Arms, make proclamation.

Serjeant at Arms. O-yes! My Lord High Steward of England, his grace, straightly willeth and commandeth all manner of persons here present to depart hence in God's peace,

Mil' qui sequitur, &c. quam pred' T. S. in propr' p'sona sua Et vic' return' nomina 12 jur' quor' null' &c. qui quidem jur' exact' veu' sup' quo facta est hic in Cur' publica p'clamatio pro Domino Rege prout Moris est quod si aliquis sit qui dicto Domino Regi nunc servien' Domini Regis ad legem aut attorn' general' ipsius Domini Regis aut jur' pred' de infra content' informare vellet veniret et audiretur Et super hoc T. Jones Ar' un' de Concil' dicti Domini Regis ad hoc faciend' se obtulit sup' quo process' est p' Cur' hic ad caption' jur' pred' p' Jur' pred' modo comparen' qui ad veritat' de premiss' pred' dicend' elect' triat' et jurat' dicunt sup' sacr'um quod pred' T. S. est culpabil' de premiss' in informatione pred' mentionat' prout per information' pred' superius versus eum supponitur sup' quo vis' et p' Cur' hic intellectis omnib' et singulis premiss' cons' est quod pred' T. S. stabit in et super Pilloriam die Sabbati 13 die Februar' in Atr' Palatii Westm' inter horas decimam et duodecimam ejusdem diei per spatium un' hore cum' papyro sup' caput suu' affix' magnis literis denotan' offens' sua' videlicet, 'Thomas Saxon

and the king's; for his grace, my Lord High Steward of England, now dissolves his commission.

God save the King.

At which words his grace taking the White-Staff from the Usher of the Black-Rod, held it over his own head, and broke it in two; thereby dissolving the Court.

' convicted, upon full evidence, for horrid perjury' Ac quod pred' T. S. stabit in et sup' Pilloriam apud Temple Bar in Fleet-street die Lune 15 die Februar' p'd' iut' hora duodecimam et secundam post meridiem ejusd' diei p' spaciū p'd' cum papyro p'd' sup' caput suu' affixat' Et quod pred' T. S. flagellabitur p' communem carnificem a porta Civit' London' voc' Ludgate usq; ad Aulam Westm' in Com' Midd' die Martis 16 die Februar' pred' ac quod pred' T. S. stabit in et sup' Pillor' apud Cornhill prope Regal' Excambium ibid' die Mercur' 17 die Februar' p'd' int' horas 12 et 2, post Meridiem p' spaciū p'd' cum papyr' p'd' sup' caput suu' affixat' Et quod pred' T. S. flagellabitur p' p'd' communem carnificem die Veneris 19 die Februar' p'd' a port' Civit' London' vocat' Newgate usq; ad furcas de Tyburn in Com' Midd' p'd' Et quod Vic' London' et Midd' erint auxilian' et assisten' ad sepeal' loca et tempora ad exequend' judic' pred' Et quod pred' T. S. solvat Domino Regi quingent' Marcas pro Fine suo sup' occasione pred' imposit' et quod pred' T. S. committatur Custod' Gaol' de Newgate quousq; finem pred' solverit."

339. Proceedings in Parliament against THOMAS Earl of DANBY, Lord High Treasurer of England, upon an Impeachment of High Treason, and other High-Crimes and Misdemeanors: 30 CHARLES II.—1 JAMES II. 1678—1685.

THE Papers of Mr. Montague, the king's ambassador in France, being seized by the king's order, upon suspicion of his intriguing with the French court, Mr. Montague (in his own defence) acquainted the House of Commons, on the 16th of December 1678, that he had in his custody several Papers which he conceived might tend very much to the safety of his majesty's person, and the preservation of his kingdom; whereupon two Letters were produced and read in the House, subscribed Danby: which are as follow:*

* Of these two antagonists Danby was by king William created duke of Leeds, and Montague was by queen Anne created duke of Montague. Each of them appears to have been distinguished (that perhaps is not the proper word) by the favour of one of king Charles's female connections. According to Reresby (*Memoirs*, 156) Danby had an intrigue with

' My Lord; Jan. 17, 1677.

' Yesterday Monsieur Rouvigny came to me with Monsieur Barillon (having given me his father's letters the day before) and discoursed much upon the confidence his king hath of the firmness of ours to him, of the good opinion his master hath of me, and of his king's resolution to condescend to any thing that is not infamous to him, for the satisfaction of our king, how certainly our king may depend upon all sorts of assistances and supplies from his master, in

the duchess of Portsmouth, who seems to have been a compound of lust and avarice, and Montague was similarly circumstanced with the countess of Sussex, eldest reputed daughter of the king by the duchess of Cleveland, whose character, if we may believe Pope and Mrs. Manley, much resembled that of the duchess of Portsmouth.

‘ case the friendship be preserved.—The main
‘ of their drift was to engage me to prevail
‘ with the king to prevail with the prince of

Besides the accounts given by the general Historians of the transactions out of which this case of Danby arose, much light is thrown upon those transactions by the “ Danby Papers,” the Appendixes to Dalrymple’s Memoirs, the “ Œuvres de Louis XIV” and the “ Pièces Historiques,” subjoined to this last work. Among the “ Pièces Historiques,” is the following Letter from Louis XIV to Charles II. soliciting the Garter for Montague :

Versailles, le 31 Mars, 1672.

“ Monsieur mon frère ; La confiance que je vais prendre en vous, sera une nouvelle marque de l’entière satisfaction avec laquelle je regarde le nouveau lien d’amitié qui nous unit, dans le traité que nous venons de conclure pour nos communs intérêts.* Plus la conduite du sieur de Montaignu, votre ambassadeur, a répondu à tout ce que vous deviez attendre de l’exécution des ordres que vous lui aviez donnés, et plus elle a été conforme à ce que je pouvois desirer d’une entremise aussi sage et aussi affectionnée que la sienne ; plus je crois juste qu’il lui demeure un témoignage honorable du grand ouvrage que vous avez bien voulu lui confier. Ne pouvant y contribuer par moi-même, je vous conjure de me mettre en état de le pouvoir faire, en m’accordant la faveur que je vous demande pour lui, je sais qu’elle est considérable, mais je sais que vous serez bien aise, en récompensant ses services, de marquer que peu d’autres vous pouvoient être plus agréables, que ceux qui alloient à former des liaisons aussi solides et aussi glorieuses que nous venons d’établir. C’est par-là que je vous devrai d’autant plus de remerciemens, si vous voulez bien l’honorer d’une place dans l’ordre des Chevaliers de la Jarretière, et me l’envoyer pour la lui donner. Je ne vous dirai point que le roi mon père, conféra une semblable grace, dans l’ordre du Saint-Esprit, au maréchal d’Effiat, à l’instance du feu roi d’Angleterre, lorsqu’il étoit ambassadeur auprès de lui. Votre amitié pour moi n’a pas besoin d’être excitée par des exemples, et j’ai lieu de me promettre, qu’elle vous fournira seule toutes les occasions qui peuvent rendre ma recommandation plus utile au dit sieur de Montaignu auprès de vous ; aussi je ne m’attendrai pas davantage que pour vous assurer que je suis, etc.”

The following passages in the Memoirs of sir John Reresby (who though related to Mon-

* C’est le second traité d’alliance contre la Hollande, que Charles II. lui-même appeloit le traité simulé. Il avoit été signé vers le milieu de Février, après beaucoup de difficultés de la part des ministres Anglais, ceux qui formoient la cabale, Clifford, Shattsbury, Lauderdale, Buckingham, &c. Ils commençoient à craindre d’être rendus responsables de cette alliance, contraire au vœu et à l’intérêt national.

‘ Orange.—The king must come to some de-
‘ claration of his mind to the parliament when
‘ it meets : That which makes the hopes of

tague was much connected with Danby, by whom indeed he had been first introduced to the king) have relation to this case :

“ A jealousy now seemed to arise between the duke and the lord treasurer. The duke thought his lordship was within himself for his leaving the court, that so he might have the king the more absolutely in his own power : And my lord (though I believe he endeavoured to serve the duke all he could, though no friend to his religion) resented the duke’s suspicion. Much was, at this time, done and transacted, in disfavour of the Popish party ; and particularly it was now that the lords passed that great bill to incapacitate such of the Roman Catholic members as should refuse to take the oath of allegiance and supremacy ; though my lord high treasurer said in my hearing but the night before, he was sure it would never pass in that House.

“ The duke of Holstein’s resident had, it seems, reported the lord treasurer to be in the pay and pension of France. Thus, at least, had his lordship been informed, and sending for him, he sent for me also to be present at the examination ; but the resident absolutely denied what was laid to his charge. To make amends for this, I, a few days after, acquainted his lordship, that the same gentleman had assured me, the Commons would most certainly fall upon him, and that it was in his power to turn the edge of one that was most violent against him. I told him also, that I had, from other hands, been informed, that my cousin Ralph Montague, since lord Montague, lately recalled from being ambassador in France, and now member of our House, would accuse him there. But my lord gave no ear to either of these ; saying, the latter durst not impeach him, for that he had letters to show from him, whilst ambassador, that would prove how officious he was to persuade him, to accept of the French king’s money, though he absolutely refused it.

“ The Commons voted an Address to the King, from that House, to represent the ill state of the nation, and the danger it was in, by his majesty’s adhering to private councils rather than to his two houses of parliament : this aimed at my lord treasurer, and some others of the cabinet councll. This was carried by two and twenty votes, and even some of the courtiers were for it ; whence it was by some surmised, that the duke, being no longer in counsils, was grown jealous of the treasurer, and had a mind he should be removed. It was now said the duke had been persuaded (but unjustly) that his lordship endeavoured to insinuate into the king, that there was something of probability in the accusation against the queen, purely that he might hearken to a divorce, and marry another more likely to bring children to the crown.

'peace yet less probable is, that the duke grows every day less inclin'd to it, and has created a greater indifferency in the

"The Commons were now intent upon disbanding the army, raising of money for that purpose, and the conviction of Popish recusants; during which the right of the lords to interfere in a money-bill was warmly contested; but not to dwell on so nice a subject, the king caused Mr. Montague's papers to be seized, and acquainted the House of Commons, that having been his ambassador at the French court, he had taken on him to treat with the pope's nuncio, without any commission from him for so doing; and that he had seized his papers to come at the purport of the said treaty. But Montague assured the House, that this was a mere artifice, a contrivance of the treasurer's to save himself; but that his lordship had therein failed, for that although most of his letters were seized, he had by good luck saved the most material. One of them dated the 25th of March 1678, instructed him to acquaint that court with the great difficulties he met withal here in the affair of peace between us and them, and the fear there was the parliament should discover it: that however he had orders from the king to bid him treat with them for a peace, as well between them and the confederates, as ourselves; upon condition, the French king would give ours 600,000 [see p. 608] livres per annum, for 3 years, together after the conclusion of the peace; for that as our king would thereby disgust the parliament, he could expect no money from them of so long a time: and finally, that when he wrote back to the secretary, concerning this transaction, he should be silent as to the money, and so on. Signed, DANBY.

"This put the House into a flame, and a motion was instantly made, that the treasurer should be impeached of high treason; for that he had endeavoured to estrange the king from his parliament and make it of no use to him; and one Mr. Powel observed, that this was usurping a power to the exclusion of other counsellors, who had a right to advise the king as well as himself; the very treason that was laid to the charge of the Spencers, and the duke of Ireland, in the days of Richard the second. [See the cases, Vol. 1, pp. 23, 89 of this Collection.]

"But it was answered, That it was no such great offence to write this by the king's own order, as was expressed in the letter itself, and would be owned, as supposed, by the king at this time. That the king had certainly a power to advise with which of his counsellors he pleased; and that if his majesty foresaw the confederates would strike up a peace, which we must comply with, where was the harm of making what advantage we could of it to ourselves, and at the same time of sparing the purses of the subject?

"A second letter was produced, which gave assurance of inclinations for a very fair understanding between us and his most christian

king than I could have imagined; which being added to the French king's resolution not to part with Tournay, do, I confess, make

majesty; together with advice to hasten the peace; because the duke seemed every day more and more averse to it; and mentioned some towns to be given up, by the French, as cautionary, to the confederates, upon the conclusion of this peace. Mr. Montague then declared in the House, that the French king was willing to deliver up two towns more than he did by the former treaty; but that my lord treasurer was so earnest and pressing for money, that he thereby made the terms much worse for the confederates; but at the same time acknowledged he could not say he knew of any money paid either to him or to his majesty. Other things were now laid to the treasurer's charge, as the male-administration of his office, and the lowness of the exchequer: but to this it was answered, by his lordship's friends, that a debt of 600,000*l.* had been paid off since he had been in office, though no money had in all that time been given to the king, but what had been appropriated to the uses designed.

"He was farther accused (this letter bearing date the 25th of March 1678, and the act which gave money to the king to enter into a war with France being passed but the 20th) of deluding the nation, in advising the king to take money for raising an army for service abroad, and at the same time treating for money from France to make a peace, which looked as if a standing army was designed to humble England, and not France. In short, the question being put, it was resolved, that an impeachment be drawn up against the lord treasurer, and a committee was accordingly appointed for that purpose.

"Mr. Montague was, in this case, justly censured, for disclosing what had passed through his hands, when a public minister, without the king's leave. Mean while, the treasurer endeavoured to destroy the credit of his accuser and produced some letters, from him, when in France, which were read in the House, and made it appear that Montague had been very guilty of the offences he threw upon his lordship: But his enemies were so many and so powerful, that the whole edge was bent against him; in a word, the tide was not to be stemmed, and six articles of impeachment were drawn up against him.

"But a debate arose, whether, supposing any of these articles to be true, they amounted to high treason, none of them being within the statute of Edward 3. At length the question being put, Whether or no an impeachment of high treason, founded upon the said articles against his lordship, should be carried up to the House of Lords, the Ayes were 179, and the Noes 130. The impeachment then was carried up to the bar of the House of Lords, where it being presently debated, whether or no his lordship should withdraw, it was car-

me despair of any accommodation : Nevertheless I am assured, that one principal cause

ried in the negative by 20 voices ; and then both Houses adjourned for Christmas eve, and Christmas day only.

“The Houses met, and the Commons heard some evidence concerning the death of sir Edmundbury Godfrey, and quarrelled with the Lords on account of the amendment they had made in the money-bill for disbanding the army. The same day I spoke both with the king and the duke, who both declared they would adhere to my lord treasurer.

“The next day the Lords voted, that he should not be committed : and the same day the dispute between the two Houses concerning the Money-Bill, was decided by a conference, and the bill passed both Houses. And here I cannot but take notice, that the king observing the lord Strafford to be very violent in the House against the lord Danby, (which, it seems, took birth from a personal pique to him, for obstructing a pension he had from the crown) told me, ‘ He wondered at it much, seeing his father came to the unfortunate end he did, by the very self same method of procedure.’

“And now, when it was least expected, the king prorogued the parliament to the 4th of February ; some said in favour of the papists, others of the lord treasurer, and others again in defence of his prerogative, which was more than one way invaded by the Commons : But his majesty at the same time declared he intended to disband the army, and prosecute the business of the Plot. Montague was now discovered in a disguise at Dover, in his way to France.

“My lord treasurer sent for me, and told me, the king had declared he would dissolve the parliament, and advised me to make interest as soon as I could against the approaching election, for that another parliament would speedily be called. This parliament was, for the most part, very loyal both to the king and the church ; which made those of adverse sentiments very desirous of its dissolution ; and the way they contrived to bring it about, as was credibly reported, was by persuading the treasurer to obtain it of the king, promising if he should succeed therein, that there should be no farther prosecution against him in the next parliament ; but they deceived him, as he afterwards experienced.

“March 1679. The Commons began to be angry with the treasurer, for that the speaker they had proposed had been rejected by the king ; saying he was the cause of it, because, truly, the gentleman was not his lordship’s friend. This dispute subsisting between the king and the commons, they at length address him, beseeching him not to invade their undoubted privilege of chusing their speaker ; but his majesty still insists on it, That without his approbation, their choice is of none effect. Now all the moderate men in the house were

‘ of the adjournment for thirteen days, has been ‘ to see if any expedient for the peace could

concerned that such punctilios should stand in the way of business, especially when business of such high importance lay before them ; but the angry party was deaf to all remonstrance ; and the king, by way of expedient, prorogued the parliament to the 11th instant, and from thence to the 15th, when serjeant Gregory being elected, both sides were satisfied.

“The storm now begins to fall heavy upon the lord treasurer, insomuch that he has thoughts of delivering up his staff, and with it his office, in hopes by such resignation to allay the heats against him. I was averse to this step, I confess, and would have had him stand his ground, as long as the king would stand by him, saying, his resignation would but expose him the more to the power of his enemies ; in short, that the Lords would fear him the less, and the Commons not love him a bit the better. Several persons had got possessed of good employments, not so much by my lord’s favour and kindness, as by giving money to his lady, who had for some time driven on a private trade of this sort, though not without his lordship’s participation and concurrence. This I knew, but had neither the face nor the inclination to come in at that door ; so that I was postponed to many, who, as I thought, deserved as little as myself ; but they had but a bad bargain, they were now all swept away with the same torrent that began to overwhelm his lordship ; against whom fresh matter now appeared, upon the evidence of Bedloe, before the Committee appointed to examine into the Plot, he accusing the treasurer of having tampered with him to fly during this interval of parliament. And now every thing went harder and harder with his lordship’s friends ; so that my election being controverted, the committee of privileges and elections, in a few days afterwards, gave my cause against me by a small majority of two only ; which considering the stream of the times, I reckoned to be as good as half a victory at least.

“In the mean time a message was sent to the Lords, desiring the treasurer might be committed ; but their lordships had but just before voted him eight days to prepare his defence in. The Commons repeated their former message to the Lords ; and the next day the king coming to the House of Lords, in the usual state and formality, informed both Houses, that it was by his particular order the lord treasurer had written the two letters, produced by Montague : that it was not the lord treasurer who had concealed the Plot, but that it was himself who told it his lordship from time to time, as he thought fit. His majesty then declared he had granted the said nobleman a full pardon, and that, if occasion required, he would give it him again ten times over : that, however, he intended to lay him aside from his employments, and to forbid him the court.

“Some would have persuaded his lordship to

' have been found in that time ; and the effect
' of the adjournment hath hitherto been, that
' nobody will now believe other than that the
' peace is already concluded between us and
' France.

take refuge abroad, as what would appease both Houses : and indeed the Lords had a conference with the Commons about preparing a bill to banish him, and the Commons desired some days to consider of it, in hopes he would have withdrawn in that time. In the midst of this perplexity I saw his lordship at midnight, as he came out of his closet, from advising with his friends what to do. He gave me a great many thanks and good words ; told me he had recommended me to the king as a fit person to be sent his envoy into France ; as also where I was to make application in his absence, if I wanted any thing with the king.

"The next day the Commons, in a great heat, refused to comply with the Lords, in their bill of banishment ; they said it was too slight a punishment, and sent to demand justice of their lordships against the treasurer, declaring, he ought not only to be punished in his own person, but his posterity likewise, as an example of those, who for the future should succeed him in his office : but before the message came, the Lords had changed their minds, and sent the black rod for the treasurer ; too late though ; he was gone, and now it was surmised the king was grown cool towards him.

"A most unhappy thing it is to serve a fickle prince, which, it must be owned, was part of our master's character. Had the treasurer considered no body but himself, he might certainly have fared better ; but he resolved rather to suffer, than to do any thing that might derive any dishonour on the king, or others about him, as he has since said himself. This great change, I must own, made me seriously ponder the incertitude of human grandeur : It was but a few months before that few things were transacted at court, but with the privacy or consent of this great man ; the king's brother, and favourite mistress, were glad to be fair with him, and the general address of all men of business was to him, who was not only treasurer, but prime minister also ; who not only kept the purse, but was the first and greatest confident in all affairs of state. But now he is neglected of all, forced to hide his head as a criminal, and in danger of losing all he has got, and his life therewith : His family raised from privacy to the degree of marquis, (a patent was then actually passing, to invest him with that dignity) is now on the brink of falling below the humble stand of a yeoman ; nor would almost the meanest subject change conditions with him now, whom so very lately the greatest beheld with envy. This confirmed me in a belief, that a middle state is always the best ; not so lowly as to be trodden on, nor so lofty as to fear the blasts of envy. A man should not be so wanting in point of industry, as not to endeavour to distinguish himself in

March 25, 1678.

' In case the conditions of the peace shall
, be accepted, the king expects to have six
, millions of livres yearly for three years from
' the time that this agreement shall be signed

some sort from the bulk of those of his rank ; nor yet so ambitious as to sacrifice the ease of this life, and of that to come, by mounting over the heads of others, to a greatness of uncertain duration. But to digress no farther.

"I wrote to his royal highness, to acquaint him with the posture of affairs here at present. The two Houses of parliament continued in division, as to what should be inflicted on the fallen treasurer ; the Lords adhering to their bill to banish him, and the Commons to their Bill of Attainder, till at last it came to a free conference between them. This business, and the plot, engrossed the attention of the Houses for a long time ; during which time it was thought the lord Danby lay concealed at Whitehall.

"The king seemed not at all concerned at thus parting with his brother, and his treasurer ; nor in any degree solicitous about the use the parliament would make thereof ; though it was suspected they would get their own friends into power, and obtain a snip of the prerogative, in consideration of the money they gave to his majesty.

"My lord Danby at length surrendering himself, was committed prisoner to the Tower, where going to pay him a visit, he seemed to be very little concerned.

"My lord Danby returned answer to his impeachment, to the upper house, pleading the king's pardon. This was sent down to the Commons, who referred it to a Committee ; and the result was, That his majesty had no power to grant pardon in this case : The same day both Houses began to cast reflections on the Dutchess of Portsmouth.

"March, 1683. Two days afterwards, I went to see lord Danby in the Tower, and found him to express himself much more obligingly towards Lord Privy Seal, than he had been used to do heretofore ; amongst other things, he said his lordship had taken a prudent and becoming course in declaring himself for a parliament, and that he was very glad of it upon a private account ; for that he despaired of being enlarged till there was a sitting. He said, lord Rochester and his party might support themselves for a while, but that the interest they built upon was no better than a sandy foundation.

"The next day I communicated this to lord Hallifax, who on his part seemed also to be more favourably inclined towards lord Danby, than he had for some time been : He said he had already enemies enough, and that what he had to say against that lord was now out of his mind ; but that however he would not now make himself enemies by being his friend, as he had formerly done by being otherwise ;

' betwixt his majesty and the king of France.
' because it will be two or three years before

so that I found Lord Privy Seal was making up his interest on the one hand, as lord Rochester was on the other, for the latter had sent for Seymour to court, and promised to be his friend."

" 1684. Affairs were now chiefly under the management of the duke of York, who carried every thing with a very lofty hand; but, what is very strange, the earl of Danby was on the point of stepping out of the Tower, though against his highness's consent. My Lord Privy Seal assured me his enlargement was at hand; that he himself had been his lordship's chief friend, and that the king had made both the duke and lord Rochester seemingly set their hands to it. The duke, indeed, appeared to be hearty in it, and that the king was so, there could be no doubt; but Rochester and Sunderland did underhand oppose it with might and main, and so contrived that the judges delayed to bail out his lordship till the very last day of the term; those two lords dreading, That Danby might join with Hallifax to weaken their interest.

" And now it was resolved to bring a *Quo Warranto*, if with any colour of justice it could be done, against the charter of York; and two days afterwards, lord Danby was hailed out of his long confinement of five years, as were all the Popish lords that had been under durance ever since the time of the first plot. Lord Danby came the same day to kiss his majesty's hand in the bed-chamber, where I happened to be present. The king received him very kindly, and when the earl complained of his long imprisonment, his majesty told him, he knew it was against his consent, which his lordship thankfully acknowledged; but they had no manner of private discourse together. My lord Privy Seal (marquis of Hallifax) came into the presence presently after, and the two lords saluted each other; but it was very slightly done on both sides. The next day, however, I went from the lord Privy Seal, to wait upon the earl, when his lordship desired me to present his service to him, and to tell him, That he should have taken a more particular sort of notice of him, but that he thought it would not prove so much for his service: And the earl said, It was for the very self-same reason he had behaved so indifferently towards his lordship; for there was at that time great jealousy of a friendship between them. Lord Danby told me, he would retire to his house out of town, nor concern himself with business, though he doubted not but he might if he would, but not upon the national foundation he desired, and therefore would have nothing to do with it, declaring his aversion to a French or a Popish interest. He told me also, the substance of what had passed between the duke and him, at the visit he made to his highness, after he had been with the king, and I thereby understood his lordship was upon no very af-

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he can hope to find his parliament in an humour to give him supplies after the having

fectionate terms with that prince. He said his highness told him, he had heard he had spoken slightly of him, and that he answered, It was true he had often been so unfortunate as to differ with him in opinion, and could not help saying, That he had never yet found any cause to repent him of it; but that for expressing himself any how against his person, if he heard so, they were whispers and lies; and desired to know who were his informers; but the duke evaded that. In short I found by my lord privy seal, That he and the earl of Danby had a good understanding together."

Collins concludes a character of Danby drawn in his usual manner, (see the Note to Seymour's Case, vol. 8, p. 132, of this Collection) by telling us, that " he was a strict observer of justice, and was also an able statesman." In that admirable piece of satire the ballad " On the Young Statesmen" (which though published in the Collections of the works of Dryden, I should from the internal evidence of sentiment and style ascribe rather to Rochester) it is said that

" Danby's matchless impudence,
Helped to support the knave."

It appears by a dispatch from Barillon to the French court, dated August 30th, 1685, that lord Danby introduced the method of buying votes in parliament. See Dalrymple's Memoirs, Appendix part 1, p. 153.

Sir W. Temple writes as follows concerning the fall of Danby:

" The short parliament met, with the disputes between the court and the commons about the Speaker, begun, indeed upon a pique between the Treasurer and Mr. Seymour, or rather between my lady Danby and him. However it was, this soon ran the House into such violences against my lord Treasurer as ended in his ruin; first by the king's sudden resolution to remove him; then by the Commons continuing their pursuits and impeachments; and last, by his lordship's first concealing, and then producing himself in the face of this storm, which ended in the Tower.

" After these heats of the Commons, which increased into new measures and motions among them, as they were swayed by popular humours upon the Plot, and many new plots layed by the ambition of private persons carried on under covert of the other; I never saw any man more sensible of the miserable condition of his affairs, than I found his majesty upon many discourses with him, which my foreign employments and correspondences made way for. But nothing he said to me moved me more, than when, upon the said prospect of them all, he told me, he had none left, with whom he could so much as speak of them in confidence, since my lord Treasurer's being gone. And this gave, I suppose, his

2 13

'made any peace with France; and the 'ambassador here has agreed to that sum,

majesty the occasion of entering into more confidence with me, than I could deserve or expect." He then proceeds to tell us, that the counsel of the Lord Treasurer's removal had been carried on by the duke of Monmouth in conjunction with the duchess of Portsmouth and lord Essex, and that Sunderland was at least in compliance with this knot.

Frequent mention of Danby and of these proceedings against him is made in the Letters of Algernon Sidney to Mr. Savile. The following extracts exhibiting his reports of what was occurring while he wrote, will probably be not unacceptable or uninteresting to most readers:

"I presume you know that the earl of Danby rendered himself to the black rod on Wednesday last; and that desiring of the lords at the bar, that for his health he might be suffered to continue under his custody; that he might have recourse, as often as occasion should require, to all state papers that were necessary to him in making his defence; that he might at once have a copy of all his charge, and be obliged not to answer to any part, until the whole were before him; and that he might have serjeant Weston, serjeant Raymond, Mr. Saunders and Mr. Holt assigned unto him for counsel: he received no other answer, than that if he told what papers he desired, the house would do as was usual in those cases; that the House of Commons could not be abridged of the liberty retained to itself, of bringing in additional charges, if it were thought fit; that he might have for his counsel, such of those he had named as were not of the king's; and that he must be committed to the Tower, where Cheeke received him. Subtle men find great mysteries in his rendering himself, and make the king to be of the plot; but those that see no farther than I, believe he hath had in this, and all his businesses of late, no other counsel, than his lady."

April 28. "The five Popish lords in the Tower, had at the first given in cavilling uncertain answers; but Bellasve and Peters on Thursday, and Powis, Stafford and Arundel on Saturday, without any ambiguity, pleaded Not Guilty, and declared they put themselves upon the lords justice.

"The earl of Danby hath not thought fit, as yet, to deal so clearly, but hath put in a huge long answer, containing great protestations of his own innocence, as to every part of his charge; and then pleads his pardon, which enumerates and acquits him of all the crimes, that it is almost possible for a man to commit. This is by some thought very strange; his innocence that he protests declaring that he had no need of pardon, and the pardon pleaded in effect acknowledging the truth of his charge; it being useless if he be not guilty. Hereupon other questions do arise, as whether the king can pardon? Whether if he have this power,

he hath rightly executed it, the formalities not having been observed? And lastly, whether he will insist upon this answer, which will not leave him any plea at all, if the pardon be judged defective? I dare give no opinion upon these points, but I hear the learned say, the king cannot pardon a man impeached by parliament upon a public account: that though he could, this would be of no value, being defective in all the formalities: and though perhaps the court may be prevalent enough in the House of Lords, to have it admitted; that would be of evil consequence, no man doubting but the House of Commons will extremely dislike such a judgment, and grow very refractory thereupon; and the whole nation would follow them in it, so that all business would be thereby obstructed; by which means the king, upon the personal account of the earl of Danby, would lose the advantage of all that hath been done of late to please the nation; which I leave to your judgment, that know the court much better than I do. This point I only find to be clear, that if the pardon can be found good, though the formalities are wanting, it will be made good; and the burthen left upon the chancellor, that put the great seal unto it, without taking care of seeing them observed."

"May 15. Nothing was done the last week concerning the Popish lords in the Tower. The earl of Danby on Saturday last did insist upon his former plea and answer, how little sense soever there be in it. Some say it is, *ex industria perplexa*; and that having the court and house of lords to favour him, he cares not for the inconsistency of protesting his innocence, which renders his pardon useless, and pleading his pardon, which is a confession of guilt; hoping that if the Commons do demur in law upon the two points, (first, that the king cannot pardon a delinquent impeached by one commoner, much less by all the commons in England; secondly, that though it were granted he might pardon, this pardon could not hold, because it wants all the formalities) the lords would over-rule it, and then he is acquitted. The whole business formerly mentioned of the earl of Danby's endeavour to suborn Beiloe to renounce his testimony, was the last week verified before a committee of lords, and Dumblain his man confessed he had been employed to do it; so that his lordship is found to have done just the same thing, for which Reading [See his Case, Vol. 7, p. 259, of this Collection] stood the last week in the pillory.

"The house of commons have voted that the pardon pretended by the earl of Danby was of no value, and went up to desire justice upon him of the house of lords. We live in a time that no man, by what is passed, can well judge what is to be expedited for the future; but I am much inclined to believe, that Danby having in this last act followed his own disposition, that ever delighted in juggling and indirectness,

but not for so long a time. If you find the will, by the tricks he hath played, have found a way to hang himself.

"May 12. The last week was spent for the most part in janglings between the two houses, upon points of privilege relating unto the rights the lords pretend unto in points of judicatories; which the lords Frecheville, Berkeley, Ferrers, Aylesbury, Northampton, and some others equal unto them in understanding, eloquence and reputation, do with the help of the bishops very magnanimously defend. Several proposals have been made by the commons of conferring with them upon all the points in question, or appointing a committee of both houses, which, meeting together, might adjust all those that might be occasion of difference; but their lordships disdaining to confer upon points that as they did suppose depended wholly upon their will, on Friday last did vote that they would have no such committee, which vote was carried only by two voices, the one side having 54, the other 52. Of eighteen bishops that were present, sixteen were on the victorious side, and only Durham and Carlisle were so humble as to join with the vanquished. Of those 52, one and fifty the next day protested, and I think only laziness hindered the earl of Leicester, who was the other, not to protest, as well as the others with whom he had voted. On Saturday there was a conference between the two houses upon this business, and it appearing that all proceedings would stop thereupon, it being impossible for two to agree upon any thing, unless their thoughts and reasons are communicated, they were pleased yesterday to recede from that vote, and appointed a committee of twelve lords to confer with a double number of commons thereupon.

"The house of commons have forbidden all commoners of England to be of counsel to the earl of Danby, under the pain of being esteemed betrayers of the rights of all the commons, by whom he is accused, unless leave be asked and given by them.

"May 19. The lords and commons have not yet found the way of agreeing upon the method of trying the earl of Danby and the other lords. The bishops are the principal causes of the dispute, affecting a right to sit as judges, and content themselves to leave the exercise of it to the Papists, but with a protestation that the precedent be not alledged against them for the future, but insist upon sitting in the earl of Danby's case, until they come to vote upon life or death; and to shew how ingenious they are in that point, they profess they do no prejudice to their calling, in being his judges, resolving not to condemn him. The truth is, that business is full of a multitude of difficulties, that are very hard to decide; the chief of which are, first, whether the king hath power to pardon one impeached by the commons; secondly, whether that judgment belonging to the declaratory part of the law, is to

peace will not be accepted, you are not to

be given by one or both houses. Thirdly, in case the king can pardon, whether this hath the formalities required. Fourthly, if this pardon be not good, whether he may be admitted to plead any thing else. Fifthly, if he may plead, whether the points he is accused of amount to treason, which may probably exercise the house until it be dissolved or prorogued. The two houses differ also, in that the lords would first try the Popish lords, and the commons would give the preference to Danby.

"June 2. This day was seemly the prorogation of the parliament was spoken of, but being then uncertain, and (as I thought) not like to be, I was not willing to mention it; but it fell out the next day, and all men's wits have been screwed ever since that day to find out the consequences. Every body hath had his conjecture, and the most ignorant shewed themselves the most bold in asserting their opinions. Many find that the king would not have done it, if he had not resolved to send for the duke, keep up the army, desire assistances from abroad, sell Jersey and Tangier to the French, (for which Mr. Savile is to make the bargain) set the earl of Danby at liberty, and with the help of the Papists and bishops set up for himself. But instead of this we see little reason to believe the duke will think himself well here. The army is in part disbanded, and had been entirely before this day, if it had pleased colonel Birch. The place from whence the foreign assistances should come is not known: Mr. Savile is not thought very good at such treaties: The earl of Danby is like to lie where he is, and the utmost help his majesty can (for ought I hear) expect, until the parliament do meet, is, by Fox, Keut, and Duncomb's credit, which perhaps will not be found to be very steady foundation.

"October 29. There is a paper cast about the town of the earl of Danby's case, which makes a very ill one of it; and amongst other things to prove he was not of the French faction, he says, he needs alledge only the French ambassador's discourses of him at madame Mazarin's; this new logic of proving a thing by a proposition, either false, or as uncertain as itself, being looked upon as the invention of that excellent wit."

Roger North, in his Examen, mentions Danby's Case with his usual abuse of Kennett, who is attacked also in the Introduction to Danby's Memoirs. In his Life of his brother Lord Keeper Guilford, North writes thus of Danby's Case:

"The earl of Danby thought he could serve himself of this plot of Oates, and accordingly endeavoured at it; but it is plain that he had no command of the engine; and, instead of his sharing the popularity of nursing it, he found himself so intrigued that it was like a wolf by the ears; he could neither hold it, nor let it go; and, for certain, it bit him at last: just

' mention the money at all ; and all possible
' care must be taken to have this whole nego-

as when a barbarous mastiff attacks a man, he cries Poor cur, and is pulled down at last. So the earl's favour did but give strength to the creature to worry him. Herein he failed, 1. In joining to aid a design of which he did not know the bottom. 2. In thinking a lord treasurer, that had enriched himself and his family, could ever be popular. And the plot went so far against him that he was within an ace of being accused of Godfrey's murder. But this was late. In the mean time, upon the producing of some letters of his to Mr. Montagu the ambassador in France, in the House of Commons, importing a treaty between the king of England and the king of France, for money to be paid upon the peace, he was impeached ; articles of high treason was brought up, and he was committed, and, afterwards, pardoned, the pardon pleaded, and the validity of it disputed by the Commons. It was first considered if the earl should venture to plead the pardon, or no, lest (in case the pardon were disallowed, and his plea overruled) it would be peremptory, and he not be admitted to plead over, as *non cul*, or what other special matter he had to defend by.

" But notwithstanding this hazard, that if the Lords had judged against the king's power to pardon after an impeachment lodged in the House of Peers, he might not be allowed to have pleaded over, taking the pardon pleaded, as is usually held, to be a confession of the fact ; yet he did plead his pardon to the impeachment, and relied upon it. And so it stood, at the dissolution of the Westminster parliament, ready to be argued and debated in the Oxford parliament. And, if the expedite dissolution had not prevented, it might have made much ado between the Lords and Commons ; for it was not probable that the Lords, by enervating the king's pardon, would have left themselves liable to be impeached, and out of the power of the king's mercy. But the faction, in all discourse and writing, asserted the non-validity of the pardon, with all the earnestness that could be ; and, at the same time, the men of law stared at such a pretence, as an unheard of innovation, accounting the offence in the impeachment to be the same as in other courts that have cognizance of it ; that is treason against the king ; which, as all felonies and misdemeanors are, is punishable at the king's suit, and may be released by him ; the impeachment being but as an indictment in the high court of parliament, which is the king's suit.

" There is a certain heathen English philosopher that says, ' when reason is against men, ' men will be against reason : ' which notable, worldly saying never shined brighter in any instance than in this ; for it is hard to pick out of the whole law, a maxim more sure than ' that the king can pardon all high treasons ' universally. And yet, when passion was at

' tiation as private as is possible, for fear of
' giving offence at home, where for the most

work, and resolution taken to urge the lord Danby to the death (for what reasons ; whether to press some secrets out of him, or otherwise, touching the desperate dependences of the time, I attempt not to say here) it is no wonder that arguments, such as they were, grew up like mushrooms. His lordship used to observe the method, when points were previously resolved upon, which could not be maintained directly ; as here, ' That the king ' cannot pardon.' First, say they to themselves, is there any case of offences by law, that the king cannot pardon ? yes ; private rights, as appeals, and common nuisances. Say you so ? then this impeachment is for a right of the people, and is their private suit by their representatives the Commons ; and, rather than fail, call the offence a nuisance. And, turning the tables, see how with positive naming and asserting, if people importunately give way to it, and quit the plain text of the law, any thing may be stood upon. It may be proved that the king can pardon bonds and mortgages. For ask, first, what can the king pardon ? answer, outlawries, and trespasses *vi et armis*. Then, because a man may be outlawed in debt, call the bond an outlawry ; and, because a man may enter by virtue of his mortgage, call it a trespass with force. It will be said that these points are too impudently urged : I grant it. And what is to be said of the other ; for, in kind, they are the same ? His lordship was always of opinion that all false reasonings, in matters of life and property, were of dangerous consequence ; and that men are not aware of the mischiefs to the public, when, from high places, times serve themselves of them. For which reason his ordinary sentence, on such occasions, was ' nova, non vetus orbita fallit.'

" I do not meddle here with the history of the case of the earl of Danby at large. It may be found in the *Examen*, and, for fail, in his own memoirs. But I cannot omit one passage, touching only his lordship's concern respecting the parliament : and that is the point of his being bailed ; wherein his lordship differed from some of his brethren. The question turned upon the authority of parliament. He stood committed by the lords, upon his impeachment, when the Westminster parliament was dissolved ; and, at the same time, the untried lords, committed for Oates's plot, lay there on the like account. And now both the earl and the Popish lords thought that, by joint influence, they might get to be bailed. Accordingly, upon the return of an *Habeas Corpus*, his lordship, the earl of Danby, was brought up and appeared in the King's-bench court. The case made a great noise, and raised a great expectation what would be the issue. His lordship, being consulted (though not of that court) answered that he was of opinion that the court of King's-bench, being inferior in jurisdiction to the House of Lords,

part we hear it ten days after any thing that

could not bail their prisoner, after he had been charged by special articles: for they had no means to bring down the record, whereby to determine any thing of the cause of his commitment; and, for ought that they could judicially know, he might be attainted of the treason. It is certain that the lord Jeffries, then chief justice, in court, refused it; and yet he was a great stirrer up of the point, in order to gain the other judges to countenance his (then declared) opinion for the bailing; which was taken ill, as may be touched elsewhere. So the Lords were not bailed at that time. But, in the reign of king James 2, they were set free; and (with the peace of all forms) I think very justly; for it is a prodigious injustice to hold men in prison perdue, without any trial, or recourse for liberty: and, if the giving it was irregular, it was erring for justice; and one would think that such consideration might purge the irregularity. But nothing hath ever been said against it, in public, yet; and, so far, all is well. His lordship had a revelation in his mind, that this bailing of Danby was a thorn pushed towards him; though nothing came of it.

“While the case of the earl of Danby depended in parliament, there was a factious pamphlet published, which aimed to prove the judicature of the lords almost sovereign; and that all courts, ecclesiastical as well as temporal, were subject to it, and appealable; that the House was the magnum concilium, or great council, in the sense of ancient records; that, in trials for treason, the peers were judges of the court; and that there was no other court but the House itself; and that there was no need, nay, it was an usurpation to have a lord-steward. For the Commons demanded of the House of Lords that they should pass sentence upon the earl’s plea of his pardon; and the Lords addressed the king to appoint an high steward, in order to the trial of these impeachments; and so it was wrangled off and on till the session ended. But his lordship provoked by this pamphlet, but more to see people mistake the laws, and strike so hard at foundations, composed an answer to that pamphlet, shewing that a lord steward and his court, as well in parliament as out of it, are necessary to the trial of a peer; and that the Lords take the place of parity, pursuant to *Magna Charta*. But the law and the sentence are of the court, and not of the peers; and farther, that the *Magnum Concilium* in *Parlamento*, or the great council in parliament was anciently, not the peerage but, all the officers of state, and such as the king should call to serve in that capacity, and that the *Placita* in *Parlamento*, or pleas in parliament, came before the great council juridically, and not before the peers. But, of late years, that jurisdiction, which is the king’s, is executed by the peerage; and the council remains only in the capacity of assistants: and so it is like to continue.”

is communicated to the French ministers.*

* To the Articles of Impeachment of Lord Danby, as published in the Appendix to the “*Memoirs Relating to the Impeachment*,” &c. are subjoined the following observations on this Letter:

“Now let it be noted, that the Treasurer’s Letter to Mr. Montagu, of the 25th of March, was writ in that very session, in the beginning whereof (the better to persuade the parliament that our court did really intend to make a war against France) he caused to be written and published a book, entitled *Christianissimus Christianandus*; in which he renders the French king as black as hell itself. And after he had (by this and such like fallacies) prevailed with the parliament to give money to raise so great a naval and land force to make an actual war with France (as the title and body of the Poll Bill declares) he doth in that letter, but five days after passing the same, in a clandestine way, (though to the violating the royal word and faith of the nation) labour to strike up a peace, and obtain such vast sums of money from the French king (whom he thought the terror of our arms would now oblige to grant any thing) as he might thereby be enabled to alter and change the legal and ancient government of England, by laying aside parliaments (as ill-humoured things) and introducing an absolute power by a fixed standing army. How well this man hath deserved of his country, and whether the justice of the nation can be satisfied, till he be made as great an example in punishment, as he hath been in mischief, let all men judge.”

And in the body of the same publication, is given the following Explanation of the Earl of Danby’s Letter to Mr. Montagu:

AN EXPLANATION OF THE EARL OF DANBY’S LETTER TO MR. MONTAGU.

“I find so many misconstructions made of the earl of Danby’s Letter to Mr. Montagu, the king’s late ambassador in France, dated the 25th of March 1678, that I could not but in common justice, give the world those true explanations of it, which must needs satisfy the minds of any, (who have no other than public designs) that there could be no ill-meaning to the nation by that letter, had it not been written by the king’s command upon the subject of Peace and War, wherein his majesty alone is at all times sole judge, and ought to be obeyed not only by any of his ministers of state, but by all his subjects.

“In the first place the letter shews, That what was sent by the earl, was but a copy of those proposals which are consented to on the part of the confederates, and sent at the same time by Mr. Secretary Coventry; so that it appears, the subject matter of the proposals was not only known to the secretaries, but approved by the rest of the council: and the letter also shews the reason, why full direction was not then given by the secretary to con-

Upon reading these Letters, it was immediately resolved, That there was sufficient matter of impeachment against Thomas earl of

clude upon them; because, although his majesty at that time, knew by Mr. Godolphin, that those were the propositions upon which the confederates would make the peace if they could; yet the formal powers were not then come from them, which should enable the ambassador in France to perfect the treaty, if the French king should accept it.

“At the same time, when this intimation was given to his majesty, of the confederates desiring the peace upon those conditions, (and as the only means left to save Holland, and the interest of the prince of Orange there) it was also desired of his majesty, that whilst such formal powers were preparing to conclude such a peace, his majesty would please in their behalf to find by some private means the humour of the French king, whether it were likely he would accept those propositions when they should be offered to him, as believing it might be some disadvantage to the confederates to propose them, if they should be refused.

“And this was the motive (at their request, and at a time, when both Ghent and Ipres were newly taken, and Holland under the utmost consternation) that his majesty, to comply with them in a matter which so highly concerned their safety, did think fit, for the secrecy of it, according to their desires, to have the king of France’s mind known privately, and with all the speed possible, that he might let the Confederates know the French king’s intentions, before they exposed themselves to a public offer of what might be refused.

“This is the true meaning of what is said about feeling the king of France’s pulse, and making one answer to be shewed to the secretary, and another to the king himself; who endeavoured to send an account into Holland of the French king’s answer, as privately and speedily as was possible; and unless the peace had been fully completed, (the advantageous terms whereof would have answered for themselves) his majesty thought it might be ill resented by the parliament, who could not presently know, either the earnest request of the confederates for the peace, their necessity of obtaining it, their countries being in a readiness for a revolt, nor the goodness of those conditions which were demanded, and which made them unlikely to be granted; as it is afterwards expressed in the said letter.

“As to that part of the letter which says, (In case the conditions of peace shall be accepted, the king expects to have six millions of livres, a year, for three years, from the time that this agreement shall be signed between his Majesty and the king of France; because it will probably be two or three years before the parliament will be in humour to give him any supplies, after the making of any peace with France) it is so presently fol-

Danby, lord high treasurer of England; and on December 21, 1678, Articles of Impeachment were drawn up and agreed to, and on

lowed with this clause, (But if you find the peace will not be accepted, you are not to mention the money at all;) And so soon after that with this farther clause; (That you believe, this will be the last time that you shall receive any propositions of a peace; if these be rejected, as you believe they will;) that it cannot be thought to have any dangerous meaning in it, nor any great hopes of getting the money. But that it may be the more fully understood, you will find by Mr. Montagu’s letter of the 18th of Jan. 1677-8 which was read in the House of Commons, for which I refer to his lordship’s volume, viz. If the king is for a war, you know what to do; if he hearkens to their money, be pleased to let me know what they offer, and I dare answer to get our master as much again: for Barillon’s orders are to make the market as low as he can.

“Now as offers of money had often been made both by Mr. Montagu, and monsieur Batillon for a peace upon French conditions, and six million of livres had been offered by Monsieur Barillon for one year; so, Mr. Montagu having informed the king that whatever Monsieur Barillon should offer, he could get as much again, his majesty was resolved to try Mr. Montagu’s power, in case the French would consent to the confederates conditions; and in addition to Mr. Montagu’s own interest in moving the French king to give the six millions for more years than one, his majesty thought it might be a good motive, without prejudice to the parliament or nation, (which would have saved their own money thereby) to say it would probably be two or three years before the parliament would be in humour to give him any supplies, after having made any peace with France.

“The reason why nothing was to be said to the secretary concerning the money, was because Mr. Montagu in a former letter to the king himself, had desired that he would acquaint nobody but the earl of Danby with the business of the money; so that he found that employment for the earl, of which he thought fit after to accuse him.

“As I hope I have sufficiently explained those parts of the letter, which are liable to misconstruction, viz. The reasons for the privacy of the negotiation, for the sake of the confederates: The grounds upon which the money was expected: The reason why the earl of Danby was employed in that business of the money, and why no mention was to be made of it to the secretary, and the reasons why his majesty would not have his parliament to know it until the conditions had been perfected, (of which his majesty would have then been able to have given a very good account) or being broken quite off, never needed to have been known at all:

“I say having spoke to all those particulars,

December 23 were carried up by sir Henry Capel to the Lords, where they were read, as follows :

“ 1. That he hath traitorously encroached

I must likewise crave liberty to observe to you those parts of the same letter, which do sufficiently shew, that his majesty was not in the least to be drawn from the interest of the confederates, for any private gain of money to himself.

“ For you see the ambassador had agreed to the sum, but not for so long a time ; and no man can imagine why six millions of livres should have been refused, if either his majesty had had any ill design at home, or would have deserted the confederates. But on the contrary, you see his majesty would make no proposals, but what they desired ; nor even those, without being prest by them to it : nor would he have any motion of money to the French king, unless he accepted those very conditions so desired by the confederates. And if the confederates could have obtained such a peace as they desired, and his majesty a good sum of money towards defraying those charges he had been at, without taxing of his people. I conceive it ought to have been esteemed good policy, as it hath been in the former times of Henry 7, and Henry 8, rather than made a pretence of treason : But how the not doing any of those things excepted against in that letter, (and that plainly by reason of the king's great integrity to the confederate interest, which he so evidently preferred before his own personal advantage) should become treason, is beyond my comprehension.

“ It is likewise made a great aggravation of this letter, that it was dated five days after an act passed to raise money for an actual war with France : But surely every man knows, That an act to raise money for a war, is no declaration of the war.

“ That his majesty hath always the sole power of peace and war in his own hands.

“ That his ministers were never recalled from treating the peace at Nimeguen ; and besides our then ill-prepared condition for a war, that of the confederates was then so low, that it was not above a week after, that the French propositions were made at Nimeguen, upon which the peace was concluded ; and after which propositions (although far worse ones than what had been offered by his majesty but ten days before) the Dutch would never think of supporting the war any longer. And so far was his majesty from agreeing to that peace, which was then made, that his majesty's ministers at Nimeguen did not only refuse to sign it, but his majesty used all possible means to engage the Dutch with him in the offensive treaty against France ; and though he could not procure them to do so, he sent an army so soon as it was in readiness to march to their assistance, and thereby had it been possible, he endeavoured to have encouraged them to continue the war.

to himself Regal Power,* by treating in matters of peace and war with foreign ministers and ambassadors, and giving instructions to his majesty's ambassadors abroad, without coun-

“ Though a great deal more is to be said upon this subject, I think this enough to convince any man that as this letter did no harm, nor hindered one step of the preparations for war against France ; so, that it intended nothing ill either to the kingdom, or the cause of the confederates, and therefore the writer of it can deserve no blame from this letter, if it had not been written by the king's command and direction.

“ As I have wondered much at those strained constructions I have found upon this letter, so I confess I have not been able to give myself a reason how this letter should only find the hard fate of being loaded with such crimes ; and yet nothing said to those letters of Mr. Montagu's, the originals of which were also read in the House of Commons, which do so manifestly give his majesty the invitations to expect great sums from France, if he would endeavour it ; and which does acknowledge this earl to be so great an enemy to France above all other men, that it was grown a maxim to the statesmen there, by one who very well understood the state of the kingdom, That they must destroy his credit with our king, before they could hope to do any good in England.”

* “ As Treason,” says Blackstone (Commentaries, book 4, chap. 6) “ is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power. [Sp. L. b. 12. c. 7.] And yet, by the antient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so : whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons ; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason, which never were suspected to be such. Thus the accroaching, or attempting to exercise, royal power (a very uncertain charge) was in the 21st of Edw. 3, held to be treason.”

So lord Hardwicke, Chancellor, in his speech in the House of Lords, February the 13th 1741, upon lord Carteret's motion, That an humble address be presented to his Majesty to advise and beseech him to remove sir Robert Walpole from his presence and councils for ever (See Archbishop Secker's Report of the Debate inserted in Cobbett's Parliamentary History) says, “ Before the law of treason was reduced to a certainty, accroaching royal power was treason, and every thing was called so, and parties and persons destroyed one another under this

municating the same to the secretaries of state, and the rest of his majesty's council, against the express declaration of his majesty and his

parliament; thereby intending to defrat and overthrow the provision that has been deliberately made by his majesty and his parliament

name. At this rate the phrase of ministerial power will be capable of the same abuse."

"The excellent statute of Treason," says Mr. Luders (*Considerations on the Law of High Treason in the article of Levying War, Chap. 2.*) "was derived from an anxiety in the parliament, to ascertain the limits and claims of forfeitures for that crime. So it appears from a petition on the rolls of the 21st year of the king, in which the Commons represent "That certain justices had then lately given judgment in their courts for treason and accroachment of royal power; and they pray that it may be declared in parliament, to what cases this accroachment of royal power extended; whereby lords lost their profit of the forfeitures of their tenants, and the accused their benefit of clergy." The king's answer to this application was, "That in those cases, the points of such treasons and accroachments were specified in the judgments themselves." [2 Parl. Ro. 166. n. 15.]

"This answer does not seem to have been satisfactory, or to have quieted the uneasiness and fears of those barons, who thus lost their territorial profits, or of the subjects at large who were thus exposed to an arbitrary law. Accordingly they addressed the king again for a new statute, complaining that men were condemned for treason upon charges unknown to the people to be such; as appears by the introduction to the act in the parliament roll. [Page 439.]"

Again: "The following account of the use of the phrase will shew that it is not applicable to the modern state of the constitution. It is well known to persons acquainted with our history, that the phrase first obtained a place in criminal proceedings, in times when the direct power of the crown was the only spring of government, and when every act of a public nature proceeded immediately from thence; the whole œconomy of the nation, as well as acts of state. The country has seen such times, and the body of the law has been the chief instrument of preserving the effects of them to the present day. The subject of this treatise is one of the few that can be said to have outlived their generation.

"We find this phrase, in very early times, employed by statesmen and others in power against their enemies, to describe very heterogeneous offences. It made the charge against Gaveston, the Spensers, and Mortimer; and meant every thing that enmity and violence wished to express. To mislead the king and govern the state by his own creatures, to procure a body of retainers to bind themselves by oath to his service, to alienate the king's affection from his liege nobles, and maintain robbers and murderers, were involved in this expression, in the case of Gavestone. [1 Parl.

Ro. 283.] The Spensers were thereby accused, of guiding the king in all his actions, of purchasing estates by duress, of moving the king's anger against his queen and son, of preventing the nobles and counsellors from advising the king, of seizing a state prisoner and condemning him to death, of preventing the king from doing justice with respect to the Templars' lands, of governing the king his council and prelates. [3 Parl. Ro. 366, and the Act of Banishment, 1 Edw. 3.] In the case of Mortimer these words meant, to place and displace officers of the household, and set spies about the king, to take the king out of the hands of his keepers and to murder him, to accuse the earl of Kent in parliament and himself procure his death, to summon the knights to follow the king into Gascoiny, and take fines for their excuse, to procure large grants of estates to his family, to cause the king to separate himself from the queen. [2 Parl. Ro. 52.] All these several actions have been called in the records of the proceedings, accroaching, assuming, or usurping royal power. Kings of modern times would not be pleased, to find such flagitious actions made peculiar to their station and character, and the perpetrators of them so dignified, as to be accused of imitating a kingly conduct. To kill a deposed king, to cheat the king's tenants, to bring a nobleman to unjust death, are examples of assuming royal power in the foregoing list.

"It seems to have been the common form of charges of high treason. A record of 18 Edw. 2, transcribed in a note p. 167 of 1 Hal. P. C. applies it to the treason of Harclay earl of Carlisle, for entering into a league to support the king of Scots. It has a remarkable addition, for he is accused of assuming royal power against his liege lord, and the peers and people of the realm. In 21 Edw. 3. 2 Parl. Ro. 136, No. 47. an abbot and convent who had violently oppressed and imprisoned one of the monks, are by him accused of taking upon them royal power within the abbey. In the same year (ib. p. 193) a petition in parliament, from one whom the bishop of Ely had endeavoured to imprison, while under the king's protection, charges the bishop with assuming royal power against our lord the king his crown and dignity. The petition which we have seen before as the foundation of the statute of treasons [In p. 11.] demanding an explanation of the phrase, is also of 21 Edw. 3. The impeachment of R. Lyons in 50 Edw. 3, (ib. p. 324.) charges him with various acts of speculation, while treasurer of the customs, concluding them to be assumptions of royal power, too horrible to be all recited. In the same year (ib. p. 356.) the Commons petition for an act to make it felony to lay on new impositions, without consent of parliament, thereby accroaching royal power. This deserves par-

for the safety and preservation of his majesty's kingdoms and dominions.

"2. That he hath traitorously endeavoured to subvert the ancient and well established form of government in this kingdom, and instead thereof to introduce an arbitrary and tyrannical way of government; and the better to effect this his purpose, he did design the raising of an army, upon pretence of a war against the French king, and to continue the same as a standing army within this kingdom: and an army being so raised, and no war ensuing, an act of parliament having passed to pay and disband the same, and a great sum of money being granted for that end, he did continue the army contrary to the said act, and misemployed the said money given for the disbanding, to the continuance thereof; and issued out of his majesty's revenues divers great sums of money for the said purpose, and wilfully neglected to take security of the pay-masters of the army, as the said act required; whereby

ticular notice, as it was in the same reign as the statute, which was applied for on account of the abuse of the term. It is therefore pleasing to find this inconsistent application of the commons rejected. They apply the same phrase, in a petition in 4 Ric. 2, to a great riot in the corporation of Norwich, against a party who had elected a mayor by force. Vol. 3, p. 96, n. 50.

"The case of the Judges in the reign of Richard the second contains various examples of the same perverse abuse of the law and legal forms, for the worst purposes, by each of the parties, who at different times took the lead in that disastrous reign. The impeachment of archbishop Laud assumed the like tone of extravagance, in the charge of the sixth article, "that he traitorously assumed a papal and tyrannical power." We have seen something very like it in France, in our own time. Their accusations for crimes against the sovereignty of the French nation, jacobinism, terrorism, federalism, &c. have been in their turns, treasous of this kind, charged in the same loose and arbitrary manner: ["Addito majestatis crimine, quod tum omnium accusationem complementum erat." The remark of Tacitus on the prosecutions under Tiberius. Annal. lib. 3. s. 38.] The authors of which have not been more unjust and absurd, than their predecessor tyrants in English and Roman history."

He proceeds with great ability to shew by the examination of a variety of cases to what extent of illegality decisious grounded upon this vague charge have been carried. "The articles" says he (of high treason as they are called) against Seymour lord Sudley exhibit a curious mixture. At the end of 22 charges of schemes of ambition as like adultery as treason, there is an *ergo* he aspired to the dignity royal." He notices also the sixth article of charge against archbishop Laud, see vol. 3, p. 327, of this Collection.

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the said law is eluded, and the army is yet continued, to the great danger and unnecessary charge of his majesty and the whole kingdom.

"3. That he traitorously intending and designing to alienate the hearts and affections of his majesty's good subjects from his royal person and government, and to hinder the meetings of parliaments, and to deprive his sacred majesty of their safe and wholesome counsel, and thereby to alter the constitution of the government of this kingdom, did propose and negotiate a peace for the French king, upon terms disadvantageous to the interest of his majesty and his kingdoms; for the doing whereof, he did endeavour to procure a great sum of money from the French king, for enabling him to maintain and carry on his said traitorous designs and purposes, to the hazard of his majesty's person and government.

"4. That he is Popishly affected, and hath traitorously concealed (after he had notice) the late horrid and bloody Plot and conspiracy, contrived by the Papists against his majesty's person and government; and hath suppressed the evidence, and reproachfully discountenanced the king's witnesses in the discovery of it in favour of Popery, immediately tending to the destruction of the king's sacred person, and the subversion of the Protestant Religion.

"5. That he hath wasted the king's treasure, by issuing out of his majesty's exchequer several branches of his revenue for unnecessary pensions and secret services, to the value of 231,602*l.* within two years; and that he hath wholly diverted out of the known method and government of the exchequer one whole branch of his majesty's revenue to private uses, without any account to be made of it to his majesty in his exchequer; contrary to the express Act of Parliament, which granted the same; and he hath removed two of his majesty's commissioners of that part of the revenue, for refusing to consent to such his unwarrantable actions therein, and to advance money upon that branch of the revenue for private uses.

"6. That he hath by indirect means procured from his majesty to himself divers considerable gifts and grants of inheritance of the ancient revenue of the crown, even contrary to acts of parliament.

"For which matters and things the knights, citizens and burgeses of the commons in parliament, do, in the name of themselves, and of all the commons of England, impeach the said Thomas earl of Danby, lord high treasurer of England, of high-treason, and other high crimes, misdemeanours and offences, in the said articles contained: and 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 the answers which the said Thomas earl of Danby shall make to the premises, or any of them, or any impeachment or accusation that shall be by them exhibited, as the cause (according to the course and

proceedings of parliament) shall require; do pray, that the said Thomas earl of Danby may be put to answer all and every the premises; that such proceedings, trial, examinations and judgments, may be upon them, and every one of them had and used, as shall be agreeable to law and justice; and that he may be sequestered from parliament, and forthwith committed to safe custody."

As soon as the Articles were read,

The Earl of *Danby* spake as follows:

"My Lords,

"I hope you will not enter upon any other business, before you have given that liberty to me, which is the privilege of every peer, to be heard upon any accusation that is brought against him, though of far less moment than what hath been newly read against myself.

"I confess I should have heard this charge with horror, if the matter of it had been true; but I thank God, I know my innocency to be so great, that it protects me from all sorts of fear, but that of lying under so black a character, as may be believed by those that cannot bear my defence; though I have the confidence to think, that it is not truly believed in the hearts of the greatest part of those that have been informed against me.

"I must needs confess, that I thought myself the last man in this kingdom that should ever have been in danger of being accused for treason, because I know no man that abhors it more, and that would pursue it more vigorously than myself, against any that should be guilty of it. Nay, to such a degree is my detestation of that crime, that were I sure the dearest child I have were guilty of it, I would willingly be his executioner.

"My lords, I know this is not the time for me to enter regularly upon my defence, because I know your lordships will first order me a copy of my charge, and appoint me a time for my vindication; when I doubt not but to do it to the full satisfaction of your lordships and all the world. In the mean time I will only beg leave to observe to your lordships, that those articles in this charge which can seem to have any thing of treason in them, have their answer so obvious, that there is very little in them which may not be answered by many others as well as myself, and some of them by every man in the kingdom.

"The first, which is the assuming regal power, I confess I do not understand; having never in my life done any thing of great moment, either at home or relating to foreign matters, for which I have not always had his majesty's command. And although I am far from having been the most cautious man in taking care of my own security, (which perhaps my great innocency hath been the cause of) yet I have not been so wanting of common prudence, as in the most material things not to have had his majesty's orders and directions under his own hand, and particularly for the letters now made use of against me.

"The second, I think, doth scarce need my giving any answer to it: it being obvious, that the army was no more raised by me, than by every lord in this House: and whoever is in that station which I hold, must certainly be a fool, to desire any thing which creates a want of money, especially so great a one, as the charge of an army must necessarily and immediately produce. And for one part of the Article concerning the pay-master of the army, it is in fact otherwise; for security from the pay-master has been taken in the sum of 400,000*l*.

"The third is of the same nature with the first, and comes from the same foundation, which is, what a gentleman had thought fit to produce to the House of Commons. I will not now censure his action, I think it will do enough for itself; I will only say, that although I take it for one of the greatest misfortunes which can befall a man, to lie under such a charge of the House of Commons, yet I would much sooner chuse to be under that unhappiness, than under his circumstances.

"The fourth Article is not only false in every part of it, but it is not possible to believe it true, without my being the greatest fool on earth, as well as the blackest villain. For were I capable of such a wickedness, yet the more wicked any man is, the more he is carried to his own interest; and is it possible any thing under heaven can agree less with my interest, than the destruction of this king? Can I possibly hope to be better than I am? And is it not apparent, that there is not one man living, whose happiness depends so much as mine upon the preservation of his person.

"My Lords, I know there is not a man in the world, that can in his heart think me guilty of that part of the article, if I should say nothing to it. But besides, I was so far from concealing this hellish plot, that it is notoriously known, his majesty sent me first notice of it, together with forty-three heads of the information, before I knew a syllable of it from any body else: And it hath been owned at the bar of the House of Commons by him (from whom only I had the intelligence) that he had all the encouragement and dispatch from me that I could give him. Besides, when it was disclosed to the council-board, he told some of the clerks of the council, (as he had done me divers times before) that it would have been much better, and more would have been discovered, if it had been longer kept private. Besides this, I had the fortune to be particularly instrumental in seizing Mr. Coleman's papers, without which care there had not one of them appeared, and consequently, the best and most material evidence which is yet of the plot, had been wholly wanting. And certainly this is the first time that any man was accused to be the concealer of that plot, whereof he hath been a principal means of procuring the discovery.

"For that part of the Article that says, I am Popishly affected, I thank God, that the contrary is so known to all the world, that even

some of those that voted against me, did own their knowledge of the falsity of that allegation; and I hope I have through my whole life given so good testimony of my religion, both in my own family, and by my services to the church, (wherever it hath lain in my power) that I shall not need much vindication in that particular: And I hope your lordships will forgive me my weakness, in telling you, that I have a younger son in the House of Commons, whom I shall love the better as long as I live, for moving to have that part of the article to stand against me, that by that pattern it might appear, with what sort of zeal the whole hath been carried to my prejudice.

“The fifth Article will upon examination, appear to be as ill-grounded as any of the rest; and I am sorry I am able to give one reason, which is, that I have known no treasure in any time to waste, having entered upon an empty treasury, and never seen one farthing given to his majesty (in almost six years) that hath not been appropriated to particular uses, and strictly so applied by me, as the acts have directed. And there hath not been one of those aids, which, instead of giving the king money, hath not cost him more out of his own purse, to the same uses, as doth appear by the larger dimensions of the new ships, and so in other things: Insomuch that I take upon me the vanity to say, that by the payments I have made to the navy and seamen, beyond former times; the paying off the greatest part of the debt which was stopped in the exchequer before my time; by my own punctuality in the course of payments, and by other things, which I am able to shew, I doubt not but to appear meritorious, instead of being criminal, upon that article.

“As to the sixth Article, which mentions my great gettings, I cannot deny but that I serve a master, whose goodness and bounty hath been a great deal more to me than I have deserved, and to whom I can never pay gratitude enough by all the services of my life. But when the particulars of those gettings shall appear, it will be found very contrary to what is suggested abroad; and that in near six years time in this great place, I have not got half that, which many others have got in lesser places in half that time. And from the examination of this, which I desire may be seen, there will arise matter to accuse my prudence, in not having done for my family what justly I might, but nothing to arraign either my honour, my conscience, or my faithful service to the crown.

“My lords, if my obedience to the king shall not be my crime, I think nothing else will stick upon me from these articles: For my own heart flatters me to believe, that I have done nothing but as a true protestant, and a faithful servant both to my king and country. Nay, I am as confident, as that now I speak, that had I either been a papist, or friend to the French, I had not been now accused. For I have reason to believe, that the principal informer of

the House of Commons hath been assisted by French advice to this accusation; and if the gentleman (Mr. Montague) were as just to produce all he knows for me, as he hath been malicious to shew what may be liable to misconstruction against me, or rather against the king, (as indeed it is) no man could vindicate me more than himself: Under whose hand I have it to shew, how great an enemy to France I am thought, how much I might have had to have been otherwise, and what he himself might have had for getting me to take it. But I do not wonder this gentleman would do me no right, when he does not think fit to do it to his majesty (upon whom chiefly this matter must reflect). Although he knows, as will appear under his hand, that the greatest invitations to his majesty, for having money from France, have been made by himself; that if his majesty would have been tempted for money, he might have sold towns for as much as if they had been his own, and the money have been conveyed as privately as he pleased; that his majesty might have made matches with France, if he would have consented to give them towns; and yet, that the king hath always scorned to yield the meanest village that was not agreed to by the Spaniard and Hollander. That gentleman hath often pretended how much his own interest in France was diminished, only by being thought my friend. And besides divers other instances, I have under his hand, to shew the malice of the French court against me, I sent two of his letters to the House of Commons, which shew how Monsieur Rouvigny was sent hither on purpose to ruin me; which I am well assured at this time they would rather see, than of any one man in England. Besides what that gentleman could say of this kind (if he pleased) I hope his majesty will give me leave (in my defence) to say in his presence, and in the bearing of divers lords, with whom I have the honour to sit in the committee of foreign affairs, that, which were it not true, his majesty must think me the impudentest and worst of men to affirm before him, that ever since I had the honour to serve his majesty to this day, I have delivered it as my constant opinion, that France was the worst interest his majesty could embrace, and that they were the nation in the world from whom I did believe he ought to apprehend the greatest danger; and who have both his person and government under the last degree of contempt: For which reason alone (were there no other) I would never advise his majesty to trust to their friendship.

“My lords, it is my greatest happiness, that your lordships are my judges; whose wisdom and justice are so great, that you will both discern the truth of the evidence when it shall come before you, and in the mean time distinguish truly what the crimes are (if they could be proved) and not what they are called. For this reason this House hath wisely provided to have the special matter before them, to the end they may be satisfied whether the

charge have its right denomination; for otherwise it were to no purpose to desire special matter, unless it were to see whether the special matter alledged be what it is called. As for example, if a man were accused of having traiterously passed the river in a pair of oars, this is special matter and stiled treason, by inserting the word traiterously; yet your lordships would not therefore proceed as taking it for treason. So in this case, I beg for all your lordships sakes, as well as my own, that you will please to use that caution which will be necessary for all your lordships safety and seats in this House: For I beseech your lordships to consider, whether such a precedent may go hereafter? What the House of Commons may do in such a case, there is no question but his majesty may do the same by his attorney; and what either of them may do against one lord, they may do against more (and we have seen it done in our days against all the bishops at once). Were it not very precariously then that your lordships hold your seats here, when by either of these ways as many of your lordships, as for a time it might be convenient to remove, should be at the mercy of having a thing called treason, whether it be so or no.

"Truly, my lords. I have reason to believe, that in the House of Commons the matter of my charge (if proved) was not thought to amount to treason, either by Statute or common law; and I hope your lordships have too sad an example in your memory, ever to assist the making of treason by accumulation.

"I should therefore not only wrong my own innocence, but the right of the peers, to submit to answer matters of misdemeanor, as a criminal in treason.

"My lords, I wonder not at the malicious prosecution of those who would have me taken for what they truly are. For I am well assured, that neither the French take me to be of their interest, nor the Papists to be of their religion: But I am troubled to fall under so severe a censure of the House of Commons, although I cannot blame them, but my accusers, who have so wrongfully informed them.

"My lords, I will conclude with this comfort, that I do not in the least apprehend the matter of my charge, under the security of your lordships' justice; and will therefore trouble your lordships no longer at this time, but only to pray your directions whether I am to withdraw, which I shall readily obey.

When the Earl had ended his Speech, a great debate arose, on the question, Whether the Impeachment should be received as an Impeachment of High-Treason only, because the Commons had added the word High-Treason in it? It was said, the utmost that could be made of it, was to suppose it true. But even in that case, they must needs say plainly that it was not within the Statute. To this it was answered, That the House of Commons that brought up the Impeachment, were to be heard to two points, viz. to the nature of the

crime; and the trial of it. But the lords could not take upon them to judge of either of these, till they heard what the Commons could offer to support the charge: they were bound therefore to receive the charge, and to proceed according to the rules of parliament, which was to commit the person, so impeached, and then give a short day for his trial. So it would soon be over, if the Commons could not prove the matter charged to be High-Treason.

The debate was carried on with much heat on both sides, and, among the Speakers on this occasion, was the earl of Carnarvon, a lord who is said never to have spoken before in that House; who, having been heated with wine, and more excited to display his abilities by the duke of Buckingham, (who meant no favour to the Treasurer, but only ridicule) was resolved, before he went up, to speak upon any subject that should offer itself. Accordingly he stood up, and delivered himself to this effect:

"My Lords; I understand but little of Latin but a good deal of English, and not a little of the English history, from which I have learnt the mischiefs of such kind of prosecutions as these, and the ill fate of the prosecutors. I could bring many instances, and those antient; but, my lords, I shall go no farther back than the latter end of queen Elizabeth's reign: at which time the earl of Essex was run down by sir Walter Rawleigh. My lord Bacon he ran down sir Walter Rawleigh, and your lordships know what became of my lord Bacon. The duke of Buckingham, he ran down my lord Bacon, and your lordships know what happened to the duke of Buckingham. Sir Thomas Wentworth, afterwards earl of Strafford, ran down the duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the earl of Strafford, and your lordships know what became of sir Harry Vane. Chancellor Hyde, he ran down sir Harry Vane, and your lordships know what became of the chancellor. Sir Thomas Osborne, now earl of Danby, ran down Chancellor Hyde; but what will become of the earl of Danby, your lordships best can tell. But let me see that man that dare run the earl of Danby down, and we shall soon see what will become of him*."

* It has already been noticed, (See a note to vol. 8, p. 127) that Arlington, Seymour, and Osborne, who had all been most eager and most bitter in the attack upon Clarendon, all in their turns, became the objects of similar attacks. Mr. Hatsell (4 Prec. 214) relates from Ambrose Phillips's *Life of Archbishop Williams* a curious anecdote upon the subject of the condemnation of lord treasurer Middlesex (see his Case, vol. 2, p. 1183, of this Collection) "His majesty king James the 1st sent for the lord keeper Williams, and told him plainly, 'That he would not have his treasurer a public sacrifice.'—'Sir,' says the lord keeper, 'I have attempted amongst my surest friends, to bring

This being pronounced with a remarkable humour and tone, the duke of Buckingham, both surprised and disappointed, after his way, cried out, "The man is inspired! and claret has done the business."—The majority, however, was against the commitment.

[Besides the general and vague Defence which upon this occasion lord Danby made in the House of Lords, he was defended from the press in a pamphlet intitled, "A Letter to a Member of the House of Commons;" or (as it appears) "An Impartial State of the Case of the Earl of Danby." In answer to this was published, "An Examination of the Earl of Danby's Case." This gave rise to "The Earl of Danby's Answer to the Examiner," which brought forth "Sir R. Howard's Account of the State of his Majesty's Revenue as it was left by the Earl of Danby at Lady-Day 1679;" and that produced

him off fairly; all shrink and refuse me.—Only the stout and prudent lord Holles adventured upon the frowns of the prince and duke, and gave his reasons, why Middlesex appeared to be innocent.—I were mad, if, for my part, I should not wish him to escape this tempest, and be safe under the harbour of your majesty's clemency.—When I deliberate upon him, I think of myself—'Tis his fortune to-day, 'tis mine to-morrow—The arrow that hits him, is within an handful of me. Yet, Sir, I must deal faithfully—Your son, the prince, is the main champion that encounters the treasurer; whom, if you save, you foil your son—For, though matters are carried by the whole vote of parliament, and are driven on by the duke, yet they that walk in Westminster Hall, call this, "The prince's undertaking;" whom you will blast in his bud, in the opinion of all your subjects, if you suffer not your old, and perhaps, innocent servant, to be plucked from the sanctuary of your mercy—necessity must excuse you from inconstancy or cruelty.' So, with these reasons, the king was persuaded to yield to the headstrong importunities of his parliament, and the treasurer was deposed, and fined 1,000*l.* and committed to the Tower.—Within a few months after this conversation, the lord keeper's prophecy was fulfilled; for by the influence of the same duke of Buckingham, he himself was removed from the office of lord keeper, and retired from court to his palace at Bugden, in disgrace. He was at that time only bishop of Lincoln."

See also an observation of the duke of Wharton (in his speech of May 15th 1723, in hishop Atterbury's case in this Collection) that bills of Attainder like Sisypus's stone have frequently rolled back upon those who were the chief promoters of them.

"The Earl of Danby's Answer to Sir Robert Howard." The merits of the Charges against Lord Danby were not discussed with any minuteness in Parliament, these Articles are therefore here inserted, as affording the best representation of the facts and arguments by which the attack upon him was enforced and resisted.]

A LETTER TO A MEMBER OF THE HOUSE OF COMMONS: OR AN IMPARTIAL STATE OF THE CASE OF THE EARL OF DANBY. WRITTEN IN THE YEAR 1679.

Sir; Had you been a member of the last parliament, you could not have been so great a stranger to the earl of Danby as I perceive you are, his lordship having long been a member of that House, and in very great esteem there: But since you are pleased to say you know him not, and are in great doubts what to believe of him, finding so many stories contradicting one another, and such an extraordinary violence in some men, as makes you suspect whether malice may not have too great a share in his prosecution: And that you have so good an opinion of me, as to believe what I shall say; I do assure you I shall be as faithful to you, in relating nothing but what you may depend upon for certain truth.

The said earl after a faithful discharge of his trust as Treasurer of the Navy; both to the satisfaction of his majesty, and to the great content of the seamen, about Midsummer 1673, had the honour conferred upon him of Lord High Treasurer of England; which he managed with so great prudence and success, that contrary to all men's expectations, but especially of his enemies, (who assured themselves of his immediate ruin by that preferment.) He supported for near six years that condition of his master, which it was not then thought could have been made to subsist so many months and without any supplies or burdens laid upon the people in all that time: Whereas it is well known, that no year passed before his administration in the treasury, that did not cost the people five, ten, or twelve hundred thousand pounds, and sometimes double those sums.

It was not without great reason that this lord's ill-willers did then assure themselves of his downfall; because of the improbability of his performing those great works, which were at that time upon his hand, with so small a stock as was then left him to work withal: And the confidence they might reasonably give themselves that he could have no relief by credit, which had newly received the most fatal blow that was ever given to it in any kingdom.

Soon after that time a peace was concluded with the Dutch, after a long and chargeable

war, and the greatest fleet that ever yet this kingdom had was then to be paid off; as also an army which had been raised for the said war; which together amounted to about 800,000*l.* to discharge both, as will appear by those accounts; and there remained for that use not much above 400,000*l.* of the last 1,900,000*l.* which had been given to his majesty by act of parliament about a year before this lord's entrance to the treasury; and that remainder was upon the fourth, fifth and six quarters of that tax, which were then to come, and consequently of no use for present payments of the said fleet and army, but only as money could be borrowed after such a breach of credit as aforesaid.

Notwithstanding all which difficulties, and the endeavours of some envious men to make that ill time of credit yet worse to this Lord, he did not only pay off that whole fleet and army, but discharged the seamen of that fleet with ready money; which had never been done before but with tickets, or part tickets, and part money. And whereas it had been usual to have ships lie undischarged two, three, or four months after the times they should be paid off; it cannot be said, until within a month or six weeks before this Lord's quitting his place, that any ship did lie unpaid a week after the books belonging to the said ship were ready; and then there were not above one ship or two, which happened so by an accident, the money having been assigned by his lordship to that use in due time.

This lord (until money was against his will diverted out of the king's revenue to the payment of an army raised by the parliament) did not only provide for the necessary, and public expences of the kingdom in his own time; but did discharge the yards, which were in arrear at the time of his receiving the staff, to the sum of 95,000*l.* and upwards. He did the same to Tangier, to the sum of 43,000*l.* and upwards; and in old tickets, and to sick and wounded men, to the sum of 93,000*l.* and upwards, all incurred before his lordship's time. Many great arrears of the household were also discharged by this lord, to the sum of 79,000*l.* or thereabouts. And although there was a suspension for part of the household for one year in his time; yet notwithstanding the great necessity of the crown, that also was satisfied by his lordship, long before his leaving his employment.

But that which is worthy of as great honour to his lordship, as it ought to be of infamy to the authors of that unjust action, is, that by this lord's care a satisfaction was given to many starving orphans and creditors, who had been put in that condition by the stop of the exchequer, to the sum of 1,200,000*l.* or thereabouts; and this he did at a time when the crown was not only in want, but when the parliament had never contributed one farthing towards it; whereas those people had been deprived and robbed of their estates and livelihooods, lent to his majesty, in times when the

exchequer had been as much filled with superfluity of aids from parliament, as it was deprived of necessary supplies in this lord's time.

Besides these expences at home, there happened in this lord's time almost a constant war with Algiers (from whence also this lord did once make a total redemption of our English slaves), and a rebellion in Virginia; which was both very chargeable in the expence of it, and hath been a great abatement in that considerable part of the customs which is brought in by tobacco from those parts: insomuch, that whatever is said of this lord's not having employed the treasure to public uses, must certainly proceed either from great malice, or want of due information: as truly I believe it doth with most men.

I offer not here to say any thing in vindication of this lord, which needs private testimony to make it good; because all I hope for from the present age (if that can be had) is, That they will admit what their own eyes may be witness to, if they please; and therefore, as I have told you what this lord hath done upon record in his employment, as lord treasurer, without any assistance of parliament: so I shall remind you what upon record he hath wanted to serve the crown withal, which his predecessors did receive yearly into his majesty's treasury; viz. By a great abatement by the corn act, which did not for some years take less than three-score thousand pounds a year from the customs: By the act for prohibiting the French commodities, which hath not lost less than 150,000*l.* a year from the said revenue; besides the inconvenient manner of repayment of the 200,000*l.* borrowed on the excise, by one fifth thereof being deposited in the exchequer, which might have been repaid with much less charge and prejudice to his majesty's affairs; and besides the abatement of 10,000*l.* of their tax to the city of London, and the forgiveness of their hearth money, &c. to the town of Northampton for several years; and many other things of that kind: amongst which, I doubt not but his kindnesses to the city of London, upon divers other occasions, besides the abatement of the tax aforesaid, must be acknowledged; as in the disputes about the water bailiff, Hungerford Market, &c.

As this lord's care was very great to see money applied to the most public uses, (as will appear by the weekly certificates in the exchequer; to which I do appeal) and from which public uses, he never diverted one penny, that was so appropriated (notwithstanding the many false suggestions to the contrary) so he was no less industrious in the improvement of his majesty's revenue, the great branches whereof he found in this state; viz. The excise newly farmed for five hundred and thirty thousand pounds a year for three years then to come, which he ordered so to his majesty's advantage, that he found means to resume the said farm, and to let it immediately to the same persons, and for the same time, for five hundred and

fifty thousand pounds per annum; and at the expiration of that time, his lordship so managed it between a farm and a commission, as did produce above 600,000*l.* a year, until a reduction was made in that revenue, of betwixt forty and fifty thousand pounds a year, by the prohibition of brandy, &c.

The hearth-money, his lordship found valued at 145,000*l.* a year; which was improved by his lordship to 162,000*l.* per annum. And the customs would not have turned to any worse account in proportion, had it not been for the hindrances I have mentioned, of the Corn-act, Prohibition act, the rebellion in Virginia, &c. And in Ireland, his lordship also raised the revenue there, from 190,000*l.* to 240,000*l.* per annum; in so much, that in the branches of the Excise and Hearth-money alone, and in the Irish revenue, his lordship increased 137,000*l.* to his majesty's income.

It is likewise observable, that, notwithstanding the great shocks newly given to credit, this lord did very rarely pay more than eight per cent. for money borrowed; and it will appear, that he found very little that did not cost his majesty ten per cent. at his entrance.

His lordship, not having wherewithal to satisfy all things, did chuse to let it fall short in pensions, and lesser payments to private persons, rather than that the public should want; so far as he was able to supply it. And yet I dare take upon me, by proof in the exchequer, to aver, that even those payments were much better made than they had been at any time before, within the same space that this lord was treasurer, as may appear likewise by the certificates of the exchequer.

Next to the not having the management of this lord truly represented to the world, I find his services have been chiefly blasted with a false suggestion of his squandering the king's treasure to private and unnecessary uses, under the name of Secret Service. And therefore, for the more ready and certain way of disabusing the world in that particular, and doing his majesty, as well this lord, right therein, I shall desire any man to take a computation of his majesty's yearly revenue (which, within a very little, is known to most men) and when he has summed up, what hath been publicly accounted for each year (which, by the certificates of the pells, will be found to be 8,276,767*l.* from Easter, 1673, to March, 1679, besides the interest to the goldsmiths, and divers other particulars, which are not included in that account;) let him compute what there could be remaining possible, to be laid out to other uses, and he will find, that if all that was the possible remainder had been laid out extravagantly, it would be a very inconsiderable sum, in comparison of what the world is made to believe.

In the next place, it is well known to all, who are versed in the ways of the Exchequer, that many sums are included in the Privy Seals of secret service, which are either for expedi-

tion of public services upon sudden occasions, or to save paying of greater fees, where his majesty is pleased to let it be so; as in the case of the lord treasurer, and chancellor of the exchequer's salaries, &c. (which were so paid till lately altered by this lord;) and I am confident that there is no year, wherein one third at least, if not half of the payments under the privy seals of secret service, might not be exposed to a public account as well as any other payments.

And whereas it is objected, That the sums now paid for secret service, are much greater than formerly, nothing can be more untrue; but the mistake lies in this, that formerly great sums were commonly paid to a particular person by a privy seal for some public use, and money was commanded from that hand to private uses by particular orders and commands, which were never seen in privy-seals for secret service; but were discharged by privy seals afterwards, upon passing their accounts: For it is well known, that in five or six of the first years after the king's restoration, there was more money given to particular persons in every year of that time, than has been paid to private uses in the whole time of this lord's being treasurer; and yet I am confident, that scarce one shilling of those great sums appear under any privy seals of secret service; so that in truth this which is imputed as a crime, was one of the most useful services this lord could do, to let the king see by a particular account, what those expences came to, which were formerly so huddled up, that his majesty could not be sensible of the greatness of those disbursements.

Lastly, I dare as confidently affirm, that payments to secret service (that is to say, such payments, whereof his majesty will not permit any account to be made but to himself) have never amounted to 100,000*l.*; nay, I durst say, not 80,000*l.* a year, one year with another, since this lord served his majesty in that employment; and I suppose that none of his subjects do grudge him that sum to his private use: But upon this occasion, I cannot forbear to observe the unhappiness of this lord, who suffers in the opinion of many for having wasted the king's treasure, to gratify some particular great ones; and I am not without good assurance, that his refusal to serve such ends, and his being firm to the interest of his master, and the kingdom, in that particular, is no small cause of his present sufferings.

To conclude this point, about this lord's behaviour in his office of treasurer, I most needs say, I know not whether this lord, or we the people of England, are the more unhappy, who can so easily be drawn by false reports, to have the worst opinion of our best ministers; when the single comparing of this lord's administration in his employment of lord treasurer, with former times of great plenty, might convince any man, there never was a better officer in that station; and to those who will not take that pains, I will appeal to another sort of evi-

dence from coffee-houses themselves, whether the good husbandry of this lord for his master, hath not been heretofore (and not long since) as much complained of, as his wasting the king's treasure is now pretended to be a charge against him; nay, even to the making that a crime of state, and laying it to his charge at that time, as a design, by good husbandry, to keep off the use of parliaments.

What I have said concerning this lord's administration in his office, as lord high treasurer, I have spoken upon certain knowledge; and what I shall now say in relation to his transactions in the affairs of state, are partly so, and the rest upon such assurances, that I am no less confident of the truth of them. And in the first place, I know that many besides myself, have often heard his lordship complain of it as an infinite misfortune to him, that his majesty did take him so much from the business of the treasury; whereby he was neither able to make those improvements, which otherwise he could have done in his majesty's revenues; nor could he give those dispatches which were necessary for his service; inso-much, that I know it was with all the regret imaginable to himself, that he was employed in any other business, but that of his office as treasurer.

In the next place, I know how unwillingly he entered into any of the foreign transactions; having always shewed himself averse to those councils, wherein he found his majesty engaged at his entrance; viz. The triple league broken, which I have often heard this lord say (and am confident he ever affirmed in all places) was a bulwark both to this nation, and all christendom, and that the breach of it would be fatal to us:

A war with the Dutch made upon the foundations of a stop of the Exchequer at home, and an endeavour to have seized the Dutch Smyrna fleet, before a war declared:

A league with France, by which they were to have the opportunity of sending a fleet to learn conduct at sea from us, (of which they were in a great measure then ignorant) and to know both our channel and our ports:

An army of English then in France (to the infinite prejudice of the confederates upon several occasions) against all which, this lord's greatest enemies cannot say but he always declared himself: and no man that was least concerned with the court, could more publicly inveigh than this lord did at that time, and ever since, against the perfidious behaviour of the French fleet in that battle where prince Rupert commanded; for which I have often heard him complain of their treachery, and say, that we deserved it for trusting them.

As these were the circumstances wherein all the world knows this lord found things, at his entrance; so I desire that men would only remember times, and consider in such deep engagements of princes to one another, as were then between the kings of England and France, whether it were possible in a very short time

to get things reduced to such a posture as might have been wished: upon this occasion much more might be said if it were convenient; but I shall make only one remark upon it, and desire it may be thought on seriously; whether it be not the most unsafe, as well as most unjust practice, for a nation to discourage such ministers as endeavour to draw their master to his kingdom's interest, although they do not immediately succeed in it: for unless they could command their master's will, instead of obeying it, these consequences must necessarily follow, that either his ministers must quit his service, or keep it only by following the pleasures and inclinations of their master entirely, or have their dependance upon some other power than their master's to protect them. For the danger of their ruin, from the impatience of the people, will not afford time to get those ill-habits in government changed, which have been long contracting, and cannot be altered but either by council or force.

I desire therefore now, that the proceedings of this lord may be impartially considered, and see whether they have not all tended to the diminishing of the French interest amongst us since his time; and if it have diminished, it will be hard to find who else there was besides himself near his majesty, who had power, and inclination to do it, since it is not reasonably to be looked for from any who had been advisers against the Triple League, &c. nor from any who were engaged in the French service themselves.

In the first place therefore, to shew that the French interest was much diminished since this lord's having the staff, is manifest: for that league with France was broken, and peace made with the Dutch, the duke of Monmouth was called from France, and our army drawn out of their service; and it is well known how much he laboured by refusing passes, and all other means in his power, to have hindered any of those recruits, which by stealth were sometimes conveyed to them.

But above all it is notoriously known, that he was the chief instrument of procuring the marriage of the lady Mary to the prince of Orange, by which he hoped a future security for the Protestant religion would be provided; and his present hope was, that the French interest, in this court, would thereby be rooted out; which in all probability had been effected, if the parliament had been so happy as to have given the 600,000*l.* demanded by the king at that time for preparations; when instead thereof, they only gave credit to borrow 200,000*l.* upon the Excise; by which, I have heard, the king was so discouraged, as did extremely hinder what this lord hoped, and endeavoured to obtain in behalf of the confederates: and were the transactions of that time between the prince of Orange and this lord, known to the world, they would as highly esteem him for his worthy endeavours, both in relation to his own country, and to the confederates interests, as he is now unjustly calumniated for the contrary. But to

omit private negotiations, (which it is this lord's great misfortune, are not seen) every body knows that the match of the prince of Orange, did produce so great an alteration in the minds of the duke of York, and duke of Monmouth, that from being the greatest assertors of the French interest, they became as forward as any for the war against France; and then the king's good intentions were protracted by the extreme dilatory conduct of the Spaniards about Ostend, &c. and the want of money sufficient to carry on so great a work; till the French king had got opportunity of making himself so sure of peace with Holland, that nothing his majesty could do, was able to hinder it: for although he both sent a considerable army to the prince of Orange, and demanded of the states to make good the offensive treaty lately made with his Majesty, they absolutely refused to continue the war any longer.

During those great uncertainties betwixt peace and war, occasioned from the causes I have already mentioned, proposals were made to his Majesty, sometimes by the French ambassadors here, and sometimes by Mr. Montagu (his Majesty's ambassador in France) for a peace, and always with offers of money, in case his Majesty would consent to worse conditions than the confederates would agree to; and the offers so large, in case the King would agree to let the French possess some towns which the confederates insisted upon to have restored; that if his Majesty would have accepted any such conditions, he might have had great sums at this time in his purse, and the confederates might have had many of those towns in their possession at this day, which are now given up to the French; and it is to be seen in a letter of Mr. Montague to the King himself, that the earl of Danby might have had more than ever he got by being lord treasurer, if he would have prevailed with the king to agree to the propositions of the French king.

But, as the said Mr. Montagu, hath by letters confessed the honour of this lord, who would be no instrument in that work, and hath in the House declared, that when it came to the business of France, he should do that lord as much right as any man; so just also was his majesty therein to the confederates, that he would never yield to any proposition which was not with their approbation, although the continuation of his ambassadors at Nimeguen was a very great expence to him: and if his majesty, or his ministers had intended the setting up an arbitrary power at home, they would certainly neither have disoblighd the French king as they have done, nor have refused his money, both for themselves and their master, which was in their power, if they would have deserted the confederates interest, which could be of no use to them in the execution of any arbitrary designs at home.

From hence it appears wonderful, that any of the ministers (and especially such as were taken to have the best credit with his majesty)

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should be charged with those designs of arbitrary power; because nothing is more evident than that it was their own fault if they had not wherewithal to have maintained armies, and enrich themselves, besides the keeping of the French king's friendship to have assisted their ill designs, insomuch that if men will but consider impartially, it will puzzle the most uncharitable censorer to find another cause than their unwillingness to enslave their country, why so many temptations of that kind were rejected and at a time when armies were in readiess, if they had designed any such use of them.

I know that to offer any arguments which are not publicly known, in behalf of this lord, would be to no purpose at this time, when men have not patience to let themselves be informed; but I hope this lord's patient suffering will at last obtain a patient and impartial hearing, and then themselves will be judges what sort of friend the French have ever taken him for to this day; their Gazettes having constantly declared their ill wills to him, and the present French ambassador's usual discourse of him at the dutchess of Mazarine's (where he is apt to speak more freely) may convince any man; which a lord of your house can testify (if he pleases.) Mr. Montagu's letters also, which were shewed to the House of Commons, do sufficiently make appear, not only their dislike of him, but that it was a maxim amongst them, That he must be ruined, before they could hope to do any good in England. And by those letters you will see also what agents, viz. young Monsieur Ruvigny, &c. have been employed hither for that purpose, and even about the very time, as well as since the writing of that letter to Mr. Montagu, for which he is so much blamed, although the letter be written both by the king's immediate command, and that the matter of it (had it not been so) is so far from importing treason, that in other ages it might bear not only a charitable, but a wise and useful construction both to the king and kingdom, which was to have re-imbursed his majesty those sums he had laid out in that chargeable mediation, without bringing any burden to his people, or any prejudice to the confederates.

And since I have made mention of that letter, I desire you will observe,

First, That the propositions sent, were only a copy of what Mr. Montague was to receive from the secretaries; so that the thing itself was no secret to them.

Secondly, that the propositions were not originally the king's, but the confederates; so that the king was to gain nothing by making the market either higher or lower; and the French had often had experience, that his majesty would not do otherwise.

Thirdly, As a full justification both of his majesty's honour in that point, and that he had no design of getting the money for the purposes suggested against the earl of Danby, (for in that case he would not have considered the

gain or loss of the confederates) Mr. Montagu is expressly forbidden, not to mention the money at all, in case the French king did not accept those very propositions of the confederates, and in the terms as his majesty received them from his ambassadors at the Hague.

And fourthly, In the last words of the letter the earl tells Mr. Montagu, that he believes that would be the last time any proposals of peace would be made, and that he is confident they will not be accepted; wherefore he might accordingly take both the king's measures, and his own.

As to that expression about the parliament (which I suppose hath been a principal cause of giving them offence) I have heard this lord say, That his majesty caused that expression to be used only for a motive to persuade the king of France to give a greater sum than six millions of livres, which had then been offered; because otherwise in the ill posture things then stood betwixt the two kings, the French king might suspect whether the king of England would agree to any peace at all. And these being the whole contents of that letter, and it being writ by his majesty's express order, you will easily conclude, this lord would not be so hardly prosecuted for that only, were there not other causes for it: When in truth I believe there are very few subjects but would take it ill not to be obeyed by their servants; and their servants might as justly expect their master's protection for their obedience.

But one great objection I have heard to this letter, hath been, that it was writ the 25th of March 1678; which was five days after the parliament had passed an act to raise money for an actual war with France: Which is very true: But it is not considered;

First, That an act to raise money for a war, is no declaration of the war.

Secondly, That till such declaration, all treaties are lawful, and even then too, if the king pleases, in whom the sole power of making peace and war is placed by law.

And thirdly, That the king's ambassadors were actually then at Nimuegen, treating of peace; and were indeed never recalled, nor forbidden to treat of the peace. And can it be thought a fault for a minister to obey the king's orders at home, on the same subject upon which other ministers were acting at the same time abroad?

Fourthly, No money was then raised, and but few men: Our islands were unprovided, nor could they so suddenly have had due notice of the war, and the French had a great fleet in the West Indies: So that if the war had ensued, it had been policy to have kept them in expectation of peace, till we had been better prepared for so potent an enemy. And although it was but five days after the act for raising money towards a war, (and the nation then so totally unprepared for it.) yet you may observe this lord in his letter says, that

he believes it would be the last time that any peace would be proposed, if that was refused: And you may likewise observe, that if it had been accepted, it must have gone formally by the secretaries of state after the answer of Mr. Montagu had been returned to those letters of the 25th, which could not have been till April following, at soonest: No far was it from being thought a crime in any other of his majesty's ministers to have treated betwixt France and the confederates, till either a peace had been concluded betwixt them or a war declared by us. And had it been otherwise, his majesty's ambassador at Paris must be in as much (if not more fault) to have obeyed the king's orders at second hand, than this lord was, to obey his majesty's immediate commands from his own mouth, and signed by his own hand.

In short, it would be ill for ministers of state, and worse for their masters, if the one may not command, and the others be obliged to obey, in such undoubted rights as are all the matters and circumstances of peace and war. And no construction in the world can be more strained, than that the six millions of livres a year for three years, should be intended for the introducing of an arbitrary power; when it is apparent that they might have had six millions for the first year if they had pleased; which would have as well sufficed to have done that work, as the having it for twenty years more; since every man knows that such a work must either be done at the first attempt of it, or not at all: So as in truth, if we lived in an age to make but equal interpretation of men's actions, we ought rather by it to judge of the sincerity of the prince's heart towards his people, and the integrity of his ministers, who would not be tempted to bring things to that conclusion (though in their powers,) which others may more reasonably be supposed to have designed, who began with those breaches of the triple league, &c. which I have already mentioned. And yet to admiration, most of those who were the first and principal causers of these ensuing miseries, are esteemed patriots of our liberties, whilst the whole blame is laid upon this lord, whose endeavours have been incessant to have got us out of those misfortunes he found us in; without any shadow of an action to the contrary, but what is drawn by a forced and uncharitable construction of the foresaid letter, writ by the king's order, and concerning matters wholly in the king's breast by law to act and determine as he pleases.

But to confirm us yet more, that this lord's integrity was too strong to be battered down by the foregoing pretences alone; it has been necessary for his enemies to raise another stronger than any of the rest, in shew; because the first (although called treason) would not by our laws bear the title either of treason or felony; but this also proves so weak in its foundations, that this lord's adversaries are forced to support it with libels of his being

privity to sir Edmundsbury Godfrey's murder, and such like improbabilities, whereby they help this lord to undeceive the people, instead of promoting their own designs against him; and just so in the same libels (besides the many gross falsities in matters of fact) the author's justice hath made him forget that what he designed for a charge against the said earl, was an accusation against the witnesses, the jury, and the judges who tried and condemned Green, Berry, Hill, &c. for the said murder.

This second attempt (whereby they hoped to blast the earl's reputation amongst the common people, if they could do nothing else) was, that he had concealed the Popish plot, to the endangering his majesty's person, and had conspired with the Papists to have given them the opportunity of putting their hellish designs in execution.

What probability there is for such suspicion, might appear sufficiently both by the contradiction it must have to his own interest, and by the ill-will the Popish party have always shewed against him; and the little favour he has received either from them, or any that have related to them; but on the contrary, there are examples of such, who have appeared as bitter against him, as any of his enemies.

But that the truth of the earl's behaviour in this particular may be as well known, as in the other matters with which he is traduced, I will give you an information of what I certainly know to be true in that business.

I am not able to set down the exact days, nor is it necessary, but about the middle of August, 1678, and the very morning that the king went to Windsor that year with the whole court, his majesty left a packet with a person of quality, which was sealed up, and commanded him to carry it to the earl of Danby, and to tell him, that one Mr. Kirkby would bring a gentleman to speak with him about it.

The earl opening the said packet, and finding therein 20 or three sheets of paper, containing several heads of informations of danger against his majesty, gave order immediately to the porter at his gate, that if one Kirkby did come to speak with the earl, he should immediately be brought to him.

Accordingly the said Kirkby did come thither that day, or the day following, and did bring with him one doctor Tongue, who told the earl, that he had delivered some papers to the king of great concernment: That the king had looked superficially over them, and said he was going out of town, but would send the papers to the earl of Danby, and would have him to wait upon the earl about them.

The earl shewed the papers to the doctor, and asked if those were they? Which he said they were.

Quest. Whether they were originals?

Ans. No, they were copies of his the doctor's writing.

Quest. Who was the author? and where were the originals?

Ans. He did not know the author, for that the originals (which he said were in his custody) had been thrust under the door of his chamber, but he did not know by whom, only he did fancy it must be one that had some time before held discourse with him tending to such like matters.

Quest. If he knew where to find that man?

Ans. No: But he had seen him lately two or three times in the streets, and it was likely not to be long before he should meet him again.

About three or four days after, the doctor came to the earl again, and told him, he had met the man; that it did prove to be as he had guessed; that he owned himself to be the author, and had given him another paper of the like kind as before, numbered into heads as the first was, but desired not to have his name known to any body but the doctor, because the Papists would murder him if they knew what he was doing.

Quest. Whether the doctor knew those men, who were called honest William and Pickering, who were named in those papers as men designed to assassinate the king.

Ans. That they used to walk frequently in St. James's Park; and if any body were appointed to keep him the doctor company, it was two to one but he should have an opportunity of letting that person see one or both of them in a little time.

Quest. If he knew where they lived? For that it would be necessary to secure those men forthwith.

Ans. He knew not at that time, but would inform himself, and let his lordship know very speedily.

Hereupon his lordship went immediately to Windsor, and acquainted the king, That Dr. Tongue had been with him according to his majesty's directions; and informed his majesty of all that had past, (shewing also the additional paper to those which had been sent his lordship by his Majesty) and that he had left a servant at London, purposely, to get a sight of honest William, and Pickering, in order to the apprehending of them, if his majesty thought fit.

At this time his lordship desired the king, That one of the secretaries might send a warrant for the apprehending them, and that the matter being of such danger to his majesty's person, some more of the council might be acquainted with it. But his majesty would neither let the men be apprehended, till he were more informed of the design: nor would he suffer the earl to speak one word to any body of it: But on the contrary, commanded the earl should not speak of it, so much as to the duke of York; only said, He would be very careful of himself till he heard more.

The earl went from Windsor to his house at Wimbledon in Surrey, directing, That if the doctor had any thing more to say to him of that matter, he should come to him thither, or send away that gentleman the earl had left to

stay with him to see the men, and learn their lodgings, and to be diligent in bringing any intelligence, which required haste.

Accordingly, that gentleman did go from London to Wimbleton, every day, and back to the doctor at night; and did sometimes bring additional papers to the former; and brought information of the dwellings of honest William and Pickering; and brought word also from the doctor, that he said, He should be able to give his lordship certain notice before-hand, when any of them were to go to Windsor; of all which the earl never failed to give his majesty an account from time to time.

Among other informations, the doctor went one night to Wimbleton himself, and told his lordship, that some of the intended assassins were to go the next morning to Windsor; but that he could order it so, that the earl's gentleman should go in the same coach with them; or if the coach should be full, he might go on horseback in their company, and watch them, so as to give notice of their arrival, and take them more conveniently that way upon the place, where they would not be able to give any account, what they had to do there.

Hereupon the earl ordered this gentleman to observe the doctor's directions, and went immediately himself to Windsor; where he acquainted his majesty with all this; and order was taking for seizing these men at their arrival at Windsor; but instead of that, the gentleman brought word from the doctor, that something had prevented their going that day; but that they intended their journey the day following, or within two days at farthest; but then also news was brought, that they were again prevented, by one of their horses being slipt in the shoulder, or some such accident.

Whereupon his majesty (who before would not give credit to it) did then take it for so mere a fiction, that, notwithstanding all the earl could say, to get the business communicated to others besides himself, the king was more positive not to permit it, saying, He should alarm all England, and put thoughts of killing him into peoples heads, who had no such thoughts before.

The earl, having done all that lay in his power, and having business into Oxfordshire, asked leave of his majesty to go thither (being but twenty two miles from Windsor, whither he could return in half a day) and left order at Wimbleton, to have any thing dispatched to him, that should come from doctor Tongue: Accordingly in three days after, came a letter from the doctor to the earl, giving notice of a packet of letters from Jesuits concerned in the plot, which were to go to the Post-house in Windsor, directed to one Bedingfield, a priest. Whereupon the earl returned immediately to Windsor, and informed his majesty, shewing the doctor's letter; and his majesty replied, that there was such a packet had been delivered some few hours before, by the said Bedingfield, to the duke of York; and that Bedingfield had

told the duke, he feared some ill was intended him by the said packet, because the letters therein seemed to be of a dangerous nature; and that he was sure they were not the hand-writing of the persons, whose names were subscribed to the letters.

This still begot less belief in his majesty, that there was any real plot: insomuch, that I have heard the earl say, He doubted whether ever he had been permitted to produce these papers, and intelligence he had received from doctor Tongue, if his royal highness had not been earnest to have the truth of those letters examined, which had been brought to him by Mr. Bedingfield; by which means he got leave at the same time to produce the said papers, and letters to the council; and from thence they have all been transmitted to both houses of parliament, in one of which they remain at this day.

When they were first produced to the council, and doctor Tongue brought thither to attest them, the doctor then said, He was sorry they had been disclosed so soon; and that it would have been much better, and more would have been discovered, if the business had been kept concealed some time longer.

This was owned by the doctor himself, and attested in the House of Commons by sir Thomas Doleman, one of the clerks of the council then in waiting; and the doctor had often said to the earl himself, that it would much prejudice the full discovery of it, if it were made public too soon.

This is the sum of what passed between the earl, and doctor Tongue, from whom only his lordship had any intelligence of the plot; and the doctor hath given an account accordingly to the House of Commons, only with the addition, that he always found all the readiness and assistance from the earl, he could desire; and as to Mr. Oates, till he was brought into the council chamber to attest the truth of the doctor's papers, &c. I am confident the earl never saw his face (although like other falsehoods, it hath been printed, that the earl used to meet him at Fox-hall, and that he invented the Plot with Mr. Oates long before his majesty sent the foresaid papers to the earl): but as the doctor (with whom only the earl had any correspondence in that matter, saving Mr. Kirkby, who brought the doctor to him,) hath fully justified the earl's proceedings, both in the House of Commons, and other places, so (besides the oath made by Mr. Oates in the House of Lords and council, that he knew nothing against any peer, but whom he had then mentioned,) I have not heard that Mr. Oates hath said any thing against the said earl. Mr. Bedloe indeed hath said that this lord, (though at that time under the accusation of concealing the Plot,) would have tempted him by money, to have been gone beyond sea, and not to say any thing against the queen, nor the Popish lords in the Tower. But when the circumstances of that story come to be told, (which are not yet convenient) I suppose

Mr. Bedloe will think as fit to retract that information against his lordship, as he hath already done another he told to the late bishop of Landaffe, (now of Peterborough) concerning the same lord, viz. That this earl was one of those at the consult with the queen, in her chapel at Somerset-house; but the earl complaining of this in council, Mr. Bedloe did not only deny that ever he said so, but told the king himself, and several others (besides his oath in the lords house, relating to all the lords,) that he knew nothing against that lord; and has told the earl himself, in the hearing of good witnesses, that he was able to say several things in his lordship's defence; and that there were some persons, (and amongst them one great man) who would have endeavoured to suborn him to swear against the earl; but Mr. Bedloe said, he was not a man to be gained to do any such base act; and as a demonstration of his honesty and justice to the earl, he brought him the copy of an information reflecting on the earl, and signed Ed. Panton; and promised to inform the earl of the name of that great man, and the others who would have suborned him before the meeting of the parliament, which was to be in March following; and he told this to the earl in February before.

Mr. Dugdale (who is one of the most material witnesses of the Plot,) was before his coming to London, examined in the country by some of the justices there; and his examination returned to the House of Lords, wherein he mentions the fear the jesuits had of the lord Treasurer; and particularly how they were afraid, lest the letters formerly mentioned, which were directed to Mr. Bedingfield, should fall into his hands; knowing how great an enemy he was to them: and he has spoke to the same effect since that time, before divers lords of his majesty's council; so that what grounds they have for accusing this lord, either for the concealing or abetting this plot, I must leave to you, and every impartial man to judge from the matter of fact.

But upon what grounds this lord hath been reputed a Papist, I cannot but wonder yet more; for in the first place he is known to have been always educated in the Protestant Religion; and hath given constant testimonies thereof, in all times, and without any alteration.

He hath not only been a constant, but a zealous asserter of the Church of England; and I pray God (that although it be not owned) this may not be one of his greatest crimes.

He hath not only appeared for it in parliament, and elsewhere, against all opposers; but would never agree to any councils that might endanger it: as the declaration in parliament for a general indulgence, &c. The consequence whereof (I have heard him say) must necessarily have been an introduction of Popery; but it is true, that I have ever heard him profess that charitable mind, as not to

desire the ruin of any sort of men, who would live peaceably under the government, whatever their opinions in religion might be.

In the next place, pray, let it be observed with what kindness the Papists have treated this lord: for so beholden is he to the generality of that persuasion, that they do not only for the most part speak ill of him, but they have slandered him in private with the story of being the inventor of the Plot with Mr. Oates, and the designer of the duke of York's ruin. Nay, even the murderer also of sir Edmundbury Godfrey; and beyond seas, especially in Flanders, it is reported of him both by priests, and others; that he was the original inventor of this Plot, and that he is the cause of all the blood which hath been shed upon that occasion: when at the same time, he is accused of being a papist, and a concealer of the Plot, in concert with the duke of York; nay, so inveterate is the malice of some men against this lord, that they are resolved to make contradictions agree, rather than want pretences to destroy him.

One instance whereof is, that this lord's design to destroy the government, was the same with Coleman's; and yet it is known for a truth, and cannot be denied, nor will it ever be forgiven him by the Papists, that there had not been one paper of Coleman's seized, but for the care of this lord, who caused a warrant to be drawn for that purpose, and got it signed by five of the privy-council, after the council was risen, who had omitted the direction of seizing his papers, out of the warrant for apprehending his person.

This alone (were there nothing else to be said for it) would be sufficient, not only to vindicate this earl's innocency from concealing the Plot; but to shew his great readiness, and industry to discover it.

Having given such an account of this lord's integrity, whereby he must appear, both a good Protestant, a good Englishman, and a good minister: I expect to have it reasonably objected, why a man so qualified to defend himself, should first withdraw from his trial, and then upon his appearance quit all these defences, (which if true, would render him meritorious, rather than criminal,) and betake himself to a pardon? by which indifferent men as well as his enemies are induced to suspect his guilt: and lastly, when he did insist upon the plea of his pardon, why he did not rather chuse to make that his last defence, (in case the plea of his innocence should have been over-ruled,) then make it his first refuge, and thereby debar himself of all opportunity of making his innocence appear, although he should be acquitted by the pardon? I confess these to be such real and solid objections, that till they are answered, I can blame no man's hard censure of this lord, who without other prejudice may have grounded his ill opinion upon these foundations.

But the answers to them are most evident: and first, why a pardon at all to a man so

qualified for his defence? hath a full answer, (if nothing else could be said for it) which is, because his majesty would not suffer that his private papers of state which ought to be this lord's defence, should be exposed to public view; and although a man may as to his innocency be fully qualified for his defence, yet if he cannot be admitted to have those materials which should prove that innocency, it will avail him no more than if such proofs were not in being.

And he had the less hopes to obtain them, when it was one of his requests to the Lords upon his first appearance at the bar of that house, that their lordships would please to intercede for him to the king, for such papers as might be necessary for his defence. To which the Lords gave his lordship answer, that it was not proper for them to move the king for any of his private papers: so as his lordship was willy without hopes of getting them, or leave to shew such as he had himself.

In the next place why he absented himself for some time, may perhaps not have been the least act of this lord's obedience; for (to omit other reasons) the date of this lord's pardon appears in his plea, which is the first of March, and this lord did not absent himself till the 24th of March; so that he was as well provided of his pardon, the first day he was absent, as he was when he delivered himself to the custody of the Black Rod; and he was as well informed then also, that there was nothing in his charge, (were it all confessed) which by the laws of England could amount to treason; so that every man, by his own reason, may satisfy himself, that it was neither for the want of his pardon, nor the danger of his crimes.

And for the last objection, why he did not reserve his pardon for his last plea? may almost answer itself; for nobody can think any man such a fool, as not to have done so for his own sake if he could; and I know that nothing did trouble this lord so much as to find he could not, (his lordship hoping never to have used it but in case of false witnesses, or to supply that defect of evidence which was not in his custody;) but it seems it is the law, and all his council were unanimous in it, that the pardon being already granted, it must either be pleaded at first, or was void; and notwithstanding that danger, it was with great difficulty, that both his council, and his nearest relations could persuade him to rely upon the pardon, although he knew he could not obtain that evidence, which was in the king's custody, nor have leave to produce what was in his own about the letters; besides, that his council told him, both by experience, and the lord Coke's authority to confirm it, that no man ever refused God's pardon, nor the king's; and his majesty would have had great reason to have deserted him, if he had rejected his majesty's grace; and yet although seven days were allowed to this lord, for the putting his answer into the House of Lords, it was not finished an

hour before the delivery of it to their lordships; and his council, for satisfaction of his lordship, were forced to contrive the expedient of a short protestation, to be annexed to the plea, as it now stands; but those who printed the plea and pardon, would take no notice of the protestation.

Now as to the granting of this pardon, which I also hear wondered at; I wish any man but to reflect upon this case, and see whether his majesty be not most concerned, that none of his foreign negotiations should be exposed to public view; and yet it would be so unjust for his majesty to suffer this lord, or any public minister, to be undone for want of producing those things, which are necessary for his defence; that for this reason alone, a pardon was not only necessary, but just; and I believe it would be difficult for any man to propose another expedient, which could both preserve the king's justice to an innocent servant, (who had only obeyed his commands,) and that right of secrecy which is due from sovereign princes to one another in all their negotiations, which if once broken, makes it impracticable to treat with one another; and which is held so sacred in all countries, that there are many examples of the divulgers of them being punished with death.

Besides, this lord had assurance that false witnesses had sworn against him, and finding the readiness men have to believe any thing of one against whom malice hath so many ill reports, and to so great a height, as it had done against him, he could not hope to be heard but with prejudice: And lastly, (as is commonly the fate of men in great places) he had contracted the ill-will of divers, either by hindering some (as they thought) from employments they aimed at; or not having procured those for some which they might expect, or by being thought the cause of some men's remove from their places; or for not having paid some, and gratified others, according to their several expectations; These added to the specious pretences which have been already mentioned against this lord, made it but just for his majesty to give his protection to him, whom he knew to be innocent, and hath as publicly declared to both houses of parliament to be so.

I will not presume to say any thing about the validity of the pardon, for fear of giving offence, more than that many have needed it more than this lord, and had it as fully granted: And I take it for one of the great happinesses of our government, that his majesty hath an undoubted free right of granting it as he pleases: And for the argument of inconvenience, it may as well be urged against any act of mercy, the king shews; every act thereof being as inconvenient to some, as it is merciful to others; and therefore hath the king only been left judge, in all ages, when and where he will dispense it; and the people would be in a miserable condition if it were otherwise.

I will conclude with some observations very

singular in this lord's case: Because I think the like hath never happened in any other man's.

This lord's accusations have been both for saving the king's money, and spending it.

For promoting the French interest; and yet the French ambassador's constant enemy here; and in France it was always a maxim, That he must be ruined before they could do any good in England.

For being a Papist, and yet the designer of the duke's ruin, and inventor of the Plot for their destruction.

For having the same design with Coleman, and yet being the sole cause of having his papers taken.

The employing the king's treasure to gratify particular persons, is one of his crimes; and yet he not doing so, is one probable cause of his punishment.

He is made the obstructor of all public proceedings in the kingdom, because he was not first brought to trial, before the Popish Lords: And yet (besides the difference of their crimes) he was denied council, so that he could not be tried when he appeared in order to it; which was never refused before to any Englishman.

He is found fault with for making use of the king's name, for excuse of his actions done by the king's command; and yet they are owned by the king himself in parliament; and his lordship must either say nothing, or tell a lie to make any other excuse.

Lastly, he hath not only the king's pardon, but with a public declaration in parliament, both of his innocency, and that his majesty will grant his pardon ten times over if this be defective, either in matter or form; and it is known that his crimes do not amount to treason, although every article of his charge were proved against him: And yet this lord remains still a prisoner, and under the same restraint with the Popish lords in the Tower.

Upon the whole matter, I can make but one conclusion, which I am sorry is so remarkable in this nation, that innocence is no protection to prince, nor subject. We have seen a sad example of the first in our age, with the same engine of Popery used for his destruction, who was the greatest martyr for Protestant religion: And I think this lord's case an instance of as great severity, with so little cause for it, as was ever heard of in this kingdom, or any other: But as it hath pleased God to let him suffer under so many contradicting circumstances, so I hope he will as miraculously deliver him, not only from his imprisonment; but he will so open the eyes of all good people, as to make them sensible of those unjust calumnies they have undeservedly laid upon a man so faithful to his king, his country, and the Protestant religion. And you are a person of so great honour, that I doubt not but you will endeavour to do it in that station wherein you are so deservedly trusted by your country.

AN EXAMINATION OF THE EARL OF DANBY'S CASE.

WRITTEN IN THE YEAR 1680.

Though I have little curiosity to read the pamphlets that swarm at this time, and think it almost as great an error to mix with the crowd of writers, as to mingle with any other riot; yet I was drawn from my own inclinations, by so specious a title, as, "An Impartial State of the Case of the earl of Danby;" having been conversant in many affairs that relate to that lord. At the first reading of it, I was not a little surprized to find, (as I then thought) a thing published with such a title, and confirmed with such confident promises of truth, and yet to be composed of three things so far from impartiality. The first is the manner of arguing, which is most upon questions begged. The second is, of many untruths, which I presume were easy to make appear by matter of fact. The third is, an endeavour to fix upon the king, most of the errors and crimes that were charged on him.

Yet with this first notion I was not satisfied, but read it more carefully the second time; and being then convinced it was subject to these errors, I thought it my duty to my king and country, to let them not be ignorant of any information that I could give; since some particular knowledge that I am furnished withal, makes me more capable to present them with some observations, than others, though of greater abilities than I, could have done.

I therefore applyed myself to examine this sharp censure upon the parliament, for so ill rewarding the merits of this deserving lord, as to let malice have too great a share in his prosecution: And in the same place there is an assurance, that nothing should be related, but what may be depended upon for truth.

Who the author of this is, I cannot tell; but if it were not the lord himself, it is a friend more passionate than usual, and one that gives him so large a character, and in whose cause he condemns both king and country; that it seems hardly credible, that one man should be so extravagantly kind for another, but rather the production of self-interest and conceit: and comparing the stile and arguments with this lord's speech in the house of peers, when he was charged, it helps to confirm my opinion, that this lord was the friend that writ it; and it is more probable, that he is so much a friend to himself, than that any other should be so to him.

I shall now proceed to particular remarks, and begin with the first matter of fact; "The faithful discharge" of this lord's trust as treasurer of the navy, to the "satisfaction of his majesty, and the great content of the seamen."

It is fit to observe, That this office depends

on the directions of the commissioners of the navy what to pay, and on the lord treasurer, or commissioners of the treasury, for money to pay; so that if this lord gave content, it seems he was supplied to make himself capable of the performance. But his impartial friend attributes all this to his lordship, as he does other things to his management with so much prudence and success.

But yet it will appear, he has but ill-luck in his first assertions; for since the treasury of the navy is so confined, the great trust that remains in him, is only in sums of money, which can be violated by no ways, but falsely disposing it, or applying some to his own private use; the last of which has been counted a high crime; for the king's treasures have ever been taken to be 'Sacra Patrimonia', and none were to use any of it, but were liable to great punishments.

But this lord ventured to apply 2,747*l.* 5*s.* 11*d.* of the king's money, to his own use; and was short so much in his account for his faithful discharge of treasure of the navy: and was forgiven it by a privy-seal, bearing date the 21st of February, 1676, which was about three years after he was lord treasurer. A reasonable time to pass such an account, to be forgiven for some money, when he had gotten the command of all the rest: but I shall not dispute whether this fault hindered his majesty from being satisfied with his performance in that employment, since his bounty and goodness was in other things much more extended to this lord; but how well returned, will appear by the following observations.

After this stumble in the threshold, he proceeds to his advancement in 1673, to the place of lord treasurer; which, he says, he managed with so great "prudence and success, that contrary to all men's expectations, but especially of his enemies, (who assured themselves of his immediate ruin by that preferment) he supported for near six years that condition of his master, which it was not then thought could have been made to subsist for so many months, without any supplies or burthens laid upon the people in all his time."

Here his impartial friend begins boldly to assert, and as confidently to beg the question; that this lord supported the king's condition for six years, that was thought could not have been made to subsist six months. I believe it would puzzle the author to name the persons that were of this opinion; for they could find no subject-matter for their judgment, but must be guided by flattery or ignorance. And it were very uncharitable, if not malicious, to believe, that those that managed the revenue before this lord, should be so weak and dishonest (for less than such a conjunction, could not reduce such a revenue to so deplorable a condition) as to give any a just ground to believe they had not left a subsistence for six months.

This heavy charge on his predecessors, seems not only very partial, but very extravagant; which will be best discerned, by exam-

ining the great success and prudence of this lord; and perhaps it will appear, that men should rather have judged, and his enemies have apprehended, that the king's revenue was left in such a condition to this lord, that it might easily have been supported for a much longer time than six years; and if any calculation was made for his ruin, it must have been from other causes.

As to that of supplies, it is very true, that there were none given directly to the king's sole use in his time. But the eighteen months tax for 1,238,750*l.* which was given in the lord Clifford's time, was all paid in this lord's; half of which, viz. the last three quarters, was solely disposed by him, and the first three by the lord Clifford, for public uses: which contributed to leave the king's condition in a better posture than is here acknowledged; which will be shewn in a more proper place, when I set down the state of the king's condition, in point of his revenue, as it was left by his predecessor the lord Clifford.

At the same time I will present how this lord left it; by which every reasonable man will be best convinced. Yet before I plainly set them down, I will beg leave to take notice of some particulars, which perhaps may be useful to the consideration of the generals.

The first illustration of this lord's prudence, is drawn from the chargeable war with the Dutch, the whole burthen of which, this impartial friend would lay upon this lord to discharge; forgetting, or resolving to forget all but his concerns; and that the war was begun in the time of the commissioners, and the great charge of it was in the time of the lord Clifford, who might as well complain, that he had no benefit of any tax given in his time, as this lord, that there was none given in his.

But that I may not say more than I can clear, nor desire to be believed only from confident affirmations, I must acknowledge that I have seen the disposition of the three first quarters of the tax: The first was made the 3rd of April, 1673, which was not three months before the lord Clifford resigned his staff; the second also was signed by the lord Clifford; the third quarter was projected by the lord Clifford with this lord, then sir Thomas Osborne; whose name I have seen to the bottom of the list, being so entered at the Exchequer: the other three quarters were not meddled with, but left wholly to the disposition of this lord; in whose time also, all these six were paid. Concerning other taxes and monies, I shall give the account in a more proper place; and only add this observation, that all assignments upon this tax, ever found credit for the advancing of money; and this burthen of the Dutch war did not lie so wholly upon this lord, nor was the tax so unuseful to him in discharging of his part of it.

I will not unnecessarily dwell upon particulars, as, what arrears were upon several offices; the general states when laid down will best answer that: but I will only touch upon some

others that will not relate to that, whereby every thing may have its just examination.

One great particular applied to the honour of this lord, and to the infamy of others, is the settling the debt to the goldsmiths; which yet is not a debt paid, but the settling of a perpetual interest to be paid. I will not deny but it was a just and good action; nay, though Mr. Coleman claims a share in it, whose benefit perhaps only made him active in it.

But upon this occasion, I would only present a small view of the impartiality of this writer; he calls this stop of the exchequer an infamous action, and fixes it upon many persons, allowing no excuse for them; though it was owned by the king in a public declaration, by reason of the necessity of affairs; but when this lord was charged with crimes of higher nature, he allows the plea, that the king commanded it; and though privately, to be sufficient to wipe off all infamy from him. This cannot appear good reason, or clear justice, and less shewed towards the king than any: If this lord be charged with an ill action, it must be fixed on the king; and if a good one be to be claimed, it is wholly applied to this lord's honour; and the king must be allowed no share of his own goodness.

The next particulars he uses to help shew what great things this lord performed, is, the war of Algiers, and the rebellion in Virginia: The last quickly ceased; and while both happened, if there had been a considerable fleet for summer and winter guards kept out besides, it had been a matter of some consideration; otherwise the sparing of those, was more considerable than the paying for these.

Other more slight particulars are set forth in the next paragraph; the great abatement of the corn-act, to the diminishing the customs 60,000*l.* a year: The act for prohibiting the French commodities, which has lost not less than 150,000*l.* a year from the said revenue; which this lord's predecessors did receive yearly into the exchequer. What these acts might lessen from what the customs might have been, none can well guess: but one thing will confute the argument, viz. That there was more paid in his predecessors times; for let any take a medium of the time of this lord's being lord treasurer, and it will appear, the customs never yielded so much as in his days.

The next complaint is, the 200,000*l.* borrowed on the fifth part of the excise, and the inconvenient manner of re-paying it. This I confess is hard to be understood: For in some measure this money was of use, not of disadvantage to this lord; for the fall 200,000*l.* was lent in his time; and at his going out, on the 25th of March, 1679, 83,400*l.* was left to pay, which since was paid by these present commissioners; so that of consequence that sum was used in the assistance of his management, and not the whole any burthen, to make the work so much the harder for his prudence and success.

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The next paragraph sets forth "this lord's care to be very great, to see money applied to the most public uses, as will appear by the weekly certificates in the exchequer, (to which he appeals) and from which public uses he never diverted one penny that was so appropriated, (notwithstanding the many false suggestions to the contrary, &c.)"

This dark text needs a commentary. First, as to the weekly certificates of the exchequer. It is to be observed, that they do indeed give an account of all appropriated moneys; but by the way, lest it should be taken for granted it does so of all other moneys, it is fit to let it be understood, that though it should and ought to do so, yet this lord caused many sums of money to be paid by his private direction, and never cognizable in the exchequer, which the commissioners of the excise cannot deny; and Mr. Bertie, or a private letter, the voucher for their being placed and allowed to their account. That he never diverted any appropriated money (he means, I suppose, by acts of parliament) is very true; but it is as true, that he could not have done it, if he had the inclination to have attempted it; for his warrant or directions would have met with no obedience in the exchequer; for the auditor would not have directed moneys, nor the tellers have paid it to a wrong voucher; which renders not the exchequer a proper way for private dispositions of money; for there no lord treasurer can be obeyed against an act of parliament expressly directing, nor in any thing that is derived solely from his own authority: But yet where this lord had power to divert, he has not been scrupulous to use it; for when money was lent on the credit of the fifth part of the excise, he hindered it from coming in; (which was often complained of publicly at the exchequer by the lenders of the money) and diverted it to other uses: nor can the late commissioners of this excise deny this; if they should, the lenders will prove it, who daily sollicited them to bring it in.

A second instance is in the poll-bill, which was given for an actual war with France, upon which many Eastland merchants were promised payment for hemp and masts, and other furniture for ships, which were taken up of them; but no care taken to reserve money for them out of the act, but are now before the present lords commissioners, who are contriving securities, or payments for them; so that it seems this lord observed just rules where he could not violate them, and broke them where he had power or opportunity.

In the same paragraph this lord's industry is set forth, in the improving the king's revenue: But this was no peculiar industry in this lord that was unprecedented; for the customs were once let for 300,000*l.* per annum, and improved to 600,000*l.* just before his time; and the excise was likewise improved; but this is more the industry of private men, than of a treasurer; for by their desire of gain, they bid upon one another; which a treasurer must receive, or put out the candle they bid by; as

they say was done in the case of Mr. George Pitt, and Mr. Brett, &c.

Nor was the art new which he there bragged of, to break a bargain, and resume the farm of the excise for the king's advantage: for the lord Clifford made him a precedent for the like trick, by resuming the farm of the customs, which he had let to sir William Bucknall, and others for 600,000*l.* per annum; so that I can neither say the art is new or good.

Lastly, if this lord so improved the revenue, he has also improved the argument against himself, if he has not used it with that success and prudence which is so boasted of in the beginning.

For the revenue of Ireland, I can say little to it; only the charge that my lord Ranelagh lies under, and the protection always shewed in keeping that business from a strict examination, does not seem to make out any advantage that the king has found by the disposition of that farm.

The next honour that is attributed to this lord, is, that he "paid rarely more than eight per cent. for money borrowed, notwithstanding the shakes lately given to credit, &c."

I hope this knowing man in the exchequer, would not for proof appeal to the weekly certificates for this; if he does, he will find nothing there of the payment of any such interest at all; for this lord practised most upon tallies of anticipation, the way that has been the great destroyer of the revenue; which is done by a fictitious bill thrown down by a teller for money, when really he has it not, and he discharged by a tally instead of an issue; which issue is removed from being vouched by record in the exchequer; so that when it is paid, or when the interest is paid, or what interest is paid, never appears there; so that all the vouching lies among those that deal in the money; and if they can but agree well, there is no fence against their combinations. This I set down as briefly as I can, only to shew, that this lord could not know what interest he paid, though he might know what he agreed for: for if a tally is to be paid a year after, the interest may commence with the date of the tally, if they be but pleased to agree; and when the farmers or contractors of the excise have advanced great sums, the commissioners have by their acquittances given vouchers instead of records, for the commencement of the interest; and I have heard, (nor is it improbable) that they were all very well acquainted.

The next paragraph is of greater moment, answering the scandal that the revenue has been squandered under the name of Secret service; and upon this, shews from the certificates of the pells, that there has been accounted from Easter 1673, to March 1679, eight millions sixty two hundred seventy six thousand seven hundred and sixty seven pounds besides the interest of the goldsmiths, and divers other particulars which are not included in that account; and then desires it may be computed what could possibly re-

main to have been laid out extravagantly, and it would appear a very inconsiderable sum.

First, it is to be observed, That it is confessed there are divers particulars which are not included in that account of the exchequer; but the argument that is here offered, is drawn from the comparison of what that account is, and what the revenue may amount to in that time; which infers, that only the revenue is brought to that account; but since he desires a computation, I will furnish him with one more particular than perhaps he desires; and then (the veil being pulled off) this fallacy, among others, will be discovered.

First, The revenue in that time, may indeed amount to about that sum; but in the account of the great sum he sets down, there are these particulars contained, viz. £.

The 18 Months Tax, amounting to	1,238,750
The Tax for Building the 50 Ships	584,978
On the Fifth Part of Excise, - - -	200,000
The Poll-Act - - - - -	252,900
The First Act for Disbanding the Army, and other Uses, &c. - - -	619,388

This had appeared an argument of some moment, if it had been stated upon the account wholly of the revenue, and that it had been left uncharged by this lord: but without searching into the fallacies of it, the condition of the revenue, as it was left by this lord, will best determine his prudence and success.

The next thing insisted on, is "secret service," which he says, "those that are versed in the exchequer know, that many sums are included in that way of payment, that are either for public service upon expedition for sudden occasions; or to save greater fees, where his majesty is pleased to let it be so; as in the case of the lord treasurer and chancellor of the exchequer salaries, &c."

This is a compound of mistakes: for there are none in the exchequer that can know what any secret service money is applied to; for the orders are in a used name, and no service mentioned; but the words betray themselves: for if it be for saving of great fees, it is of consequence that the exchequer knows not what it is for, or else they would have their fees accordingly; but for this very cause, because those that were versed in the exchequer did not nor could not know what such monies were for; the passing of such orders was stopt by the officers, till the certain fees were agreed; for otherwise they took it as free gift; and rather than it should be known what it was for, a proportion of fees were consented to. But the particular instance of saving the lord treasurers and chancellors of the exchequer's fees on their salaries, by this way, is yet more unlucky; since if the author had been at all versed in the exchequer, he would have known that there was never any fees demanded or taken for those salaries (though the orders came in their names, and the payment expressed,) since the exchequer had a being; and this very lord's pension of 2,000*l.* per

annum, was never included in secret service, and yet paid without fees.

As for the sum paid, as I remember, it was delivered in parliament to be 252,467*l.* paid in two years and about three months; upon which I shall only say, that it was much more than was used in all the time before: and since he says that one third at least, if not half the payments for secret service, might be exposed to view as well as other payments; I cannot dispute it, but only wish they had either been so exposed, or else not so paid, that those jealousies of ill-disposing moneys, and corrupting members of parliament, had not so much prejudiced the king's affairs.

As to the way of arguing, That this private account is better than what was formerly contrived: it is not my design to dispute upon the comparisons of ill things, but leave every thing to be considered abstractedly, and to bear its own proper weight; but without question, the issuing of the king's money ought to be public, and the occasion intelligible on the records; unless the privy-purse, for which none sure would grudge a plentiful provision; and no just bounty or reward ought to be concealed; it is just and honourable for a king to bestow, but not for others to have the secret power; nor can any thing be more inconvenient, than too great opportunities of power given to any subject; it breeds and nourishes temptation in him, and suspicion in others; and what two greater rocks can a king govern between, than too much power in one, and the jealousy of that in all others?

I will instance one particular that shewed a subject for these two, and it will be easy to judge, how immodestly power was used, and what just jealousies it must give; it far exceeded this way of secret service; for a whole branch of the king's revenue, and no less than the excise, was endeavoured to be brought under the sole disposing of this lord, out of all due course of common-law, (for so the method of the exchequer is taken to be) by a particular patent under the broad seal; wherein an office of a general cashier was erected, and one Mr. Kent put in, which project the patent says was seriously examined by the lord treasurer, and the chancellor of the exchequer, &c.

The chancellor of the exchequer was then sir John Duncomb, who utterly renounced the knowledge of it, and thought it a patent of a most dangerous consequence; besides, in the same patent, when it comes to the disposition of the money, it leaves out the chancellor of the exchequer; and says, it shall be paid into the exchequer, or in such other manner as the lord treasurer shall think fit. These are the very words; and it is probable, if that the chancellor of the exchequer had approved this and some other things, he had not been removed from an employment which he performed with so much uprightness.

This patent was questioned in parliament; and being of so infamous a nature, and a question accordingly formed, that this patent is il-

legal, and of dangerous consequence; this lord found such open friends, (perhaps by secret service) that though they granted themselves it was an ill patent, yet for fear it should be part of the charge made good against this lord, and not yet being so hardy as to give their negatives, found out an invention to avoid the sure blow, by the orders of the house, which give a freedom for any to move for the adding or taking away any words to the stated question; upon which privilege they moved and seconded one another with private zeal in this public cause, to leave these words out of the question, viz. illegal, and of dangerous consequence; which they carried in the affirmative; and then the question only remaineth,

“This Patent is—”

It is easy by this to judge, what power an ambitious man may aim at; and what jealousies, excess of power in a subject may justly give; since it could thus operate upon the major part of a House of Commons, and leave such an incomparable question upon their books.

I have dwelt too long perhaps upon these particulars, from which I confess no demonstrative argument of the whole is to be framed; but I thought it fit to shew what artifice lay hid under every specious particular, and how little the promise was performed of relating nothing but truth. What excuse the author would make, I cannot guess; unless that he was unfortunate to choose such a subject to defend, that always gave great suspicions to be inseparable from the contrary.

I will now give a plain Account of the Generals, which must be the sure proof of all; First as to the condition of the Revenue, how it was left by the lord Clifford; of which I have procured a copy truly written from the original paper, under sir Philip Floyd's hand:

“June 10, 1673.

“The customs were charged with about 153,000*l.* for the navy, ordnance, &c, and I hope that this last fleet will go near to clear it.

“Almost two thirds of the rent of the Excise for the quarter due at Michaelmas next, is charged for the forces, cofferer, &c.

“All the forces are provided for till the 25th of July, and the last new additional levies till Michaelmas next.

“The household is provided for till Lady-day last.

“The treasurer of the chamber till Christmas last, except the old arrears in the late lord treasurer's time.

“The office of the Works till Lady-day last.

“The great wardrobe hath been supplied from time to time, as their most pressing occasions have required.

“Tangier is weekly provided for on the customs.

“The ordnance hath had as much yearly in proportion, as in the former Dutch war; but by reason that that office hath not kept the ac-

‘ counts, I cannot justly say how that office stands.

‘ The victualler is paid within a small matter, except the last agreement for the landmen.

‘ The first three quarters of the tax given by the parliament, are assigned; the three last are untouched, which amount to about 600,000*l.*

‘ There will be in October and November, for payment of the fleet and yards, in ready money, these three following sums.

‘ From the advance of the Excise - 150,000*l.*

‘ From the French money - - 112,500

‘ Upon the 3 quarters of the subsidy 80,000

342,500*l.*

‘ The chimney money and the law bill are left free, to be charged as there shall be occasion.”

By this it appears that there was 942,500*l.* left in money, and the charge upon the revenue not 300,000*l.* For the Excise was left charged not above 110,000*l.* when the lord Clifford went out: and whether this be a truth, any that doubt it may be resolved by sir Stephen Fox, or Mr. Richard Kent.

And to shew also that the condition of the customs was truly presented, and the lord Clifford in his paper guessed right, and that the return of the last fleet would clear it; I have obtained a copy of a letter written from Mr. Mounteney, who was then cashier of the customs, to sir Robert Howard, the then secretary to the Treasury:

“ Sir;

‘ I have a list signed by the lord treasurer Clifford, and confirmed by the present lord treasurer, the said list being wholly paid, only 8,400*l.* payable to the treasurer of the navy. I do hear there are several tallies struck on the customs, but I know not of what value, nor to whom payable. I understand the persons have made their applications to my lord treasurer, and that my lord intends to make a new list; which is all I can say to this affair.—Sir, &c. RICH. MOUNTENEY, Custom House, London, the 10th of Nov. 1673.”

It now remains to shew on the other side, the effect of the great prudence and success so boasted of, by us faithfully presenting the State of the Revenue at Lady-day 1679, when this lord left it. And to be as clear in this as I was in the other, I have obtained likewise a copy of it, as it was presented to these present lords commissioners of the treasury.

‘ The charge upon the three great branches of the king’s revenue, computed to remain, Lady-day, 1672.

‘ Remains unpaid of tallies charged on the customs, 435,106*l.* 1*s.*

‘ Of tallies charged on the excise, 550,464*l.* 15*s.* 4*d.*

‘ To repay the advance, 250,000*l.*

‘ The charge on the hearth duty by tallies and the advance money, 250,000*l.*

‘ Total, 1,485,570*l.* 10*s.* 4*d.*

And now the equal reader is left to judge, (though the Impartial Author says he is not) whether this “lord, or the people of England, be most unhappy in his misfortune.”

But to those that will not take the pains to examine this, and are not convinced there never was a better officer in this station, he proposes a new sort of evidence from “Coffee-houses themselves,” who have complained of the “good husbandry this lord used for his master, for fear it should keep off the use of parliaments.”

I will not wonder at such a proof, for the writer uses always great liberty; but I will only do the same, and desire those persons also that will not take pains to examine this, to receive the evidences now in the coffee-houses for his lordship’s character. I am almost persuaded, that if ballads had been sung in his favour, they would have been urged as evidences of his innocency; but I dare not take the liberty to urge those that are sung on the contrary, for testimonies of his guilt; but after such evidences as coffee-houses introduced, the next may probably be ballads.

I have now finished my observations on that part of this lord’s ministry which belonged to the treasury, and shall now proceed to state affairs, in which other sphere, (for it was not enough to shine in one) the impartial author presents him as great a minister as he has done a treasurer; concluding as he began, “That what he had said concerning this lord’s administration in his office as lord high treasurer, he spoke upon certain knowledge; and what he shall say in relation to his transactions in the affairs of state, are partly so, and rest upon such assurances, that he is no less confident of the truth of them.”

Thus he tells us, That he builds upon some assurances by him received, as firmly as on his own certain knowledge. This I suppose he might do, without any compliment to those from whom he received them; for by the examinations of all compared, it will I suppose appear, their credits ought to have no pre-eminence.

He first introduces his discourse with a complaint he heard this lord make, That “it was an infinite misfortune to him, that his majesty did take him so much from the business of the treasury, whereby he could not make those improvements in his revenue, and give those dispatches that were necessary; and expressed his regret that he was employed in any other business than the treasury.”

As to the improving of the revenue, it has been discoursed already; but for dispatches, I suppose he did not believe much time was necessary; if it be true, as I have heard, that he endeavoured to gain a belief in his majesty, that no man could be a good treasurer that was easy of access.

As for that regret this lord had, for the im-

cross of business, and consequently power in the king's affairs, I shall only make some observations upon this lord's temper and proceedings; which will shew, he rather desired to engross all affairs, than share any. The assurance of a modest and confined nature would have best appeared, by the easy and friendly carrying on the king's business, with such ministers and officers as were of good repute: but instead of that, this lord shewed a temper of a contrary nature, by attempting the removal of every one that was not prostrate enough to him. He began with sir John Duncomb, and sir Stephen Fox, men of most unquestioned worth in their employments: then brought a change in the council against sir Robert Howard, auditor of the receipt; the success of which is publicly known, and might questionless have been very well guessed by this lord; but there were two great causes that blinded his reason; his son the lord Dunblain had the reversion of the auditor's place, and the removal of him with the others, had reduced the Exchequer into his uncontradicted power.

The ministers in state-affairs, (that did not submit implicitly) found him not less ambitious. My lord Arlington, and Mr. Secretary Coventry, seemed to have writs of ease in foreign affairs, and very often were reports and expectations of their leaving their places; and those that were upon better terms with him, were obeyers of his power, and not sharers in any: and I am confident, whoever thoroughly examines this lord's temper and carriage amongst men and business, he will hardly conclude it probable, that any regret could spring from his increase of power; rather the character of a very great man may be applicable to him, as to our part of the world.

“*Æstuat infelix angusto limite Regni.*”
Juv. Sat. 10.

The reasons why this lord entered unwillingly into foreign transactions, was, “because he always shewed himself averse to the counsels wherein he found his majesty engaged; and reckons up the breach of the triple league, a war with the Dutch, a league with France, and an army of English then in France.”

These particulars will not concern my observations; if any did amiss, let it be examined when there is such an impartial account as this pretended to be given; but upon this depends the following paragraph, which ought not to be let pass without some reflections.

He complains there, that the nation was too hasty, and did not give this lord time to “reduce things in such a posture as might be wished;” and makes a query, whether it be not the most unsafe, as well as most unjust practice, for a nation to discourage such ministers as endeavour to draw their master to his kingdom's interest.

Here the impartial author lays the foundation of his ensuing arguments; and resolving

to charge this lord's crimes on the king, he first boldly attempts to make him a fit subject to bear it; and to lessen his own impeachment, draws up one against his sovereign, that he had forsaken the interest of his kingdom, and wanted this lord to draw him to it.

With this gratitude, he seldom fails to pay his majesty in every particular; and having declared what a profest enemy this lord was, to the French interest, believing it destructive to this nation, he desires,

That the proceedings of this lord may be “impartially considered, and see whether they have not all tended to the diminishing the French interest since his time; and if it have diminished, it will be hard to find who else there was, besides himself, near his majesty, who had power and inclination to do it, &c.”

The issue then to be joined, is upon the question begged, whether the French interest was diminished by this lord's proceedings; but it will easily be granted, that it would be hard to find any near his majesty, besides himself, that had power: And then I hope if it appears, that the French interest grew enlarged in his days, it is as reasonable to apply his power and inclination to be the causes of it, as it is for his impartial friend to use them for the contrary.

I will pass over some instances he gives which cannot amount to the proof of the whole; as, the breaking the league with France, peace made with the Dutch, the duke of Monmouth called from the French service, the match with the Prince of Orange: All which are attributed to this lord, as the custom is of any reputed good. At which I will not quarrel, because I have yielded the point, that he had all power; but I will only put him in mind of the address from parliament to the king to recal the forces from France, and the bills passed in several sessions to that purpose, even in those years when the French so clearly owed success to the English. And the marriage of the lady Mary, unless the consequences had been happier, might rather be thought the disposer of the Prince of Orange to the peace that followed, than be a prejudice to the interest of France, which prospered most after it.

In the same paragraph, it is said, that every one knows that this match altered the minds of the duke of York and duke of Monmouth, that from being the greatest asserters of the French interest, they became as forward as any for the war of France.

And this conversion, it seems, assisted by the power and inclination of this lord, brought on the actual war with France, for which the parliament gave their money; and by this we see it owned, that all were French but this lord; and people not so mistaken, it seems, that have been constantly jealous of it. But whether the dukes of York and Monmouth have reason to thank him for declaring their conversion, I know not; since he condemns them for an error which we found ill effects of; but none on the contrary by the persuasion.

And then he says, the king had good intentions, &c. which implies, that he never had any good before; as if he had now drawn him to his kingdom's interest. And as this lord was pleased to order it, he never appears to have better after it: For whatever he is accused of, he charges upon the king, and acts as if agreed with what he pretended to know of the opinion of the French, that they had the king's person and government in the last degree of contempt.*

I know not whether that lord shrunk, when he spoke those words in the House of Peers; but next the owning of such an opinion of the king, it was an audacious crime to own a belief that any could retain such a judgment of him. I hope this lord is the only person that thinks it either probable or possible.

But leaving this point with blushes to have repeated such a thing, I will set down some general observations of public affairs, which will best shew whether the diminution or increase of the French interest, was likely to be intended or effected in his time.

In the first place, to lay a foundation to build upon, I suppose it may be taken for granted, that the parliament did ever appear warmly averse to that interest: and of consequence, must give the greatest apprehensions to the French, that from them might proceed the only fatal opposition, and which was not probably to be diverted either by skill or money.

In March 1676, the Commons in parliament presented an Address most humbly offering to his majesty's consideration, That the minds of his people were disquieted with the manifest dangers arising by the growth and power of the French king, &c. And therefore humbly presented their desires, that his majesty would strengthen himself with stricter alliances, to quiet the minds of his people, and preserve the Netherlands. The king's Answer agreed, That the preservation of Flanders was of great consequence. But it seems, not being thought particular enough, it begot a second Address, on March the 26th, wherein they again more strictly pressed the king to enter into such alliances as might obtain those ends. And in case, that in pursuance of such alliances, his majesty should be engaged in a war with the French king, they promise cheerfully, upon notice of it in parliament, so to supply the king, as that he might prosecute the same with success. And in their Address of the 29th of January 1677, they humbly desired no treaty, but such a one as might put the French king in no better an estate than he was after the Pyrenean Treaty.

This sufficiently shewed the temper of the parliament, and their judgment, that war itself was more suitable to the interest of England, than the growth of the French power. But this begot great debates, and shewed so many influenced, that they appeared ill witnesses for

the boasted power and inclination; and presently after, while things of this great nature here had heavy motions, the frontier towns were taken, as Valenciennes, and St. Omers, &c.

I will not delay, to set down the particular reasons and arguments that were raised against this constant sense of the parliament; nor the sharp reprehensions they sometimes received from the notions of their too-much invading the king's sole power in peace and war. It shall suffice to observe, that those reprehensions, arguments, and delays, did not seem to tend to the diminution of the French interest.

But to proceed; To make it yet more clear that the growth of the French interest and power was nourished in the time of this lord's power and inclination, let it be fairly examined what proceedings here could most favour their growing interest.

I will presume then to assert, That nothing could contribute more to it, than all means used to hinder the parliaments engaging the king according to their judgment: And probably since it appeared, that notwithstanding all opposition by debates, and displeasure shewed to some of the addresses, they rather grew more warm than cooler in the pursuit; what was left, but frequent prorogations and adjournments, to divert the weighty stream of the parliament from running with unresistable violence against the French interest?

Mr. Coleman was of this opinion, as plainly appears in his long letter: where he says, That it was their dependancy on the parliament, that encouraged the confederates to continue the war: and that their dissolution would break all their measures.* And there says, that the good father he writ to before, so concurred in his politics, that he assured him the king of France would assist it with his power and purse. And a little after gives an account of the useful prorogation to the 13th of April, being to a day so high in the spring, that the thrifty Monsieur Ituvigny thought, would put the confederates beyond their measures: And it appears, this lord concurred also in their politics, that a prorogation or adjournment was ever a help at a pinch; for in his letter to Mr. Montagu, dated the 17th of Jan. 1677-8, he says, That the principal cause of the adjournment for thirteen days, was to see if an "expedient for peace might be found in that time; and the effect of the adjournment hath hitherto been, that no body will believe other than that the peace is already concluded betwixt us and France."

I will not here set down the frequent adjournments and prorogations that were made, but only observe, they kept pace with the success of the French, and were most frequent when they were most prosperous; and that this happened in the years 1677, and 1678, when the power and inclination was boasted of; and in the same years the French grew so enlarged with success, that it is improbable any, but the

* See his Speech in the House of Lords at his Charge, p. 627.

* See Coleman's Trial, vol. 7, p. 1, of this Collection.

concerned party, should immediately affirm, that this lord's proceedings "tended to the diminishing the French interest in his time."

Since then the contrary so clearly appears, That in this lord's time the French interest grew so enlarged; I hope it will seem more proper to give the words their true application, and to say, if it thus increased, it will be hard to find who else there was near his majesty, who had power and inclination to do it.

I come now to the last great particular of this lord's proceedings towards the diminishing the French interest, viz. The letter which was produced to the House of Commons, and hastened, or rather necessitated, by this lord's power and inclination; for it were hard to find any other about his Majesty, that could or would have endeavoured to have Mr. Montagu's cabinets so violently seized; and had he believed, as his impartial friend affirms, That the letter might justly have borne a wise and useful construction both to the king and kingdom, he would not by so unusual a violence have implied a guilt in his own opinion, which is confirmed by that secrecy he enjoins the ambassador to use in the negotiation, for fear of giving offence at home.

I will here continue my method, not to delay upon arguing particulars and circumstances, where the right judgment must be drawn from the general, which is the subject matter itself; as, that Mr. Montagu confesses great honour in this lord; and that by a letter to the king, himself says, That the earl of Danby might have had more than ever he got by being Lord Treasurer, if he would have prevailed with the king to agree to the propositions of the French king; and a little after cries, "That if the ministers intended the setting up an arbitrary power at home, they would certainly neither have disobliged the French king, as they have done, nor refused his money."

What character Mr. Montagu gives this lord in former letters, or what opinion the French had of him, was only liable to a reflection made by a member of the House of Commons, when the letters were read, That if the French had an apprehension that this lord was not once their friend, he was confident his own letters shewed, that they had reason now to have a kinder opinion of him. What the letter to the king himself was, how my lord of Danby might have got money, we know not; but it appears by his letter now, that money would have been accepted: But for the last assertion, That the minister had disobliged the French, needs no confutation, but what has been said of the whole course of things; which I fear they will never be so just to repay England by counsels, as weak as those which so much contributed to their successes.

From these arguments he concludes, "That it would puzzle the most uncharitable censurer to find another cause than their unwillingness to enslave their country, why money from the French was refused."

If this be a good consequence, That to ac-

cept French money is to enslave the nation; I hope it follows, that the sum of six millions of livres yearly, to be paid for three years, and offered to be accepted, was for the same purpose.

The last Evidences, instead of coffee-houses, is now offered from Gazettes, and the dutchess of Mazarine's lodgings; the first declares the ill will the French had for this lord; and the other being a place where the present French ambassador [is apt to speak more freely] he used such discourses as would convince any man, &c.

If the French Gazettes gave such an account of him, it is answered as the other was, That they had no such occasion now: And for the other proof, I have heard that the dutchess of Mazarine's chamber has been more used to the free discourses of the confederate ministers, than the French ambassadors. But among these weighty arguments and evidences, I wonder it is omitted, that this lord drunk a confusion to the French, at the late bishop of Canterbury's house at dinner; and I think it as full and cogent as most of the others.

But I am now brought close to the matter, by being desired to observe four things:

First, "That the Propositions sent, was only a copy of what Mr. Montagu was to receive from the secretary; so that the thing itself was no secret to them."

This argument seems very strange, because the secretaries knew of the propositions for the peace; which was likewise known to the foreign ministers: Ergo, the treating for so much money for three years, to beget a right temper in parliaments, was no secret to them neither, though enjoined to be so; especially to the secretary: the logic would be as good, to conclude, that he that knows something, knows all things.

In that letter also, it is fit to observe, that the king was sufficiently informed that the French desired peace upon the terms sent by the secretary; but thinks it not fit to stay till the desire was formally received, and the ambassador as formally impowered to propose, for fear the time should be lost of effecting the peace; that is, for fear the market should be missed of contracting for so much money, as might secure against the troubles of parliaments for some years. And if adjournments and prorogations have been the usual prudence, certainly a well-bought dissolution (for three years at least) must needs be thought admirable politics.

The second is, "That the Propositions were not originally the king's, but the confederates; so that the king was to gain nothing by making the market either higher or lower: and the French had often experience that his majesty would not do otherways."

This second way of arguing, is as strenuous as the former, and bears equal resemblance to the reason and nature of it; for it is still grounded upon the Propositions, that they were originally the confederates; who at that time were too much discouraged to hope or

propose any thing equal to the common interest: and therefore the market was to be made up in the preventing that which might raise their spirits, the meeting of parliaments. Which Mr. Coleman (whose policy agreed with this lord's) declares to be the fountain of their resolutions. So that the logic appears this:

There was no markets to be made of the propositions:

Ergo, There was no market to be made of parliaments.

The third continues in the same method; which is laid down as a full justification of his majesty's honour in that point, and that he had no design of getting the money for the purposes suggested against the earl of Danby; for in that case, he would not have considered the gain or loss of the confederates. And Mr. Montagu is expressly forbidden in the letter, to mention the money at all; in case the French king did not accept those very propositions of the confederates, and in the terms as his majesty received them from his ambassador at the Hague.

This argument also is like the rest, grounded upon the propositions; and is made to prove, that the money was not designed for ill purposes, because there was so great a care expressed of sticking entirely to the propositions. Here he forgets, that but a little before he says, that this lord in his letter assures him, that they were sufficiently informed, the French desired peace upon those propositions. It seems strange then, that the justness of sticking to them, should be so insisted upon, when the French had given their permission by the approbation of them.

I wish, that in this paragraph, the argument and respect for his majesty's honour had been better defended, or wholly let alone; but first to bring the king's honour in question, and then to argue so ill in the defence of it, was too great, though not equal crimes; for no guilt but treason can exceed or equal that of too boldly meddling with that sacred subject.

The fourth is a new sort of argument, from the last words of the letter, where the earl tells Mr. Montagu, "That he believes that would be the last time any proposals of peace would be made; and that he is confident they will not be accepted; wherefore he might accordingly take the king's measures and his own."

How to apply this argument for any use to this lord, I know not; it only expresses an apprehension or opinion, that the proposals would not be accepted: sure he cannot mean the proposals that he says were received from the confederates; for those, he was informed, were desired by the French: it could be only the propositions for the money, that probably gave the apprehensions of the refusal.

After these four Observations, he proceeds to that expression about the parliament (which he supposes has been a principal cause of giving them offence) and plainly avows, that he has heard this lord say, that his majesty caused

that expression to be used, only for a motive "to persuade the king of France to give a greater sum than six millions of livres, which then had been offered; and because otherways in the ill posture things then stood betwixt the two kings, the French king might suspect whether the king of England would agree to any peace at all: and these being the whole contents of the letter, and being writ by his majesty's express order, you will easily conclude this lord could not be so hardly prosecuted for that only, were there no other causes for it; when in truth he believes there are very few subjects, but would take it ill not to be obeyed by their servants; and their servants might as justly expect their master's protection for their obedience."

Before I enter upon the argument of this paragraph, it is fit that I should first avoid the crime, that I presume to condemn in this lord: For if I should endeavour to prove the thing to be ill in its own nature, and by silence leave the king entitled to it, I should share the guilt so common to this lord, I will therefore, first endeavour to do myself that justice, which the law does the nation, to separate the king from wrong or dishonour; and I will after, in a more proper place, examine the argument drawn from obedience.

I need not go about to prove the well known maxim of the law, That the king can do no wrong; and if he cannot be liable to do wrong, none can entitle him to be the author of wrong done: and this is not only matter of law, but grounded upon prudence and necessity; for to allow it to be possible, that a king could do no wrong, and yet that he is accountable to none but God, were to grant, there is a mischief without the compass of the laws; and it were rational, if the king could commit the offence, that he should be subject to men to judge the punishment: Therefore justly it is said of the ancient lawyer Bracton, who wrote in Henry 3d's time: 'Ipse autem Rex non debet esse sub homine, sed sub Deo, &c.' and by the same reason the king's honour is as little subject to men, as his person; accordingly the act of the 13th of the king expresses a care of the preservation of his majesty by declaring, that in his honour and happiness consisted the good and welfare of his people, so that of consequence, any one that attributes dishonour to the king, is an offender against the good and welfare of the people.

On the other side, if any favourite or counsellor should be discharged from ill actions or counsels, by charging the king with the allowance or knowledge of them, what an encouragement might this be for guilty men, and what an asylum to fly to when the guilt is committed? In the same act there is a heavy sentence on any that shall say the king is a Papist, or shall any ways, by word or writing, publish or utter any thing to incite people to the hatred or dislike of the king's person. I would desire any to consider, whether any of these crimes would be answered by pleading

that what was said, was spoken by the king's knowledge and allowance; it would appear, the king that can do no wrong, cannot avow the wrong done to him and his people. If this should appear rigorous to any, let them but equally compare the inconveniencies on both sides, and it will appear by this way, some particular men of shaken consciences and principles may suffer by their own folly; but by the other way, the public may suffer under the protected guilt of a few corrupted or ambitious persons.

And since in all ages it appears, how soft men are to the impressions of wealth and power, how just will it seem there should be no excuse for ill councils; and those that will undertake the care of great things, ought to bear the weight and hazard of the employment: this would increase the care of doing well, and opposing ill; and great men would find it better and safer to depend upon their own virtues, than on their flatteries; and truth will then appear the best policy, when falshood becomes the greatest danger. And I will venture to add this farther remark, That this lord hath been bolder in this way, than ever any subject was; and it looks like an ill return to his gracious and bountiful master, that he never entitles him to any thing for his honour; but as I observed before in the business of the goldsmiths, he wholly attributes the good action to himself and would make the king's treasure purchase his honour and esteem.

I have heard of such generous friends that have charged themselves with their friend's misfortunes, to make themselves capable to suffer for them; but this lord has not acted so for his king; but on the contrary, would fix ill things on him; For if what was charged upon him had been avowable, there was no need to make any other plea, than what might proceed from the nature of the thing.

This brings me to consider the expression about the parliament, which he might justly indeed suppose had been a principal cause of giving offence.

Having now with just duty separated the king from the concern of this matter, I dare proceed to consider it with the reason of the paragraph.

I agree with the author, That the clause that gave the parliament offence, (he might have added, and every Englishman that read it besides) was this:

"In case the conditions of the peace shall be accepted, the king expects to have six millions of livres yearly for three years, from the time that this agreement shall be signed betwixt his majesty and the king of France; because it will be two or three years before he can hope to find his parliament in an humour to give him supplies, after the having made any peace with France."

The reason given for this clause is remarkable; that it was inserted only for a motive to persuade the king of France to give a greater sum than six millions of livres; because other-

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wise, in the ill posture things stood in, the French king might suspect whether the king of England would agree to any peace at all.

I cannot imagine the force of this argument, unless it be to shew, that there was no motive to the French king to give money largely, nor to make him believe the king of England was firm to him, but the conditions of keeping off parliaments.

How clearly does it now appear, that this way only the French believed their interest was to be supported; and as if the old arts of adjournments and prorogations had not been sufficient, it is projected now to let a lease of parliaments to the French for three years; and it is reasonably guessed they would have been out of humour to grant supplies, when supplies were gotten from others to destroy them; but how after three years the parliament should be brought in humour, is not to be supposed; it is more probable that the lease would have been renewed.

The next objection to this letter (he says) has been, that it was writ the 25th of March, 1678, which was five days after the parliament had past an act to raise money for an actual war with France.

This is confessed to be true; but answered,

First, "That an act to raise money for a war, is no declaration of the war."

But that act was grounded upon a message from the king to the parliament for an actual war, and it was so declared to be by one of the secretaries in the House of Commons; but now it will be hard for this impartial friend to advise his lord which to stand to, whether the king was author of the message sent by the secretary, or of the clause in his letter: for sure, though he has been very bold with the king, yet he would not make him own contradictions at the same time.

The second is, that till such declaration, all treaties are lawful; and even then too, if the king pleases, in whom the sole power of making peace and war is made by law.

There is no question, but in the time of war declared, the king may treat of peace; but whether this lord may treat for it in such a way, as by the clause of the letter, is the more proper question.

Thirdly, he says, that the king's ambassadors were then at Nimeguen treating of "Peace, and were indeed never recalled, nor forbidden to treat the peace; and can it be thought a fault, for a minister to obey the king's orders at home, on the same subject upon which other ministers were acting at the same time abroad."

This is the usual manner of arguing; but it affords some new matter of answer, which arises from observing, that the ministers abroad treated upon the same subject as this lord did at home; which implies, they all treated for so much money to be the price of parliaments, or else this minister may be in fault, though the others were not: but I suppose the ministers were not so bold upon this

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point abroad, as this minister was at home; and if not, the argument is at an end.

The fourth argument is composed of no new matter, till at the latter end it is said, that had it been a crime, his majesty's ambassador at Paris must be in as much (if not more) fault to have obeyed the king's orders at second hand, as this lord was, to obey his majesty's immediate commands from his own mouth, and signed by his hand.

I have before taken notice how little it adds or diminishes to any offence, to compare it with what others have committed; it being only just and proper, that every thing should bear its own weight: but if it were not so, I should not trouble myself to dispute whether the same fault was greatest in the first or second concoction; but possibly the first might be the adviser and obeyer both, which the last could not be. But perhaps the meaning of this is, that the ambassador had been in the greatest fault, if he had believed this lord, that it was the king's order. But Mr. Montagu did not seem guilty of such an error, as to believe so much in this lord, or so well of the business; yet in his speech in the house, as well as in his letter, he affirms, he could produce the king's hand for the most material things, and particularly for the letters now made use of against him.

I know not what papers such a one, so great in the king's trust, and who usually presented him with so many, might get signed; but he had shewed the same respect to the king to have published them, as to own he had them.

After this, he winds up all upon this sure bottom, in these words:

"In short, it would be ill for ministers of state, and worse for their masters, if the one may not command, and the others be obliged to obey, &c."

Though this argument of obedience has been often used, I thought here would be the properest place to take notice of it; remembering a little before he says, "there are very few subjects, but would take it ill, not to be obeyed by their servants; and their servants might as justly expect their masters protection for their obedience."

I desire any reader, more impartial than this author, to consider the falseness of this in every particular. First, sure there are few masters that would expect obedience from their servants in unlawful things; and the servants could less expect protection, unless their masters were above the law. The great master of the nation can give no more protection, nor require more obedience than the laws of God and man allow. If obedience is the excuse of ill acts, it ceases to be a good duty; and if absolution be fixt to obedience, all crimes have lost their natures, and counsellors should only be sworn to a prince's will, and not his interests. If a prince of another religion should command a change in me, would the obedience be a good plea at the last tribunal? And the reason holds the same in every lesser

crime: but this argument of such an implicit obedience, is only put into the disguise of conscience, to prevent the true obedience of Christianity rather to suffer than do ill; but such a notion of conscience is much more pleasant, that shelters interest and ambition, rather than the other that exposes them to hazard.

I have now gone through this lord's performances, in the treasury and state-affairs: and as for that which follows, about the murder of sir Edmundbury Godfrey, I easily agree them to be libels that charge this lord with it; and think it must be an accusation against the witnesses, judges, and jury. And I for my part must confess, that the matter appeared to me clearly and fully proved.

As to what relates to the Popish Plot, I leave it to others that know more; not pretending to meddle with any thing that I have not had some particular knowledge in: and therefore shall say little to his concluding argument, upon an objection raised by himself, "Why an innocent man should withdraw from his trial; and then upon his appearance, quit all defences, and betake himself to a pardon?" But this particular, of making a defence, or relying upon a pardon, belongs only to the lord himself; and to draw arguments from thence to imply a guilt, would rather shew a desire to find a crime, than prove it. Nor will I meddle with the nature of his pardon; by what means obtained, or how valid; that must be considered in a more proper place; and it were too much confidence in any single writer, to anticipate a parliament's judgment: but this impartial writer taking it for granted, that he has made it evident that this lord was a good minister and a good Englishman; he concludes, that it may be reasonably objected from thence, why a man so qualified to defend himself, should quit all defences but his pardon: but if by the observations that I have made, the contrary does appear, his pardon was certainly the best defence to insist on.

The conclusion of this whole matter brings me to my last Observation, upon the complaint made, "That innocence is no protection to prince or subject:" for one, he instances the last blessed king; for the other, this lord; and makes the severity of their cases equal. This indeed, if true, is a sufficient answer for pleading his pardon, when his innocency could be no protection; and agrees with the foundation laid down in the beginning, "That malice had too great a share in his prosecution:" So that he returns a charge upon his prosecutors, the Commons, for malice; and against his judges and jury, the peers, as no regarders of innocency: though in this lord's case, arguing against the libellers, that would fix sir Edmundbury Godfrey's death on him; he says, in that they did accuse the witnesses, judge and jury, that condemned others for it: but now it seems he argues another way, not allowing so much favour to Lords and Com-

mons, as to the others. Nor does he deal less boldly with all kings, and their reputations, that come in his way: upon this king he endeavours to fix many of the crimes charged on him; and with his father's sufferings and virtues compares his own: the excellent nature and bounty of the first, as little merited the return, as the case of the last did the comparison.

I have not wanted reflections, that it seems severe to endeavour to add weight to the unfortunate; and were there no cause given, I should censure it as a want of generosity to say any thing, though true, that might add to affliction: but since it is charged upon all, "That malice may have too great a share in the prosecution of this lord;" I preferred my duty to the public, before any particular consideration; in presenting these observations to inform them of those truths, which by so many disguises are turned into masquerade, and needed some that were well acquainted with them; to make the discovery of every particular: and the reader is now left to judge, whether they are well used in the promise of so much truth, in this Impartial Case of the Earl of Danby.

THE EARL OF DANBY'S ANSWER TO THE EXAMINER.

I have lately seen a pamphlet called "An Examination of the Impartial State of the Case of the earl of Danby;" and pretended to be an answer to that State; but instead of being so, I find it (as I believe was the whole intent of the author) to be only a scurrilous libel against me, every page of it having something of that nature in it.

I cannot learn certainly who is the author; although he says he has been very conversant in my affairs; and pretends to be furnished with more particular knowledge of them than other men: but I believe, that is but a pretence for the more specious wounding of me; because it is too knavish a part for any body who was a servant or officer under me to do, for his own sake, had the subject-matter of it been true; but I find it to be so generally false, that it is impossible for any that related to the exchequer or treasury to be so ignorant of the matters of fact: besides, to have told so many untruths knowingly, and under colour to do his king and country service, is an action too black to believe of any man. Although I must confess, I know not how far such a man may go, as abandons all the rules of honour and generosity, in speaking of one under restraint, things that he knows ought not to be said of any gentleman.

He is so sensible of this fault himself, that he thought it needed an apology; but is able to make no better an one for it than by another untruth; which is, that he says it is charged upon every body by the author of the state of my

case, "That malice may have too great a share in the prosecution of me:" whereas the expression in that letter, is in the beginning of it and speaks only "of the cause which makes some men suspect whether malice may not have too great a share, &c." So ill has that reason supported him against the want of generosity; which otherwise, he confesses himself, he might justly be censured for.

Though he hath shewed himself a very mean enemy, yet he has been so favourable to me through his whole book, that most of his reasons and inferences have been suitable to this beginning; and I intend not to trouble myself with repeating or answering them, nor with his frequent contradictions of himself; but shall barely inform the truth of those matters of fact, which the author has falsely related: Having no design but to vindicate myself from all aspersions, of having done any thing knowingly to the prejudice either of my king or country.

The Examiner has pursued no method; and therefore I must be excused to take the matters of fact confusedly, and to answer them in the same order as they stand in his paper.

In the first place, he charges me with "having applied 2,747*l.* 5*s.* 11*d.* to my own use; and to have been short so much in my account of the navy;" Which is very false; for the money was remaining in my hands, and always owned by me to be so. But it is true, that his majesty, at my leaving the place of treasurer of the navy, was pleased to remit me that sum on the balance of my account: and I hope his majesty is best judge, whether my service in that station deserved such a reward.

The next matter of fact mentioned, as to money, is the 18 months tax. (For I shall take notice of his suggestions upon that and other things, when the facts are cleared.) This was payable in six quarters, viz. The 3rd of June, 1673. Third of September, 1673. Third of December, 1673. Third of March, 1674. Third of June, 1674. Third of September, 1674. And I entered to the treasury the 19th of June, 1673, so that I received all that came in of that tax, saving what was paid between the 3d and 19th of June, 1673. Inasmuch that the Examiner in that particular is so near speaking true, that the whole six quarters were paid in my time; and besides the first three quarters, which the Examiner confesses were assigned by my lord Clifford, there was also 21,163*l.* 6*s.* 8*d.* charged by his lordship on the fourth quarter of that tax; and if the Examiner were as knowing as he pretends to be in the Exchequer, he must know that the last three quarters of that tax brought clear into the Exchequer, only the sum of 565,498*l.* 13*s.* 10½*d.* after all charges deducted: out of which sum is likewise to be taken the aforesaid sum of 21,163*l.* 6*s.* 8*d.*

When he comes to what the king lost in his customs by the Corn-Act, and the Act for prohibiting French commodities; he answers that, "by calling them slight particulars," although one of them was above 60,000*l.* a year, and the

other estimated to me by the commissioners of the customs, at 150,000*l.* a year. And herein he arraigns his own skill, as much as he undervalues the king's loss, by saying, "that none can guess what those acts might lessen from the customs:" Whereas the computations are duly made thereof every year by the comptroller of the customs; by whose certificates the corn-debentures amounted in my time to more than 60,000*l.* a year, for the years 1676 and 1677; and what the loss by the prohibition hath amounted to, could not appear in my time. At last, he ends that paragraph with an argument to confute the author of my case, by which he has done me much more kindness than that author did; for he says, "it will appear the customs never yielded so much as in my days:" By which he acknowledges a better management of that revenue in my time, than before; and let who the Examiner pleases have the honour of it, since his majesty has had the profit.

His 63*rd* page is so full of falshood and ignorance, that I know not of which there is most; for he charges me "with hindering money from coming into the Exchequer, which was lent on the fifth part of the excise, and diverting it to other uses," which is notoriously false; and he says "Mr. Bartie, or a private letter was the voucher for the commissioners of excise placing and having allowed to their account many sums of money which were paid by my private direction;" which is not only untrue, but utterly impossible; there being nothing less than a tally or privy-seal which can be such a voucher.

The next Charge this Examiner endeavours to lay against me, is about the Poll-Bill, and that "because some of the East-land merchants were not paid for some goods which were contracted for by the commissioners of the navy, beyond the sum that act amounted to."

It is in this, as in most of the particulars throughout the whole, both the Examiner's misfortune, and mine, that he knows so little of the matters he meddles with; for if he had known better, he would have given both me and himself far less trouble: For as an exchequer-man, he must have known, that the whole bill brought in but 256,223*l.* 2*s.* 4*d.* to the king's use, of which he charges me with the receipt but of 252,000*l.* in my time, and it was all issued according to the direction of the said act, to the navy, ordnance, and forces: Which himself in the last foregoing page, has said could not be otherwise, so that he might have answered himself, why no care could be taken by me to reserve money for them out of that act; and before my going out I had procured the king's warrant for making them assignments upon the revenue for their remaining debt, but was removed before the said assignment could be perfected: And had the Examiner either been privy to the proceedings of the House of Commons, or that he would have perused the act itself, he would have known, that the parliament gave credit by that act for 300,000*l.* in money, and an in-

definite credit for goods and stores beyond the said 300,000*l.* so as had the act held out but to the money-credit given by it, the East-land merchants had been long since paid the greatest part of their debt: and therefore the reader will see how unjustly I deserve the reflection made upon me in that particular.

In the same page he does against his will acknowledge the improvements of the king's revenues in my time; only he has no mind to admit me any share in the doing it, which, as I have said before, I am contented with, the king's service having been performed: and for the Case of Mr. Bret, &c. it has been solately re-examined, that it has sufficiently justified itself; and I do further aver, that his Majesty did by that contract with Mr. Dashwood and partners, get near 50,000*l.* a year increase to his revenue of excise, more than ever any did offer by a certain farm, or than ever was made before of that branch of the revenue.

For the improvements in Ireland, he pretends to know little of them, because he fears it might be to my advantage; for otherwise he seems through the whole, to pretend to such a general knowledge, as could be ignorant of nothing in this world.

In page 65, he tells you most truly, "that you are not always to appeal to the weekly certificates for proofs." In which I agree with him; for I have had out of the exchequer some of those certificates, which have not been true, and that to the mistake of 10 or 12,000*l.* in one week: But in the same page he takes great pains to shew, "that I could not know what interest I paid, though I might know what I agreed for," which is very ridiculous, for there was no allowance made for interest of money but upon an account of the particular sums lent, the times of lending, and days of repayment stated and adjusted by one of the king's auditors upon oath, examined by the chancellor of the exchequer, allowed and signed by the lord treasurer and chancellor of the exchequer; and consequently what interest was paid, must needs be known both to myself, the chancellor of the exchequer, and the auditor, before whom the said account is stated: and whereas the Examiner asserts, "that nothing will be found in the weekly certificates of the payment of any such interest at all;" it is so much the contrary, that in many of the weekly certificates it will appear, that such interest is therein accounted; and I dare be confident, there will not appear above eight per cent. unless it be for some inconsiderable sum or time.

In the next paragraph, he comes to what he calls the foundation of all his work, and says he will furnish the author of my case with a computation more particular than perhaps he desires, and will pull off the veil; which if he had done, he would have corrected the author of that case, by setting down a true computation; as I would have done myself, if the said author had consulted

me before his book had been printed: but there are divers things I would have altered therein, had I been the author of it, although I know not one matter of fact that is untrue in the whole, (except the said computation, which was to my disadvantage) nor has this Examiner made appear that there is; and if I had been so friendless, as he supposes me, that no body would have writ in my defence, I would at least have been my own friend so much, as to have set down the sums in it to my own advantage where they had been true, and so ought this Examiner to have done, if he had been honest.

He lays hold of a mistake of the author of that State, (for I cannot call it an untruth, because it is a sum less than the true one, and to the prejudice of him whose case he designs truly to represent.) It is a computation the author of the State makes by a certificate of the pells from Easter 1673, to March 1679, amounting to 8,276,767*l*; besides interest to the goldsmiths, and other particulars, which makes it very uncertain; and besides that, it commences from a time three months before my entrance to the treasury, and is liable to the Examiner's cavil, unless by his knowledge he would either have rectified it, or his printer's mistake, who I rather believe has told the untruth on my side; for he has made it eight millions, sixty two hundred seventy six thousand, seven hundred sixty seven pounds: which makes 14,276,767*l*.: But I suppose he means the first sum of eight millions, &c. that he may the better disguise what he there endeavours to have believed, which is, that the revenue in five years and three quarters, viz. from Midsummer 1673, to Lady-day 1679, amounted to the above sum of 8,276,767*l*.; whereas he cannot possibly be so ignorant as not to know, that what has arisen from the revenue alone in that time, has not been near that sum: and by sir Robert Howard's state thereof, for the year 1675, (which is hereunto annexed) he tells you it amounted that year but to 656,172*l*. clear to the king's use.

The sum also which the author of the State calls 8,276,767*l*. (accounting from Easter 1673, to Lady-day 1679,) ought to be 10,867,126*l*. (betwixt the 23d of June 1673, and Lady day 1679.) He knows likewise amongst the supplies which this Examiner tells you were given by parliament, viz.

	£
The 18 Months Tax amounting to	1,238,750
The Tax for building the 30 Ships	581,978
On the fifth part of the Excise	200,000
The Poll Act	252,900
The first Act for disbanding the Army, and other Uses,	619,388
In all	2,896,016

That the 200,000*l*., mentioned on the 5th part of the excise is accounted double being part of the 619,388*l*. (so grossly wilful or ignorant are the mistakes in his calculations) and

152,757*l*. part of the said 619,388*l*. is not within the foresaid sum of 10,867,126*l*.; because so much of the said 619,388*l*. was not come into the Exchequer in my time.

His next head is about secret service, where he talks of a compound of mistakes, but shews not one but in himself; for to make proof of what he says, he affirms, "that my pension of 8,000*l*. per annum as lord treasurer, was never included in secret service;" whereas it was never paid otherwise until Michaelmas, 1676, and by a warrant dated the 13th of July 1676, which I procured to express the particular service, nor in all my lord Southampton and lord Clifford's times (and I think the lord-commissioners) was it ever otherwise than by secret service; so that (to use his own phrase in that paragraph) it will be seen to whom this instance is most unlucky.

Indeed he seems offended that the Exchequer does not know all the uses to which money is applied under the head of secret service; which is an imposition that the Examiner (whoever he be) would be loth to have put upon himself in his own expences, how regular soever those may be.

For the sum of secret service delivered in parliament, I do not know when he means that delivery, unless it were at the time of my impeachment, when by the articles of that impeachment, I was charged with having laid out the sum of 231,602*l*., for secret service, in two years; which must then be meant from Christmas 1676, to the time of my said charge which was the 23d of December 1678. But as that would have appeared to have been a very wrong computation which was then given to the House of Commons, so it will appear by sir Robert Howard's certificates, that the Examiner is as much mistaken in his computation of 252,467*l*. for secret service, in the space of two years and three months, there being no such sum in that time; but I find 252,467*l*. to be the just sum accounted under the head of secret service in three complete years, viz. from Lady day 1676, to Lady-day 1679, which amounts but to 84,155*l*. 13*s*. 4*d*. a year, and is a sum I should not have thought a man expressing so much service and duty to his majesty, would have wondered at, though it had all been laid out in the space of three years, without giving him or any body else an account of it; but had there been opportunity for that account, I had shewed, and am at all times ready to shew and prove, with his majesty's leave, that 57,763*l*. at least of that sum, hath been disbursed for public uses; and then the remainder of this pretended grievance has been at most but 194,704*l*. in three whole years; which has been but at the rate of 64,901*l*. 6*s*. 8*d*. a year.

After all these computations and proofs pretended to by the Examiner, he confesses, 'That no demonstrative argument is to be framed from the particulars he has mentioned, but will therefore betake him to generals for the sure proof of all:' which I believe is the first time of such an undertaking, and shews sufficiently

how falsely this Examiner pretends to the knowledge of exchequer accounts.

When he comes to this "plain account of generals," he says, "he has a copy of a paper dated the 10th of June 1673, under sir Philip Floyd's hand, which would not pass for a proof in this case, if it were true; but that I might know the truth of it, I writ to sir Philip Floyd, and had this following answer from him; by which it appears both how much sir Philip has been abused by the said printed paper, and how different a state was made up by sir Robert Howard my then secretary, the 21st of June 1673, which was but two days after my having the staff.

A Copy of Sir PHILIP FLOYD's Letter. Dated March 18, 1679-80.

My Lord;

I have received the honour of your lordship's Letter of the 15th instant; and in answer to it, I do hereby assure your lordship, that I have at no time given any state of the revenue to any person, but to such as from time to time have been my superiors in the treasury. And as for this thing in particular which is printed in a pamphlet under the title of, An Examination of the Impartial State of the Case of the Earl of Danby; and called a copy of the condition of the revenue, as it was left by the late lord treasurer Clifford, and said to be procured under my hand; I do declare to your lordship, that my name is abused in it. And to convince your lordship that such a copy could never come from me; give me leave to say, that I have examined such papers as I have by me concerning the revenue, when your lordship received the staff, and I find it to be false almost in every particular. As for instance: I find the customs were left charged with—245,905*l.* 19*s.* 3*d.* besides the weekly charge for Tangier. Upon the excise I find—201,148*l.* 13*s.* 8*d.* Upon the hearth-money—22,318*l.* 11*s.* 3*d.* The law-bill left quite useless; and which is far different from the Examiner's printed state. And then, for the three last quarters of the tax; they were not left clear neither, as the Examiner is pleased to say: For, the first quarter of those three, I find to have been charged with 21,163*l.* 6*s.* 8*d.* before your lordship's time; and of the whole of those three quarters, there came only five hundred sixty five thousand, odd hundred pounds into the exchequer.

I could enlarge upon the errors and falsehood of this pamphlet, concerning the revenue, in many other particulars; but having, as I humbly conceive, fully answered your lordship's commands, in assuring you, and shewing to your lordship, that no such copy as the Examiner hath printed could come from me; I will give your lordship no further trouble with any remarks of my own upon it; but take leave only to remember your lordship of a paper which I have seen in your lordship's hands, of better authority than any

thing that I can say: which is a state of the revenue presented to your lordship, by sir Robert Howard, the 21st of June, 1673; which was two days after you entered upon your office; wherein having stated the income of the ordinary revenue, and the expences for that year, by way of debtor and creditor; he finds the expence would exceed the income by the sum of 1,163,400*l.* And there is no doubt but sir Robert Howard, who was furnished with all the means of making a true calculation, did take care to do so. And that, in my humble opinion, (my lord) will be of considerable use to your lordship, to shew the mistakes of this Examiner. I beg your lordship's pardon for this long trouble; and am, my lord, &c. PHILIP FLOYD.

Having perused the said state of the revenue mentioned in sir Philip Floyd's Letter, which was given me by sir Robert Howard, the 21st of June 1673, and remains in my custody, I find it to agree exactly with sir Philip's Letter, both in the calculation of the expence of the year 1673, to exceed the income of that year, by the sum of 1,163,400*l.* and in the sums which were left charged upon the three great branches of the revenue by my lord Clifford; nor could any copy of the said printed paper come from his lordship, because there is not one half of it true: Besides, this Examiner is not only ignorant of things in the treasury, but he does not know the officers of it at that time; for he mentions a Letter from Mr. Mounteney, dated the 10th of November 1673, and says it was directed to sir Robert Howard (then secretary to the treasury) whereas Mr. Bartie was then my secretary, and not sir Robert Howard.

The Examiner closes his report concerning the treasury, pages 76 and 77, wherein he pretends to shew: First, "that the revenue was left charged with less than 300,000*l.* (advance-money excepted) at the time of my lord Clifford's leaving his place. Secondly, that there was 942,500*l.* then left in money. And thirdly, that the said revenue was computed to be left charged with 1,485,570*l.* 16*s.* 4*d.* at Lady-day 1674." I suppose he means 1679, when I was removed from the treasury: although I could no more know he means that time by the computations he has made, than I could by that year of our Lord which he has printed.

The first and second of these are proved from that copy before mentioned, pretended to be from sir Philip Floyd, to which sir Philip's answer has been seen, and consequently the truth of his sure proof: But that it may be truly known how the three great branches alone were left charged by my lord Clifford's own computation, it is therein set down that,

The Customs were then charged	£.	s.	d.
with	-	-	- 245,905 19 3
The Excise	-	-	- 201,148 13 8
The Hearth-money	-	-	- 22,318 11 0
In all	-	-	- 469,373 3 11

besides that the smaller branches were left useless for the said year: And in the same computation (which I have in my custody) it is estimated that for the said year of 1673, there could not be expected for the service of that year from the aforesaid three great branches, any more than 746,629*l.* and the establishment of the constant yearly expence (besides the great sums owing at that time to the fleet and army, then in being for the said year) amounted to above 1,300,000*l.* per ann. And here I must have leave to observe, that had it not been for that chargeable war against the Dutch, it must have been strange that any considerable charge should have remained on the revenue in the beginning of the year 1673, which was so soon after a total postponing of the king's debts, and when the credit was so broken, that through the whole year of 1672, I believe there was not 20,000*l.* borrowed on the credit of the revenue.

From the same copy of what he calls sir Philip Floyd's paper, and his sure proof of all, is made his next calculation; that there was 942,500*l.* left in money; viz.

	£.
By the last 3 quarters of the Tax	600,000
From the advance of the Excise	150,000
From the French Money	112,500
Upon the 3 quarters of the Subsidy	80,000
In all	942,500

As to the first of these sums, (as I have said already) the said last three quarters brought in clear to his majesty's use but about 565,496*l.*; which is about the sum of 188,499*l.* for each quarter one with another; and the first of those quarters was charged with 21,163*l.* and was not payable till the 3d of March following; which was full three quarters of a year (wanting but sixteen days) before I could expect the first quarter; which would then be clear but 167,336*l.*: and yet this Examiner speaks with confidence the whole 600,000*l.* to be left in money.

The three last sums, viz. the advance, the French money, and subsidy, amounting to 342,500*l.* he says, "will be ready in October and November, for payment of the fleet and yards:" Whereas the greatest part of advance money goes always in repayment of the former advances, in case of new farmers, and is always continued by old farmers; but no new money advanced, unless there be an increase of advance money, as at that time was made of about 30,000*l.* which sum could only be accounted applicable to the present service.

For the French money, I do not know what he means, unless it be a sum of 85,000*l.*, which I find placed to the treasurer of the navy's account, betwixt June 1673, and December 1674.

And for the 80,000*l.* upon the three quarters of the subsidy, it is a sum in the clouds for anything I know of it, having been all expended before my time, or if any thing did

come in afterwards of that tax, it must be some considerable arrears.

Thus has "his sure proof" made out in general, what he confesses he could not demonstrate by particulars: and I must further observe, that although the last three quarters of the 18 months tax were not assigned by my lord Clifford; yet much more than that sum was then become due to the fleet and army then in being: and it is well known, and was owned in the House of Commons by the then Speaker, that within the space of fifteen months from the time of my entrance to the Treasury, I had paid above 1,500,000*l.* to the navy and army alone; which was three months before the last of the 18 months tax was payable into the Exchequer; besides the inconsiderableness of the sum then come in by that tax, and of the 30,000*l.* increase of advance upon the excise, and of the 85,000*l.* (if that be it he means by French money) to so great a disbursement as was made to the navy, and army only, in the said space of 15 months.

For his third and last general proof, viz. What charge was left upon the revenue at Lady-day, 1679, he says, "That to be as clear in this, as he was in the other, he has obtained likewise a copy of the then state of the revenue, as it was presented to the lords commissioners of the Treasury:" and which he says, is as followeth:

Remains unpaid of Tallies	£.	s.	d.
Charged on the Customs	485,106	1	0
Of Tallies charged on the			
Excise	550,464	15	4
To repay the advance	250,000	0	0
The Charge on the Hearth			
Duty by Tallies, and			
the Advance Money	250,000	0	0
Total	1,485,570	16	4

I have indeed been informed that a state of the revenue was presented to the Lords commissioners about that time, but I know nothing of it, nor was any thing of that kind ever required at my hands; but if any body have given them such an one as is printed by the Examiner, it has been a very malicious and wilful mistake, to charge the revenue to be under such a debt, because there were such tallies upon it, at the time of my leaving the Treasury, unless he would at the same time have shewed the uses of those tallies: As first, how much of them was for service forwards, and beyond Lady-day 1679. Secondly, what was to be reckoned in repayment of some of the said tallies, which is to a very considerable sum: and thirdly, how much the advance money alone on the excise and hearth duty amounted to; which is not to be reckoned as anticipation, but as security for the rent of those great branches of the revenue, and which must be always done if his majesty were in the most plentiful condition of his Exchequer: and it may be observed, that the Examiner himself does not charge the 150,000*l.*

advance on the excise, as any part of the 300,000*l.*, which he says was the charge left by my lord Clifford; for he tells you the whole charge upon the excise, was then but 110,000*l.*

The said advances, &c. therefore being deducted, there will be taken from the Examiner's charge of 1,485,570*l.* these sums following; viz.

For the Advance on the Excise	-	270,000
For Advance on the Hearth Duty	-	150,000
To be Discharged by Orders to the Commissioners of Excise on the first act for disbanding the Army, &c.	-	101,000
More by Tallies on the Surplus of the Excise for 30,000 <i>l.</i> and 99,000 <i>l.</i> being no Charge upon the Rent, unless the Surplus fail, which is not likely	-	129,000
More by Tallies which were to pay the Forces from Lady-day 1679 forwards to the first of July, which was 97 days beyond my time; viz. by 29,000 <i>l.</i> or thereabouts on the Excise and about 30,588 <i>l.</i> on the Customs	-	59,588
More by Tallies on the Customs made use of to carry on the Service of the Navy and Ordnance beyond the said Lady-day, 1679	-	35,000
More by Tallies struck for Pensions upon the two last quarters of the Excise, viz. Christmas 1678 and Lady-day 1679, for payment of which, Money was left in the hands of the Commissioners of Excise about	-	33,000
More by Tallies upon the Customs restored for Tin, which was deposited in Mr. Kent's hands	-	15,000
More by Tallies on the Customs, accounted by the Examiner to be unpaid to Mr. Montagu, which were paid in my time	-	2,342
Total	-	794,930

And then the charge which ought truly to be said remaining upon the three great branches (as an anticipation of the revenue) at Lady-day 1679, stands thus upon each branch, as near as I am able to compute; viz.

By Tallies on the Customs	-	352,176
By Tallies on the Excise	-	238,464
By Tallies on the Hearth Duty	-	100,000
Total	-	690,640

The said three Branches of the Revenue were left charged (as hath been already said) by the lord Clifford; as follows:

The Customs	-	245,905
The Excise	-	401,148
The Hearth-Duty	-	22,318
Total	-	469,371

So as the Charge upon the Customs hath increased in 5 years and three quarters, viz. from Midsommer 1673, to Lady-day 1679, by the Sum of - 102,271*l.* And upon the Excise in the said time; 27,316*l.* And upon the Hearth Duty in the said time - 77,682*l.*

In all - 207,269

As by this it appears that the anticipations upon the revenue in five years and three quarters are increased but 221,269*l.* so I must observe, that there was 140,000*l.* paid to the goldsmiths for two years interest of their debt, by virtue of a grant under the great seal, dated the 25d of July 1674; and 128,473*l.* more to them and others by several grants of perpetual interest, betwixt Christmas 1676, and Lady-day 1679; which together amounts to the sum of 318,473*l.* and is truly a payment of so much of the king's debt, although it has not been called an anticipation of the revenue since the stop of the exchequer. The said 318,473*l.* having therefore discharged so much of the king's debt, in my time, although what are called the present anticipations be increased by the sum of 221,269*l.* yet the king's debt is really less than it was at my entrance to the treasury the 19th of June 1673, by the sum of 97,204*l.*

Notwithstanding that no aid was given by parliament in the foresaid time of five years and three quarters, but what was appropriated to particular uses by the parliament; and notwithstanding the charge of the war with Algiers, and the rebellion in Virginia, which were both great stops to trade, and very great expences to his majesty. The Examiner indeed undervalues those expences, as he does everything to which he can give no better answers than he has done to that in page 60 wherein he says, "That the rebellion in Virginia ceased quickly; and while both that rebellion and the war with Algiers happened, if there had been a considerable fleet for summer and winter guards kept out besides, it had been a matter of some consideration." So that where he cannot possibly deny the facts, he endeavours to blemish them by something else; but in this instance that will not serve his turn, the summer and winter guards having been as great as the need was then for them, and the merchants will be the best judges how their trade was then secured, as well as how that war was supported against the Algerines.

With this state of the revenue at Lady-day 1679, viz. that the debt then upon it amounted to 1,485,570*l.* 16*s.* 4*d.*, the Examiner sends his computations concerning the treasury, the truth of which will be best decided by the records themselves: but before he closes this part of his book, he thinks fit to leave his civil remarks to the reader about me, and threatens me with ballads; which by his stile it looks as if he could perform much better than matters of account.

Having gone through the matters of fact mentioned in this first part of the Examiner's paper, I should take notice of some of his suggestions, before I proceed to the other part of it: but those being only observations of his own, who has dealt so unfaithfully in things which are visible upon record, I think it will not be necessary to say any thing to them: only I will inform the reader, that whereas this Examiner says, that "the office of treasurer of the navy depends upon the lord treasurer or commissioners of the treasury, for money to pay?" yet those supplies I received whilst I was treasurer of the navy, were two parts of three in orders and assignments, and left upon me to borrow money as I could upon them; inasmuch that most of my time and care was then employed in that work: although I made it far more easy afterwards to the present treasurer of the navy, while I remained lord treasurer.

I must likewise desire the reader to observe, that although this Examiner insinuates, "that it would puzzle the author of the state of my case to name any persons who were of opinion that the king's condition was in great straits for money in the first six months after my being treasurer:" yet that is not only true, but is testified to be so, by that state of the revenue drawn up by sir Robert Howard the 21st of June 1673, which is mentioned in sir Philip Floyd's Letter; for he thereby makes appear (as hath been said already) that the expence of that year (which in the establishments is always accounted to commence in January) does exceed the income of the said year by the sum of 1,168,400*l*.

Now besides that state of sir Robert Howard's (my then Secretary), I am confident the king and his royal highness will both remember the straits of the treasury to be then such, and the difficulty so great to get money for paying off the fleet at the end of the war, that it was doubted whether some ships must not have been sent out of the river to sea again, only for want of money to pay them; and although means was used to discharge the seamen of that fleet without tickets, yet most of the money was borrowed which was raised for that purpose, and not without great hardship, as the credit of the exchequer stood at that time.

I know his majesty will also remember, that in March 1675 a state of his revenue was delivered to himself from sir Robert Howard, which state is remaining in my custody (a copy whereof is hereunto annexed) wherein sir Robert sets forth to his majesty, that his revenue was then in so ill a condition, that it could afford him clear but 656,172*l*. that year; inasmuch that it was thereupon proposed by him to help his majesty to 8,000*l*. a week in aid of his revenue for his subsistence, and upon a condition to have all the three great branches put into the hands of such undertakers as should be named to his majesty. In so strait a condition was the exchequer understood to be so many years ago, by those who certainly

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ought to know the condition of it much better than the Examiner; and therefore it puzzles nobody but himself, to name persons who were of that opinion.

A Copy of the Paper delivered to his Majesty from Sir ROBERT HOWARD, the 5th of March 1675.

The Sum that seems the foundation and measure from whence the Suspensions are made, is	£.	s.	d.
	1,951,968	0	0
The Sum remaining after the Suspension made, is	1,175,315	0	6
The Sum suspended, is	176,653	0	6
The last year's expences amounted to	1,841,931	18	2
Out of which the Navy had	599,320	4	11½

Spent the last year besides what the Navy had - 1,242,611 13 2½

The Sum of Expence after the Suspensions made for a following Year, is - 1,175,315 1 6

The Income for the following year to discharge the expence of 1,175,315*l*. 1*s*. 6*d*. may arise from these branches.

(The rest of the Excise is charged.)

	£.	Charge	£.
Customs	600,000		100,000
Excise by the Moiety of Pensions	50,000		
First Fruits and 10ths	16,000		
Law-Duty	15,000		
Small Branches	30,000		10,000
Hearth-Duty	150,000		82,828
Total	851,000		194,828

The clear Income remaining, is - 656,172 0 0

The Income short of the proportioned Expence, by - 519,143 1 6

He proceeds to affairs of state; in answer to which I shall trouble myself no farther, than to shew his false quotations of my letter of the 25th of March, 1678, and of the letter called The State of my Case, (as to so much therein as concerns that letter) leaving the malicious inferences and observations through this part as well as the rest of his pamphlet, to such as are more ingenious and more knowing in foreign business, than I perceive the Examiner is; of which this one instance may suffice, "Of his belief that the French interest was promoted by the marriage of the lady Mary to the Prince of Orange."

Besides his frequent applying of things to me which are not only untrue, but not so applied by the author of that State, he takes the liberty to affirm, that some things are in my letter of the 25th of March, which are not in it, and

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thing of argument, nor any thing in a digested method; but as I insert the particulars, to my best knowledge I will set down the matter of fact.

The first thing that occurs, is about the 2,707*l.* 5*s.* 1*d.* short upon the lord Danby's account, when he was treasurer of the navy (page 55,) the sum is mistaken 40*l.* perhaps false printed.

The matter of fact is, his lordship left the treasurer of the navy's place in 1673, and the sum of 2,747*l.* 5*s.* 11*d.* was forgiven him by a privy-seal, bearing date the 21st of February, 1676, as the Examiner says; but whether it was used by my lord, or kept in money by him for so long a time, his lordship best knows.

The next thing is about the 18 months tax, which was payable in six quarterly payments. The matter of fact is thus.

The first quarter of that tax was charged by the lord Clifford with the sum of 200,000*l.*

The second quarter was charged with 199,356*l.* And signed CLIFFORD.

The third quarter was charged with 201,000*l.* And signed, OSBORNE.

And are so entered in the receipt of the exchequer.

I had then the honour to be secretary to sir Thomas Osborne, who was then lord treasurer, as it must needs follow when he signed this list of the third quarter, all which original lists are now in my hands.

The next thing is in the sum which the last three quarters of this tax brought clear into the exchequer, all charges deducted, which his lordship affirms to be but 565,498*l.* 13*s.* 10*d.* $\frac{1}{2}$.

The matter of fact is thus. By the records of the exchequer there appears to have been paid upon those three quarters, to the day that my lord Danby resigned the treasurer's staff, the sum of 584,718*l.* 7*s.* 5*d.* so that the mistake herein is 19,219*l.* 13*s.* 6*d.* $\frac{1}{2}$. Besides, there was paid in the name of arrears, 7,378*l.* 3*s.* 5*d.* the one half of which may be presumed to be applied to this part of the tax; and then the mistake will appear to be 22,908*l.* 15*s.* 3*d.* and this falls but little short of the computation of the last three quarters in the printed copy, by the Examiner of the condition of the revenue, how it was left by my lord Clifford, in which paper it is said, not expressly, but about 600,000*l.*

And for the sum of 21,163*l.* 6*s.* 8*d.* which my lord Danby says was charged on the fourth quarter of that tax by my lord Clifford, I know nothing of it; nor is it probable it should be so, since the disposition of the third quarter was signed by him, as I have shewed before.

The next thing is about the customs, and the Examiner's words quoted, where he says it will appear, "The customs never yielded so much as in this lord's days."

The matter of fact is true; and I believe the customs at that time were managed by most excellent commissioners; and that which did yet contribute more to it, was occasioned by the wars abroad; inasmuch, that the English

were then the carriers to most parts of the world.

The next thing that occurs, is, that my lord Danby says, the Examiner charges him, "With hindering money from coming into the exchequer, which was lent on the fifth part of the excise, and diverting it to other uses;" which my lord says, is "notoriously false."

In this place, it seems, that rather than my lord Danby would lose the advantage of so decent an expression, of calling something notoriously false, he would transpose some words, leave out others, and slip over all the matter of fact, to make it like the expression.

I find the words in the Examiner are these, "For when money was lent on the credit of the fifth part of excise, he hindered it from coming in (which was often complained of publicly at the exchequer by the lenders of the money) and diverted it to other uses."

The words of the Examiner that are here transposed, is perhaps to try to make it imply, that the Examiner does charge my lord of Danby with hindering money to be lent on the fifth part of excise; whereas it is plain enough, it was for hindering the money which was lent, to be repaid, according to the act of parliament.

The words left out are a whole parenthesis, viz. (Which was often complained of publicly at the exchequer by the lenders of the money.) If this had been in, it would have seemed strange that the lenders of the money should complain they were hindered to lend; and money not lent could not be diverted to other uses.

The matter of fact that is slip't over, is set down by the Examiner, page 61, where speaking of the fifth part of the excise, his words are these, and can hardly be plainer expressed: "For the full 200,000*l.* was lent in his time, and at his going out on the 25th of March, 1679, 83,400*l.* was left to pay, which since was paid by these present Lords Commissioners."

This 200,000*l.* was lent in his time, by Rich. Kent and Charles Duncombe, esquires, and there was left to pay at the time when he resigned the treasurer's staff, as appears by the Records of the Exchequer, 83,400*l.* which was since repaid by these present lords commissioners, and is discharged in the Exchequer.

This sum was part of the charge left on the revenue, which the Examiner did not include; for the account as it is set down by him, was only of the anticipations on the revenue by tally, and repayment of advance-money: but I shall take notice of this, together with other more considerable sums, in another place, when I come to consider of the deductions my lord Danby makes from the charge. It is likewise very true, that Mr. Charles Duncombe did often complain to me at the Exchequer, That my lord Danby did hinder and divert the money from being paid into the Exchequer, according as the act of parliament did direct; and last, Sir, you may doubt, whether if the fifth part of the excise had been duly paid in, it would have

been sufficient to have repaid the 200,000*l.* the matter of fact stands thus :

Compute the excise at 580,000*l.* per annum, which it certainly yielded, a fifth part of which, from the 24th of June, 1677, (at which time the act commenced) to the 25th of March, 1679, being one year and three quarters, amounts to 203,000*l.* which is 3,000*l.* more than the principal money, towards payment of interest ; which in the whole was but 11,920*l.* 10*s.* 4*d.* and would yet have been much less, had the fifth part been duly paid into the Exchequer to have discharged the loans. As for the monies said to be paid by private letters and vouchers, the matter of fact is thus.

There must either be a great seal or a privy seal for the issuing of any money in the Exchequer, though notwithstanding this general discharge there : Many considerable sums so issued, particularly those in the name of secret service, are afterwards distributed to particular persons, oft-times by private letters or directions ; and it yet more clearly appears by what hath been said in the foregoing paragraph, that the 83,400*l.* of the fifth part of excise so diverted from coming in, was applied by this lord to other uses, in the assistance of his management, &c. by his particular directions, and was allowed to the commissioners of excise upon their accounts : For it cannot be made appear, that any great seal or privy seal ever diverted specially, any of this money from the use it was appropriated to by act of parliament. And as for tallies of anticipation, at what time the sums so charged are paid, or when the interest is to commence, the Exchequer has no cognizance of it ; and although the account is made up by a sworn auditor, yet his computations of interest must arise from private vouchers, and the lord treasurer and chancellor of the exchequer must allow the account, upon the credit of private vouchers : For they can have no public ones from the Exchequer, there being no record of any real issue to vouch it there ; and perhaps these present lords commissioners of the treasury, having searched into the nature of tallies of anticipation, and finding that by that way of disposing of money, they never can have any account, but what must be made up by private credit, they endeavour to bring all things to be governed by the records of the Exchequer : For what monies they are forced to borrow, they borrow upon loans made in the Exchequer ; and Mr. Richard Kent and Mr. Charles Duncombe, who have lent divers great sums, have paid it into the receipt of the Exchequer, where the record will not only vouch the receipt, but the issue ; and of all monies so lent, the account of interest is made up by the records ; and no combination of private persons in this method can defraud the king.

The next thing is about the Poll-Bill, and the Eastland merchants, page 115, where my lord Danby says, That bill brought into the Exchequer but 256,223*l.* 2*s.* 4*d.* The matter of fact as appears by the records of the Exchequer, is thus :

There was paid upon that bill to the 25th of March, 1679, the sum of 249,404*l.* 4*s.* 8*d.* and no more : but the loans made upon the credit of that act amounted to 252,900*l.* which sum my lord Danby had the whole disposition of ; and is what the Examiner charges him with.

The Eastland merchants were promised ready money for their goods, yet were wholly left unsatisfied ; and these present lords of the treasury have upon their accounts since stated, made them assignments upon the hearth-duty to the sum of 186,585*l.* 18*s.* 9*d.* and have actually performed what this lord can only say for his best excuse, that he intended to have done. And this is yet a farther charge left on the revenue, which the Examiner did not include.

By what has been said in the foregoing paragraph, it appears the weekly certificates in the Exchequer cannot be proofs for monies disposed by tallies of anticipation : but my lord Danby has been pleased to say the cause is, that he has had out of the Exchequer some of those certificates which have not been true, and that to the mistake of 10 or 12,000*l.* in one week. I cannot imagine what my lord means by this ; for I suppose, had it been really so, I have not had so great a share in his lordship's favour, but that he would have made it appear in a more proper place, if he could have made good any such thing as is pretended.

The next thing is about the argument concerning an account of the Pells from Easter, 1673, to March, 1679, amounting to eight millions, &c. which my lord Danby has made to be ten millions and more. The repetition of the former sum I imagine is false printed in the Examiner.

I shall not meddle with their arguments, but agree with my lord of Danby, that the 200,000*l.* on the fifth part of the excise is twice reckoned, it being included in the act for disbanding the army. And I do also believe some part of that tax was not paid in his time : but not finding any inferences to be drawn from it, I have not given myself the trouble to examine it : Since if the ordinary revenue, together with the accidental taxes, have not amounted to above ten millions, as this lord alleges has been publicly accounted for at the Pells in that time ; it will necessarily follow that the remainder must be an anticipation upon the revenue ; which will be best determined by the charge he left upon it Lady-Day, 1679, in the matter of fact of which much depends ; and I will be as clear as I can, when I come to it.

The next thing is about secret service. My lord Danby is pleased to say, the just sum paid in three years complete was 252,467*l.* But by the records of the Exchequer I find paid in three years, viz. from Lady-day, 1676, to Lady-day, 1679, the sum of 294,916*l.* 11*s.* 4*d.* whereof in Mr. Berty's name indeed 252,467*l.* 10*s.* 5*d.* besides the further sum of 14,640*l.* as should be privately directed to be distributed in news-years-gifts by Mr. Berty's

hands; which sum in the half year's account of the Exchequer is placed under the head of secret service, there being no other proper head for it, according to the methods of the Exchequer. This sum being then added to the former, will make the total of secret service for those three years to amount to 309,556*l.* 11*s.* 4*d.*

As to the payment of my lord treasurer's pension of 8,000*l.* per annum, it was never included in the accounts of secret service for those three years, which I suppose the Examiner must mean: For it was altered by a privy seal bearing date the 19th of July, 1676, to express the particular service of that sum; the first payment to commence from Christmas 1675. But neither when the service was expressed, as well as before, did my lord treasurer ever pay fees for his salary, or the Chancellor of the Exchequer pay any for his, as the Examiner rightly affirms.

The next thing is in the State of the Revenue left by my lord Clifford. The matter of fact is thus.

My lord Clifford made a state of the revenue the 10th day of June 1673, as follows; viz.

The customs were charged with about 153,000*l.* for the navy, ordnance, &c. and I hope this last fleet will go near to clear it.

Almost two thirds of the rents of the excise for the quarter due at Michaelmas next, is charged for the forces, cofferer, &c.

All the forces are provided for, until the 25th of July, and the last new additional levies till Michaelmas next.

The household is provided for until Lady-day last.

The treasurer of the chamber until Christmas last, except the old arrear in the late Lord Treasurer's time.

The office of the works until Lady-day last.

The great wardrobe hath been supplied from time to time, as their most pressing occasions have required.

Tangier is weekly provided for on the customs.

The ordnance hath had as much yearly in proportion as in the former Dutch war; but by reason that that office hath not kept the accounts, I cannot justly say how that office stands.

The victualler is paid within a small matter, except the last agreement for the land-men.

The first three quarters of the tax given by parliament are assigned; the three last are untouched; which amount to about 600,000*l.*

There will be in October and November, for payment of the fleet and yards, in ready money, these three following sums.

From the advance of the excise,	- 150,000
From the French money,	- - - 112,500
Upon the 3 quarters of the subsidy	- 80,000

The chimney-money and law-bill are left free to be charged as there shall be occasion.

The original of this paper was drawn by

sir Philip Lloyd, by my lord Clifford's directions; of which I have had a copy by me ever since that time. I cannot say whose hand it is directly; but I can affirm this to be a true copy of it; and it was so acknowledged by sir Philip Lloyd, to a gentleman that I sent to show it him; but denied that paper to be his hand.

I did after this, about the 21st of June, make some further examinations for the service of my lord Danby, then Lord Treasurer; and did presume the increase of charge on the customs by that time was 92,905*l.* 17*s.* 8*d.* which if reckoned together with the former charge, makes up the sum of 245,905*l.* 17*s.* 8*d.* But in the same examination I gave my lord, the excise agreed very near with the sum in the copy before recited.

I did also present the Hearth-duty to be charged with 22,318*l.* 11*s.*; but withal explained it in these words:

This charge may be paid by the arrears of Hearth-money due at Lady-day last; and at Michaelmas there will be half a year due to the king, which amounts to 67,500*l.* which at Michaelmas will begin to be paid by about 2,500*l.* per week; so that the variation herein will amount but to about 93,000*l.* in case my lord Danby is pleased to give my calculation the greatest credit.

I do further acknowledge, in that paper I presented my opinion, that the Customs would not have paid its charge at the Christmas following, probably by 40,000*l.* But it seems the good management of the customs, and the fulness of trade, gave Mr. Mounteney occasion to write this letter to me, which I have now by me.

'Sir;—I have a list signed by the late lord treasurer Clifford, and confirmed by the present lord Treasurer; the said list being wholly paid, only 8,400*l.* payable to the treasurer of the navy.

'I do hear there are several tallies struck on the Customs, but I know not of what value, nor to whom payable. I understand the persons have made their application to my lord treasurer, and that my lord intends to make a new list: Which is all I can say to this affair.—Sir, &c. R. MOUNTENEY.
'Custom-House, London, 10 Nov. 1673.'

And it is very true I was then auditor of the receipt, and not secretary to his lordship at that time.

In the same paper before-mentioned, I likewise acknowledge to have given a short state of the revenue, and the expences for that year; wherein at a general guess I calculated by way of debtor and creditor, that the expences would exceed the ordinary income by 1,163,400*l.*

I could not but admire at the ingenious use my lord Danby makes of what I then presented: for I believe no unprejudiced man could imagine that I should give such a state, as that so great a revenue as the king then had, should not supply the ordinary charges of the

government, by above a million in one year. But my lord Danby was pleased to pick out of the paper only such words as he thought might be useful to his purpose: For had he expressed the true cause I gave of such a state, (which was the time of the war) the matter had been explained; the expence of the war being stated by the commissioners of the navy to amount in one year to the sum of 1,400,000*l*.

And in the said paper I also added in the very next words, another calculation for the ensuing year 1674, where my lord Danby might have likewise found, if he had pleased, these words:

The state for the ensuing year 1674, if in peace will be

	Dr. by Expence.	Cr. by Income.
	£1,167,400	£1,386,500
Balance	- 219,100	
	£1,386,500	

So that by a clear calculation, in times of peace the yearly income would exceed the expence by 219,100*l*.

I will not make any further reflections on these things, but keep only to my rule of matter of fact.

The last thing that occurs, is the state of the Revenue, how it was left charged by my lord of Danby at Lady-Day 1679. It is set down by the Examiner, and not denied by my lord of Danby to amount to the sum of 1,485,570*l*. 16*s*. 4*d*. excepting one tally of Mr. Montagu's of 2,443*l*. which he says was paid in his time.

From this Charge my lord Danby deducts these following particulars; viz.

	£.
For the advance on the Excise	- 270,000
For advance on the Hearth-duty	- 150,000
To be discharged by orders to the Commissioners of excise on the first act for disbanding the army, &c.	101,000
More by tallies on the surplus of the excise for 30,000 <i>l</i> . and 99,000 <i>l</i> . being no charge upon the rent, unless the surplus fail, which is not likely	139,000
More by tallies which were to pay the forces from Lady-Day 1679, forwards to the 1st of July, which was 97 days beyond my time;	59,588
More by tallies on the customs made use of to carry on the service of the navy and ordnance beyond the said Lady-Day, 1679	35,000
More by tallies struck for pensions upon the two last quarters of the excise, viz. Christmas 1678, and Lady-Day 1679, for payment of which, money was left in the hands of the commissioners of excise about	33,000
More by tallies upon the customs restored for tin, which was deposited in Mr. Kent's hands	15,000
More by tallies on the customs, ac-	

counted by the Examiner to be unpaid to Mr. Montagu, which were paid in my time - - - - - 2,342

Total - - - £794,930

Thus have I set down the charge as it is made up by the Examiner, as also particularly the deductions out of that charge, as they are set down by my lord Danby.

	£.	s.	d.
The Examiner's Charge is	- 1,485,570	16	4
My Lord Danby's Deductions are	- 794,930	0	0

So that by that Lord's Computation, the Debt on the Revenue Lady-Day 1679, amounted to no more than 690,640 16 4

The examination of these particulars must determine the true state of the charge left on the king's revenue; which I shall endeavour to do with as much candour and clearness as lies in my power. But before I proceed to take the particulars in their order, I must take notice of one small mistake of my lord Danby's; for he reckons the advance on the excise 30,000*l*. more than it really was, which increases his deductions: for the advance was but 250,000*l*. and is so set down by the Examiner. But upon the farm of the excise let the 13th of March 1678-9, which was a little before my lord Danby left the staff, the advance indeed was 270,000*l*. of which sum his lordship only disposed of 58,352*l*. 9*s*. 6*d*. which being charged by tally, was included by the Examiner, in the general account of the charge on the excise by tallies.

But this mistake is not of much moment, since I presume the deduction itself is by no means allowable.

I shall take the particulars in the same order as they are set down by my lord Danby. The first two are of the same nature, viz. the 270,000*l*. advanced on the Excise; and the 150,000*l*. advanced on the Hearth-Duty.

I cannot imagine why these should not be looked upon as so much of the debt left upon the revenue: it seems as if it were implied, that it was never to be paid again; but his lordship's reason for his opinion is, "That those sums are a security only for the rent of those great branches; which must always be done, if his majesty were in the most plentiful condition of his Exchequer."

In answer to this, I would in the first place ask his lordship, what security is now given for the rent of the customs: and what prejudice it would be to his majesty's revenue if these two branches of the excise and hearth-duty were managed as the customs are, and not farmed? And then there was no necessity of such a security (as his lordship calls it) for the payment of the rent.

As to my own opinion, I cannot but think, that these two branches, managed as the customs are might be improved above what they

now yield, as well as the customs now exceed whatever they made to the king when they were farmed, and whilst they also had an anticipation upon them by way of security: and perhaps if this advance-money (that my lord Danby would not have reckoned as part of the debt) were not in the way, they might at this time be managed in the like manner with the customs, with equal advantage to the king's affairs, and prevent many frauds and bargains that are this way sheltered.

And upon these several accounts this advance-money may very properly be called part of the debt:

First, Because that until it is cleared, his majesty is not at liberty to manage those two branches to the best value.

Secondly, The matter of fact determines the argument; for every quarter the sum of 22,000*l.* is really paid to those that advanced upon the excise, and 17,500*l.* every half year to the farmers that advanced upon the hearth-duty; which certainly makes those two branches, the one now let for 460,000*l.* per annum, and the other for 160,000*l.* per annum, so much less worth to the king every year, as 88,000*l.* and 35,000*l.* amounts to: so that I presume I may justly conclude, this advance-money must of necessity be accounted as a debt left upon the revenue; unless my lord of Danby can demonstrate, that while those sums are repaying the advance to those that lent the money, the king does not receive the less for it.

The next deduction, according to my lord Danby's placing it, is 101,000*l.* that was to be discharged by orders to the commissioners of excise, on the first act for disbanding. This 101,000*l.* and the 99,000*l.* mentioned in the next deduction, amounting to the sum of 200,000*l.* was double security in the hands of sir John James and partners, to enable them to carry on the payments that should be charged on the excise: And in this perplexed condition the present lords commissioners of the treasury found it at Lady-day 1679.

The 99,000*l.* will receive its proper answer in the next paragraph; and this 101,000*l.* to be discharged by orders, did not come in till some months after, by the tax on which it was assigned: Nor was this sum comprehended in the Examiner's charge, and therefore ought not to be deducted out of it: So that without either malice or mistake, the charge on the revenue was as it is set down by the examiner (notwithstanding this pretence, among others of a deduction.)

The next deduction, claimed by my lord of Danby, is 129,000*l.* on the surplus of the excise; which my lord would have to be no charge on the revenue, unless the surplus fail, which is not likely.

These are my lord's words; but not intelligible by me, while I take the surplus and the rent both, to be part of the king's revenue: So that in my opinion, if the surplus was charged with this sum, the revenue was

also: And sure my lord of Danby was of the same opinion a little before his going out; for he had almost completed a bargain, to part with the king's title to the surplus, for a considerable sum of money: And I am sure it hath been esteemed by the present lords commissioners as a part of the revenue, and so considerable a part, as hath sometimes come in very seasonably, for many important occasions.

But to make this yet more clear by matter of fact, it will be proper to shew the king's title to the surplus by this short account, viz.

The excise, formerly let in absolute farm, was now granted to Mr. George Dashwood, and others for three years, under a certain rent, with several limitations, and restrictions for the king's advantage: viz.

1. The king had a power to make orders for the better regulating the farmers and their officers.

2. The commissioners were obliged to keep fair books of accounts, of all the duties of excise by them received, and upon oath to give up such books.

3. A certain sum was consented to, for the yearly salaries and allowances to the sub-collectors, and other inferior officers; and in case less than that sum should be expended, the overplus was to be accounted and paid to the king.

4. That at the determination of the said term, in case the whole duty of excise made more than the reserved rent payable by the patent; they the said George Dashwood and others were to have a further allowance for their care of management, proportionable to the overplus; and the residue of the said overplus to be paid to the commissioners of excise, for his majesty's use.

These conditions perhaps had two respects; one, that the excise was better paid when collected for the king, than to absolute farmers; the other, to try to improve it. But however, it appears clearly by the whole, that the king had as much right to the surplus, as the real rent: And since all profits arising by the duty of excise, are alike the king's money and revenue; to allow this a deduction, were likewise to agree, that the tallies so struck upon the surplus, were never to be paid again.

I may therefore presume to affirm confidently, that whatever either of the rent or surplus had any charge upon it, may very justly be esteemed as so much debt left on the revenue. And thus I hope it is evident, that of these three first particulars, (by much the most considerable part of the deductions) there is no colour for allowing the least tittle of them.

"The next deduction claimed by my lord Danby, is the sum of 59,588*l.* which was charged by tallies to pay the forces from Lady-day 1679, forwards to the first of July, being 97 days beyond my lord Danby's time."

This particular I have examined with the pay-master of the forces, and it is acknowledged.

by him to be very true. This deduction therefore ought to be allowed; and when I sum up the whole, I will accordingly subtract it. "The next deduction is for tallies on the customs, made use of to carry on the service of the navy and ordnance beyond the said Lady day 1679, amounting to 35,000*l*."

Concerning this particular, I have received a certificate from the office of the ordnance, very contrary to what is asserted: For they say, "That the late master of the ordnance did obtain from my lord of Danby, when lord treasurer, something like a settlement: but only by a verbal promise of 41,600*l*. per annum, to be constantly paid out of the customs by 800*l*. per week, for defraying the ordinary expence of the office, and to commence from Midsummer 1677.

"That this continued to be paid but till Feb. 10, 1677, being 33 weeks, amounting at that rate to 26,400*l*. which yet was not fully paid before the 13th of May 1678.

"So that at Lady day 1679, the office was in arrear of this allowance no less than 58 weeks, that is, 46,400*l*. and from Lady-day 1679, to Midsummer last 1680, being one year and a quarter, 52,000*l*. in toto 98,400*l*."

"Whereof received, March 19, 1678, by a talley struck upon the customs, by order of the late lord treasurer, 10,000*l*. for the ordinary expence of the said office for one quarter, ending at Midsummer 1678.

"More at several times, by order of the right honourable the lords commissioners of his majesty's treasury, for the ordinary expence thereof till the 24th of June 1680, the sum of 21,414*l*. 6*s*. 3*¼d*. in toto 31,414*l*. 6*s*. 3*¼d*."

"So that then, viz. at Midsummer last past, supposing the said allowance of 800*l*. per week to be continued to this office, there was in arrear the sum of 66,985*l*. 13*s*. 8*¼d*."

"That no tallies struck upon the customs before Lady-day, were applicable to any service done since that time. (Signed)

JONAS MOORE. EDWARD CONYERS.

EDW. SHERBURNE, G. WHARTON.

Office of Ordnance, Sept. 9, 1680."

These are the words of the Certificate; which instead of allowing any such thing as a Provision for carrying on the service of the navy and ordnance beyond Lady-day 1679, it charges an arrear of 36,000*l*. (allowing the talley of 10,000*l*. struck the 19th of March 1678, as present payment) left at that time instead of the sum of 35,000*l*. to carry it on beyond that time. This, as to the ordnance, seems a strange mistake; and what relates to the navy will appear as unlucky, when I come to give the account of that particular, in the charge that is to be added.

"The next deduction is for tallies struck for pensions upon the two last quarters of the excise, viz. Christmas 1678, and Lady-day 1679, about the sum of 33,000*l*. for payment of which money was left in the hands of the commissioners of Excise."

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This particular could be determined no way properly, but by the commissioners of excise; from whom I received a Certificate sent the 15th of September 1680, viz.

"That all moneys received by the late commissioners of excise, are by them disbursed and accounted for, except what is remaining at the foot of their account: and that it doth not appear unto us, that any such sum as 33,000*l*. was at any time left in the said commissioners hands for payment of pensions.

(Signed) DEN. ASHBURNHAM.

ROB. HUNTINGTON, CHA. DAVENANT.
'Excise Office.'

These two last deductions therefore cannot be allowed, unless my lord of Danby could likewise find out a notorious falsehood in the Certificates of the offices. "The next deduction is for tallies upon the Customs restored for tin, which was deposited in Mr. Kent's hands amounting to the sum of 15,000*l*."

I have obtained from Mr. Kent and Mr. Duncombe, the account of this tin, that I may be as clear as I can in matter of fact.

The Account sent me was thus, by way of debtor and creditor.

Tin Account Dr.

	£.	s.	d.
1678.			
Sept. 11. To money lent	-	31,220	17 0
Aug. 13, 1679. To so much allowed to Charles Duncombe, Esq; and Comp. for commission for selling and managing the tin,		711	7 0
Aug. 13. To money paid to the present Lords of the Treasury	4,395	3	6
	<hr/>	<hr/>	<hr/>
	36,327	7	6

Tin Account, Cr.

	£.	s.	d.
1679.			
May 13. By tallies on the customs,	-	10,000	0 0
Aug. 13. By the product of the sale of the tin,	-	26,327	7 6
	<hr/>	<hr/>	<hr/>
	36,327	7	6

By which account it appears, that instead of 15,000*l*. claimed by my lord of Danby, there is but 4,395*l*. 3*s*. 6*d*. to be allowed as a deduction, which I shall likewise subtract, when I come to sum up the whole.

"The next and last deduction is for tallies on the customs, accounted by the Examiner to be unpaid, amounting to 2,342*l*. which were paid" (as my lord says) in his time.

I sent to Mr. Kent, the cashier of the customs, concerning this particular, who sent me word he could not find any such tallies: however, by reason I have no direct Certificate, I will rather admit it as a deduction, than dispute it."

The deductions then to be allowed are,

	£.	s.	d.
1. The tallies to pay the forces forwards to the 1st of July.	59,588	0	0
2. The Balance of the Tin Account, - - - - -	4,595	3	6
3. Mr. Montagu's Tallies, - - - - -	2,342	0	0
	<hr/>		
	66,325	3	6

	£.	s.	d.
The Examiner's charge was,	1,485,570	0	0
From which subtracting the deductions, which are - -	66,325	3	6

The remaining charge will be 1,419,244 16 6
 And that the matter of fact may yet more clearly appear, how the king's revenue stood charged when my lord Danby left it, I must also add three other particulars, amounting to 655,634l. 19s. 6d. (of which sum the present lords of the treasury have paid and satisfied 478,646l. 18s. 6d. viz.

	£.	s.	d.
1. The Moneys left unpaid on the Fifth Part of the Excise, which was - -	83,400	0	0
2. The Debt to the Eastland Merchants, paid by Talley on the Hearth-Money, which was - - - - -	186,585	10	6
3. Upon the Return of Sir John Narborough's Fleet (which had been a long time at Sea) there became a great Debt upon the Navy, which being computed to Lady-Day 1679, amounted to 385,648l. 1s. The particular Account I had in two Certificates from the Navy-Office; of which Sum these present Lords of the Treasury have satisfied	£.	s.	d.
the Sum of - - - - -	208,660	18	9
Ships yet unpaid in the List, amounting to - - - - -	60,273	15	0

268,934 13 9

And the remaining Sum to complete the Debt above-mentioned, being - - - - -

116,714 6 0

385,648 19 9

is supposed either to be paid by Tickets before the 25th of March 1679, or is still unpaid.

The Total of these three Particulars - - - - - 655,634 19 6
 To which adding the Charge on the Revenue before computed, amounting to 1,419,244 16 6

£. 2,074,879 16 0

The total of the whole charge left on the revenue at Lady-day 1679, by this account, appears to be 2,074,879l. 16s.

And as to the proof of all these three particulars:

The first, concerning the fifth part of the excise:

The second, concerning the Eastland merchants:

The Records of the Exchequer will be the evidence. And for

The third particular, concerning the Navy and Fleet, under the command of sir John Narborough,

The charge is according to the two certificates before-mentioned, which I have now by me, together with the others; and am ready to show them to any that doubts the truth of the particulars.

And these present lords of the treasury will be the truest judges whether these charges are justly computed; to whom I submit it; and shall gladly acknowledge my error, if they do not feel the matter of fact to be too true.

There is nothing more remains, as I see, that concerns me, or matter of fact, but a paper delivered by me to his majesty, the 5th of March 1675, which was almost three years after this lord's leaving the staff.

I have not the copy by me; but I remember

I delivered such a paper to the king, and did it out of a sense of duty, to offer to him, whether he in his great prudence would think fit to make some suspensions, and upon that declare payment of the residue, which the revenue would not bear.

I do believe, that as near as I could then guess, the income would be short of the proportioned expence, by the sum mentioned by my lord Danby, of 519,143l. 1s. 6d. which only shews the matter of fact, how much the revenue was impaired, from June 1673 to March 1675.

And the state of it, as it is here now represented, shews as well, how much it was impaired from March 1673 to Lady-day 1679. And his majesty I doubt not but remembers, that I gave him often notice of my apprehensions, how much the revenue was like to suffer, by the way of management; and therefore my proposition to the king, to find a weekly credit, was to help to pay off all tallies, and to bring the government of the king's revenue by specie into the Exchequer; in which those frauds that had been committed, would infallibly have been avoided. Which is quite contrary to what my lord Danby mentions "of putting the three great branches into the hands of undertakers;" and a thing I never thought of. But the propositions I presented to the king, & of

ferred to prove, and could have made good, if he had thought it for his service; which I can make appear by men of the greatest quality, if required of me; and to evidence that it was my constant judgment, that tallies of anticipation would be the ruin of the revenue, I presented to my lord Danby at Windsor, not long after he received the staff, my thoughts of it; and how it was at that time in his lordship's power, to place it in the right way of management; upon which he commanded me to put it in writing, which accordingly I did; and in that paper there appeared no difficulty, but upon the debt due to sir Stephen Fox by tallies on the excise, to whom I was commanded by his lordship to impart the scheme; who seeing it for the king's service, freely consented to receive his debt by the week, by which means the revenue might have been reduced to that way of management, as would have hindered many disadvantages to the king, which since that has happened.

I only give this short account, to shew what my judgment ever was concerning tallies of anticipation, and am at last extremely satisfied, to see my constantly declared opinion approved by the proceedings of these present lords commissioners of the treasury, who use their endeavours to bring the king's revenue as fast as they can, to be governed by record, according to the rules and methods of the Exchequer, which is the common law of England.

Thus, Sir, I have endeavoured to be so clear in what I have done, that it may admit no contradiction; at least, I am not conscious to myself, that I have not in every thing acknowledged truth where it appeared, nor have denied or asserted any thing, but what I had proofs to justify me in; and hope it may give that satisfaction which is desired by you, and intended by, Sir, Your's, &c.

Oct. 13, 1680.

R. HOWARD.

THE EARL OF DANBY'S ANSWER TO SIR ROBERT HOWARD.

I know not whether I should find fault, or thank sir Robert Howard, for his "Account of the State of his Majesty's Revenue, as it was left at Lady-day 1679," &c. Because upon examination it will appear to have done me no injury; and has shewed the Examiner, that there was nothing to be said in justification of any other part of his book, but only what concerned the state of the revenue, as it was found by me at June 1673, and left at Lady-day 1679.

Sir Robert does likewise shew how he detects such scurrilous language as the Examiner is full of: for in my answer, I have but once called a certain untruth, a notorious falsehood, and sir Robert seems to be much offended at the expression.

He shews himself also far more ingenuous than the Examiner was; for he confesses many

errors, although the Examiner be very positive in the defence of them; viz. In his absolute affirming that my salary was never included in secret service. In his double charging of 300,000*l.* on the one-fifth of the excise. And in saying, that the whole tax upon the first act for disbanding the army, was come into the Exchequer in my time, &c. which sir Robert is so much my friend as to acknowledge he believes to be otherwise; although he confesses, that he has not given himself the trouble to examine it: And in the same page he says, he shall not meddle with their arguments (meaning, I suppose, the Examiner's arguments and mine) so as I perceive we must stand upon our own legs for what either of us have said; he being resolved only to give the public an account how the revenue was left at Lady-day 1679, and not to meddle with politic disputes, nor matters of state; which fills the greater number of folios in the Examiner's book.

Sir Robert does also know, that if all the matters of fact contained in his account were true, it could be no crime in me, that the revenue was more or less in debt at my leaving it; unless I had either lessened the income of the revenue, or not truly answered the whole income according to his majesty's directions; or had diverted any of the moneys given by parliament, to other uses than were limited by the several acts: And he does not pretend to say any thing either as to the lessening, or not answering the whole revenue; (but on the contrary, confesses the revenue to be increased in my time;) and for diverting any part thereof, he speaks as if some others did complain to him of it; but I do not understand that he directly charges any such thing himself; nor can any man do it, but with great untruth. Inasmuch, that were it not for some expressions not so becoming a man's own secretary to be guilty of, and that the time of publishing his account hath not been so generously taken, as some men of honour would have done, I should not only have forgiven him, but have thanked sir Robert for the opportunity of clearing the integrity of my management in the Treasury, however I may have been wanting in those abilities which God hath given to himself above other men: And he ought not to blame me, but my understanding, if I could not always comprehend such schemes and projects of his concerning the revenue, whereof I have some still in my custody, which I must acknowledge I do not yet understand, any more than I did when I first received them.

That which makes me complain of the time, sir Robert has taken to divulge himself, is, because it may be too reasonably suspected, that those reasons he gives for having deferred it so many months, are not so probable, as some other reasons may be, which he does not think fit to give; because if his relations were not well at Tunbridge, yet it seems he was well himself: And how a man whose office and dwelling is in the Exchequer, and

who hath so great a controul over it, could want either records or certificates from other offices, so long as he hath taken to satisfy his friend's enquiry, is not very likely.

But these reasons were likely: First, That such an account as this (though I dare say understood by very few that read it) would make a great noise against a man in my condition, in the time of a parliament's sitting. Secondly, That in probability it would be impossible for me, under a confinement, (and who am without power to send for any records or papers, and who am now without the help of those officers who acted then under me) to give any full answer (during the sitting of parliament) to what he has found so many mouths little enough to do, who had all the leisure and helps for it he could desire. Thirdly, That being under accusations in Parliament, I might probably be called upon to answer them at this time: So as I should not only want leisure, but in all likelihood I could not have my thoughts free to attend to such a matter as this, when I had so much greater concerns upon my hands. And Lastly, Though it contain nothing of criminal in it; yet it might be hoped that any small weight which could not receive an answer in due time, might contribute to the heightning of men's ill opinion against one he thought not yet loaded enough with false aspersions.

If this was the design, (as I have too much reason to believe, both from what I have said, and because otherwise I do not believe he would have troubled himself to have writ what he knows will be found to have so many mistakes) I do acknowledge that he has gained so much of his design, that I shall not be able, under my circumstances, to give so full an answer at present, as I hope to do hereafter, if my condition will permit: and I doubt not but to make it appear, that I have said nothing in my first answer, but what I have still good reason to believe true.

In the mean time I shall endeavour to shew the fallacies which are in many parts of his account: the wrong state of the questions to such officers from whence he hath got certificates: So as though the certificates may be true, yet they are not properly applied by sir Robert: And lastly, the disingenuous swelling of the account, to make a noise to the world of a great debt, besides the anticipations, which will appear to be no more any ground for accusing my management, than it hath been of my predecessors, and must be of those who succeed me in the Treasury. As the Examiner I doubt not but knew very well, when he made no mention of it in the range of his malice; who made appear sufficiently, that he would not have spared those, nor any other particulars, to have loaded his charge, but that he knew how easily they would be answered.

As to the fallacious glosses (of which he makes great use throughout) he begins, "That the third quarter of the eighteen months tax was signed (Osborne);" and hopes from thence

to have it inferred, that I had the disposal of some of the money of that quarter; which I can prove that himself knows the contrary (as well as that I never was lord treasurer under the title of sir Thomas Osborne): and from the same reason of my having signed that quarter (which was done at the request of my lord Clifford, and for satisfaction of the creditors on that quarter, that they should not be postponed by my coming to the treasury), he would have it believed that the 21,163*l.* 6*s.* 8*d.* said in my book to be charged by my lord Clifford on the fourth quarter of that tax, was not so: but I must acknowledge he insists not much upon that matter; but ends that paragraph, with a confession, "That he knows nothing of it."

His next pretence is, that upon the three last quarters of that tax, there appears to have been paid into the exchequer the sum of 584,718*l.* 7*s.* 5*d.* which I call but 565,498*l.* 13*s.* 10*d.* all the charges being deducted (as the forgiving any receivers, or their securities, &c.) which is notwithstanding made received in the exchequer, as if it came to be disposeable money to the king's use. And although I cannot now have the sight of originals, I have great confidence that the certificates I received of that matter before my leaving the staff, will prove my computations to be true, when all the circumstances are examined.

He takes great pains to show, "That I did hinder and divert the money of the one fifth of the excise, from being paid into the exchequer, as the act of parliament did direct;" and says "Mr. Duncombe the goldsmith did often complain to him of it." The truth is, I have so often heard Mr. Duncombe complain of sir Robert himself, that he should not for his own sake much regard his complaints: but in this matter it happened, that the 200,000*l.* being lent by Mr. Kent and Mr. Duncombe; and Mr. Kent then being receiver of the customs, from whom sir John James, major Huntingdon, &c. (who were then paymasters of the army) were to receive 2,000*l.* a week out of the customs; and the said sir John James, major Huntingdon, &c. being receivers of the excise, so as the one fifth was to be paid by them to the said Mr. Kent and Mr. Duncombe; an agreement was made, or pretended to be made amongst themselves, (and without any direction of mine,) for the accommodation of the king's service, by Mr. Kent and Mr. Duncombe's taking the 2,000*l.* a week, (which was in their own hands) for part of the money due to them from sir John James, &c. upon the one fifth of the excise: and although some differences did at last arise in this matter betwixt them, yet it was settled in the king's presence at the treasury-chamber, before my leaving the staff; and was so far from being diverted by me, either from being paid into the exchequer as the act directed, or from being paid to any other uses than the direction of the said act did appoint; that I will put the truth or falshood of what either he or I have writ about the re-

venue, upon the proof of that particular. And for the 83,400*l.* which he says was unpaid of the 200,000*l.* I confess I understand not how that could be, when Mr. Kent and Mr. Duncomb might force the receivers of the excise to pay what was due to them on the one fifth, whenever they pleased: besides, that I believe at the time of my leaving the staff, there was 52,000*l.* in Mr. Kent's hands, by an arrear of the 2,000*l.* a week on the customs, then due to sir John James, &c. By which Mr. Kent and Mr. Duncombe might pay themselves so much of whatsoever sum was remaining unpaid to them at that time, on the one fifth of the excise. And in truth the whole matter concerned me no more than it did sir Robert himself: and I have some reason to think, that the Examiner was not so ill instructed, as to have left that sum out of his charge (especially having particularly mentioned it,) if it could have been made any argument against me; which (as I have already said) it cannot be; unless I had either given orders to the receivers of the excise, not to pay the fifth according to the act, or had given them orders for applying any part of it to other uses than the act directed: either of which I do challenge sir Robert, or any body else, to prove; and therefore it was, that I called it, notoriously false.

The next head wherein he is knowingly unwilling to do me right, is, about the Poll Bill, which I find I have spoke so fully to, in my answer to the Examiner, that I see he thinks not fit to make any reply to what I have there said; but only designs to make it a piece of my ill management, that 186,585*l.* 18*s.* 9*d.* (for which he says the commissioners of the treasury have given assignments) is added as a charge upon the revenue, to make up his additional charge at the end of the book, to amount to the sum of 655,634*l.* 19*s.* 6*d.* whereas no body knows better than sir Robert, that the poll Bill was estimated to 400,000*l.* at least; that credit was given by the Act for 300,000*l.* in money upon it, and an indefinite credit for stores beyond the 300,000*l.*; so as no part of the money or credits lent upon that act, was believed would ever have affected the revenue at all; and if ready money was promised to any body upon that act, which was not performed, I am sure no man can say they had that promise from me: and moreover though sir Robert puts this 186,585*l.* 18*s.* 9*d.* as a debt due only to the Eastland merchants, I remember that the sum demanded by them in my time was far less, (and, as I think, not full 40,000*l.*) so that I believe, that reckoning must be swelled by other demands, and is no fault of mine if there be now such a charge on the revenue.

Likewise I find sir Robert brings the same paper, which was quoted by the Examiner for a state of the revenue, as it was made up by my lord Clifford the 10th of June, 1673. I confess I do not see any use he makes of it: But he hopes perhaps that others will, when he has told them, That the original of that

paper was drawn by sir Philip Lloyd: But that can by no means agree with sir Philip's own letter, which is printed in my answer; and sir Robert must give me also leave to doubt it; because I never saw nor heard of any such paper from my lord Clifford, who would probably rather have designed such a paper for my information, than any bodies else, unless the king himself. But the Examiner having said, That he has a copy of it under sir Philip's own hand, may put this matter out of dispute, if sir Robert have but interest enough to procure that copy from the Examiner.

Those points I have already spoke to, (as having been very disingenuously handled by sir Robert) I take to be all the matters of fact mentioned by him, till he comes to the main business, (beginning with the state of the revenue at Lady-day, 1679,) excepting a mistake of the printer, of forty pounds, which he believes hath been made in the Examiner's computation, to the sum of above three millions (although sir Robert calls it a repetition of the former sum (which it is not): And excepting an acknowledgement he makes, That the customs never yielded so much as in my time: And excepting the head about secret service, where he confesses that the sum of 252,467*l.* 10*s.* 5*d.* is all that was paid for secret service in Mr. Bertie's name, in three complete years ending Lady-day, 1679: but does add, 14,640*l.* in the said three years, which he does unhandsonely (and contrary to his own knowledge) insinuate, as if the yearly sums for new years gifts (which I am not provided to say whether they be that sum he names for three years or not) were privately directed to be distributed by Mr. Bertie; which on the contrary he knows was the king's constant yearly allowances to several of his servants, and officers, long before my time, and without any alteration of them that I know in my time; so that I might justly have added this amongst the rest, which have had such disingenuous applications made of them; but that I am not furnished to answer, nor do I know what he means by that sum which (with the 252,467*l.* to Mr. Bertie, and the 14,640*l.* for new-years-gifts) he pretends to be for secret service, and to make the sum of 309,556*l.* in the said three years; nor do I know to whom any such money hath been paid for secret service in that time more than the said 252,467*l.* 10*s.* 5*d.* to Mr. Bertie; and of which (as I have said in my former answer) 57,763*l.* at least has been disbursed for public uses, and sir Robert may perhaps be mistaken in this matter as well as he confesses (in the very next paragraph) that the Examiner was, in his positive averment, that my salary was never included in secret service.

Sir Robert begins, p. 174, of his account with the Examiner's charge, and my deductions; but immediately confesses "a mistake of the Examiner, in that charge, to the sum of 58,352*l.* 9*s.* 6*d.*" which it seems is charged by the Examiner as part of the total charge, be-

sides all the advance-money; of which the 58,322*l.* is part, and which I could not have known but by sir Robert's help; so as by that computation, the Examiner's charge upon the three great branches of the revenue at Lady-day, 1679, ought to have been but 1,427,218*l.* 6*s.* 10*d.* and whether it may not be yet less by such double charges, which I cannot know for want of the general particulars of the charge, is very uncertain.

The Particulars which I say ought to be deducted from that Charge are the nine following, viz.

	£.
1. For the Advance on the Excise,	270,000
2. For Advance on the Hearth-Duty,	150,000
3. To be discharged by orders to the Commissioners of Excise on the first Act of disbanding - -	101,000
4. More by Tallies on the surplus of the Excise for 30,000 <i>l.</i> and 99,000 <i>l.</i> being no charge on the rent, except the Surplus fail, - - - -	129,000
5. More by Tallies which were to pay the Forces from Lady-day 1679, to July, following which was 97 days beyond my time;	59,588
6. More by Tallies on the Customs made use of to carry on the service of the Navy and Ordnance beyond that said Lady-day 1679, - -	35,000
7. More by Tallies struck for Pensions upon the two last quarters of the Excise, viz. Christmas 1678, and Lady-day 1679, for payment of which, money was left in the hands of the Commissioners of Excise, about - - - - -	33,000
8. More by Tallies on the Customs restored for tin, deposited in Mr. Kent's hands, - - - - -	15,000
9. More by Tallies on the Customs accounted by the Examiner to be unpaid to Mr. Montagu, which were paid in my time - - -	2,342

Total Sum, 794,930

I agree with sir Robert, "That the examination of these particulars must determine the true state of the Charge left then on the king's revenue;" and by this declaration of his own, that it must do so, it appears that sir Robert did not think any great weight was to be laid upon his following particulars of 655,634*l.* 19*s.* 6*d.* by which he would swell the debt to 2,074,879*l.* 16*s.*

But I can by no means agree with him, nor admit his reasons, why none of the above-said deductions should be allowed, but 59,588*l.* to the forces, and 2,342*l.* to Mr. Montague, (nor does he agree with himself, in some of them) and for the 4,395*l.* 3*s.* 6*d.* which he alloweth on the tin account, it will appear in its proper place to be over and above the 15,000*l.* deducted for the tin in my computation; and must therefore in its due place be added to my former deductions.

As to the advances which are his first exception, it is to be observed, that sir Robert as well as the Examiner, makes use of a pretended paper, of the lord Clifford's; but omits to draw from thence (as the Examiner doth) a state how the revenue was left charged by my lord Clifford; and yet without doing that, it is impossible to compare whether the debt be increased or decreased since that time: Inasmuch that this omission must be for some other end, and serves particularly that it may not be seen (as it must be by drawing such a state) and as it was in the Examiner's book, That the advances in my lord Clifford's time were accounted no part of the debt upon the revenue; and I wish that all his Majesty's debts were in such a condition as would always discharge itself, and yet leave his majesty the full use of his revenue: And although sir Robert be of another opinion, I cannot help believing, that if all his majesty's revenue was brought into the same way, which I brought the excise, viz. of being let upon a certain great rent, and that secured by a great sum advanced, and the overplus (after certain salaries paid for management) to be to the king's own use, with an encouragement to the managers of increasing their wages by a small allowance out of every pound, which they can improve beyond the sum secured; the whole revenue would be increased by the industry of the managers (who in that case work for themselves as well as for the king) much more than would pay the interest of the sums advanced; as hath been made appear by the overplus of the excise in my time; and which, I fear, it would not have done by any who had only taken pains for the king, without any prospect of gain to themselves more than their bare salaries. But to conclude this point, since it hath never heretofore been reckoned in the state of the debt (not by the Examiner himself) and his majesty having the use of his whole revenue, notwithstanding the advance-money, and that sir Robert's best reason, is only, That he is of opinion it might be better done by management without advance: I suppose these first and second deductions will be thought but reasonable, and I must here desire it may be observed, that sir Robert says, I have reckoned the advance on the excise 20,000*l.* more than really it was; and yet in the end of the very same paragraph, he confesses that the advance on the excise indeed was as much as I call it, viz. 270,000*l.*

My third deduction is 101,000*l.* to be discharged by orders to the commissioners of excise, &c. as aforesaid.

To which sir Robert gives no colour of contradiction, only he says, It was a part of a double security given to sir John James, &c. by which he acknowledges there was so much money in their hands for the discharging of tallies; and then, whether it was in the Examiner's charge or no, is no great matter, nor is it less to be allowed for one of the deductions: Only here I do observe sir Robert is so intimate

with the Examiner, that he knows of what particulars the Examiner's charge is made up, which I should have been glad to have known either from the Examiner or sir Robert; and then I could have answered more particularly every part of the charge, in the same method as I do now set down every particular, of the deductions which ought to be allowed.

My fourth deduction, is 129,000*l.* by tallies on the surplus of the excise, which I say is no charge upon the rent; and yet sir Robert says, that I say it is no charge on the revenue; which I do not say; and the difference I make herein, is, because I found the revenue of the excise let at a certain rent of 530,000*l.* per annum, at my entrance to the treasury; which I first raised to 550,000*l.* per annum, and then to 560,000*l.* per annum; and it was never let for more than that sum under any certain rent; and it was at the said rent of 550,000*l.* and no more, which sir Robert made his calculations concerning the state of the revenue to the king, in 1675, about which something will be said in its proper place: But I mention this now, to shew that this branch of the revenue was no more impaired by me, than himself confesses the customs to have been in my time; and it is as well known that I raised the hearth money from 145,000*l.* per ann. to 162,000*l.* per ann. so that how he will make out the revenues being impaired from June 1673, to March 1675, and from March 1675 to Lady-day 1679, as he says, I do not understand: Since therefore the highest rent of the excise was but 560,000*l.* per ann. and that by my way of letting that branch, betwixt a farm at the said certain rent of 560,000*l.* and a management accountable to the king for the overplus, there has arisen a surplus of 129,000*l.* and more beyond the said rent of 560,000*l.* I think it ought to be allowed as a deduction, the revenue not being abated by it; but on the contrary is accounted at 560,000*l.* per ann. which is 10,000*l.* per ann. more than sir Robert accounts that branch of the revenue in his computations to the king, and is 30,000*l.* per ann. more than that part of the revenue was let for at my entrance to the treasury, which is the time taken for making the comparison betwixt the charge on the revenue then, and at my leaving the treasury in 1679. So as in truth I might justly (though I do not) account all the increases of the revenue on any branch of it in my time to balance the increase of the debt in the said time; and then I am sure the total of the debt would be much less than it was when I entered to the treasury; but I have only accounted this one surplus, because it could not be depended upon as any certain rent; nor was it charged to any certain uses, as all the certain rent of the excise was; but was applicable to such uses as his majesty should direct.

My fifth deduction, is 59,588*l.* to the forces, &c. which sir Robert is pleased to allow.

My sixth deduction, is 35,000*l.* made use of to carry on the service of the navy, ordnance, &c.

And my seventh deduction is 33,000*l.* for tallies struck for pensions upon the two last quarters of the excise, &c.

These two last, viz. the sixth and seventh, I have put together, because sir Robert hath got certificates in these two particulars, seeming to contradict the reasons given by me for the allowance of them as deductions from the charge; which I am glad to find is all he can pretend to contradict by any authority; because both the sums together, if they were not allowed, do amount but to 68,000*l.* and (as I have remarked before) he acknowledges, that the Examiner hath mistaken 58,352*l.* 9*s.* 6*d.* by a double charge of so much of the advance-money; so as the difference of my first computation would be lessened but 10,000*l.* if these two sums were not to be deducted; but to shew that the matter of fact is as I have said in both these particulars, I must shew that those certificates (if true) from the ordnance, and commissioners of excise, are nothing to the matter he pretends to make out by them: for as to the ordnance, I must needs say, that it was not only the office from which I could get very little of any accounts in my whole time; but notwithstanding any directions or orders to the contrary they would take no notice of that stop which was put to the exchequer before my time; but did apply those moneys to payments under that stop, which were ordered to the payments of service forwards; so as it was impossible for me, without entirely discharging the old debt of that office, to have brought up their payments to the time of my leaving the staff; and this makes the latter part of my time seem not to be provided for in that office: But I do say that tallies struck in my time to the sum of 35,000*l.* (and which is reckoned as part of sir Robert's charge of 1,419,244*l.* 16*s.* 6*d.*) were paid after my time, and the money applied by the present commissioners of the treasury in the stead of other money, which they must have paid. And sir Robert himself knows that these lords commissioners, when they appointed a weekly sum out of the customs, of 2,000*l.* a week, to discharge the debt by tallies in course, made use of tallies struck for the navy, ordnance and forces in their course too; and by that means had so much also of the 2,000*l.* a week, which they applied to the payment of the several offices; as I doubt not but both the commissioners of the treasury, and paymaster of the forces will own: and to say this was no carrying the offices of the navy and ordnance forward beyond the time of my leaving the staff (because it did not pay the whole debt of those two offices) is no argument; for until the whole debt can be paid, all payments are directed in course: and as I paid debts before my time, (especially to the navy) so these gentlemen must pay before their time; and so must the payments of any who shall succeed them be applied to the payment of ships and yards, &c. due before their time, unless it may be supposed that ships abroad,

&c. at the alteration of the treasury into other hands) shall never be paid.

But had sir Robert sent to the office of the ordnance for a certificate, to know how much money I had paid them in all my time, and what the accrued debt was in the said time, I doubt not but it would have appeared, that I had supplied more money to that office, than would satisfy the whole debt accrued in the said time.

As to the 33,000*l.* or thereabouts (for I have not positively named that sum) the matter of fact is,

That a stated sum for pensions was directed yearly; so that if tallies were not struck, yet the money remained in the hands of the commissioners and receivers of the Excise, until such tallies were struck: and that this money did remain in their hands at my leaving the staff (in part of a greater sum) sir Robert who was one appointed to state their accounts, cannot but know; as also that those commissioners and receivers (being to be laid aside) did apply all the cash in their hands to tallies in course, and paid over this 33,000*l.* or thereabouts, and the other moneys in their hands to discharge tallies in course; and such tallies as are reckoned part of the charge left by me on that branch of the revenue.

But the said commissioners and receivers of the Excise, might perhaps give the present lords commissioners of the treasury an account of little or no cash in their hands, for the reasons aforesaid; and yet this is no manner of argument to prove what sir Robert would infer by his printed paper; unless, as he had lessened thereby my deductions, he had also lessened the charge as he ought to have done: knowing that with the money in their hands, at my leaving the staff, they really paid as much in tallies, which are a part of the charge said to be left by me. And this sir Robert would have writ to them to certify, they must have owned to be true: and consequently (from what I have said concerning these two deductions (I hope others will think them reasonable, although sir Robert do not.

My eighth deduction is 15,000*l.* by tallies on the customs, &c. This I must needs say was not so plainly expressed, as it ought to have been in my former answer: for these tallies were given to Mr. Kingdon (then paymaster of the army) and not being made use of by him before my leaving the treasury, they were since delivered by him, to the present lords commissioners of the treasury; so that they relate not to that account which sir Robert hath taken the trouble to set down. But I am sure sir Robert knows it to be true, that such tallies, to the sum of 15,000*l.* were delivered up by Mr. Kingdon to the lords commissioners; and he ought therefore in justice to have added them to that sum of 4,395*l.* 3*s.* 6*d.* on Mr. Kent's account; for the knowledge of which I am beholden wholly to sir Robert, because otherwise I should have been ignorant of that deduction.

My ninth and last deduction, is 2,342*l.* by Mr. Montagu's tallies, which sir Robert is also pleased to admit.

Having gone through the deductions, and having given the reasons on which they are grounded. I hope they are so clear as will give every body satisfaction; and I shall now follow sir Robert's method, by taking,

	£.	s.	d.
First, the Examiner's charge			
which was - - - - -	1,485,570	0	0
Then subtract my former			
Deductions, which were			
794,930 <i>l.</i>			
Then subtract likewise the			
deductions now to be added			
by sir Robert Howard's			
assistance amounting to			
58,352 <i>l.</i> 9 <i>s.</i> 6 <i>d.</i> which is			
double charged on that ad-			
vance of Excise; and also			
4,395 <i>l.</i> 3 <i>s.</i> 6 <i>d.</i> deducted on			
Mr. Kent's account of tin,			
viz. 62,747 <i>l.</i> 13 <i>s.</i> 0 <i>d.</i>			
Which together amounts to			
the sum of - - - - -	857,677	13	0
And the remaining charge			
will be - - - - -	627,892	7	0

I suppose sir Robert admits the charge left on the three great branches of the revenue by the lord Clifford, to be as I have said in my answer, viz. 469,371*l.* because he says nothing against it; and in that computation are neither reckoned advance-moneys, nor moneys unpaid to ships, &c. which amounted then to above treble the sum sir Robert now reckons to sir John Narborough's fleet.

	£.	s.	d.
And then, the charge left by			
me on the said three			
branches being put - - -	627,892	7	0
And the Charge by my Lord			
Clifford, being - - - - -	469,371	0	0

The Anticipations are increased in my time, viz. in five years and three quarters (although no supplies were given by parliament, but what were appropriated, and were so applied) only by the sum of - - - - - 158,521 7 0

And as I have said in my answer to the Examiner, that I paid in that time, 318,473*l.* to the goldsmiths for their perpetual interest, which is almost double the sum increased upon the anticipations: besides the rebellion of Virginia, &c. which I have mentioned in that answer, and therefore will not repeat them here.

Before he closes his account, sir Robert thinks fit to add to the Examiner's charge, A further charge of 655,634*l.* 12*s.* 6*d.* by three particulars, viz.

	£.	s.	d.
Unpaid on the one fifth of the			
Excise, - - - - -	83,000	0	0
The Debt of the Eastland			
Merchants, - - - - -	180,584	19	9

The Debt to the Navy upon the return of sir John Narborough's fleet, - - -	385,648	19	9
Of which he says the present Lords Commissioners of the Treasury have paid and satisfied, - - - - -	478,656	18	6

I suppose the Examiner knew nothing of this matter, or certainly it would not have been omitted by him : and I must here observe, that what sir Robert calls in me, a charging the revenue by tallies, he calls now in others, a satisfying of creditors, although it be the very same thing, and by tallies at a very great distance of payment : which if I had done, I perceive sir Robert would have made no use of for me, but to have added it to my load of anticipations.

For the 83,000*l.* as I have already said (and am very confident of the truth of it) there was remaining in Mr. Kent's hands at Lady-Day, 1679, 52,000*l.* for 26 weeks, of 2,000*l.* per week on the customs due to sir John James and partners ; and for the remaining 31,000*l.* or for the whole 83,000*l.* I know no man that either did, or could have protected them from the payment of it, according to the act, if Mr. Kent and Mr. Duncomb had prosecuted the receivers of the excise about it ; nor did I ever use any authority or other means in that matter, betwixt them, than by persuading them (as I did all men, who were concerned in the king's service) to accommodate one anothers occasions in their several employments, as far as their own safeties and conveniences would permit : nor should I have either charged the king or any but the receivers of the excise themselves, to have made satisfaction to any body for any sum which was due to them by virtue of the Act of Parliament out of the one fifth of the excise.

For the 186,585*l.* 19*s.* 9*d.* (which sir Robert calls the debt to the Eastland merchants, and which I do not remember to be so much in my time as 40,000*l.*) it became a debt by the money of the Poll Act falling so infinitely short of what it was calculated to be by the parliament ; and for which there will be found very little of my directions ; insomuch, that as I did not charge the revenue with it, in my time, so I take myself to be no cause of the accruing of that debt.

For the 385,618*l.* 19*s.* 9*d.* due to the fleet upon the return of sir John Narborough, I wonder sir Robert will name it, when he is comparing the state of the debt left in 1679, with the debt left in 1673, when he knows how vast a disproportion there is betwixt that debt to the navy, and this in 1679, the sum then due to the fleet being much above a million : so that I look upon this last addition to be (as I have said before) only to make a noise ; besides that sir John Narborough's fleet came in since I was out of employment ; and, I thank God, I am able to prove that there never was three ships in all my time, that were not paid off with ready money ; and as soon as the ship

books were perfected by which they were to be paid.

Lastly, If sir Robert will give me leave to reckon, as the Examiner hath done, I may reckon the advance of the excise, viz. 211,647*l.* 10*s.* 6*d.* (for sir Robert does acknowledge, that I had only disposed of 58,352*l.* 9*s.* 6*d.* of the 270,000*l.* advanced on that branch) to be so much in ready money, towards payment of the said fleet.

So that upon the whole, I can no more conceive these three last particulars ought to be added to the charge of the revenue in my time, than the Examiner did, when he had mustered up all he could think possible to be laid to that account ; and for the particular of the ships, it is impossible but there must always be a debt to be paid by whomsoever shall succeed in the treasury, only it will be less or bigger, as the ships kept abroad are more or fewer in number ; insomuch, that sir Robert needs not give himself the trouble of proving this particular with that care which he seems to take about it.

Most of p. 157, is taken up about sir Robert's paper which was given to the king the 5th of March, 1675, by which he says " he intended other uses than have been mentioned in my answer to the Examiner."

I shall say more to that paper and some other of sir Robert's schemes, as also to some managements of his own in his office, and his mistaken certificates, (which I have in my custody) when my leisure will give me leave to ask him the meaning of them : In the mean time his paper of the 5th of March being printed in my answer, every man is at liberty to make his own construction of it : and not being present myself at the delivery of it, I can only say what was told me when I received that paper, from those whom I do perfectly believe. One intent of the paper, sir Robert says, was to prevent those frauds which had been committed in the Exchequer ; but since he hath not thought fit to instance any one particular of those frauds, I am apt to believe, he either knows none, or none that he is willing to speak of ; for he knows, that if any fraud came to my knowledge, as some did, I made it always to be examined in public ; and I take it for one of the highest vindications of my integrity in the Treasury, that sir Robert cannot charge me with any other applications of money to my own use, out of those great sums which have passed through my hands, more than the sum of 2,747*l.* 5*s.* 11*d.* bestowed upon me at the making up of my account as treasurer of the navy : whereas there are good store of instances of lord treasurers heretofore, who from less foundations of estates than myself, have left visible monuments of more money laid out in some one single building of theirs, (besides the estates added in proportion to them) than I have got in near six years enjoyment of the same office : So that since the blame can only be laid upon my management (who could be no wiser than God had made me) and not upon any corrupt actings in my employment ; I do not

only willingly undergo sir Robert's rebukes, but do acknowledge my own failings, and hope that by sir Robert's good advice, his majesty will for the future be served as he ought to be.

In the last page of his account, sir Robert says, "it is only to give a short account, to shew his judgments concerning tallies of anticipation, and how extremely satisfied he is" (which I verily believe) "to see his opinion approved by the present lords commissioners."

He has mentioned something of the anticipations in the beginning of his account, which I passed over in that place, because they would more properly be spoke to both together, as also the matter of interest depending upon such anticipations.

And in the first place, I do agree with sir Robert as much as any body else can do, that it is better to avoid tallies of anticipation, where it can be done, than to make use of them; but that the revenue must be ruined by them, I deny; or that the interest is left to any such uncertainty, as he would have believed; but that it must be by the knavery of the lord treasurer, chancellor of the exchequer, or the sworn auditor of the exchequer, before whom the account is brought) if the king be wronged in what interest he pays upon such tallies.

I doubt not neither, but the present lords commissioners of the Treasury have endeavoured to avoid such tallies; and so did I, till I found it impossible for me to help it; and (if I am not misinformed) although the present lords commissioners have spared 2000*l.* a week by their other retrenchments, to discharge tallies, which I was not able to spare, and supply the king's other occasions, yet those tallies which were in course, being paid, I hear and have good ground to believe true, that now the lords commissioners are necessitated to comply with some lenders of money so far, as to give them tallies of anticipation to a considerable sum: Nor do I know how it can be helped, unless sir Robert can be able to do more by his legislative capacity for remedy of the matter, than he will ever be able to do by his private; and if this be now the case, as well as it was in my time, then by sir Robert's rule, the exchequer will still be no wiser than it hath been, in knowing when interest is to commence upon such tallies.

It is true, that the exchequer does not presently know the commencement of interest upon anticipations; but I doubt not but the lords commissioners do take care, that the vouchers, though called private ones, shall be as authentic as public ones: And it is the duty of a sworn auditor to see they be so, from whence they are entered in the exchequer; and from that time the exchequer does know the times of lending upon tallies of anticipation, and consequently the charge of interest upon them; so that the bugbear is made far more terrible than it is, although, as I have said, it were better to be avoided, if the king's necessities will permit.

I have now gone through sir Robert's ac-

count, and hope I have made appear that the state of the revenue at Lady-day, 1679, was not as it hath been represented either by the Examiner or sir Robert Howard; and since sir Robert's friend, (to whom he writes) had no curiosity to enquire into those other parts of the examination which concerned the affairs of state therein mentioned, I shall repeat nothing upon that subject, but conclude that his friend is satisfied in those matters, which are of much the greatest concern to me: But I hope it will be taken notice of, that both the Examiner and sir Robert (how much soever they may be stangers to one another) have carried on the same design against me, as if it had been with the same hand; saying, that sir Robert has shewn himself to be the better accomptant, by rectifying divers errors in the Examiner's computations, and that he has been much more civil than the Examiner in his language.

I shall conclude this answer to sir Robert Howard with this single request to all my countrymen; that they would not believe any thing against me by reports, till they see it proved: And then I shall desire no other favour, so I doubt not but to be restored to this good opinion of all such, as have not particular prejudice against me.

March 20, 1679.

The House of Commons resumed the Proceedings relating to the earl of Danby's Impeachment, when, among others,

Mr. *Foule* delivered himself as follows:

Mr. Speaker;

I should have been pleased to have heard, what was needful to have been spoken unto, from some other member of this house, rather than myself; it is concerning the earl of Danby, who stands impeached by the Commons of England of high-treason.

The person to whom we owe the dangers and fears of the French king against us.

The person to whom we owe the threats and severe answers to those humble addresses we made the last sessions of parliament.

The person to whom we owe the ruin of this nation and exhausting the king's revenue.

The person, to whom we owe the expence of 200,000*l.* and upwards, within a year, unaccounted for.

The person to whom we owe the many prerogations that happened in the last parliament, when many profitable bills were ready for passing.

The person to whom we owe the raising of a standing army, to be kept up by the receipt of six millions of livres yearly, for three years together, to enslave us and our religion.

The person to whom we owe the late hose that was thrown in the sitting of the last parliament, to hinder the good issue that might have come by their proceedings; who is now laying down his staff, and making up his ac-

compts in the treasury as he pleaseth, to enrich himself out of the spoils of the people, and so depart.

My humble motion is, That a messenger be sent immediately to the Lords from the Commons of England, to desire their lordships, That Thomas earl of Danby be immediately committed to safe custody, he being impeached by the Commons of England of High-Treason.

Upon debate the House came to this resolution :

“ Resolved, Nem. Con. That a Message be sent to the Lords to put them in mind of the Impeachment of High-Treason, exhibited against Thomas earl of Danby, in the name of the Commons of England; and to desire that he may be committed to safe custody.” Resolving again, “ That it be referred to the Committee of secrecy to draw up further Articles against him.”

March 22. The Black Rod summoned the Commons to attend the king immediately in the House of Lords, where the king said ;

“ My Lords and Gentlemen ;

“ I should have been glad to see you had made any good progress in the matters I called you for. I perceive that your proceedings against my lord treasurer have hindered you therein. I am therefore now come to put an end to that business, such as I hope will be to your satisfaction. I have given him my pardon under my broad seal, before the calling this parliament, for securing both his life and fortunes, and if there should happen to be any defect therein, in point of form or otherwise, I will give it him ten times over, rather than it should not be full and sufficient for the purpose I design it. I never denied it to any of my servants or ministers, when they quitted their places, as lord Shaftsbury and the duke of Buckingham well know. Besides, I must inform you, that there are great mistakes in those matters concerning him. For the letters were written by my order. And for the concealing the plot it was impossible, for he had heard nothing of that but what he had immediately from myself. I have dismissed him my court and councils, and not to return. Public business presses hard, and therefore I recommend them to you to go speedily upon them.”

The Commons being returned to their House, the following debate ensued.*

Mr. Bennet. As there has been too much heat used here formerly, so I hope this House will not be too cool now. If pardons go on at this rate that the king has told us, we are in a desperate condition. In Spain, when a Don is sent to a government, and is accused of ill administration, the court squeezes some money out of him, and he is pardoned, and the next Don that governs does the same, and so thereby their government is become most despicable. France is grown great by a contrary method. There is a chamber of accounts,

and what the officer has got more than the usual perquisites and profits of the place he must refund, and that goes on towards the war. Our case is much worse. When a minister falls, as in lord Clarendon's case, there was an act of banishment, and now, in the treasurer's case, a pardon. The lawyers can best tell you whether this pardon is good in law. Instead of squeezing a minister that has been faulty, he goes away with 247,000*l.*—An army raised—And the fleet unpaid, with Popish captains in it! When he put the Papists in, then the plot opened upon him. We shall be still worse, if this minister rides off thus unpunished, and it will be always thus, whilst, after an impeachment of high treason, any man shall go at large. It is for the safety of the king and the nation, that a minister be afraid of this House. If you let this minister go thus, three years hence you may have such another, and, in time, we shall be all beggars.

Sir George Hungerford. Suppose the treasurer be commanded by the king to do an ill thing, as the writing those letters to Mr. Montagu, &c. let him plead his pardon at his trial. We are not to take notice of it till then.

Mr. Wogan. As the matter stands upon Impeachment, the pardon may be pleaded. Such an impeachment or information he must plead his pardon for, at his arraignment, and not before. We cannot take notice of it. Matter of fact cannot be pleaded against matter of record. We ought therefore to desire the lords, that he may be secured to answer his charge.

Sir John Knight. In the treasurer's last letter of 25th of March, Mons. Barillon, the French ambassador, and he, made up a peace, when that letter was written without the king's direction. When a man comes to be tried, then is his proper time to plead his pardon. This man must come to trial, to shew the world, how ill a minister he has been to the king. All things have been done by him, and not by the king and council. Therefore, pray go on with the articles of impeachment, and let him plead his pardon upon his trial, and shew himself a traitor to both king and kingdom.

Sir Nicholas Carew. If you should go by address to the king, &c. as sir Robert Markham has moved, let it go with a representation, in what condition the nation is in. We have neither ships, money, stores, nor alliances, that I know of.

Mr. Booth. I think this is the first time, that either any king, or this king, sent for a House of Commons to attend him about such a business as this. I will not say that this is crossing us in these great matters, but it looks like it. The king has told us, “ that it is usual for him to pardon his servants when he discharges them, &c.” If it be a custom, it is an ill one, and the worst that can be. But if such pardons be justifiable, they are not so in this man's case. No story can parallel the villainies and wickednesses of this man. The king tells us, “ he

* See Grey's Debates, vol. 7, p. 40.

would have us mind the great business of the nation." you have no greater business than this. If these pardons are thus obtained, it will be such an encouragement to rogues! If the king will give us up, let us do our duty notwithstanding.

Mr. Leveson Gower. If the speaker had remembered all the king's speech, he would have reported all. The king said, "he has given this lord his pardon before the parliament met, and has done no more than he did to the duke of Buckingham and lord Shaftsbury." And I think, if he be so removed, as you are told, by the king, that the nation is not in danger, and the king says, "he will pardon him again and again."

The Speaker. I will not say, that the king did not say the words of "pardoning him again and again," but, on my credit, I do not remember them.

Mr. Powle. The king said "all those that had quitted his service he gave pardons to, as you will find Buckingham and Shaftsbury had." But, "that he would pardon him again and again." I did not hear.

Sir Charles Harbord. It is ordinary for a minister or secretary of state to say, "Sir, I am going off from your service. Pray let me have your pardon." Lord Bacon, Michell, Mumpesson, lord Middlesex, lord Suffolk, had pardons. But did the king ever pardon any one after an impeachment was against them? This way of pardoning (an impeachment depending) is of the most dangerous consequence in the world, both to king and people. I have said this fifty years ago. In the last king's time, projects and monopolies flew about, and I was troubled about them; those reduced the king, the best of kings, and perhaps of men, to own them at the council-table. It is a destruction to the laws of the kingdom, and of the people. Take away the hearts of the people, and you ruin the king in countenancing these things. When the treasurer of the kingdom disposes of the public treasure, for the king's recreation, still it is *pro bono publico*. It is *crimen laci imperii* to destroy the treasury, which is for safety of the people. How shall the Commons be able to support the king, that he may aid his allies abroad, when the treasury is wasted? Whoever does this, commits treason against his allegiance. I move that you will make a remonstrance of the state of the kingdom.

Sir Henry Beaumont. I am glad to find reasons and arguments the same to day as they were yesterday. I am glad no crime is too big for this House to punish. If the treasurer be not suspended in this sense, I hope he may be in another.

Sir Thomas Clarges. I would have you represent to the king all the evils that may issue from this pardon. The king in his speech, at the opening of the parliament, says, "that we were best able to vindicate him from the calumny put upon him by the worst of men." Nothing can make the king more happy,

or shine in greater lustre, than his parliament. This is no factious parliament; no bands of pensioners are here. Here the king's sceptre is of gold and not a rod of iron—And the king shines in his greatest lustre. Though the king has pardoned my lord treasurer, the like was never done in any memory, when the whole body of the kingdom hold up their hands for justice against him. Those about the king have his ear, and represent things to him. If those about him (*protectio trahit subjectionem*.) intercept his grace from his parliament, not two nor ten can protect the king at Whitehall. Let us, in what we do, beget a confidence in the king. But still these unhappy actions and advices are the king's own; when we should deliver him from them, they are put upon him, and what those about him advise, is ill advice. I hope what Gower said may be forgotten, and I second the motion for an Address, &c.

Mr. William Harbord. As for the pardon, I know not what that is, nor what means "pardoning for murder;" which the king cannot pardon, because it is a crime against a greater than himself, against God. Some things the king will not pardon. Suppose any man had sold forty or fifty ships of the king's to the French king, or burnt them, does any man think that the king would pardon it? Let us proceed with safety to the king and ourselves. The lords have refused you justice, and have not committed the treasurer to custody, and you ought to insist upon it as your right. When the earl of Middlesex was charged in parliament for embezzling the king's stores, he was immediately sequestered from parliament. This parliament has impeached the treasurer, and the lords deny us justice, which their ancestors ever did us. As the king comes towards you, so I would have you go towards the king, and I believe the king will never allow those letters to have been by his own order, but that the treasurer has been well paid for it by somebody. I can never believe that the king is so ill a man, that, when a war was depending, &c. he should order those letters, to bargain for a peace. I desire justice against the treasurer, in the name of all the commons of England, but yet with all good manners to the king. I would have a Committee to draw up a representation to the king of the miserable state of the kingdom, and that this gentleman is the occasion of it. If you suffer this pardon to pass over so, you will never discover the plot. And if the advice of this gentleman had been followed, some heads of the last parliament that were troublesome to this gentleman had been cut off. A gentleman told me this morning of sitting of evidence, by the artifice of somebody or other, (pray God it be not a member) that a principal witness is left out—Because a pardon stifles all evidence. Put both questions, the one for the representation, &c. and the other for the right of the Commons, in having the treasurer sequestered from parliament.

Mr. Sterne.* We have spent much time in talking of the treasurer's pardon. Every one knows the king's power of pardoning; cases of appeal only excepted; but if you will have a Bill to restrain the powers in them, that may prevent it for the future. All laws that are made, are to restrain that unlimited power in the king, for without those laws, all power is in the king. (He was out, and could proceed no farther, and Mr. Seymour pulled him down.)

Sir Robert Southwell. One word has dropped from Mr. Harbord, "that there is an abominable evidence concealed, in the murder of sir Edmundbury Godfrey." I would have him named.

Sir Thomas Lee. Pray let no interlocutory discourse divert us from the question, of sending to the king, as was moved.

Sir Francis Winnington. The rights of the crown are not only in the case of this pardon, but of us and our posterity when we have done. I never had any difference with this lord, but as an enemy to the king and the nation. Now what is your duty to do in this case upon the king's signification of his intention of pardoning the treasurer? which I suppose is, as it were, asking your advice in it. If the king will pardon the treasurer, without all controversy he has acquainted you early with it, to be advised by you, I apprehend, that is the reason why we entertain the debate. If the king proposes it as a legislative case, then it is but to give the king advice what is fit and convenient to be done and advised. But if you consider it as you are prosecutors, then you are to consider the legal part; and I will consider both. He that stands charged, and pretends to a pardon, confesses the crimes he stands charged with; he takes sanctuary, and pleads his pardon under the great seal of England. The law of England says, "that by taking a pardon, he confesses the crimes he stands charged with." This being considered, what is fit in this case for us to do? A pardon once granted is not the law of Medes and Persians, not to be revoked. They have been damned in Westminster Hall, much more may they be here. And now what is fit for us to do? What is this lord guilty of? Either his pardon is commensurate to his crimes, or it will do him no good. A less crime than of assuming royal power was in the Spencers case in Edw. 2's time. The treasurer has exhausted the treasure of the crown, by acquiring a great estate to himself, &c. and endeavoured to stifle the discovery of the plot, when it was just coming to light. Now the king communicates his pardon to you, for these and several other offences, &c. for your advice. In this matter I will speak plain, and discharge my conscience. The law of England is of an admirable composition. When great men are in the presence of the king, I must believe, that persons, in their several

stations, are good or bad, according to the effects of their ministry. Should a minister of state have endeavoured to subvert the government, parliaments have power, by 25 Edw. 3, to declare that treason, and it is the wisdom of the government to leave that declaratory power to parliament, that no man, though ever so great, may be able to struggle with a parliament. This lord's crimes are so well known, that a man cannot pretend to be unprovided to speak to them—When came this great lord in? When Popery came, and the Protestant Religion was discouraged, and no fitter man to succeed lord Clifford, than sir Thomas Osborne, a private gentleman in the country! Have not French councils and Popery prevailed and the triple league been broken? And had the plot gone on, nothing could have saved our religion but a hand from heaven. No man has been preferred in court, but a friend to the French government. Money was given by the parliament for a war with France, and this man, at the same time, treats for a base and dishonourable peace. Though the law was made severe, that the money should be employed for so many ships, yet they are not half built, though Mr. Pepys said "they would be built in a year." And there was 600,000L. gone, for they got the money and prorogued the parliament—Money was given to disband the army, and that money was spent to keep them up, and then we were prorogued: But we have been so bit before, that no appropriating clause we thought would serve turn, if the money was lodged in the Exchequer; and so the chamber of London was thought of, to place it there; and this, you were told, was against the king's prerogative, and gave offence; though in the Palatinate War, the same thing had been done before, and so the parliament was sent home; and this lord is the person that breaks all your laws. A message was sent from the king, the last summer, "That things abroad had all tendency to peace, but because of several emergencies of state, the king was advised to ask of his parliament such a revenue as might bear proportion with his neighbouring princes, the better to carry on and support the government, &c." This project was then brought into the House, and then gentlemen said, "That it was a subverting the government, and the way to make parliaments useless." And though many gentlemen in the last parliament were willing to give money to the king, yet they supposed the granting the king so great a revenue as he then demanded, would make their use in parliament cease, and so become insignificant. And upon their giving no money, their mettle broke off, and they had no money. This lord must be the person that has done these things. How could this revenue, that the king asked of us the last parliament, be brought to adjust that sum, but by him that knew and adjusted the treasury? Things coming to this head, say they, "How shall we relieve ourselves?" Out comes a plot, too hard for the statesmen

* The Archbishop of York's son.

to suppress; and this demand was as a refuge to the statesman. They fly then to a pardon for refuge, when the letters this man is impeached for are all under his own hand, to subvert the crown as well as the people. He that sets up Popery suppresses the royal family—The spiritual pope, and the temporal power of France, suppress both soul and body. But in the close of the last parliament the inequality was so strong, that the strength of the pensioners did signify nothing, and the king sent them home and dissolved them. And I thank God here are none of them that I see. Kinspon and Dudley were mentioned; and was ever any man punished for not going against law? It was answered, "That they stretched the law farther than was intended." But shall he be pardoned that has gone against law, and breaks the law? No man is so mean as to have malice in his heart against the treasurer, but the rights of the king are concerned in his crimes, and a good mettle man sets up again, and does the like exorbitances, and gets a pardon from the king, and this shall be a reward for his crimes, and so escape unpunished. Since this pardon of the treasurer's was passed, he has got 5,000*l.* a year for a pension, and 1,200*l.* a year of the *fee farm* rents, which is part of the queen's jointure; and has taken it out of another branch of the revenue, because the queen will not be so kind to him as to die. It has been said, "that the king lets the unfortunate fall gently;" but never that he rewarded a man that has been such an enemy to his king and country. What then shall I propose to you in this case? I would make an address to the king, to take consideration of this pardon, &c.—One word I heard of the king's speech, "that we should not dispute this pardon, though it had not passed the usual formalities, &c." I believe it has not passed all the offices; as the Secretary's, the Attorney General's, the Solicitor General's, the secretary's again for the privy seal, so that a caveat may be entered, and so to the Great Seal. In all these gradations pardons ought to pass, that the subject may enter caveats. But if this pardon has passed *per saltum*, I would move the king not to pass it, and represent to him the inconvenience of it. It is not without precedent that pardons have been voided by *scire facias*, when obtained upon false suggestions, &c. The treasurer could never have got this pardon, but that he used arguments to the king, "that he was for his prerogative, and his sufferings were for that; and so the pardon needed not to pass the usual form, that the Commons might not put in a caveat." I would therefore some way address the king, to represent to him, how unjust it is this pardon should pass, and pray that it may be stopped. If the legality of it be now argued, it is a very improper time. For the legislative part, we impeach him as demandant. The king speaks to us in his legislative capacity; this is nothing to the impeachment that is in the Lords House. It was sent up the last parliament, and the

same Commons of England prosecute the impeachment still—But it is to my admiration that he is not committed to custody, being charged with treason, (when formerly the lords, committed persons when for misdemeanors or only) especially now there are such tricks of rousing away. We say it is not a good pardon, and may have a fatal ship in it, because done in the dark—Let him plead his pardon *in hoc verba*, and we will plead to it. I infer from hence, whether it be lawful, or not? And though the king be surprised in the grant of it, you may not be surprised. A man may have as much injustice in the manner, as the matter, of a grant. If the crimes of the treasurer come to be judged capital, the forfeiture of his 1,200*l.* a year—But those that come after us may say he is an example made of an offender, &c. You can but do these two things, either think him innocent, or make good your prosecution. It is a position in law, "That the king's mercy is boundless;" but upon an appeal, if one kills my father, the king cannot pardon it: I am his heir; I may have vengeance. The king can pardon only what relates to himself, no more than he can pardon an action of debt. I will come a little closer. There are *malis prohibita*, wherein one part of the forfeiture goes to the informer, the other to the king. Before the information is commenced, the king may pardon the whole, there being no informer, &c. I would therefore address the king, to know how this pardon was obtained, and then demand justice of the king, &c.

Serj. *Meynard*. The great danger the king's person, our laws and liberties, have been in, you all know. What advice to give, concerning this great lord, I am at a stand. A great deal has been said, and with good affection, but some things mistaken. The king cannot pardon murder, unless it is said, in the pardon, that it is murder. A man is found guilty of murder, and he pleads his pardon; that is usual; but you have not read this pardon, nor seen it. It cannot be allowed, till it be seen. But that which stumbles me most, is, that, when such acts are put upon you, the whole nation is put upon ruin, if we do not take notice of this, when the king's life is at stake—This lord being charged not only with concealing treason committed, but a plot whilst upon execution; I take that for more. I will never speak for favour, nor affection; but a pardon does discharge him in point of law, yet you may enquire into it, and it is in the power of parliament to take off that pardon; but I do not think that your impeachment takes off the pardon; but it is in your power, as a parliament, to void these pardons.

Lord *Cavendish*. I am one of those for the king's power of pardoning, &c. as many of his predecessors have done. But applying this pardon to the circumstances this lord is in, it is cruelty to the public to let this pardon pass. I would therefore apply to the Lords, to remind them of our last message.

Mr. *Vaughan*. I will say nothing to the legality or illegality of the pardon. But whether, on such an occasion, this pardon can be just. When a pardon is destructive to the people, it cannot be. That cannot be a mercy to the people that is so. One thing cannot be pardoned; he is called to account for high offences; and that he should advise his own pardon, (what use are you of?) an Impeachment depending. When me grow too big for the laws, you can call them to account, else they will triumph over the king's justice and yours too. Before ever the nature of his crimes is opened, here is a pardon chopped betwixt you and justice. It is a great and glorious prerogative in the king to pardon offences, &c. but at this rate of pardoning, you may have all persons break loose, and all honest men in prison. If you prosecute not your Impeachment you mislead the king, and give countenance to those ill counsels given the king. If he must have his pardon, let it be laden with all the notorious crimes. Naturally all is true out of the king's mouth, but this speech he is advised to. If this man must have the benefit of such a pardon, I hope you will take care that no man else may.

"Resolved, *new. con.* That a message be immediately sent, to remind their lordships of the last message sent from this House, relating to the earl of Danby, and to demand that Thomas earl of Danby may be forthwith sequestered from parliament, and committed to safe custody."

A present Conference was desired by the Lords, without declaring any subject-matter; which occasioned this debate.

Mr. *Powle*. If the Lords may require Conferences, without declaring the subject-matter, it may be about money, and then you will never reach them with a conference about judicature. They appoint place of conference, and we do not. I am apt to think this an omission of memory in the messengers; but if not, you must send an answer by messengers of your own.

Sir *Thomas Meres*. The last parliament, there was a present conference desired by the Lords "on matters of great importance," and was granted it. When great things, as the Plot, &c. were on foot, that was some matter of conference, but this is nothing at all. This is too big for me to advise upon. I will leave it to others.

Mr. *Vaughan*. Suppose that the Lords shall tell you "that it is necessary to give money to build ships." This message cannot have a particular answer now, but I would send an answer by messengers of our own.

Mr. *Sacheverell*. Take care how you accept this message. This looks as if it were upon some matters not to be conferred upon. I king James, after the House had resolved a point of their own privileges, they answered the Lords, "that they could not confer upon that point, having resolved it already." Therefore now I

would send the Lords answer, "that you will send them an answer by messengers of your own." And then send them word "that this message is unusual, and that we cannot grant them a conference, before they declare the subject-matter."

Mr. *Seymour*. I am very desirous to keep a good correspondence with the Lords, and our endeavours are all little enough to preserve the nation from the dangers we lie under. This is indeed an unusual message. Formerly we have excepted against a general Conference, and now, in this here is no matter at all—This may disturb a good correspondence. I would therefore send a message to the Lords, to let them know "that it is unusual to confer upon what we know not the subject-matter of before."

"Resolved, That a Message be sent to the Lords, to acquaint them that it is not agreeable to the usage and proceedings of parliament, for either House to send for a Conference, without expressing the subject-matter of that Conference."

A Message from the Lords: "The Lords desire a present conference, &c. upon matters relating to the Earl of Danby."

Mr. *Powle* reports, That the duke of Monmouth opened the conference thus:

"I am commanded by the lords to acquaint you, that their lordships, having taken into consideration matters relating to the earl of Danby, together with what his majesty was pleased to say upon that subject, have ordered that a Bill be brought in, by which Thomas earl of Danby may be made for ever incapable of coming into his majesty's presence, and of all offices and employments, and of receiving any grants or gifts from the crown, and of sitting in the House of Peers."

The earl of Essex added, "That the Bill relates to the beginning of the parliament."

Lord *Fauconberg*. "The Lords made haste to the conference; and to take away all difference between the two Houses, have sent the special matter of the conference."

Earl of *Shaftsbury*. "The Lords are well contented, if you have a mind to it, to send the special matter of the conference; but it was the ancient way and usage of parliament to send without it, &c. but out of compliance to the Commons the Lords have now sent special matter."

Debate on the Conference.

Mr. *Powle*. I think, this conference is of the greatest consequence imaginable, and will cause great debate. I desire that we may have time to think of it. Now it is too late to proceed, and let it be adjourned to Monday.

Mr. *Vaughan*. Time is protracted by adjourning the debate, but not lost. Your steps will be the wariar by consideration, and I second Powle. [It was ordered accordingly.]

Mr. *Powle*. I would know how this pardon of the treasurer stands. If it has passed with-

out the due formality, the lord chancellor deserves to be impeached for it, next to the treasurer himself. I think it is the next crime. I would have enquiry made of the lord chancellor, how this pardon was obtained, and into all other offices; it is of so dangerous a consequence.

Sir Thomas Lee. I second the motion, that two or three members may attend the chancellor, to know whether the pardon passed his office, and so the rest of the offices.

Sir Francis Winnington. A great lord in office (lord Anglesea) said, "he knew nothing of this pardon, till he heard of it in the Lords House." This pardon is of more consequence than twenty treasurers.

Mr. Solicitor Finch. As to the method of passing this pardon by the chancellor, nature bids me speak. Since I heard of the passing this pardon, I have enquired into it; and the more I have enquired, it is the more for the service of the lord that keeps the seal. If the person be innocent, it was ill for him to get his pardon. I cannot say who advised this pardon, or who was for it, but who was against it I do know. When the lord chancellor dissuaded this pardon to be given, and when he denied the seal, and wrote a letter to have it pass in the usual forms, a command was sent from the king, that he should come to Whitehall, and he brought the seal to the king, and the king commanded the officer, in his presence, to seal it. The parchment had C. R. on the top. This is the true state of the affair; and if you enquire into it, you will find it so. Pardon me, if my relation to this lord constrains me so early to give you an account of this.

"Ordered, That a Committee be appointed to repair to the Lord Chancellor, and the other offices, and to enquire into the manner of suing forth the pardon of Thomas earl of Danby; and make their report, &c. [on Monday.]"

Monday, March 24th.

Sir Francis Winnington reports. We repaired to the Chancellor, according to your command, to enquire into the manner of passing the Lord Treasurer's Pardon. The Committee went to the several offices, where Pardons always must pass. At Mr. Secretary Coventry's office there was no entry, and Mr. Secretary said, "He knew nothing of the entering any such pardon in his office." Then the Committee went to lord Sunderland's office, (the other Secretary.) Mr. Bridgman, his Secretary, assured us, "There was no entry of the pardon there." We then sent the chairman of the Committee to lord Sunderland, &c. He sent us word, "He knew nothing of the pardon till the king acquainted the parliament with it." We found no entry, &c. at the Signet-Office. From thence we went to the Lord Privy Seal's office, where was no entry, &c. and the Lord Privy Seal farther said, "That if such a pardon had come to his office, he would very well have considered it before he would have passed it."

Then we went to the Lord Chancellor, &c. who said, "As to the pardon, &c. he neither advised it, drew it, nor altered one word of it—And as to the manner, &c. the treasurer delivered it to him, and asked him, 'Whether omnia et omnimoda indictamenta, &c. impetitus vel non impetitus, did extend to the impeachment?' The date the 1st of March, &c. The treasurer desired 'That it might pass with all the privacy in the world, because he intended not to make use of it, except false witnesses should be produced against him at his trial, and then he would make use of it at an extremity.' He thereupon wrote the treasurer a letter, 'That it was for the service of the king, that the pardon should be considered, and if he would take his advice, he should let the pardon pass in the regular course, to prevent resuming the impeachment against him.' Then the next day he met him, he declared to him the same advice. The treasurer told him, 'That the king was resolved to have it done in all privacy.' The next day, the king commanded the seal to be brought to him, and commanded him to take it out of the bag. Then the king wrote his name on the top of the parchment, and the person that usually carries the purse set the seal to it; and at that very time this was done he looked not upon himself to have the custody of the seal. And the Chancellor farther said, "He took upon himself to make no memorial of the pardon in his office, and that it was a stamped pardon by creation."*

* Mr. Hatsell (4 Precedents, 192) notices, that "In the year 1791, pending the trial of the impeachment of Mr. Hastings, a small pamphlet was printed and published, intitled, 'A Treatise of the King's Power of granting Pardons in cases of Impeachment,' by Henneage earl of Nottingham, Lord High Chancellor. In the advertisement prefixed to it, is the following entry: "There is a memorandum in the first leaf of this tract in the hand-writing of Nicholas Hardinge, esq. Clerk of the House of Commons, in the following words: 'This treatise was transcribed from a MS. communicated to me, by the right honourable Arthur Onslow, Speaker of the House of Commons; which was transcribed from a manuscript communicated to him by Daniel now earl of Winchelsea and Nottingham, who assured Mr. Onslow, that it was written by Lord Chancellor Nottingham, upon the occasion of lord Danby's pardon.' 'N. Hardinge, Dec. 1. 1731.' It is very properly observed in that advertisement, 'that the opinion delivered by lord Nottingham in this treatise, viz. 'That impeachments do not remain in *statu quo* from parliament to parliament,' is very different from that which he delivered and acted on upon the trial of lord Stafford.' Another observation is very obvious on the doctrine contained in this pamphlet, which is, That, however clear lord Nottingham might be, when he wrote this treatise, 'That the king might

Debate thereon.

Mr. Sacheverell. By the Report that is made to you, it is visible, that this pardon, and the manner of gaining it, is as dark as the crimes it has pardoned, against the stat. of Rich. 2.

‘legally grant a pardon, which might he afterwards pleaded in bar of any impeachment,’ it appears from the report of the Committee of the House of Commons, (on the 24th March, 1678, who were ordered to attend his lordship, to enquire into the manner of suing forth lord Danby’s pardon) that he was so cautious on that occasion, as to be able to assure the House of Commons, ‘That he neither advised, drew, or altered one word of it.’ And afterwards, when the king ordered the seal to be affixed, ‘it was done by the person who usually carries the purse; and that, at that very time, he did not look upon himself to have the custody of the seal.’”

As to the observation concerning the difference between the opinion declared by lord Nottingham in his treatise, and that which he delivered and acted on upon the trial of lord Stafford, see a Note to vol. 7, p. 324.

In Roger North’s Life of Lord Keeper Guilford, lord Nottingham’s ‘shift,’ as North calls it, is noticed in a passage, the curiosity of which may perhaps justify its insertion in this place. But little of it is immediately connected with the Case before us, yet the whole has a relation not very remote from it, and has a nearer relation to transactions and to persons of frequent occurrence in cases of this period which are reported in this Collection.

“After the lord chief justice Jeffries was assumed into the king’s privy council, which was some time before he came into the cabinet, there went forth a mighty fame of his greatness at court; which was mostly artificial, although such incidents commonly blow up reports far beyond truth. When this chief justice had chosen the northern circuit for his expedition, it was so contrived that, on a Sunday morning, when the court was full, the king should take notice of his good services, and, in token of his majesty’s gracious acceptance of them, give him a ring from his royal finger. This was certainly so done, by way of engine, to rear up a mighty machine of authority; and the printed news informed the whole nation of it: Whereupon the same lord chief justice was commonly reputed a favourite and next door to premier minister; sure enough to eclipse any thing of the law that stood near him. It is to be remembered that, at this time, the trade of procuring charters to be surrendered was grown into a great abuse; and nothing was accounted at court so meritorious as the procuring of charters, as the language then was. Therefore, as it was intended that the chief justice should be ingratiated into his majesty’s good opinion and favour, as much as was possible; this care was taken that, through the fame of

which directs the method of passing the seal, &c. That this pardon is nought, I doubt not, and not according to that statute, nor do I doubt that, when his cunning has deceived you, you may have your end. The subject has a right of entering a caveat against any patent. In

his great honour, he should have appeared so to the country, and, in consequence of that, wherever he went, all charters must needs fall down before him; and, for that reason, the towns were to be prepared by Quo Warrantos sent down. This affords an useful speculation how mean persons derive to themselves merit from the power of great ones, who shall ascribe to their inferiors those very events which flow really from their own power. Here the chief justice is made to seem powerful by the king, with whose authority he is graced; and that makes the affrighted towns, at his instigation, surrender. This must be argued to demonstrate to the king that the chief justice had a mighty influence upon the country, having done greater things, in his majesty’s service, than any judge had ever done before; when, in truth, it was not his own proper influence, but the king’s power, through him, that had such virtue in the country. It was so also with respect to the city of London; over which the chief justice exercised a sort of violent authority. That he had a great influence there was true; but it was because the citizens thought him a great man at court; and he obtained favour at court, because he was thought to have a great influence in the city. Thus the court conferred their own influences, and took them back by rebound, as so much merit reflected from the person that managed them. Then it is also to be remembered that the north of England is the seat of the Roman Catholic interest; and some things were to be managed by this chief justice, with respect to them, which no other of the twelve judges would have done, and I am about to relate.

“In the course of this northern voyage, which was carried with more loftiness and authority, than had been known at any asizes before, the charters, (as was to be expected) tumbled down, and the chief justice ordered all the under-sheriffs and bailiffs, to give him perfect lists of all persons who, upon account of recusancy, lay under commitment. When he returned to London, and his great services, which argued no less abilities to serve the king, were displayed, the next step was his being appointed to attend his majesty at the cabinet. The lord keeper, who was but an observer of these motions, did imagine that somewhat extraordinary was to come forth at the next meeting; the rather because, on Sunday morning (the meetings were usually on Sunday evenings) the duke of York spoke to his lordship ‘to be assistant to a business which, that evening, would be moved to his majesty;’ and that morning, his lordship observed a more than ordinary shyness in the countenances of the great men, whose remark-

the name of the House, if you, by order, &c. resolve that no such patent be entered, I doubt not but it will be so effectual, as that never an officer in England would dare to touch it.

able gravity satisfied him that they were upon their guard. But what the matter was, his lordship did not discover till he came to the cabinet; where, after the king was come, and they were sat, my lord chief justice Jeffries stood up, and, with the rolls of recusants before him, 'Sir,' said he, 'I have a business to lay before your majesty, which I took notice of in the north, and which will deserve your majesty's royal commutation. It is the case of numberless numbers of your good subjects that are imprisoned for recusancy. I have the list of them here, to justify what I say. They are so many that the great gaols cannot hold them without their lying one upon another.' And then he let fly his tropes and figures about rotting and stinking in prisons, concluding with a motion to his majesty that he would, by his royal pardon, discharge all the convictions for recusancy, and thereby restore liberty and air to these poor men. This motion, at that time, was indeed a swinger; for, in consequence, the execution of it, by such a pardon of all convictions, had lost the king irrecoverably, spoiled all future parliaments, set up the fanatic interest, his majesty's declared enemies, and disabled his friends from appearing, with any countenance, for him. The language had been, 'now it is plain—you would not believe us. What is Popery, if this be not? What signify the laws? Will you not expect some better security?' And the like.

His lordship was not to learn such consequences as these. But there was yet more, and what directly concerned himself in the duty of his office. He could turn his thoughts no way clear of precipices, which, to him, were fatal, though others made account to leap over them. It must needs occur that such a pardon must pass the great seal, of which he was the keeper, whose office it was to affix it; and although, in strictness, he could not disobey the king's express command in that, or any thing else that might be called an act of grace, nor be rendered criminal for so doing; yet all the loyal party of England, who were his sure friends, would have expected from him such strong and plain advice to the king, as might have averted him from such a pernicious step, whatever the consequence was to himself, who ought, as many would have said, to have quitted the seals rather than held them on such terms; and, for certain, the next parliament had resented it in all extremity. Now let us see with what temper, prudence, and courage, his lordship comported under this sudden and desperate trial. After the lord chief justice Jeffries had done, and composed his rolls and papers upon the table (which none there cared to inspect) his lordship, the lord keeper, sat a while silent, as the rest, expect-

Mr. Garraway. The Treasurer has mistaken himself in this, &c. and I am glad he has so. Now let him have no advantage upon you, since he has missed the right way. Go on

ing some of the lords, eminently in the Protestant interest, as Halifax, Rochester, &c. should begin to speak; but finding no probability of their saying any thing, but rather a disposition on their parts, at that time, to let the thing pass, he applied himself to the king, and 'Sir,' said he, 'I humbly intreat your majesty that my lord chief justice may declare whether all the persons, named in these rolls, were actually in prison or not.' The lord chief justice hastily interposed, saying, he did not sure imagine any one could suspect his meaning to be that all these were actual prisoners; for all the gaols in England would not hold them. But if they were not in prison, their case was little better; for they lay under sentence of commitment, and were obnoxious to be taken up by every peevish sheriff, or magistrate, and were made to redeem the liberty they had with gross fees, which was a cruel oppression to them and their families. Then the lord keeper turned to the king, and 'Sir,' said he, 'I beg your majesty will consider what little reason there is to grant such a general pardon, as this is, at this time. For they are not all Roman Catholics that lie under sentence of recusancy, but sectaries of all kinds and denominations; perhaps as many or more, who are all professed enemies to your majesty and your government in church and state. They are a turbulent people, and always stirring up sedition; and if they do so much when they lie obnoxious to the laws, which your majesty may inflict upon them at your pleasure, what will they not do, if your majesty gives them all a discharge at once? That would be to quit the greatest advantage you have of securing the peace of the nation. Is it not better that your enemies should live under some disadvantages, and be obnoxious to your majesty's pleasure, who may, if they are turbulent and troublesome, inflict the penalties of the law upon them? And as to the Roman Catholics, if there be any persons to whom your majesty would extend the favour of a pardon, let it be particular and express, and not universally, to set your enemies, as well as friends, at ease. And, after all, the disadvantage they lie under, is but the payment of some fees to officers, which is compensated by the exemption they have from serving in chargeable offices, which other conformable persons sustain. But, in a general view of the ill uses, that would be made of such a step, in the nation at large, to the prejudice of your majesty's interest and affairs, both in and out of parliament, as they were obvious, so the extent of them is beyond my view, and, as I think, have no end;' or to this effect. The king gave great attention, and the other lords wondered; but no farther word was made of the matter; and they pro-

with your business of the caveat, that neither this, nor any other pardon, pass in this clandestine way.

Sir Francis Winnington. I propose, that a

ceeded to other business. That night his lordship came home full of melancholy; and it was some time before any person, near him, knew the occasion of it. But he would sometimes break out in exclamations, as, 'What can be the meaning! Are they all stark mad!' and the like. That very night he took his pocket-stanack, and, against the day, wrote,

'Motion,* cui solus obstiti.'

'Motion, which I alone opposed.'

For he accounted this action of his the most memorable that he had ever done. He was not without a jealousy that one great end, of that pestilent, absurd motion, was to put a thorn in his foot, and, by way of dilemma, heave him out of his place. For, if the king had commanded, and he refused to put the seals to such a pardon, then he deserved to be removed by a just displeasure. If he had complied, then the parliament had effectually done it. And the shift the lord Nottingham used, in sealing the earl of Danby's pardon, that is by surrendering the seal to make it the king's act (which he called a stamp of creation) might not have served his lordship's turn so well, whom both papist and fanatic strove, with all their might, to remove out of their way: and small pretensions had served their turn, as appeared in diverse attempts of that sort, which are largely displayed elsewhere, and particularly in the *Examen*. But thus much I am led, by his lordship's notes, to say of the cabinet council."

North is a very prejudiced writer, and very inexact as to matters in which it appears not how the influence of his ordinary prejudices could be excited. And in his style the incongruous association of affected refinement, superficial pedantry, and coarsest vulgarity is abominably offensive.

The statute 27 H. 3, c. 11, prescribes very particularly the course to be pursued in passing royal gifts, grants, and other writings, through the different offices and under the different seals. That statute also regulates the fees to be taken by different officers employed in passing such instruments, and inflicts penalties for deviating from the course prescribed, but it provides (by sect. 11.) 'that this act or any thing contained in the same, be not in any wise prejudicial to any manner person or persons, whom the king's highness shall by express commandment direct, send, or appoint, to procure any thing or things to be sealed with any of his majesty's seals, for or concerning his majesty's private affairs, or the affairs of his highness's realm, but that as well the same person or persons being appointed by the king's highness as aforesaid,

* So in the 8vo. edition, London, 1808.

form of a caveat, &c. may be drawn, to be entered at the several offices. I believe that no learned man can pretend, that a pardon can pass in bar of an impeachment. It is a duty

'as also such officer and officers as shall have the keeping of any of the king's seals, their ministers and clerks, shall and may seal, write and deliver and procure the sealing, writing, and delivering of any such thing and things concerning the king's highness affairs as aforesaid, without being bound to procure any manner warrant; or paying any manner fees at or to the signet or privy seal for the same, so that the name or names of every such person or persons as shall procure the sealing of any such thing or things on the king's behalf as aforesaid, be entered in the clerk of the hanaper's book after this sort, 'Per A. ad mandatum domini regis,' any thing in this act contained to the contrary notwithstanding.' See also 2 Blackst. Comm. 246, 247. Coke, 4 Inst. 55. 4 Blackst. 400.

Concerning the power of pardoning impeached persons, Blackstone (4 Comm. 399.) says:

"There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; viz. that the king's pardon cannot be pleaded to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the earl of Danby was impeached by the House of Commons of high treason, and other misdemeanors, and pleaded the king's pardon in bar of the same, the Commons alledged, 'that there was no precedent, that ever any pardon was granted to any person impeached by the Commons of high treason, or other high crimes, depending the impeachment;' and thereupon resolved, 'that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the Commons of England;' for which resolution they assigned this reason to the House of Lords, 'that the setting up a pardon to be a bar of an impeachment defeats the whole use and effect of impeachments: for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed.' Soon after the Revolution, the Commons renewed the same claim, and voted, 'that a pardon is not pleadable in bar of an impeachment.' And at length, it was enacted by the act of settlement, 12 and 13 W. 3, c. 2, 'that no pardon under the great seal of England shall be pleadable to an impeachment by the Commons in parliament.' But, after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is farther restrained or abridged: for, after the impeachment and attinder of the

we owe to our king and country to be very cautious how to proceed in this matter; and that it may be put into such method as may have effect, I would not confine ourselves to a caveat; that looks too little for the Commons of England. Consider these two things; first, what to do in this; and then, how to prevent it for the future; and I hope you will resolve on apt methods to prevent such mischiefs for the future.

Mr. Secretary *Coventry*. What is moved is full of reason. But as to the matter of prevention of passing pardons in all future cases; if the commons urge, that no pardon shall pass till they be heard, no particular man goes to a general—That no man shall get a pardon, till I am heard—That no pardon shall pass for robbing or killing such a man, till I am heard generally—That never was; but that a pardon pass no farther than a caveat can prevent.

Mr. *Sacheverell*. The motion that I made was not general, but only to this particular and individual person, the treasurer.

Serjeant *Ellis*. This Report is of great concern to do something upon it. Consider whether the chancellor, by the duty and trust of his place, ought not to have acquainted the king with the exorbitancy of this pardon; neither fit for the king to grant, nor the treasurer to receive, in a clancular and clandestine manner. I think that you may declare “that the chancellor has not done the duty of his place to pass this patent;” an illegal patent both in matter and manner! I offer it to your consideration whether the pardon is not absolutely void? The king is the fountain of justice and mercy; he may pardon offenders, but some things the king cannot pardon, though the indictment be in the king’s name; as that of the repair of a highway, or a bridge, or any nuisance, because all the people are concerned in it, and it is *pro*

six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king’s most gracious pardon.

In a note to this passage, Mr. Christian prints the following record:

“Item prie la commune a nostre dit seigneur le roi que nul pardon soit grante a nully persone, petit ne grande, q’out este de son conseil et sermentez, et son empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, teuemenz, biens, ou chateux, lesqueux sont ou serront trevez en aucun default encontre leur ligeance, et la tenure de leur dit serment; mais q’ils ne serront jammes conseiliers ne officiers du roi, mais en tout oustez de la courte le roi et de conseil a touz jours. Et sur ceo soit en present parlement fait estatut s’il plest au roi, et de touz au res en temps a venir en cas semblables, pur profit du roi et de roialme.

“Responsio.—Le roi ent fra sa volente, come mieltz lui semblera.” Rot. Parl. 50 Ed. 3, n. 188.

bono publico, &c. and is not this matter of the treasurer, &c. as public as a highway, or a nuisance, or any other thing? This impeachment is at the suit of all the Commons of England; neither the king nor the attorney general are parties to it. It is in the nature of an appeal of rape, which the king cannot pardon: And now that all the Commons of England are in the nature of appellants, I offer it to your consideration, and would have the gentlemen of the long robe consider, whether this be a good pardon, or valid in law, or not. I advise that, notwithstanding this impeachment of the House of Commons, this pardon has walked in the dark—Let the treasurer put his case to it, whether it be a good pardon in law, and put it whether he ought not to be imprisoned. I move therefore that you will go on to the lords upon the impeachment, and desire that the treasurer may be imprisoned. This is the reason of all our misfortunes, that the lords do not imprison him, and do us justice at the first.

Mr. *Pocle*. The entering a caveat by this House in the several offices, &c. against this pardon of the treasurer is a diminution of the authority of the House; our obligation must be to the king—Not the officers to go to every petty office to enter caveats. The very procuring this pardon is criminal, and it will make those that have been faulty in it criminal. As for the pardon, I take it to be a void pardon—By 13 Richard 2. “all pardons for treason, murder, rapes of women, &c.” 18 Hen. 6. “there must be a warrant from the chancery; and a recipe for the date of all pardons;” otherwise obtained, they are void within that stat. Pardons must go by regular steps, and all things are to pass through those hands that may be accountable for them; otherwise, both the king, and the subject may be abused. Lord Coke, in his Institutes, says, “that if the lord chancellor put the king’s seal to a grant, without a warrant to a grant, it is treason.” If any thing passes the seal without a warrant, it is void. It is true, that writs, and things of ordinary course, as pardons for killing a person *se defendendo*, or by chance-medley, may pass without warrant; but where there is not a warrant for the Great Seal, as the statute appoints, it is absolutely void. The order of the day is “to consider of the conference with the lords on Saturday,” where they acquainted you with their intention about a bill for banishment of the treasurer, &c. I suppose that the meaning of the lords is, that you should lay aside the impeachment and embrace that bill; but that way is very improper; for I never heard of a conference upon an order for a bill to be drawn up, from either of the Houses. The same power that brings in this bill on Saturday may throw it out on Monday, and can this convince any reasonable man that we do lord Danby justice? If Danby can be had to answer justice, then there is no need of this bill, nor bill of attainder. Lord Cromwell advised an act of attainder, and the person was never brought to trial, and lord Cromwell was attainted in the

same manner. I hope, as that was the first precedent, &c. as it will be the last. If men fly from justice, let an act of attainder follow them; but I am for this lord's trial, and I would go on in the same steps as before. One process of law is as much as judgment of court. The lords deny justice to this House, and the whole kingdom, &c. and I would send a message to the lords to demand justice of them, and send it in writing, to desire that this lord may be committed; and when the lords will not do it, and refuse to take it into consideration, if great men may offend with impunity, I know not what will come of it. Therefore I move as before.

Sir William Pulteney. It may be this pardon is conditional, and will depend upon averment; but admitting that the form be good, and the *non obstante*, I cannot speak to it till I see it; but whether the king can pardon any great minister impeached by the House of Commons, or not, is the question?

Sir Thomas Lee. I would have you demand a conference, upon the subject-matter of the last conference, and so take an opportunity of reasoning with the lords on your right, &c. and how this bill is not suitable to justice, and that it will look like an encouragement, &c. of their assuming to commit, or not commit, a person impeached of treason, arbitrarily, and the offender may be protected for want of justice, that he may retire into the country. What is before you to day is not the pardon, &c. whether it be good or not good, but that the lords should let slip the opportunity of committing him, and that he should be so near the king, as to put you to all this trouble. You may show the lords, that they are the great Court of Justice, and how can they punish inferior courts for delay of justice, when they shew them the example?

Sir Thomas Meres. I would have a conference with the lords, rather than a message; it loses time as papers and letters do, when persons may speak together. I would ask a conference upon the subject-matter of the last conference.

Mr. Vaughan. By what appears to us, this pardon, thus let go by the Lord Chancellor, is as ill as what lord Danby has done. What we go to confer about, is not ours or the lords right, as to the pardon, but the right of the kingdom. All the traitors in England may get away at this rate. I would therefore send to the lords, to demand justice against the earl of Danby.

“Resolved, Nem. Con. That a message be sent to the lords, to demand justice, in the name of the Commons of England, against Thomas earl of Danby; and that he may be immediately sequestered from parliament, and committed to safe custody.”

DEBATE ON A MOTION for an Address to the King, to represent the irregularity of the earl of Danby's Pardon, &c.

Mr. Sacheverell. I remember of late, but one singular instance that you have had benefit by addresses. That against the duke of Lauderdale,

and for preventing the growing greatness of France, you had excellent success in. That's a single instance against all, &c.

Colonel Birch. I remember not that success in other things, as in the declaration, but I know not why we should not lay before the king the prejudice this will create, if the king renews the pardon of lord Danby. It is impossible this nation should be defended, if there be this precedent of money squandered away, as has been in these six years last past. There are twelve or thirteen petty farms upon the customs, though given for the defence of the seas by act, &c. I would let the king know this. A thing may be well done by three or four officers, and ill done with fourteen by putting in a friend. Money has been forgiven and remitted, for what consideration I know not. What has been well done with 400,000*l.* has been ill done with 700,000*l.* In the garisons of thirty guns, not ten mounted; and this, by putting in friends to be officers. As for the plot, “Damn me, why should they meddle with the plot?” And “There goes Oates, (says Danby) the Saviour of England; I hope to see him hanged within a month;” and persuades others to go away where they say he is gone—Rather be under one tyrant than a hundred—I mean France. As for this pardon, had I a hundred lives to breathe, I would not breathe one of them if these things be endured. I would therefore represent to the king, in all humility, that he would be pleased to lay aside this pardon.

Mr. Garraway. I would address the king with submission and gentleness; but before they should touch one penny of our money, I would have satisfaction about this pardon. But when they come with strained stories of necessity for money, next to perjury, the plot was upon our purses, and then we were sent home, and did nothing for the nation; and for these eighteen years we have done nothing. But I hope these gentlemen will be wiser. If you will address the king, I am not against it, &c. and send to command the inferior officers, &c. for the rest.

Sir John Ernley. What calls me up is not for money; I had no thoughts of it; but for the embezzlement of the treasury for these seven years, as is alleged. I have a paper in my hand, of what has been done in the Exchequer. Of 900,000*l.* there has gone 700,000*l.* to the Navy, and the Bankers; since these six years, not particular to the king's purse one penny. But the additional duty went only to the king's purse.

Mr. Vaughan. When a motion for money is unseasonable, it will be denied when it is seasonable. When laws are broken, it is not by the prince, but by his ministers. Addresses have been denied; but (to what Ernley moved) as we have been unfortunate in our addresses, so has the king been in having such ministers, that have advised him to deny our addresses. When laws were abused, we addressed; and when we gave the king good reasons, he yielded.

ed to us, and you have as good reasons now as ever. You had success then, and I hope you will have so now.

Sir Francis Winnington. When we appeal to the king in his royal power, then it is reasonable he should do us right: but an address is a kind of a compliment and wish, and the king may deny us. All that is desired now is, to represent to the king the undue manner of lord Danby's obtaining this pardon. The parchment was brought to the king. I would know who brought it, ready cut and dried! When great men are too hard for honest men; All have complained of the exorbitancy of this man; and we are like to do little service in parliament, when all the answer to an impeachment from the Commons is a pardon. My motion is, "That you would make an address to the king to stop any farther pardon, and on Thursday take into consideration how to prevent such unexampled mischiefs for the future." Else I shall neither esteem my life, nor my estate, to be my own.

Lord Capendish. I would have a Committee appointed to draw up an address to the king, as was done in the case of the declaration, "That such pardons may not pass, but by act of parliament."

Sir Thomas Lee. There is a difference betwixt desiring the king, "that it may be done for the future," and saying, "that it is against law and it ought not to be done." As *sir Thomas Clifford* said, "Give the king money by land-tax this once, and you shall for the future petition the king that you might give money by land-tax again." If you enter a caveat against this pardon in the offices, &c. it is below the dignity of the House. If you address the king, &c. I would express that the pardon is against law.

Colonel Titus. You were told the other day (by Howard) of the dismal state of the Exchequer by anticipations, and now by Ernly of the good estate of it, and what vast debts have been paid by this treasurer, and a course taken for the payment of the bankers; but in six terms it will appear, there has been 231,000*l.* paid by the treasurer for secret service. Both these accounts cannot be true. By another you are told, "that the revenue is so anticipated, it is impossible to be redeemed." I am of opinion that you address the king, but am far from thinking it fit for the House to enter a caveat, and as far from commanding the inferior officers not to enter the pardon, &c. But you may address for the inferior officers to be punished for entering it. Put a brand upon this surreptitious way of obtaining pardons, and provide against such things for the future. Back your address with reasons, and appoint a Committee and prepare your reasons to obviate such an inconvenience for the future.

"Resolved, That an humble Address be made to his majesty, representing to his majesty the irregularity and illegality of the pardon lately granted to the earl of Danby; and the dangerous consequence of granting

"pardons to any persons that lie under an impeachment of the Commons of England."

Tuesday, March 25.

A message from the Lords; by baron Thorland and baron Littleton, "That their lordships had taken into consideration the matter relating to the earl of Danby, and had ordered the Usher of the Black Rod, before they had received the last message from this House, to take him into custody, and bring him to the bar of the House of Lords to-morrow morning, and that the Usher had returned their lordships answer, that he could not be found."

Ordered, "That a bill be brought in to summon Thomas earl of Danby to render himself to justice, by a day to be therein limited, or, in default thereof, to attain him."*

* "The House immediately fell on lord Danby. Those who intended to serve him said, the heat this dispute had raised, which was imputed wholly to him, had put it out of their power to do it. But he committed other errors. He took out a pardon under the Great Seal. The earl of Nottingham durst not venture to pass it. So the king ordered the seal to be put to the pardon in his own presence. And thus, according to lord Nottingham's figure when he was afterwards questioned about it, it did not pass through the ordinary methods of production, but was an immediate effect of his majesty's power of creating. He also took out a warrant to be marquis of Carmarthen. And the king, in a speech to the parliament, said, he had done nothing but by his order; and therefore he had pardoned him; and, if there was any defect in his pardon, he would pass it over and over again, till it should be quite legal.

"Upon this a great debate was raised. Some questioned whether the king's pardon, especially when passed in bar to an impeachment, was good in law: This would encourage ill ministers, who would be always sure of a pardon, and so would act more boldly, if they saw so easy a way to be secured against the danger of impeachments: The king's pardon did indeed secure one against all prosecution at his suit: But, as in the case of murder an appeal lay, from which the king's pardon did not cover the person, since the king could no more pardon the injuries done his people, than he could forgive the debts that were owing to them; so from a parity of reason it was inferred, that since the offences of ministers of state were injuries done the public, the king's pardon could not hinder a prosecution in parliament, which seemed to be one of the chief securities, and most essential parts of our constitution. Yet on the other hand it was said, that the power of pardoning was a main article of the king's prerogative: None had ever yet been annulled: The law had made this one of the trusts of the government, without any limitation upon it: All arguments against it might be good reasons

Thursday, March 27.

The Bill of Attainder against the earl of Danby was read a second time.

Mr. Booth. I like this Bill very well. Danby deserves this punishment, and more too. I move for an addition to it, to make it more effectual to your end, "That all fraudulent settlements and trusts, whereby the King is defrauded of his right, he having struck tallies to a great value in a few days, which may be put in trust, may be voided." If you make no provision that persons concerned in these trusts be punished, all you do will be to little purpose; therefore I move "that such may suffer as fe-

for the limiting it for the future: But what was already past was good in law, and could not be broke through. The temper proposed was, that, upon lord Danby's going out of the way, an act of banishment should pass against him, like that which had past against the earl of Clarendon. Upon that, when the lords voted that he should be committed, he withdrew. So a bill of banishment passed in the House of Lords, and was sent down to the Commons. Winnington fell on it there in a most furious manner. He said, it was an act to let all ministers see what was the worst thing that could happen to them, after they had been engaged in the blackest designs, and had got great rewards of wealth and honour: All they could suffer was, to be obliged to live beyond sea. This enflamed the House so, that those, who intended to have moderated that heat, found they could not stop it. Littleton sent for me that night, to try if it was possible to mollify Winnington. We laid before him, that the king seemed brought near a disposition to grant every thing that could be desired of him: and why must an attainder be brought on, which would create a breach that could not be healed? The earl of Danby was resolved to bear a banishment; but would come in, (rather than be attainted,) and plead his pardon: and then the king was upon the matter made the party in the prosecution, which might ruin all: We knew how bad a minister he had been, and had felt the ill effects of his power: But the public was to be preferred to all other considerations. But Winnington was then so entirely in Mountague's management, and was so blown up with popularity, and so much provoked by being turned out of the place of Solicitor General, that he could not be prevailed on. It was offered afterwards from the court, as Littleton told me, both that lord Danby should by act of parliament be degraded from his peerage, as well as banished, and that an act should pass declaring for the future no pardon should be pleaded in bar to an impeachment. But the fury of the time was such, that all offers were rejected. And so a very probable appearance of settling the nation was lost: for the bill for banishing lord Danby was thrown out by the Commons. And instead of it a bill of attainder was brought in." Barnet.

lous, that do not in a certain time reveal such trusts."

The Bill was ordered to be committed.

Then an ingrossed Bill from the Lords, was read, for banishing the earl of Danby, viz. "By perpetual banishment and exile, not to sit in the Lords House, nor enjoy any office, &c. If he comes into England after the first day of May, 1679, treason, or be found in any part of England, treason, and no pardon but by Act of Parliament. All correspondence with his wife and children forbidden, unless about his estate. If they hold any other correspondence with him, they shall be punished as for corresponding with traitors. Letters sent to him, or received from him, shall, within ten days, &c. be showed to one of the Secretaries of State. All trusts for him of patents, gifts, or grants since December. And if he renders himself before the first of May next, the penalties of this Act to be void."

Sir Harbottle Grimston. To the intent I may speak orderly, I shall move to throw out the Bill. We have impeached Danby, and sent up our charge, and he was prayed a day to answer, and you have now agreed to a Bill of Attainder; but this bill from the lords is not an attainder, but a compounding for treason. Danby, by his flight, has confessed himself guilty of treason, and this bill is as much as to say, "Cut off his ears for treason." And this is the way to countenance traitors, rather than discountenance them. A traitor is a traitor. What mercy he may find upon trial, I know not, but I move you to throw out the bill.

Lord Annesley. This bill is contrived by some person to have Danby fall easily, that he may come into his employment, and do the same things he has done. I would lay aside this, and go on with your own bill.

Sir John Knight. This bill is unjust to lord Danby, for he may be innocent upon trial; and unjust to the Commons of England. He is fled already from justice, and you give him May-day to appear.

Serjeant Ellis. This is such a precedent to compound for treason, as I never yet saw. But because the Lords have made some steps, I would not throw the bill out, but go on with your own bill; and, to maintain a good correspondence with the Lords, I would give this bill another reading this day fortnight.

Sir Thomas Player. I am for throwing out this bill, and presently. You have had precedents of lord Clarendon, &c. The delay of that bill did almost *in terminis* produce the effect desired, which was, composition for treason—delay it for a month, and then something may happen of composition. If this great person (Danby) had any thing in him of the greatness of the men of old, the Romans or the Grecians,—if he loved his country, it might be a punishment to be sent from it; but sending him away from a country he loves not, is no punishment. If we must endure the miseries likely to be upon us, by his means, let him en-

dure the punishment the law has provided for him.

Serjeant Maynard. It is all one to your purpose, to put the bill on presently, or to delay it; it will be all the same fate. The premises in the bill are very far granted to your advantage. No man, I believe, will call for this bill in haste; and you may lay it by.

Sir Thomas Lee. If the Lords shall think fit to reject your bill, because it is too much, had not you better have something than nothing? Possibly some of the Lords may be more afraid to see Danby in the Lords House again, than we, or at least, than I am. In matters of proof, things are not yet before us, but in the trial they will be; and this bill of banishment is too little a punishment for his crimes. The same arguments may be used upon the same bill, and I fear there will be the same consequence, that neither of the bills will take effect.

Sir Francis Winnington (who had been lately removed from being Solicitor-General) made the following speech: Mr. Speaker; The king cannot pardon treason against the government, for then the government cannot be free from evil counsellors. Could a king have done it, would not Belknap, Trejilian,* and the two Spencers,† have been pardoned? A king ought to be the sanctuary of his people from the oppression of evil ministers, but not the refuge of the enemies of the government, and the protector of such arch-traitors as Danby. If Danby be pardoned, then the Popish Lords in the Tower may be, and the Jesuits in Newgate likewise.

Is this the way to secure the laws, and the Protestant religion? The king hath a limited power, or else it is not legal; his limitation then is for the good and benefit of the people. But is shrouding an open and notorious traitor, the minister of the present mischief, and the common centre, in which all the lines of confusion do meet; is that, I say, for the good of the people? Prerogative is to abate rigorous justice, not to evade and destroy it. If ministers may be pardoned at the prince's pleasure for all the wrongs they do the people (though the prince be sworn to protect the people from those wrongs, and is therefore trusted and paid) there is no security, and our pretended freedom and legal government is a mere cheat, and we are all arrant slaves. And I say, he that speaks one word for Danby, speaks two for himself. Besides, this is treason impeached in parliament, therefore not pardonable but in parliament; this is a national and catholic treason; the life, the root of government is invaded: a pardon here is so unsufferable a thing, that it ought to be placed to his account that dares plead it, and ranked amongst the rest of his evil counsels. The bill sent from the House of Lords is not his punishment, but his pardon, a salvation by act of parliament. Who will be

deterred by that act, that can plead such a precedent to escape unpunished, and can carry away honour and wealth, the reward of treason, and the poor people's spoils; and that at such a time as this, circumstantiated with plots and conspiracies, and he tardy too? If this must be, it is good, yea, meritorious, to invade property, to betray the kingdom, sell the people, encourage Popery, suborn witnesses, and strangle and murder the discoverers of the Plot.

Remember how you used to proceed; make him an example for the rest; if he must live, let him survive his glory; at least degrade him and sequester him; that is, reduce him to as small a thing as sir Thomas Osborn, and as lean and indigent; leave him nothing he has got by his monstrous actions against the kingdom. I am bold to say, That those Lords and Commons that agree not in this, would do the same thing, to end in the same security.

It is a licence to cheat the king for five years; if this must be, pray let there be a clause in this bill to pardon all villainies and treason against the government whatsoever, and for poor as well as rich. Let not the great rogues only escape and go unpunished. Was Green, Berry, and Hill, hanged for killing sir Edmundbury Godfrey? and must he escape, that so vehemently discouraged and bitterly menaced him? What reason was there that Groves and Ireland should die for being in the Plot, while he is rewarded that concealed and would have stifled it, and afterwards have fathered it upon others?

To conclude, If after all this discovery made and proceeded in by us, this point shall be delivered up, they will not however escape unpunished, but God will bring deliverance another way.

Sir Thomas Lee. I would be satisfied, whether it be a rejection of the bill, without expressing, that it was rejected by vote.

The question for a second reading of the Bill was carried in the negative, and, upon a second question, it was rejected.

April 1.

The Commons passed a Bill for the Attainder of Thomas earl of Danby of High Treason, unless he should surrender himself within a time fixt, which was sent up to the Lords by sir Robert Peyton.

April 4.

There was a Conference between the two Houses relating to the Bill of Attainder, where the Lord Privy-Seal managed the Conference for their lordships, and delivered himself to this effect:

"That the Lords House have chosen the way of delivery of this Bill at a Conference, rather than by Message, the better to preserve a good understanding between the two Houses; which they shall always endeavour.

"And, to prevent debates and controversy as much as may be, their lordships do observe, that the greatest affairs of parliament are at a stand, in the time of the greatest difficulties

* See vol. 1, p. 89, of this Collection.

† See vol. 1, p. 23.

and dangers, both at home and abroad, that this kingdom hath ever been known to lie under.

“ They observe also, and none of us but must with comfort remember, that his majesty hath ever set himself in a way of clemency and mercy to all his subjects; so that his reign hath been to this time merciful and compassionate; and their lordships were unwilling the first interruption thereof should be by the two Houses pressing his majesty to the utmost severity in this case, that hath interrupted greater affairs so long; and therefore have passed your bill with some Amendments, which they hope and desire the House of Commons concurrence in.”

Monday, April 7.

The Commons took into consideration the Lords Amendments. Upon which occasion this debate took place.

Mr. Garroway. By the Lords Amendments, it is but a semblance of banishment of the earl of Danby, and he shall not have it—It is an act of indemnity, and you are about to mend it. I would not make this bill otherwise than it is entitled; and not compound for treason.

Sir Thomas Clarges. If possible, by any means I would preserve a good correspondence with the Lords. As for “the day of rendering himself, &c.” you may make it longer; but if he be stripped of his honours and estate, and reduced to his first condition of *sir Thomas Osborne*, you may have your ends.

Sir Thomas Lee. You have said in the Bill, “If he does not appear, &c. by the 10th of April;” and the lords say, “the 15th;” the consequence only is, that it gives him five days more to appear. But if it could be regular, I would offer it to be “May-day;” and if there should happen to be five or six days debate, it would look like a retrospect bill. I offer it only.

On the Lords Amendment, “if he be found in England after the 1st of May, 1679, he shall stand attainted, &c.”

Mr. Sacheverell. This Amendment makes it a Bill of banishment. Then whether is it more eligible to prevent *Danby's* standing his charge, or to go away out of England with all he has got, and come no more? It can never be but the bigger the penalty is, the more likely it will be to bring him in. If we are of opinion he will stand his charge, or come in, we ought not to agree with the lords.

Sir Thomas Clarges. He forfeits his honours, &c. since the 22d of December last. You strip him of all his estate and honours, and there will be little left to comfort him. I would agree with the Amendment.

Mr. Vaughan. The Amendment runs thus: “*Danby* shall appear by the 15th of April;” but he is at his liberty whether he will appear or not; so he may be in England till the first day of May, and have time to do all he has a mind to, &c. and carry away all he has got with him. And where are you minded in

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this, by rejection of the Lords bill of banishment?

Lord Cavendish. If I could be of opinion of the amendments of banishment, &c. I would agree, &c. But this leaves the ancient methods of parliament, giving up the justice of England, as if you could not make good the charge. And so he may go away with the honours he has acquired, by the very crimes he is charged with. It is not for your honour, and I would not agree.

Mr. Powle. I am one of those who desire the Bill may pass, but not as it is amended. The case concerned in the Bill is, whether such crimes as *Danby* stands charged with, shall go away with impunity? But here, in this clause something is mistaken. It seems to me to be very monstrous, that you give him time to the 15th of April for his appearance: Then come the lords amendments, if he come back, he shall stand attainted “from the 1st of May.” Then, in that interval of time, he is under no manner of restraint (for I am of opinion he lies lurking about town,) and what then will hinder him in that space of time from coming into the king's presence, the House of Lords, or the council-board? what he does now privately, he may, in that interval of time, do openly and ship himself away with the spoils he has got—The penalties upon him are in the next ensuing clause. I shall never agree that he shall go away with life and fortune. But if you have something equivalent, you have your end. This is my opinion, but I submit it to the House.

Mr. Garroway. This clause is turning of the whole bill. The time given him is a pretty time to do what he has to do, so is a licence for him to stay here all that time. But say the lords, “We may reach his estate.” But the king may give it him again—There is no injustice in the case, in our bill. If he will, he may come in in that time, and be tried.

Sir Thomas Player reciting the proceedings against lord *Clarendon*, said, The letting him go unpunished was the occasion of all the misfortunes of the nation that followed. To which answered

Mr. Hyde. I cannot let those words pass without an answer. The case was quite otherwise than *Player* represents it. “Special and particular matter,” in the impeachment against lord *Clarendon*, was insisted upon by the lords. And I then offered, “That if the gentlemen that brought in the articles would make good any one article, he would confess them all.”* But he went away to leave his country in peace, and that he should give no occasion of difference between the two Houses, and had sufficient punishment by the act of banishment.

Colonel Birch. As to what fell from *Player*; I was one of those that gave no consent to that lord's impeachment, without inserting “special matter” in the articles. But as to this case I

* See Vol. 6, p. 323 of this Collection.

will not speak for Danby in this Amendment of the Lords; but you may possibly hold so hard upon your bill, that he may have opportunity to escape. Such is our fortune, by the goodness of a prince, that rather than have ministers chastised, he would be chastised himself. Great familiarity has been with them by princes, and they have been led by them. But it is our duty to throw our garment over them, rather than discover their nakedness. It may be the treasurer will lay what you charge him with at the door of his prince—and many know where he lay trinketing with the French—This will be ill done—but is this the most honourable way of dealing? Deprive Danby of his honour and estate; and if more be to come after him (as Bennet said) it may fright them.

Major Beake. I wish that all crimes may have proportionable punishment. What is offered to you is, whether Danby shall have such a punishment, &c.? If banishment be a better punishment than the forfeiture of his estate and the corruption of his blood—I apprehend that banishment was no mean punishment among the Romans and Grecians. For divers ages after the conquest, confiscation of estate and banishment were the usual punishments. Magna Charta says, “Nemo perdat patriam, &c.” If you attend those ends you desire by banishment, &c. a greater punishment will follow him, and that which he will never recover; the curse of Englishmen will go after him—He carries with him a wounded conscience: and that is part of the spoils he will take with him. His crimes are transcendent! They will dog him wherever he goes; the meanest person that he has oppressed may assault and attack him on the other side of the water. If we can but reach this, to lay him as low as the dust, can you promise to yourselves that the Lords will concur with what you aim at, or the king? I would take that course by which we may probably arrive at our end—And his honours and estate may be taken from him, before he had the treasury.

Sir Henry Capel. I am glad to see so great an assembly, in a matter of so great moment, in so great a calmness. I shall ever take care to behave myself with moderation and temper, and will do it in this point, and keep the government steady. As to what is said in reference to agreement to the lords amendments; in some measure, I agree. The steps of this Bill to the Lords have been very regular, very just, and we ought to stand by it. But the lords, under favour, have not done the same. I know not by what measures the lords have gone to amend this Bill. What reasons the lords had, not to commit lord Danby, &c. are yet unknown to me. Now this is come before you in this parliament (though the lords thought it irregular in the last.) The Black Rod is sent for Danby, and he is not to be found; and no more. You proceed with your Bill, and you ought to stand to your articles, if you can, and put the least blemish upon them

that you can, and you ought to take care not to be the first persons that comply, &c. I suppose the lords have good reason for what they have done; but yet it appears not to us, what induced them to these amendments. Your attainder reaches to Danby's honours and estate, &c. We shall, it may be, agree to all the lords have offered, &c.; but my motion is, let us disagree with the lords at present; and so if we go to conference, the lords may give us reasons.

Sir Thomas Meres. The lords, at giving back this Bill at a conference, with the amendments, gave us no reasons for them, but said, “They observed, that the great affairs of this nation are at a stand, at a time of the greatest danger and difficulty that this kingdom ever laboured under; that the king hath always in his reign inclined to mercy and clemency to his subjects; therefore, to a king so merciful and compassionate, the first interruption of his clemency, they did desire, should not proceed from the two Houses pressing the king to an act of the greatest severity. Therefore have passed the Bill with some amendments.”

Reasons were ordered to be drawn up, for not agreeing to the Lords Amendments.

Tuesday, April 8th.

Mr. Powle reports the following Reasons why the Commons disagreed to the Lords Amendments, &c. viz.

“The addition to the title doth shew, that the Amendments, made by your lordships to the Bill, do wholly alter the nature of it; and from a Bill of attainder, have converted it into a Bill of banishment, which the Commons cannot consent to for these reasons:”

“1. That banishment is not the legal judgment in cases of high-treason: and the case of Danby, being impeached by the Commons of high-treason, and self from justice, hath thereby confessed the charge, and therefore ought to have the judgment of high-treason for his punishment.

“2. That banishment being not the punishment the law inflicts upon those crimes, the earl of Danby might make use of this remission of his sentence, as an argument, that either the Commons were distrustful of their proofs against him, or else that the crimes are not in themselves of so high a nature as treason.

“3. That the example of this would be an encouragement to all persons that should be hereafter impeached by the Commons to withdraw themselves from justice (which they would always be ready to do, if not prevented by a commitment upon their impeachment;) and thereby hope to obtain a more favourable sentence in a legislative way, than your lordships would be obliged to pass upon them in your judicial capacity.

“The Amendments being all in order to these

* A stroke is made across these Reasons, in the MS. Journal, as if it was intended they should be struck out.

alterations, the Commons do not agree to them for the former Reasons."

At the same time the Commons "Resolved That an humble Address be made to his majesty, to desire his majesty to issue out his royal proclamation for the apprehending Thomas earl of Danby; with the usual penalties upon such as shall conceal him: and that his Majesty will be further pleased to give order to the officers of his majesty's household, that they take care that the said earl of Danby be not permitted to reside within either of his majesty's palaces of White-hall, Somerset-house, and St. James. And it is referred to Mr. Powle, &c. to prepare and draw up the same, and present it to the House to-morrow morning," which was done accordingly the next day, and presented to the king.

The same day the Commons had another Conference with the Lords upon the earl of Danby's case, where the lord Huntington managed the Conference, and what he delivered was to this effect;

"The Lords have desired this Conference with the Commons, not so much to argue and dispute, as to mitigate and reconcile:

"They have already observed, that the debate of this Bill hath given so long and so great an obstruction to public business, and therefore they desire you to believe, that that is the reason which hath chiefly prevailed with their lordships in a matter of this nature; and upon this ground it is, that if a way may be found to satisfy and secure the public fears, by growing less than the Bill you have proposed, the lords do not think it advisable to insist upon the utmost and most rigorous satisfaction, to prevent justice, which might be denied.

"To induce you to this compliance, the Lords do acknowledge, that banishment is so far from being the legal judgment in case of High Treason, that it is not the legal judgment in any case whatsoever, since it can never be inflicted but by the legislative authority: But they see no reason why the legislative authority should always be found to act to the utmost extent of its power; for there may be a prudential necessity sometimes of making abatements, and it might be of fatal consequence if it should not be so.

"And the Lords, to remove all jealousies of the precedents of this kind, do declare, that nothing which hath been done in the earl of Danby's case shall be ever drawn into example for the time to come, and will so enter it upon their journal. And thereupon their lordships insist upon their Amendments so far, as to exclude all attainders; and do promise themselves the Commons will in this point comply with their lordships, who do again assure them, that their resolutions are grounded only upon their tenderness and consideration of the public."

Wednesday, April 9.

This day there was another Conference on the subject matter of the last. The Commons

attending in the Painted Chamber the Free Conference, the House appointed the same Lords who managed the last Conference to report this.

And the Lord Privy Seal reported to the Lords the effect of the Free Conference: viz.

"That Mr. Edward Vaughan opened the Free Conference, urging and reinforcing the Reasons which they had offered at a former Conference, and which the lords at the last Conference had waved the answering of; taking notice, that, reason and justice being for the Bill as they sent it up, they could not yet doubt their lordships concurrence in it; these being the only motives to the passing of a law; which being occasioned by the parties flight from justice, and in affront of this the highest court, they hoped their lordships, who are judges for the kingdom, and not only for themselves, will follow the example of their ancestors, and proceed by rules of law, which are to guide in passing of acts of parliament, as well as in the ordinary course of judicature.

"Sir Francis Winington spake next, and urged precedents for the like attainder, old and new; as, the statute of 5^o H. 4. cap. 6, John Savage, flying from justice, was attained if he came not in by a day. So, 17^o Car. 2. Bamfeilde attained unless he came in by a day. And we cannot doubt but your lordships will guide yourselves by former precedents, the ground and reason being the same. But I shall add reasons, to persuade your lordships; which is the proper work of Free Conferences:

"1. We think, when such bills are regular and legal, as is confessed, for the Lords to change the punishment, would bring a great prejudice on the Commons, when he appears, for him to say, "The Commons agreeing to a composition, admit their proofs are not full for treason."

"2. Though we thirst not after blood, and might have consented to a bill that gave not him advantage, instead of punishment, as this by the amendments would do; yet as it is, we cannot consent, for that reason.

"3. It is the earl punishes himself. Our bill is not severe nor rigorous; but according to rules of justice, against a person impeached, that flies, and dares not abide a trial.

"4. Flight is so odious in the eye of the law, that the innocent suffer for flying as well as the guilty: Loss of goods and chattels immediately incurs against him that flies from justice.

"5. This would shew, as if different degrees of persons should have different degrees of justice; whereas the poorest Englishman is to have the same proceedings against him as the greatest peer: And would your lordships make so favourable provision for a flying commouer? Besides, this is not a flight of innocent Moses from the Egyptians; but of a wicked Cain, out of a sense of his guilt, and the punishment due to it.

"The next that spoke was Mr. Powle: The last Conference was for an expedient, by mit-

gating punishment, to put a quick end to this affair. There are but two reasons why punishment should be mitigated :

" 1. When a man seems penitent, and willing to mend, and give satisfaction : Whereas this man affronts the justice of king and parliament, and lurks hereabouts, doing ill offices, and hindering the great affairs of the kingdom.

" 2. When they merit favour in their office ; but we cannot find one good action he ever did whilst in power and place.

" Mr. *Vaughan* replied : If your lordships admit attainders, some of the lords admitting flight to be a proof, the earl of Danby's flight hath made the proof in this Case.

" Mr. *Sacheyrell* : It is but a Bill of Summons, to keep him from perfecting his treasons abroad, and continuing his enmity to his country. But, as your lordships have made it, it is an act of indemnity and safety to him ; giving him leave to go to repair the little loss he is under here, by the favour of those beyond sea, which he hath served against his country.

" Sir *Thomas Leigh* : What your lordships offered at the last Conference, of not drawing into precedent the proceedings in the case of the earl of Danby, was mistaken by us. We thought it meant only this parliament ; not the errors of the last, in not causing the earl of Danby to withdraw after the articles of impeachment of treason read, and the not imprisoning him ; which we are glad your lordships do us justice in, and find the error in the proceedings of the last parliament.

" Mr. *Vaughan* again said, That justice should have his course, is the prime consideration : This earl, he stops all himself ; therefore he should not have benefit thereby ; but ought to find that justice will be too hard for his evasions.

" So they delivered us the Bill again, with our amendments ; with expression of hopes and desire of our concurrence in the Bill as they have agreed it, that justice may have its course, and the great affairs of parliament be no longer obstructed, by spending more time on his person, who hath brought the kingdom into so sad a condition."

The lord viscount Newport reported, " That he and the rest of the Lords have waited on his majesty, and presented him with the Thanks of this House, for communicating to them the Address of the House of Commons to his majesty, concerning a Proclamation for summoning the earl of Danby ; and to let his majesty know, that the humble advice of this House is, That his majesty will be pleased to issue out such a proclamation as is desired ; and his majesty returns this Answer, That he will give order for a Proclamation the next council day."

Debate in the Commons on the Report from the Conference.

Mr. *Sacheyrell*. The Lords have desired a conference upon the matter of the bill of attainder of the earl of Danby, &c. They agree

that your reasons are strong and valid against their amendments, but pray you to wave all methods of parliament, and destroy all methods of proceeding, &c. I am in a doubt, whether you will not be caught in a free conference to argue the subject-matter of the bill. I would only show the Lords, that their paper, now offered, is destructive, and contrary to methods of parliament, and draw up your reasons for it, &c.

Sir *Thomas Lee*. I speak to point of order. The Lords went yesterday in an irregular method in the conference ; for you agreed to confer with them upon the subject-matter of the last conference, and when the Lords came to debate, they did not fall upon the subject-matter, &c. But you cannot have a free conference from the Lords, when they will say nothing of your reasons, and by not drawing it into conference, they do in effect allow your reasons. I speak only to forms. I reserve myself for the debate.

Sir *William Cozentry*. I speak to method of proceeding. If you go to a question, you must read the Lords' amendments ; to some of which you have agreed, to others not. Now the Lords send you down reasons why you should agree to their amendments. Every time you put the question for the conference, they must be read ; for it may so happen, that members were not here, when they were read before, and so cannot give their judgments to the question.

Sir *Joseph Williamson*. I take it, you cannot read them again. The Lords agree, in the last paper, with such and such circumstances. As to the first point, they do not agree, as to the cutting off all his honours and lands, &c. But they agree so as that your question is not upon the first point, but the last.

Sir *Thomas Lee*. Suppose, upon this conference, some alterations are fit to be made, how can that be done without reading them ? The matter betwixt you is the attainder.

Sir *Harbottle Grimstone*. This paper from the Lords, is not an answer to your reasons, but to accommodate and arbitrate the thing. In effect, if you will take 10s. in the pound, you may. They say, " Let us banish him," and you would attain him. They would have you depart from your reasons, and accept of their expedients.

Sir *Francis Winnington*. I take it, as the matter stands, to be no more than this : We send a bill to the Lords, and they make amendments to it, and you disagree to those amendments, and send the Lords your reasons for it. Barely they insist upon their amendments, so far as to exclude all attainder. They tell you, " They do not come to argue, but to mitigate and reconcile." They have not yielded to any particulars of your amendments. They agree so far as to exclude all attainders ; and that is the same thing as to disagree ; and they insist upon all their amendments.

Mr. *Vaughan*. You have offered the Lords your reasons, &c. and they answer them not, but say they will not argue your reasons, but

insist upon their own amendments. When that is done, there is an end of all intercourse in that matter, and that is a way of reasoning in the streets. We ought to proceed then no farther, but adhere to our own reasons.

Sir John Trevor. The Lords have got a word, a fine one, "insist." It was never known in parliament, but in the last parliament. You send them up a bill of attainder, and they send you down amendments by amendments, and you deliver your reasons against them. The Lords should, in this case, desire a free conference, and give no reasons, but "insist," &c. You sent the Lords a bill for disbanding the army, and to place the money in the chamber of London. They amended it, and would have it in the Exchequer. The Commons would not agree to it, and at that conference they told you, they did insist upon it; whereas they should have had a free conference, &c. If you do not now demand a free conference, and put their amendments to the question, you are out of the course of parliament.

Mr. Seymour. I rise up to speak to method of proceeding. You are moved to desire a conference with the Lords, to show the Lords the errors of their proceedings. They who do it, would do well to assign those errors. The Lords were at liberty to say what they would, and you thought fit not to agree with their amendments, and you presented them your reasons at the conference, why you could not agree, &c. The Lords have given you reasons, why they insist upon their amendments, though not logically, for not agreeing strictly. You ought to put the amendments to the question, point by point. You are to agree to the amendments with the coherence. The Lords cannot mend their own amendments, but you may yours; and you may put that question after that question of adhesion. Then you stick to your bill.

Sir Joseph Williamson. I did think this last paper delivered at the conference, not to be the same as their first; they come nearer to you, than in their first. You are reading the amendment of changing the attainder, if he came not into England by such a day, into banishment; it is a penalty, upon that condition only. Thus far then the Lords come; they say, "they shall insist on their amendments no farther than to exclude attainder and forfeiture of all his honours and grants, &c. from such a day," &c. They agree, then, if you will bate them the attainder, they will insist upon no farther point; so they are in a disposition to deprive this lord, if he appear not by a day, of his honours and grants, &c. from such a day. I have spoken my mind. This being the case, I wish this lord justice beyond that, and it is pretty well known, I have no obligation to him; I would condescend to the public convenience. There is more cause than this for agreement between the two houses. When you come to apply to them judicially, and they turn themselves to the legislative

course; this is the place for that consideration. If justice can be reasonably satisfied by this compliance of the Lords to deprive Danby of honours, &c. this being the case, how advisable is it for you to insist upon the attainder, &c. with the consequences, which turns him and his family to the lowest condition, without remedy but by act of parliament! You have all the reality of the penalty if he stands out; you have all your end but that of the attainder.

The Amendments were disagreed to.

Serjeant Ellis. Lord Danby at first was not committed, and those who manage the conference must lay that as the first foundation, that all this ill consequence is come from the not committing him, and lay some weight upon that at the opening of the conference.

Sir Henry Capel. If omitting securing lord Danby, &c. be not enforced at the conference, it will open a door for all great men to escape justice; the not committing, &c. upon the Commons' accusation. If the Commons cannot reach men in their regular way of proceedings, there is an end of all parliaments. The five Lords were committed by the lord chief justice for the plot, and the parliament in being. I move, therefore, that the managers at the conference may have some such instructions.

Sir Thomas Lee. I think that the committee is pretty well impowered already, and you have reason for it; for in your parenthesis in the last reasons, you touched that matter sufficiently; so that there is a foundation laid for this debate already. The Lords say, "That whatsoever has been done in Danby's case, to remove all jealousies of the precedents of this kind, shall not be drawn into example for the time to come." And the Lords said, "They would not commit him," &c. I know not to which to apply; what is moved should be insisted upon, whether one or all. In the case of lord Clarendon, so often cited, &c. there was only special matter insisted upon by the Lords, &c. before they would commit him; and then they asked the opinion of the judges, as now in this case they have done. Now the question is, whether you will not cozen yourselves in it, &c. if you insist upon this bill (and no man is the better for Danby's going away) then you will have a good precedent for running away; but if you lay the weight upon the matter of securing Danby, that is in the judicial proceedings; and so you may put the Lords upon starting aside from the matter in question. Therefore I would not insist upon that, but touch it only.

Sir William Coventry. The Lords may retract, if you insist upon that point of their not securing Danby. An error they committed the last parliament is not a proper subject-matter for this conference, and they may say, "Your managers have transgressed their bounds, for the conference was asked upon the amendments of the bill," &c.

Mr. Sacheverell. The Lords have made you an offer which seems very kind, but is no way

beneficial to your end, &c. They say, "What they have done in this lord's case, &c. shall not be a precedent for the time to come." I am afraid the Lords foresee that your articles have laid a foundation for the Commons to defend themselves, and so that shall not be a precedent. Possibly subversion of the government is not by any positive law high-treason, reserved to judgment of parliament by 25 Edw. 3. Consider if you do not in a great measure deprive yourselves of that right, that the Lords have made a resolution in, "That Impeachment, and Writs of Error, &c. shall remain still, though the Parliament be prorogued or dissolved, &c." The Commons still have their right, and if you agree to this point, you may part with that, a much greater point.

Mr. Hampden. I have stood still to hear the prudential part of this matter only. The question is, Whether you will meddle at all with the Lords omission of not securing Danby, &c. I would touch it the most you can do. In the preservation of your rights, you may go farther than touch it lightly; you must stand to it, and defend it; if you touch it lightly, you will rather lose than gain by it. Suppose any of the Lords (for they are touchy, and nice, and well versed in their methods) should reply upon it, and bring it in debate, should your Managers yield it, or argue it? I would rather let it alone at this time.

There was another Conference on this subject-matter, April 12; upon which the Commons again resolved to adhere to their Bill, and to disagree to the Amendments made by the Lords: upon which the Bill of Attainder did at last pass both Houses.

Upon this the earl of Danby surrendered himself; and sir Edward Carteret, Usher of the Black Rod, on April 16, gave the House of Lords an account that the earl of Danby had the last night rendered himself to him, and was in his custody. Their lordships ordered him to be brought to their bar, where kneeling, and then standing up, the Lord Chancellor let him know, that he stood impeached by the Commons, and that, upon his withdrawing himself, a Bill of Attainder had passed the two Houses; by which, however, he had time given him to come in, and make his defence.

The earl of Danby excused his not appearing sooner, declared his innocency, and made several Petitions to the House, and then was ordered to withdraw. And being called in, and brought to the bar again, the Lord Chancellor acquainted him that their lordships would allow him time to give in his Answer to the Articles of his Impeachment, till the first day of the sitting of the House after Easter: That if any further charge be put in against him, he shall have further time to answer; That he shall have counsel assigned him, and shall have liberty to make use of records, and that his witnesses shall be summoned.

Upon which he withdrew, and by order of the House was committed to the Tower.

On April 25, the earl was brought from the Tower to the bar of the Lords' House, where he delivered in writing his Plea to the Articles of his Impeachment, which was as follows:

THE PLEA OF THE EARL OF DANBY, LATE LORD HIGH TREASURER OF ENGLAND, TO THE ARTICLES OF IMPEACHMENT, AND OTHER HIGH CRIMES AND MISDEMEANOURS, AND OFFENCES, EXHIBITED AGAINST HIM BY THE NAME OF THOMAS EARL OF DANBY, LORD HIGH TREASURER OF ENGLAND.

The said Earl for Plea saith, and humbly offereth to your lordships, as to all and every the treasons, crimes, misdemeanours and offences, contained or mentioned in the said Articles, That after the said Articles exhibited, namely, the 1st of March now last past, the king's most excellent majesty, by his most gracious letters patents of pardon, under his great seal of England, bearing date at Westminster the said 1st day of March, in the one and thirtieth year of his majesty's reign; and here, into this most high and honourable court, produced under the said great seal:

Of his special grace, certain knowledge, and mere motion, hath pardoned, remised and released to him, the said Thomas earl of Danby, all, and all manner of treasons, misprisions of treasons, insurrections, rebellions, felonies, actions, oppressions, publications of words, misprisions, confederacies, concealments, negligences, omissions, offences, crimes, contempt, misdemeanours and trespasses whatsoever, by himself alone, or with any other person or persons, or by any other, by the command, advice, assent, consent, or procurement of him the said Thomas earl of Danby, advised, committed, attempted, made, perpetrated, concealed, committed, or omitted, before the 27th day of February then and now last past, being also after the time of the said Articles exhibited, although the said premises, or any of them did, or should touch or concern the person of his said majesty, or any of his public negotiations whatsoever; and also his majesty's affairs with foreign ambassadors sent to his said majesty, or by not rightly prosecuting his majesty's instructions and commands to his ambassadors, residing on his majesty's behalf in foreign parts.

And as to all and singular accessories to the said premises, and every of them, although he the said Thomas earl of Danby were, or were not of the said premises, or any of them, indicted, impeached, appealed, accused, convicted, adjudged, outlawed, condemned, or attainted; and all and singular indictments, impeachments, inquisitions, informations, exigents, judgments, attainders, outlawries, convictions, pains of death, corporal punishments, imprisonments, forfeitures, punishments, and all other pains and penalties whatsoever, for

the same, or any of them; and all, and all manner of suits, complaints, impeachments and demands whatsoever, which his said majesty, by reason of the premises, or any of them, then had, or for the future should have, or his heirs, or successors, any ways could have afterwards against him the said Thomas earl of Danby: And also suit of his majesty's peace, and whatsoever to his majesty, his heirs, or successors, against him the said earl of Danby, did, or could belong, by reason or occasion of the premises, or any of them. And his majesty hath thereby given and granted his firm peace to the said Thomas earl of Danby. And further, his majesty willed and granted, that the said letters patents, and the said pardon and release therein contained, as to all the things therein pardoned and released, should be good and effectual in the law, although the treasons, misprisions of treason, insurrections, rebellions, felonies, exactions, oppressions, publications of words, misprisions of confederacies, concealments, negligences, omissions, offences, crimes, contempts, misdemeanors and trespasses were not certainly specified. And notwithstanding the statute in the parliament of the lord Richard the Second, late king of England, in the 13th year of his reign, made and provided. And notwithstanding the statute in the parliament of the lord Edward the Third, in the 14th year of his reign, made and provided, or any other statute, act, or ordinance to the contrary thereof made and provided. And moreover, his said now majesty, by his said letters patents, of his further grace, did firmly command all and singular judges, justices, officers, and others whomsoever, that the said free and general pardon of his said majesty, and the general words, clauses, and sentences abovesaid, should be construed, expounded, and adjudged in all his said majesty's courts, and elsewhere, in the most beneficial, ample and benign sense.

And for the better and more firm discharge of the said Earl of and from the crimes and offences aforesaid, according to the true intents of his majesty, and in such beneficial manner and form to all intents and purposes whatsoever, as if the said treasons, crimes, offences, concealments, negligences, omissions, contempts and trespasses aforesaid, and other the said premises, by apt, express and special words had been remitted, released, and pardoned. And that the said letters patents of pardon, and the release and pardon therein contained, shall be pleaded and allowed in all and every his majesty's courts, and before all his justices whatsoever, without any writ of allowance, any matter, cause, or thing whatsoever in any ways notwithstanding, as by the said letters patents themselves more at large appeareth; which said letters patents follow in these words.

Carolus secundus, Dei Gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ Rex, Fidei Defensor, &c. Omnibus ad quos præsentis literæ nostræ pervenerint, Salutem. Sciatis, quod Nos pro diversis bonis Causis et Considera-

tionibus nos ad hoc specialiter movent, de Gratia nostra speciali, ac ex certa scientia et mero motu nostris, Pardonavimus et Relaxavimus, &c.

And the said Earl doth aver, That he the said Thomas earl of Danby, in the said articles named, is the said Thomas earl of Danby in the said letters patents of pardon here produced, likewise named. Which pardon the said Earl doth rely upon, and pleaded the same in bar of the said impeachment, and in discharge of all the treasons, crimes, misdemeanors and offences contained or mentioned in the said Articles of Impeachment, and every of them; and his the said Earl is ready to aver.

Whereupon he humbly prays the Judgment of your lordships, and that his majesty's most gracious pardon aforesaid may be allowed: and that he the said Earl, by virtue hereof, may be (from all the said Articles of Impeachment, and all and every the treasons and crimes therein alledged against him) acquitted and discharged.

A Copy of the Pardon of Thomas Earl of Danby.

Carolus secundus, Dei Gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ Rex, Fidei Defensor, &c. Omnibus ad quos præsentis literæ nostræ pervenerint, Salutem. Sciatis, quod Nos pro diversis bonis Causis et Considerationibus Nos ad hoc specialiter moventibus, de Gratia Nostra speciali, ac ex certa scientia et mero motu nostris, Pardonavimus, Remissimus et Relaxavimus, ac per præsentem pro Nobis, Hereditibus et Successoribus nostris, Pardonamus, Remittimus et Relaxamus prædicto, et perquam fidei Consanguineo et Consiliario nostro Thomæ Comiti Danbii, omnes et omnimodas Proditiones, Crimina Inestæ Majestatis, Misprisionis Præditionum, Insurrectiones, Verborum Propagationis, Misprisiones, Confederaciones, Conclamata, Negligentias, Omissiones, Offensas, Crimina Contemptus, Malefacta et Transgressiones quæcumque, per se solum seu cum aliqua alia persona, vel aliquibus alijs personis, aut per aliquem alium, sive aliquos alios, ex præcepto, advisamento, assensu, consensu, seu procuratore ejusdem Thomæ Comitis Danbii, advisata, præcepta, attempta, facta, perpetrata, concejata, commissa, seu omnia, ante 27 diem Februarii jam ultim. prætoritum, licet præmissa, vel eorum aliqua, vel aliquod, tangunt vel tangat personam vel negotiationes Nostras publicas quoscunque, necnon transactiones nostras cum Forensibus Legatis ad nos missis, vel non rite prosequendo Instructiones et Mandata Nostra Legatis Nostris, in partibus extramarinis, ex parte Nostra resident. ac etiam omnia et singula accessaria præmissorum et cujuslibet eorum, licet idem Thomas Comes Danbii de præmissis vel aliqua præmissorum indictatus, impetitus, appellatus, restatus, convictus, adjudicatus, obligatus, condemnatus vel atinctus, Existit vel non Existit, ac omnia et singula Indicta-

'menta, Impetitiones, Inquisitiones, Informa-
 'tioncs exige da judicis, attincta, utlegaria,
 'Convictiones, Executiones, Pœnas mortis,
 'Pœnas corporales, Imprisonamenta, foris factura,
 'Punitiones, et omnes alias Pœnas et
 'Pœnalitates quascunque, pro eisdem vel eorum
 'aliquo, ac omnia et omnimoda, Sectas,
 'Querelas, Impetitiones, et Deuanda quæ-
 'cunque, quæ Nos versus ipsam Thomam
 'Comitem Danbii, ratione præmissorum vel
 'eorum alicujus, habuimus, habemus, seu in
 'futurum habere poterimus, aut Heredes, seu
 'Successores nostri, ullo modo habere poterint,
 'in futuro, sectamque pacis Nostræ, ac quæ ad
 'Nos, Heredes et Successores Nostros versus
 'ipsam Thomam Comitem Danbii pertinet, seu
 'pertinere poterit, ratione seu occasione præ-
 'missorum, seu eorum aliquorum vel alicujus,
 'ac firmam pacem Nostram. Et inde damus
 'et concedimus per presentes, et ulterius volu-
 'imus, et concedimus, Quod hæc literæ nostræ,
 'ac hæc nostræ Pardonatio, Remissio, Relaxa-
 'tio in eisdem contenta, quod omnia et singula
 'superius pardonata, remissa, et relaxata, bonæ
 'et effectuales in lege siut, et erint, licet Pro-
 'ditiones, Crimina læsæ Majestatis, Mispris-
 'siones Proditionum, Insurrectiones, Rebel-
 'liones, Felloniæ, Exactiones, Oppressiones,
 'Verborum Prophanones, Misprisiones, Con-
 'federationes, Concelamenta, Negligentiæ,
 'Omissiones, Offensa, Crimina Contemptus,
 'Malefacta et Transgressiones antedicta, Minus
 'certe specificat. existunt. Et non obstante
 'Statuto Parlamento Dom. Ricardi Secundi,
 'nuper Regis Angliæ, Anno 13 Regni sui edito
 'et proviso. Et non obstante Statuto in Par-
 'liamento Doli. Edwardi Tertii, nuper Regis
 'Angliæ, Anno Regni sui 14 edito et proviso ;
 'Aut aliquo alio Statuto, Actu vel Ordinatione,
 'in contrarium inde editis et provisus. Et
 'ulterius de uberiori Gratia Nostra firmiter
 'Præcipimus omnibus et singulis Judicibus,
 'Justiciariis, vel aliis quibuscunque, Quod hæc
 'presens Litera et Generalis Pardonatio nostra
 'et generalia Verba, Clausulæ et Sententiæ
 'supradicta, construuntur, exponentur et ad-
 'judicentur in omnibus Curis nostris et alibi,
 'in beneficentissimo, amplissimo, et benignis-
 'simo sensu, et pro maxima et firmiori exone-
 'rationi prædicti Thomæ Comitis Danbii de et
 'à criminibus et offensis prædictis secundum
 'veram intentionem nostram, et in tam bene-
 'ficiali modo et forma et ad omnes intentiones
 'et proposita, prout si prædictæ Proditiones,
 'Crimina læsæ Majestatis, Misprisiones Pro-
 'ditionum, Crimina Offensæ, Misprisiones,
 'Concelamenta, Negligentiæ, Omissiones, Con-
 'temptus, et Transgressiones prædictæ, ac cetera
 'præmissa per apta expressa, et specialia Verba
 'Pardonata, Remissa, et Relaxata fuissent.
 'Et quod hæc Literæ Patentes, Remissio, Re-
 'laxatio, et Pardonatio, omnia in eisdem con-
 'tenta, in quibuscunque Curis et coram quibus-
 'cunque; Justiciariis nostris, placitentur et al-
 'locentur, sine aliquo Breve de allocatione,
 'aliqua re, causa vel materia quacunque; in
 'aliquo non obstante. In cujus rei Testimo-

'nium hæc Literas nostras fieri facimus Pa-
 'tentes. Teste Meipso apud Westmonas-
 'terium 1 die Martii. Anno Regni nostri 31.
 'CHARLES.'

' 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 our letters-patents shall come, sendeth
 ' greeting. Know ye, that we for divers good
 ' causes and considerations, us hereunto espe-
 ' cially moving, have out of our special favour,
 ' certain knowledge and mere motion of our
 ' own, pardoned, remitted and released, and by
 ' these presents for us, our heirs and suc-
 ' cessors, do pardon, remit and release to our
 ' well-beloved and right trusty cousin and
 ' counsellor, Thomas earl of Danby, all, and
 ' all manner of treasons, as well high-treason
 ' as misprisions of treason, insurrections, re-
 ' vealing of councils, misprisions, confedera-
 ' tions, concealments, neglects, omissions, of-
 ' fences, crimes, contempts, misdeeds and
 ' transgressions, whatsoever by himself alone,
 ' or with any other person or persons, or by
 ' any other, or others, by the command, advice,
 ' assent, consent, or procurement of the said
 ' Thomas earl of Danby, advised, commanded,
 ' attempted, done, performed, concealed, com-
 ' mitted, or omitted, before the 27th day of
 ' February now last past. Although the pre-
 ' mises, or any of them, touch, or may touch
 ' our person, or our public negotiations what-
 ' soever, or our transactions with foreign am-
 ' bassadors unto us sent, or for not right fol-
 ' lowing our instruction and mandates to
 ' our own ambassadors resident on our behalf
 ' in foreign parts beyond the seas; And also
 ' all and singular accessaries to the premises,
 ' or any of them, although the said Thomas
 ' earl of Danby be indicted, impeached, ap-
 ' pealed, arrested, convict, adjudged, or as am-
 ' bassador condemned, or be, or be not attained
 ' of the premises, or any of them; and all
 ' and every indictments, impeachments, in-
 ' quisitions, informations, judgments to be required,
 ' attainders, outlawries, convictions, penalties
 ' of death, corporal punishments, imprisonments,
 ' forfeitures, sufferings, together with all other
 ' pains and penalties whatsoever, for the same,
 ' or any of them, and all, and all manner of
 ' suits, complaints, impeachments and de-
 ' mands whatsoever, which we, against the
 ' said Thomas earl of Danby, by reason of the
 ' premises, or any of them, have had, now
 ' have, or hereafter may have, or which our
 ' heirs or successors in any manner may have,
 ' hereafter, together with any suit for breach
 ' of our peace, which to us, our heirs, or suc-
 ' cessors, against the said Thomas earl of
 ' Danby doth, or may belong, by reason or oc-
 ' casion of the premises, of some, or any of
 ' them; We do for ever indemnify him. More-
 ' over we give and grant by these presents, and
 ' it is our further will and pleasure, that these
 ' our letters and this our pardon, remission and
 ' release therein contained, as to all and singular

‘the things above pardoned, remitted and released, be and shall be good and effectual in law, although the treasons, high-treasons, misprisions of treason, insurrections, rebellions, felonies, extortions, oppressions, betraying of councils, confederacies, concealments, negligencies, omissions, offences, crimes, contempts, misdemeanours and transgressions aforesaid, be not fully specified. And notwithstanding the statute of Richard the second, late of England king, in the 15th year of his reign made and provided. And notwithstanding the statute by the parliament of Edward the third, late king of England, in the 14th year of his reign made and provided, or any other statute, act, or ordinance to the contrary heretofore published and provided. And moreover of our abundant grace, we do strictly command all judges, justices, or others whatsoever, that this present letter, with our general pardon, and general words, clauses, and sentences above said, shall be construed, expounded and adjudged in all our courts, and elsewhere, in the most beneficial, most ample, and most favourable sense, and for the greatest and firmest discharge of the aforesaid Thomas earl of Danby, of and from the crimes, and offences aforesaid, according to our true intention, and in so beneficial a manner and form, and to all intents and purposes, so as if the said treasons, high-treasons, misprisions of treason, crimes, offences, omissions, contempts, concealments, negligence and transgression aforesaid, and other the premises, had been by apt, express and special words, pardoned, remitted and released. And that these letters patents, remission, release and pardon, with all things therein contained, in whatsoever courts, and before whatsoever our justices, shall be pleaded and allowed without any writ of allowance, any thing, cause, or matter whatsoever in any wise notwithstanding. In witness whereof we have caused these our letters-patents to be made. Witness myself, at Westminster, the first day of March, in the 31st year of our reign.’

When the Plea and Pardon were read, the earl withdrew and was carried back to the Tower.

A message was sent from the Lords to the Commons, ‘That Thomas earl of Danby had this day appeared in person at the bar of the House of Lords, and had put in his plea, which the lords have sent down, desiring it may be returned with all convenient speed.’

Hereupon the following debate took place.*

Sir John Knight. Lord Danby was impeached in the last parliament, when he sat in his place; but he has done worse since the last parliament was dissolved. I am unable to give answer to this, especially when it is called ‘A stamped Pardon by creation.’ I would

refer it to the same Committee. It is of vast importance.

Serjeant Ellis. I think this matter is of great weight, and worthy of your most serious consideration. The earl of Danby has put his life upon his plea, and if it does not stand good, your articles are in force. He fully relies upon his plea. I will give no opinion at present upon it, but I move that some select number of gentlemen may be ordered to prepare, and consider the manner how this Pardon was obtained. You are not yet ready to consider; the more you do, it will be the better, and in a day or two’s time you may give an answer to it.

Sir Francis Winnington. Since I have had the honour of being a member of this House, great matters have been discoursed here. This is as great as can be. All the plea is mentioned under the word ‘Protestation to all the Articles, &c.’—And they have no more operation in law than if not mentioned. The earl of Danby has gone so far, as that the Commons are not obliged to any answer. He has left no room to prove any one article; for his pardon is amounting to a confession. Should this pardon have allowance, without the legal course of obtaining it? If great men do exorbitances with pardon, it takes away *culpa* as well as *pena*. There is an end of all justice against men, if such pardons are allowed. No man is more tender of blood than I am; but put it in some way, that the matter may have some representation, to see what former ages have done in such cases, and see whether this is not a rare thing; and see what the Commons ought to stand upon. It is too big for a resolution of a Committee; I would have them only state the matter, and then consider what a condition we are in, as to law, against such great men as these; when all we have is at stake.

Mr. Garroway. I honour the gentleman in his station. But what becomes of us all, if this pardon pass? If it had been done barefaced, it had been all one to me. Preparatory to referring it to some Committee of the Long Robe, they may inform you how the case stands in their books, and you may take deliberation what to determine in the matter. Now I am up, I would move you to have those whom you refer it to, consider, whether you will not let this pardon be pleaded for all, and then we may consider what that ‘All’ is, that is pardoned. Next I move, that when the Report comes from the bar about the money, (let it come when it will,) that you give no money till you have cleared yourselves of the earl of Danby, before you proceed upon any Lord whatsoever.

Sir Thomas Clarges. I think it not fit to proceed till the Committee shall state the matter in point of precedent. But I differ with the gentleman that said ‘He cares not in what form the pardon is done.’ For if that be not differenced, Chancellors may put seals to raising money, or any thing.—‘per se solum, aut cum aliquâ aliâ personâ.’ They may be

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* Grey’s Debates, vol. 7, p. 133.
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females as well as males—I am of opinion, that we ought to have right in this, before we give money; for the king has been deceived in this pardon, and so has the nation. But I would not put the Committee to needless trouble—I believe there are no farther articles but since March last, and this pardon does amount to a confession of the whole, &c.

Colonel Titus. By the trouble this great person has given us, we may plainly see how much easier a favourite undoes a kingdom, than serves a kingdom. The man possessed with the devil, in the Gospel, had his body torn, and foamed, before the devil could be got out. Of Danby's protestations of not guilty, in his pardon, I believe not one word. And I believe Danby does not believe one of them, else he would not need a pardon. If he need it not, with what face can he plead his pardon? In that he acknowledges his guilt, and if all knew as much as he, he stands in need of a greater. What offence is there not mentioned in this pardon? And yet, what offence has he not done that he stands not in need of a pardon? If by villainy he has got honours, if by rapine an estate, and if that pardon is pleaded to a House of Commons, and made valid, ours will be like the Athenian laws, to catch flies, while wasps and hornets break out. Will any good man have encouragement to do good, or discouragement for ill men? Has Danby any hopes of another world? He would never then be guilty of such crimes, to stand in need of such a pardon. I move you "That a Committee of the Long Robe may search precedents, and give you an account, &c."

Sir Henry Capel. I differ with the gentleman but in one particular. He says, "as Danby has given us trouble in his prosecution, so he has at his exit"—If it be as he says, the articles are out of doors, and the pardon only remains to be considered—When great men have committed great crimes, and such a body of men as the House of Commons have knowledge of them, we ought to bring such a man to justice. And since he has got a pardon, it is worthy of the consideration of the whole House, and not of a Committee barely. And therefore I would debate it in the whole House.

Sir John Trevor. I doubt it will be a hard matter to put a limitation upon the King's pardon unless by act of parliament, and that not is yet to be found out. As for the King's Coronation Oath, lord Latimer and Lyons, in Edward 3's time, were impeached by the Commons, and after their trial and condemnation, they were both pardoned. And this was at a time when arbitrary power was as high as ever since. 1 Richard 2, this pardon was complained of by the House of Commons, but the result at last was, they impeached the persons who procured the pardons, and looked into the manner of procuring them. This I say, that the Committee may view the precedents next, as to the manner of gaining of pardons. When gained so much to the dishonour of the king and kingdom, they were complained of and re-

voked. And next, though Danby has put his life upon this pardon, and this pardon be void; yet it lies upon your honour by bill to show the king, how his honour is concerned in it, and the nation's, and to desire him to revoke it.

Mr. Sacheverell. I differ from most gentlemen, &c. or else I would not trouble you now. My opinion is, that this pardon is illegally grounded, and that it is void in itself. If it pass, that this is a good pardon, and that all such crimes as this lord stands charged with, are pardoned at one blow, farewell all! There is one thing we ought to take high notice of; the plea lays all the crimes, that he stands charged with, upon the king. I would shew him, that this plea of laying them upon the king, deserves as great an article against him, as any of the rest, &c. and I would have it added for one.

Sir Thomas Lee. If you go on without an act of parliament, and make this pardon void, you save yourselves the labour of all proofs, and so you deprive him of all defence—You should not hinder the proceedings of the secret committee; but if other matters are before you, prepare them into articles, and go upon them; and then you may spend your time to consider whether it be proper to void this pardon by act of parliament.

Resolved, &c. "That it be referred to the Committee of Secrecy appointed to draw up further articles against Thomas earl of Danby to examine the matter of the plea of the said earl to the Articles of Impeachment exhibited against him by this House: and to search and enquire how precedents stand in relation to the pardon; and in what manner, and by what means, the same was obtained; and make report thereof to the House with all expedition."

April 28.

Sir Francis Winnington reports from the Committee of Secrecy, to whom it was referred to examine and peruse the nature of the Plea of Thomas earl of Danby, to the Articles of Impeachment exhibited against him by this House; and to report how Precedents stand in relation to the pardon; and in what manner, and by what means, the same was obtained; that the Committee had agreed upon a report to be made to the House: which he read in his place; and afterwards, delivered the same in at the clerk's table: where the same was again read; and is as followeth, viz.

"We find no precedent, that ever any pardon was granted to any person impeached by the Commons of high treason, or other high crimes, depending the impeachment."

"As to the manner of passing the earl of Danby's pardon, it hath been formerly reported to the House: and the Committee refers themselves to that report."

"That by what means it was obtained, the time allowed the Committee hath been so short, that we cannot as yet discover the advisers or procurers thereof, any further than what is

mentioned in the said report relating to the lord chancellor."

Debate thereon.

Mr. Bennet. I believe it will not be found in law books, that a pardon has been obtained in this manner, or that the lord chancellor ever parted with the seal, as you have heard it reported.

Serjeant Ellis. The question is, Whether this plea of lord Danby's pardon be a good plea, and the manner of obtaining it? The regular way of pardons is by the Attorney General, and the Solicitor General, &c. They are men of the law, and might stop it in their office, and the rest of the offices, &c. It is the duty of the lord chancellor's place, if he thought this not a good pardon, to have informed the king of it. But to pass by all this, the question before you is, whether this be a good pardon to hinder your impeachment. I confess, I am of opinion, that the pardon itself is not legal; it is a void pardon, and if you demur upon it, I hope the lords will give judgment. If this plea be over-ruled by the lords, you can never have justice against him, &c. This is as cunningly as ever was done—*capture vulgus*—His counsel knows we can take no issue upon this; he has not done dutifully to the king; for the Commons cannot vindicate the king's honour; for no issue can be joined upon this Plea. I therefore would join in the demurrer, and expect the issue of this pardon, and it is most proper to go to the lords to join in demurrer, that this is no legal pardon.

Sir John Trevor. The question is now this single point, whether this pardon of the earl of Danby be a good and legal pardon, or no? I will not contest the point with serjeant Ellis, whether this be a good pardon, or not. I protest before God, I am no advocate for lord Danby; but for the fair interpretation of the House, I will open that part of the pardon to you. I humbly conceive, that in those two precedents I vouched to the House the other day, I dealt fairly. One precedent was 50 E. 3. in lord Laumer's case. The other, of Richard Lyons, Merchant, was in the 1st R. 2. The precedent I cited of lord Latimer was contrary to the opinion of the Committee. Latimer was impeached of high treason, and one or two more; the rest were of misdemeanor. First, he gathered the king's impositions in Britany, and gave him no account of them. Then he delivered up the fort of St. Saviour. The last offence was, that he encroached upon regal power, and let go several felons, and other prisoners, without the king's order. Latimer pretends, "He does acknowledge 2,000 marks due to the king, and submits to the king's grace and favour, and that he cannot pay the 2,000 marks without selling his lands." To all the rest he gives answer—And whereas Latimer confessed the matter, and produced no pardon from the king, he was condemned, but no *quietus* to Latimer. The parliament ended, then the king gives him his

pardon, not only for the 2,000 marks—He confesses all, offering the king 20,000*l.* and the king pardons all the impeachment. The thing is, the impeachment was impending, and here is a pardon granted, but if the rest of the impeachment fell by the dissolution of the parliament, then all that I have said signifies nothing.

Serjeant Ellis. In the pardons of Lyons and Latimer, it is plain that the king recites the judgment given by parliament in their pardon, and the king pardons what belonged to him, which the king is so interested in, that he may dispose of it how he pleases, and the king gave Latimer his lands, as if no impeachment had ever been (though there was something that might import treason in the impeachment, though not by the Stat. of 25 Edw. 3.) So the lords put a fine upon him of 20,000 marks; and after that the king pardoned all that belonged to him, which the king may dispose of to whom he will; to the party, if he pleases. I will not say there are no precedents of pardon, &c. but the king never pardoned, till some judgment or resolution was given of the offence in parliament. But to pardon before trial, when the king knows not what fact he is to pardon, is a dangerous precedent. A man may destroy the nation, if so, and do what he will. This is a thing of a strange nature. The king cannot pardon a man, an impeachment depending.

Sir Francis Winnington. This does not only concern a particular man, but the government of England. What you debate is not conclusive either to the Commons or lord Danby, but only methods to discharge our duty to the king, and those that sent us hither. As to precedents of the manner and means of obtaining this pardon, no man can pretend any precedent. Danby thought the illegality of the pardon so great, that the officers, through whose hands it must go, would not pass it, and therefore took this course. But we must cut off the particles of the manner of obtaining it. I am of opinion to demur to this plea of his pardon, for it was never practised, and Trevor's two precedents are not to this case. A pardon granted "for all offences, to the 27th of February," which is three months after the impeachment was exhibited, and the crimes, &c. perpetrated. State this fact only, and see what a condition we are in, if this be a good pardon. As to the case of Latimer and Lyons, Trevor agrees that the facts they were impeached of were confessed by the parties; and Latimer "submits himself to the grace and favour of the king, but by special prayer, not to put him to his fine, for he must sell his lands." What is the meaning of impeachment in parliament? Because great men commit great exorbitances; and when the fact is proved by the commons, or the party confesses, &c. that is all the commons can do, and the lords give judgment thereupon, and if the party be reduced to judgment, a right of his forfeiture accrues to the king, and all is vested in the king, and the

king may pardon his part. I conceive, without all scruple, that the Commons right is to have justice by trial. As for the fine of 2,000 marks, in lord Latimer's judgment, that came to the king's coffers, and the king might pardon it. In the case of an appeal of murder, the king loses a subject, and enquiry is made how he came by his death, &c. The wife and heirs of the party, &c. have their vengeance, and the king cannot pardon, &c. He cannot hinder execution of the party; and no man can deny it. When an impeachment is by the Commons against a great man, they are aggrieved, and they must have justice. An impeachment is to no purpose when a pardon shall stop our mouths—And there is no end to the oppressions of all great men, who are too big for inferior courts to deal with. The committee does distinguish pardons, where impeachments are depending, and where not. We have proved our case, and a pardon is clapped upon you. I would argue it at the lords' bar, and I hope the lords will not give judgment in this case, &c. to be a good pardon. I only mention this, to show that is not a point to give up. No great man was ever so stout yet, as to 'get a pardon when his impeachment was depending. The late duke of Buckingham, though he had a pardon, durst never bring it to light during his impeachment. Certainly this experiment might have been found out, had it been legal, in five hundred years. We are not to give up this point. Now the country has entrusted us, let us do the best we can for them.

Sir John Trevor. I say, a person impeached may deny one crime, and confess another. Lord Latimer was impeached, and one of the crimes he was charged with he did acknowledge, before they proceeded to the rest. There is no relative expression in lord Latimer's pardon—"Quoad nos pertinet"—The king cannot restore what he has already given away—The 2,000 marks were laid on Latimer as a fine: the 20,000 marks was his submission to the king. That impeachment was subsisting after the parliament, and this of lord Danby is a pardon, &c. pending the impeachment.

Mr. Poole. I confess I am unprepared to speak to this matter. I find the case of lord Latimer urged, which was an impeachment of 50 Edw. 3. and sentenced then, &c. But that in the case is not yet taken notice of, that in 51 Edw. 3. the parliament reversed all those judgments, and a particular petition of the Commons complains, "that lord Latimer was unduly impeached, and desires he may be restored *in integro*." Historians tell us of some extraordinary power in calling that parliament, by the duke of Lancaster, the king's son. Sir John Peachy and Lyons particularly petitioned that they might be restored. Others, in 11 Rich. 2.—A great number of persons were appealed by particular lords, and some by the Commons. The judges were all impeached for giving judgment against a judgment of parliament, and were banished to Ireland. Sir Robert Belknap and several others were not re-

stored but by act of parliament—11 Rich. 2. Squire attained, restored 16 Rich. 2. Another thing 19 Hen. 4. little different. In the Revolutions of York and Lancaster there were few impeachments, but by Bills of attainder—Little difference, being the assent of the whole body. There was a power lodged in the king that he might pardon, &c. notwithstanding there was no parliament, &c. A great instance that the king could not do it without parliament. Lord Bacon was fined for misdemeanor; the king pardoned the fine, but for the judgment of his disability for offices, he never pardoned. The duke of Buckingham concludes his answer, "That what he did was before the 21st of king James, and claims that general pardon, and the coronation pardon of king Charles, and he had taken a pardon, according to that grace of the king, to the 21st of February last parliament." The duke thought it the better way to dissolve that parliament, than to plead his pardon. I think it not convenient to take lord Danby upon the first advantage of this first proposal, but peremptorily, if he insist upon his pardon, judgment must go against him. For my share, I would unwillingly insist upon it at the Lords bar.

Serjeant Maynard. People abroad know not what is plea, and what is not plea; but it lies all upon the king. The plea is not yet entered, &c. and lord Danby may withdraw it. As things now stand, I would advise to apply yourselves to the Lords, to know whether Danby will stand to this plea. If criminal, and that plea be found against him, he is gone; but in parliament he should not be taken with a Why not. I desire you would go only on the crime, and not on point of law.

Lord Cavendish. The sense of the House is to demur to the pardon. If Danby insist, &c. then to try the validity of it. The lord chancellor said, "he intended to make use of it, if false witnesses should arise against him." He cannot know false witnesses before he comes to trial. I would desire the Lords to demand of Danby, whether he will insist upon his pardon, or his plea.

Resolved, "That a Message be sent to the Lords, to desire their Lordships to demand of the Earl of Danby, whether he will rely upon and abide by the Plea, or his Pardon."

Saturday, May 3.

A Message from the Lords, by Mr. Justice Atkins, and Mr. Justice Jones, viz. That the earl of Danby, being this day brought to the bar, made the Answer following, by word of mouth only, viz. "The plea, which I have put in, was put in by the advice of my counsel; and my counsel tells me, that my Par-

* "The man of the law, that the earl of Danby depended most upon, was Pollexfen, an honest and learned, but perplexed lawyer. He advised him positively to stand upon his pardon. It was a point of prerogative never yet judged against the crown, so he might, in that

"don is a good pardon in law; and advises me to insist upon my plea put in: Which I now do; and I desire that my counsel may be heard, to make out the validity of my Pardon."

*Debate thereon.**

Sir John Knight. This pardon of the earl Danby, for the articles he confesses, will have no effect before his trial, bringing in Popery, to be an opportunity to subvert the government of the nation. The five lords may have the same pardons; but I hope God will bless us from this pardon, which does no less than pardon all those crimes he stands accused of. I know nothing of law but self-preservation: I would therefore move, seeing there is such a pardon, to bring in a bill of attainder against him. He renders himself, and is no traitor, for he pleads his pardon. Lay your hand upon your heart, and consider that Danby is a bucket to the ocean in comparison of the safety of the nation, and let us do as we ought to do.

Mr. Williams. The plea of the earl of Danby is full of equivocation. This is a plain proposition, whether he will be concluded by his pardon. It is a simple proposition, in opposition to a complex one, not by Ambages to answer; but will he abide by it? Will any man take this to be an answer? To speak like a lawyer, a school-man, or a country gentleman. Will you be bound by it? A man that has not been truckling with a House of Commons, nor with France, nor the nation. So long as he has been at the helm, he must know how to give a plain answer. Danby, as he is a nobleman, is not skilled in the law. But when we find by his answer, that it is by his counsel; whether they be Jesuits of his counsel, I know not, but I am sure no Jesuit can give a more equivocal answer to a plain question. I am not parliament-man sufficient to propose what you shall do. Now, whether will you go to the Lords, &c. or lay your hand upon your own bundle of *Fugam fecit*, and go by bill of attainder? One or the other you must do.

Sir Francis Winnington. This great lord has given you a great deal of trouble. Give me leave to state the case, how lord Danby stands impeached the last parliament, and continued in office after the prorogation and dissolution of it; and in the last parliament as well as this, he craved time to put in his answer to his impeachment, and to have recourse to his papers for his defence. After a month's time,

case, depend upon the House of Lords, and on the king's interest there. It might, perhaps, produce some act against all pardons for the future; but he thought he was secure in his pardon. It was both wiser and more honourable for the king, as well as himself, to stand on this, than to enter into the matter of the letters, which would occasion many indecent reflections." Burnet.

* *Grey's Debates*, vol. 7, p. 167.

he produced his pardon, and pleaded it. This pardon is of more consequence than an hundred such single lords. When it was pleaded, the Lords sent it down to you. You perused, read, and debated it, and then sent a Message to the Lords to know, "Whether lord Danby would rely upon his pardon for his plea?" And so you left the case. Danby appears to-day, and says, "This pardon is good in law, and he is advised to insist upon it," &c. I humbly conceive, that there are several things in the message that we must discourse of. Danby says, "that he will insist upon his pardon," &c. "Insist" is such a parliamentary term as is not absolutely conclusive, but it is a vehement affirmation; but in plain English and common acceptation, he is not bound up by it. The cause is great, and the House is thin. The cause is great, because the committee can find no precedent of such a pardon granted, pending an impeachment. Next, absolutely, if it be sufferable in the government of England, that a man impeached of treason, which he tacitly confesses by pleading his pardon, [should escape,] (and any man, if such pardon be allowed, in a high station, may do so,) I put not that value on my birthright that in all my life I ever did. It is the constitution of the government to have impeachments against great lords offenders, &c. and if this be stopped now, by this pardon, farewell all; and they will still be established in their iniquity without redress. I propose, therefore, that if this House be of opinion, that by this Message lord Danby demurs upon this plea, let the Commons see what the fate of their interest is. For his counsel to be heard at the Lords' bar, this is a matter of great moment, if Dauby intends to have his counsel heard, and the Lords will say it is a good plea—no man can say that the Commons ever pleaded against counsel, &c. It does not become their grandeur to debate and advocate against any gentleman of the long robe. That is without precedent. I mention this, &c.—The Commons are concerned, and our rights to us are as dear as Danby's life is to him; and I move for Monday to consider of it.

Sir Thomas Lee. I agree that we should not defer the consideration of this longer than necessity requires; but in the mean time, have the opinion of the secret committee. But what will you do, in case he drives you to the necessity of an act of parliament? The pardon, if it be voided, must be judicially, or legislatively; but I would try the first, in the first place. Refer it, &c.

Mr. Paul Foley. I agree that you refer it, &c. till Monday. The committee were of opinion that the House should join issue, that is, demur; which if you do, lord Danby must be concluded by it, and he can put in no other plea, unless cause be shown to the contrary why you should not join in demurrer with Danby. In lord Strafford's case, the Commons would not argue with his counsel; so you refer that and the manner to the com-

mittee, and you need not trouble the House farther.

Mr. *Williams*. When we first came, &c. there was a debate whether you would prefer this lord's trial before the five lords. If you stay till you have a return from the committee, Danby may be postponed to the five lords. Danby has declared, "That he will be concluded by this plea." But says the party to the demurrer, "I will not be bound by it." Says justice *Atkins*, "The plea was delivered by Danby by word of mouth *ore tenus*, only, and no writing." First, you ought to be satisfied whether Danby will be bound by it, and be concluded by it; if not, you do a vain thing; else Danby will walk in a circle and he will conjure still. Therefore I would make application to the Lords, &c.

Sir *Robert Howard*. There is nothing before you applicable to any debate, but the validity, or invalidity, of the pardon; and I believe that may be now, without referring it to the committee. In this case I would not lose a minute, and I would let the lords know, that this answer seems to be *ore tenus*, and may be denied again by the same mouth that said it. What advantages men propose to themselves by delay, may be great; therefore I would proceed upon what is clearly before you. He desires his counsel may have leave to make it good; and it is as natural that his counsel may desert the plea again. Therefore I would send to the lords, to know whether this be his plea, and that it may come under his hand, (and it is a favour to him to know whether he will stand upon his pardon, or any other plea,) and know whether he will make a categorical answer. If Danby will stand by his trial, I would know no more, and ask no more, but whether Danby will plead guilty, or not guilty?

Mr. *Seymour*. The question is not now, "Whether the pardon be good, or the plea," but the question is, "Whether this be a positive answer, which he will rely upon?" I would not trouble you now, but that the honour of the nation and our privileges are concerned when this is delayed, and he may have time to turn three kingdoms into Aceldama—A little alteration of the words may alter the sense. But as we have his answer, it is evasive and uncertain, and makes it part plea, and part pardon. This is so fallacious that we cannot join issue upon it. He asks of the Lords, "That he may have counsel, &c." and that, as to matter of law, is a just demand. But in what manner is he to have it, not to join with the Commons, but to inform the Lords in matter of law, as to the pardon, &c.? But you come not there to capitulate with the counsel at the lords bar, who plead for their fees. A Jesuit was asked, whether he was a Jesuit, or no? He said, "That is not a question to be answered, because it is not to be asked;" and it is not to be asked, because not to be answered. You are well advised to ask, "Whether directly he will rely upon his plea, or his pardon?"

Mr. *Vaughan*. Matter of record must be your guide. If the lords have recorded his plea, then it is fit for you to go upon it. But if he insists upon his pardon, and the court says, "He does insist upon his pardon," then he positively relies upon it, and insists. We shall never know what we have to do, till you send to the lords.

Sir *F. Winnington*. I propose that he may be asked whether he will either stand by it, or wave it, for you see Danby will go no farther than he is driven. If we carry our demurrer to the lords, then you will send to know whether he will join in demurrer; so, if you please, the gentlemen of the Long Robe, in a quarter of an hour, will draw it up. We have his plea, and so may draw up the demurrer, and send it up to the lords, and stand to it.

Mr. *Williams*. If the Commons had a certain rule, &c. your sense might go by it; but this is such an *Ignis futurus* to follow—There is some cunning man in his practice, that has advised this, and he is laying a trap for you. It is the ordinary course in Westminster-Hall, upon a pardon being pleaded, the question is asked, "Whether he will insist upon it?" But now you are upon an impeachment, and Danby has pleaded, and the lords are judges of all this. Therefore I beseech you, walk warily; let him deal plainly with you, what he will do; if you are satisfied that he rests upon this plea, I would say no farther. The lords are judges of their own methods; what is recording and not recording, they judge, and we cannot well examine, and must be bound by what they will say. The lords were in doubt whether this plea concluded him. The lords tell you not whether he is concluded or not, by it, but only what he says *ore tenus*. Take the matter so before you, and you are in a safe way: Whether he is categorically concluded, and whether the lords take this to be conclusive, if you take it that he is bound by it, then the lords will tell you no such thing, and they will say hereafter that it is not conclusive; therefore send to the lords to be satisfied. If the lords say he is concluded, then you may safely proceed.

Sir *Thomas Meres*. I take his pardon to be his plea, and his plea to be his pardon, and that you are at an end, and that he insists upon his pardon.

Mr. *Powle*. I do not wonder that lord Danby has taken this way, having so great a charge against him, and so little to answer in his own justification, that he has so proceeded. His plea was put in five or six days ago. I was then of opinion that it was a good plea. His pardon being put into the court, in parchment, before which he is to be judged, is a good record, and the lords only transmitted it to us. Say we, 'we will not surprize him in it, and 'will not conclude him immediately.' Only we, as an act of favour of prosecutors, show the fairness of our proceedings. He takes four or five days to advise, and now he says, he insists on his pardon. I take it, that a parlia-

ment is not tied up to those formalities, *modo et forma*, that the other courts of Westminster are. 'To rely upon his pardon,' or 'insist,' there is no difference; they are of the same signification. I think this plea is as far to conclude him as possible. If you send to the lords, as is moved, he may give you one or two more evasive answers. I would therefore send to the lords to give a rule of court in it, and so proceed as if he were concluded by it.

Mr. Williams. See what a noose you are drawn in by demurrer. You must be bound up by it, by the judgment of the Lords, and it must be conclusive to the Commons of England. I lay the danger before you. If the Lords give judgment against you upon demurrer, you can proceed no farther. The demurrer is plainly a confession of the fact, and as Danby must be tied up, so must you.

Sir T. Littleton. I speak to order. You have sent to the Lords to sit: I suppose about the amendments of the Habeas Corpus Bill, and the committee have perused the clause that the Lords added, and passed it with some alteration, &c. and accordingly sir William Pulteney reported it.

Mr. William Harbord. Before you have any conclusion from the Lords, I would bring in a bill of attainder against lord Danby; for if you bring in a bill, &c. after the Lords have overruled the demurrer, they give themselves the lie if they pass it. The Lords, we know by experience, kept some lords in the Tower the last year, for no more than disobedience to their order, so close, that they were almost killed, and these lords that are in for high treason have their liberty to walk about. Therefore I would not trust to the justice of the Lords too much.

Mr. Williams. If lord Danby be acquitted by plea of demurrer, it would be a saucy thing in us to bring in a bill of attainder. A man must be tried for his life but one way, for the same offence, else it would be unjust.

Mr. Powle. It is a mistake, that if the Lords pass judgment, lord Danby is immediately acquitted. But we have an interest in that judgment, modestly speaking. The Commons required farther judgment from the Lords than that which they pronounced against lord Latimer (the precedent before recited.) When you argued that the Lords cannot give judgment till the Commons come up to demand judgment, in the case of lord Strafford, the Commons, before they demanded judgment of the impeachment, brought up a bill of attainder against him, when the Lords had the whole matter before them; and that is much more liable to censure than what has been proposed.

Mr. Vaughan. A pardon is *liberatio a pœna*. But a man may have an action against him that calls him criminal, &c.

The farther consideration of this Debate was adjourned till Monday, the first business.

Monday, May 5.

The adjourned Debate resumed.

Sir Thomas Player. The law is too hard for me to speak to. I had not the honour to be bred to that profession, but, with your leave, I shall offer what I have to say, and I hope the effect will be to raise our spirits. I remember that the parliament has been always called, 'A great, wise, and powerful council.' But if by pleas and demurrers, over-rulings and attainders, the earl of Danby be let slip through your fingers, and he become a great and a free man, then I am apt to believe we shall be thought, 'a weak, a childish, and a foolish council.' If Danby put himself upon a fair trial, I wish he may escape. I do not thirst after blood; but if this pardon be good, what will become of the safety of the whole nation? If one, another may escape again by the same method. I shall be scarce able to show my face in London; they begin to laugh at me already, out of apprehension that a pardon, stamped by creation, will set him free. I am concerned for the honour of the House. I do think, that, in the management of this affair, Danby has done what was never done by any man in the world. I think Danby has betrayed his friend the chancellor. Upon his advice, he gets this pardon, and says, 'He will not make use of it, unless false witnesses rise up against him.' Now after long waiting and expectation, Danby waves all legal means of trial, and stands upon his pardon—But it is 'If the House of Commons will raise up false witnesses against him.' I would seriously consider whether there be any way to avoid this pardon. I am no lawyer, but I will offer my opinion. If we cannot get off from this rock, I would rather vote to sit still than go any farther.

Sir John Hewley. 'He is now advised to insist upon his pardon, &c.' I hear it said, that the word 'insist' is not so positive a word, &c. But there is no other signification of the word 'insist,' than 'to stand and rely upon, &c.' Though it be doubtful, it must be taken in the strongest sense against him, and it can have no other legal construction than 'that he will rely upon it.' It has been said, by a learned gentleman, 'That it may afterwards be voided by bill.' Therefore I would join in the demurrer, and proceed to trial.

Sir Harbottle Grimstone. Whether this of lord Danby's be a good plea, or no, is that which calls me up. I am of the long robe, and my opinion is, I think this pardon is void in several respects, and therefore needs no bill for revocation of it. If you go to void it by bill, before you have the royal assent, it will take up a great deal of time, and it rests upon us to prove it ineffectual. Now whether it be void, or no? I conceive it is void by the irregularity in obtaining it. We all know, that is clear, there was no warrant, &c. signet, privy seal, nor great seal. Those were thought no compliments, but essential things, and these,

we all know, are the legal warrants for passing all pardons. But there is another irregularity in this pardon, &c. past all cure. By the statute, there is a recipe, &c. and the pardon must bear the same date with the recipe entered now, and therefore it is void, having no date, and so it can take no measure right. As for the illegality of it, I have not yet heard any thing to alter my opinion. It has been sufficiently cleared to the House. There are things which the king cannot do, and that is what is not consistent with the end of majesty and government. A common nuisance the king cannot pardon. The suit of the party in an appeal of murder the king cannot pardon. But this is of a higher nature than that which we call 'nuisance.' This pardon is 'an universal grievance.' 'Nocumentum totius populi.' If a great favourite, an overgrown favourite, be too great for Westminster-hall, and such a favourite gets the ear of his prince, by flattery and insinuation; and shall, upon the confidence of that liberty with the king, be emboldened, and made so daring, that he cares not what counsel he gives the king, to please his humour for the present; and who will reflect on him? 'for,' says he, 'here is my pardon.' If this be admitted, that the king can grant pardons thus, it is to no purpose to complain; our mouths are stopped with a pardon. I am of opinion, that if this pardon had passed with the regularities, yet it signifies nothing, though it had all the formalities. This is to the detriment and prejudice of the whole nation, which is not in the king's power to pardon. There are things out of the king's power to command, as things against the law of God, (and we ought to obey God rather than man) as to do violence to nature, to throw myself down a precipice, I am not obliged to do it. Commands, not warranted by law, are not to be obeyed. The king is a man, and may be misled by counsel; but let them look to it that execute such commands. When counsel give the king such honest advice as is fit, all will go well; but when, by surrendering up a place, all is well, with a pardon. I say, it is not in the power of the king to pardon an universal grievance. Whoever gets such a pardon, I hope, will be hanged, with the pardon about his neck.

Mr. *Garroway*. I beg pardon, if I speak now. I am not able to speak to point of law, though I am satisfied that, take the formalities of the pardon away, and I look upon it as nothing. It is the first of this nature, and without precedent, that ever, an impeachment impending from the House of Commons, a pardon was granted, &c. If the Lords over-rule the demurrer, lord Danby is quit; and this is your short story. If you put all your stress upon this demurrer, you take a weak course. I am of opinion that this is no answer from Danby, but an evasion of your prosecution. His protestation and declaration of his innocence is not his plea. I would therefore send to the Lords, that Danby may put in a plea that he will abide by, and upon it I would charge him

with 'imputing the scandal upon the king of the contents of the two letters to Mr. Montagu,' for one article, and for another article, 'the obtaining his pardon surreptitiously.' As for the pardon, the arguments against it are pleadable when he is tried. I would prosecute this business immediately, that Danby may answer what he will abide by.

Sir *Thomas Clarges*. This matter is of great moment. Lord Danby's plea is entered upon record in the Lords' book. When he came to his plea, he said, 'He would insist upon his pardon.' I would be satisfied, whether, in your demurrer, you may save to yourselves the irregularity of this pardon. For ought I know, all the lords in the Tower may plead pardons. The king can do no ministerial act. The king could not seal this pardon himself. The chancellor should have told the king, when this pardon was sealed, 'Sir, I cannot be present; do what you will with the seal; I cannot be by to see an illegal act done by a ministerial person.' I am weak in the law, but am convinced, by Grimstone's arguments, &c. If this be granted, then the king may do a ministerial act; but it is for that reason void. That which never has been done, cannot be legally done. If it be on record that no such pardon has been granted, none such can be. I submit what I have said about the demurrer, &c. saving the illegality of the pardon, &c. But if not that way, then I would go by bill, and so damn all such pardons for the future.

Sir *Harbottle Grimstone*. I will only speak to the manner and way of your proceeding. I will tell you my opinion. We need none of these savings, as is moved: Why should we abridge ourselves any way? But go up to the lords with the whole matter, with the best authority you have for your reasons, in regard both to king and people, and you must take it for granted, that all those crimes lord Danby stands charged with, are confessed by his pleading his pardon; as his raising an army, and truckling with the French king for money to maintain this plot, &c. And then you may allege the want of date of the recipe. And then, if the lords adhere to the opinion, that the pardon is a good pardon, the last resort is, by bill to void it. But I do not believe the lords will be of opinion that it is a good pardon, and it is not advisable for Danby to put his life upon it. I would have the lords desired to appoint a day, &c. and gentlemen of the long robe will provide themselves against that time.

Mr. *Powle*. As to my own particular, I think the pardon is not good; but the question is not that now, but what way you will proceed to vacate it. The reasons are so strong to make the pardon void, that they need not be farther laboured. Gentlemen seem to be against loss of time, and this of sending to the lords will lose more. I say, that Danby will "insist." "Rely" upon his pardon is all one. It remains only to consider whether you will join in demurrer, or proceed by Bill of Attainder. As for the question before you, you

have heard all that can be said in defence of the pardon, and then it is time to make some Resolution. I am as much of opinion as any man, that little can be said for it; but it does not consist with your honour to come to any determination, till you have heard all against it. The Commons will not undervalue themselves, to come and plead with counsel at the lords bar, &c. In lord Strafford's case, the Commons did not argue *pro* and *con* with his counsel, &c. but they were heard what they had to say; which will be proper, when you come with your mace to the lords bar, to demand judgment against lord Danby.

Serjeant Maynard. The earl of Danby has both wronged the king and this House; he has put in a protestation; which, in effect, is a justification of himself, and a diversion of his crime upon the king. He has charged it on the king, and it was unnecessary for him to do it—But to come and tell a story, upon which no issue can be taken, is but a flourish, and no plea at all. For putting the blame thus upon the king, he deserves as much punishment as he can do. Part of the report from the Lord Chancellor, about obtaining the pardon, &c. was; "That he would not make use of it, but in case of subornation against him, &c." By that, he lays an imputation upon you—To get a pardon, under pretence that he will not make use of it, but in case of subornation, &c. and yet he does for his plea! As for what is alleged, 'that a pardon, for want of a recipe, is void;' in Plowden's Commentaries there is a case of no recipe, and yet the pardon was good—The law sets the degrees of pardons to be obtained by, that it may not be had clandestinely, and the king deceived in it. A man that is to make defence, &c. will do it at several wards. Lord Danby has leaped over all formalities; and this is as a flaw. To the main of it, certainly it is a strange pardon, that in so many hundred years was never yet done before—When not only the safety of the king, but the Commons lives, and religion, and all may be in danger by it! The five lords in the Tower may have such pardons, by the same reason, and what then becomes of all your liberties, &c.? Danby misleads the king, in doing all the ills he is charged with, and gets a pardon for them, when he has done—He thinks, surely, the thing is so. Great persons, too great for the law, and who have done ills by virtue of an exorbitant power, from time to time; *toties quoties*, by such a pardon, may defeat all calling them to account. There is no obstacle to the impeachment of the House of Commons in this pardon, and it would be worth your considering, whether general words shall extend to a particular and extraordinary case; where the king is not informed of an impeachment, &c. and goes not in words to it in the *Non obstant.* But what course will you take? I am a little unready in giving my judgment. I do not deny that, in these cases, no issue can be joined, when the matter is laid upon the king, and it remains

without contradiction. I make but an essay, and am a little doubtful in the matter. To proceed by demurrer is a little dangerous. And who shall give judgment in the demurrer? I think you were well moved to make a replication to this plea; the pardon being got against a known law, and by false information to the king, and of great consequence, not only to Danby, but to all great counsellors—And withal, I would allege the things, not by formal way of demurrer. What is charged against him, amongst other things, is, 'getting a vast estate.' You give money to relieve the kingdom, and if it falls out that he has diverted the money to himself, or his friends, it is another article, and if you proceed singly by demurrer, you may prejudice yourselves. But if this be a good pardon, parliaments are to little purpose. They will get power to do mischief, and heal it by a pardon, when it is done. Again I say he has bestowed the money that the parliament has given, and we must, by this pardon, give more money for him to devour. Some things the king cannot pardon; as a nuisance, whilst actually complained of. The man is indicted; there is not only a fine to the king (*distingatur ad respondendum*) but reparation to the people. The king cannot pardon a recognizance for the peace; it is the subjects interest to be preserved. How far this is applicable to the case before you, I have humbly offered my opinion.

Sir Francis Winnington. The validity of the pardon, and what is the best way for you to proceed in, is the subject of the present debate. I am one of those that will not reduce the law and rights of parliament to school divinity, by arguments of subtlety, and conclude nothing. If we come not clearly to it, but diversify in the point, we may hazard the nation as much as lord Danby has done. Without all controversy the pardon is void. I shall sum up former arguments only. I shall take it for granted that Danby relies upon his pardon (and so he repeats his plea.) Some things have been said, as to the formality of this pardon, and some gentlemen would disclaim that, in case of a man's life—" *Impetitus vel non impetitus*" in his pardon, &c. and a gentleman said, "It may be, the king knows not of the impeachment of the House of Commons." But I know of none else. But I will waive that, and go upon the validity of the pardon. In appeals, &c. where the king has an interest and share in the suit, there the king may bar an indictment. Where a man informs *tam pro domino Rege quam pro seipso*, there the king's share of the forfeiture is pardoned only. But where the king has no share, and the king's serjeant or Attorney General prosecute not, and the king's name is not so much as mentioned, and only by the Commons of England, which the courts of Westminster cannot punish; it is you that have the interest in the suit, and all the Commons of England. If what is grievous to the people be pardoned, it is to no end that the parliament should ever meet. The same power that made

Dauby venture on this offence, the same has pardoned him, and I know no farther use of parliaments, than to give money when it is asked. If the king has no interest in the suit, and be no party to it, and grants a pardon, &c. there is an end of your constitution. I dare not offer that violence to my own reason, as to say, that this is a good pardon. Serjeant Maynard did not make a conclusive argument, but I will conclude, whether the serjeant will, or no. In Littleton, &c. it is an argument, 'That the thing is not lawful, because it was never practised'—In law, not sufferable. But to distinguish it—It is good in way of plea, but to void it by bill—But that is a reason why illegal; and never found in a former age, but is so. I will take the boldness to make conclusions from the serjeant's reasons—To say that this is no demurrer, &c. that seems advisable; there is no occasion to plead this, for it was never done before—Now, whether the House of Commons shall go up to the lords, and say, not as in the common form of way of demurring to a boud, but all the Commons to say, this pardon is a monstrous thing, and ought not to be? I cannot say there was ever any precedent for demurrer, because there was never any occasion for it—What will you reply upon all Danby's protestation?—He will say, that is not traversable—But should it fall out, this pardon ought not to be allowed—It looks bigger than a demurrer—But if the lords say, that the pardon is good in law, what have you to do? Then you have recourse to a Legislative Bill. Because he has so confessed it, there is no occasion for us to prove it. I cannot blame that lord, if his life be at stake, for making as good a shift as he can. Life is sweet, and a man will fence as long as he can for it—In the preface of a bill may be put, 'If such a pardon be allowed, the government of England will be destroyed, and the Commons of England cannot be relieved from the exorbitances of great men.'—And we shall have arguments enough to put into the face of that bill; and if the lords have a mind to save the kingdom, as well as we, they will pass it. Pray let us go roundly to work, and have no more tricks put upon us, as have been for these six weeks.

Serjeant *Maynard*. I told you, 'I could not deliver my opinion positively, without farther consideration, &c.' *Winnington* has concluded for me, but one of his arguments is weak, viz. 'That there is no precedent that it was ever done before.'

Sir *Francis Winnington*. I have learned more from the learned serjeant than any man. We both agree, though in different ways, and I agree with him, &c.

Mr. *Williams*. It is incidental to our profession that we love to spare a little. I perfectly agree with *Winnington* in his argument. One question is, 'Whether the pardon be illegal?' And another, 'How the pardon was obtained?' There may be reason to void it by *Scire facias*. I think it is not safe to let the pardon continue.

Danby has committed a greater crime in procuring this pardon and he is as guilty of procuring it, as of all the rest of his other great crimes. But to make the lords sensible of it, as well as the people, I would go up to them in a body, &c.

Mr. *Hampden*. You have been well showed the consequences of such a pardon, and by going away with such crimes unpunished, two great things will be lost, accusing great men, and accounting for money. I am not well versed in records, but in the last king's time (I crave leave to read the words out of the print) in his answer to the parliament's nineteen propositions, the state of the nation, &c. the government is there stated, as to peace and war, and pardons, &c. After the enumerating his power of pardoning and other prerogatives, 'That a prince may not make use of his high and perpetual power to the hurt of those for whose good he hath it, and make use of the name of public necessity, for the gain of his private favourites and followers, to the detriment of his people.' If after all this, a pardon may come, &c. to what purpose is all this stated by the last king?

Mr. *Faughan*. This pardon is against common reason, the government, and the safety of the crown. I say, it is against common reason, for the support of the government is from rewards and punishments. The power of pardon from the king proceeds not from any positive law, but from the reason of the government. If once it can be made use of to interpose betwixt the greatest crimes and punishments, no man can say but the crown must expect the greatest ruin imaginable. Suppose the king pardons all crimes for ten years—They will fly not then to laws, but to nature, to defend themselves, and so the government will fall. By the statute of R. 2, the king could not pardon any thing against his coronation oath. Treason was not enumerated in that oath, because it was not supposed that the king would pardon it. It is the subjects interest that the king cannot pardon a recognizance of the peace, but the party may renounce it. If therefore you consider, of what use can the laws be, if such pardons be good, &c.? How odious are they to the government, the safety of the king, and against law! And therefore I am against it, &c. We may go up to the lords, and shew the invalidity of this pardon, and the way of procuring it. In the late duke of Buckingham's impeachment, the king might as well have obviated it by a pardon; but he got that parliament dissolved, and put himself into the star-chamber, to be rather in the force of justice.

Several then moved, "not to put in the irregularity of obtaining the pardon, but to insist upon the illegality of the pardon."

Colonel *Titus*. I would not have you say, "The pardon is irregular," for this short reason; it will be some implication that it is legal.

Mr. *Sacheverell*. If you go up to the lords, &c. as is proposed, I fear you will fail of your ends. I would know, whether, before issue be joined you can ask judgment; next, whether you will go up before you pass judgment that the pardon is illegal; and next, whether you will go up before you show the Lords your reasons why it is illegal? And if the Lords differ from you, how will you then argue it? I offer then that the question may be, 'That the pardon, &c. is illegal;' and then I shall propose something farther. But I cannot agree to your going up, till you pass your judgment that it is illegal.

Sir *Richard Corbet* moves, that the question may be, 'That it is illegal, and void in law.' To which

Colonel *Titus* replied, That is as much as to say, 'It is legal and illegal.'

Mr. *Seymour*. I have sat still all this day, and have heard very many good arguments, I do not question your power or authority, but will speak as to your method. I fully agree to go to the Lords Bar to demand judgment in those words, &c. but I know not the meaning of the Speaker's going with the mace to the Lords Bar. You say, 'you come to demand judgment of that which you think is no good pardon in law.' If they agree not, &c. then you will come to tell them what your reasons are that it is not a good pardon.

Mr. *Garroway*. You are put in a good method. Put a question only, 'That the pardon is illegal,' for a resolution to your own satisfaction.

Sir *T. Clarges*. The Speaker came into the Lords House with the mace declined, and asked judgment against the earl of Middlesex, 21 James.

Mr. *Powle*. In the 18th of James, in the case of lord St. Albans, the Lords sent to the Commons to acquaint them, 'That they were ready to give judgment, if they came up to demand it;' and they came with their mace to demand it, but it was declined, held down.

Sir *F. Winnington*. If you go to the Lords House in a body of the whole House, you must not leave your mace behind you.

Sir *W. Coventry*. It is for your honour, not only to see the next step, but to foresee what may fall out; therefore be well acquainted with your strength. You say, Danby's pardon is not good, and you are not prepared with reasons to satisfy yourselves, much less the lords; and the lords declare Danby innocent upon it. Let your reasons therefore be drawn up first, before you go to the lords, and see what it is you have to maintain.

Sir *F. Winnington*. I am glad we did not take the bill of banishment of the earl of Danby, when it was offered us by the lords; it looked like compounding for treason. Coventry desires, 'That we should prepare reasons for our vote, &c.' I would know, what was the debate all this day, but your reasons? If, upon every punctilio, a Committee must draw reasons, we may sit all the summer. When you

carry up the vote, the lords will see the reasons of it, as soon as we have, &c.

Sir *Thomas Lee*. At a conference, if the lords require your reasons, it will be more for your advantage to give them then, and that Danby's counsel be first heard, &c. that they may have no advantage of your reasons, and reserve your reasons till the lords shall deny you judgment, &c. Let us have the very words written down, that you, Mr. Speaker, are to deliver at the lords bar, every word, that it may comport with our debate.

The Vote was read. &c.

Sir *W. Coventry*. If these are the individual words that you intend to deliver at the lords bar, in order to that, I shall offer one thing, that the gentlemen of the Long Robe may give their judgments upon. I conceive, it is to demand justice against the earl of Danby; but the last thing to demand is judgment. I would not have you put to bring proofs against Danby, for an aftergame.

Sir *H. Grimstone*. It is more proper to demand "judgment" than "justice," against Danby. We have voted the pardon illegal and void; I would therefore put the vote into form, as you will deliver it.

Sir *F. Winnington*. We are to demand judgment, &c. because the lords should not expect us to come and show that this is a void pardon, and demand justice upon the impeachment.

Sir *John Trevor*. "Justice" and "judgment" are two things; they are not terms convertible. Justice 'convertitur in iudicium'—To demand judgment, &c. He pleading his pardon, you must demand judgment upon his own confession of his charge, for now he is past his trial.

A Committee drew up a form of words, for the Speaker to deliver at the Lords bar, as follows:

"My Lords;

"The knights, citizens, and burgesses, in parliament assembled, are come up to demand judgment, in their own names, and the names of all the Commons of England, against Thomas earl of Danby, who stands impeached by them, before your lordships, of High-Treason, and divers high Crimes and Misdemeanors, to which he has pleaded a Pardon; which Pardon the Commons conceive to be illegal and void; and therefore they do demand judgment of your lordships accordingly."

The Speaker, with the House, went up to the House of Lords and demanded Judgment accordingly.

Wednesday, May 7.

A Message from the Lords, by Mr. Justice Atkins and Mr. Justice Dolben, to acquaint the House, "That the Lords have appointed Saturday next for hearing the earl of Danby make good his Plea; that the Lords have resolved, that the five Lords in the Tower shall be brought to their trials, upon the impeach-

“ment against them, on this day sevensnight; and that the lords have appointed an Address to his majesty, for naming a Lord High-Steward, in the case of the earl of Danby, and the other five Lords; and that the same shall be in Westminster Hall.”

*Debate thereon.**

Sir Thomas Lee. How your Committee should behave themselves, at lord Danby's plea, and what is to be done, I would have the Committee consider; and that to-morrow you would rise timely, that the Committee of Secrecy may have five or six hours to prepare for the Trial. They will have time little enough.

Mr. Swynfin. Consider, this business cannot admit any delay. To-day is Wednesday, and you have but a short time to prepare for lord Danby, &c. The gentlemen of the Robe are not here: I would send the Mace for them to the bars, and when they are come, fall upon the consideration of lord Danby's Plea, upon what the lords have sent you, and consider what you are to do.

The Serjeant was sent to all the four Bars to command the attendance of the members of the Long Robe.†

Mr. Powle. This case will govern itself by the precedents of former times. It is said, ‘The precedent of lord Strafford's attainder is abolished, and what relates to it, &c.’ But in that case, after the proofs were heard at the bar, he desired that counsel might be heard as to matter of treason. The Commons were only present, not as pleaders, and all the House was there. I think they made a step too far in it. I would have the Long Robe heard.

Sir Thomas Clarges. In lord Strafford's case, you had managers of the impeachment, and he had counsel at the end of his trial, not at the beginning. The whole House went up to demand Judgment against the earl of Danby, and if counsel come to justify the validity of this pardon, I would advise you to send nobody at all to hear it: I would take no notice of it; and pray hear the opinion of the Robe.

Colonel Birch. I know that proviso in the bill of attainder of lord Strafford, ‘That it shall not be brought into example, &c.’ is that the judges shall have no power in declaratory treason, &c. And it is generally mistaken, as if the power of parliament, in declaratory treason, was taken away by that Proviso. I desire, if that be declaratory as to the judges only, that that precedent may be cleared up to you.

Mr. Swynfin. It is not that Proviso that is supposed, which takes away that power from parliament, &c.; but that statute you made in reference to restoring the earl of Stafford, in repealing the attainder, &c. that is considerable. In that there is a recital of the whole proceeding against him, by Articles of Impeachment; how far that proceeded; and when that was

left, how the parliament went by Bill of Attainder; and the revoking clause takes away all those proceedings. The record taken out of the lords journal, and that way never to be used in parliament. It was so far urged in another case, (that of the earl of Clarendon,) that it became a question, whether a peer accused of treason, should be imprisoned without special matter. That being the case, that statute of the repeal, &c. ought to be read.

Mr. Wogan. On the conclusion of lord Strafford's trial, a point of law did arise about accumulative treason, and the lords would not judge him upon it; and so the Commons withdrew, &c. and then they brought up a Bill of Attainder. It is below the dignity of the House for their members to argue with lord Danby's counsel; but it is convenient that some members do go down to inform themselves what the counsel will say, as to the pardon, &c. The statute of R. 2. was made, that the king should not be deceived in any grant; that all pardons, and other grants, should pass such hands and offices, &c. I suppose that lord Danby's counsel will justify the *Non obstante* in the pardon, &c. Next, whether a pardon subsequent to an impeachment is pleadable, and the king by a pardon can prevent the matter, &c. and whether there be such an interest in the Commons, that the king cannot pardon, *pendente lite*?

Mr. Swynfin. First, take the lords message into consideration; but if, upon that debate, any thing arises, then it is useful to read the act of repeal of lord Strafford's attainder.

Mr. Powle. I would have that act read, to clear gentlemen's minds. I see nothing in that act but that you may go by Bill of Attainder.

The Act was read, 13 Char. 2 chap. 29.

Serjeant Maynard. The lord high steward is not only in Danby's case, but the five lords, &c. I understand not what the lords mean by a High Steward.* He may have a name, but not office. There are but two ways of trial in treason or felony: either the person is indicted, and tried by a jury, or if he be too high for the ordinary course of law, by impeachment. But in the ordinary course of trial of a peer, the lord high steward appoints what lords shall be tryers, as many as he pleases above the number of twelve; but this quite differs when a lord is tried by the whole body of peers in parliament. The high steward is not then judge in matters of law, but every peer particularly. In *peenunire* the lords are tried by themselves, and they can have no challenge, and though three or four of his enemies were named of the jury, if that could be supposed, he can have no challenge. A commoner may challenge thirty-five at common law, because

* “The uneasiness which the Commons showed on this occasion, arose from a jealousy that the lords meant thereby to leave it in the king's breast to put a stop to all their proceedings by refusing, or delaying to constitute, a lord steward.” Ralph.

* Grey's Debates, vol. 7, p. 199.

† This is not mentioned in the Journal.

he likes not the men peremptorily, but the high steward can admit no challenge, if the lord to be tried have ever so good a cause to shew. But what I drive at, is, that, in the ordinary proceedings of the lords, the high steward is in the nature of a judge. A man indicted at the King's-bench cannot plead not guilty, if he have a pardon, but may plead his pardon. The lords can have no challenge, because the baronage and peerage of the realm are their tryers. I have observed, that when lords have been tried, the steward of the king's household has been lord high steward—Now the lords have a high steward. The case of lord Danby and the five lords is very different; the case of the five lords is fact to be tried, but in that of lord Danby there is no fact to be tried, for he pleads his pardon. Call him a high steward, or what you please, but the lords try lord Danby. Now the question is, what you shall do in this case? It is a case that never happened before. A man questioned for such high crimes never pleaded a pardon; the thing was never done, and therefore I cannot tell you what has been done. In lord Strafford's impeachment, twelve persons were named of the secret committee; they examined the whole business; it is now 39 years ago. They desired some of the long robe to be added; thereupon I was added to prepare the charge, and make good the evidence. There is a worthy gentleman now of the House (sir Charles Harbord,) who was one of the twelve; he may inform you whether a high steward was named; be pleased to hear him. Sir Anthony Irbv was of the House then also.

Sir Charles Harbord. He was not then High steward as in other cases, for here all the peers must give their judgments; there was "guilty, or not guilty?" But here, in lord Danby's case is no such thing; he puts all upon the king. This whole thing is in point of pardon. I will serve the House with the best information I can.

Sir Henry Ford. I was present at lord Strafford's trial; the earl of Arundel was Steward of the Household, and Lord High Steward then.

Serjeant Maynard. I know not what he was, whether High Steward or not, but he was a necessary person to hear the evidence.

Sir Charles Harbord. Maynard has told you true; he was not high steward to name twelve peers, but only to hold the court of peers below in Westminster-hall. The lord high steward, in lord Strafford's case, was quasi a chairman, to put questions. My opinion is, that it is best for you to appoint members to be present; else you will never be informed what the counsel say, as to the pardon; but not to bandy there with counsel.

Sir Francis Winnington. There are several matters under your consideration as to the five lords: I would not clog this debate relating to the earl of Danby with them. There is nothing that the Lords have done, as to the five lords, but what is regular and customary. There is a difference; when an accusation is in

full-parliament, a lord steward then is but in the nature of a prolocutor. In vacancy of parliament, upon the trial of a peer, a lord steward is appointed by the king; but in both those cases, they are no more judges than the rest of the peers; and methinks it is not worth your curiosity to debate it. On the contending it, as to Danby, I will offer you my thoughts. As I have been always sensible of this pardon, I shall never have any comfort to come to parliament again, if that be a good pardon. Now the question is, what method you will take, that you may not be prejudiced in your cause. Danby puts his life upon his pardon. For his counsel to appear for him to justify his pardon, that is not irregular at all; that is a right due to the prisoner; but the question is, how the Commons must demean themselves, whilst the counsel is to be heard? I apprehend that Danby will come to the Lords bar, and have his pardon argued, and the Commons not be present at all. And upon debate of counsel, either the Lords will allow it, or if they conceive it doubtful, they will send you word; but you are not to advocate it with the counsel. The Lords' Message tells you, 'That they have appointed Westminster-hall, &c.' But the Lords sitting, being not local, they may go from one room to another, &c. but I am utterly against the House being there. In lord Strafford's case, the Commons were present, because they were to make good their charge; but in Danby's case, here is nothing but a question of law about the pardon. You may go and hear the counsel's arguments as private gentlemen. If their arguments stick not with the Lords, you will hear no more of them; if otherwise, they will send them you down—It is not for us to debate their proceedings, but where it is prejudicial to our cause. If they doubt the Lords will give no judgment, and they will communicate the arguments to you, and here it comes naturally for you to argue against the pardon.

Mr. Sacheverell. I desire the case may be a little opened. I fear you will find some difference with the Lords about the lord steward, &c. I would have satisfaction, whether, before lord Strafford's trial, there was ever a Lord Steward in case of an Impeachment from the House of Commons? Then let any man show me how, if there be a Lord Steward, you can confer with the Lord Steward's Court, and the Lords no House; and there is an end of your conferring, they not being a House. I would know, whether there was ever a Lord Steward to try matter of law? I fear the Lords will undo one point of Impeachment that they have already admitted. If they get that point of a Lord Steward (appointed by the king) in time of parliament, they will get it out of parliament too.

Mr. Powle. I agree that, before lord Strafford's trial, there was never any Lord Steward appointed for Impeachments, but out of parliament only, upon trials in appeals in parliament. A Lord Steward was not appointed, but was

hereditary in the duke of Lancaster. 1 R. 2, an archbishop of Canterbury was tried, and there was no Lord Steward. But in Impeachments the only case is in lord Strafford; but the ill consequences were not then objected, for he was not properly as a Lord Steward, but they sat as a House of Lords, and they spoke 'My Lords,' when our Managers gave it their appellation; whereas the Lord Steward is called 'his Grace,' when applied to. That shows plainly, that they sit as a House of Lords, and not as a court. But be he Steward, or what he will, if the Lords be under the notion of a House of Peers, there is no encouragement by it to try an Impeachment out of parliament. Now, the proper question is, what message is proper for you to return to the Lords? I think it may be, 'That you will attend the Lords, to make good your charge against the five Lords.' But you ought not, as a House, by your appointment, to be there, to hear the counsel for lord Danby's pardon. Having once passed your judgment, it would be too precipitate to go to argue. I would signify to the Lords, 'That you would not be present by a Committee, nor the House.' It is an improper course in the Lords, to go to Westminster-hall to hear a pardon argued. Whenever we go there, we treat with them, and speak to them, as a House of Lords, and not as a Court of Judicature. The Lords have appointed a day for the trial of the five Lords, which you may prepare for, but as to lord Danby, &c. it is not fit that you should be present by yourselves or others.

Mr. Vaughan. I am against your going, when lord Danby appears, for another reason. You go to hear your own vote arraigned before your faces, and I would not be he that should be a counsel for lord Danby to do it.

Mr. Peel Foley. In the case of Weston, there was no Chancellor in R. 2. If he was a bishop, he could not be present; but it appears by the Rolls, that there was no Lord Steward appointed by the King, but by the Lords. Now whether we be present, or not, I challenge any man to show me any impeachment tried, and not in full parliament. That being so, how can any man have a pardon pleaded, and we not there?

Sir F. Winnington. With your leave, I will speak one word more. The Impeachment is in the name of all the Commons of England, and they are all parties to it. The Lords, by assigning Danby counsel, are counsel against themselves. Lane, the Attorney General, was allowed to be at lord Strafford's elbow; but I would have a precedent showed me, whenever, a charge being confessed, any commoner came to argue us out of the case. I desire to know, whether, if the Lords do assign commoners of counsel for the prisoner (Danby) those commoners are not parties? The Judges are indifferently to declare the law; so are the Lords; and I look upon it as a high matter, for commoners to be of counsel in this case. If the Judges' opinions are asked, there it is neces-

sary for you to be in full parliament, that the whole Commons may see right done by them.

Sir W. Coventry. I shall not meddle with points of law. I heard it said, 'That counsel ought not to appear, because they are commoners, but that the judges may argue this pardon, &c.' But they are commoners, as well as all the rest of the counsel. A commoner may be impeached by commoners, and therefore in favour of life, I would not have things restrained. If the judges be in purgatory, a middle state betwixt Lords and Commons, I never heard that before. In the Lords House the Judges cannot open their mouths, but by command of the Lords; and it is but just, that Danby should have somebody also to plead for him. It is fit to consider what part you will take in this matter, if we are sent there, neither as a House, nor a Committee, nor managers, and if law be argued there, and only on Danby's side, where shall the Commons be heard to argue? When we took exceptions only at the place that lord Mordaunt sat in, when we impeached him (which was upon a stool within the Lords bar,) about that nicety the Lords would not admit so much as conference. If you have law to maintain the invalidity of the pardon, come with it; for in this, you come not so near a co-ordinacy with the Lords as in bills. This is Judicature. If you put this too forward, the Lords will say, 'It is your fault that you appear not;' and so I know not where your arguments will ever be heard. I speak with great tenderness in a thing out of my way, and the matter is so obliterated, and hard to find in ancient precedents. Now I would move you to have the Committee consider, whether Danby's counsel shall deliver their plea in writing, and then you will make no scruple in answering that.

Ordered, "That a Committee be appointed to inspect the Journals, and search precedents, touching the methods of proceeding in relation to the Message this day sent from the House of Lords; and make Report to the House to-morrow morning."

Thursday, May 8.

Sir Thomas Clarges reports, from the Committee appointed to inspect the Journals, and search precedents relating to the message yesterday sent from the Lords, relating to the earl of Danby, That the Committee had met; and had agreed upon a Report to be made to the House: which he read in his place; and afterwards delivered the same in at the clerk's table: where the same was again read: And is as followeth:

"That the Committee finds, that, on the like occasion, the House of Commons have appointed a Select Committee to join with a Committee of the Lords, to consider of the methods and circumstances to be observed in the trials."

Debate thereon.

Sir Thomas Clarges. In the precedent of lord Strafford's trial, I find that he had his counsel, but they did not interrupt the evidence, but when all was done they spoke to matter of law; but here in lord Danby's case, the Lords begin with counsel. The Committee did think it the safest way to send for a conference with the Lords to agree to methods, &c.

Mr. Hampden. I know not what reason has induced the Committee to this opinion. So far as concerns the five lords in the Tower, they have done well; but what is this to your business of lord Danby? Will you go and adjust it with the Lords, whether you shall be there, when Danby is there with his counsel? Or will you treat with Danby's counsel? It concerns not your service to go, and less your dignity to go; it may be, another question will be, Whether he shall have his counsel or not? However, do not this. When you manage, &c. that is another case. Take your own resolution in it.

Colonel Titus. It will be absolutely necessary for you to go and examine the circumstances. We have passed our judgments, 'That the pardon is not legal,' and the Lords have given us notice, 'That they will hear Danby by his counsel, to the validity of his pardon.' Suppose we are not there, and the Lords hear his counsel, and there be no objection against them, and the Lords are convinced, or not convinced, and Danby has many friends amongst them, and they say it is a legal pardon, then we have brought our business to a fine pass: Danby is acquitted, and we know not how he is acquitted. To hear, at least, how counsel acquit themselves, I would appoint a Committee, and move the Lords, &c. to appoint another, to adjust this matter, as was done in the case of lord Strafford.

Sir Thomas Lee. I think it hard for you to delegate your power to a Committee in so great a difficulty as you are upon. The Lords having told you they would try Danby, &c. in Westminster-Hall, and you not present, I know not what you will do after it. I am not versed in these matters of a Lord Steward, to declare in matter of law, &c. and many difficulties will arise upon you, should you desire a Committee of Lords, &c. without informing them of the grounds and reasons, and make objections against the method they are in.

Sir T. Clarges. All the Committee agreed that this method should be taken, but left it to you, without any opinion given. In the extract of lord Strafford's trial, &c. the Lords sent down lord Strafford's answer to the articles, &c. to the Commons, by Mr. Whitlock; "They send to this House to prove the charge, and manage the evidence, by members of their own." For hearing in Westminster-Hall, &c. implies the Commons present. They might else hear the counsel at their own bar in the Lords House. It was agreed by the Committee, in serjeant Maynard's chamber, to be

the safest way, and the best method, to follow the precedent of proceeding in lord Strafford's case.

Mr. Boscawen. The gentleman (Talbot) wholly mistakes the thing; for the attainder of the earl of Strafford is repealed, but not the impeachment. They are two distinct things. The accumulative part only is repealed.

Colonel Titus. Can any man think that the method of trial is altered? Can any man think that, because an axe was carried before lord Strafford, that formality is repealed? Or that the Lord Steward's office is repealed?

Mr. Vaughan. I do not think it for our dignity to be present in Westminster Hall, when Danby is there, &c. When an accusation is made in parliament, it is not by a particular member *qua* such, but it is the accusation of all the Commons of England. Every Commoner of England is here present, and the counsel are commoners, and you cannot be present; but this you may do, you may punish the counsel; for they affirm by their arguments, against a resolution you have taken. You ought, at a conference, to tell the Lords, that you cannot be there present, but desires Danby's reasons to be given you in paper, as the Five Lords Reasons, &c. And then you may show the unreasonableness of your being present to hear the counsel argue.

Mr. Paul Foley. At the committee, all were of opinion, that no lord high steward had ever been appointed by the king, unless in lord Strafford's trial; and he was but in the nature of a speaker, and he can do no harm. As there was no precedent of it before, so, I believe, the Lords were led into a mistake. If we can show a judgment given upon an impeachment, without a lord high steward, then the Lords may waive it. I am of opinion to prevent the prejudice that may come by the precedent. I have informed myself of the commission the earl of Arundel had for high steward at lord Strafford's trial: if there be no commission but that, the Lords may make their speaker; the king may make one when he pleases. The Chancellor is speaker by commission. But if there must be a commission to try peers in Parliament, I know not but that it may be error, as much as if the Chancellor should give judgment in a case of the King's Bench. Another thing was discoursed at the committee, whether the House should be there in person? But there was no case found of the pardon, &c. Many of the impeachments in parliament, and all the steps to condemn or acquit, are to be in full parliament, and that is a reason why we ought to be there. The lords, it seems, expect our company to hear the counsel for Danby's pardon. In lord Strafford's case, when the counsel argued, the Commons were all there, and the counsel were as private gentlemen assigned him, and the lords resolved in their own House. This morning, at the lords House, I looked over the order. Their order is restrictive, 'to hear what lord Danby's counsel has to say, in jus-

'tification of his pardon.' If the lords think it not reasonable to condemn him, unless his counsel be heard to matter of law, we may be present, and return again to our own House.

Mr. *Powle*. There passed an opinion current in the House, &c. which I gave into, but since I have thought of it. In 21 R. 2, in the case of lord Cobham, judgment was pronounced by the duke of Lancaster, Lord High Steward. In the archbishop of Canterbury's trial there is nothing of a High Steward; but in lord Cobham's case, it does expressly appear, that at his trial there was a Lord High Steward, by express direction: For the High Steward is rather the lords servant, or speaker, than a judge, or director of the court. There is another note in *Placita Coronæ Parliamenti*. There is particularly a High Steward appointed, &c. And that probably is the reason, why the lords admitted a High Steward in lord Strafford's case; and since it has been admitted, I see no great injury in it. Counsel was assigned lord Strafford to a particular point, as to the pardon of lord Danby. In the same parliament of R. 2, was the case of Arundel, archbishop of Canterbury. (Then five lords appellants did appeal a certain number of lords of High Treason in *pleno Parlamento*, for obtaining and exercising a commission.) In 11 R. 2, he pleaded his pardon. All was done for the public good. Another he pleaded, 17 R. 2. They did, by act of parliament, reverse that act, 11 R. 2.—1 Hen. 4, though the things were condemned, yet the manner of proceeding was not condemned. The Commons requested the lords judgment as to that particular pardon; who judged it to be a blemishment to the king's royal crown and dignity, and surreptitiously got, and voided it by act, &c. Then the Lord Steward, the duke of Lancaster, acquainted archbishop Arundel, 'That his pardon was repealed by act of parliament, and if he had nothing else to say for himself, he must pass judgment upon him.' And he was banished. Now I desire you to consider, whether this record I have mentioned is not fit to be translated. Now whether the king can pardon is a declaration of the law, and, in points of declaring treason, the Commons joined with the lords. It is worthy your consideration, whether, if the lords declare that the king has this power of pardoning, all the Commons are not concluded by it. I am clearly of opinion, that, whether you go in a body, or in a committee, to Westminster Hall, it is against the dignity of the House. Now by solemn vote you have declared this pardon to be illegal, you to sit and hear counsel arraign your vote, is very indecent. You may let your members go as spectators—else you will go to try a man, after you have given judgment—You hear that yourselves are precipitate. Therefore I would send a message to the lords to take what course they please, to inform themselves of the pardon, but that you will not hear it argued. If the lords please to confer with you on the reasons why they can-

not judge the pardon void, it may be for your honour.

Colonel *Birch*. You have heard from the lords, that they have set a day for trial of lord Danby; that is, his pardon. In the case of lord Strafford, there was a committee appointed, &c. If you will put things together, I would desire a Conference with the lords, that a committee of lords may join with us, to consider of the ways, not only of having counsel in lord Danby's case, but that what relates to the five lords may be put into method.

Mr. *Sacheverell*. I think this is a weighty point, and that it ought to be considered of. As for that of Danby's counsel, I would only put the lords to declare how far they will make use of it. Next, 'That we hope the lords will not introduce any new method of proceeding.' 'That as you have searched precedents, so they may likewise.' And I hope the lords will not go any unusual way of trial, but the usual. Next, I cannot apprehend what should induce the lords to address the king for a Lord High Steward, since the proceedings in parliament, of like nature, have been in full parliament. Next, 'That the Commons do not doubt to give the lords such satisfaction, concerning the pardon, as shall convince their lordships, &c.' And I doubt not but the lords will give you such satisfaction as that the matter will be settled.

Sir *T. Clarges*. I like the matter well, but not the manner; for this will beget conference upon conference without end. I would rather secure the thing by a committee of both Houses, and then the question about the Lord Steward, and the question about the precedents, will all be settled. Conference will be tedious, and the time will not bear it.

Sir *Richard Cust*. That way last proposed will be longer. It must be by debate, and since that end cannot be foreseen, I rather close with Sacheverell's motion, and would leave your reasons with the lords. In the 17th of Rich. 2, chap. 6, no pardon for treason or felony, &c. unless it pass the privy seal, &c. except when the Chancellor may grant a pardon of course without speaking with the king.

A Conference was ordered, where the Commons acquainted the Lords, "That they could not apprehend, why their lordships should address his majesty for a Lord High Steward, in order to the determining the validity of the earl of Danby's pardon, as also for the trial of the other five lords, because they conceive the constituting of a High Steward is not necessary; but that, upon impeachment, judgments may be given in parliament without a High Steward: They therefore propose a Committee of Lords and Commons, to consider of the most proper ways and methods of proceedings upon impeachments of the House of Commons, according to the usage of parliament, that all inconveniences may be avoided."

Sir *Robert Howard*. I know not what to call

this bringing lord Danby to Westminster-hall. It looks like a pageant. I know not what to call it. There was never such a thing brought before the world. A criminal to be brought to the bar, &c. and nobody against him; all for him, and you must go to hear council argue against your Vote. In my opinion, I would clear that matter first.

Friday, May 9.

The Lords desired a conference, &c. which was agreed to, and reported as follows: "The Lords do not agree to 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 ever must be, tender in matters relating to their jurisdiction."*

Debate thereon.

Sir Robert Howard. The Lords have absolutely denied your conference and conversation, about methods of proceedings in the trials, and you may for ever be denied it. It will be a strange spectacle to see the earl of Danby at the bar to-morrow there to arraign your vote, &c. and all the counsel for him; and the people admitted to hear it, by pretence of not agreeing with the lords in this conference. They that carried this question of not conferring with you, are resolved to carry the other question of saving him. They who are against any method of proceeding, are against the thing itself; they will resolve this to be a good pardon, and there is an end of all. Here is the case: Can any man say that ever a pardon was obtained against the king's coronation oath? Edw. 2. Edw. 3. against all consideration of appeal, &c. Common nuisance, &c.—Against all those visible things; all pardoned. You desire to argue with the lords, and they will not agree with you. And now, which way shall we proceed in parliament, in the declaratory power of treason? A pardon will, at the root, destroy any Act of Parliament.

Sir Thomas Meres. Suppose the Commons say, 'Their scaffolds and seats in Westminster-hall, are inconvenient,' must they not be heard? But in a thing never heard of, Danby to go triumphantly into Westminster-hall, and come back triumphantly, and be acquitted in the Lords' House, must we not be heard by the

* Mr. Algernon Sidney affirms, "That the above Vote was carried only by two voices, the one side having only fifty-four, the other fifty-two; that, of eighteen Bishops that were present, sixteen were on the victorious side, and only Durham (Dr. Crew,) and Carlisle (Dr. Rainsborough,) were so humble as to join with the vanquished. That of these fifty-two, fifty-one the next day protested, and that, he thought laziness only hindered the earl of Leicester, (who was the other) from doing the same." But if this be true, the records of Parliament have dropped the names of thirty-two, and have left us only nineteen.

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lords, as to methods, &c. ? By this proceeding of the lords, all laws are cut off. This hinders all questions whether the pardon be good, or no; this erects such a judicature as was never before. In the mean time, before you proceed any farther, I would search what the Lords have done.

Mr. Sacheverell. I am really against desiring the Lords to sit this afternoon. The lords have determined the point; they will have nothing to do with you; and I would make a vote to have no more to do with them. This is not only lord Danby's case, but the rest of the Lords in the Tower. If this be so, let us have no farther correspondence with them; and vote it.

Sir Thomas Lee. I move you, to search the Lords Journals. If you find it so, then I am for all the things moved for.

Colonel Titus. As to all the proceedings in lord Danby's case, and the five lords, &c. I hear the Bishops are likely to sit. This is a novel thing, and contrary to all precedents and practice. The Bishops are not men of blood, and will be very merciful to the lords; it concerns us, that law and custom may not be changed.

Resolved, "That a Committee be appointed to inspect the Lords Journal, &c."

Mr. Sacheverell. The Lords have given you no answer at all to the point of a Lord High Steward, and let the Lords Judicature be ever so great, they ought not to go in an unusual way. To that point they have said nothing. You will find a protestation entered into the lords books, and by that you will see what lords are for it, and what against it.

In the Afternoon.

Mr. Hampden reports the search of the Lords Journal.

Debate thereon.

Mr. Sacheverell. This will not abide any great delay. During all this time of the Lords settling the order of trials, &c. the Bishops become concerned—Another Lord may be assigned counsel in fortification of his pardon, &c. Your Committee cannot give you an account of what is done to-day in the Lords' Journal; but if you please, I desire, before I give you my opinion in the case, that the matters you sent to the Lords yesterday about, and their answer, may be read, and then you are ready for judgment. [They were read accordingly.]

Now I see plainly what pass we are at. You have desired a conference, &c. only to suppose that the Lords will not take any unusual methods; and to that you have no answer. You next would know, upon what account the Lords desire of the king a lord high steward; and to that you have no answer at all. Next, you have proposed a committee of the two Houses, to prevent differences and delays in the proceedings, &c. Notwithstanding all this foresight of yours, this is as if, 'Let the Commons do what they will, they will give

'you no answer.' You must show your resentment, that the Commons will not suffer the House of Lords to trample upon them. If they will do at this rate, they will straiu their power, as they did in the last parliament—they ordered their officers to make use of a considerable sum of money which was for disbanding the army. Perhaps their judicature is one of the greatest grievances of the nation. All they shelter themselves with, is their judicature; so sacred, that we must not speak of it. There are but two ways to let the Lords know how we resent it, viz. To punish those that appear for Danby as counsel, who are of the same degree with us, commoners; and to take such methods as have been taken, that no person of the long robe presume to plead against your vote; and if they do, that they shall be esteemed enemies to the privileges of the Commons of England. [Which motion was seconded by many.]

Mr. *Boscawen*. The four gentlemen retained counsel for lord Danby were at the door this morning, to have had the opinion of the House in this matter. By what discourse I had with them, they were not forward to appear in the business. If you do it with the least noise, it is best. Gentlemen here cannot but be sensible of the consequence of the affairs depending betwixt us. I am far from giving up our right, and yet I would not make a false step in it. 'Therefore I move, that if any counsel shall presume to plead,' &c. as before.

Sir *Henry Ford*. The lawyers are in little better condition, than betwixt the upper and nether mill-stone. If the Lords commit the lawyers to the Tower for not pleading, your vote cannot fetch them out. I would not have them plead without leave of the House.

Sir *Robert Carr*. The courts of Westminster never assign counsel against themselves. This will be counsel of Commons against yourselves. It is not necessary that the Lords should assign counsel, for two reasons: It is not counsel that will convince the Lords of the legality of the pardon. They plead for their fees, and they have better law near at hand, the judges. And the Lords will not go, I presume, to Westminster-hall, and expect that we shall go and wrangle with the lawyers.

Sir *Thomas Clarges*. Your vote is general, and counsel are assigned in defence of lord Danby, by the Lords. For counsel to appear in this case, is for a commoner to be of counsel against himself; for all the Commons of England are parties to this impeachment. 'All the Commons here' is by a fiction in law, and it is a just vote, 'That no counsel be admitted to plead in behalf of this pardon.'

Mr. *Vaughan*. If either House say they will, or will not do a thing, without giving any reason for it, I would not have that failure here. That large jurisdiction of the Lords was the cause of so much blood from Richard 2d's time to Hen. 7. I fear, the time you have spent so long will be lost by this arbitrariness of the Lords. Now for the appearing of the

counsel, &c. If the Commons are represented here, the laws made here are as much as if all the Commons of England were here present. You cannot call all the Commons to give their voices here. When once it is said, 'You represent the Commons here, by a fiction in law' (as Clarges) your bills will be but 'fictions.' Without injustice to the people of England, you cannot (for your honour) be present when the counsel are at the bar, to plead Danby's pardon; and I insist positively upon the vote moved for.

Lord *Cavendish*. When lord Strafford was arraigned for treason, he was so far from pleading a pardon, that he wrote a letter to the king to pass the bill of attainder. This is widely different from Danby's case. In Dr. Shirley's case, a vote passed of this nature, and the serjeant took the counsel into custody, &c. and what was the consequence? We ended in a breach; and that, I fear, will be the consequence now, and is the thing that Danby's party in the Lords' House aim at; which will be the most fatal thing in the world. Before this vote pass, I would see a little, &c. lest things come to the last extremity; and vote only, that no counsel presume to plead, without leave of the House.

Mr. *Rushworth*. In the case of sir Ralph Ferrers, 4 R. 2. Resolved, "That he ought not to have counsel of any earthly creature, but of God himself, in case of treason." 5 R. 2, sir Ralph Coggan impeached, &c. was denied counsel. 28 Hen. 8, the duke of — had copies of his charge, but no counsel, &c. In the case of lord Middlesex, he was denied counsel; but that was to misdemeanours only. Lord Bristol was accused 2 Charles 1. To the earl's answer, counsel was allowed him; but the king sent a message to the Lords, 'That counsel was not to be assigned in felony and treason.' And the Lords offered the order of 21 James, and said, 'They had assigned counsel, before the king's message came.' The judges were not advised with; but these were plain matters of misdemeanour, but not felony and treason, wherein they could not have counsel, by the ancient and fundamental law of the land.

Sir *John Trevor*. Several precedents have been cited to you; give me leave to make some observations upon them. The Lords cannot assign counsel in any impeachment, without the leave of the Commons. The case of Ferrers was this: He was impeached for treason; which treason was contained in several letters, found by a beggar, of his correspondents in France, &c. which were afterwards found to be forged (see Cotton's Records, 4 R. 2.) he was denied counsel, &c. Coggan's case was a riot upon the knights of St. John of Jerusalem; it tended only to treason, and he had no counsel allowed him. The Cambridge riot, where the townsmen seized the university treasure, treason; they were not allowed counsel. In the earl of Bristol's case, which was not an impeachment, the king

laid it down as a fundamental law, 'That in felony and treason no counsel was to be allowed,' &c. but that parliament was dissolved. By Hobart's Reports (printed) the earl of Bristol, by law, could have no counsel. The prisoner is always supposed as learned as the jury. But I would ask, where matter of law has been alleged by the prisoner, and counsel has not been assigned him? The earl of Danby ought not to have counsel, and he ought to have pleaded his pardon before you, face to face; and if it be otherwise, it is error, and may be reversed. The Lords cannot take the jurisdiction to themselves, without the Commons, and therefore your vote is grounded on reason, and it binds without doors as well as within, and is no 'fiction in law,' as it is called by some. If you make a vote that no counsel shall appear, you conclude yourselves generally. I would have it, 'That none shall appear without leave of the House.'

Mr. Williams. I take the case plainly, as the common law stands, that whoever is at the bar for his life, ought to have counsel for matter of law. And it is the rule of law generally, that he cannot have counsel; but any person indicted of treason or felony, in matter of law cannot be denied counsel. The law is the same in parliament, and out of parliament; and whilst we are hunting down one man, let us have a care that we do ourselves no hurt. Danby is to stand and fall by his pardon; and he is to live and die by it. I am not lawyer enough to decide the matter, that here is law in it as to this particular point. Now, whether the Lords can assign Danby counsel, without the leave of the Commons? Take it in an ordinary case, for you must make an analogy: Have the accusers any hand in assigning counsel? It is the court that is judge of law, and they assign counsel. But it is said, 'The court is counsel for the prisoner;' but they may assign counsel. We all know, the Commons have no hand in giving judgment; it is the Lords that do it. Therefore I take that to be the reason why they may assign counsel, and no others. I admit, that it is a more solemn thing than an indictment of a grand jury. This difference is only in degree, not essentially. 'But will you trust the Lords to assign counsel?' say some. I answer: As the Lords are trusted with the judgment, so they are trusted with every thing that leads, and induces to it. You may as well say, how can a commoner be a witness for a lord? as deny him counsel. You do not eat and drink for all the Commons of England. I take it, that the Lords are proper judges, and of all things that induce to it. If there be right to Danby in having counsel, let right be done him.

Mr. Vaughan. Consider what Williams says, 'It is the right of the Lords to assign counsel, &c.' Let him give an instance, whenever the Lords assigned counsel out of them who are the accusers.

Mr. Williams. I spoke to the necessity of the thing. Danby must have counsel out of

the Commons, or none. The court may assign him, for counsel, any man whom they think fit.

Sir John Trevor. I have had the honour to serve the king, as counsel. I, by my oath, am not to plead an untruth, and if I declare an opinion for the prerogative that I think is not so, I am perjured.

Sir Thomas Lee. The Lords are now setting up their jurisdiction. In all causes, and in all time, courses of parliament and Westminster-hall have been very different. It is a strange thing, that a point of law should be found out, by two or three gentlemen, that neither the Lords nor Commons can find out. The nature of your accusation of this lord is from the notoriety of the thing; every man is his accuser and prosecutor. There is a great difference, in a suit, between the king and the subject. There can be no benefit here to the prosecutors in the Impeachment. I make no doubt, but that the Lords may assign counsel for their information. Lord Mordaunt escaped, &c. because the Commons would not proceed, &c. As it is now, I fear this way will destroy all Impeachments, and therefore I am against it.

Sir Robert Howard. I have but one word to say to what we are to do. We are driven to a necessity to defend ourselves from as great a blow as we can apprehend. I will say something new to you, not yet observed. If a man be impeached at the bar, and if matter of law arise, the prisoner may have counsel. But if there be so extraordinary a thing as this pardon, so got, and snatched from the king, and all turned into a point of law, it is strange.

Mr. Garraway. Do you remember what you have voted? Are you afraid of what you have done? If these Lords have counsel assigned, be not afraid of what you have done. Let us leave our cause fair to the world, and trust God. If the Lords will retreat, they may; they will not hear you as to method of proceedings, &c. and now you will not defend yourselves. I would say, 'That if any counsel plead in justification of this pardon, they shall be esteemed betrayers of the privileges and liberties of the Commons of England.'

Mr. Powle. It is the greatest mistake in the world, to tie us up to arguments of inferior courts, and the greatest mistake, to presume, that this House will do any injustice, to deprive any man of his just defence. When there is just cause to have counsel, this House will allow it to the greatest offender in nature. No commoner ought to plead against what we have done, without our licence. But now you have made a step in this matter, never admit this to be done by the Lords, solely, and singly, upon their own power only, without admitting you to Conference, to settle methods of proceeding in the trials of the lords, &c. I see not why we should go to any extreme votes to occasion a breach betwixt the Lords and us. But if there be such a strange fate over us, let us not be the occasion of it, for the greater satisfaction of the country, that we have done no-

thing precipitately. Lord Danby is not so low, but that he has friends; therefore I desire, that, in our proceedings, we may not do that which carries defiance in the forehead of it to the Lords. If you vote, therefore, 'That no commoner presume to plead in defence of lord Danby's Pardon, without the consent of this House,' you do that in substance which has been proposed you in words.

"Resolved, That no Commoner whatsoever shall presume to maintain the validity of the Pardon pleaded by the earl of Danby, without the consent of this House first had; and that the persons so doing, shall be accounted betrayers of the liberties of the Commons of England."

"Resolved, That the Answer delivered by the Lords this day, at the last Conference, tends to the interruption of the good correspondence between the two Houses."

Saturday, May 10.

Mr. Hampden reports from the Committee, the Reasons to be offered at a Conference with the Lords, as follows:

"The Commons hope that your lordships will not proceed to the trial of the lords, &c. till things are adjusted betwixt the two Houses, as they desire at all times to keep a good correspondence with the lords, so most especially in this conjuncture, when the most heinous delinquents are to be brought to justice: and therefore for answer to the last conference, the Commons have commanded us to say this to your lordships: that your lordships do not offer any answer or satisfaction to the Commons in their necessary proposals amicably offered, by way of supposition, that they might have been confirmed therein, by answer from your lordships, that your lordships do intend, in all the proceedings upon the impeachments now depending before your lordships, to follow the usual course and methods of parliament.

"And farther that your lordships have not given the least answer or satisfaction to the Commons, concerning your lordships address to the king for a Lord High Steward, though the Commons proposed their desire of satisfaction in that matter in as cautious terms as could be, to avoid all disputes about judicature.

"The Commons, to avoid all interruptions and delays in the proceedings against the lords impeached, and the inconveniences that may arise thereby, having proposed to your lordships, that a committee of both Houses might be nominated, to consider of the most proper ways and methods of proceeding upon impeachments, your lordships without any reason assigned, (save only that you say, you do not think it conformable to the rules and orders of the proceedings of this court) have refused to agree with the House of Commons in appointing such a committee, though not heretofore denied, when asked upon the like occasion, and at this time desired purposely to avoid disputes and delays.

"And therefore the House of Commons have commanded us to acquaint your lordships, that things standing thus upon your answer, they cannot proceed in the trials of the lords, before the methods of proceedings be adjusted between the two Houses."

Sir John Trevor reports from the Conference with the Lords, "I had the members appointed had attended at the Conference: and that the Conference was managed by the Lord Privy Seal: and that he acquainted them, That the lords had received a Petition from the earl of Danby, who was ordered to attend their lordships this day: which his lordship read; whereby the earl of Danby sets forth, 'That he met with information severally from his counsel, that they durst not appear to argue the validity of his pardon, by reason of a Vote of the House of Commons:' and that their lordships desired to know, whether there was any such Vote as was alledged in the Petition."

Debate thereon.

Mr. Garraway. Whether this paper be an original, that the lords gave you at the Conference, or not, it is no matter; but you may take a copy, and deliver the paper back again.

Mr. Sacheverell. I conceive that now you are to consider, whether we should give an Answer to the lords, or whether this House can tell, whether Danby's counsel has given him such an answer in matter of fact? When the lords can give you satisfaction to the desires of this House for a Committee to adjust matters of the trials, &c. by way of good correspondence, then it is time to proceed.

Mr. Vaughan. Look over the journals from Edw. 3's time, and you will never find that we ought to be asked questions at a Conference. In plain terms, this is an accusation against the House of Commons, and you are asked whether you are guilty or not guilty? In sir John Fagg's case, which gentlemen may very well remember, you were asked at a Conference, whether it was by the Speaker's Warrant, that the counsel who appeared, &c. were attached.

Mr. Powle. I remember that question was asked at a Conference, and then it was said, 'That the proper way of asking a question was by way of message, and not by conference.' But I would not have you take that for granted that it is not parliamentary to ask questions; for it is so; but then by a message, and not at a conference.

Sir Thomas Mores. A question that we like not we let pass, and make no answer to, and this question will keep cold.

Sir Thomas Littleton. I would not let this thing altogether sleep, but would order some members to search the Journals, to see whether there have been such proceedings in the like cases.

Colonel Titus. I doubt not, but a question may be asked from either House. The lords desire to know whether such a vote has passed

this House or no? As much as to say, 'If you have, then we will take a course with you.' Ordered, "That a committee be appointed to inspect the Journals; and search Precedents concerning Questions asked at a Conference."

Ordered, "That all the members of this House, that are of the long robe, do prepare themselves with Reasons against the pardon pleaded by the earl of Danby."

Thursday, May 15.

Sir John Trevor reports, from the Committee appointed to join with the Committee of Lords, to consider of propositions and circumstances relating to the Trials of the Lords in the Tower, That the committee had made two propositions to the committee of lords.

"First, That they did desire to see the commission of the Lord High Steward, and the commissions to former Lords High-Stewards.

"Secondly, That they did desire to know, what resolutions had been taken by the lords spiritual being present or absent at the trials of the lords impeached.

"To the first proposition, the Lords of the Committee produced copies of the commissions to the Lords Stewards, for the several trials of the lord Morley and the lord Cornwallis: But those trials were out of parliament. They produced the copy of the commission for the trial of the earl of Pembroke, for murder: which trial was before the peers in parliament; and so differed from the two former commissions.

"The lords did further produce a copy of the commission passed under the Great Seal, for the trial of Thomas earl of Danby; and also, a form of the commission for the trial of the other five lords impeached; and did communicate to the Committee a Resolution of the Lords House, *in hæc verba*:

"Die Lune, 12 Maii, 1679.

"It is declared and ordered, by the lords spiritual and temporal in parliament assembled, that the office of a High-Steward, upon trials of peers upon impeachments, is not necessary to the House of Peers: but that the lords may proceed upon such trials, if a High-Steward be not appointed according to their humble desire."

"Their lordships further declared to the committee, That a Lord High-Steward was made *hac vice* only: That, notwithstanding the making of a Lord High-Steward, the court remained the same, and was not thereby altered, but still remained the Court of Peers in parliament: that the Lord High-Steward was but as a speaker or chairman, for the more orderly proceedings at the trials.

"The copy of the commission for a Lord High-Steward for the trial of the earl of Danby being read, the Committee of this House took exception to these words in the commission; viz. 'Ac pro eo quod Officium Seneschalli Anglie (cojus Præsentia in hæc parte requiritur)

'ut accepimus, jam vacat;' and desired, that they might be left out; as implying, that the constituting of a Lord High Steward was necessary: and thereupon proposed these words to be inserted in their stead; viz. 'Ac pro eo quod Procures et Magnates in Parlamento nostro assemblati nobis humiliter supplicaverunt, ut Seneschallum Angliæ hac vice constituere digneremur.' To which amendment the lords of the committee did agree. And it was further agreed by the said committee of the Lords and Commons, that the commission under seal, for the constituting a Lord High-Steward for the trial of the earl of Danby, should be recalled; and a new commission, according to the said amendment, to be issued, and to bear date after the said resolution: and that the like commission, 'mutatis mutandis,' should be issued for the trial of the other lords impeached.

"As to the second proposition, the committee of the Lords communicated to the committee of this House the resolution of the House of Peers, *in hæc verba*; viz.

"Die Martis, 13 Maii, 1679.

"Resolved, &c. by the lords spiritual and temporal, in parliament assembled, That the lords spiritual have a right to stay in court in capital cases, till such time as judgment of death comes to be pronounced."

15 Maii, 1679.

"The Lords explained themselves, That the meaning of their resolution passed yesterday, concerning the lords spiritual, is that the lords spiritual have a right to stay and sit in court, till the court proceed to the vote of Guilty or Not Guilty.

"The second proposition being a matter of great weight and consideration; the committee of the Commons had commanded him to report it to the House, in order to receive their directions for their further proceedings."

*Debate thereon.**

Sir Thomas Clarges. It is necessary that you leave something upon your books of what the Lords have resolved, viz. "That the Lords may proceed to trial upon impeachments without a Lord High-Steward."

Sir William Coventry. I would have the whole settlement of the matter entered into the Journal, under one draught and regulation of it, for posterity to be guided by.

Sir Robert Howard. I hear that the Lords are going to strike at any method of proceeding in impeachments of the House of Commons. Their first vote is, 'That the bishops shall not say in court at any sentence of 'Guilty, or Not Guilty, &c.' This is a dark text, and should have a commentary. This does nothing to the case of lord Danby; it seems, they take not voting to the validity, or invalidity of his pardon, to be life or death.

* Grey's Debates, vol. 7, p. 279.

This gives occasion to the lords spiritual to judge any pardon good. If the pardon be not a good plea, the charge is confessed, and there remains nothing but execution to be demanded, and the spiritual lords call this nothing but matter of law. Now their canons are turned upon themselves. I have heard say, that if a bishop kills a man, he is to have one trial in parliament-time, and another out of parliament; he is to be tried by twelve men of the neighbourhood. If this be so, no man shall be tried, but by his peers, if bishops sit. This is taken generally so far for granted, that Mr. Selden says, 'They sit as barons in parliament, as *Jure Regis*, and they are to withdraw from the trials.' If they were peers in parliament, it would be in their blood and generation, and they must sit to appear upon blood and generation. This seems, that they who exclude themselves from judging in matters of blood, by canons and all gospel business, have some reservation upon this, to show an object of kindness, rather than justice. Then see the state of this case. Say they, 'It is Guilty, or Not Guilty.' But in the plea of his pardon, it is nothing; it is but only a point of law. If that be over-ruled, he is left to come over again to trial. In short, that they who should avoid seats of blood, should press this in particulars that they deny in the universal, is strange. If in a surreptitious pardon the bishops come to help men, the law of England is in the power of one body of men, and the statute 25 Edw. 3, will be wholly voided, if the party be so well instructed as to plead a pardon. I would therefore give the committee instructions, wholly to disagree with the Lords, as an error of judgment, if the bishops sit, and so the judgment may be reversed.

Sir *Thomas Merca*. The bishops press not this; they leave it to the lords. I know not that the bishops said one word in this matter. Now, when the Lords judge, whether this pardon be good, or not, there it is you would have it proposed, whether the bishops shall withdraw then? I conceive, that the Lords take it, as you do, that if the pardon be good, or bad, it is decisive, whether life or death. The same reason carries it by their canons. They are not to sit, for it is life or death. I believe you will have the thing explained tomorrow, and carry the point.

Sir *William Hurbord*. I desire not to be governed by the canons of the church, but by the laws of England. When you sent up your message to imprison lord Danby, the bishops were very instrumental to save him from being committed. I appeal, if they voted not against the law of England? The thing must be so settled, that posterity may be safe. But suppose the bishops exclude themselves, as is said; if they judge to misdemeanor, if that man lose his life by it, or be saved, they judge in matter of fact. If the Lords come to some determination, &c. we may be safe. I would set this matter without dispute.

Mr. *Sucheverell*. Consider a little the state

of the case. It is a great point, and I would settle it so, as never to trouble the House more. It is all one to me whether they proceed in any part, or the whole. They have power to acquit, and not condemn. I say, the bishops ought not to be present by the law of England. If the offences of lord Danby turn to misdemeanor, it is as dangerous as the judgment itself. I would turn it thus, 'That in capital cases the lords spiritual have no vote at all, in proceedings of impeachment from the House of Commons.'

Serjeant *Maynard*. I look upon the whole matter to be upon the old string, viz. to keep the five lords from trial. A great man may be pardoned *toties quoties* as he can get a pardon, let the offences be ever so great, if this pardon be good. The matter is now the bishops, &c. If their meaning be to deliver their opinion, 'That this is a good pardon, or no,' it is all one, whether 'guilty, or not guilty,' of the charge. Now, was it ever seen that a judge has power of one part of the law, and not the other? To do justice on one side, and not on the other? To save, and not to condemn? The main end of all these things looks to another purpose. They may say, he shall be acquitted, but not condemned, and so all the justice of the lords is shut up against offenders. I would therefore have an express declaration from the lords, 'Whether the bishops shall judge in lord Danby's parlon?' Be pleased therefore to appoint your Committee to offer their reasons for a farther explanation of this vote, to the lords, and above-board. I did hear that one lord should say, 'That he was for the bishops voting, &c. because they would acquit lord Danby.'

Sir *Robert Carr*. I will speak to matter of fact only. Your Committee finding only, that the bishops should stay in court till the temporal lords voted, Guilty, or Not Guilty, desired to know, 'Whether their judgment upon lord Danby's pardon was taken for Guilty, or Not Guilty?' One of the lords said, 'He was for the bishops voting in the pardon because they were for lord Danby.'

Sir *Thomas Clarges*. For ought we know, the five lords have five pardons. The law says, 'That the king can do no ministerial act.' But the king took the seal from the chancellor and sealed Danby's pardon. The five lords may, at the bar, produce such pardons as this. It is plain, that this judgment of the bishops is a judgment in part, to acquit and not condemn, so that all this proceeding upon the pardon will be 'coram non iudice.' So that if the bishops will take all this upon their shoulders to obstruct the justice of the nation, let them bear it themselves.

Sir *Thomas Lee*. Two or three things have startled me much. I find this is a novel thing. In lord Strafford's case, there was no question of the right of the bishops, and this matter never came in question. The lords did commit Danby early in this parliament, and said, 'It was fit a new parliament should correct the

'error of the last.' This may prove an error in the proceeding, if the bishops judge the pardon, and the next parliament may restore Danby. As long as we keep old methods of proceedings, there is no harm. The lords say, 'the bishops may be in court,' but say not, so long, and no longer.—In all cases, as they call themselves 'the Great Court,' they will make what rules they please, to be observed. But those that are judges of methods, by the same reason may be judges of life and death, and dispense with their own canons. I would have this matter stay, till the kingdom is at better leisure to dispute it. If the lords had said, 'That the bishops shall withdraw, or stay so long, and no longer,' yet I cannot be satisfied, if they shall say, 'The bishops shall withdraw for his time, and may resume it in another.' I would not make one step till this matter be adjusted, and go on with no trials.

Sir *William Coventry*. You have been told what has been done in the case of lord Straf-ford. There was a committee then to consider, whether to try him in the Lords House; for said the Lords, 'The bishops will be absent, and the barons may sit upon their benches.' For this that is the proper question before you was, 'this stay,' stirred by your Committee. One or two of the lords said, 'They would move their House in it.' I see no fruit of voting any thing, till you see how the Lords will proceed upon it, and possibly you may have satisfaction from the Lords, and you may avoid doing it. It is necessary only to have your committee at liberty to urge this to the Lords to-morrow.

Sir *Francis Winnington*. The debate now is the jurisdiction of the Lords in proceeding, &c. I am unwilling to give offence to the Lords, or to let them have a jurisdiction unusual. When the question was proposed, 'Whether the bishops should withdraw,' it was answered, 'They should at the vote of Guilty, or Not guilty.' But now, so far as the thing stands, we must look to our rights in proceedings. If that be a reason for their stay, that the bishops may countenance the pardon, it is in vain to proceed in any matters of parliament, till that be settled. I will not enter into the debate, how far the bishops may be present in point of blood. I propose this as to matter of jurisdiction. If we see the Lords proceedings not coherent to law, we are as interested in that as the Lords are in the judgment. When we think of the chancellor's speech, that this is the cogent time, that all is at stake, I did not think these difficulties would arise. Those who raise them will do it for the five lords in the Tower, as well as this lord. This, to my understanding, extends to all pleas, Guilty or Not guilty, to life and death, 'No.' But to pardon or not pardon, 'Yes.' But surely the bishops are better versed in the art of disputing, than to stick to that. They will not judge what the life of a man depends upon, but to save him. If I knew their meaning, whether they would do this in all cases—Whether in a pardon only,

or where life and death is immediately judged. If we meet with this, it is our inheritance we have in the methods of the court in their proceedings, as this is of judgment, and we may interest ourselves in it.

Mr. *Vaughan*. This thing is of that consequence, and one of the fatalest and most absurd things I ever saw. From Edw. 3's time to the trial of lord Pembroke*, the bishops never sat in capital judgments, and they have formerly made a declaration of parliament, that they ought not to sit. The novelty of the thing makes me jealous, that it is for some particular end of their own. They are judges for themselves in this matter, in the Lords House, and vote. If they were absent, you would have another account of it. They pretend to sit upon this pardon of lord Danby, and I pray God they sit not to pass judgment upon their whole function!

Mr. *Powle*. The House is possessed of the matter only, I will speak to the manner. If you dispute with the lords about rights and privileges of their House, it will be dilatory, and I would not enter upon it now. This day this proposal was made to the lords, and they seemed to intimate that they would move it. If it prove contrary to morrow to your desire, then I would confer with the lords about it. But if they tell you, 'The bishops will not meddle with it,' you may then decline it. You may instruct your Committee to insist upon having a resolution from the lords to morrow. But for to day, I would lay it aside.

Sir *William Coventry*. If I had an intention to save the lords in the Tower, I would contest with the lords upon their jurisdiction in this matter; but if you put it as it is moved, it will put an end to all things.

Sir *Thomas Lee*. I do say, that, next to my fears of the Pope's jurisdiction, I apprehend heightening the lords jurisdiction.

Mr. *Sacheverell*. If in this case gentlemen take a little more liberty than ordinary, you may pardon them. If the bishops tell you, 'They will be absent,' does that settle the jurisdiction? Settle the point so that their voluntary withdrawing now does not entail their jurisdiction upon you for ever.

" Resolved, That it be given as an instruction to the Committee appointed to join with the Committee of lords, to consider of propositions and circumstances relating to the trial of the lords in the Tower: That they insist upon it at the Committee, That the lords spiritual ought not to have any vote in any proceeding upon the impeachments against the lords in the Tower."†

* See vol. 6, p. 1310, of this Collection.

† "A famous debate arose, concerning the bishops' right of voting in any part of a trial for treason. It was said, that, though the bishops did not vote in the final judgment, yet they had a right to vote in all preliminaries. Now the allowing, or not allowing the pardon to be

Saturday, May 17.

Sir John Trevor reports from the Committee of Lords and Commons, That the Lords had communicated to the Committee certain proceedings of the House of Lords, which he read in his place, in these words :

May 16, 1679.

“ Resolved, &c. That Thursday next be appointed to begin the trial of the five lords in the Tower, &c.

“ After which Resolution passed, The lords spiritual asked the leave of the House, “ That they might withdraw themselves from the trials of the said lords, with the liberty of entering their usual protestation.” And that the Committee of the House did desire the direction of the House, how they should proceed therein.

*Debate thereon.**

Mr. *Sachverell*. If I understand the report right, this is clearly in contradiction to what both you and the Lords have agreed upon your books already. The point of time of trials was the last thing to be adjusted. I farther observe, that the Lords have not in any sort agreed that the bishops have no votes in the trial of the five lords. The Lords Spiritual are so far from it, that they ask leave to be absent. As to that point which the Committee did insist upon, I think the Lords have made no answer. I conclude, that the Lords apprehend, very rightly, that, should the Lords

good, was but a preliminary : And yet the whole matter was concluded by it. The lords Nottingham and Roberts argued for the bishops voting. But the lords Essex, Shaftsbury, and Hollis, were against it. Many books were writ on both sides, of which an account shall be given afterwards. But upon this debate it was carried by the majority, that the bishops had a right to vote. Upon which the Commons said, they would not proceed, unless the bishops were obliged to withdraw during the whole of the trial. And upon that breach between the two Houses the parliament was prorogued : And soon after it was dissolved. And the blame of this was cast chiefly on the bishops. The truth was, they desired to have withdrawn, but the king would not suffer it. He was so set on maintaining the pardon, that he would not venture such a point on the votes of the temporal lords. And he told the bishops, they must stick to him, and to his prerogative, as they would expect that he should stick to them, if they came to be pushed at. By this means they were exposed to the popular fury.” Burnet.

“ It is easy to see, that all this contest about the bishops vote arose from a presumption, that their weight would turn the scale, and that both parties were equally certain into which it would be thrown.” Ralph.

* *Grey's Debates*, vol. 7, p. 298.

make a difference between the five lords and lord Danby, that would look too broad in the eyes of the nation, that you should not argue the pardon ; which I value more than any ten lords trials. If these five lords only are taken out of the way, and you confirm this pardon to lord Danby, you make the king absolute. Any man may then embezzle the king's revenue, ships, and stores, and may produce a pardon. And what difference is there between that, and arbitrary government without law ? I would shew this to the Lords, as the great concern of the nation, and that the Commons will never give that power away ; if they do, they are undone. If once you admit this pardon, in bar of justice, against the Commons, who shall call them to account, when they have a pardon to help them ? And new judges will be taken to assist to make it good, and there is an end of all. You have demanded judgment of the Lords about the pardon, &c. and have had no answer ; and when the trial of the five lords is over, they will settle the pardon (by the strength of Danby's friends in the Lords House,) and there is a precedent upon you eternally. No ; I would let the Lords know, that we value settling this pardon, more than any five lords, and that the Commons will not give them such a handle to undo themselves ; and let it lie at the Lords' door. And I would let the Lords know, ‘ That it is ‘ contrary to their agreement, and that till the ‘ nature of the pardon be tried, we cannot ‘ proceed.’

Sir *Robert Howard*. What has been said, is so well, that I shall repeat no arguments ; but I will come closer to the distinction that is made, and by that distinction it will appear closer to you, what the thing is. But here is a recedency in the bishops ; but the receding is to such and such lords, but not to lord Danby. When you sent up the impeachments, the rest of the lords pleaded guilty, or not guilty. Danby takes the choice of another advantage, viz. ‘ That of his pardon, ‘ which he will rely upon.’ You say then, ‘ That his plea was guilty, for he confesses the ‘ charge by pleading his pardon.’ Upon which you demand judgment. If his pardon be good, he has the benefit of it ; if not good, nothing remains but sentence. Now this is, by the recedency of the Lords Spiritual, a kind of trial of skill. When the pardon is good, or not good, there is a reservation of guilty, or not guilty. This shall only in the consequence be to stay judgment. This is a good way to tie up all declaratory treason. I only add, if this is taken here, that this is a plea of pardon, and by which Danby must stand, then the Lords Spiritual ought not to be present. It is plain that the bishops will sit upon this of the pardon, and not on the other five lords, &c. You ought to be clear first in this case. We take Danby's plea to be his issue ; and if so, you ought not to proceed till this is determined.

Sir *Thomas Meres*. I agree that the bishops ought as equally to withdraw in one trial as

the other. I agree that it is the interest of this House and England that the pardon should not stand good. There are six lords concerned in the trial, in the Lords House, and the bishops have complied with five of the six to withdraw; and I see nothing but that the Lords House may comply with five of the six—I do not say, but that there is a shorter way to be rid of Danby and his pardon. If fairly and regularly the five lords may be tried, we may, for discountenancing of Popery, go on with them and finish something.

Mr. *Montagu*. I have been silent in this matter of lord Danby out of respect to the House, lest it should look like private pique against him, &c. But since, by his pardon, I have made observation that the justice of the nation will be stopp'd, and that by his ambition he may be on the same foot still, to the ruin of the nation, I would not proceed to the trial of the other lords till this be over.

Sir *William Pulteney*. Till this pardon be judged, you can have no fruit of the trial of the five lords, &c. If they get pardons, all your proceedings are to no purpose; though there is some difference between pardons, impending impeachments, and not impending. If the king can pardon, &c. there is an end of all your lives and liberties, till you settle that.

Sir *William Coventry*. I differ, &c. because the safety of the nation depends upon a good correspondence between the two Houses. I am afraid, if this dispute is inextricable, we shall have all the disadvantage in the world abroad, who do not see the matter so plain as we do, and so will lay the blame on us. The power in judicature is always in the Lords, and in bills we have an equal power with the Lords; but even in that, time and place are in the lords nomination. If in a thing wherein we are co-ordinate with the lords, they have that power, it will be dangerous to pass this vote, &c. Gentlemen would have this matter of the bishops clear—Thrust the needle through, and the thread will follow; you will have it in all. Divers bishops have said, and do say, 'That if the pardon do determine Danby's life and death they will withdraw.' If the Lords determine not that point, I am not sure that Danby has not a second post to pass, to pretend his innocence. What is the prudential reason of Danby's first expectation?—The five lords have been seven or eight months imprisoned, and we after the Habeas Corpus, &c. 'That the subject shall not be without trial.' Shall we assume that to ourselves, and stand in that gap which the king has no power to do? Will the proceeding against the five lords make Danby's pardon better or worse, when it comes to be judged? But have not the five lords pardons? some may say. But that thing would be so odious, that it will bear down Danby's pardon, and twenty more on the back of it, so that the thing weighs down on that side of the argument. If the bishops shall not withdraw, then it will follow that the bishops are partial to Danby, and the weight and odium will

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lie on the bishops. Whoever wishes the bishops well, would have them do neither. This will plain the way for Danby's trial, &c. If we do not agree with the lords, we know not how the Lords will insist upon the constituent power of their House; so that if you would secure your passage to all the rest, instruct your committee to agree to the trial of the five lords first.

Lord *Cavendish*. I agree with Coventry, 'That the nation expects justice against the five lords,' and against lord Danby also: (By the way, I think him as great a criminal.) We are not to consider what the nation expects, but what the constitution of the government is. Why was this Committee appointed? The five lords trials may be long, and I know not what there may be of prorogation. I move, 'That you will not agree to the trial of the five lords, till the validity of the pardon be decided.'

Mr. *Bennet*. The meaning of what is done in the Lords House is to cozen and cheat us of the rights of our House, and in this it is more than the trial of twenty lords. They will put the pardon by, till the five lords are tried, and so they shall never be impeached, &c. My meaning is to impeach any lord that shall play the rogue with us; you must supply the king, when you have lords picked out, fit to be hanged for the ill they have done; your fault is that you did not proceed upon that lord's stamped pardon by creation. When the Lords feel the Commons of England, then they will be honest.

Mr. *Vaughan*. The question is, 'Whether all crimes shall be legitimated and pardoned?' Which will be so, if this pardon stand good. Some things are laws, and as obligatory as statute law. For instance, the powers of parliament are laws, but the effect of those laws is right of impeachment, and that is your right, and if this pardon stand betwixt you and home, law and all is gone. This is equal to any thing whatsoever if there be no punishment to these crimes, that tears you up root and branch, and farewell all!

Sir *Joseph Williamson*. I speak to order. Some of these points are not now in question before you. If you go upon the pardon, or the priority of the trial of the Lords, that is not properly the question. The matter plainly before you is 'That the bishops ought not to have a vote in this pardon.' The Lords say, 'They will sit on Thursday to try the five lords;' and the bishops have prayed leave of the Lords not to be present there; my motion is that you will insist upon your own assertion, 'That the bishops ought not to be present, &c.' And it must be cleared before you can proceed to the trial of any of the Lords. The question is no circumstantial question, but a fundamental right of judicature, the fourth, fifth, or sixth part of the whole judges. The question is, Who judges? Till that be decided, the trial will be nothing; for all may be void by error of proceeding, of which there have

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been several precedents. By that leave that is asked by the Lords spiritual to withdraw, it implies, if not amounts to a proof, that the spiritual Lords may sit if they please. Get this matter clear, and the other will follow: but I am far from doing any thing whereby you may lose your right, by implication; it is affirming the point against you for ever hereafter. In fundamental points who shall be judges? — Contrary to that, the point is settled against you; therefore I would give instructions to your Committee, to insist upon your last vote, 'That the bishops ought not to sit upon the pardon, &c.' and to desire the lords' minds in that.

Sir Edmund Jennings. By the arguments I have heard, it may be as well said, that the other lords shall not come to trial, as Danby, &c. and that Danby shall be a sacrifice of expiation for the rest. It is said, 'That the bishops have no right to sit.' And who shall be the judges of that? If Coleman himself were now alive, he could not more promote the designs of popery than this discourse I have heard. I move, 'That you would let the Lords know, that this House will proceed to manage the charge against the five lords, the day appointed.'

Mr. Bennet. He speaks of 'making lord Danby a sacrifice, &c.' Nobody said that. The question is now, 'Whether pardons for crimes shall take away all impeachments.'

Sir Robert Carr. The words 'sacrificing lord Danby' are a little too hard. If the articles be true against him, and the pardon not good, his pleading his pardon is a confession of the charge. If he is condemned for confessing his charge, he is not made 'a sacrifice to save others.' The question is, 'Whether you have had satisfaction from the lords, &c.' Now the lords tell you, 'That, as to the trial of the five lords, the bishops are content to withdraw,' and your committee was to adjust the right of the thing. And whereas it is said, 'it is easier to get the point of the bishops not judging the pardon, after the five lords are tried, than before,' now you see plainly, that the Lords insist upon their old vote of the right of the Lords spiritual to sit till judgment be given; so that upon your vote the Lords say nothing, and the bishops insist upon it. I think this a new judicature, to take spiritual Lords to judge in capital causes and crimes. The Lords themselves scuttled the point, so that this should be the last thing to be adjusted, and they have made it the first. Those without doors think Danby as deep in the plot as any of the five Lords. But what cannot be pardoned if these crimes pass? How appears it, but that the five lords have pardons? And then neither you nor posterity can be safe. If you settle not the point now, I believe you will scarce have time to do it a second time.

Sir Francis Winnington. I desire to answer some objections. It may be, some things are not fit to be expressed, but I will speak plain. If we consider what the lords have done, as to

the matter of the bishops, there are two great things before us. Lord Danby, the last parliament, desired time to answer. He renders himself, and pleads his pardon. You would then know, whether he would stand to it; and he adhered to it. When we declared, that we were ready to try the five lords, the last parliament, Jennings says, 'Danby is to be a sacrifice.' I do believe Danby one of the plot; to separate him from the plot, I cannot. He took his advantage to rise, by his interest with the Papists, and hath stifled the evidence of the plot. He hath pleaded his pardon, in bar of his charge, and confesses all the charge to be true. Now the question is, 'Whether you will do any business, if such a thing hang over your heads, as a pardon in bar to an impeachment of the Commons of England?' Now, as for the priority in proceeding against him, the court always asks the prosecutor, 'Which indictment are you ready with?' Who knows the evidence best to assign a time. It appears, that to our impeachment a pardon is pleaded in bar. You have voted that it is not good. If the lords do think it good, to what purpose should we impeach any man else? So that this is a bigger point than the trial of Danby: Here will be no impeachment for ever hereafter; it fell out first, how the bishops were concerned. It looks like a nice distinction, as if the popish lords should be found not guilty, if Danby's pardon be good. Then, as to the trials of the five lords, there is a day appointed, and the bishops say, 'They will withdraw at their trials,' and, to be sure, Danby is not one of them. They name the five lords. Your committee answered, 'That this is an answer to part, &c. but not to the whole.' And had they put Danby's trial *sine die*, they said, 'they had no order to answer that.' So that Danby's trial is postponed. It is to no purpose to proceed to any impeachment, till this preliminary matter be removed, that stops all things for the future. After all proceedings are over, he will plead his pardon in bar. But, says a gentleman, 'If the five lords have pardons, it is the worse for Danby.' Can we believe, that pardons will not be granted, when we see it has been granted? It is to no purpose to spend out time and estates, when a pardon be thrown in your teeth, and there is an end. It is to no purpose to try the five lords; (the people will say) 'till we have asserted their liberties.' And I believe we shall have logic enough to make the people understand us that sent us. I propose, that you will give your committee instructions, 'That you have had an answer in part, as to the Lords Spiritual trying the five lords, but you find no answer to that of lord Danby.' The great matter, which concerns the government, is the pardon of Danby. I desire that the pardon may be cleared, that we may have satisfaction in that point. It may be, the bishops have as much kindness for the Popish Lords, as for Danby, and *à contra*; for they do not (it seems) stand much to their votes. Let us

stand upon the pardon, and then I hope the lords will do you right as to the five lords.

Sir Thomas Lee. The bishops will withdraw, with protestation to their right, as they did in the case of lord Strafford. I am sure, the pardon is illegal, or ought to be so, and I am sure England is undone, that day this is a good pardon. But, says a gentleman, 'there may be pardons granted to the five lords, betwixt judgment and execution;' but the lords Spiritual tell you, they will go away. How shall we satisfy gentlemen in the country that sent us hither? I agree, that, if the government had depended, this plot must have been, else you could not have asserted this—Oates and Bedlow die, and there is an end of your prosecution. It is of the most dangerous consequence in the world that this pardon stand good. If Danby be not the creator of the plot, but the supporter, let us be constant in our opinion.

Mr. Saynfin. I take not what is moved to be the most convenient way with the lords. If you make that your ground to insist upon, consider how this communication of the lords has been with you. The lords say, 'They have appointed such a day for the trial of Danby and the other lords.' A day after, you appoint a committee to adjust the manner, &c. You considered then the bishops presence, &c. and the lords vote, 'That they have a right to stay in court until sentence of guilty or not guilty, &c.' Then the lords appoint the five lords to be tried first, and settle no point as to Danby. But to the trial of the five lords, they tell you that the bishops have asked leave to withdraw; they will not be present. I would say, 'That we have had satisfaction as to the bishops, in the trial of the five lords, but not as to Danby.'

Mr. Paul Foley. The bishops have voted, as to this trial of the five lords on Thursday next. I doubt, the lords in judicature will stand stiffly upon their points, which they always do. I think you have not yet made an order for the committee to insist upon your former vote, as to the bishops presence at the trial of the pardon.

Sir Henry Capel. I think it not the question, 'Whether the five lords be tried first,' but 'Whether the validity of the pardon, to prevent the ill consequences of it for the time to come.' Parliaments sit upon two great things, giving money, and questioning great men for offences, &c. and you had better part with your power of giving money, than that. You will be of no use at all, if your power be taken away of questioning exorbitances in the government. This is the great point, and I move it for instructions to the committee, 'That, till this point be settled, you cannot proceed to any other matter.'

Mr. Powle. I cannot agree, that this answer of the lords is satisfactory to your propositions. The lords have asserted their right to be present, and then tell us, 'That the bishops have asked leave to withdraw;' both voluntary things; and the lords may tell you, 'That their leave to withdraw is not accepted,' and so they may sit; and if the Spiritual Lords do not ask it,

the Temporal Lords will not give it; and so you are where you were before. At lord Strafford's trial, the Spiritual Lords sent you word, that they would withdraw; now, they will ask leave to withdraw. The lords have not dealt with you according to intercourse of parliament. They tell you, 'They will not proceed to trial, &c. till all matters are adjusted,' and now they set down a peremptory day for trial of the five lords. I move, 'That the lords may be desired not to appoint a day, till all matters are adjusted.' If the Lords will force a dispute upon us, and cram it down upon us, they may, but let us not give them occasion. I would only desire their vote to be explained, as to the Lords Spiritual, &c. and that they would not proceed to trial, till matters are adjusted.

Mr. Hampden. For instructions to the Committee, I would have satisfaction, as to the bishops, &c. before we proceed upon Danby's Trial. You were some time before you had the honour done you to have a Committee of Lords and Commons for adjusting matters, &c. The matter of the lord Steward is well adjusted. The next thing is, that of the bishops being present, which is more in relation to lord Danby's pardon than any thing else. The Lords said, 'The bishops should not be present at the judgment of Death;' but when the Committee urged that of their presence in the judgment of the pardon, the Lords say, 'They had no power to debate that.' Then you proceeded to vote, 'That no bishops ought to be present at the trial of the pardon,' and the Lords go quite out of the way of that, and tell you, 'That the five lords are to be tried on Thursday, and that the bishops shall ask leave to withdraw.' The lords distinguish the cases, and naturally have brought you to this, and had appointed the time for Danby, &c. before. This is not expressed, that the trial of Danby is postponed, but plainly implied. I respect not Danby in the matter, &c. but the business of the pardon. If it be so heavy a thing that nobody can bear it, yet if the pardon be good, what can the nation bear? This matter of the Lords Spiritual, &c. is less understood, because it is less explained. 'What if there should come a prorogation, how will you dispute the pardon then, and Mr. Bertie's book, &c.? I can see no hurt in pressing the lords to go upon the pardon first. I would therefore plainly know the bishops mind as to this of lord Danby's pardon, &c. and then proceed to that of their withdrawing at the trial of the other Lords.

Mr. Garroway. By the last proposition, there is no danger of meddling with the lords judicature. The Lords cannot be angry with it. All England is too heavy a weight for them to bear.

Sir Nicholas Carew. The five lords would destroy the nation one way by Popery, and lord Danby another, by a standing army, and pensions to parliament men, and would deliver us up to France that way. He that takes

away our money, takes all, and he is as culpable as the five lords. If you decide not this matter of the pardon first, you may be sent home before you decide the other.

Mr. *Sacheverell*. I would not give occasion of difference betwixt the two Houses, but I would preserve our right. I like what is proposed. I would know whether the lords will proceed upon the pardon, and would have the bishops explain themselves. You have demanded right against Danby, and the lords cannot give judgment, till you demand it, and so you cannot proceed upon the other lords till then.

Resolved, "That it be given as an instruction to the Committee, To insist upon the former vote of this House, That the Lords Spiritual ought not to have any vote in any proceedings against the lords in the Tower; and when that matter shall be settled, and the method of proceedings adjusted, this House shall then be ready to proceed upon the trial of the pardon of the earl of Danby, against whom this House hath already demanded judgment; and afterwards, to the trial of the other five lords in the Tower."

Saturday, May 24.

Debate on the Earl of Danby's Plea of Pardon.

Mr. *Sacheverell*. If you allow this Plea of Pardon, your lives, liberties, and all, is given up. I move that you will stand upon the vindication of your right, and send a message to the Lords, 'That, till the matter of Danby's pardon be settled, and that of the bishops, &c. you cannot proceed.'

Sir *Thomas Clarges*. I move that the whole House may go up to the Lords in a body to represent this matter, and to demand justice against Danby. This will be so public a thing, that it will tend more for your advantage.

Mr. *Powle*. I attended the Committee of Lords and Commons yesterday, and 'the papers the Lords delivered us,' we said, 'We received only as proposals; though the lords were not so kind as to answer our proposals, yet that we should theirs.' And if you please, give directions, to have whereby to answer the lords in what may arise.

Mr. *Gurroay*. Consider the consequences; now to change councils would be but a vain thing. Therefore I would have no other question put, but to insist upon what you formerly resolved as to the lords spiritual, and to give instruction to your committee to make no answer to the lords propositions yesterday, till we receive an answer from the lords concerning the lords spiritual. I am for drawing reasons and representations of your proceedings to the lords. If the lords will deny us this, and go to a new way of judgement; if it must be a breach, let it be a breach. I had rather the five lords should escape, than that Danby's pardon should stand good. If it does, you come here for nothing, but to give up the whole legislative authority. (Yesterday, we had a

such example of pensioners, &c. If their names rest upon your books public, nay, though you take care to secrete them, the people will pull them to pieces.) I would insist upon your right with reasons, and have them printed.

Mr. *Hampden*. I should be sorry if the House was afraid to do its duty, for fear of a prorogation. When I heard of 'a stamped pardon by creation, &c.' who knows but the five lords in the Tower have such a pardon? A hundred Papists at Rome may pretend to such a pardon. I hope you will settle these points, and insist upon this of the pardon.

Sir *William Hickman*. That matter of the pardon has been so long and fully debated, that I would lose no more time about it, but let the Committee draw reasons, &c.

Mr. *Sacheverell*. I propose that you would resolve that an answer be returned to the peers, about the trial of the lords, with Reasons why you cannot proceed, &c. and appoint a Committee.

Resolved, "That an Answer be returned to the last Message of the House of Peers, touching the appointment of the trial of the five lords in the Tower, to be on Tuesday next, with Reasons why this House cannot proceed to the Trial of those five Lords, before Judgment be given of the earl of Danby's Plea of his Pardon; and the point of the Bishops not voting in any proceedings upon impeachments in capital offences be settled; and the methods of proceedings adjusted; and that a Committee be appointed to prepare and draw up the same."

Monday, May 26.

Mr. *Sacheverell reports*, from the Committee appointed to draw up Reasons, Why the House of Commons cannot proceed to the trial of the lords before Judgment given upon the earl of Danby's Plea of his Pardon; and the point of the bishops not voting in any of the proceedings upon impeachments for capital offences, and the methods of proceedings, adjusted; That the Committee had agreed upon an Answer to be returned to the last Message of the House of Peers, touching their appointment of the trial of the five lords in the Tower to be on Tuesday next; together with Reasons for their insisting upon their former vote: which he read in his place; and afterwards, delivered the same in at the clerk's table: where the same were again read: and, with some Amendments made at the table, upon the question, agreed; and are as followeth; viz.

"The Commons have always desired that a good correspondency may be preserved between the two Houses.

"There is now depending, between your lordships and the Commons, a matter of the greatest weight; in the transaction of which, your lordships seem to apprehend some difficulty, in the matter proposed by the Commons.

"To clear this, the Commons have desired this conference: and by it they hope to main-

fest to your lordships, that the propositions of the House of Commons, made by their Committee, in relation to the trial of the lords in the Tower, have been only such as have been well warranted by the laws of parliament, and constitution of the government; and in no sort intrench upon the judicature of the peers; but are most necessary to be insisted upon, that the ancient rights of judicature in parliament may be maintained.

“The Commons readily acknowledge, that the crimes charged upon the earl of Powys, viscount Stafford, lord Petre, lord Arundell of Wardour, and lord Bellasis, are of deep guilt, and call for speedy justice: but withal, they hold any change in judicature in parliament, made without consent in full parliament to be of pernicious consequence, both to his majesty and his subjects; and conceive themselves obliged to transmit to their posterity all the rights, which, of this kind, they have received from their ancestors, by putting your lordships in mind of the progress that hath already been between the two Houses, in relation to the propositions made by the Commons, and the reasonableness of the propositions themselves: they doubt not to make it appear, that their aim hath been no other than to avoid such consequence, and preserve such right; and that there is no delay of justice on their part: and, to that end, do offer to your lordships the ensuing reasons and narrative:

“That the Commons, in bringing the earl of Danby to justice, and discovery of that execrable and traitorous conspiracy of which the five lords now stand impeached (and for which some of their wicked accomplices have already undergone the sentence of the law, as traitors and murderers,) have laboured under great difficulties, is not unknown to your lordships: that, upon the impeachment of the House of Commons against the earl of Danby, for high-treason, and other high crimes, misdemeanors, and offences, even the common justice of sequestering him from parliament, and forthwith committing him to safe custody, was then required by the Commons, and denied by the House of Peers; though he then sat in their House: of which your lordships have been so sensible, that, at a free conference, the 10th of April last, your lordships declared, that it was the right of the Commons, and well warranted by precedents of former ages, that, upon an impeachment of the Commons, a peer, so impeached, ought of right to be ordered to withdraw; and then to be committed. And, had not that justice been denied to the Commons, a great part of this sessions of parliament, which hath been spent in framing, and adjusting a bill for causing the earl of Danby to appear, and answer that justice from which he was fled; had been saved; and had been employed for the preservation of his majesty's person, and the security of the nation; and in prosecution of the other five lords: neither had he had the opportunity of procuring for himself that illegal pardon, which bears date the

1st of March last past; and which he hath now pleaded in bar of this impeachment; nor of wasting of so great a portion of the treasury of the kingdom as he hath done, since the Commons exhibited their articles of impeachment against him.

“After which time thus lost, by reason of the denial of that justice which of right belonged to the Commons, upon their impeachment; the said bill being ready for the royal assent, the earl of Danby surrendered himself; and, by your lordships' order of the 16th of April last, was committed to the Tower: after which he pleaded the said pardon; and being pressed, did at length declare, that he would rely upon and abide by that plea. Which pardon pleaded being illegal and void, and so ought not to bar or preclude the Commons from having justice upon their impeachment; they did thereupon, with their Speaker, on the 5th of May instant, in the names of themselves, and of all the Commons of England, demand judgment against the said Earl, upon their impeachment; not doubting but that your lordships intended, in all proceedings upon the impeachment, to follow the usual course and methods of parliament.

“But the Commons were not a little surprised by the message from your lordships, delivered on the 7th of May; thereby acquainting them, that as well the lords spiritual, as temporal, had ordered, that the 10th of May instant should be the day for hearing the earl of Danby to make good his plea of pardon; and that, on the 13th of May, the other Five Lords impeached should be brought to their trial: and that your lordships had addressed to his majesty, for naming a Lord High-Steward, as well in the case of the earl of Danby, as of the other Five Lords.

“Upon consideration of the said message, the Commons found, that the admitting the lords spiritual to exercise jurisdiction in these cases, was an alteration in the judicature in parliament; and which extended as well to the proceedings against the Five Lords, as against the earl of Danby: and that, if a Lord High-Steward be necessary, upon trials on impeachments of the Commons, the power of judicature in parliament, upon impeachments, might be defeated, by suspending or denying a commission to constitute a Lord High-Steward.* And that the said days of trial, appointed by your lordships, were so near to the time of your said message, that the matters, and the methods of proceedings upon the trials, could not be adjusted by conferences between the two Houses before the day nominated; and consequently the Commons could not then proceed to the trial, unless the zeal which they had for speedy judgment against the earl of Danby (that so they might proceed to the trial of the other Five Lords) might induce them, at this juncture, both to admit of the enlarge-

* See the Case of earl Ferrers, A. D. 1760, in this Collection.

ment of your lordships jurisdiction, and sit down under those or many other hardships (though with the hazard of the Commons' power of impeachment for the time to come) rather than the trial of the said Five Lords should be deferred for some short time, whilst these matters might be agreed on and settled.

“ For reconciling differences in these great and weighty matters, and for saving that time which would necessarily have been spent in debates at conferences betwixt the two Houses; and for expediting the trial, without giving up the power of impeachments, or rendering them ineffectual; the Commons thought fit to propose to your lordships, that a committee of both Houses might be appointed for this purpose: at which committee (when agreed to by your lordships) it was first proposed, that the time of trial of the lords in the Tower should be put off, till the other matters were adjusted: and it was then agreed, that the propositions, as to the time of trial, should be the last thing considered: and that the effect of this agreement stands reported upon your lordships books.

“ After which, the Commons communicated to your lordships, by your committee, a vote of theirs; viz. That the committee of the Commons should insist upon the former vote of their House: and that the lords spiritual ought not to have any vote in any proceedings against the lords in the Tower: and that, when that matter should be settled, and the methods of proceedings adjusted, the Commons would be then ready to proceed upon the trial of the pardon of the earl of Danby, against whom they had before demanded judgment; and afterwards, to the trial of the other Five Lords in the Tower: which vote extended, as well to the earl of Danby, as the other Five Lords. But the Commons as yet received nothing from your lordships towards an answer of that vote, save that your lordships have acquainted them, that the bishops have asked leave of the House of Peers, that they might withdraw themselves from the trial of the said Five Lords, with liberty of entering their usual protestations.

“ And though the Commons have almost daily declared to your lordships committee, that that was a necessary point of right to be settled before the trials; and offered to debate the same; your committee always answered, That they had not any power from your lordships, either to confer upon, or to give any answer concerning that matter: and yet your lordships, without giving the Commons any satisfactory answer to the said vote, or permitting any conference or debate thereupon, and contrary to the said agreement, did, on Thursday the 14th of May, send a message to the Commons, declaring, That the lords spiritual, as well as temporal, had ordered, that the 27th of this instant May be appointed for the trial of the Five Lords: so that the Commons cannot but apprehend, that your lordships have not only departed from what was

agreed on; and, in effect, laid aside that committee which was constituted for preserving a good understanding betwixt the two Houses, and better dispatch of the weighty affairs now depending in parliament; but must needs conclude, from the said message and vote of your lordships, on the 14th of May, that the lords spiritual have a right to stay, and sit till the court proceeds to the vote of Guilty or Not Guilty: and, from the bishops asking leave (as appears by your lordships books) two days after your said vote, that they might withdraw themselves from the trial of the said lords, with liberty of entering their usual protestations; and by their persisting still to go on, and give their votes, in proceedings upon the impeachment; that their desire, of leave to withdraw at the said trial, is only an evasive answer to the forementioned vote of the Commons; and chiefly intended as an argument for a right of judicature in proceedings upon impeachments; and as a reason to judge of the earl of Danby's plea of his pardon; and upon those and other like impeachments; although no such power was ever claimed by their predecessors, but is utterly denied by the Commons: and the Commons are the rather induced to believe it so intended, because the very asking leave to withdraw seems to imply a right to be there, and that they cannot be absent without it; because, by this way, they would have it in their power, whether or no, for the future, either in the earl of Danby's case, or any other, they will ever ask leave to be absent; and the temporal lords a like power of denying leave, if that should be admitted once necessary.

“ The Commons, therefore, are obliged not to proceed to the trial of any of the five lords, the 27th of this instant May, but to adhere to their former vote: and for their so doing, besides what hath been now and formerly by them said to your lordships, do offer you these Reasons following:

I. “ Because your lordships have received the Earl of Danby's plea of his pardon, with a very long and unusual protestation; wherein he hath aspersed his majesty by false suggestions; as if his majesty had commanded or countenanced the crimes he stands charged with: and particularly suppressing and discouraging the discovery of the plot, and endeavouring to introduce an arbitrary and tyrannical way of government: which remains as a scandal upon record upon his majesty, tending to render his person and government odious to his people: against which it ought to be the principal care of both Houses to vindicate his majesty, by doing justice upon the said earl.

II. “ The setting up a pardon to be a bar of an impeachment defeats the whole use and effect of impeachments: for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed.

and consequently the government itself: and therefore the case of the said earl, which in consequence concerns all impeachments, ought to be determined before that of the said Five Lords, which is but their particular case.

“And without resorting to many authorities of greater antiquity, the Commons desire your lordships to take notice, with the same regard they do, of the declaration which that excellent prince king Charles the first, of blessed memory, made in this behalf, in his answer to the nineteen propositions of both Houses of Parliament: wherein, stating the several parts of this regulated monarchy, he says, ‘The King, the House of Lords, and the House of Commons, have each particular privileges:’ and, amongst those which belong to the king, he reckons power of pardoning: after the enumerating of which, and other his prerogatives, his said majesty adds thus again, that ‘the prince may not make use of this high and perpetual power, to the hurt of those for whose good he hath it; and make use of the name of public necessity for the gain of his private favourites and followers to the detriment of his people.’

“The House of Commons (an excellent conservator of liberty) is solely entrusted with the first propositions concerning the levies of monies; and the impeaching of those, who, for their own ends, though countenanced by any surreptitiously gotten command of the king, have violated that law, which he is bound (when he knows it) to protect; and to the protection of which they are bound to advise him, at least not to serve him in the contrary:

“And the Lords, being intrusted with the judicatory power, are an excellent screen and bank between the prince and the people, to assist each against any encroachments of the other; and, by just judgment, to preserve that law which ought to be the rule of every one of the three.

“Therefore the power, legally placed in both Houses, is more than sufficient to preserve and restrain the power of tyranny.

III. “Until the Commons of England have right done them against this plea of pardon, they may justly apprehend, that the whole justice of the kingdom, in the case of the Five Lords, may be obstructed and defeated by pardons of the like nature.

IV. “An impeachment is virtually the voice of every particular subject of this kingdom, crying out against an oppression, by which every member of that body is equally wounded: and it would prove a matter of ill consequence, that the universality of the people should have occasion ministered and continued to them, to be apprehensive of utmost danger from the crown, whereby they of right expect preservation.

V. “The Commons exhibited Articles of Impeachment against the earl of Danby, before any against the other Five Lords; and demanded judgment upon those Articles: whereupon your lordships having appointed the trial of the said earl before that of the other Five

Lords; now your lordships having since inverted that order, gives a great cause of doubt to the House of Commons, and raises a jealousy in the hearts of all the Commons of England, that, if they should proceed upon the trial of the said Five Lords in the first place, not only justice would be obstructed in the case of those Lords, but that they shall never have right done them in the matter of the plea of pardon; which is of so fatal consequence to the whole kingdom, and a new device to frustrate public justice in parliament.

“Which Reasons and Matters being duly weighed by your lordships, the Commons doubt not but your Lordships will receive satisfaction concerning their propositions and proceedings; and will agree, that the Commons ought not, nor cannot, without deserting their trust, depart from their former vote communicated to your lordships; ‘That the Lords Spiritual ought not to have any vote in any proceedings against the Lords in the Tower. And, when that matter shall be settled, and the methods of proceedings adjusted, the Commons shall then be ready to proceed upon the trial of the earl of Danby, against whom they have already demanded judgment; and afterwards, to the trial of the other Five Lords in the Tower.’”

Tuesday, May 27th.

The Narrative and Reasons delivered at the Conference yesterday with the House of Commons were again read in the House of Lords, and after a long debate, the Vote of this House, dated the 13th of May instant, and the explanation thereupon, dated the 14th instant, were read, and the question was put, ‘Whether to insist upon these Votes concerning the Lords Spiritual’, and it was resolved in the affirmative. Dissenters present, Buckingham, Huntingdon, Kent, Shaftsbury, P. R. Bedford, Winchester, Rochester, North and Grey, Suffolk, J. Lovelace, Townshend, Herbert, Gray, Stamford, Newport, Say and Seal, P. Wharton, Leicester, Scarisdale, Strafford, Derby, Delamer, Howard, Paget, Clara, Salisbury, Falconberg, Windsor.

The same day the King came to the House of Lords, and in the following short speech, prorogued the parliament:

“My Lords and Gentlemen;

“I was in great hopes that this session would have produced great good to the kingdom, and that it would have gone on unanimously for the good thereof. But to my great grief, I see there are such differences between the two Houses, that I am afraid very ill effects will come of them. I know but one way of remedy for the present, assuring you, that, in the mean time, I shall show my sincerity with the same zeal I met you here. Therefore, my Lord Chancellor, I command you to do as I ordered you.”

His lordship accordingly prorogued the parliament to the 14th of August. But before that day, it was dissolved by proclamation.

“ When the resolution to prorogue the parliament was taken, it was also resolved to procure the sanction of council for so bold a measure, which, it was thought, would be obtained without any difficulty; one half depending on the king by their offices, and as many of the rest being under the influence of the Trinitate, (lords Essex, Sunderland, and Halifax) as, joined to the others, made a sure majority. Unfortunately, in the midst of this sage disposition, the court was alarmed with the sudden news, ‘ That there were remonstrances (says sir William Temple.) ready prepared in the House of Commons to inflame the city and the nation, upon the points of the Plot and Popery;’ or perhaps according to the intelligence sent by Mr. Algerouon Sidney to Mr. Saville, ‘ That an address was framing in the city, signed by 100,000 men, giving thanks to the parliament for their vigorous proceedings in discovering the Plot and opposing of Popery, and promising to assist them in so doing with their lives and fortunes. Upon which the king and his three wise men were struck with such a panic, or affected to be so, that they would not trust the very council with their tears till by the prorogation they had got rid of the danger.’ Accordingly, on the very morning that these dismal tidings were received, his majesty went post to the House of Peers, almost without attendants as well as advice, their lordships having scarce time to robe, or the Commons to make their appearance, and with more brevity than accuracy, expressed himself, &c. (as above.)” Ralph.

“ This prorogation caused infinite astonish-

ment and no less indignation to the Exclusionists, who expressed their resentments aloud and without reserve; lord Shaftsbury himself being so far transported, as even in the House to threaten, ‘ That he would have the heads of those who had been the king’s advisers on this occasion.’ On the other hand, the friends and partisans of the duke were much overjoyed.” Temple.

“ The city of London, where the anti-court party was very strong, took so great offence at this, and were so very angry, that it was thought they would have risen, but all, with much ado, was hushed, and kept quiet
Rereshe

“ The more dispassionate contented themselves with wondering, that his majesty, continuing the privy council, should publickly declare ‘ That he would have no cabinet council, but that he would in all things follow their advice, next to that of his great council the parliament;’ and that now he should suddenly prorogue that great council, without so much as mentioning it to the other
Sidne

As to the earl of Danby, though he had escaped out of the hands of the Commons by the prorogation, he could not make his escape out of the Tower; though the king had pardoned, he could not enlarge him, nor would his majesty’s new counsellors advise him to strain a point in favour of one, who then had sufficient reason to think, would, in return, exact them of all farther trouble in his majesty’s service.

PROCEEDINGS IN THE KING’S-BENCH, UPON THE EARL OF DANBY’S MOTION FOR BAIL, A. D. 1682.

THE Earl of Danby having been confined for above three years, and no parliament sitting, to which he could apply for his liberty, brought an Habeas Corpus in the King’s-Bench, in order to be bailed; which came to be argued May 27, 1682, Easter term, 34 Car. 2.

Immediately after his lordship was in court, the return of the Habeas Corpus was read, and Mr. Saunders (of council for his lordship) did move the court, that whereas in Easter term, 1681, the court had dismissed his lordship with a Declaration, that they would take into their consideration, till the term following, what answer they would make to what had then been said to them by his lordship and his council; he therefore moved, that they might now accordingly know the pleasure of the court, and that they would be pleased to grant bail to the earl of Danby.

But before the said Mr. Saunders could well have pronounced the foregoing words, the Lord Chief Justice Pemberton did reprimand the

said Mr. Saunders, for having offered to impose upon the court what had never been said to them: saying, ‘ That there was no such thing as their having said, at any time, that they would take the earl of Danby’s case into farther consideration; for that they had told the lord of Danby the last time, that it was not in their power to give him any relief at all; and that he therefore won’t and must extremely blame Mr. Saunders, for moving the court again in a matter to which they had already given such a positive answer; and could not but admire, that he should so misinform his client, as to give him any such advice, which could only be to the giving both him and the court an unnecessary trouble.

To all which Mr. Saunders replied, That he humbly begged his lordship’s pardon, if he had mistaken him; for that truly he did understand, that his lordship had declared that he would take time to consider of my lord of Danby’s case all the following term; but that if it was a mistake, he must beg his lordship

pardon; and did believe the rest of his brethren took it so, as well as himself.

The earl of Danby then spoke himself for about two hours, and said to the Lord Chief Justice, That he met with an objection, which he did not expect; and that he must beg his lordship's pardon, not to let that pass for a mistake which his council had affirmed, of the court's having taken time to consider of his case, till the next term after that of his lordship's being last there; for that his lordship did therein appeal both to the rest of the judges, which were upon the bench with him, and to all other persons whatsoever, who were then in court, whether his lordship had not said, that if he (meaning the earl of Danby) pleased, they would take time to consider of his case till the next term; and he did declare upon his honour, that those words had been pronounced to him by my Lord Chief Justice himself, and that he did then accept it as a favour from the court, and did return his humble thanks to them for it: Inasmuch, that his lordship said, that he confessed he was very much surprized to meet with such an introduction at the first entrance into a matter which he conceived to be of so great weight, as he doubted not but he should make this case of his appear to be.

But yet, that it did give him reason to believe, that he came with some prejudice before his lordship, and that they were so much prepossessed in this matter, that if he did not think every man in England would find that he might be concerned in what resolution should be given in this case, as well as himself, he should scarcely have ventured upon it, though he had lain so long under so unreasonable a confinement, as he took himself to do; and therefore he must desire their lordships' patience and attention to what he had to offer in his own behalf, and (as he believed) in the behalf of the liberty of the subject in general.

His lordship, directing himself to the lord chief justice, said, It was just now a year since he was before his lordship in this court; and that he was assured, that his lordship did then please to tell him, that they would take time to the following term to consider of what they should think fit to do in his lordship's case: But he said, that care was then taken the first day of that following term to prevent his coming there, by an indictment which was brought against him (ready cut and dried, as he had been told) for his being privy to the murder of sir Edmundbury Godfrey.

He said he did not wonder at it, because there was nothing so black, which had not been invented to be said against him; but, he confessed, he did wonder to hear, that such an evidence of an Irish Papist (who was upon trial for his own life, and upon an hear-say only) should be believed against an English Protestant, by a jury of Englishmen, and some of them gentlemen; but yet that wonder hath been much abated, when he heard that the same foreman had been as favourable in the case of a notorious murder, as he had been

ready to find that murder against him, which had not the least probability in it, and which no man could think of with more detestation both of the fact, and of any man that could have an hand in it, than himself.

However, this prevented him from coming there again, till after notice had been given to sir Edmundbury Godfrey's brothers, to know if they had any thing further to say against him on that matter, and that he could get himself discharged from that indictment; and as to the wretch himself, Fitz Harris, (who had accused him) he did two days before his death send the minister of the Tower to his lordship to beg of him that, before he died, his lordship would forgive him his having sworn falsely against him; and he did confess, that he was put upon it to save his own life; and did say by whom he was prompted to do it. And whether it proceeded from those men, who might think their villainies discovered, and so might fear they could no way be safe but by putting that matter yet farther against him, or from what other cause, his lordship could not tell; but (if his lordship was not misinformed) he did hear that some men were still endeavouring to get something more of the same nature to be sworn against him, if they can contrive how to make their forged testimonies to agree about it.

He said he thought that time would have tired out the malice of such blood suckers before now, whom he had found so busy, for the first year and half after his imprisonment; that he was not a week without endeavours used by strange people to get to speak with him, and such as he had reason often to suspect to be knights of the post; amongst whom the story of one Magrath, (another Irishman) he said, was notably remarkable, in his endeavour (under pretence of kindness) to have made him their tool, to prove, that sir Edmundbury Godfrey had killed himself: But he said, he had the good fortune immediately to detect that villainy, as he hoped yet to live to do of some others; but that in the mean time he foresaw, that he was always to be a particular object of the malice of such men, so long as he was left under this confinement, from which he saw no hopes to be relieved, but by that court, where the law directs every Englishman to come for justice that is oppressed in his liberty.

He said, he hoped his lordship would forgive him for having been a little tedious on that subject of Sir Edmundbury Godfrey, because his reputation had been so much exposed in that particular, and before that court.

After his discharge from that indictment, he said, there seemed to be a probability of the call of a parliament in some short time; and whenever he could give himself the least hopes of that, he resolved to trouble no other place: But that now he had not the least prospect of that kind; and that he had been a prisoner about three years, and yet could safely swear, he was without the knowledge to that day, for

what real crimes he was committed; only he knew that the name of treason had been laid to his charge, without saying wherein the treason consisted.

He said he came, therefore, now to that court (as the only proper place for all persons to resort to for their liberty) and he was sorry, that he was put to the great disadvantage of speaking in his own cause. But because he saw the last time he was there, that some fault seemed to be found with his counsel, for urging things which seemed to relate to matters of parliament (although upon a due consideration of his request, there is nothing in it which does touch their jurisdiction), he had chosen rather to rely upon the court's pardoning his defects, than put any further hardships upon those gentlemen, who had been his counsel, to whom he had been more beholden, than they had been to him, for that they had undergone some unheard of rebukes already in another place, for offering to be of counsel with him, (though in matters of law) which he believed had never been heard of, but in his case; and he hoped, that (when all his circumstances shall have been well considered) he shall be the last Englishman that will ever have so many hardships put upon him, as will appear to be through every part of his case.

In the first place he said, That he had been both accused and committed, without any oath or affidavit made against him, for any crime whatever: Which hath been in the case of no other lord but himself, and he did believe of no other man.

Secondly, That there was no particular treason mentioned in the articles against him, only the word traiterously had been applied to things which were not treason, if they had been true (as was then declared by sir William Jones, the king's attorney); and he said, there were good store of witnesses to prove, that when it could not be maintained by argument in the House of Commons, that any of the crimes, mentioned against him, were treason, it was answered by one of the long robe there, (who would not have spared to have assigned the treason, had there been any) that however, they ought to give the title of high treason to the Articles, for that otherwise they would dwindle to nothing when they came into the House of Peers. Now in the impeachments of other lords (not to meddle with the truth or falsity of their accusers) they were charged with the highest treasons in name, and upon oaths made against them.

Thirdly, When a short day was set by the Lords for his being heard; and that he appeared that day accordingly, his counsel was then threatened if they did dare to plead matter of law for him: Which he said was never heard of before in any man's case whatsoever, nor in the worst of times.

Fourthly, He said, if all the articles had been true against him, and had been treason; he had his majesty's pardon (which he then shewed to the court, and demanded the benefit

of it); saying, That that did pardon both his crimes (if he were guilty of any) and his imprisonment; and yet, that both that pardon and he had been prisoners together for above three years (of which he said he durst confidently affirm, that his was the first precedent since the conquest).

Fifthly, He set forth, That he had not only his majesty's pardon, but that there had been his majesty's declaration of it in his speech to his two Houses of Parliament, together with a declaration of his innocency, and a declaration that he would give him his pardon ten times over, if that were defective either in matter or form. And in this also he said, that his case was not only particular from any others, but that such declarations of the king's intentions to pardon, (although the formal pardons have not been obtained) have heretofore been alone a ground to procure bail at least, when the party has been the king's prisoner, and at the king's suit; which he supposed was not doubted in his case.

Sixthly, He said that he had not only been thus committed, and thus detained for above forty months, but he had been kept a prisoner without any prosecution for the greatest part of that time; which is another sufficient ground by the law for bail: But instead of a restraint *Ad Custodiam*, he said he had undergone punishments greater than the crimes alleged against him could have deserved if they had been true; both by the length of his imprisonment, which was agreed to be a sufficient ground for bail, both by the king's council and the prisoner's, in the arguments on the grand Habeas Corpus, 3 Car. as also in Melvin's case,* 1 Car. and in sir Thomas Darnell's† and other cases.

By the inconvenience of his accommodations in the prison, for above two years and a half of this time.

By two most dangerous sicknesses in the prison. And

By the loss of divers of his family since his being in prison, who would some of them most certainly not have been in those places where they have been lost, had he been at liberty.

He said he was informed, that his majesty had been again pleased to give his directions to Mr. Attorney, to give his consent a second time to his bail, and he did beg leave to ask Mr. Attorney if it were so? Whereupon Mr. Attorney did stand up, and say, that he had his majesty's directions to give his majesty's consent again to his lordship's being bailed.

His lordship did thereupon say, that this also was particular in his case; and he did believe, there was scarce a precedent in the world, of the king's prisoner, and at the king's suit, not being bailed when there hath been the king's consent to it; unless where the prisoner hath not been able to find sufficient security for his appearance to abide his trial. For that the

* Palm. Rep. 558.

† See the Case in this Collection, vol. 3, p. 1.

two only justifiable grounds for the continuance of restraint by the law, are, either for keeping the party from being able to do any harm by his being at liberty (of which the king is the best judge,) or for securing the party to abide the judgment of the law, (in which the court ought to have good satisfaction) and so they might have sufficiently in his case.

He said, that the precedent would be no less strange and new against the king, than against himself, if they should not permit him to be bailed under such circumstances: For he had heard, that the law did admit of no absurdity: now he did desire to know, how any thing could in reason be more absurd on behalf of the king, than if the king's prisoner, and at the king's suit, should be kept in prison by any of the king's courts, against the king's will?

Or how, said he, can any thing be more dangerous to the subject, or be a plainer failure of justice (whatever may be pretended to the contrary) than to say, that there can be any such restraint of English liberty, as cannot obtain so much as bail, but by the leave of the House of Lords? when that House can neither meet but when the king pleases, nor can never sit larger than he pleases: so that to say a man shall be a close prisoner (I mean by that a prisoner without bail, for bail itself is imprisonment in the eye of the law) till he shall be discharged by the House of Lords, is to say, that a man shall be a prisoner during the king's pleasure, which was the great grievance complained of, when the Petition of Right was granted, and that was thought to have fully and for ever redressed that grievance.

But if after so many heats and disputes which our ancestors have had with the crown about their liberties, this doctrine should now be admitted for law; we would seem to endeavour (as much as in us lies) to bring it to this conclusion, and be our own *Felo's de se*; 'That the king shall have a way found out by ourselves, and without his seeking, how he may imprison any man or number of men, when he pleases, in a parliamentary way; and by dissolving that parliament he may keep them as long as he pleases in a prison without remedy; but that he shall neither have power to relieve us himself by his own authority, nor by his courts of justice.' So as in short by this doctrine, the king should only have power to hurt his subjects as much and as long as he pleases, but should not be able to do them any right if he would; and then we shall have Magna Charta and the Petition of Right reversed, instead of receiving that benefit by them, which the kings of England have been so gracious as to give us, and all the learned writers upon those happy laws of liberty have told us, we are secure under, at all times, and against all accidents whatever.

He then begged leave to observe to his lordship what he found in my lord chief justice Coke's comments upon Magna Charta; who said, that the words, 'Nulli vendemus, Nulli Negabimus, and, 'Seremus Justitiam vel

'roctum,' are spoken in the person of the king, who (in judgment of law) is always present, and repeating the said words in all his courts of justice.

And therefore (says he) every subject in the realm may, 'at all times,' have a remedy by the course of the law; and may have justice done freely, fully, and speedily, without delay; for that delay is a sort of denial.

The said lord Coke observes farther, That those words of Magna Charta are fully expounded by latter statutes, viz. 20 Eliz. 3, &c. which do direct, That there shall be no delay nor hindrance of speedy justice to any man, neither by any seal, nor by any order, nor any writ whatsoever; neither from the king, nor from any other, nor by any other cause.

* Now, whatever may be said out of other considerations, he said, no man can deny, but that there is great delay of justice (to say no worse of it) to any man who (through no neglect of his own) can neither get trial nor bail in above three years, although his cruises were never so great. And he said he durst be confident, that the makers of Magna Charta did believe they had secured all Englishmen from ever being under the possibility of such a danger; and that he made no question at all, but that by law we are so.

He said, that the said lord Coke does say in his comment upon the 15 W. 1. (where he speaks of what things are bailable, and what are not; and names treason amongst the things not bailable) that is (says he,) such offences shall not be replevied by the sheriff; but all or any of these, he saith, may be bailed in the King's-bench.

And he said, he had also some of the present judges opinions to shew, in this point, which he desired to read out of a copy of the lords journal, (viz.) 23 December 1678. The question being put, Whether the lord treasurer should withdraw? It was carried in the negative. And on the 27th of the said December, the question being put, whether the earl of Danby, Lord High Treasurer, (who stands impeached by the House of Commons) should be committed? It was resolved in the negative.

And it was the same day proposed to the judges, whether the judges can bail any person, in case of misprision of treason, wherein the king's life is concerned?

To which sir William Scroggs (lord chief justice of the King's-bench,) sir Francis North (lord chief justice of the court of Common Pleas,) justice Windham, justice Jones, and other of the judges then present, gave severally their opinions; that the court of King's-bench may take bail for high-treason of any kind, if they see cause.

He cited the lord Coke also in his comment on the 24 W. 2, where he says, that it is a rule in law, 'Quod Curia Regis non debet Deficere 'Conquerentibus in Justitia Exhibenda.' And the reason of this is, that a failure of justice may be prevented; which he frequently says, is abhorred by the law: So as it appears, That

the law abhors all failure of justice; and he said, that if such failure do appear in his case, or any man's else, no order can license such failure; nor no court can justify the not giving relief against it: And he said, he should either make such failure appear, or his lordship (meaning the lord chief justice) would be able to tell him where he might repair for justice; which both Magna Charta and the Petition of Right are understood to have provided at all times for the subjects liberty: But if his lordship could not inform him where he might appeal forthwith for his liberty: in that case, he said, that for that reason alone (were there no other) he ought of right to be admitted to bail by that court; till he could be brought before such a judicature, as had power to discharge him.

He observed also, that the lord Coke (in a chapter on the King's-Bench) did say, that that court might bail for any offence whatsoever: And that in the said chapter it was particularly observed, that there had been such care taken by the law to avoid failure of justice, (even in small matters, in comparison of liberty) that he gives there an example concerning a clerk or officer of that court: For he takes notice of what things, and against whom that court hath power to hold plea by bill. And amongst those, he names against any officer or clerk of that court; and gives the reason: Because if they should be sued in any other court, they would have the privilege of that court, which might be the cause of a failure of justice. And from this his lordship said it did appear, that the law intended that there should be no failure of justice by the privilege of any court, how great soever it was; for that (as was said before) the law did abhor all failure of justice. And he said, if such care had been taken against a failure, in such small matters, and not in what concern our liberties; all Englishmen ought justly to break out into the like exclamations, as the same lord Coke and many others did, in their speeches in parliament, and in their pleadings, 3 and 5 Car. upon the argument of the Habeas Corpus at that time: Where the lord Coke breaks forth into this expression; 'Shall I have an estate of inheritance for life, or for years, in my land? And shall I be tenant at will for my liberty? Shall I have property in my goods by the laws; and not liberty in my person?' And thereupon he tells us, That 'Perspicere vera non sunt probanda;' As taking for granted, that our liberties were not to be doubted, where our properties were so secured: And the king (says he) had distributed his judicial power to courts, and to his ministers of justice: 'Who are to see right done.'

And he said, the lord Coke gave the reasons of those laws which are against undue imprisonments; and that one of those is, 'For the indefiniteness of time;' which, he says, may be perpetual during life: and that his words are, 'That it is unreasonable to think, that a man has a remedy for his horse or cattle (if

detained) and none for his body indefinitely imprisoned; for that a prison without any prefixed time is a kind of hell.'

And here his lordship said, that he hoped the court would either allow him bail, or tell him a prefixed time, when he should be tried or discharged. He did then also quote the case of the duke of Suffolk, 26 H. 6. and the opinions of Prescott and Fortescue (who were eminent judges,) who said, that he ought not to be committed (though for treason) without especial cause of the treason shewed; which had not been in his case.

He further said, That many other principal gentlemen of that parliament had spoke most sensibly on the same subject of liberty; and amongst the rest sir Robert Phillips had said, 'To have our liberties (which are the souls of our lives) taken from us, and to be pent up in goods without remedy by law; and this to be so adjudged (for so that court had then thought fit to deny bail, for reasons which were at that time also best known to themselves,) he cries out, 'O improvident ancestors! O unwise forefathers! To be so curious in providing for the quiet possession of our lands, and to neglect our persons and bodies! And to let them lie in prison! And without remedy, *durante bene placito!* If this be law, what do we talk of our liberties? This (says he,) is *summa totalis* of all miseries.'

He said also, That Mr. Selden did in the same parliament argue, at a Conference with the lords, That in all cases where any Right or Liberty belongs to the subject by any positive law, written or unwritten, if there were not also a remedy by law for enjoying or regaining of this right of liberty, when it is violated or taken from him, the positive law were most vain, and to no purpose; and it were to no purpose for any man to have any right in land, liberty, or other inheritance, if there were not a known remedy, by which in some court of ordinary justice he might recover it; and in this case of right and liberty of person, if there were not a remedy in the law for regaining it, when it is restrained, it were to no purpose to speak of laws.

Here he desired leave to shew his lordship what sir Nicholas Hide (when sitting as lord chief justice in that court) did say on this occasion, viz. That the king's pleasure is, his law should take place and be executed; and for that do we sit here: and whether the commitment be by the king, or others, this court is the place where the king doth sit in person to do right, if injury be done; and if it appear that any man hath wrong done to him by his imprisonment, we have power to deliver or discharge him. And he further said, That the same lord chief justice Doderidge, Jones, and White-locke, (answering the prisoner's counsel at that time) did say, the attorney-general had told them, that the king had done it; and that they (the judges) do ever trust him in great matters. And here he took occasion to say, That he hoped that the king's consent to his

bail, and his declaration of his innocency, would be now as much trusted in this court.

He cited also the argument of Mr. Calthorpe for sir John Corbet, on the same occasion, who said, that, admit the commitment were lawful, yet when a man hath continued in prison, a reasonable time, he ought to be brought to answer, and not to be continued still in prison: for that it appears by the books of our laws, that liberty is a thing so favoured by the law, that the law will not suffer the continuance of any man in prison, longer than of necessity must.

He cited also Mr. Hackwell; who said, upon the same occasion, that the law admits not the power of detaining in prison at pleasure, when the imprisonment is but "pro custodia:" for a man, by long imprisonment, might otherwise be punished before his offence. And he mentioned an expression of his, That long imprisonment was, *Vita peior morte*.

He mentioned how the Commons, at the end of the parliament 3 Car. did desire, that the judges might declare themselves upon the matter, why those gentlemen had not been bailed, when (by the judges arguments) it was possible they might have been kept prisoners all their days.

To which, he said, Whitlocke answered, First, not so; but they did remand them, that they might better advise of the matter; and that the gentlemen, if they had pleased, might have had a new writ of Habeas Corpus, when they thought fit. And, secondly, that he had spent much time in this court; and that in such great cases, he never knew any man bailed without the king first consulted in it: and the same, he said, was then said by the rest of the judges of that court.

Hereupon he made two remarks: First, that by this it did appear, that upon consideration, that court had altered their opinions in the case of bail, just contrary to what their first opinions had been positive in: and, secondly, that the consulting of the king was ever necessary in such great cases. And he said, he did believe, that there was not a precedent, where the king had agreed to the bail, that ever it had been denied.

He said, those men whom he had quoted, were men of no ordinary understanding in the Law: and as the judges then did at last acknowledge their sense of them to be right, so he said, he hoped our laws were neither changed nor diminished, in what related to the subjects liberties; and he hoped that no order of one House, nor ordinance of both Houses, nor King alone, nor King and either House alone, could alter them: And he rested assured, that a king and parliament would never alter them to the prejudice of liberty.

He proceeded, that if the law were still the same it was heretofore, it was plain, that that law did both give a power to that court to bail for all offences whatsoever (and for treason particularly), and did require that the subject should at all times find remedy in it, when his liberty was restrained, by any cause whatever.

The chief reasons, he said, why such large powers had been given to that court, were principally for avoiding all failure of justice; and to the end, first, that the king may both have a means of giving right to his subjects at all times, according to his oath at his coronation, and according to the intent of Magna Charta, and the Petition of Right. And, secondly, that there might be a constant place for the subject to resort unto for remedy at all times, whensoever he was oppressed in his liberty: and he hoped we were not now to learn a new law, that the king could neither keep his oath, nor maintain Magna Charta, nor the Petition of Right, without the assistance of an extraordinary court, which he may both chuse, whether he will call, or when he will call it, and how long it shall sit; which (as he had said) would put all under the king's absolute will.

He then said, he took for granted, that there would be no dispute made in this matter, but that there was an order of the lords which was supposed to stand in the way: but he said, if his lordship would give him leave, he would first say something to the order itself, and then he hoped to shew his lordship that it stood not at all in the way, as to his request of bail; and that it should neither be interfered with in the least, nor the jurisdiction of the lords, nor their proceedings meddled with in any kind by his being bailed; but rather owned and submitted to, by his being bailed to the parliament.

And first for the Order itself, he desired the court to observe, that it was dated the 19th of March, 1678, and worded as followeth, viz.

Die Mercurii, 19 Martii, 1678-9.

'The House this day taking into consideration the report made from the Lords Committee for privileges, that in pursuance of the order of the 17th instant to them directed, for considering whether petitions of appeal, which were presented to this House in the last parliament, be still in force to be proceeded on; and for considering of the state of impeachments brought up from the House of Commons the last parliament; and all the incidents relating thereto; upon which the Lords Committees were of opinion, that in all Cases of Appeals, and Writs of Errors, they continue, and are to be proceeded on in *statu quo*, as they stood at the dissolution of the last parliament, without beginning *de novo*. And that the dissolution of the last parliament doth not alter the state of the impeachments brought up by the Commons in that parliament.*

Now upon this Order he observed, That it related as well to Appeals and Writs of Error, as to Impeachments; and seemed to be more fully worded to them, than to impeachments; the words *Statu Quo*, and without beginning *De Novo*, being annexed in the order more

* Cro. Jac. 321 311. See also Jenk. 302. 1 Roll. 14, 77. Pain. 150. 280. 2 Bulst. 157. 257.

particularly to the Appeals and Writs of Errors; whereas all that was said as to the impeachments, he observed to be, that the dissolution of that last parliament doth not alter the state of impeachments brought up by the Commons in that parliament, and are not words which (strictly taken) can bind after the dissolution of any other than that parliament.

But he said, if the Order should be expounded otherwise, yet that both the law, and the practice of the inferior courts, were undoubtedly contrary, in the cases of Appeals and Writs of Error. And, he hoped, no court would take upon them to expound the order so, as if they were at liberty to slip the order, and to judge, which part of the same Order should be binding and which not; for that would be to meddle, in a more extraordinary manner, with the proceedings of the Lords than he had desired.

Now, as to Writs of Error, he said, there were full resolutions of the judges in the case, though in times of prorogations only, when a day is set for the sitting of the Lords' House; and he cited the case of Heydon and Godsaive, in Croke's Reports; * as also the lord chief justice Hale, who did not only grant execution upon a writ of error (depending in parliament) but did also answer the defendant's counsel (who would have pleaded the lords order in bar of the execution), that he should always pay all due respect to that superior court of the lords; but that he must act according to law; and, that he knew, that the lords did not intend otherwise. And of this lord chief justice Penberton himself, who he said had denied restitution upon an execution lately taken out, in case where a writ of error was, and is still depending in parliament. And in cases of appeals, he said, he was informed, that the court of chancery did not take any notice of the appeal being in parliament after a dissolution, but did notwithstanding proceed to sequestration. And he said, that there was a late precedent in the Court of Exchequer, in the case of one Fountaine, where an appeal was brought from a decree in the Exchequer, and recognizance entered into by the said Fountaine, to abide the order of the House of Lords: And after the parliament was dissolved, the counsel of the said Fountaine did insist on the said order before the barons, that the House being possess of Mr. Fountaine's cause, and security having been given by him to abide the order of the House, that no proceedings ought to be had in the Exchequer upon the said decree, until the matter on the appeal was determined before the Lords. Notwithstanding which, and that Mr. Fountaine produced the Lords order in court, and produced the security allowed; yet the now barons declared and ordered, That the decree by them made

* See the Cases cited in vol. 7, p. 1519 of this Collection, and particularly that case of Warren Hastings, in which it was after great consideration decided, that an impeachment is not decided by dissolution of the parliament.

should be proceeded on, against the said Fountaine, in the Court of Exchequer: And a proceeding hath been had accordingly.

By all which he observed, That the inferior courts did proceed upon matters, forbid as much by the House of Lords, in the matters of appeals and writs of error, as it was upon impeachments; and yet that the reason was plain why they did so, for that the parliament might proceed again upon the same appeals, and writs of errors notwithstanding those proceedings in the inferior courts, in the interval of parliaments; for that none of those acts of the inferior courts do so hinder the proceedings of the superior, but that the plaintiff in parliament may revive the same matter there again, by *scire facias*, or by resummons, &c. But he said, it was never heard of, that the Lords themselves did proceed again *ex officio*, without the petition of the party to revive the cause. And so he said in the case of impeachments, that the Lords would no more proceed *ex officio* upon that neither, unless they were called upon by the prosecutors; and then their lordships proceedings upon the impeachment, would be no more hindered by the bailing of him in the inferior court, than they were in the other cases by the executions and sequestrations, which are granted in the intervals of parliament, which were for the prevention both of delay and of failure of justice.

Besides, he said, If this should not be done, how could it be known whether the prosecutors of an impeachment from the House of Commons (who are never the same men in a new parliament) will proceed any more upon a former impeachment? For he said, it had many times fallen out otherwise; and he cited a late case of the lord Mordaunt* who was impeached upon articles in one session; and having taken out a pardon during the prorogation, was never more called upon, nor never questioned upon the former impeachment; although the very same parliament sat again, which had impeached him: and therefore he said, that the case might more probably happen to fall out so, when a new parliament should meet again, which would consist of new men.

He said, It was likewise to be observed, that although the transcript of the record in a writ of error might have days of continuance, yet no supersedeas is grantable; and he said, that if the Lords order be no ground for a supersedeas on a writ of error, why the lying of an impeachment should be a ground for confining a man within the Tower walls all his life, he was sure must be less reasonable and less just, as liberty was more valuable than property, and without which property could be of no comfort.

In the next place he observed, That if the order should be construed literally to mean,

* See the Case, vol. 6, p. 785, and the Note in p. 806.

that the impeachments, as well as the appeals and writs of error (and the incidents relating to all of them) should remain in the same state they were at the dissolution of that parliament mentioned in the said order, his case thereupon, he said, would be quite different from any others; for that he was not under any commitment at the dissolution of that parliament, nor at the time when that order was made, but was then at liberty to be a sitting member of that House, and by a vote of the House had leave to continue so; for that (as he had already observed) the date of the order was the 19th of March, 1678, and the warrant of his commitment did appear by the return before the court, to be the 16th of April following: Insomuch that he desired the court to take notice, that the strict letter of the words *statu quo* in the order (compared with the time when the said order was made) would be an argument to set him in a state of liberty, as he then was.

He then told the court, That by what he had said, he hoped he had made appear, that the order did not afford the least shadow for the hindering of his being bailed? but that on the contrary, the reasons were much stronger for the doing of that (as it related not only to him but to the liberty of the subject in general) than for the proceedings which the inferior courts do daily practise upon appeals and writs of error (which are but for property), and are comprised in the same order; and therefore he said, that he hoped he should at least find the same favour in a case of liberty, which is allowed every day in cases of lesser moment.

He then said, that although it did not concern his particular case, yet for the sake of English liberty itself he could not but say something farther upon this point: For he could not but be of opinion, That if the order had directly forbid bail; which it was far from doing; and besides, the Lords own practice had shewed their meaning to the contrary by the bailing of a commoner, whose crimes are declared to be greater than his; and in which case they made no *Non Obstante* to their order, but take that to be still in the same force towards him, as towards any others who were in custody: yet he said, in that case, if such an order should be found to be against *Magna Charta*, and the fundamental right of the liberty of the subject (as any thing must be, which does subject any man to an indefinite imprisonment;) he conceived, that of right that court ought to free any man from such a slavery; for he said, he could give it no better a name. And he then cited an argument of the earl of Shaftesbury's upon that point, which that lord argued in that court upon an *Habeas Corpus*; when the court agreed they would have bailed him, had it not been in the time of adjournment only of the parliament. His words, he said, were, 'That this court will and ought to judge an act of parliament void, if it be against *Magna Charta*; and more might be judged of an order of the House of Lords,

that is put in execution to deprive any subject of his liberty.' And, as he said, this could not be denied to be law; and he was confident the earl of Shaftesbury was still of the same mind, and so must every lord in England be, or (when they consider their own cases) they would make their liberties to be very precarious.

He proceeded to say, That the earl of Shaftesbury being allowed to be a knowing man, both in the laws, orders, and constitutions of parliaments, he would beg leave to quote another part of the same speech, viz. That Mr. Attorney (which was then sir William Jones) was pleased to answer the instance of one of his lordship's counsel, That if a great minister should be committed, he hath the cure of a pardon, a prerogation, or a dissolution: But (says the earl) if the case should be put, why forty members, or a greater number, may not as well be taken without any remedy of any of the king's courts? his lordship said, That Mr. Attorney could not very easily answer. And if in this case (says he) there can be no relief, no man can foresee what may be hereafter. And in another place of the same speech he says, he does not think it a kindness to the Lords to make them absolute, and above the law; for so it must be, if it be adjudged, that they may commit a man to an indefinite imprisonment.

He said, he took these men whom he had named, for no small authorities in this age: And the earl of Shaftesbury, he said, was a man still as much for the maintaining of this order as ever; but that his lordship did shew himself at the same time to be for English liberty. And he plainly shewed his own sense, both of this and all orders whatever, which concerned the liberty of the subject; and declared, That he took that court to be the proper judge of all such orders.

He said, It thereby appeared how sensible that lord was, that such cases might concern forty as well as one, and members of either House as well as other men; and without relief, if it should be admitted, that ordinary courts could not relieve. And the earl of Danby said, That there was no answering of these arguments of the earl of Shaftesbury; unless it could be denied, That the king can impeach as well as the Commons; or that the king cannot call and dissolve parliaments at his own will and pleasure: for if he may (as was not to be doubted), he said, he was sure every man in England was in the same danger when the king pleased; and then he saw nothing whereby he had any security; but that we lived under a king who would not exercise this power over us, which we will needs put into his hands, although he does not desire it himself. As if we were so weary of our liberties, that we would be industrious in contriving how we might insensibly slide into those slaveries, which our ancestors have been some ages taking pains to secure us from; and our kings have been so gracious as to grant and confirm to us, so many times over as they have done; and

which other kings may be as ready to reassume hereafter, as we are to give them away.

He concluded his observations upon that speech of the earl of Shaftesbury's, with taking notice, that his lordship had shewed he was one of those peers who would take it for no kindness to be made absolute, and above the law, by such orders of theirs being construed to extend to indefinite imprisonment.

He then repeated sir William Jones's declaration in that court; That either a pardon, a prerogative, or a dissolution, was a cure against such imprisonments. And he observed thereupon, That if that doctrine were true, that any one of those was a cure against such imprisonment (and he could not doubt of its being good law), then certainly he ought to find relief from his imprisonment, who had every one of these cures on his side.

He then desired to put the court in mind, how in the worst of times justice had taken place so far, as to lay aside the force of orders made in parliaments, after the dissolutions of those parliaments which made them; although it was to the prejudice of the interest of those usurpers themselves.

He cited an instance of one sir John Stowel, who, by the articles of Exeter, was to have been admitted to composition for his estate; but yet, contrary to those articles, the parliament did afterwards order his estate to be sold. After the dissolution of which parliament sir John Stowel pleaded by his counsel (which were serjeant Maynard and Mr. Lutch), That that order was dissolved by the dissolution of that parliament; and that therefore the articles were again in force: And that the plea was admitted to be good, and sir John restored to the benefit of the articles upon that plea, even by Bradshaw himself. But he said, he was sorry that he could neither have sir William Jones to argue those points for him which he had used against my lord Shaftesbury; nor serjeant Maynard, to make good the invalidity of parliamentary orders after dissolutions: But he said, That it was not his fault, and he doubted not but that he was before more just judges than there was in those ill times; and that he hoped, That the liberty of the subject was not now more precarious than it was in those days.

He added, That if upon such orders men could not be bailed in the interval of parliaments, they would become grievances equal to the multiplications of treasons in former days; which have sometimes been greedily made heretofore by parliaments in intemperate times; but the Commons had never been quiet, till they could get their hear chained up, and their laws reduced to the old standard of treason again: but yet those things had been done by acts, and not by orders of parliament.

He desired them likewise to remember, That it had been one of the chief grounds of the late war betwixt the king and his parliament (in which so much blood had been shed), that an ordinance of parliament should not be

held equal to an act of parliament; and yet those were orders of both Houses. And now, said he, shall we be defending, that an order of one House only shall be equivalent to a law? and shall be in force against our greatest and most sacred laws of liberty, which have been so continued to us? This, said he, I am not able to understand the reason of; nor will any man who shall give himself the least leisure to think upon it.

He then said, he desired to ask any man that then heard him, or any commoner of England, who would but take time to consider this case (which may be any man's in England,) Whether they would be contented to invest the Lords with such an inherent power over their liberties, which they can no more be exempted from than the Peers themselves?

And he said, that the Lords had already made it appear, that they would not have any such arbitrary power placed in them, for that they had refused to pass a favourite act (which was for their own trials) only by reason of a clause which was inserted therein, to have enacted the substance of this present order into a law.

And he said, That the House of Commons desiring that such a power might have been enacted into a law (though themselves would have been the first who would have repealed such a law), did sufficiently denote, That the Commons did not think the order would be binding in law after their dissolution; for otherwise what need was there of a law, if the order was in force after dissolution, without a law?

Upon the whole he said, he thought the distemper of that time had given more weight to the order, than any thing else; and some of their lordships on that bench did know, both in what an heat it had been made, and how it had been since blown upon by the Lords themselves; who he was confident would no more endure to have it construed in that sense which now seems to be put upon it (of subjecting men to be under indefinite imprisonment), than they will endure themselves to be every day put in the stocks.

As he had said thus much to the order itself, so he said, he hoped to make appear, That the court's bailing of him would not at all intrench upon the order, nor meddle with the jurisdiction of the Lords nor their proceedings in any kind.

For that he took it for granted, That what is done by that court, and the courts of Chancery and Exchequer, on Appeals and Writs of Error, was understood not to meddle at all with the jurisdiction nor proceedings of the Lords in those cases; and that this was just the same, all being alike subject to the final determination of the Lords, whenever they pleased to call the Appeal, Writ of Error, or Impeachment, before them, and without any prejudice to their lordships proceedings by any of those acts done by that or the other courts in the interval of parliaments.

Besides, he said, it had been usual to bail in

that court to the justice seat in Eyre, and yet that that court could not proceed further.

He instanced also, That court's allowing of the pardon of peers (when pleaded there), and yet that they had no power to proceed to the trial of a peer.

And so he said, there were divers other instances of that court's proceeding to such and such degrees of exercising their power to avoid delays, &c. where the court had no jurisdiction to determine the matter.

Precedents, he said, were not to be expected which were exactly fitted to his case, because he durst be bold to say, there never was such a case before (when well considered in all its circumstances), nor he hoped never would be again: but he said, that therefore both the king's power and the people's liberties would be the more concerned in what resolution should be given by the court in this case of his.

He said there were precedents of discharging of men impeached in parliament upon the king's writ to that court, commending the proceedings to cease, and they have been discharged accordingly by that court; without any other reason given in the writ, but because the king held the parties to be innocent and free from the crimes charged against them. As in the cases of Melton archbishop of York, and Gravesend bishop of London, 7 E. 3.

He mentioned also Hugh Spencer, and sir Thomas Berkley's being mainprised to parliament, and yet that the latter was upon suspicion for the murder of a king (viz.), Edward the Second.

He said, inferior courts had bailed to parliament, about the Pope's Bull, &c. Reg. Writs, 274.

He said, a single judge, (viz. sir Robert Atkins) had lately bailed one for treason, and another for murder; and that he did himself bear his justification of both allowed (as to the legal part) before the king and council.

He said, that kings had formerly abolished accusations of treason, and instanced a case of Talbot against Ormond in the time of H. 6.

And to shew how powerful the bare intention of kings to pardon hath been heretofore, he instanced the case of a man indicted of felony, who (without any counsel) shewed forth a charter of pardon to the court, which was discordant to the indictment, and also to his name; and yet because the court perceived that it was the king's intention he should be pardoned, he was remanded to get a better pardon, 26 Ass. p. 46.

And he did thereupon say, that he hoped the king's intention of pardon as to him, had been sufficiently declared to the whole kingdom.

And in short, he said, That if the matter was proper for the jurisdiction of that court, before it was in parliament; its having been there, did not take away the jurisdiction from a competent court, when the extraordinary jurisdiction fails; which was not to be supposed could lay all other jurisdictions asleep, when itself

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was not in being; and especially when that competent court should do nothing in contradiction to the proceedings of the extraordinary court, as he hoped he had made appear that that court would not do by the bailing of him.

Whereas, on the contrary, he said it was most evident, that justice did fail in the highest concern (which is that of mens' liberties), unless he could be informed when and where he might certainly be either tried or discharged; for that (as he had said before) it was agreed both by the counsel for the king, and the counsel for the prisoners, in the arguments on the grand Habeas Corpus, that indefinite imprisonment was held to be perpetual imprisonment, which the law did admit in no case where the imprisonment was only *ad custodiam*. And although his had been intended but *ad custodiam*, yet it could not be denied, but it had already been *ad gratiam panem*, and without any particular cause yet shewed for which he ought not to be bailed by law.

He then said, That Littleton had declared in his arguments, 5 Car. That if treason in general should be held to be a sufficient return, yet that the King's-bench might bail: And the said Littleton and the king's attorney in their arguments (one for the king, and the other for Mr. Selden) did agree, That where the party could not avoid the judgment of the law, nor that there was no danger by his being at liberty, he ought to be bailed after long imprisonment; and at that time, six months was taken to be long imprisonment.

He said he had read a passage in lord Coke's Institutes, where he spoke of such imprisonments as he compared to the imprisonment of St. Paul, by the centurion, who first put him in chains, and then inquired who he was, and what he had done.

He said he would not compare his case to that; but that there was so much of resemblance in it, that he had been in chains, or what was there meant by chains (which was a prison) for above three years, on a pretence of treason, without being told to that day what kind of treason he had committed; which had been done in nobody's case but his, and by so much the greater was his hardship.

He had also both been accused and committed without any oath made against him.

When a day had been appointed for his hearing, his counsel had been forbid to plead matter of law for him.

It had been acknowledged, that there was no treason contained in any of the articles against him, if they were all true.

And if they had been true, and had amounted to treason, he had there shewed the king's pardon, which did release both the crimes and the imprisonment.

That besides that pardon, he had his majesty's declaration in full parliament, both of his innocence, and that he would grant him his pardon ten times over, if this were defective.

That he had now had his majesty's consent to his bail, a second time, declared to that

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court by the attorney-general by the king's direction.

That in all these foregoing particulars, his case was singular, and different from all others who are or have been made prisoners since the beginning of the late plot, or (as he believed) at any other time.

Besides these things, which are peculiar to his own case, he said that there was also what was common to other cases as well as his.

The length of his imprisonment, which had been above 40 months.

The being confined so long under pretence (as he conceived) of an order of the House of Lords, which neither directs nor implies any thing to forbid bail. But in that also he had what was particular to himself (which he had already said, and desired leave to repeat, because it would deserve their consideration), viz. That he was at liberty, and had leave to be a sitting member in the House of Lords, at the time when that order did declare that the impeachments, appeals, &c. and the incidents belonging to them should stand in *statu quo*; so that (as is already observed) the *status quo* (as to him) he again said, was to put him into a state of liberty.

Lastly, he said, That he had no prospect now when any parliament would sit, and by the examples of past parliaments he might reasonably fear, whether, when they did meet, they might sit so long as to give him relief; for that his petition had been read the first day that the last parliament entered upon any public business; or whether greater business of the kingdom might not (as it had done already) so take up their time, as not to give them leisure to consider the case of a single person: And since this had already fallen out to be his misfortune in three parliaments successively, he took it to be but too plain a demonstration of his lying under an indefinite imprisonment, unless he should find relief in that court, for that there was no other to appeal unto.

He said, That in those great and eminent cases which fell out, 3 and 5 Car. about the bailing of persons committed to indefinite imprisonment, the judges were then very positive against their bail, and yet changed those opinions afterwards; and so he hoped that court might do upon a due consideration of his case and circumstances; or else he hoped that his lordship would convince him, that his imprisonment was not indefinite, by letting him know at what prefixed time and where he might resort for remedy, which the law does, without question, allow to all men, and at all times.

He said he was a very reasonable man, and when he was convinced by reason (upon which he was sure all laws were founded) he could be content to suffer still, though his imprisonment had been so long already; for that however he may have been misrepresented, for an arbitrary man, he would rather perish in his prison, than have any thing done for him which the law would not warrant: But, on the

other side, he should be sorry, that his case should be made a precedent against law and against English liberty, which he was sure it would be, if he should be continued to lie under an indefinite imprisonment without being bailed; and he said he was not ashamed to say, in the behalf of all Englishmen's liberties, as well as of his own case; that it was a case which did concern every man to take care of in the consequences of it, and which did cry loudly for relief.

He then told the court, That he had troubled them long, but that he hoped it would be excused in a case of that moment: And in the first place, he said, he hoped it was plain, that that court had it in their power to grant him relief, if they pleased.

That it was as plain, that there was nothing in the Lords' order against it, and that the practice of the Lords had been otherwise, even in the behalf of commoners.

That it was apparent, that both that court, and the courts of Chancery and Exchequer, do relieve upon appeals and writs of error, which are in the same order with the impeachments, and yet do in no sort meddle with the judicature or proceedings of the House of Lords.

That it was manifest, that let the order be construed as any man pleases, yet that bailing could be no sort of judging of any proceedings in the superior court, but would leave the judgment entirely to the parliament, and would continue him a prisoner in law, bound to appear before that extraordinary court, whenever his majesty shall be pleased to call it; and he said it was more evident, that otherwise he was an indefinite prisoner, and at the king's will only for his liberty, the consequences of which every man ought to lay to his heart, with a dread of it, whenever they should live under a prince that might not be so merciful as our present king; and he hoped the court would duly consider it.

Besides all this, he said he durst confidently affirm, That there was not a precedent since the conquest, of any man's being refused bail under such circumstances as his were. Whereas he said, the detaining of men under long imprisonment, ought either to have express law for it, or a good number of precedents, and in good times to justify it, and not any single instance or two (if they could be produced) which he thought they could not.

And he hoped that precedent, which he had already mentioned on his majesty's behalf, would be very well considered, which was, how the king's court should keep the king's prisoner, and at the king's suit, in the king's prison, with the king's pardon, and against the king's will, twice declared in that court by his Attorney General.

He said, he should conclude with letting his lordship know, that as the king himself had sufficiently declared that there was no danger in the letting him have his liberty, so he had such bail to offer to his lordship, as would sufficiently satisfy the world, that he should be

forthcoming to answer when and where that court should appoint; and then, he hoped, the two chief grounds for detention in a prison (viz. the danger of a man's having his liberty, and the danger of his not appearing to abide his trial) would be fully answered.

And if it might not seem too great a vanity to say (although the true reason does take away the vanity of it, because it would not be for his hut for their own sakes, as what may happen to be their own cases), he said, he doth believe, he could have the major part of the House of Lords to be his bail in this case, and some of those very lords who were for the making of this order, although not in that sense which would seem to be put upon it. Inso-much that there would be no more to fear in the granting him bail, than, he hoped, there was either reason or justice to deny it. And he doubted not, but he was there before very just judges, who would duly consider what he had said.

The *Lord Chief Justice* then speaking did say, That the earl of Danby had seemed to reflect upon the court, as if they had denied him justice in not hearing his counsel.

Then the earl of Danby desired leave to interrupt his lordship, saying, That his lordship had mistaken him, for that he had said no such thing of that court, nor did he mean of that court; but said, it was very well known, that his counsel had been forbid to plead for him in another place; which was then acknowledged by justice Jones to be very true.

The *Lord Chief Justice* then proceeded, and said, That for his lordship's saying they needed not to fear, because he did believe the greatest part of the lords would be his bail: That it was not the fear of another court that had any kind of influence upon them, or that they should do such things as they feared to be called to an account for; but that they were to govern themselves by the doing of justice.

That they had heard his lordship with a great deal of patience; and that he had said many material things, and with much acuteness; and that they were not senseless of the hardships of his lordship's case, and of the greatness of his sufferings.

That they were likewise sensible of the king's desires, that his lordship should have no longer imprisonment than the law requires. And he confessed, That the king had done as much as lay in his power.

That it was not denied, because that court could not bail for treason; for that they had a power to bail in all cases whatsoever, if the court saw cause. Neither would the indictment which was found against him about sir Edmundbury Godfrey have hindered; nor was it the order of the House of Lords which hindered them: But, that they were to act there according to law; and he prayed his lordship to consider, that they could not relieve him according to law.

That he did agree to some things mentioned by his lordship; and that it was a very hard

case he should lie so long in prison: But here was the misery; they could only compassionate him; for that his lordship was imprisoned by an higher hand, and where they had no power to intermeddle.

He instanced indictments for treasons, and several other great crimes, in which they could bail men; but in this case, the supreme jurisdiction of the nation had laid their hands upon it, which was attended by the House of Commons with an impeachment.

Whether their lordships had cause, or not cause, to commit his lordship, they could not suspect; but that they ought to believe that his lordship was justly committed; and that their lordships, in their mature deliberation, would do nothing unjustly.

He said, That they had a jurisdiction over all the courts in the kingdom (that only excepted). And as it would be very incongruous for an inferior court to bail whom they had committed, or to call their processes in question; so would it be in like manner for them to do in this case, because the lords exceed their jurisdiction, and were above them. He said also, That the opinion of all the judges in England had been taken therein, and had delivered their opinions, that he could not be bailed: and that the truth was, his lordship was imprisoned by too high a court for them to bail him: For that his lordship was not indefinitely imprisoned, as he had alledged; for whenever his Majesty is pleased to call a parliament, his lordship would have remedy.

That the king has power to do it when he pleases; and for his people's good, no doubt he will, when he sees fit: But that at some time the circumstances of state differ from other times, and that it may not for some space of time be thought convenient: And though this may prove mischievous to a single person, or to two or three persons, yet such things must be endured for the good of the public. He said also, That if that court should commit a man for High-Treason, and the king should adjourn them from time to time, that man could not be bailed until they sat again: So that he must confess, (as his lordship had said) that as his case did happen, he was under a temporary indefinite imprisonment.

He concluded with telling his lordship, That he must be contented to wait the king's pleasure when he would call a parliament.

That, for his part, he was before of opinion, that they could not bail his lordship, and he was so still.

The *Earl of Danby* to all this answered, that he must confess, his ears did tingle to hear his lordship say, That the king had done as much as lay in his power; when his majesty is bound both by his Coronation Oath, and by the laws, to see right done at all times to his subjects; and he desired to know, Whether this was not the king's court, and whether he had not deputed a power to them to see right done to all accordingly?

He said also, That he was now under greater amazement than before ; since his lordship had both granted, That this court could bail any Treason, and that the order of the House of Lords did not hinder it ; which, till now, he confess, he had taken to be the only obstruction to his liberty.

That he had hoped, he had satisfied his lordship, that although he was imprisoned by an higher hand, yet that the bailing of him did not intermeddle with the jurisdiction of that higher judicature, and he had yet heard nothing to shew him that it did.

That for what his lordship had said of the opinion of all the judges of England, being taken in his case, he must needs inform his lordship, That that was a mistake ; for that the opinion of the judges had never been asked in this particular case, saving once, upon petitioning the king for liberty to go to his country-house at Wimbeldon, with a guard, or otherwise, as his majesty should think fit ; which petition was referred by his majesty to the judges : And they (according to their wonted prudence and caution) did only report, That they thought his majesty could not legally grant the petitioner's request.

That whereas his lordship said, That he was not indefinitely imprisoned, for that whenever his majesty is pleased to call a parliament, he will have remedy ; and that he must be content to await the king's pleasure when he will call a parliament ; he took those to be fuller arguments than any himself had made, to prove, That his imprisonment was indefinite, and at the king's pleasure ; so that he was now more fully confirmed than ever to be of that opinion, and wished that every man, that heard that doctrine given for law, might fully consider the consequences of it.

He said further, That his lordship had mistaken him, in thinking that he had said he was under a temporary indefinite imprisonment ; for that he had said he was under an absolute indefinite imprisonment : And that his lordship had rather proved him to be so, than shewed any thing to the contrary ; nor did he know what temporary indefinite did mean.

The *Lord Chief Justice* then said, That he was not a judge at that time when the judges opinions were asked, but desired his brother *Jones* to relate how it was.

Mr. Justice *Jones* then said, That he remembered the case had been put to the judges : Whether the lords in the Tower might be bailed, and that it was then the opinion of the judges that they might not : But he said, he did think the earl of Danby was not particularly concerned in the question at that time, but that it related to the Popish lords only, and that there was much difference betwixt his lordship's case and theirs ; besides, he did think, that was at a time when there was a day appointed for the meeting of a parliament.

The Earl of *Danby* then said, that the question which was put at that time to the judges,

about the Popish lords, did not concern his case at all ; for that it differed from theirs in very many particulars, which he had already mentioned, viz. Of no oath against him ; no special treason alleged, &c. which he was both to trouble them with repeating again ; but he supposed, that the then opinion of the judges ought not to be made any argument against him.

He said also, that the *Lord Chief Justice* had argued very strongly for him : For that it was true, That the king might call a parliament when he pleased ; but if therefore a man must stay in prison till the king did please to do so, he may (by that very argument) be there all his life-time, if the king please ; which confirms what he had been a great part of his time labouring to prove : And, he said, he must confess, he did expect to have heard stronger and more powerful arguments to have convinced him, that he was in the wrong in what he had said ; but that now he was more encouraged than before, not to give over a cause which did so much concern every man in England.

The *Lord Chief Justice* then said, That his lordship was mistaken in believing that that court did keep him in prison ; for that he was not kept in prison by them, but by a superior court, which was too big for them to meddle with, or to examine what they did.

To this his lordship answered, That he had wrong done him, which must be done by somebody, and that it was a maxim of the law, ' That the king could do no man wrong ' (being advised by his courts ;) besides, that his majesty had twice shewed his consent in that court to have him bailed. Neither could he say, that the lords did him wrong, because there was nothing in their order to hinder his being bailed, (besides their own practice to the contrary) and it seemed now to be said, that it was by the law, and not by the order, that he was kept a prisoner. He said, he would not say, that that court did keep him a prisoner, but by somebody he was sure he was kept prisoner ; but perhaps it might be by the stars, since he could not find who it was upon Earth that did it.

He concluded, That if he were legally imprisoned, yet by *Magna Charta* and the *Petition of Right*, &c. it was impossible for an Englishman to be without some certain prospect of relief in a reasonable time, they being to have justice done them by the law at all times, and without delay ; and that he was now in the king's proper court for justice ; wherefore, as his lordship had given his own opinion, so he did desire that every judge would be pleased to deliver theirs severally.

Then Mr. Justice *Jones* said, That he was not ready to give any present opinion, there having been so much, and some things so materially said by his lordship : But that for his better satisfaction, he did desire to ask his lordship a question, in a point which did much

stick with him, and would go a great way in guiding his judgment; and he was confident, that his lordship was as able to give him an answer to it, as any man; which was this: his lordship (he said) had been charged with treason by an impeachment, and had pleaded a pardon to the impeachment before the lords; He said he took that plea to be a tacit confession of guilt in law, (though the party were never so innocent) and then it had been a tacit pleading of guilty; inso much, that he did believe, there could be no admittance of any second plea; and if so, he did confess, he did not see how that court could then have any thing to do with his lordship in that case; but it was what he had not well considered (though at present he took the law to be so,) and he did desire to hear what his lordship did say to that?

His lordship answered, That he gave him great thanks for letting him clear any objections, and giving him liberty to answer them as well as he could. That this indeed was a question of law, which he was but little versed in, but that he was at present able to say, that he had read the opinions of some great men of the law, to be otherwise; and instanced what the lord Coke has said upon the case of Gravesend, bishop of London, 7 Edw. 3. who did get a writ of discharge to the King's-bench, and did not take a pardon; upon which he observed the said lord Coke to have said, 'That it may be he thought that the taking of a pardon would have implied a confession of the fault, and therefore went a new way; but that was a mistake, for that no man that is wise and well advised, will refuse God and the king's pardon, how often soever he may have it; for there is no man but offendeth God and the king almost every day, and the pardon is the safest and surest way.'

And though at present, he said, he was not provided of precedents in the case, yet he remembered there was a case of a coiner tried at Durham upon a pardon, where the pardon proved defective, and yet he was allowed to plead over.

And he told him, That the same question had been moved in the House of Lords upon his own case, where divers lords had declared themselves, 'That they hoped it should never pass for law amongst them, that a man should not have one plea for his life; and gave for reason, that if a pardon was pleaded, and not admitted to be good, then the prisoner had depended upon what he thought had been a good plea, but was adjudged by the court not to be so; and then, if he should not be admitted to plead over, it would be to ensnare a man's life, without giving him any plea at all for it.' And he concluded, saying, he thought that this question was rather going into the merits of his cause, than to what he only demanded, which was but bail.

Mr. Justice *Dolben** then said, He must ac-

knowledge there was a vast difference betwixt his lordship's case, and the case of the Popish lords in the Tower, in many material particulars, which his lordship had mentioned: and he must confess he thought it one of the hardest cases in England. He said also, that he could not but differ from what his brother Jones had said, as to the not having liberty to plead over; for that he was of opinion, his lordship ought not to be debarred from having a second plea, if the pardon should be over-ruled; and (if I did not mistake him) he cited the instance of one *Hetley's* case, (or such a name) and he said, that his lordship had said so many things of great consequence, that he thought it did very well deserve further consideration; but if he should be put to give any present answer, he must then say (as my Lord Chief Justice had done), that he thought they could not bail his lordship; but he thought it might well deserve further consideration.

Mr. Justice *Raymond* then said, That his lordship's case had so many weighty circumstances in it, as ought to make it to be very well considered, before any opinion could be delivered in it. That for what had been said by his brother Jones, about the pleading over or not, he thought that did not properly lie before them in that place: that his lordship had said some things, to which he thought full answers might be given; but that he had also said some things, to which he thought it would not be so easy to answer. That for his part, he thought it was a case which might well deserve the consideration of more of the judges, betwixt this and the next term; and that he must acknowledge he must further consider it, before he would presume to give any opinion at all upon it.

A Counsel at the bar then moved, That a rule of court might be made to bring his lordship thither again, the first day of the next term.

The Lord Chief Justice seemed displeas'd with the forwardness of that counsel; and the earl of Danby excus'd it, saying, It was not moved by his desire or directions; but said, That was all alike to him, whether there were any rule of court or no; for that they were like to be troubled with him again, and that he

Luttrell's MS. "Brief Historical Relation" in the Library of All Souls' College Oxford, relates to the removal of this Judge, who was replaced upon the Bench by king William, upon his first appointment of Judges.

"April, 1683. This vacation just before the term, Mr. Justice *Dolben*, one of his Majesty's Justices of the Court of King's-bench, had his *Quietus* sent him. Many think the occasion of his removal is, because he is taken to be a person not well affected to the *quo warranta* against the charter of the City of London; and sir Francis *Withens* has a writ to go out *Serjeant at Law*, and it is said will succeed Mr. Justice *Dolben*: and Mr. *Bonithon* succeeds sir Francis in his place of Steward to the courts of Westminster in the gift of the Dean and Chapter of Westminster."

* The following passage in *Narcissus*

should not easily give over a cause, wherein he took the liberty of the subject in general to be as deeply concerned as himself, and wherein he had found so little to be said against him, that he did believe he should be as troublesome to them as ever Judge Jenkins* had been heretofore in the defence of English liberty.

The *Lord Chief Justice* then standing up, said, My lord, your lordship must for the present be content to be remanded; and speaking to the lieutenant of the Tower's officer, told him, he must take back his prisoner.

And then the *Lord Chief Justice* immediately left the court.

June 29, 1682. *Trin. 34 Car. 2.*

The *Earl of Danby* again moved the court to be bailed; which he spake as follows:

My Lord,

When I last attended your lordships and this court, the judges (or most of them) were of opinion, that what I then said to your lordship might deserve further consideration; and therefore, my lord, I doubt not, but that your lordship has been pleased to consider further thereof.

At that time, my lord, none of the judges but your lordship, I think, made any very particular objections against my being bailed; and if I am able to offer any thing to your lordship that may give a sufficient answer to those objections, I do not doubt but that your lordship is so just, that you will not adhere to any opinion, only, because you have been once of that opinion, if any thing can be shewed to convince you to change it. In confidence, therefore, that I am before a court, which is not to be influenced by any body (how great soever,) nor by any thing but by the laws of England, and by your oaths to do justice according to those laws; and being well assured of the care which your lordship will always have to maintain the English liberties, with which your lordship is intrusted by the king, and by the laws, and invested with power enough by both to defend them at all times, and against all opinions whatsoever: my lord, I say presuming, and not doubting of all this, I shall take upon me to add something to what I have said already to the objections which were then made by your lordship, and I hope I shall have liberty to answer any new objections that may be now made.

My lord, I take it for granted in the first place, that the order of the House of Lords is no objection against my bail, because your lordship was pleased to tell me so the last time I was here; and then I do reckon that those objections which have been made against my being bailed, may be summed under these three heads:

The first, my lord, as well as my memory will serve me, was, That as it was incongruous for a

court which was inferior to this, to bail any man that was committed by this court, or to call in question the process of this court, so it would likewise be for this court to do in my case; for that if a man were committed by this court, no inferior court could bail that man (in case his majesty should think fit to adjourn this court from time to time) until this court should sit again.

The second objection was, That I am not indefinitely imprisoned, for that when his majesty shall please to call a parliament, I would have remedy; and therefore I must wait till his majesty should please to call a parliament.

The third was, That this cause of mine was depending in a superior court, which was too big for this court, and that the supreme court having laid its hands upon me, therefore this court could not intermeddle in that matter; my lord, these, to the best of my remembrance, are the substance of the objections then made.

The first of these, I have been told without doors, is taken to be one of the weightiest objections against me, and truly I should be very glad it should prove so, because I think it may be so easily answered.

For in the first place, as to the calling in question the process, I conceive that bail is no calling in question any process; and this court did truly think so, when in the case of the earl of Shaftesbury they did declare, that had he not come to them in the time of an adjournment of parliament, they would have bailed him; and, my lord, as nothing is more evident, than that this court and other courts do meddle with the proceedings of that superior court, so I do not doubt but to make appear, that they do meddle in a much greater degree than what I desire of bail; and that the consequences of what they do every day practise, may be far more dangerous to the subject, than the bailing of me can be.

For that part of the objection that compares a commitment of this court to a commitment of the House of Lords, and doth from thence conclude, that because an inferior court to this cannot bail a man who is committed by this court, therefore this court cannot bail a man who is committed by a superior court:

This seems so very unequal a comparison, and the inequality of it so obvious, that truly I thought it had not needed any answer; for I would desire no other answer from your lordship, (if you can give it me,) than what an inferior court may give to any person that shall come before them with the like request: For they may give him good and sufficient reasons why they do not bail him; they may not only tell the party that he is committed by the superior court of the King's-bench, and that he must go thither for his relief; but they can give him good reasons why he must do so; for they can tell him that the court of King's-bench will sit next term, they can tell him when that term will begin, and they can tell him how long that term will last, and they can tell him that the court of King's-bench cannot be dis-

* See his Case, vol. 3, p. 921. of this Collection.

solved as the parliament may be: and, my lord, this takes away all that prisoner's pretences, to say that he is an indefinite prisoner; and if your lordship can give me any such answers as these, I shall be as well satisfied as that man ought to be; but if no such certain answers as these can be given, then I must beg pardon, to tell your lordships, that it cannot be denied, but that my imprisonment is indefinite, and if it be so, I do as an Englishman affirm, that no law in England can support it.

For the saying that if the king should adjourn this court from time to time, the party could not be bailed till such time as this court should sit again; my lord, if this should be admitted as a reasonable supposition (which, under favour, I do not think your lordship yourself does take it to be,) yet it is but an adjournment that is objected, and if the parliament were but under an adjournment, I would not have troubled your lordship: but this is not the case; for though sometimes the king may adjourn this or any other court of Westminster, by reason of some extraordinary occasion, as in case of a pestilence or something of that nature (and I know there have been precedents of it;) yet, my lord, these are upon extraordinary occasions, and it is not to be thought, nay I am very certain, that his majesty will never do any thing that shall deprive his subjects of any of those rights the law allows them; so that in one case the law obliges that the terms should be kept four times a year, and that then the court shall sit if there be no extraordinary occasions to hinder it; but in the other case of a parliament, the king lies under no obligation, nor restraint, whether he shall call, or whether he will call it; and therefore the inequality of the comparison is sufficiently apparent: and besides this, it is as unknown how long a parliament shall sit, as when it is to sit; insomuch that I take all this but to have offered additional arguments on my side, and shews how little the arguments are that can be brought against me; and I think it makes out to me and to all Englishmen, that no man ought to lie under such an indefinite restraint as I do: and truly, my lord, I thought I shewed more respect to the court, in giving a more general answer to this objection (as I did before) than I can do now by being so particular.

For the second objection, viz. That I am not indefinitely imprisoned, for that when the king will please to call a parliament, I would have a remedy there, and therefore I must wait till the king will call a parliament.

Truly, my lord, perhaps your lordship may know the mind of the king or his ministers better than I do; but if you do not, I am sure no man but the king can tell whether I shall have remedy then or no; for by the experience of three parliaments that have been called since I was a prisoner, it hath appeared that I have had no remedy: Therefore I should be very glad to see this matter any better proved, than it hath been, that I am not indefinitely impris-

soned; but if this cannot be proved neither, but that I must wait till the king shall please to call a parliament; and when he shall call a parliament, I shall be no more certain of my remedy than hitherto I have been, truly then I shall need no other council but your lordship to prove I am under an indefinite imprisonment; and that any man in England may be so, when the king pleases; and how any doctrine can be more arbitrary than that, or less to be defended by law, whenever that matter shall be brought into question, others than either your lordship or I must be judges, and those who will be parties so much concerned in this question for their own sakes, as well as the public, that I believe there is small doubt to be made how they will then decide this question.

My lord, if it should then be found that this would hold water, and should be maintained for good doctrine; truly, I think, there would need no other arbitrary power to be set up to make men quit this country: For as to any man's liberty, it might be equal to him whether he lived under the French government, or under the Grand Signior's government, as under a government so arbitrary as this doctrine alone would make ours; and therefore I make no doubt, my lord, but that you will be very careful how you give it us for law.

As I should be very sorry that there should be any such arbitrary doctrine taught to set the king's prerogative higher or greater than it ought to be by law, or than this king desires, so I should be as sorry that the king should not have that right which duly belongs to him, which is a right and power at all times to administer justice to his subjects, and which I never heard denied to the kings of England, nor I hope I never shall: And, my lord, I must say, that the preservation of that right to the king, would take away all pretences for any of these dangerous and new doctrines; for if the king may administer justice at all times to his subjects, (as it hath been the care of parliaments, and by Magna Charta itself that he should) there is no reason left for any of those things to be started or put upon us.

It is true, indeed, that the king cannot make laws without a parliament; but I did never hear in my whole life, but that he could administer justice without his parliament: and if he could not, his subjects would be in a miserable condition; for surely it would be a very hard case, if his subjects could have no hopes of being righted by their sovereign's authority, either by himself, or in his courts, in all cases, and at all times.

The House of Peers in parliament (it is true) is his greatest court, but they sit only by virtue of the king's writ, and if the king should die (which I hope I shall never live to see), they would not then be a court of justice, nor any court at all; and therefore, my lord, in this question, the royal authority and the subjects liberties are so involved, that what judgment soever shall be given, must pass upon the one,

as well as upon the other, and cannot possibly be divided.

The third objection that was made, is, that this cause of mine is depending in parliament, which is a superior court to this; and that the supreme court having laid its hands upon me, therefore this court cannot intermeddle.

My lord, there is no man living that hath a greater reverence for that supreme court than I have, or that will go further than I will, to defend it, in all the rights and privileges that belong to it by law: Nay, my lord, I have so much a greater esteem for that court, because I am sure it will never suffer me, nor any man living to go unpunished, that shall transgress the law, or that shall go about any way to make them transgressors of the law, or to make them such as would be restrainers of the English liberties beyond what the law permits. They have shewed the contrary, when it was offered to them by a bill from the House of Commons, that they would have no such absolute authority put into their hands over the liberties of the subject, but did then refuse it; so that to say, that supreme court hath laid its hands upon any man's liberty in England, further than the law permits, would be to put an unjust odium upon the House of Lords to the nation, instead of doing them right; and therefore I must needs say, that in this particular case of my own, I find only the word and name of superior court to be made use of against me, but nothing in reality; just as they were pleased in the House of Commons to use the word traiterously, in the articles against me, when there was not a tittle of treason in them, only that by calling it treason, it might serve to lay me where I am.

But, my lord, I know no court that is superior at this time to this court where I am now; and how any thing can be said to be depending in a court that hath no being, I think will not very easily be defended from nonsense, without having the matter extremely well explained; and whenever that superior court shall have a being, my cause will then be before it, by my being bailed to appear there. And for saying, it has laid its hands upon this case of mine, it ought to be shewn in what the superior court hath laid its hand upon me, so as to keep me from bail, when neither that superior court itself (though it were willing so to do) is able to give me any relief, nor that I can get to be tried or discharged elsewhere, nor have any time prefixed when that superior court shall sit; as if there were no justice left in England.

But if it be so, that I shall neither be bailed, nor have it shewed, what hand the superior court has laid upon me to hinder it, then truly any man may be so concluded and the argument may be decided, by the will and pleasure of those who have men in their power; but the shadows of things, when there is no substance in the argument, will not satisfy reasonable men for an answer, why so public a grievance shall not be remedied; and I am confident, that the superior court itself will never suffer

its name to be made use of, nor themselves to be made properties, to support such a grievance as may concern not only themselves, but the whole nation, both in this age, and to all posterities; and by which, not only Magna Charta and the Petition of Right would be evaded, but the late act of Habeas Corpus may also be eluded by this device; and the parliament (when it shall meet again) will find, that instead of securing their liberties, they have only been hedging in the cuckow; for that there is now a new way found out, by which all acts for our liberties may be made of no effect! And this cannot be contradicted, unless (as some would fancy) the king could not impeach as well as the Commons: but there are so many evidences to the contrary of that, as there is no room left for the dispute: And amongst the precedents of that kind, there is one (because it hath a double consequence) that I do desire to put your lordship in mind of.

It is in the 5 H. 4, in the records of the Tower. There you will find, that the Commons came to petition the king, that his majesty would be pleased, not to impeach the archbishop of Canterbury, the earl of Northumberland, and some others that were at that time accused for being in the confederacy of sir Henry Piercy, and the king grants their request, and does agree he would not impeach them.

I have quoted this the rather, because of the double precedent that is in this case; for again the same day the Commons came (after his majesty had granted their former request), and did tender petition his majesty, that he would be pleased to affirm those lords (whom he hath promised he would not impeach) to be his true liege-men: and the king did grant that also; by which it was then taken for granted, that he had set them *recti in curia* (even though they were in that conspiracy with sir Henry Piercy); and my lord, I give you this instance, that you may observe two things by it: First, That the Commons did petition the king not to impeach; and when he had granted that, it appears also, that by the king's declaring them to be his true liege-men, it was by the Commons conceived, that the king did set them *recti in curia*; by which it does appear, what great regard the House of Commons had to the king's bare affirmation, of their being his true liege-men; and I hope, that neither this king's power nor credit shall be less with his own court, than that king's was with his House of Commons; and I am sure, no king's affirmation can be greater, nor more public, both to his parliament and kingdom, of any man's being a true liege-man, (to use that old word) than the king's hath been concerning me.

My lord, there are some men very unable to distinguish (though they would) between sound and good sense, and there are a great many, that are as willing to let men remain under their mistakes: but since it weighs a great deal with some who do not very rightly distinguish, it will be of absolute necessity for me to explain

what it is that is meant by a case depending in parliament, when there is no parliament: This will be best shewn by an instance in a writ of error depending in parliament, in which case, when the parliament is sitting and so the writ is really and truly depending in the court that is in being, there can (during such sitting) be no execution sued upon the judgment. But, my lord, no sooner is the parliament dissolved, but experience shews, that execution may be sued, and goods levied, and the properties of men's estates changed; and therefore it is by this sufficiently plain, that depending is not then meant in the same sense, or in the same manner, as it was meant when the parliament was actually sitting; for then there could have been no execution sued.

Now, my lord, when a parliament shall meet again, what does it meet with? It meets it is true, with the same cause again, (as to the merits) but it meets it quite altered as to other circumstances, viz. as to the execution that hath been granted by an inferior court, in the interval of parliament. And, as to the change of property, for a man's estate (and perhaps of great value) may happen to be in another man's hands at the same time by the execution; so that when a parliament doth meet again, it doth meet, it is true, with the same cause (as to the merits), but indeed as to nothing else.

And therefore, by this, it is clear, that a parliament does only expect, when it meets again, to meet with the cause in the same state (as to the merits of the cause), and doth not at all meddle or concern itself to find fault with those suppletory acts that have been done by an inferior court in the interval, which was only to prevent failure of justice; but it commends them for not having delayed justice, and that men should not be kept too long out of their rights, (even though there may have been prodigious wrong done to the parties, if the judgment have been erroneous) for that the superior court will at last see to the error, if any have been committed by the judgment of the inferior court, and will enter upon all as entire again, (as to its merits) as if nothing had been done by the inferior court; so that in reality, that which can only reconcile the sense of being depending in parliament, when the parliament is dissolved, is this last order of the House of Lords, which declares impeachments, &c. to be continued, notwithstanding dissolution. For by virtue of this last order, the Lords do proceed upon the cause, without beginning *de novo*, or having any new writ or new impeachment brought up to them: But this is new doctrine, and never practised till of late; however, since they have done so, in this sense, and in this only, a cause may be said to be depending; and so it was adjudged in that single instance of the trial and condemnation of my lord Stafford; and there they proceeded to the merits of the cause, and they tried and condemned my lord Stafford; and there is no manner of doubt, but by virtue of their late order, they may proceed upon me when they

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shall meet, as they shall think fit, notwithstanding my having been bailed; for I desire not to have the merits of my cause removed from before the lords, if I might, but that they may do with me as they please, even to condemnation, if they shall have cause, which I hope in God they never shall.

Therefore, I say, my lord, in this sense only which I have explained, a cause may be said to be depending, though a parliament is not in being; but I will challenge the ablest lawyer, with all the sophistry he can use, together with his law; to shew me how he can possibly distinguish the case of writs of error from the case of impeachment, or wherein they differ, as to their depending, in the intervals of parliament; and I likewise challenge him to make appear, how bail is any other than such a suppletory act, to relieve a man from being kept too long from his liberty, as the granting of execution in the interval, is to relieve a man from being too long kept out of his money or estate; for that the merit of the cause, both in the one case and the other, remains entire for the parliament to recommit upon (if they see cause), as well as to reverse the judgment, and all the proceedings, upon the writ of error.

Where is then the difference, my lord? If there be any difference, I think it lies only in this, that in one case there may be an erroneous judgment, and a man may be almost undone and ruined, by being wrongfully dispossessed of his estate (be it never so great); but in this case, the suppletory act which is done to admit to bail, can only be to ease a man from his too long or perhaps perpetual imprisonment, and can hurt no body, nor take no man's liberty from him, to grant him his; but yet this must be thought an hard case, and the other a very easy one, and fit to be practised every day.

My lord, if the law has taken care, and made such provision, that a man shall not be kept too long out of 10*l.* in money, or out of 40*l.* a year in land, then it would be strange, that the law should not have made provision, that a man should not be kept too long out of his liberty, and when there is no prospect of his having it.

Besides, in a Writ of Error the judgment given is controverted, and the power of awarding execution is suspended, upon that very account, because the judgment of the court is in question, and the justice of it is brought in dispute, whether they have judged right or wrong.

Now, my lord, if the dissolution of a parliament can restore the judges power in the interval of parliament, so as to award an execution upon a man's estate, where the property shall be changed and altered, and notwithstanding their justice was brought in question, and that they may have done great wrong to the party by their judgment; and yet we are to believe, that the same dissolution cannot restore the power of the judges so as to give a man a little ease from a confinement within

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four walls, where the justice of no court is questioned nor arraigned, nor no wrong can have been done to any body; but on the contrary, does right to the king, who by his consent shews his will to have a man bailed; and great right to the subject, who ought to be delivered from the danger of an indefinite imprisonment which is so contrary to law: Then indeed there must be some infallibility supposed in that chair, which shall maintain such doctrine, and must be submitted to, with the same implicit faith which they do who can believe infallibility.

But for my part (who can believe infallibility in no kind upon earth), I confess I must have any reason better satisfied, before I can any more believe this exposition of the law, than I can believe those infallible mens exposition of the Gospel.

My lord, I hope I have made plain to your lordship, what it is that is meant, or can be understood, by a cause depending in parliament when there is none, and how and in what sense only it can be understood to be so depending; and it is as plain, that the bailing of me is no intermeddling with the merits of the cause in parliament, but on the contrary, an evident affirmation of the jurisdiction of that supreme court; and if I cannot be admitted to bail in some other court than the House of Lords, it is contrary to what my Warrant of Commitment implies, by which I am committed only till I am discharged by due course of law, for which I am properly in this place.

My lord, it cannot be meant that bail can be any more than a suppletory act ('propter rei necessitatem'), and for the ease of the subject; and it is impossible for that old rule of 'Salus Populi Suprema Lex esto,' to be more aptly applied in any case in the world than in this, that concerns every man in England in his liberty: For should it be otherwise, pray see what the consequence of this doctrine would be; that because a superior court which is not now in being (nor hath it in its own power to be so) hath committed a man, therefore he cannot be admitted to bail; what should become of men, if after the dissolution of a parliament there can be no possibility of having justice done them?

Nay farther, if it should be granted that this court cannot intermeddle, because the superior court has committed, by that doctrine it would not matter whether the commitment were for treason, or for the smallest quarrel or misdemeanor, for which a man might happen to be in prison at the time of a dissolution of a parliament; nor would it be any matter, whether the order of the House of Lords were revoked or not.

For it is an order of a superior court, which will still be a superior court though the order were burnt; and yet that must be enough to keep one in prison by this rule, for that there would be still no other remedy, though the order were repealed.

But, my lord, the Warrant of Commitment

shews the Lords directions to be contrary to this opinion, for I can shew several instances of warrants which run, some to be kept 'till farther order of that House,' others to be kept 'till they shall be discharged by the House,' and others to be kept 'till the pleasure of the House be farther signified,' and others 'during the pleasure of that House:' but my warrant is, 'till I am discharged by due course of law.' Now I doubt not, but if the Lords had thought those words had not given a latitude for relief elsewhere, they would have worded the warrant otherwise, and instead of saying 'by due course of law,' would have said, 'till I were discharged by that House,' if the Lords had thought there had been no other remedy by law, but by that House. But, my lord, the Lords will not act any thing above the law, they will keep every thing within the compass of the law; and I am sure that there cannot be a better example to follow, than the example of those wise and great men of that great court, and I desire it may be followed, and not contradicted.

For by this doctrine, truly, my lord, liberty itself would not only be utterly lost; but to make the riddle the greater, and the manner more ridiculous, it would be lost, and yet no body invade it: For the king he consents to my bail (if he hath any power,) so he does not intend to deprive me of my liberty: The lords would for their own sakes and justice sake (if it were in their power to meet, and have time to sit so long as to take the case of a single person into consideration) do me justice, either in discharging or trying me: So that in my case, here is a subject of England imprisoned by nobody, and yet no power upon earth can relieve me. Shew me an example of this in any nation under the sun, but this, that there wants a power in the government to relieve a prisoner at all times (if it would,) and I will be satisfied: Nay, my lord, the very Spanish Inquisition is more reasonable than this, for though the cause may be unjust that they commit a man for, and their usage of him may be very severe while he is there, yet the Inquisitors (if they please) can deliver him; there is no prisoner in the world but can be delivered by some power or other, but me; and, my lord, this is a rule that must be for every man in England as well as me, and I am not so inconsiderable but that my fate may be made a precedent of note.

The opinions, my lord, that were given by the judges in the case of ship-money, appear far more tolerable, in my opinion, than this; for I know there is no man but had rather have a sentence passed against his estate (which he may recover again) than have it passed against his liberty, which he may never have, and which is more valuable than any estate.

Besides, where is the justice of the nation? And what a shame would it be to our laws and to our government, that it could be said of this country, that a man might be punished by imprisonment in England (where the government is not arbitrary) for seven years or more,

and at last be found guilty of no offence? And what satisfaction could be in nature given to that man? I say, if that man could have a crown given him, it could not make him satisfaction for the loss of his liberty all his life, which may be the consequence of this doctrine; and, my lord, there are precedents good store where men have suffered sufficiently for their judgments against the Liberty and Property of the subject, but I never found one that suffered in the defence either of the one or the other.

I have shewn, I think, sufficiently what can be meant either in my case or any other, by a cause depending in parliament, when there is no parliament; as also how much inferior courts do meddle with things of much an higher nature, than bail will be; insomuch that truly I should think it might be sufficient to say no more than I have said: but I do not know what may be sufficient in my case; and therefore, my lord, you must pardon me, if I do put you in mind of a case wherein you have gone to the merits of the cause itself, when depending in parliament.

It is Fitz-Harris his case; and I know very well what answers will be given me; as that that was a case rejected by the lords, and that it was not the same treason for which he was impeached, and other things that I could mention; but I know your lordship will speak by the record of the court (of which I have here a copy,) and the record is that which must satisfy the world an hundred years hence; by which it will appear to them, that he was impeached, and tried, and condemned, depending that impeachment; for he made that his plea, and Mr. Attorney General demurring to it, the court must take the matter pleaded, as confessed and allowed; and this being so, I should think there should be no scruple made in the point of bail; or if there should, there must certainly be very great hardship in one case or the other, and must be very difficult to be answered.

But to conclude: besides all this, I am the king's prisoner, and I have the king's pardon; and if I cannot get to be bailed, there is not only a defect of jurisdiction in this court, but a defect of the regal authority and power of the kings of England to administer justice to their subjects; which was never heard of, I think, and I hope I shall never live to hear of it (especially from the king's supreme ordinary court of justice.) And that, my lord, that must make this case the more unhappy at this time is, that we live in days wherein his majesty's prerogatives are so much brought in question: For what prerogative hath he which is more undoubted than his power of pardoning? And yet you see that brought in question to the utmost, and those that are the ablest men that speak against that power, do laugh at the little small triflers who object, that the king may pardon before impeachment, and after the sentence be given, but not betwixt those times: they laugh at this, and tell you that he cannot pardon at all; and it is easily perceived, that if they could reach their design, they would have

it understood, That treason may be committed against the people, and by that doctrine another High-Court of Justice may be set up, and the King may be tried by his people, as well as he can try them. My lord, there are a great many consequences attending upon that doctrine, which I am sure will never be countenanced by the King's courts; but I shall not wonder that such men as these be trying their projects, and think themselves in the right to do so, if they find his majesty cannot do so much as a lesser act of grace for his prisoner, which is but to give him ease from too long or perhaps a perpetual imprisonment; for if he hath not power so much as to bail his own prisoner, I shall not wonder if others question whether he hath power to pardon him.

My lord, I have seen such keepers of our liberties, from whom I should expect such doctrines: but I thank God that by our laws the king is the keeper of our liberties, and therefore I hope I shall not hear any such doctrine by which he can only be the keeper of us in prisons, but shall have no more power than another man, to set his prisoner at liberty, although his will be only to give his prisoner ease (as the law intends) against indefinite imprisonment.

Lastly, My lord, if I should die in prison with this pardon by me, which I have shewed your lordship; or suppose that the House of Commons (if it were but with a design to destroy the pardon) would give some other reason than the pardon (as being better satisfied concerning me, or any thing else) why they would prosecute me no more (of which there be divers precedents;) what a wound would thereby be given to the king's prerogative! and pray how is it possible almost to give it a greater blow than this would be?

What a precedent would it be to posterity to say, that a man had lain three, four or five years or more in prison, notwithstanding a pardon, that signified nothing all that time? for that the king would have eased him if he could, and hath shewed his court that he would do so, but was not able so much as to have him bailed—would not this put that prerogative in great hazard? I confess I do wonder that some others besides your lordship have not taken more care of the prerogative of the king, for their own sakes as well as the king's; for it would be very convenient it should be useful, if ever it should become necessary: and it is not improbable, but if the king should hereafter find such a prerogative diminished, he would not only reflect upon his loss, but upon those who might have advised better, or might have better defended this prerogative of the king; and for the subjects liberties, there will never be eyes wanting to inquire after any invasion which shall be made of that kind.

Upon the whole, I have troubled your lordship too long, but it hath been upon a subject of the greatest concern to Englishmen: I have such bail to offer to your lordship, as I am sure cannot be denied; and I am in my own con-

science sufficiently satisfied, that I am detained a prisoner from bail, neither by the king, by the lords, nor by the laws; and therefore, my lord, I do humbly pray your lordship, you would please to accept my bail; and as I here offer your lordship my pardon again, so I again pray the benefit of it, and I desire your lordship it may be read in court.

The *Lord Chief Justice* then spoke, and so did all the rest of the judges, (upon the earl's desiring that they would severally deliver their opinions.) And the *Lord Chief Justice*, and *Mr. Justice Dollen*, did deliver their opinions, that the earl could not be relieved by that court. *Mr. Justice Jones* concluded his discourse with saying, that he could not give his judgment that the earl should be bailed 'at that time.' *Mr. Justice Raymond* did say, he could not see but that there would be a failure of justice if so be his lordship should not have liberty upon bail; but that he had not time to view precedents, and therefore it would be very unfit for him at present to be positive in what he did say.

And then the *Lord Chief Justice* did tell the earl, he must be contented to be remanded.

But afterwards, on the last day of *Hilary term*, 1633, the judges delivered their opinions severally, and were unanimous, that the earl ought to be bailed. And accordingly bail was taken in 40,000*l.* his lordship in a recognizance of 20,000*l.* and the dukes of *Somerset* and *Albemarle*, and the earls of *Oxford* and *Chesterfield* in 5,000*l.* a piece; upon condition that the earl of *Danby* do appear in the *House of Lords* the next session of parliament, and not depart without leave of that court.

This Case is reported in 2 *Shower* 335, and *Skinner* 56, 162. Of these reports, the former is the more full as to the arguments of counsel, the latter the more explicit as to the points ruled by the court.

Pritchard's (or *Pintchard's*) case, which is very strong, is reported in different books. See 1 *Lev.* 165, 1 *Siderfin* 245, *T. Raym.* 120. But the best report which I have seen of it is in 1 *Keble*.

By the four *Popish lords* said to be bailed out on the same day with *Danby*, are meant, *lords Powis*, *Arundel*, and *Bellasis*, and the earl of *Tyrone*. *Lord Petre* had died in the *Tower*, before the accession of king *James*. *Lord Petre* denied the *Popish Plot* with his last breath, as appears from the following Letter, which is stated to have been written by him on his death-bed, to king *Charles* the second:

"May it please your majesty,

"I give myself the hopes that your majesty will pardon this presumption of a dying but dutiful subject, in giving you the trouble of

this short account and declaration of myself, by which, in the first place, I offer to my God my hearty prayers for your majesty's long life and happy reign, with all the blessings of this life, and eternal happiness of the next.

"I having been now above five years in prison, and, what is more grievous to me, lain so long under a false and injurious calumny of an horrid plot and design against your majesty's person and government; and I am now, by the dispositions of God's providence, called into another world, before I could by a public trial make my innocence appear. I conceived it necessary for me, as an incumbent duty I owe to truth, and my own innocence, to make this ensuing protestation to your majesty and the whole world. That whereas one *Titus Oates* hath maliciously and falsely sworn, that he saw me receive a commission directed to me from *Johannes Paulus de Oliva*, constituting me lieutenant general of an army, which he pretended was to come into England; I declare in the presence of the all-seeing God, before whose just tribunal I am shortly to appear, that I never saw any such commission directed to me, or any other person whatsoever; and do firmly believe, there never was any such.

"But of the folly as well as the falshood of the information, the sober part of mankind, are, as I conceive, sufficiently ere this convinced.

"And as to those aspersions which the ignorant and malicious have thrown upon the *Roman Catholic church* (of which I am, and by the grace of God, do die a member) as if murdering of kings, and taking up arms against our sovereigns, were an authorised principle of that religion, I do knowingly affirm, there is nothing with more horror detested by the *Catholic church*, as being expressly contrary to the command of our Saviour, and *Christian doctrine*; and as such I renounce and detest it; as I do all plots and conspiracies against your sacred person.

"Having thus briefly, and with all sincerity of a dying man, discharged my conscience; I shall end where I began, and with my last breath beg of God to defend your majesty from all your enemies, and to forgive those who by their perjuries, have endeavoured to make me appear to be one: Who am living and dying, as in duty bound, &c."—1 *Ralph*, 823.

The case of *Seymour*, lord *Sudley*, mentioned by *Mr. Luders*, in the passage cited in a note, p. 625 of this volume, is reported, vol. 1, p. 483, of this Collection. The proceedings against his brother, the duke of *Somerset*, are reported, pp. 509. 515, of the same volume. The indictment against the latter, set forth in pp. 518, et seq. of that volume, occurs also in *Cok. Entries*, 482.

340. Proceedings against RICHARD RUMBOLD, for High Treason :*
 1 JAMES II. A. D. 1685. [Now first printed from the Records
 of Privy Council and Court of Justiciary at Edinburgh.]

Apud Hallirudhouse vigesimo die Junii, 1685, Chancellor Thesaurer principall, Errol, Marishall, Kintore, Tarbet, Kinnaird, Advocate, Justice Clerk, President of Session, Sir George Monro.

THE Lords of his majestie's privy council doe hereby require and command the magistrates of Edinburgh, as soon as Rumbold, called colonell Rumbold, traitor, comes to the water-gate†, to putt him in a cart, and cause the hangman to put a rope about his neck, and go behind him, and the rope in his hand, and the hangman's man goeing befor leading the horse: Rumbold being fettered and bare headed in the litter, and ordaines captain Groeme, with his whol company, colours displayed and drums beating, to receive the said Rumbold at the said Watergate, and guard him to the castle of Edinburgh, where he is to be received prisoner.

Apud Edinburghum, 23d June 1685, &c.

The lords of his majestie's privy council doe hereby give order and warrant to his majestie's advocate for processing Rumbold, the maltster, before the lords justice general, justice

clerk, and remanent commissioners of justiciary, for high treason and rebellion against the king and government.

Apud Edinburghum, 25th June, 1685, &c.

The Lords of his Majesties Privy Council doe hereby recommend to the Lords Justice General, Justice Clerk, and remanent Commissioners of his Majesties justiciarie, to meet to-morrow by ten o'clock in the forenoon, and to call the dittay of High Treason and rebellion against Rumbold, commonly called colonell Rumbold, or the maltster, and after he is found guilty of the saids crymes, doe recommend to the saids lords to cause him the said Rumbold to be immediately taken from their barr to the laigh toun counsell house to be examined by the magistrates and hear prayer in the ordinary way, and that order may be given by them to the saids magistrats that a scaffold and a high gibbet be erected above the cross towards the West, and that after he is examined and prayer heard, they cause him be led down by the hangman, having his hatt on to the scaffold, and there to be hoised up the gibbet with a rop about his neck, and immediately to

* See the Introduction to the Trials for the Rye-House Plot, vol. 9, p. 357, and the Trials themselves in the same Volume.

† "Not long after the earl [of Argyle], that gallant and good man, colonel Rumbold, was taken I have no distinct account of the manner or place, but am told that being attacked by the country militia, he made his way easily through them, and being of great courage, skill, and strength, when two or three attacked him at once, he was abundantly able for them, and maintained a running fight, and was like to get off, till one of them, wiser than the rest, came up and cut his horse's legs miserably, and disabled him so that he was no longer of use to him, and then he was soon oppressed with numbers, and terribly wounded." Wodrow.

About the same time perished Ayliffe, another of the adherents of Monmouth and Argyle, concerning whom Burnet writes thus :

"Ailoffe had a mind to prevent the course of justice, and having got a penknife into his hands gave himself several stabs. And thinking he was certainly a dead man, he cried out, and said, now he defied his enemies. Yet he had not pierced his guts : so his wounds were not mortal. And, it being believed that he could make great discoveries, he was brought up to London."

"When Ailoffe was brought up to London,

the king examined him, but could draw nothing from him, but one severe repartee. He being sullen, and refusing to discover any thing, the king said to him ; Mr. Ailoffe, you know it is in my power to pardon you, therefore say that which may deserve it. It was said that he answered, that though it was in his power, yet it was not in his nature to pardon. He was nephew to the old earl of Clarendon by marriage ; for Ailoffe's aunt was his first wife, but she had no children. It was thought, that the nearness of his relation to the king's children might have moved him to pardon him, which would have been the most effectual confutation of his bold repartee : but he suffered with the rest." [upon a sentence of outlawry passed in the reign of Charles.]

Of Burnet's story concerning the severe repartee, Mr. Fox says, "This is one of those anecdotes which is believed rather on account of the air of nature that belongs to them than on any very good traditional authority, and which ought therefore when any material inference with respect either to fact or character is to be drawn from them, to be received with great caution."

The treatment of Rumbold was a good deal like that of Hackstoun, of Rathillet. See his Case, vol. 10, p. 791. In that Case, also, the Council took upon them, previously to his trial, to determine the manner of his execution.

be lett down and the rop being about his neck, his heart to be cutt out by the hangman and shewn to the people upon the point of a baynet or dagger, round about on the scaffold, who is to expresse these words (Here is the heart of a bloodie traitor and murderer); and which thereafter the hangman is with disdain to cast in a fire prepared of purpose on the scaffold; and thereafter his head to be cutt off and shewn to the people by the hangman in manner forsaid and expressing the former words; and then his body to be quartered, and one part thereof to be affixed at the Port or Tolbuth of Glasgow, another at Jedburgh, a third at Dumfries, and a fourth at the Newtown of Galloway; his head being to be affixed at the West Port of Edinburgh on a high pole, and to ordain the magistrates of Edinburgh to see this order putt in execution accordingly.

CURIA JUSTICIARII S. D. N. Regis, tenta in pretorio Burgi de Edinburgh, vigesimo quinto, die mensis Junii Anno millesimo sexcentesimo octuagesimo quinto, per Honorable Viros, Dominos, Jacobum Foulis, de Collintoun, Justiciarii Clericum, et Alexandrum Seton, de Pitmedden unus, * ex Commissionariis Justiciarii, dicti S. D. N. Regis.

The Lords continue the dyet against Richard Rumbold, Englishman, for treason and rebellion, till to-morrow at nyne o'clock, and ordaines witneysaes and assysers to attend ilk persone under the paine of two hundreth merks.

CURIA JUSTICIARIE, S. D. N. Regis tenta in pretorio Burgi de Edinburgh vigesimo sexto die mensis Junii anno millesimo sexcentesimo octuagesimo quinto, per nobilem et potentem Comitem Georgium Comitem de Linlithgow, Justiciarium Generalem, et Honorabiles viros Dominos Jacobum Foulis, de Collingtoun, Justiciarie Clericum, Johannem Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcars, et Alexandrum Seton de Pitmedden, Commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

Intran,

Richard Rumbold, designed colonel Rumbold, maltster at Rye, in the countie of Hartford in England, indyted and accused, that wher notwithstanding he the common law, lawes and acts of parliament of this and all other well governed nations, particularly he the second act, second session, and fift and first session first parliament king Charles the second: The plotting, contriving, or intending the death or destruction of the king's most sacred majestie,

* So in the original. See a note in p. 881, of the tenth Volume of this Collection.

or any bodilie harme to him, or the deprevying, deposing or suspending him from the style, honour or kinglie name of the imperial crown of this realme, or the overturning of the government of the monarchie, or the rysing in armes or rebellion against his majesty or his authoritie upon any cause or pretext whatsomever, or the concealing and the not revealing of any of these crymes, are crymes of high-treason, and punishable with forfaiture of lyffe, lands, and goods. Neverthelesse it is of verity, that the said Richard Rumbold being the most execrable of all traitors, did conspyre, undertake and endeavour to kill and murder our gracious sovereigne and his late majesty of ever glorious memory, at the said Richard his own house at Rye, in England, and with his own hand, in their returne from New Mercat to London in the moneth of

1683 years. But God of his great mercy and goodness having preserved our present and late gracious sovereigne from his horrid and bloodie hands, by their coming soouer from Newmarket than was designed by reason of an accidental fire happening ther, yet he the said Richard continued in his horrid plotts and contrivances, and for promoting thereof, and for his own securitie he fled over to Holland, and to the late earle of Argyle, and with him and other execrable traitors there proceed further and further in the saids plotts, and did conspire the overturning of the government of these kingdomes, and accordinglie he and the said late earle of Argyle, and severall other rebells and traitors, did invade this kingdom, with ships, men, armes, and amunition, and landed with them in the West Highlauds of Scotland upon the day of May last, and there issued furth their treasonable proclamations and declarations, did convocat and gather together his majestie's subjects within the shires of Argyle Tarbat highlands and islands thereabout, in open rebellion against his majestie and his authoritie, did take in and maintaine forts, strengths, and garrisons, against him and his forces, did robb and plunder the goods and houses of his majestie's good subjects and souldiers, and the said late earle of Argyle and the said Richard, who was employed be him as a captain of horse (though he was to have assassinat the king) and his accomplices to the number of did continue in open rebellion against his majesty and his authoritie, committing all acts of hostilitie and high treason, untill at length they were dissipat and defate, and the said Richard taken in his flight at Off the whilk horrid crymes of treason, rebellion and others above specified, he is actor art and part* which being found be an assyse he ought to be punished with forfaiture of lyff, lands and goods to the terror of others to commit the lyke herefter.

Peritur.—Sir George M'Kenzie, of Rosehaugh, his majestie's Advocat, declares he restricts his lybel to the second part thereof, viz. that the pannall did associat himself with that

* See a Note in Vol. 10, p. 807.

execrable traitor, Archibald Campbell, sometime earle of Argile, and invad this kingdome in armes in manner lybelled.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the lybell persewed be his majesty's Advocate against Richard Rumbold, with his majesty's advocates declaration, whereby he restricts the same, they find the lybell relevant as it is restricted to infer the paines of treason, and remitts the same to the knowledge of the Assyse.

ASSISE.

James Paterson, brewer.
 Thomas Montgomery, merchant.
 John Paterson, shoemaker.
 George Hunter, baxter.
 Patrick Runsiman, cook.
 Egertoun Snow, Englishman.
 Mr. Thomas Boyne, Englishman.
 George Clark, English factor.
 Capt. Alexander Blair, Englishman.
 John Bower, ribbon weaver, Englishman.
 Thomas Landle, Englishman.
 John Ortoun, Englishman.
 William Cockburn, merchant.
 William Fullertoun, merchant.
 James Smeitoun, merchant.

The Assyse lawfullie sworne, no objection of the law in the contrair.

The pannall Richard Rumbold, confesses, and declares in presence of the justices and assyse, that he did asociat himself to Archibald Campbell, late earle of Argile, and with him and others invadit this kingdome in the moneth of May last in armes, and that he was a commander of a partie of the rebels under Argile, who assaulted a partie of his majesties forces, under the marques of Atholl, at Ardkinglass, and that ther was on killed on each syde, being interrogat if he knew John Balfour, of Kinloch, one of the archbishop of St. Andrew's murderers, declares he did not know him till he came a shipboard, and confesses that the said John Balfour was designed to be a cornet of horse, and was present with the late Argile him and others in the highlands; confesses he knowes James Stewart, and hes met several times with him in Holland; and that James Stewart did know of his coming to invade Scotland, and sir John Cochran told him that James Stewart said to him before they parted from Holland, that the late earle of Argile would spoile all by his landing in the highlands, and lingering there,* and that the best and surest way was for them to land in the main land of the west of Scotland, and to offer armes to such as would take them; and that he heard the late earle of Argile or some other say, that James Stewart was for asserting the duke of Monmouth's title to the crown, and

* See sir Patrick Hume's Narrative published by Mr. Rose, with His Observations on Mr. Fox's Historical Work.

farder sayes that he heard James Stewart had given the duke of Monmouth counsell to assume the title to the crown.

Sic Subscribitur, RICH. RUMBOLD.

Followes the Verdict of the Assyse.

The Assyse all in one voice finds the pannall Richard Rumbold, guilty of the treasonable invading this kingdome in armes in manner lybelled in respect of his own judiciall confession.

Sic Subscribitur, E. SNOW, Chancellor.

The Lords Justice General, Justice Clerk, and Commissioners of Justiciary, having considered the said Verdict of Assyse, therfor be the mouth of John Lealie Dempster* of court decerned and adjudged the said Richard Rumbold to be caryed from the barr to the laigh councill house of Edinburgh, and from thence in a hurdle or sledge, to be led be the hangman, to the mercat crosse of Edinburgh, and there to be hanged on a gibbet, and immediatlie let down alive, and the rope being about his neck, his heart to be cut out by the hangman, and shoven to the people upon the poynt of a bygonet or dager round about the scaffold, at the foot of the gibbet erected for that purpose, and the hangman is to express these words: "There is the heart of a bloodie traitor and murderer." And which thereafter the hangman is to cast into a fire prepared on purpose on the scaffold; and ordains the said Richard Rumbold's head to be cut off and shoven to the people in manner forsaid, and expressing the forsaid words, and then his body to be quartered, and one part thereof to be affixed on the Tolbuith of Glasgow, another at Jedburgh, a third at Dumfries, and the fourth at the Newtoun, of Galloway; and ordaines his head to be affixed on the west port of Edinburgh, on a high pick or pole erected for that purpose; and ordains this sentence to be put to execution this present 26th of Junet betwixt two and fyve o'clock in the afternoon preceislie, and ordaines his name, fame, memory, and honours to be extinct, his blood to be tainted, and his armes to be riven furth and delate out of the books of armes, sua that his posterity may never have place nor be able herefter to bruik or enjoy any honour, officers, titles, or dignities within this realme, in tyme coming, and to have forfait amitted and tint all and sundrie his lands, heretages, tacks, steddings, rounes, possessions, goods and geir, whatsoever pertaining to him to our soveraigne lord, to remaine perpetuallie with his highness in perpetie. Which was pronounced for doom.

The following Account of the Execution of Rumbold is inserted in the Western Martyrology:

* As to this, see vol. 10, p. 108.

† See a Note in p. 844, of vol. 10.

The LAST SPEECH of Col. RICHARD RUMBOLD at the Market Cross at Edinburgh, with several things that passed, at his Trial, June, 26, 1685.

At the same place died colonel Richard Rumbold, about eleven o'clock he was brought from the castle of Edinburgh to the justices court in a great chair, on mens shoulders; where at first he was asked some questions, most of which he answered with silence; at last said, He humbly conceived it was not necessary for him to add to his own accusation, since he was not ignorant they had enough already to do his business; and therefore he did not design to fret his conscience at that time with answering questions. After which, his libel being read, the court proceeded in usual manner; first asking him, If he had any thing to say for himself before the jury closed? His answer was, He owned it all, saying that part, of having designed the king's death; and desired all present to believe the words of a dying man; he never directly or indirectly intended such a villany; that he abhorred the very thoughts of it; and that he blessed God he had that reputation in the world, that he knew none that had the impudence to ask him the question; and he detested the thoughts of such an action; and he hoped all good people would believe him, which was the only way he had to clear himself; and he was sure that this truth should be one day made manifest to all men. He was again asked, If he had any exception against the jury? He answered, No; but wished them to do as God and their consciences directed them. Then they withdrew, and returned their verdict in half an hour, and brought him in Guilty. The sentence followed; For him to be taken from that place to the next room, and from thence to be drawn on a hurdle, betwixt two and four of the clock, to the cross of Edinburgh, the place of execution, and there to be hanged, drawn, and quartered. He received his sentence with an undaunted courage and cheerfulness. Afterwards he was delivered into the town magistrate's hands; they brought to him two of their divines and offered him their assistance upon the scaffold; which he altogether refused, telling them, that if they had any good wishes for him, he desired they would spend them in their own closets, and leave him now to seek God in his own way. He had several of the same kind by others, which he put off in like manner. He was most serious and fervent in prayers the few hours he lived, (as the centinels observed, who were present all the while.) The hour being come, he was brought to the place of execution, where he saluted the people on all sides of the scaffold, and after having refreshed himself with a cordial out of his pocket, he was supported by two men, while he spoke to the people in these words:

"Gentlemen and brethren, It is for all men that come into the world once to die, and

after death to judgment; and since death is a debt that all of us must pay, it is but a matter of small moment what way it be done; and seeing the Lord is pleased in this manner to take me to himself, I confess, something hard to flesh and blood, yet, blessed be his name, who hath made me not only willing, but thankful for his honouring me to lay down the life he gave, for his name; in which, were every hair in this head and beard of mine a life, I should joyfully sacrifice them for it, as I do this: And Providence having brought me hither, I think it most necessary to clear myself of some aspersions laid on my name; and first, That I should have had so horrid an intention of destroying the king and his brother.

[Here he repeated what he had said before to the Justices on this subject.]

"It was also laid to my charge, That I was antimonarchical.

"It was ever my thoughts, That kingly government was the best of all justly executed: I mean, such as by our ancient laws; that is, a king, and a legal, free-chosen parliament. The king, having as I conceive, power enough to make him great; the people also as much property as to make them happy; they being, as it were, contracted to one another. And who will deny me, that this was not the just constituted government of our nation? How absurd is it then for men of sense to maintain, That though the one party of this contract breaketh all conditions, the other should be obliged to perform their part? No; this error is contrary to the law of God, the law of nations, and the law of reason. But as pride hath been the bait the devil hath caught most by ever since the creation, so it continues to this day with us. Pride caused our first parents to fall from the blessed estate wherein they were created; they aiming to be higher and wiser than God allowed, which brought an everlasting curse on them and their posterity. It was pride caused God to drown the old world. And it was Nimrod's pride in building Babel that caused that heavy curse of division of tongues to be spread among us, as it is at this day, one of the greatest afflictions the church of God groundeth under, that there should be so many divisions during their pilgrimage here; but this is their comfort that the day draweth near, where, as there is but one shepherd, there shall be but one sheepfold. It was therefore in the defence of this party, in their just rights and liberties, against Popery and slavery—

[At which words they beat the drums:] To which he said:

"They need not trouble themselves, for he should say no more of his mind on that subject, since they were so disingenuous, as so interrupt a dying man, only to assure the people, he adhered to the true Protestant religion, detesting the erroneous opinions of many that called themselves so; and I die this day in the defence of the ancient laws and liberties of these nations: And though God for reasons best

known to himself, hath not seen it fit to honour us, as to make us the instruments for the deliverance of his people; yet as I have lived so I die in the faith, that he will speedily arise for the deliverance of his church and people. And I desire of all you to prepare for this with speed. I may say, This is a deluded generation, veiled with ignorance, that though popery and slavery be riding in upon them, do not perceive it; though I am sure there was no man born marked of God above another; for none comes into the world with a saddle on his back, neither any booted and spurred to ride him; not but that I am well satisfied, that God hath wisely ordered different stations for men in the world, as I have already said: kings having as much power as to make them great, and the people as much property as to make them happy. And to conclude, I shall only add my wishes for the salvation of all men, who were created for that end."

After ending these words, he prayed most fervently near three quarters of an hour, freely forgiving all men, even his greatest enemies, begging most earnestly for the deliverance of Zion from all her persecutors, particularly praying for London, Edinburgh, and Dublin, from which the streams run that rule God's people in these three nations.

Being asked some hours before his execution, if he thought not his sentence dreadful? He answered, He wished he had a limb for every town in Christendom.

Mr. Fox in his Appendix, No. IV. has printed the following passage from Lord Fountainhall's MS. Memoirs [those I apprehend in the Advocate's Library at Edinburgh:]

"Colonel Richard Rumbold, another Englishman, was also taken at Lesmahago, by Hamilton of Raploch and his militia-men. He was flying into England, being conducted by one Turnbull, a man of Polwart, (for Polwart had secured himself by flight sooner than the rest had done.) He was bold, answerable to his name, and killed one, and wounded two, in the taking, and if one had not been some wiser than the rest, by causing shoot his horse under him, he might have escaped them all; however, he undervalued much our Scots soldiers, as wanting both courage and skill. What had unfortunately engaged him in this enterprize was, that he had been from his infancy bred up in the republican and antimonarchic principles; and he owned he had been fighting against these idols of monarchy and prelacy, since he was nineteen years of age; (for he was now past sixty-three,) and was a lieutenant in Oliver Cromwell's army, and at Dundee, and sundry of the Scots battles; and by the discovery of the English fanatick plot in 1683, it was proved and deposed against him, that this Rumbold had undertaken to kill the late king in April 1683, as he should return from Newmarket to London, at his own house, at the Rye in Hogsdowen, in the county of Hertford, where he had married a maltster's

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relict, and so was designed the maltster; and intended to have a cart overturned in that narrow place, to facilitate their assassination. But God disappointed them, by sending the accidental fire at Newmarket, which forced the king to return a week sooner to London than he designed: see all this in the king's printed declaration. But Rumbold absolutely denied any knowledge of that designed murder; though on the breaking out of that plot he fled with others to Holland, and there made acquaintance with Argyle."

"On the 28th (June, 1685,) the said Richard Rumbold, maltster, was brought to his trial. His indictment bore, that he had designed to kill the late king, at the Rye or Hogsdowen, in his return from Newmarket to London, in April, 1683. But in regard he positively denied the truth of this, (though sundry had sworn it against him in England,) the king's advocate passed from that part, lest it should have disparaged or impaired the credit of the said English plot; therefore he insisted singly on the point, that he had associated himself with the late Argyle, a forfeited traitor, and invaded Scotland, &c. All this he confessed and signed; and being interrogated if he was one of the masked executioners on king Charles the First's scaffold, he declared he was not, but that he was one of Oliver Cromwell's regiment then, and was on horseback at Whitehall that day, as one of the guard about the scaffold; and that he was at Dunbar, Worcester, and Dundee, a lieutenant in Cromwell's army. He said that James Stewart, advocate, told them Argyle would ruin all their affair, by lingering in the Isles and Highlands, and not presently marching into the inland country; wherein he had proved a true prophet, but might see it without a spirit of divination. And being asked if he owned the present king's authority, he craved leave to be excused, seeing he needed neither offend them, nor grate his own conscience, for they had enough whereon to take his life beside. He was certainly a man of much natural courage. His rooted ingrained opinion was, for a republic against monarchy, to pull which down, he thought a duty, and no sin. And on the scaffold he began to pray for that party which he had been owning, and to keep the three metropolitan cities of the three kingdoms right; and if every hair of his head were a man, he would venture them all in that cause. But the drums were then commanded to beat, otherwise he carried discreetly enough, and heard the ministers, but took none of them to the scaffold with him."

Wodrow, vol. 2, pp. 551, 552, relates this case with his usual correctness, and mentions some other particulars of Rumbold's composure and firmness, and of the insults he received from the Council.

I will here insert Mr. Fox's account of Rumbold's Case, which is highly interesting,
 § L

not merely from the exquisite spirit, clearness, and simplicity of the narration, and from the justness and sagacity of the reflections, but from the very shrewd and critical investigation which it contains, relating to the Rye House Plot; and the extent of Rumbold's participation in it:

"Rumbold, covered with wounds, and defending himself with uncommon exertions of strength and courage, was at last taken. However desirable it might have been thought, to execute in England a man so deeply implicated in the Rye-house Plot, the state of Rumbold's health made such a project impracticable. Had it been attempted, he would probably, by a natural death, have disappointed the views of a government who were eager to see brought to the block, a man whom they thought, or pretended to think, guilty of having projected the assassination of the late and present king. Weakened as he was in body, his mind was firm, his constancy unshaken; and notwithstanding some endeavours that were made by drums, and other instruments, to drown his voice when he was addressing the people from the scaffold, enough has been preserved of what he then uttered, to satisfy us, that his personal courage, the praise of which has not been denied him, was not of the vulgar or constitutional kind, but was accompanied with a proportionable vigour of mind. Upon hearing his sentence, whether in imitation of Montrose, or from that congeniality of character, which causes men in similar circumstances to conceive similar sentiments, he expressed the same wish which that gallant nobleman had done; he wished he had a limb for every town in Christendom. With respect to the intended assassination imputed to him, he protested his innocence, and desired to be believed upon the faith of a dying man; adding, in terms as natural as they are forcibly descriptive of a conscious dignity of character, that he was too well known, for any to have had the impudence to make such a proposition to him. He concluded with plain, and apparently sincere, declarations of his undiminished attachment to the principles of liberty, civil and religious; denied that he was an enemy to monarchy, affirming, on the contrary, that he considered it, when properly limited, as the most eligible form of government; but that he never could believe that any man was born marked by God above another, for none comes into the world with a saddle on his back, neither any bearded and spurred to ride him."

"Except by Ralph, who, with a warmth that does honour to his feelings, expatiates at some length upon the subject, the circumstances attending the death of this extraordinary man have been little noticed. Rapin, Echard, Kennet, Hume, make no mention of them whatever; and yet, exclusively of the interest always excited by any great display of spirit and magnanimity, his solemn denial of the project of assassination imputed to him in

the affair of the Rye-house Plot, is in itself a fact of great importance, and one which might have been expected to attract, in no small degree, the attention of the historian. That Hume, who has taken some pains in canvassing the degree of credit due to the different parts of the Rye-house Plot, should pass it over in silence, is the more extraordinary, because, in the case of the Popish Plot, he lays, and justly lays, the greatest stress upon the dying declarations of the sufferers. Burnet adverts, as well to the peculiar language used by Rumbold, as to his denial of the assassination; but having before given us to understand, that he believed that no such crime had been projected, it is the less to be wondered at, that he does not much dwell upon this further evidence in favour of his former opinion. Sir John Dalrymple, upon the authority of a paper which he does not produce, but from which he quotes enough to show, that if produced it would not answer his purpose, takes Rumbold's guilt for a decided fact, and then states his dying protestations of his innocence, as an instance of aggravated wickedness. It is to be remarked too, that although sir John is pleased roundly to assert, that Rumbold denied the share he had had in the Rye-house Plot, yet the particular words which he cites neither contain, nor express, nor imply any such denial. He has not even selected those, by which the design of assassination was denied, (the only denial that was uttered,) but refers to a general declaration made by Rumbold, that he had done injustice to no man*; a declaration which was by no means inconsistent with his having been a party to a plot, which he, no doubt, considered as justifiable, and even meritorious. This is not all: the paper referred to is addressed to Walcot, by whom Rumbold states himself to have been led on; and Walcot with his last breath, denied his own participation in any design to murder either Charles or James. Thus, therefore, whether the declaration of the sufferer be interpreted in a general, or in a particular sense, there is no contradiction whatever between it and the paper produced; but thus it is, that the character of a brave, and, as far as appears, a virtuous man, is most unjustly and cruelly traduced. An incredible confusion of head, and an uncommon want of reasoning powers, which distinguish the author to whom I refer, are, I should charitably hope, the true sources of his misrepresentation; while others may probably impute it to his desire of blackening, upon any pretence, a person whose name is more or less connected with those of Sidney and Russell. It ought not, perhaps, to pass without observation, that this attack upon Rumbold is introduced only in an oblique manner: the rigour of government destroyed, says the historian, the morals it intended to correct,

* The words of Rumbold, as reported by Woodrow, were, "I am at peace with God through Jesus Christ; to men I have done no wrong; what then can confound me."

and made the unhappy sufferer add to his former crimes, the atrocity of declaring a falsehood in his last moments. Now, what particular instances of rigour are here alluded to, it is difficult to guess: for surely the execution of a man whom he sets down as guilty of a design to murder the two royal brothers, could not, even in the judgment of persons much less accustomed than sir John to palliate the crimes of princes, be looked upon as an act of blameable severity; but it was thought, perhaps, that for the purpose of conveying a calumny upon the persons concerned, or accused of being concerned, in the Rye-house Plot, an affected censure upon the government would be the fittest vehicle.

“The fact itself, that Rumbold did, in his last hours, solemnly deny the having been concerned in any project for assassinating the king or duke, has not, I believe, been questioned. It is not invalidated by the silence of some historians: it is confirmed by the misrepresentation of others. The first question that naturally presents itself, must be, was this declaration true? The asseverations of dying men have always had, and will always have, great influence upon the minds of those who do not push their ill opinion of mankind to the most outrageous and unwarrantable length; but though the weight of such asseverations be in all cases great, it will not be in all equal. It is material, therefore, to consider, first, what are the circumstances which may tend in particular cases to diminish their credit; and next, how far such circumstances appear to have existed in the case before us. The case where this species of evidence would be the least convincing, would be where hope of pardon is entertained; for then the man is not a dying man in the sense of the proposition, for he has not that certainty that his falsehood will not avail him, which is the principal foundation of the credit due to his assertions. For the same reason, though in a less degree, he who hopes for favour to his children, or to other surviving connections, is to be listened to with some caution; for the existence of one virtue, does not necessarily prove that of another, and he who loves his children and friends may yet be profligate and unprincipled, or, deceiving himself, may think, that while his ends are laudable, he ought not to hesitate concerning the means. Besides these more obvious temptations to prevarication, there is another, which, though it may lie somewhat deeper, yet experience teaches us to be rooted in human nature. I mean that sort of obstinacy, or false shame, which makes men so unwilling to retract what they have once advanced, whether in matter of opinion, or of fact. The general character of the man is also in this, as in all other human testimony, a circumstance of the greatest moment. Where none of the above-mentioned objections occur, and where, therefore, the weight of evidence in question is confessedly considerable, yet is it still liable to be balanced or outweighed by evidence in the opposite scale.

“Let Rumbold's declaration then, be examined upon these principles, and we shall find that it has every character of truth, without a single circumstance to discredit it. He was so far from entertaining any hope of pardon, that he did not seem even to wish it; and indeed, if he had had any such chimerical object in view, he must have known, that to have supplied the government with a proof of the Rye-house Assassination Plot, would be a more likely road at least, than a steady denial, to obtain it. He left none behind him, for whom to entreat favour, or whose welfare or honour were at all affected by any confession or declaration he might make. If, in a prospective view, he was without temptation, so neither if he looked back, was he fettered by any former declaration; so that he could not be influenced by that erroneous notion of consistency, to which, it may be feared, that truth, even in the most awful moments, has in some cases been sacrificed. His timely escape, in 1683, had saved him from the necessity of making any protestation upon the subject of his innocence at that time; and the words of the letter to Walcot are so far from containing such a protestation, that they are quoted, (very absurdly it is true,) by sir John Dalrymple, as an avowal of guilt. If his testimony is free from these particular objections, much less is it impeached by his general character, which was that of a bold and daring man, who was very unlikely to feel shame in avowing what he had not been ashamed to commit, and who seems to have taken a delight in speaking bold truths, or at least what appeared to him to be such, without regarding the manner in which his hearers were likely to receive them. With respect to the last consideration, that of the opposite evidence, it all depends upon the veracity of men, who, according to their own account, betrayed their comrades, and were actuated by the hope either of pardon or reward.

“It appears to be of the more consequence to clear up this matter, because, if we should be of opinion, as I think we all must be, that the story of the intended assassination of the king, in his way from Newmarket, is as fabulous as that of the silver bullets by which he was to have been shot at Windsor, a most singular train of reflections will force itself upon our minds, as well in regard to the character of the times, as to the means by which the two causes gained successively the advantage over each other. The Royalists had found it impossible to discredit the fiction, gross as it was, of the Popish Plot; nor could they prevent it from being a powerful engine in the hands of the Whigs, who, during the alarm raised by it, gained an irresistible superiority in the House of Commons, in the city of London, and in most parts of the kingdom. But they who could not quiet a false alarm raised by their adversaries, found little or no difficulty in raising one equally false in their own favour, by the supposed detection of the intended assassination. With regard to the advantages

derived to the respective parties from those detestable fictions, if it be urged, on one hand, that the panic spread by the Whigs was more universal, and more violent in its effects, it must be allowed, on the other, that the advantages gained by the Tories were, on account of their alliance with the crown, more durable and decisive. There is a superior solidity ever belonging to the power of the crown, as compared with that of any body of men or party, or even with either of the other branches of the legislature. A party has influence, but, properly speaking, no power. The Houses of Parliament have abundance of power, but, as bodies, little or no influence. The crown has both power and influence, which, when exerted with wisdom and steadiness, will always be found too strong for any opposition whatever, till the zeal and fidelity of party attachments shall be found to increase in proportion to the increased influence of the executive power."

The passage in Dalrymple, upon which Mr. Fox animadverts, is as follows: "The excessive rigor of punishment destroyed those morals which it was intended to amend. There is a letter from Rumbold to Walcot, upon the discovery of the Rye-house Plot, still existing,* in which he thanked Walcot for not betraying

* "This letter is dated August 2, 1683, and is in the paper-office. It laments the bad success of the conspiracy, thanks Walcot for concealing his name, and contains these words:

him. And yet Rumbold, in his last speech at Edinburgh, denied the share he had had in that Plot; and his last words were these: 'Death is terrible, indeed! but to me it has no terrors. With my God I have made my peace: To no man have I done injustice: What then have I to fear?'"

It appears from 1 Fount. 369, that in Galloway and the other Western Counties, the exasperation was such, that in Lesmahago a man was murdered as having been a taker of Rumbold.

By the obliging permission of Mr. Secretary Ryder, obtained through the kind intervention of Mr. Rose, very diligent search has been made, [August 1811] in the State Paper Office, for the Letter from Rumbold to Walcot, but no such paper is there to be found at this time. Upon a former occasion, Mr. Secretary Ryder, at my request, permitted a diligent search to be made in the State Paper Office, for an article cited by sir John Dalrymple, as being among sir Leoline Jenkins's Papers in that office, but it was not to be found.

"It is not unknown to any of us, with what zeal and sincerity you led us on, whilst there was any hopes of succeeding." Dalrymple's *Memoirs*, vol. 1, p. 81, 4to edition of 1771.

341. Proceedings against THOMAS ARCHER, ALEXANDER SHEILS, and others, for Treason: 1 JAMES II. A. D. 1685. [Now first published from the Records of Justiciary in Edinburgh.*]

CURIA JUSTICIARII, S. D. N. Regis tenta in pretorio burgi de Edinburgh, sexto die mensis Augusti anno millesimo sexcentesimo octuagesimo, quinto per nobilem et potentem comitem Georgium Comitem de Linlithgow, Justiciarium Generalem et honorabiles viros dominos Jacobum Foulis de Collingtoune Justiciarii Clericum, Johannem Lockhart de Castlehill, Rogerum Hog de Harcarss, Alexandrum Seton de Pittmedden, et Patricium Lyon de Carsa Commissionarios Justiciarii dicti S. D. N. Regis.

Curia legitime affirmata.

Intran,

Mr. Thomas Archer, preacher
Mr. Alexander Sheil, preacher
Thomas Stodhart,
David Lawe,
Edward Stout,
William Jackson,
William Cunningham,
James Wilkieson,
Matthew Bryce,
Archibald Campbell,
Gavin Russell,
John Muirhead.

INDYTED and accused that wher notwithstanding, be the common lawe, lawes, and acts

* Of these Proceedings Fountainhall's account is as follows:

"August 6, 1685. At Criminal Court, 11 or 12 prisoners are pannelled, either for their disloyal principles or for their being with Argyle, viz. Mr. Thomas Archer minister, to whom a physician and chirurgeon being sent to prison, they declared on soul and conscience he was raging of a fever, and not able to be brought to the bar; and therefore they continued his condemnation for some days.

"2. Mr. Alexander Shiels student of divinity, who was sent from England last winter, and was before the articles of parliament, after much velitation, at last consented to sign the abjuration of these treasonable principles of rising in arms, &c. but declined to swear it; which is conform to the 23d act of the last parliament 1685, not mentioning swearing. The anabaptists in Germany in the Boors war were tried with the same formula, if they owned their princes yea or no; but it should be only in *statu belli*. Shiels would have entered a protestation, that he signed it only in so far as it was consistent with his duty, but this was utterly rejected, and he was required to do it simply. Then he complained, that the only

of parliament of this kingdom, and constant practice thereof, particularlie be the fyft, and first session first parliament king Charles the second, the rying of his majesties subjects, or any number of them, the joyning or assembling together in armes without his majesties speciall authority, is declared to be high-treason, and punishable be forfeiture of life, land and goods, and be the second act second session of the said first parliament king Charles the second, It is declared high treason for any of his majesties subjects to maintaine these positions, that it is lawfull for subjects upon pretence of reformation, or any other pretence whatsoever, to enter into leagues or covenants, or to take up armes against the king, or these commissionat by him or to put limitations upon their dew obedience and alleadgeance, and it is thereby statute and ordained, that if any person or persons shall by writing, printing, or other malicions and advysed speaking, express and declare their treasonable intentiones of depriving, deposing, or suspending of his majestie from the st. le, honour, and kingle name of the imperiall crowne of this realin, or from the exercise of his royall government: after such person or persons being upon sufficient probation legallie convict thereof, they shall be deemed, declared and adjudged traitors, and shall suffer forfeiture of life, honour, lands and goods, as in the case of high treason, and be

liberty of a subject being that of the freedom of his judgment and thoughts in controverted cases, this should be retrenched; yet, seeing authority required him, he was content to declare he owned the present king, and that it was unlawful to raise war against him, or to assassinate his adherers; yet a man might declare many things he could not swear; and he said, though he was a presbyterian, yet he was against the imposition and pressing of the covenant itself; and at last, he subscribed the abjuration; but, in regard he had formerly retracted his taking the said abjuration, and said he was forced, it was marked now that what he had done was voluntary; they therefore resolved only to banish him.

"Three or four, viz. Cunningham, Jackson, and Edward Slit, (who had in a mad fit proclaimed the duke of Monmouth king,) were so wise as to own the king, and abjure their principles; and so were remanded to prison, that they might apply to the privy council to obtain banishment.

"The rest of them, viz. Campbel, Stoddart, Russel, Matthew, Bryce, &c. being either obstinate in their principles, or unclear to disown the lawfulness of rising in arms, and the declaration of war; and it being proven against them

the twentieth-third act first session of his majesties current parliament, the owning or refusing to disowne a late traitorous proclamation in sua farr as it declares war against the king's ma-

by witnesses, that they were with Argyll, (though the pannels alledged they were forced by him,) they were remitted to the knowledge of an assize, and by their verdict were returned guilty of treason, and sentenced to be hanged on the 14th of August.—But some of them being better advised, and ready, now on the prospect of hanging, to renounce their disloyal opinions, positions, and principles, it was expected the privy council would commute their punishment to banishment to the plantations.

—Some of those, sentenced to death, had got their ears cropt the day before, which seemed to make it *res judicata*, that they could not be pannelled for their life. As Mathæus de criminibus teaches, pag. 910, *et seq.* But, 1mo, It was said, they had thronged in with the rest, after they had got their indictments for treason, and concealed it. 2do, Since that *pæna* was inflicted, they had reiterated their guilt by refusing to own the present king; though indeed they only shifted the question, asserting they owned all kingly authority in the general; and when they were put to disown that declaration of war, they said they disowned all murder, and yet would not disown that paper in particular. And Stit said, he knew not if he was our king, because new kings used to be crowned, and then to grant jail-deliveries to prisoners, and pardons, which they had not yet seen. On the 12th August, four of their pannels were hanged; and Mr. Archer being recovered, was then sentenced, and hanged on the 14th August."

The practice of cutting off the ears of men, and burning the cheeks of women, sentenced to transportation, appears to have been very extensively exercised about this period. See Wodrow's History, book 3, chap. 9.

"1685, July 30. The advocate is ordered to process before the justiciary, Thomas Stoddart, James Wilkison, Matthew Brice, Archibald Campbell, Edward Stit, David Low, Gavin Russel, William Cuninghame, John Muirhead, William Jackson, and Mr. Alexander Shiels, for treason, rebellion, and not owning his majesty's authority, as also the heirs of the late duke of Monmouth, Fletcher of Saltoun, and Claud Alexander of Newton.

"August 6. Thomas Stoddart, James Wilkison, and Matthew Brice, are found guilty of treason by an assize, because they refuse the abjuration; and the Lords sentence them to be hanged at the Grass-market, Wednesday August 12. Thus after the soldiers are almost weary of killing in the fields, for alledged refusing of this oath, the justiciary of new condemn some more upon this score.

"By other papers I find they were executed as above. I have no further of Thomas Stoddart, but what is in his testimony published in the Cloud of Witnesses, where he says, he

jestie, and asserts that it is lawfull to kill such as serve him, are thereby guilty of treason, and are art and part of the said treasonable declaration. Nevertheless it is of verity that the said

first received a sentence of banishment, and afterward, without the least provocation given by him, he was called to abide an assize, and condemned to die, because he owned the authority only in as far as agreeable to the word of God; and because he would not expressly disown and judge as to the apologetical declaration. His paper is very plain and natural for a common country man, and is as modest as many insert in that collection.

"Matthew Brice lived in the parish of Carmunnock, and James Wilkison suffered with him and the former, not July 27, as the Cloud of Witnesses have it, for they were only tried August 6, but the day named, for any thing I know. These two were mostly urged with the oath of allegiance and supremacy, and being asked if they owned authority; they answered, they cheerfully owned all authority according to the word of God. Upon this restriction, and refusing the abjuration, they were condemned.

"Since writing what is above, I am assured by an unquestionable hand, that this month Gavin Russel, with three others, were executed at the Grass-market; and that their carriage and speeches were much of the same strain with Mr. Thomas Archer's, afterward to be insert. We see one of this name is ordered to be prosecuted, but I have not observed him in the Justiciary-registers, though in such an heap as is there, I may have overlooked him, and it is probable he was executed with these I have been giving some account of.

"That same day they were executed, the Lords, as it were, ashamed of cutting off so many, precisely upon their refusing such an oath, and against whom they had no matters of fact, have before them 'William Cuninghame, John Muirhead, and William Jackson, who having refused the oath of abjuration, and declared themselves willing to be banished,' the advocate deserts the diet, and the criminal process is dropped, upon their signing an act of banishment, never to return to Scotland without licence, under penalty of a thousand merks."

The following is the article in the 'Cloud of Witnesses,' referred to by Wodrow:

THE LAST TESTIMONY OF THOMAS STODDART, who suffered at the Grass-market of Edinburgh, August 12, 1685.

"Men, Brethren, and Fathers, hearken; I being to take my farewell of the world, I leave this my dying testimony, according to the form of the Christians of old. I having, like the same ground for it, that he had, who used that word, that was Stephen, who was condemned, because he spoke blasphemous words against the law and the temple. So because I will not

Master Thomas Archer, Master Alexander Sheil, and the other persons above complained upon, shacking off all fear of God, respect and regard to his majesties authority and lawes,

adhere to or approve of their laws, which now have power in their hands, they condemned me to die, though they could not witness so much against me for speaking against them, and they never essayed to prove the sentence upon me: which now I shall study in a word, to give you an account of. And first, I received my sentence of banishment; and then, notwithstanding of that, I was committed to the justices to abide the assize, and they past upon me the sentence of death, for no other cause, as I can give, but because I could not give such an answer to their questions about the government and the king's authority (as they called it) as could satisfy their lusts, and that I durst not disown the apologetic declaration; and so I humbly conceive it will come to this as the ground of my suffering, that I could not own Christ's enemies, nor the power that they have taken to themselves against him, nor disown Christ's friends and their actings as they required, and therefore I am sentenced, albeit I owned as much of the authority as any Christian can be obliged to, that is to say, lawful authority according to the word of God; but I desire to be submissive to his will, who hath called me to this, and to have high thoughts of him. I cannot get words to set him out, but I find something to say to the commendation of Christ, as it is said in Cant. ii. 1. He is the rose of Sharon, and the lily of the valleys; the sweetest rose that ever I smelled, and never sweeter than when under the cross, and suffering upon his account. Now, I shall not be long, I have told you upon what account I suffer, it is out of love to Christ, and by faith in his mercy, that I venture upon it. I shall end it with a word, I thought it my duty to adhere to the word of God, and to every thing agreeable thereto: and I would suffer for every thing as a ground, which I think is right, and taken out of the word of God, having encouragement from his blessed promises, Isa. xliii. 1. But now thus saith the Lord that created thee, O Jacob, and he that formed thee, O Israel, Fear not, for I have redeemed thee, I have called thee by thy name, thou art mine. When thou passest through the waters, I will be with thee. And I have this to say also, that in all my imprisonments, he was wonderfully seen in owning me, and carrying me through all the temptations that I was trysted with; if I would tell you them all, they would take up much paper and time; and time being very short, I cannot get it done; but I think I must speak something to the commendation of free grace, that hath made me to suffer all cheerfully. I have read in the Apostle, 2 Tim. ii. 11. It is a faithful saying, for if we be dead with him, we shall also live with him: if we suffer, we shall also reign with him. It is good at all times, but especially now. O! but the people of

have presumed to committ, and are guilty of the saids crimes, in sua far as there being in the year 1683, one hellish and damnable plot and conspiracy entered into by the late earles of

this generation be greatly involved in sin, by reason they are so greatly and deeply involved in the breach of covenant, which though it must not be owned by the laws of the land, yet I dare not but own it. I would fain say, as it is said, 1 Kings xviii. 15. And Elisha said, As the Lord of hosts liveth, before whom I stand, I will surely shew myself to him to-day. I own it before all, and I own myself to have joined, and do allow it heartily, in joining with that poor persecuted party so much disowned; the thing that I did in that case, I thought it my duty. I leave my testimony to my owning of it; and that I have joined myself to that which was most agreeable to the word of God. I leave my testimony in behalf of these that I joined with, that little handful in their societies and fellowships, which have been very refreshing to my soul, and I have been much delighted in these; for I thought it was the church of God.

“ And, therefore, I leave my testimony against all superstition and error, contrary to that way I received of the Lord there; and every thing contrary to the word of God. I leave my testimony against all unlawful deeds, and all murdering acts and actings whatsoever they be. I leave my testimony against Popery and Prelacy, and whatsoever plant is not of my heavenly father's planting, and every thing contrary to sound doctrine, and the power of godliness. I leave my testimony also against these that hear the curates, and against all them that have said in effect, the word is a lie; that is because they will not take it to be their rule; for that is the only thing we should take to be our rule, in all the steps of our sojourning here. Now, I think I must take my farewell of all created comforts, and all the things of the world, which have been so great a mean to make many of this generation scar at the croes of Christ, which is much mistaken by the world. He was so condescending that he paved the way for poor sinners himself, and made it straight and easy; and wonderful it is to think upon. The way that leads to heaven is very straight, and very easy also to these that believe. He is that universal king that lives and reigns for ever; and all who subject themselves and obey him, and consent to his terms, shall even know peace, and shall enjoy his presence, which is the chief of all things. It is peace with God, that is the matter of the believers' rejoicing, and makes them all to fight with joy in following him, who is the way, the truth, and the life; and whom to know is life everlasting; that doth and may give great courage to those who love this way of his, that is so greatly reproched by the people of this generation. I think ye may conceive what I mean by the saying of this. And now, my dear friends, and fellow-sufferers

Shaftsberry, Essex, Argyle and other rebells and traitors subjects of this kingdome and of England, for killing and murdering, at leist seizing upon the persone of his sacred majesty and his royall brother our late gracious soveraigne king Charles the second, and for raising open warr and rebellion in both kingdomes, and for furnishing men, money, ships and armes to the late earle of Argyle for that effect, and accordinglie the said late earle of Argyle and the saiks Archibald Campbell, David Law, Gavin Russill and Mr. Thomas Archer, and severall other traitors and rebells did invade this kingdom, with men, ships, armes and ammunition, and landed at the West Highlands of Scotland upon the _____ day of last^o did issue furth treasonable proclamations, and declarations, did convocat and gather together his majesties liegges to the number of _____ with-

and brethren in the Lord, O but the counsel of the Lord be wise in bringing me hitherto! And I shall say no more, but touch at one thing, and that is, that here I join my hearty testimony with all that ever the people of God did in his way, and for his cause in his gospel terms; to all the blood-shed for the gospel, in all fields and scaffolds whatsoever. So I take my farewell of all things under heaven. Farewell to the world, the flesh, and sin; and also to all friends and relations, and kinsmen and brethren, and also I take my farewell of mother and brethren and sisters, and also I bid farewell to all my wonted privileges and enjoyments; as also, I take my farewell of all the sweet societies that have been so refreshful to my soul several times; farewell friends in Christ; farewell sun, moon, and stars. Welcome heaven; and welcome my God, and angels, and glorified spirits; and so come Lord Jesus. THOMAS STODDART.

“ Together with the foregoing martyr, two others received the sentence of death, viz. Matthew Bryce, and James Wilkie, who suffered at Edinburgh, July 27, 1685. The former whereof declares in his testimony, that they were interrogate only on these two questions. 1. Will ye take the oath of allegiance? To which they answered, No, we will not take it. 2. Will ye own the authority? They answered, we will own all authority according to the word of God. Upon which they were immediately all three sentenced to be hanged. Whence the said martyr very justly infers, That they had nothing else to charge upon him as the cause of his death, but that he spoke of the word of God. His testimony, as to all the material heads, is consonant with this of Thomas Stoddart.”

It appears by a record published in 2 Wedrow. 481, 482, that Stoddart, Wilkie, and Bryce had exasperated the council by not only obstinately refusing the oath of allegiance (which probably would have been punished by transportation) but by “most impertinently and indiscreetly misbehaving themselves before the council.”

• See in Original.

in the shires of Argyle, Tarbat, Highlands and Islands thereof, in open rebellion against his majesty and his authority, did take in and maintaine forts, strengths and garrisons, against him and his forces, did robb and plunder the goods and houses of his majesties good subjects, rendivouzed and exercised themselves, did scoutt furth kill and murder severall of his majesties good subjects and souldiers, and did continue in open and avowed rebellion against his majesty and his authority, committing all acts of hostility and high treason, until at length they were dissipat, defate, and taken prisoners, and brought in and examined before the lords of his majesties privy council and judiciary, wher they most treasonable did and doe own and maintaine the treasonable positions after-mentioned, viz. That it is lawfull to rise in armes against the king's majesty, and those commisioned by him, and to deprive, depose and suspend him from the style, honour and kinglie name of the imperial crown of this realme, and from the exercise of his royall government. And they did put treasonable limitations upon their due obedience, and allegiance to him; and they did most treasonable disown the king's majesty and his authority, and did most treasonable at least refused to disown the forsaidd proclamation in sua farr as it declares war against the king's majesty and asserts it lawfull to kill such as serve him. Of the whilk treasonable crymes and positions above specifit, or ane or other of them: they and ilk ane of them were actors art and part. Which being found be assyse, they ought to be punished with forfeiture of life, lands and goods to the terror of others to commit the lyke herefter.

His *Majesties Advocate* produced a warrant of council for persewing the persons above named. The lords in respect Master Thomas Archer was so sick and unwell as he was not able to be brought from prison, continue the dyct against him till to-morrow.

INTERLOQUIOR.

The lords having considered the indytmnt, against Mr. Alexander Sheil, Thomas Stoddart, James Wilkie, Matthew Bryce, anent their owning the treasonable positions, mentioned in the lybell, and owning, or not disowning the treasonable declaration therein mentioned. They find the samen relevant, against them separatim, to inferr the paine of treason. And also having considered the lybell, against Archibald Campbell, David Law, Gavin Russill, anent their having been in the rebellion with the late Argyle and other treasonable articles lybelled against them. They find the samen relevant separatim to inferr the paine of treason, and remitts the same to the knowledge of the assyse.

ASSISA.

James Cockburn, goldsmith
Robert Smith, merchant
Andrew Duff, merchant

James Brown, feltmaker
 John Brown, glover
 Archibald Duncan, merchant
 Francis Brown, vintner
 Thomas Crichton, merchant
 James Park, cordiner
 John Alexander, wright
 Adam Muir, glover
 Andrew Montcurr, penatherer
 George Brown, mason
 William Armstrong, trunkmaker
 John Black, vintiner

The Assyse lawfullie sworn, no objection of the law in the contrair.

Edward Stott owned the king's authority, and that he is his lawfull king, and prayed for him, and disowned the apologetical declaration, and all traitorous principles, and practices, and offered to give his oath that he never gave intelligence to any of the rebels, wherupon the Lords deserted the dyet against him, and remitted him back to prison that the Lords of Council might dispose upon him at their pleasure.

PROBATION.

Hector M'Gibbon, in Cowall, aged twenty-four years, unmarried, purged and sworne. Depons, he knows Archibald Campbell the pannall, and saw him in the rebellion with the late Argyle in armes, and saw David Law, and Gavin Russil lykeways in the said rebellion, and this is the truth as he shall answer to God.

Sic Subscibitur. HECTOR M'GIBBON.

Dougal M'Gibbon, in Cowall, aged twenty-five years, married, purged, and sworne. Depons he knowes Archibald Campbell and Gavin Russil, and saw them in the rebellion with the late Argyle. And this is the truth as he shall answer to God.

Sic Subscibitur. DOUGAL M'GIBBON.

Gilbert M'Rertur in Isla, aged fourtie five years, unmarried, purged and sworne. Depons, he saw Archibald Campbell, David Lawe and Gavin Russil in the rebellion with the late Argyle, and this is the truth, as he shall answer to God. Depones, he cannot writ.

Sic Subscibitur. LINDITHGOW, I. P. D.

Dyets deserted as to Cunningham and Muirhead.

The said William Cunninghame, and John Muirhead, did give in a Petition signed be them, and making mention, that they were by the privy council, remitted to the justices as if they had disowned the king's authority, and are now indyted for owning these treasonable positions following, viz. That it is lawfull to rise in armes against the king's majestie, and those commissionat by him, and to depyve, depose and suspend him from the style, honour and kinglie name of the imperiall crowne of this realme, and from the exercise of his royall government, and for putting treasonable limitations upon their due obedi-

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ence and allegoance to his majestie, and treasonable disowning the king's majestie and his authority, and for the treasonable owning, at least refusing to disown the treasonable proclamation declaring war against the king and asserting it lawfull to kill such as serve him. The saids petitioners did deny their indytement, and disowned the positions lybelled, and did solemnlie ajure the traitorous declaration in sua farr as it declares warr against the king, or those commissionat by him and asserts that it is lawfull to kill such as serve his majesty, and owned the king's majestie and his authority, and offered to swear never to rise in armes against his majestie, or any commissionat by him, and prayed for his majesties long and prosperous reigne, and humble craved, the lords would desert the dyet against them and sett them at liberty from the bar, or would remitt them to the council for their liberation. The lords therfor deserted the dyet as to the said William Cunningham and John Muirhead, and remitts them back to the council. Master Alexander Sheill, having signed the abjuration, and having owned the king's authority, but not upon oath,* the king's advocate in re-

* Wodrow (vol. 2, p. 136) states, that in a letter dated Rotterdam, November 23d, 1680, Shiels, writing concerning the Queensferry paper, (See vol. 10, p. 795) declared himself for disowning the king's authority.

Wodrow gives but little account of Shiels; referring readers to a printed Narrative published from a Copy of what Shiels himself left. This I recollect not to have ever seen. Wodrow says however,

"By the council-registers I find general Dalziel ordered to send a party to Leith, to bring up Alexander Shiels and John Frazer, masters of arts, Andrew Crawford, Charles Gray, William Cunningham, William Oliphant, John Martin, and John Foreman, sent down prisoners from London; and March 6, Mr. Alexander Shiels being examined before the lords of justiciary, 'did abhor, renounce and disown in the presence of the Almighty God, the late pretended declaration of war, in so far as it declares war against his majesty, and asserts it lawfull to kill such as serve his majesty in church or state, army or country; and August 6, Mr. Alexander Shiels having signed the abjuration, owned the king's authority, but not upon oath, is remitted back to the council.' And by their registers I find, August 7, he is sent under a guard to the Bass.

"This is all I have observed about him in the Records. I can only further refer the reader to the printed account, now in the hands of every body, where the circumstances and qualifications of his doing what is recorded in the registers, will be found.

"Mr. Shiels was a minister of extraordinary talents and usefulness, he was well seen in most branches of valuable learning, of a most quick and piercing wit, and full of zeal, and

3 M

spect thereof declared that the justices might continue the dyet against him, and the said Master Alexander did humbly beg the lords would continue the same, which was accordingly done, and his case was referred to the council.

Followes the Verdict of Assyse.

The Assysers above written, all in one voice by the mouth of James Cockburne their Chancellor, finds Thomas Stoddhart, James Wilkieson, Mathew Bryce, guilty, in sua farr as they refuse to take the abjuration, and to assert his majestie's authority. Lykcas they do all in one voice find Archibald Campbell, David Law, and Gavin Russill, guilty of being at the rebellion with the late Argyle, in sua farr as they have acknowledged the same, and lykways it being relevantlie proven.

Sic Subscribitur. JAS. COCKBURN.

The Lords Justice Generall, Justice Clerk, and Commissioners of Justiciary, having considered the Verdict of Assyse, They therfor be the mouth of John Leslie, Dempster of Court, decreed and adjudged the saids Thomas Stoddhart, James Wilkieson, and Gavin Russill to

a public spirit, and of shining and solid piety. By many original letters of his in my hands, I find him opposing the heights which some of the society people ran to; and whatever lengths he went in the troubled and oppressed state of the church, when rules can scarce be kept, yet as soon as a door was opened for giving a testimony against what he took to be wrong in the disturbed state things had been in, he came in, and brought multitudes with him to join in public ordinances.

"At and after the revolution he was of singular use in the army, and valued by that great judge of men king William. After he had served God there he came home, and was settled at St. Andrews, and was a successful, serious, and solid preacher, and useful minister in this church, till being moved with love to souls, and somewhat of the old apostolic spirit, he was pitched upon and prevailed with to go over with his countrymen to our national settlement at Darien in America, where, by letters under his hand giving a most particular account of matters there, I find his spirit was sunk with the divisions, impiety, and unrighteousness of too many of that handfull, and perfectly crushed with the fatal disappointment of that undertaking, which, he shews plainly, had it been faithfully and well managed, would have been of unspeakable advantage to this nation, as well as to the holy Christian religion. He died in Jamaica of a short sickness, after they had left Caledonia. After his death this church was brought under new debt to him, by the publishing of his essay upon church communion, which I wish were more read and considered by such who withdraw from this national church."

I suppose him to have been the author of the "Hind let Loose."

be taken to the Grass Mercat of Edinburgh upon Wednesday next the twelt day of August instant, betwixt two and four a clock in the afternoon, and ther to be hanged on a gibbet till they be dead; and all ther lands, heretages, tacks, steddings, roumes, possessions, goods, and gear, whatsomever, to be forfait and escheat to our soveraigne lord's use: which was pronounced for doom.

7th August, 1685.

Mr. Thomas Archer being testified to be so sick and unwell as he could not be brought from prisone to the barr, was continued till Wednesday next, and the Assysers ordained to attend.

12th August, 1685.

Intran'

Master Thomas Archer, Preacher.

Indyted and accused for the crymes of high treason and rebellion, and others mentioned in his dittay, recorded upon the 6th of August instant.

Persewer.—Sir George M'kenzie of Rosehaugh, his majestie's advocat.

The Lords having considered the lybell persewed be his Majestie's Advocat against Mr. Thomas Archer, prisoner, anent his joyning in rebellion with the late earle of Argyle, and being in armes with him, they find the samen relevant, and remitts the same to the knowledge of the Assyse.

ASSISA.

James Cockburn, Goldsmith
Archibald Duncan, Merchant
Robert Smith, Merchant
Francis Brown, Vintner
Andrew Duff, Merchant
Thomas Crichtoun, Merchant
James Brown, Feltmaker
James Park, Cordiner
John Brown, Glover
John Alexander, Wright
Adam Muir, Glover
Andrew Montcurr, Peutherer
George Brown, Mason
William Armstrong, Trunkmaker
John Black, Vintiner

The Assyse lawfullie sworn, no objection of the law in the contrare.

THE PROBATION.

His Majesty's Advocat for probation adduced the pannall's own judiciall confession, whereof the tenor followes, viz. Mr. Thomas Archer prisoner being examined, confesses and declares, That he knewe the late Argyle in Holland, and that he imparted to the declarant his designe of invading this kingdome; and that the declarant went from Holland to Ireland, before Argyle took shipping from Holland, but that the affair he went for took no effect, and that his errand ther from Argyle was to desyre some persons to come over to joyne with Argyle, but non of them came. Declynes to condescend upon any of the persons to whom he

was sent to give advertisement. Confesses he came over to Argyle about a fournight after Argyle landit in the west, and stayed with him untill the tyme they were dissipat. That he received a shott in his syde being with sir John Cochran's partie near to the Stonefold, wher sir John Cochran was with his partie after the break, and was carryed to a house near by, and was ther apprehended, and that he conversed with sir John that morning.

Sic Subscritur, THO. ARCHER.

The said day the above wriitten declaration being read to the pannall in presence of the Justices and Assysers, he judicallie renews and adheres to the samen in all poynts, and confesses he had a sword.

Sic Subscritur, THO. ARCHER.
LINLITHGOW. I. P. D.

Followes the Verdict of Assyse.

The Assyse all in one voice find the pannall, master Thomas Archer, guilty of conversing with the late Argyle in Holland, and his being in knowledge of Argyle's designe to invade this kingdome, and of his joyning with Argyle and the other rebells in the west of Scotland, and of his being with them in armes, and continuing with them till they were dissipat; and that in respect of his own judicial confession.

Sic Subscritur, J. COCKBURN, Chancellor.

Followes the Doom.

After opening and reading of the whilk verdict, the Lords Justice General, Justice Clerk, and Commissioners of Justiciary, therfor be the mouth of John Leslie, Dempster of Court, decerned and adjudged the said master Thomas Archer* to be taken to the Grass Marcat of

* The following particulars of this person occur in Wodrow :

"By the Council-registers, I find, June 9, 1682, Mr. Thomas Archer had been a long time in the Canongate Tolbooth, for being at a house-conventicle, and nonconformity. He was an excellent youth, brother to the fore-mentioned John Archer, a good scholar, and close student. While he was in the Canongate Tolbooth, I am informed, he made himself master of the Hebrew tongue, the Chaldaick, Syriack, and some other of the Oriental languages. Upon the 9th of June, he petitions the Council, signifying his design to leave the kingdom, and begging the Council may liberate him. There was nothing to be proven against him, and he had lien long in prison, so his petition is granted; and the good youth went over to Holland, and continued there, very much improving himself in all valuable branches of human learning, as well as solid religion. There he was ordained by Mr. Fleming, and the rest of the Scots ministers then at Rotterdam, Mr. Alexander Hastie having preached the Ordination sermon. Mr. Archer had been licensed in the excellent lady Riddell's family, before he was taken, which was at the time when Mr. Semple was seized."

Edinburgh on Friday next being the fourteenth day of August instant, betwixt two and four a clock in the afternoon, and ther to be hauged on a gibbet till he be dead, and all his lands,

"The reverend Mr. Thomas Archer was brother to John Archer formerly mentioned; and I have the following accounts of him from ministers and others yet alive, who had the happiness of his acquaintance. The Lord began very early to incline his heart to piety; and when he was little more than a child, that eminent minister, and extraordinary Christian formerly mentioned, Mr. Alexander Moncrief, gave him that character, That he made conscience of lifting his bonnet, that is, of the most minute actions of his life, and did all with an holy tenderness, and out of a principle of religion; and yet after he had gone through his University studies, he wanted not shakings and exercises about the state of his soul; at length he got comfortably out of all, and enjoyed much of a life of serenity and consolation through the remainder of his time.

"When he received his degrees at the University, I think, of St. Andrews, it was with great applause, and the masters who examined him, declared they had not met with his equal in learning for many years. Some years after, when chaplain to the lady Riddel, in that country, he was licensed to preach the Gospel by Presbyterian ministers, and his sermons were very judicious, methodical, and most scriptural. He was so exact in what he delivered, that he neglected the manner, being intent upon the matter. He was not so acceptable to vulgar hearers, as some other young men far inferior to him in abilities.

"His conversation was very grave, sedate, prudent, affable, and cheerful; he was an excellent scholar, very bookish, and gave himself to reading, meditation, and prayer. When staying in a gentleman's house in the Merse, he was, about the year 1682, taken prisoner, for no other fault than preaching the Gospel now and then; and, as we heard, he was brought in prisoner, and continued some months in the Canongate Tolbooth.

"There he improved his time very closely, and in a little, made himself absolutely master of the Hebrew tongue, and was a great master of both the original languages of the Scriptures. At length he was banished the kingdom, and made to sign a bond never to return to his native country, without the government's allowance; and he retired to Holland.

"In Holland, he mightily improved in all branches of valuable learning; and while there, was employed to correct the Dutch edition of Pool's *Catijcks*, then printing. He was there ordained a minister of the Gospel by the Scots ministers, from their deep sense of his excellent endowments. Mr. Robert Fleming, and Mr. Alexander Hastie preached at his ordination.

"He was assured that his bond was got up by his friends in Scotland, from the Council, otherwise 'tis probable he would not have con-

heritages, tacks, steddings, rounes, possessions, goods and gear whatsoever to be forfeit and escheat to our sovereigne lords use, which was pronounced for doom.

seated to have come back. Being a youth of great gallantry and spirit, he was prevailed upon to engage with Argyle.

"After they were dissipate, he got over Clyde, and was in the engagement at Muirdyke, where sir John Cochran commanded: His horse stumbling, fell to the ground, and his pursuers might easily have made him prisoner, but such was their barbarity, that before Mr. Archer could recover himself, one of them poured in a pair of balls into him, whereby he was sorely wounded, and while lying wounded, he was robbed of his bible, watch, and some gold; and, as we have heard, after he had lieu bleeding almost to death, he was, by his friends, carried into a country-house, where he was soon taken, and brought in to Paisly, where his wounds were dressed, and were extremely painful to him.

"Thence he was carried into Glasgow, where he remained some days in great distress, and very low; and was sent into Edinburgh, by order of the Council. So extremely weak was he, that he was not able to sit upon a horse, and therefore was sent east upon a cart, and, with no small difficulty, the honest people in Glasgow prevailed to get a feather-bed laid under him.

"Before the Council he was reproached bitterly, that he had broke his engagement by bond. This was no small grief to him, and he regretted very much that he had been made to believe that his friends had got it up; and the Council, July 13, put him over into the hands of the criminal court.

"While in prison, great importunity was used with people in power, for his liberation; and it was represented he was in a dying condition by his wounds, and physicians declared so much; but nothing would prevail with them. In all the turns, they resolved to have some ministers sacrificed to their fury, the great Mr. Guthrie after the Restauration, the excellent Mr. Hugh Mackail after Pentland, Mr. King and Mr. Kid after Bothwell, and now worthy Mr. Archer. The duke of Queensberry was addressed in a particular manner, and even by his own son, who had a high value for Mr. Archer, but always received with indignation; and he told his son in very odd terms, His life could not be spared.

"All those endeavours failing, a design was laid to have him secretly conveyed out of prison, and it came so great a length, that once the sentinels had money given them. A worthy gentlewoman, yet alive, Mrs. Montgomery, servant to the late excellent dutchess of Hamilton, bestowed ten dollars that way. In short, every thing was made ready, but he himself broke the project, and told his friends, that he reckoned himself a dying person; and seeing he reckoned he could not serve his

The said day William Cunninghame, John Muirhead, and William Jackson, prisoners, indicted and accused for the crymes of high treason, rebellion, and maintaining the treason-

Master in any other manner, he did not think it his duty to decline a testimony for him and his truth, by a publick death."

Wudrow then briefly states what occurred at Archer's Trial, and after noticing that his execution was delayed till Friday, August 21st, proceeds thus:

"I am sorry I have no large accounts of his christian and cheerful carriage on the scaffold, but shall here insert his last Testimony, which he drew up in prison, and delivered as much as he was able at his death, and I give it from the original copy, yet remaining with his friends.

The LAST WORDS and TESTIMONY of Mr. THOMAS ARCHER, Minister of the Gospel, which he designed to speak on the Scaffold, August 21, 1685, and left with his friends, subscribed with his own hand.

"My weakness being such, through long sickness, as I know not when I may be surprised with death, and being persuaded in my own mind, that in some weak measure I desired to follow God's call, whilst I came along with this (now broken) party, and, that with some simplicity and self-denial, I desired to aim at God's glory and the comfort of his church.

"I desire, in some sincerity of heart, to leave my mind in these few lines, for the satisfaction of my friends and others. The apprehension I had of the great danger of the Protestant religion, and the informations of the exorbitant oppressions of men in their estates, but especially in their consciences, even to their wasting were my motives to engage in this enterprize, if not sufficient I leave it to others to judge.

"That Popery is like to be the plague of these lands, many now begin to be convinced that would not believe it before; the atheism and profanity of the generation is a fit disposition for it; and, it may be, the evil of it may begin to be less seen, that it may be accounted a light matter: but let that scripture be seriously considered, Revel. xiv. 9, 10, 11. And the third angel followed him, saying with a loud voice, If any man worship the Beast and his Image, and receive his mark in his forehead, or on his right hand, the same shall drink of the wine of the wrath of God, which is poured out without mixture, into the cup of his indignation, and he shall be tormented with fire and brimstone, in the presence of the holy angels, and the Lamb; and the smoke of their torment ascendeth up for ever and ever, and they have no rest day nor night, who worship the beast, or his image, or whosoever receiveth the mark of his name.

"It was always my judgment, and I hope to

able positions, having refused the oath of allegiance, and having declared themselves willing to be banished this kingdom, and his majesties Advocate having past from the criminal per-

die in it, that the obligation of the covenants is national, and indissoluble, and that even the posterity renouncing them, shall be found guilty of horrid perjury and apostacy before God, since in them we first engaged immediately to serve him.

"I own the alone headship of our glorious Saviour Jesus Christ over his church, to be a truth from scripture most clear and incontrovertible. To set up officers over his church, and not of his appointment, to give laws to her of that nature, is an usurpation most fearful, especially when it may be in the hands of a person, not a member of the church; and to rob the church of the ministerial ruling power communicated to her officers by her head Christ, or to hinder her of the due exercise of it, is a tyranny and oppression most crying before God.

"I have ever opposed myself to contentions and new differences, wherein (I thank the Lord) I have peace without a challenge as to the thing. Divisions and contentings have been the undoing of this church first and last, but I think more of late, and more shamefully than ever, the matter being so small (if wisely considered) about which all this noise hath been made.

"I take not upon me to justify the indulged ministers, neither will I rigidly condemn them; but if the separating from their ministry, and pressing the matter with such heat and violence, shall be found to be good service done to Christ, I have read the scriptures wrong; and the sad consequences of it are convincing enough, if people were humble and convincible. It was this contention which expelled that profitable and most edifying exercise of mutual prayer, and Christian conference, (that I may say nothing how it drove from the shepherds tents) upon which followed a sensible decay in the exercise of Godliness.

"I did devote myself to serve the Lord in the gospel of his son; I trust he hath accepted my offering. I had some willingness to do him service upon occasion, although, alas! my dress of self and other evils, cleaved fast unto me; yet he knows, that to edify his people, was the principal thing next to his glory, I aimed at.

"I have lived, and desire to die, hoping that the Lord will yet glorify his grace and gospel in the land; and that he hath not brought us under the bond of the covenant, immediately to cast us off, (though we deserve to be cast off) but that the children which are yet to be created may praise him.

"Those sad desolating strokes are so far from being a stumbling-block to me, that they are rather a confirmation. Sure the most pious people, and of the greatest numbers likewise proportionably (to the yondmost of my

sute, and the dyet deserted against them, and they cleared of the criminal process. The lords justice general, justice clerk, and commissioners of justiciary, therfor banish the said William

knowledge) is in Scotland of any place in the earth; and shall we think, that the Lord scourgeth them in the open sight of others, for their destruction! and not rather that he is beginning his judgments at the inner house and sanctuary! And others who now may laugh at our calamity shall not escape, if judgment begin at the House of God, 1 Peter iv. 17.

"I desire to hope the Lord will bring his third part through the fire, and will refine them as silver is refined, and try them as gold is tried; and God shall say of them, it is my people, and they shall say, The Lord is my God. Zech. xiii. 9.

"I own the king's authority, since he hath it not only by God's providence, but by the consent of the estates of the land, who have determined, that he is the lawful successor. And it is a question, if he be worse than those whom the prophets have been subject unto under the old testament, and those to whom the Apostle commands subjection under the New. And if the distinction betwixt the authority itself, and the exercise thereof, were rightly understood, I think there should be less poor men's blood spilt, and less reproach cast upon religion.

"I thank the Lord, I have no prejudice against any man living to the utmost of my knowledge; but do most heartily forgive every man, as I desire to be forgiven of God myself.

"I resent and acknowledge my weakness, in being a witness against several worthy persons, both present and absent, a worse deed than Saul's consenting to the death of Stephen; though, I think, I had no eye to my own safety, far less an ill will at the persons, all whom I highly honour, and of all whom I heartily intreat forgiveness.

"I desire to give a farewell to the world, and all the enjoyments thereof, and to my dear relations, dear both in the flesh, and in the Lord, in the firm hope of the eternal fruition of God, Father, Son, and Holy Ghost, whom I desire to choose for my portion, and through my Saviour Jesus Christ, whom I have designed in some weak measure to serve; to whom I commit myself as to a faithful Creator and Saviour.

THOMAS ARCHER.

"This solid and judicious testimony needs no commendation from me. I only add, that Mr. Archer was so very weak that day he was executed, that he behaved to be carried to the scaffold in a chair, and in all probability a few hours would have carried him to heaven though he had been spared. When coming out of prison, he said, I bless my God, I have now no more to do but to die.

"When upon the scaffold, he prayed first, and then read Isaiah 65, and next spoke to this

Cunninghame, John Muirhead, and William Jackson to the plantations in America, never to return without licence from his majesty, lords of privy council, or justiciary, under the paine of death, and ordaines them to be delivered to

purpose as far as could be gathered. ' There is great confluence of people here, and I hope there are many who desire to be edified by this kind of death, and I wish there were more. By reason of my weakness and sickness, you cannot expect a long discourse, nor with such utterance as this auditory requires. As to the grounds whereupon my sufferings at this time are stated, I need not enlarge, they are well known; I shall only say this, as my design was upright, so were my motives in coming to Scotland in such a time and manner: they may call it insurrection and rebellion; but the Lord knows there was no such thing. My motives were the great apprehensions I had of Popery, and my regard to the kingdom and interests of Christ here, and I wish every one were concerned with the evil and hazard of Popery.'

' Here the Bailie interrupted him; whereupon he added, ' I shall only refer you to Revelations, xiv. 9, 10, 11, and said to the Bailie, you cannot deny but Popery is hazardous; who answered, It is true, but there is no fear of it here, blessed be God. Mr. Archer said, I wish to God it be so, and then continued his discourse.

' What I have further to say is, that as Christ hath a kingdom, wherein and over which he reigneth as king, so he will suffer none to usurp that power, which is his own prerogative, and which he will not give to another, to constitute and appoint officers contrary to his institution.' When going on upon this subject, the bailie interrupted him again, saying, Sir, if you hold not off your principles and reflections, I will cause beat the drums. Mr. Archer went on. ' Well then, I hope none of you who are the people of God, need stumble at our fall, as if God would let the work rest at us, for he has other means, ways, and instruments nor us to make use of; for it may be well known to you from scripture, that the people of God have got many backsets one after another, but the Lord has waited for their extremity, which he will make his opportunity; and for this, take no-

master George Scot, of Pitlochrie,* to be transported thither upon his enacting himself, that they shall not return without licence as said is under the paine of a thousand merks the piece, and the said Mr. George Scott being personally present, he came judicially enacted, bound, and obliged to the effect, and under the paines above specified—*Sic Subscribitur.*

WM. CUNNINGHAM, JOHN MUIRHEAD.
WM. JACKSON, GEORGE SCOTT.
LINLITHGOW, I. P. D.

' tice of Micah iv. 10. I will bring them to Babylon, and there will I deliver them. So I pray and intreat you all to be concerned for your souls interest; as for my own part, I know I have no more to do as to that. Fear of death does not fright or trouble me, I bless the Lord for my lot.'

' Then he prayed again, and sang the 73d Psalm, ver. 24. to the end, and died with great cheerfulness and joy. In him the church of Scotland lost a burning and shining light, who might have been long an useful minister of Christ, one who knew him well, assures me, for solidity and learning he was qualified to be a professor of Divinity in any University. He was about thirty two years of age at his death.'

* It appears from 2 Wodrow 9, 367, that this George Scot, laird of Pitlochrie, had in the year 1677, given bond and caution under ten thousand marks to confine himself to his own lands and not to keep conventicles: that for his having contravened this the council, in the year 1679, ordained his cautioners to pay three thousand marks, and returned him to his confinement: that he was afterwards imprisoned in the Bass, and in 1684, liberated from thence upon promise to go to the plantations. He and his wife, together with many of the transports, died in this same year (1685,) at sea on the passage to New Jersey. It appears that several persons sentenced to transportation, were given to Robert Barclay, of Uri, but that Scot of Pitlochrie had the greatest number. See Wodrow, book 3, chap. 9. The punishment of transportation seems to have been illegally introduced into Scotland, in the year 1667, upon occasion of the rising at Pentland, see 4 Laing's Hist. 47, 48, edition of 1804, and Mackenzie as quoted by him, see also 1 Wodrow, 375.

342. Proceedings against several Persons of Galloway,* for Treason :
 34 CHARLES II. A. D. 1682. [Now first printed from the
 Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tentam Prætorio Burgi de Edinburgh, undecimo die mensis Decembris, 1682, per nobilem et potentem Comitum Jacobum Cornitem de Perth, Justiciarium Generalem, et honorabiles viros Robertum Dominum de Nairne, Dominos Jacobum Foulis de Collingtone, Davidem Balfour de Forret, Rogerum Hog de Harcaras et Alexandrum Seton de Pitmedden, Commissionarios Justiciariæ dicti S. D. N. Regis.

Curia legitime affirmata.

THE said day asent our sovereigne lord's criminal letters of treason, raised, used, and

* Of this proceeding and those against James Robertson, William Cochran, John Finlay and Alexander Hume, which occurred in the same year, Wodrow writes as follows :

" November 14, the counsel appoint the advocate to prosecute criminally, about thirty persons, mostly Galloway gentlemen. Accordingly in the Justiciary Records December 11. I find process king's advocate contra Galloway rebels. Criminal letters had been raised against them for being at Bothwell, where I know several, and probably most of them were not. That day the advocate produces a commission to pursue the following persons before the justice court, — Hay of Arrioland, Alexander Hunter of Colquhassen, Andrew Martin of Little Ellies, James Welsh of Little Clowdon, — M'culloch of Barholm, — Gordon second son to the deceased laird of Holm, Mr Samuel Arnot late minister at Tongland, Mr. Thomas Warner late minister at Balmaclellan, — Haliday of Mayfield, William Thomson younger of Moncraig, — Kennedy younger of Knoek-nallonie, — Macnaught younger of Overtoun, Thomas Crichtoun of Hole of Balwhassie, — Brown smith and heritor of Newtown. Several others had been ordered to be prosecuted by the council, but interest had been made for them, and these only I find in this day's process.

" Those persons being cited to this day, did not compare to answer for the crimes of rising in, and being at Bothwell-bridge, harbouring, conversing, aiding and assisting rebels: The Commissioners of Justiciary adjudge the hail persons named, to be our sovereigne lord's rebels, to be put to the horn, and their moveable goods and gear to be brought in to the king's use, they being outlaws, and fugitives from the law.

" It seems this sentence was found too soft ;

execute at the instance of sir George Mackenzie, of Rosehaugh, his majesty's Advocate for his highness interest, against — Hay, of Ariellane, Patrick Fergusone, of Dowaltoun, William M'Kie, of Drumbowie, Alexander Hunter, of Colquhassen, Andrew Martine, of Little Aries, William Welsh, of Scarr, James Welsh, of Little Clowdon, Hugh Maxwell, of Cuil, Henry M'culloch, of Barholme, — Gordon, second son to the deceased laird of Holme, Mr. Samuel Arnot, late minister at Tongland, William Martyne, younger, of Dullurge, Mr. Thomas Vernor, late minister at Balmaclellan, — Fullertoun, of Senick or Nethermilne, — M'clellan, of Anchinguill, Alexander Cairnes, nottar, at Glenlie, —

and therefore, December 18, I find many of the same persons and others are processed upon treason, that their heritable estates might fall into the managers hands. For form's sake the depositions of some witnesses are taken ; and some of them were seen in arms in different places of the country before the rising at Bothwell. The witnesses depone they saw others of them at Hamilton-muir ; yet it is but few that were seen there. The assize bring them in guilty, and the Lords of Justiciary, considering the verdict of the assize returned against the deceased Samuel Grierson of Dalgonar, Williams Grierson of Kolchqubar, James Welsh of Little Clowdon, John Brown heritor in Newtown, Henry M'culloch of Bornholm, — Haliday of Mayfield, Mr. Thomas Warner sometime minister at Balmaclellan, George Gordon second son to the laird of Holm, Alexander M'Naught younger of Overtoun, Anthony M'kie of Glencard, Mr. Samuel Arnot late minister at Tongland, James Crichtoun of Hole of Balwhassie, — Hay of Arrioland, Alexander Hunter of Colquhassen, Andrew Martin of Little Ellies, Alexander M'kie of Drumby, and — Fullarton of Sennick, whereby they were found guilty of treason and rebellion. The said lords therefore adjudge the said Alexander M'kie of Drumby, and Anthony M'kie of Glencard, prisoners, to be executed at the cross of Edinburgh, the first Wednesday of July next ; and the rest, except Grierson of Dalgonar deceased, to be executed to death, demeaned as traitors, and under the pains of treason when apprehended, at the places and times the lords shall appoint. And appoint their names, fame and memory to be extinct. However, sovereigne providence appointed otherwise, and I think none of them were executed.

" Upon the same 11th of December I find

Milne, of Kenmuir, Anthony M'Kie, of Cloncard, William M'Culloch, of Cleichreid, — Haldy, of Mayfield, William Thomson, portioner, of Muncraige, — Livingstoun, of

Quintonespie, — Kennedy, younger, of Knockallen, John M'Naught, elder, of Overtonne, Alexander M'Naught, younger thereof, — Ferguson, of Cairloch, Thomas Creich-

another process, which took more effect, before the Criminal Court, against James Robertson ordinary residenter in the parish of Stonehouse, William Cochran in Carduff, and John Finlay in the parish of Kilmarnock. I shall give some account of these three sufferers unto death from the Juxtiary Registers, and some other papers before me.

“ James Robertson was a merchant in Stonehouse in the shire of Lanerk. This serious and religious person used to travel up and down the country with a pack; and in October this year, when in the town of Kilmarnock about his business, he went in to see a prisoner there of his acquaintance, and when with him, without the least offence or provocation, he was seized and carried to the guard-house; his pack and his goods were taken from him, and never restored, and himself kept close prisoner in the guard house ten or twelve days.

“ During this time he was brought before major White, who would have him give his oath *super inquirendis*, which the prisoner absolutely refused to do, whereupon he was very barbarously used. My accounts bear that the major himself pulled him by the nose, and wrung it about, till he gushed out in blood. After this treatment he was sent to prison, and when there, whilst he and his fellow prisoners offered to worship God together, the captain of the guard getting notice, came in with great rage, and pulling the bible out of James Robertson's hand, swore bloodily he would burn it if he offered to go about that work again.

“ In a few weeks he was carried into Edinburgh under a guard. At Linlithgow he was pressed to drink the king's health, which he refusing, the soldiers treated him very rudely, and tied his head and feet together with curds, and left him in that posture upon the cold earth all night. To morrow, when on horseback, they tied his feet together very hard under the horse's belly, and in that posture carried him into Edinburgh. There he was several times examined by the Committee for public affairs, and his interrogatories being very ensnaring, and his answers pretty cautious and pointed for one of his education, I have inserted his examination as it was brought as the only evidence they had against him.

“ James Robertson being interrogate, whether or not it was lawful for these at Pentland and Bothwel, to rise in arms against the king? He answered, that it was lawful, as they rose in their own defence, and that of the gospel, and this, says he, is acknowledged by the confession of faith, whereupon the test itself is founded, which owes it lawful to resist tyranny. And being asked if the king be a tyrant. He answers, he desires that the obligations in his coronation oath, and his present practice may be considered, and his

usurpation upon the privileges of the church of God, and the prerogatives of Jesus Christ, and his being made absolutely supreme in ecclesiastical matters, from which let it be considered by persons at home, and nations abroad. As to the archbishop's death he answers, he is not a judge to cognosce upon it, and refuses to answer otherwise: And being desired to say God save the king, he answers, he is not in composure for such an action, adding, prayer ought to be gone about in de- liberation.’ When what is above is read, he confesseth it is as he said, but refuses to subscribe, and the lords sign the confession.

“ His answers are set down in the Cloud of Witnesses, as he remembered them, and contain some things, which, it seems, the clerk of the committee did not think worthy the acting down. When the president of the committee asked him, Is the king your lawful prince, yea, or not? He answered, ‘ Since you make your questions and my answers matter of life or death, it were reasonable to give me time to think upon what I say; but since I am put to it, I answer, as he is a terror to evil doers, and a praise to them that do well, he is, or he is not.’ He was interrogate, if he was at Bothwel bridge; and answered, you count that an act of rebellion which is criminal, bear witness of it, and so make it evident against me. Then he was ordered to purge himself upon oath from that, and he should be liberate. He answered, I will say no more upon that point. When I told some of you the truth upon that head, I was not believed. One of them said, Now I will try you if you be a man of parts, jesting him, there was an act of parliament standing when the Confession of Faith was made, declaring the king was supreme, which all the Presbyterians of that time owned. The prisoner returned, How could that be owned, since the confession, which declares otherwise, was owned? and desired the act might be read, for he knew it not; but it was not produced. At the close the president said, Now after all, as a test of your loyalty, will you say God save the king? He answered as above; whereupon one of them replied, Would you ask a blessing to your meat? He answered, If you were present you should know, but the case differs. Another of them said, These principles of yours will condemn you. James calmly answered, If I be absolved of God, the less matter though men condemn me.

“ These examinations at this time were preliminaries to an indictment, and generally speaking, the advocate formed his indictments against country people out of their answers, having for the most part no other proofs. Accordingly, he was indicted for denying Pentland and Bothwel to be rebellion, denying the king's authority, which, meanwhile, he did not

town, of Holl, of Ballwhassie, and — Brown, smith and heritor, of Newtoun, makeand mentione, That wher, notwithstanding he the common lawe, lawes, acts of parliament, and

do; but the great matter they took his life for, though they could have no probation for it, was a surmise they had that James Robertson was the person who affixed a protestation against the test upon the church door of Stonehouse, containing several pointed reasons against it.

“ William Cochran (the Cloud of Witnesses names him Mungo Cochran) was next indicted touch upon the same heads: His answers to the interrogatories before the committee, were all the proof they had against him, and are in short. ‘ William Cochran being interrogate, ‘ if it be lawful for subjects to rise in arms against the king, refuses to answer. Being ‘ interrogate, whether the king be lawful king, ‘ answers these are kittle questions, and will ‘ say nothing of them, being a prisoner. Being ‘ desired to say God save the king, refuses to ‘ say any thing. Can write, but refuses to ‘ sign his answers.

“ John Finlay was the last of the three, and held much on the reserve likewise. ‘ Being ‘ interrogate, whether it be lawful to rise in ‘ arms against the king, refuses to answer, ‘ these being kittle questions, and he a poor ‘ prisoner. Refuses to say God save the king, ‘ but says he loves the king as well as any ‘ person. Confesseth he was present at Drum- ‘ clog, but without arms. Being asked, if he ‘ conversed with Mr. Donald Cargil within ‘ these two years, refuses to answer otherwise, ‘ than that a man is neither by the law of God ‘ nor man, bound to have a hand in shedding ‘ his own blood. Declares he cannot write.’

“ All the three own judicially before the Criminal court, that these were the answers they gave before the committee of council. And two soldiers are adduced as witnesses against them, who depon that the two last took their arms from them, and left them bound in the fields. The assize bring them all in guilty of treason, though the reader may see their answers are mostly negative, and the court sentence them to be hanged at the Grass-market, on Friday next, being the 15th of December.

“ This harsh and iniquitous sentence was accordingly executed. When James Robertson offered to speak upon the scaffold, he was interrupted by the ruffling of the drums, and when complaining of this, Johnstoun the town major beat him with his cane, at the foot of the ladder, in a most barbarous manner. This abominable rudeness to a dying man, and the patience and cheerfulness of this good man in suffering all this, I know was the occasion of a deep conviction to some who were present, of the evil of persecution and prelacy; and there are severals yet alive, who can date their first serious impressions, of religion, from their seeing some of the persecuted party suffer, as they themselves have informed me.

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constant practise of this kingdome, the rying of his majestic's subjects, or any number of them, the joyning and assembling together in armes without and contraire to his majestic's

“ John Finlay was a dear comrade of James Robertson's, and, if I mistake not, his visiting him was the occasion of his being taken; and William Cochran lived in the same neighbourhood, in the parish of Evandale. This last says, in his paper he left behind him printed in the Cloud Witnesses, that the main article upon which he received his indictment, was for refusing to say God save the king. Somewhat hath been said of this above, and it may not be out of the road to drop a word further here upon it, since this was put to all these three.

“ This and the like seeming condescensions are mightily insisted upon, in some of the pamphlets which defend the reign I am now describing, and it is said with a vast deal of triumph, that those persons might have had their lives upon the easy and fair condition of praying for the king, and this is mightily magnified as an instance of the lenity of this period. This plain honest countryman gives a very distinct answer to this. ‘ When I was ‘ bid say God save the king, I could not comply with this, when they had set him up as ‘ an idol in the Mediator's room, without being ‘ guilty of saying Amen to all they had done ‘ against the church and people of God, the ‘ true subjects of the kingdom, and the fundamental laws thereof; neither could I bid ‘ him God speed, lest I should be partaker of ‘ his evil deeds: yea, adds he, they said before our face he was king over all persons, ‘ and in all causes, which is a putting him in ‘ God's room; they sentenced me because I ‘ (they said) disowned authority, which was a ‘ diving into the thoughts of my heart.’

“ These were the sentiments of the poor serious country people who suffered, and when they had this view, that praying for the king was really an approbation of all now done, it will not appear so narrow a point upon which they stated their sufferings, as at the first it may seem, and the prelatists represent it; especially, considering the poor country people's ignorance and education. And these blood-thirsty men were so far from endeavouring to instruct and convince the pannels, that they essayed to ensnare them; and proposed their queries so, as the poor men could scarce miss concluding, that their saying God save the king was an approbation of what was done in his name. They required this as a testimony of their loyalty, as we saw in James Robertson's case; so this piece of reproach may very justly be turned over upon the managers, who had no matter of fact, no act of rebellion or treason to charge many of them with, but endeavoured to ensnare them with captious and double-faced questions, and then took away their lives upon the poor people's being unwilling to approve the wickedness of this time.

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command, warrant, and authority, and the abating, assisting, receiving, intercomoning, or keeping correspondence with such rebels, and the furnishing them with meat, drink, horse,

powder, ball, or other munition bellicall, are most defalcable, horrid, haynous, and abominable crimes of rebellion, treason and lese majesty, and are punishable with forfeiture of

“ I come now to end this year with one of the most flaming instances of the rigour of this period, in the execution of that excellent and worthy gentleman Alexander Hume of Hume toward the close of this year. This good man had been apprehended, and in his taking sore wounded, by a brother of the earl of Hume, and was brought in prisoner to Edinburgh. The ground of his sentence was only converse with some of the party who took the castle of Hawick, in the year 1679, and every body owned that the probation of that small crime was not clear, and the verdict of the assize was evidently different from the oaths of the witnesses. Yea, he was at his first trial assoiled, and the diet plainly deserted, his innocence appeared so plain to the criminal court: But afterwards a new process was begun, when these people who thirsted after his blood, and resolved to have his estate, had got some more pretexts against him. I shall give an abstract of his process from the registers.

“ November 15. Alexander Hume portioner of Hume, prisoner, is indicted before the justice court. Because indictments are so numerous now, and it would take up much room to insert the whole of them, and they all run much in the same strain, excepting some few particulars in the application to particular persons, I do not insert them, but observe here, that they generally begin with a large enumeration of the laws they alledged were broken, as act 5, sess. 1 parl. 1, Jam. 1, act 129, parl. 6, Jam. 6, act 10, parl. 10, Jam. 6, act 4, parl. 16, Jam. 6, act 2, Sess. 2, parl. 1, Char. 2. And the indictment goes on with, ‘ Nevertheless it is of verity, that the pannel bath committed, and is guilty of the same crimes, in so far as John Balfour of Kinloch, the deceased David Hackstoun of Rathillet, and others, having on the 3rd day of May, 1679, murdered his grace the late archbishop of St. Andrews, they, to escape justice, and involve others, fled to the western shires, and there joined in a desperate and avowed rebellion.’ And then follows an enumeration of the different steps, Drumclog, the attack upon Glasgow, Bothwel-bridge, according to the different pannels. And though, as in this case before us, and many others, the pannel was no way concerned in what was done either in Fife or the west country, yet still the narrative is much the same, so I only consider what is peculiar to the prisoner, and the depositions of witnesses.

“ Mr. Hume is particularly indicted, ‘ Of rising in rebellion against the king’s majesty, within the shires of Roxburgh, Berwick, Selkirk, and Peebles, in marching up and down in arms, rendezvousing with the rebels in Bewly-edge, resisting and fighting a party of his Majesty’s forces, under the command of the master of Ross, besieging the castle of Ha-

wick, robbing the arms therein, and marching towards Bothwel-bridge.’ The Lords for several causes desert the diet *simpliciter*. In short, the process was perfectly invidious, no probation appeared, and had there been any justness and righteousness in the present procedure, the gentleman ought to have been liberated: But by no means could he obtain that without taking the test, which in conscience he could not do; and so he continued in prison till December 20, when new occasions are sought against him.

“ December 20. He is again accused and indicted by the advocate, ‘ That in June 1679, he rose in rebellion, as above; that he came to the house of sir Henry M’Donald of Muckerstoun, besieged it, and called for horse and arms; and being bolted out, came armed to Kelso, Selkirk, and Hawick, and searched and sought for horses and armour, and carried away militia colours, drums, &c. and wounded Mr. John Purden schoolmaster at Hawick, and did resist his majesty’s forces at Bewly-bridge, (or Boig) under the command of the master of Ross, and marched forward to Bothwel-bridge.’ None of these matters of fact are at all proven.

“ Sir Patrick Hume, advocate for the defender, offers presently to prove, that he came only accidentally to Muckerstoun’s house, (being only in his way to his own) having nobody with him but one servant; and when challenged by Muckerstoun where he was going, told him he was riding home, and accordingly he and his servant went home most peaceably. The advocate opposes the ditty, and the Lords repel the defence, and remit the libel to probation, without allowing this exculpation, though most reasonable.

“ The witnesses are called, none of them are *ad idem*, and all of them most lame. The matter, as far as I can gather, seems to have been this: There had been a sermon at Bewly-bridge, and Lilius Leif-nuir, where Mr. Hume had been with his sword and pistols, as multitudes had likewise been; and as he was returning from one of them, he, with his servant, called on Munday at Muckerstoun’s house, and offered to buy his bay horse. However, the assize, December 21, ‘ bring him in guilty of commanding a party of the rebels horse, in besieging the castle of Hawick, though, as far as I could notice in the depositions of the witnesses, there is no probation of this. Whereupon he is sentenced to be hanged at the market cross of Edinburgh, upon Friday December 29, betwixt two and four o’clock after noon.’

“ Mr. Hume earnestly begged so much time as his case might be laid before his majesty, but this was peremptorily refused, and the day hastened in order to prevent it. By a written

lyfe, lands, heretages and escheat of their moveables; and be the third act of the first parliament of king James the first, and thretty-sevynth act of his second parliament, and four-

account before me, I find, that interest being made at court, under the prospect of what Mr. Hume's friends saw was designed against him, for a remission, it actually came down to Edinburgh some days before his execution, and was kept up by the earl of Perth; and that on the day of his execution, his spouse Isabel Hume, came in the most moving manner to the lady Perth, begging she might interpose for her husband's life, urging she had five small children. The lady's answer was so inhuman, that I shall not put it in writing, though I have these accounts under the hand of a reverend minister yet alive, who was well acquaint with this gentleman, and his family.

"I cannot but remark here, that the managers at this time were so full of rage, that not only, as in the former instances, by their ensnaring examinations and questions, they brought poor ignorant country people to do before them, what they made a denying of the king's authority; but even when the king's authority was owned, and no act of rebellion proven, merely upon converse with rebels, and presence at a field-meeting, and that alledged only and not proven, they shed the blood of the Lord's saints.

"His last words upon the scaffold, are so full of the primitive spirit of the first Christians, in their martyrdoms, so agreeable to our own first three worthies, and those after Pentland, and contain so much of the temper and sense of the body of presbyterians in Scotland, that I could not but insert them here.

The LAST WORDS of ALEXANDER HUME, Portioner of Hume, when he suffered at the Cross of Edinburgh, upon the 29th of December, 1682.

Men and Brethren,

There is a great confluence of people here at this time, and I would fain hope, there are some amongst you that desire to be edified by the last words of a dying man, which shall be but few, because I do not think or judge myself so qualified, to enlarge upon any thing I have to say, as need requires, and some might expect; and moreover, the time allowed is but short. And now I am come here to lay down my life and I bless the Lord that I am not to lay it down as an evil doer, and albeit I be a sinful man, as others are by nature, yet, through his grace, I hope I am planted in Jesus Christ, in whom I have redemption, and remission of sins, through his blood, and am separated from the generation of unbelievers: Free love only hath made the difference, and happily hath ordered it so, that I have been born within the church, where the blessed device of the Gospel hath been discovered, and the means

teinth act of the sext parliament, and forty-nynth act twelt parliament of king James the Second, and hundred and forty-fourth act of the twelt parliament of king James the sixt: it

of salvation made effectual for converting and building me up in grace, and begetting in me the hope of that glory and redemption which I am now going to possess.

"The ground of my sentence is the alledged converse I had with that party that took in the castle of Hawick, in the year 1679, the probation whereof was not clear, and from which the verdict of the assyse did materially differ; as is evident from the witnesses subscribed depositions, and the recorded verdict of the said assise, the equity and justice whereof I leave to God and all unbiassed persons to judge.

"I need not be ashamed to live, (as through his grace I am not ashamed to die) and here I dare say, it has been my study to keep a conscience void of offence towards God, and also towards man. The world represents me as seditious and disloyal, but God is my witness, and my own conscience, of my innocency in this matter; I am loyal, and did ever judge obedience unto lawful authority, my duty, and the duty of all Christians. I was never against the king's just power and greatness, and this I commend to all that hear me this day; but all a Christian doth must be of faith, for what clasheth with the command of God cannot be our duty, and I wish the lord may help the king to do his duty to the people, and the people to do their duty to the king.

"It doth minister no small peace and joy to me this day, that the Lord hath set his love upon me, one of Adam's unworthy posterity, and has given me the blest experience of his grace working in my heart, whereby he hath inclined me to look towards himself, and make choice of him for my soul's everlasting portion. It is the Lord Jesus, and he alone, who is my rock, and the strength and stay of my soul: all my own righteousness I do utterly renounce, as a garment too short for me, yea, as filthy rags. I die a Protestant and Presbyterian this day adhering unto the holy scriptures, and work of reformation from Popery and prelacy, according to the engagements, personal or national, lying on me; and I do leave my testimony against all steps of defection therefrom, either in doctrine, worship, or government, and all the encroachments made upon the kingdom and privileges of Jesus Christ, and whatever is against the life and power of godliness.

"It was the glory and happiness of our land, that the Lord Jesus Christ made choice of us, to dwell in the midst of us by his gospel, and the ordinances thereof, the precious symbols of his presence, by which we had the advantage of many, if not of all the churches about us. But ah and alas! how far are we degenerate, and what contempt of this precious gospel are we become guilty of? We have not received the love of God in our hearts nor improved him

is statut and ordained, that no man openly nor notourly rebell against the king's person or authority, or make warr against the king's liedges, or willfullie receipt, mantain, or doe favour to open and manifest rebels, or supply or intercomon with them, or give them

any relieff or comfort, or any help, redd or councill, under the paine of treason; lykeas be the fyft act of the first session of his majestie's first parliament, it is declared, that it shall be hye treason to the subjects of this kingdome, or any number of them, move or

for growth and progress in holiness; in place whereof, all manner of impiety and naughtiness does abound, which I fear shall provoke the holy and jealous God, to send many heavy judgments on the whole land, whereby it may be laid utterly desolate, without an inhabitant. It is to be feared, that these things may turn this church into a den of idolatry, and provoke the beloved to put a bill of final divorce into our harlot mother's hand. O! what cause is there to fear, that this people, partly through their own ignorance, and partly through the unfaithfulness and delusion of their pretended teachers, shall return again in multitudes, into the darkness and superstition of Popery, from which the Lord in his mercy delivered our fathers. O! that the Lord would give repentance to this generation that the evil day might be prevented. Be exhorted to turn from your sins, and make your acquaintance and peace with God in time, which is not so easy a work as many apprehend; and who wunta his own challenge for negligence in this matter? People love to defer this great concernment until it be too late, unhappily preferring the pleasures of sin to the favour of God, and all the expectation of the saints, within or beyond time. Was there ever a generation wherein so many sad prognostics of divine wrath, upon its near approach, did so much abound amongst men of all ranks and capacities, of whom far other things were expected, and I am sure, solemnly thereunto obliged, no less than these who have suffered at their hands, upon that account? which cannot but highly aggravate sin, heighten and hasten judgment beyond ordinary, which I pray the Lord may prevent. He knows, I desire not the evil day, I would exhort the Lord's people to study much nearness to God, and oneness among themselves that being of one mind and one spirit, they may stand fast for the faith of the gospel, which is in such palpable hazard this day, as all who have but half an eye may see. I cannot but be sensible of the sharpness and severity of my sentence, which, after strict enquiry, will be found to be as hard measure as any have met with before me; which seems to flow from some other thing than what law and justice could allow. I wish I may be the last that may be thus dealt with; I question not but if competent time had been given, that application might have been made unto his majesty, his clemency would not have been wanting in this case. Nevertheless, I bless the Lord, I find it in my heart to forgive all men, even as I desire to be forgiven, and obtain mercy in that day; and if there be any at whose door my blood may more directly lie than others, I pray the Lord forgive them; and now I wish it may be well with the land when I am gone. My

conscience bears me witness, I ever studied the good of my country. I hope I shall be no loser, that I have gone so young a man off the stage of this world, seeing I am to make so blest an exchange, as to receive eternal life, the crown of glory, the near and immediate fruition of the blessed Father, Son, and Holy Ghost, in place of a short, frail, and miserable life here below. I bless his name he made me willing to take share with his persecuted people, for I hope I shall also share with them in their consolations, when he shall wipe all tears from their eyes, and they shall suffer no more, but reign with him in his kingdom. I am shortly to be clothed upon with my house from above, and that city that hath foundations; I shall sin no more. O desirable condution! when, beyond all hazard of offending God any more, I shall be capable both of serving God, and enjoying him more: I shall wander and toil no more, having reached that harbour of eternal rest. I now contentedly take my leave of the world. Farewell all enjoyments, earthly pleasures and contentments: farewell friends and relations, in whom I had much satisfaction: farewell my dear wife and children, dear indeed unto me, though not so dear as Christ, for whom I now willingly suffer the loss of all things, and yet am no loser; I leave them on the tender mercies of Christ. Now welcome blessed Father, Son, and Holy Ghost; welcome innumerable company of angels, and spirits of just men made perfect: welcome celestial city; welcome endless joy; and now, O Father, into thy hand I commend my spirit, Lord Jesus receive my soul.

ALEXANDER HUME."

"I am of opinion the collectors of the Cloud of Witnesses, have done their collection no service, by leaving out this testimony, if, as I doubt not, it hath come to their hands, and shewen themselves not a little partial in leaving out so valuable a paper, unless they are of the same sentiments with reason to Mr. Hume, which they own themselves to have as to the earl of Argyll, to whom they allow the honour of dying a martyr for the protestant religion, but not for the presbyterian establishment of it.

"Mr. Hume, when the rope was about his neck, and immediately before his being turned over, concluded his life with singing the last verse of the 17th Psalm. His estate was forfeited, his wife and five children exposed to very great hardships till the happy Revolution, but the Lord carried them through; and since the Revolution, his eldest son enjoys, by divine retribution, double more estate than was forfeited, while these who enjoyed the forfeiture, were not able to repay their vicious intrusions."

less, upon any ground or pretext whatsoever, to ryse or continue in armes, to make peace or warr, or make any treaties or leagues with forraigne princes or estates, or amongst themselves, without his majestie's speciall authority and approbation, first interponed thereto, and all his majestie's subjects are discharged upon any pretext whatsoever to attempt any of these things, under the paine of treason; and be the eleventh act of the first session of his majestie's second parliament, it is statut and ordained, That in tyme coming, in all cases of treasonable ryseing in armes and open and manifest rebellion against his majestie, his majestie's advocat for the time may, and ought, to insist against and prosecute such persons as he shall be ordored by his majestie or his privy councill to persue; and if they be cited and doe not appeir, our justices, notwithstanding of their absence, may and ought to proceed and consider, and give their interloquitor upon the lybell, and if it be found relevant to admitt the same to the knowledge of an assyse, and upon the verdict of the inquisit, finding the same to be proven, the doom and sentence of forfaiture ought to proceed, and be given and pronounced in the same manner as if the persons accused had compeired and were present. Nevertheless, it is of veritie, That John Balfour, of Kinloch, the decest David Hackstoune, of Rathillet, and others, having, upon the 31 day of May, 1679, killed and murdered his grace James, late archbishop of St. Andrews, they to escape justice and involve others in their guilt, fled into the western shyres, and there rose in a desperat and avowed rebellion, with many others, their accomplices and associates, and upon the 29th day of the said moneth of May, came in a warlike and military pouster to the burgh of Rutherglen, and thereafter proclaiming of treasonable acts and declarations at the marcat croce of the same, they burnt his majestie's lawes and acts of parliament, and drowned out benefyres, set on in commemoration of his majestie's happy restauration, and upon the sabbath day thereafter assaulted a partie of his majestie's forces, at Drumclog, and killed and murdered severalls of them: Lykeas the — Hay, of Aricallane, and the other persons above-complained upon, and their rebellious associates, to the number of seven or eight hundreth men, in armes, and did lykewayes ryse in open and manifest rebellion against his majesty and his authority within the shyres of Wigtowne and Dumfries and Stewartrie of Kirkcudbright, marched up and down the country, and to the burghs of Wigtoun, Kircudbright, Dumfries, Senquhar, and others in hostile and military, did keep guards, displayed colours, beat drummes, exercised, drew up and marched in forme of an army, did quarter upon and oppress his majestie's loyall subjects and people, robbed and rifled their goods, houses, horses, and armour, and marched forward to Hamiltonne more, wher they joyned in open rebellion with the rebels there, incamped themselves together,

randevouzed, exercised and formed themselves in ane army, naming captaines, commanders and other officers, under Robert Hamiltonne brother to the laird of Prestoun, and the bloodie murderers of the late arch-bishop of St. Andrews; did issue furth treasonable declarations and proclamations, robbed and pillaged the country and committed all acts of open hostility, violence and rebellion, and continued therein till the 22d day of June the said year 1679 that they were defate by his majestie's forces at Bothwell-bridge: Lykeas the persons above complained upon did harbour receipt intercomon and keep correspondence with, and did aid abait and assist the forsaid open and manifest rebels and particularie Mr. John Welsh, William and James Welshes brothers to Scarr and others guilty of the late rebellion and of the rebellion in anno 1666, and did furnish the rebels with meat drink, powder, ball, horse, and armour, particularie the said Alexander Cairnes elder did furnish and outreik Alexander Cairnes his sone and — Wilsons sone to — Wilson Millar at Glenlie with horse and armour to the said Rebellion 1679, and has harboured and receipt them often since. Lykeas he did instigat advyse and intyse severall persons to god out to the said rebellion particularie Robert Grierson of Millmark. Lykeas the said William Welsh of Scarr did not only furnish and outreik William and James Welshes his brothers with horse armour and other necessaries to the forsaid Rebellion but has also receipt and harboured them and others guilty thereof. many tymes since throwe doing wherof or ano or other of the above mentioned, the said — Hay of agriculture and the other persons above complained upon are guilty of the crimes of treason rebellion and others above specificit and are actors or art and part thereof. Which being found be ane assyse they ought to be punished with forfaiture of lyfe land and goodes, and other paines and punishments above specificit to the terror of others to committ the lyke herefter.

The said day anent our soveraigne lordes criminal letters of treason raised and executis at the instance of Sir George M'Kenzie of Rosshaught his majestie's advocat for his highnes interest against the decest Samuel Grierson of Dalgonar; making mentione that wher notwithstanding be the common lawe, lawes of nations, lawes and acts of parliament of this kingdome and constant practise thereof, the ryseing of his majestie's subjects or any number of them, the joyning and assembling together in armes without and contrair to his majestie's command warrant and authority, and the abaiting assisting receping intercomonning or keeping correspondence with such rebels, and supplying of them be levies of men, horse, money, armes, and furnishing them with meat drink powder ball and other munition bellicall, are most detestable, horrid, haynous, and abominable crimes of rebellion, treason, and less majesty; and by diverse acts of parliament are punishable with forfaiture of life lands here-

tages and escheat of their moveables; and be the fyft act of the first session of his majesties first parliament, It is declared, that it shall be hye treason to the subjects of this kingdome or any number of them more or less upon any ground or pretext whatsoever to rise or continue in armes, to make peace or warr, or to make any treaties, or legues with forreigne princes or estates or amongst themselves without his majesties speciall authority and approbation first interposed therto. And all his majesties subjects are discharged upon any pretext whatsoever to attempt any of these things under the paine of treason. And be the elevinth act of the first session of his majesties second parliament, it is statute and ordained that in tyme coming in all cases of treasonable ryseing in armes and open and manifest rebellion against his majesty, his majesties advocat for the tyme may and ought to insist against, prosecute, and persewe such persons as he shall be ordered be his majesty, or his majesties privy council, and if they be cited and doe not appeir, his majesties justices notwithstanding of their absence, may and ought to proceed and consider and give their interloquitor upon the lybell and upon the verdict of the inqueist, finding the same to be proven, the doom and sentence of forfaiture ought to proceed and be given, and pronounced in the same manner as if the persons accused had coupeired and wer present. Nevertheless it is of verity that the said deceast Samuel Grierson of Dalgonar, shaiken of all fear of God, conscience and sense of duty, allegiance, and loyalty to his majesty his native prince and sovereigne, has presumed to commit, and is guilty of the said crymes. In sua far as John Balfour of Kinloch; the deceast David Hackston of Rathillet and others having in a most cruell barbarous and sacrilegious manner killed and murdered his grace James late archbishop of St. Andrews upon the third of May 1679, they to escape justice fled into the western shyres and there joyned in a desperat and avowed rebellion against his majesty their native prince and sovereigne, under the command of Robert Hamiltoun, brother to the laird of Prestoun, and upon the twenty nyth of the said moneth they came to the marcat croce of his majesties burgh of Rutherglen, and ther burnt his majesties lawes and acts of parliament, and drowned out bonefyres set on in commemoration of his majesties happy restoration, and thereafter killed and wounded severalls of his majesties souldiers at Drumclog, and being assembled to the number of seven or eight thousand, they did assault the city of Glasgow, and his majesties souldiers and loyal subjects therein, marched up and down the countrey in warlick pouster, robbing quartering upon and pillaging his majesties good leidges. And the said deceast Samuel Grierson and his accomplices and associats to the number of fyve or six hundreth men in armes did lykewayes in June 1679 rise in open and manifest rebellion against his majesty within the shyres of Wig-toune, Dumfries, Aire and Stewartrie of Kirk-

culbright, did rendivouz at severall places particularie at Keirmosse, appoynted officers and commanders, and marched in warlike and military pouster with drumes, colours and trumpet up and down the saids shyres, and to the royall burghes of Drumfries and Saughar, and other burghs within the samen, where they took free quarters, keepd guards, exercised, came in and out in warlike pouster with trumpet sound, beating drums and displaying of colours, and marched forward and joyned with the forsaide rebellious army at Bothwellbridge; robbed and pillaged the countrey all alongst as they came, and being joyned with the said rebellious army the said deceast Samuel Grierson of Dalgonar continued in open rebellion committing all acts of hostility with them, till they were defate at Bothwellbridge upon the 22d day of June 1679 years, by doing wherof or one or other of the saids deeds the said deceast Samuel Grierson of Dalgonar has committed and incurred the crymes and pains of treason, which being found be one assyse he ought to be punished with forfaiture lands and goods to the terror of others to commit the lyke herefter.

The said day anent our sovereigne lords criminal letters of treason, raised and execute at the instance of sir George M'kenzie of Rosehaugh, his majesties Advocat for his highnes interest, against William Grierson, of Lochwhurrie, making mention that wher notwithstanding of the common law, lawes, acts of parliament, and constant practise of his majesties kingdome, the riseing of his majesties subjects or any number of them by joyning and assembling together in armes without and contrary to his majesties command, warrant, and authority, and the abaiting, assisting, receiving, intercommoning or keeping correspondence with such rebells, are most detestable, horrid, haynous, and abominable crymes of rebellion, treason, and lese majesty, and are punishable with forfaiture of life, lands, heritages, and escheat of the moveables; and be the third act first parliament, and thretty seventh act of the second parliament. King James 1. and 24 act 6 parliament, and 9 act 12 parliament, king James 2d, and 144 act par. 12 king James 6. it is statut and ordained, that no man openly nor noutourlie rebell against the king's persone or authoritie, or make warr against the king's liedges, or wilfully receipt, mantain, or doe favour to open or manifest rebells, or receipt, supply, or intercommon with them, or give them any relieff or comfort, or any help redd or council under the paine of treason, lykeas by the 5th act first session of his majesties first parliament, it is declared, that it shall be high treason to the subjects of this kingdome, or any number of them more or less upon any ground or pretext whatsoever, to ryse or continue in armes, to make peace or warr, or to make any treaties or legues with forraigne princes or estates, or amongst themselves without his majesties speciall authoritie and approbation first interposed therto, and all his majesties subjects are

discharged upon any pretext whatsoever, to attempt any of these things under the paine of treason, and be the 2 act 1 session of his majesties 2d par. it is statut and ordained, that in tyme coming in all cases of treasonable rising in armes, and open and manifest rebellion against his majesty, his majesties Advocate for the tyme may and ought to insist against, and prosecute such persons as he shall be ordered be his majesty or his privy council to persew. And if they be cited and doe not appeir, his majesties justices, notwithstanding of their absence, may and ought to proceed to consider and give their interloquitor upon the lybell, if it be found relevant to admitt the same to the knowledge of ane assyse, and upon the verdict of the inquest, finding the same to be proven, the doom and sentence of forfaiture, ought to proceed and be given and pronounced in the same manner, as if the persons accused had compeired and were present. Nevertheless it is of verity that John Balfour, of Kinloch, the deceast David Hackston, of Rathillet, and others having upon the 3d of May, 1679, killed and murdered his grace James the late archbishop of St. Andrews, and for their securitie having fled to the western shyres, and then risen in open, avowed and desperat rebellion against his majesty and his authoritie, under the command of Robert Hamiltoun, brother to the laird of Prestoun, they came in warelike pouster to his majesties burgh of Rutherglen upon the 29th day of the said moneth of May 1679, and thereafter publishing treasonable declarations and proclamations, they burnt his majesties lawes and acts of parliament, at the Marcat Croce of the samen, and drowned out bonefires sett on in commemoration of his majesty's happy restauration, and upon sabboth day thereafter they did assault, feight, and resist a partie of his majesty's forces at Drumclog, and killed and murdered severalls of them, and thereafter marched up and down the countrey in open and warlike manner, quartering upon and oppressing his majesties good subjects, and robbing and riffling their goods and horses, and committing other acts of hostility and rebellion. Tthe said William Grierson, of Lochwhurre, and his accomplices within the shyres of Dumfries, Wigtounne and stewartrie of Kirckudbright, to the number of sevine or eight hundredth did in the moneth of June in the said year 1679, lykewayes rise and joyne together in armes in avowed rebellion against his majesty and his authority, marched up and down the said shyres and stewartrie, and to the burghs and villages of the samen, particularly to Dumfries, Wintoun, Sanquhar and Kirckudbright in hostile and military pouster, with trumpet, drumes, and colours displayed, did quarter upon and oppress his majesties loyal liedges, and people within the same did robb and riffle their goods, houses, horses and armour, and marched forward in military posture and joyned in rebellion with the forsaid rebells at Hamiltoun-muir, when they encamped for severall dayes together, randivouzed, exercised, did form themselves in

ane army, did appoynt officers and commanders over them under the said Robert Hamiltoun. And the saids bloodie murderers did issue furth treasonable declarations and proclamations, did riffle and pillage the countrey, and committed all acts of hostility and open rebellion, and continued therein till the 22d day of the said moneth of June, that they wer dissipate and defate by his majesties forces at Bothwelbridge. Throwe doeing wherof or ane or other of the saids deeds, the said William Grierson has committed and incurred the crymes and paines of hie treason and rebellion, and of the whilk crymes he is actor art and part. Which being found be ane assyse he ought to be punished with forfaiture of life, land, and goods, to the terror of others to committ the like hereafter.

His majesties Advocate produced the forsaid criminall letters and dittayes dewlie execute against the rebells therein contained, compeired William Glover herauld, and the witnesses insert in his executions, and made faith upon the truth and veritie of the samen in all poynts. Compeired lykewayes James Dumbar, herauld, and Donald Cameron, messenger, in Edinburgh, and John Duncan, wrytter there, who were witnesses to his executing the letters against William Grierson, of Lochquhurrie, at the marcat croce of Edinburgh, peir and shore of Leith, and the said William Glover and his witnesses to the executing of the letters against him, at his dwelling house and marcat croce, and made faith upon the truth and veritie of the samen.

His majesties Advocate produced a warrand of privy council, ordering him to persewe a process of forfaiture against the hail persons above namd, whereof the tenor followes:

Edinburgh the 13th day of November 1682. The lords of his majesties privy council doe heirby give order and warrand to his majesties advocat to persew, and insist in a criminal process before the justices against the persons under written, for their accession to the late rebellion, and the other crymes lybelled, viz. William Welsh of Scarr, James Welsh of Litteclowden, William M'Clellan Auchinguil, John Brown of Newtown, Henry M'ulloch of Barholme, William M'ulloch of Cleichreid, Hugh Maxwell of Couill — Halyday of Mayfield, Alexander Livingstone of Quintonespie, — Martyne younger of Dullurgie, Master Thomas Verner late minister at Balmaclellan, George Gordoun second son to the deceist laird of Holme, John M'Knaught elder of Overtoun, Alexander M'Knaught younger thereof, — Fergusone of Garroch, Alexander Cairnes at Glenliemilne, Anthony M'Kie of Clowcaird, Mr. Samuel Arnot late minister at Tongerland, — Kennedy of Knoeknalleine, Thomas Crighton of Holl of Ballwhassie, — Hay of Areoland, Patrick Fergusone younger of Dowaltoun, Alexander Hunter of Culwhassen, Andrew Martyne of Little Arries, — M'Kie of Drumbowie, William Grierson of Lochwarre, William Griersons brother and nearest

line to the deceist Samuel Griersons of Dalgonar; as also doe give order and warrant to his majesties advocat to insist and persewe in a criminall process before the justices, against James Robertsons, William Cochran, John Findlay, and Alexander Millar, for their accession to the rebellion and for being accessory to the killing of one of the king's sojers, and the other crymes libelled.

Extracted by me,
Sic Subscritur. P. MENZIES, Cl. S. Con.

The said day — Hay of Arrioland, Alexander Hunter of Colobasson, Andrew Martyne of Little Aries, James Welsh of Little Cloude, — Mc-Culloch of Barholme, — Gordoun second son to the deceast Laird of Holme, Master Samuel Arnot late minister at Tongland, Mr. Thomas Vernour late minister at Balmacellan, — Halyday of Mayfield, William Thomson younger of Mounraig, — Kennedy younger of Knochnallenie, Mc-Naught younger of Overtoun, Thomas Crichtone of Holl of Ballwhassie, — Brown, smith and heretor of Newtoun, being oftymes called to have compeired before the saids lords commissioners of Justiciary this day and place, in the hour of cause, to have underliven the law for their ryseing and joyning in armes with seven or eight hunder of his aocomplices within the shyres of Wigtoun, Dumfries and Stewartrie of Kirkcudbright, Sanquhar and others, in hostile and military posture, keeping guards in June 1679, marching up and down the country and to the burghs of Wigtoun, Dumfries, Kirkcudbright, Sanquhar, and others in hostile and military posture, keeping guards, displaying colours, beating drums, exercising, drawing up, marching in forme of ane army, quartering upon and oppressing his majesties loyal subjects and people, robbing and rifling their goods, houses, horses, and armour, and marching forward and joying in open rebellion with the rebells at Hornalton Mure, and continuing with them in the samen committing all acts of hostility, rebellion and hys treason until they were defate at Bothwellbridge upon the 22d June, the said year 1679, and for harbouring, receipting, intercommuning and keeping correspondences with, aiding, abating and assisting the saids oppen and manifest rebells and particularly Mr. John Welsh, William and James Welshes, brothers to Starr and others guilty of the late rebellion and of the rebellion in anno 1666, in manner at length mentioned in the criminall letters raised at his majesties advocat's instance against them, thereanent as they who were lawfullie cited be William Glover herald to have found sufficient caution acted in the books of adjournall for their appearance this day and place, to the effect above specified, lawfull tyme of day bidden, and they nor none of them compeired. The Lords Justice Generall and Commissioners of Justiciary, therefore be the mouth of John Baizie macer of court, decerned and adjudged, the haill forenamed persons and ilk one of them, to be denounced our

sovereign lords rebells and to be put to the horne, and all their moveables, goods, and gear, to be escheat at and inbrought to our sovereigne lords use, for their being outlawes and fugitives frae the lawes, for the crymes above specifit, which was pronounced for doom.

Intran,

Patrick Ferguson, younger of Dowelton
Alexander M'Kie, of Drumbowie
William Martyne, younger of Dullurge
James Fergusone, of Cairloch
Alexander Cairnes, at Glentiemilne
Hugh Maxwell, of Little Cuill
William M'Culloch, of Clsieheid, prisoner
John Mc-Naught, ekker of Overtoun

Indyted and accused for the crymes of treason and rebellion mentioned in their dittay above written.

Persewer, Sir George M'Kenzie of Rosshaugh, our sovereigne lords advocat.

Procurators in defance.—Sir Patrick Hume, Sir David Thiores, Mr. Walter Pringle, Mr. George Dickson, Mr. Colin M'Kenzie, Mr. Robert Stewart, Mr. John Fergusone.

Sir David Thiores, for Patrick younger Fergusone of Dowalton, alleadges he cannot be remitted to the knowledge of an inquisit, because he was no heretor the tyme of the rebellion, and took the bond appoynted be the indemnity, and was thereupon assoylized at the circuit of Ains.

His Majesties Advocat answers that the pannall Patrick Fergusone, younger of Dowalton, most renunce any land he has in favours of his majesty, else the defence is not relevant. It being constantly found be the commissioners of justiciary, That the king is obliged to prove no man one heretor.

1. It is offered to be proven that the pannall entered into a contract of marriage before the rebellion, by which the fayr was obliged to dispone to him his estate, so that by the said contract, he had ane action against his father, to which action the king would have right by the forffaulture, if the contract had not been fulfilled to him 'namqui habet actionem ad rem et rem ipsam habere videtur,' and he is in lawe an heretor, who has a right to heretage the' that right be not completed, and the sone being thereafter putt in file by his father, or at least marriage having followed, the sones right was thereby established and must be drawn back to the date of the contract, and as the sone might have obliged the father to fulfill, so might the king as having right to the forffaulture.

2. The sone had a right of appearance in his person, and consequently he might forfault, so that if the father does not dispone upon the estate for ane onerous cause in his own lyff tyme the king might succeed thereto.

Sir David Thiores replies, 1. That he is content to renounce all lands and heretages wherein he stood inest the tyax of the re-

bellion or any tyme after the rebellion before his taking and subscribing of the bond.

2. It is denied that a personall obliedgement, doeth make a man ane heretor, seing ane heritor be our lawe is not he 'qui habet jus ad rem,' and albeit the pannall had had a personall obliedgement from his father as to any part of his estate, and which is denyed, yet notwithstanding thereof, the father might have granted a second disposition to a third party, and the first infestment upon the second disposition had carryed the estate.

3. That Brockhard, 'qui habet jus ad rem ipsam habere videtur,' can only be obtruded against the granter of the obliedgement, to infest, but not against a third party, and our law is so positive, as to that, that such obliedgements cannot make a man a heretor, and in case the person in favours of whom the resignation was made, and charter exped should dye before infestment, the king would have right to the feudall casualties upon the account, that the granter dyed heretor, and last infest, and seing that notwithstanding of any such obliedgment, the king would have had all feudall casualties by decease of the granter, as then being heritor: It cannot be pretended, that the father was denuded by the said pretended personall obliedgement, or that the pannall was thereby constituted ane heritor.

3. He is not repute ane heritor, who cannot remove tennents, or who is not liable to answer at the head-courts as being infest, nor who is obliedged to answer at the king's host, nor who has ane interest to compete against other persons infest in a multiple poynding, and the pannall was stated in no such right, nor case, and therfor *Esto*, that a personall obliedgement, could constitute a man in the case of ane heretor, and which is thought impossible without subverting the fundamentalls of our law, yet the obliedgement founded upon by my lord advocat (if any such were, which is denyed) could never be sustained, to enforce such a conclusion, because all that my lord advocate pretends is, that there was ane obliedgement conceived in favours of the pannall, in contemplation of a marriage, to have followed, and which marriage never having followed, nor taken effect before the rebellion, nor before that the pannall was exonered of the rebellion, by taking of the bond. The same was only in the termes of a conditionall obliedgement, and the pannall could never pretend to the benefite thereof, before the marriage was compleited and the condition thereby persewed, so that the pannall, not being so much as creditor, in the obliedgement, the tyme of the rebellion, nor before his taking of the bond, it cannot be pretendit that any such obliedgement could fall to the king, *ratione defecti*.

4. As the pannall was no creditor, in the said personall obliedgement before the marriage, so nothing antecedent to the marriage can affect the said obliedgement, and in case the pannall had not been fully exonered of the re-

bellion before the marriage, neither would the father have made the obliedgement effectual, neither would the friends of the woman had accepted of the pannall for her husband, and seing if the marriage had not followed, the pannall could have pretended no right to the obliedgment, and that before the marriage, he was fully cleared before the marriage, by taking the bond, the marriage could not make the treason revive, nor deprive the pannall of the benefite of his majesties act of indemnity, seing there is no law declaring marriage to be treason.

5. Repeats his majesty's act of indemnity, which is appoynted to be extended and interpret in the most ample, favourable and comprehensive sense, that can be for the persons who imbrace the benefite therof as the pannall did. It is referred to the lords of justiciary how such a stretch as this case consist with his majesty's royall pleasure and inclination in the for-said act, especially against this pannall, who was then but a young boy of seventeen or eighteen years of age, and who went only after the rebell to seek back his own horse which they had robbed, and who is knowen himself to be of most loyall principles and education, being the sone of a father who was ane eminent sufferer for his majesty and his royall father in all the late troubles, and could never be induced to subscribe the treasonable covenant.

His *Majesties Advocat* alleadges, that the word heretor in the act of indemnity is to be understood not of men actually infest, but of men who had any right to land; as for instance, if a man had bought and had a disposition subscribed of 20,000 merks by year, though not infest, would be not fall under the designation of ane heretor. 2. If a man who had right by contract or disposition were at the home, would not the king have right to the mails and dewties, though he wer not infest. 3. If a man having a right to a disposition were forfault, would not the king have right to the mails and dewties. 4. If the act of parliament appoynting heretors, wadsetters and others to be lyable for the wrong done by thieves, would not a man who had right by disposition, though not infest, be obliedged to contribute conforme to the 6th act 2d session and parliament 1 Charles 2d, and wold not a man who had a personall right be liable to repair mauses and gleibes conforme to 21 act 3d session 1st parliament Charles 2d which appoynts heretors to repair. 5. The meaning of the act is, that poor people should have the benefite of the act, and were it not ridiculous that a man of 10,000 merks by year, that had been in possession 20 years and not infest, should not be punished, and a man of 50 merks by year should be punished, and as to the contrary arguments they are of no moment; for *nulla Sanima nulla terra* is only to be understood quod the way of denuding vassals in feudall rights in order to the falling of casualties and feudall effects, but not in order to crymes which consider personall rights as well as real

rights, for would not a man forfait his land tho' he were never infest. As to the instance of heretable bonds, its verie clear, that if a person had right to lands for securing of his money they would fall under the act of indemnity for the absurdity above written, and lastlie does not in the construction of our law such as have a right to lands even by substitutions fall under the designations of heretors how soone the person institut is dead, and this were allowed men that wold not compleit their rights and hold of the king should be in a better condition, than they who enter, and this were a way to encourage all rebellion. And whereas it is pretendit, that if the father had disposed to the sone, and both in the rebellion both could not have been forfait as heretors. It is answered *primo* that the case does not meet, for the designe of punishing all crimes is satisfied when the king gets right to the subject matter, *quo vis titulo*, which cannot be in this case where this is proponed to exclude the king.

2. The king would have his choise either to persow the father or the sone, and if the father or the sone had dyed during the dependance, the king wold have right by vertue of either and could not be excludit but by the death of both. And the word heretor in our law is only meant proprietor, and he truly is proprietor who has an action wherby he can exclude the other, and ther is nothing more certain, but he most be the proprietor who has the best right, and he that has an obliedgment upon the other has the best right and the only right. Lykeas it cannot be denyed that if another have only a trust forme to land worth 20,000 merks by year, but that in that case if the person who had truly the right was in the rebellion wold be forfait, though the trustee could not be forfait. For in effect he that is but a trusty or who can be forced to denude is but *umbra* propriariy and not proprietor, and are not all people tho' not infest, lyable to pay cessa, monthlie maintainance, outriok, &c.

Whereas it is pretendit, that the sone had only a conditional right, and the condition was not purified befor the act of indemnity. It is answered that whenever a condition is purified by implement it is drawn back *ad suam causam* and the *medium impedimentum* is not at all in this case, for a *medium impedimentum* is never considered to hinder the draweing back of the condition except wher ther is *jus perfecte questum*, to a third partie during the dependance, which is not in this case, and this has been 100 tymes decidit in cases of ordinar rebellion, and particularlie in the case of Doctor Fraser anent Salton's escheat.

Sir David Thoires for the pannal, duplyes that the act of indemnity and former answers are opponed, which are noways elidit by the instances aduced by his majesties Advocat. Because 1. It is simply denyed that an heretable obliedgment can constitute a man an heretor. 2. As to the pretence that the escheat of a person having a disposition belongs to the king, the same is repeated for the pannal,

Because if persons were actually infest, their liferent escheats could not belong to the king, but to the respective superiors, and the liferent escheats of persons not infest are declared to belong to the king upon that only accompt, that the persons denounced are not heretors, but have allenarly personall obliedgments. 3. *nulla susina nulla terra* is an uncontraverted principle, and it cannot be pretendit that a personall obliedgment does state a man in the preferable right of the land, and make him proprietor, seeing notwithstanding therof the disposer by a posterior right can evacuat the said disposition or obliedgment to infest. 4. Notwithstanding of such personall obliedgments, the lyferent escheat of the granters, wold fall to the king and other superiors, and the saids obliedgments wold not defend there against. 5. If the disposer had been in the rebellion, the land wold have fallen under this pannalls forfaiture in respect the disposer renounced as heretor, and in the sie, *Ergo* the receiver of the personall obliedgment cane never be repute proprietor. 6. Such obliedgments being only personall, as said is, they cannot make the land to fall under the forfaiture, but only produce an action to the king, in case the pannal were forfaited. And it is admired how it cane be pretendit that a man is an heritor by whose forfaiture there can be no real right, but allenarly a simple personall action transmitted to the king. 7. The pannal is not in the case where both father and sone was in the rebellion, as my lord advocate alleedges, and seeing by the pannalls forfaiture no other right can accesse to the king, he is sufficiently secured by the act of indemnity, and taking of the bond. 8. As it is denyed that the pannal hade such a right, as my lord advocat founds upon, so the pannal neither was nor could be in possession, by vertue therof, the same being only conditional as said is, and the pannal is not to this hour either infest or in possession. 9. As to the acts of parliament founded upon anent the repression of robbie, repairing gleibs, and manses, &c. and the same are opponed being only in relation to heretors in generall, and the pannal is no heretor. 10. It cannot be pretendit, that the pretended contract must be drawn back to the date in respect the marriage is not consumat, because my lord advocat founds his majesties interest in the pannalls forfaiture upon the pannalls rebellion as being *medium impedimentum*, wherby ther was *jus regi questum*. But the said impediment of rebellion, as it did obstruct the marriage, and without which the pannal had not so much as the benefite of a personall obliedgment, so the said rebellion was sufficiently taken off by the act of indemnity, and the pannalls taking of the bond long before the marriage, and the pannal being therby cleared of the rebellion his father, was in *bona fide* to grant him a portion, and the wyfe and her friends to accept him for a husband and a loyal subject.

Sir David Thoires for Alexander M'Kie of

Drumbowie, denies the lybell, and if it shall be made appear that he went once to the parioch of Crocemichael where any of the rebels were, it is offered to be proven that he went thither to dissuade his countrymen to goe out to the rebellion, and did openly declare to them, that he thought it a most unlawfull and treasonable rebellion; and declared he would not go with them, and immediately returned home, and that both before and sensyne he lived orderly, and frequently kept the kirk.

His *Majesties Advocate* oppones his lybell, bearing that he was with the rebels, and condescends upon several tymes which he offers positivlie to prove, and he should not at all have gone to the rebels without a command from authoritie, else the going is intercommuning with rebels, and any persone whatsoever may pretend this, and might publicly diswade some, and yet might be privatlie still carrying on the rebellion.

Master *Colin M^r Kensie* for William Martye alleadges he cannot be put to the knowledge of ane inqueist, in respect he offers to prove that during the tyme of the rebellion he was at his fathers house *alibi* at Dullar, and so could not be present, and *esto* it were proven that he were seen at Dumfries, yet that's not relevant except it were lybelled, that he was there in armes, mustering and doing acts of hostility, for being a merchant going about his lawfull affaires, and living near the place, is a sufficient presumption that he came not there *animo* to join with them; and in fortificatione of which defence, repeats his act of desertion before the lords of justiciary.

His *Majesties Advocat* repeats his lybell bearing his being with the rebels at severall tymes, and the justices have frequentlie found naked presence sufficient.

Sir *Patrick Hume* for Fergusone of Cairoch, and Alexander Cairnes of Gleniemilne, alleadges, allwayes denying the lybell and hail qualification therof. Whereas it is lybelled against the said James Fergusone, that he did receipt, keep company, and intercommone with rebells, it is not relevant *prima*, because there is neither tyme place nor persons condescended upon who he did receipt and intercommon, or keep correspondence with. 2. Albeit, the tyme place and persons were condescended upon, yet the pannall cannot be lyable for the crymes lybelled as have receipt and intercommoned with the rebels, unless the persons whom he receipt, and with whom its alleadged he kepted company, had been actually intercommoned, seeing no man is presumed to be a rebell with whom persons ought not to keep company, unles they be actually intercommoned, which is the intimation to the leidges. That they ought not to receipt, keep company with, or entertain them; and if it were otherwayes, then there is few gentlemen of the west country but might be found guilty upon that heid. 3. Albeit it could be made appear that the pannall did keep company with

any of the persons, as he did not; yet it is offered to be proven, and it is clear by the lybell itself, that the rebellion in the west country being in a modelled army, under prentendit captaines and generalls, they were such a force as could not be resisted, and it is clear by the lybell that they marched up and down the country, and did take meat and drink and all they could get, from the most honest persons, and if that time the Welshes were with the rebels and coming in such a hostile manner, it could be no cryme in the pannall to give them meat, drink, or otherways keep company with them, when it was not in his power to resist them.

As to Alexander Cairnes, alwayes denyeing the libell as said is, whereas he convened for sending his sone and ———— Wilson to the late rebellion, he being already twice convened upon that same ground, and for the crymes libelled, and receipt of his sone, he was absolved upon the ground that his sone had taken the bond, and no guilt could be made appear against them, and for instructing therof produced ane act of adjournall: As also the former defences are repeated, that albeit his sone had been at the rebelliou, yet he was not intercommoned. It was no cryme in the father to allow him to come back to his house if he had been a stranger, much less being his owne sone; and whereas he is convened for sending out, his sone with horse and armes, it is not relevant seeing a sones having and making use of the father's horse and armes, cannot inferr a cryme, seeing it is verie well known that many men's children and servants did take away their parents' and master's horse and armes, and went to the rebellion whither they would or not, so that unless it could be made appear that the father actually sent him out, and gave him horse and armes, and commanded him to goe, the simple having his father's horse cannot inferr a cryme against the father, and its notourlie known that the rebels tooke the honestest men's horse and armes where they could gett, and upon the same reason he might very well take back his own horse.

His *Majesties Advocat* answers, that Fergusone of Cairoch shall only be insisted against for receipting these that are contained in the libell, and their being denounced or fugitives, or notor rebels shall be proven, and notour rebels is relevant *per se*, as is clear by the 14th act parliament, 2nd James 6, wherby it is declared that all who shall receipt such as are justified for crymes, frae the cryme be nottour or the trespass or convict are declared guilty, and it were very absurd that persons seeing rebells go by to a rebellion, and receipt them immediately efter defate, though they were not declared fugitives, should not be found guilty: and the pannall is persewed for other crymes, and as to the *vis major* if he show any aversioh it shall be found relevant. As to Cairnes the alleadged absolutor is but a deserting of the dyet, and therfor the libell is opposed.

Sir Patrick Hume replies, that whereas by the act of parliament, that they should not receive nor intercommon with notour rebels, that is only understood where the persons are actually intercommoned, for otherways for what end should there be letters of intercommoning, if it were not to putt the hedges in *mala fide* to receive or supply rebels, at least that they should be actually declared fugitive for the rebellion, for it is not to be supposed that countrey people that lived at a distance could know that they were at the rebellion, unless by some public act or proclamation they had been declared rebels, and if it should be otherways then when the rebels did come into honest mens houses, in the countrey, the most part of all the gentlemen in the west countrey, and many other places, might be found guilty, upon that ground; and as to Alexander Cairnes, the former alleadgeance is proponed, and he is secured by the act of indemnity, especially considering that his sone has taken the bond, and so was free, and if the sone was free as principall, much more the father who was only convened as accessorie upon that heid, and oppous the act upon which the sone was liberat upon taking the bond, as also the act wherby the dyet was deserted against the father upon the like ground.

His Majesties Advocat condescends upon the notorie of the pannalls receiving rebels, in sua far as they entertained such as they knew had been in the rebellion, at least could not but know it, it being generally held and repute in the countrey, that they were rebels, and yet the pannalls never inquired into their condition nor where they had been the tyme of the rebellion but notwithstanding of the said notorie received them and harboured them, albeit they could not but know by a common fame and had never inquired, as said is.

Mr. Walter Pringle for Hugh Maxwell of Cuill alleadged that he cannot, as to the knowledge of ane inquest because denying always the lybell he has taken the benefite of his majesties indemnity by taking the bond prescribed thereby, as by a testificate produced under the earle of Niddisdales hand, who is informer, is instructed, whereof the tenour follows:

I Robert earle of Nithsdall, lord Maxwell Herries Eskdail and Carlyle and steward of Kirkeadbright, doe testifie and declare, that Hugh Maxwell in Carluth come before me, and cravit the benefite of his majesties act of iudemnitie, dated the twentieth of July last, and did subscribe the bond for not taking armes against his majesty, or his authority, whilk the lords of privy council have appoynted me as being steward principall of Kirkeadbright to tender to those within the said Stewartrie who were at the late rebellion conforme to the tenour of the counsells proclamation, dated the fourtein of August instant, in witness whereof I have subscribed thir presents with my hand at Tarrigels the 18th day of August 1679.

Sic Subscribitur,

NITHSDALL.

And for clearing that he is no heritor, offers

to renounce what heritage he had the tyme of the rebellion.

His Majesties Advocat offers to prove he was infest.

Mr. George Dickson for M'Naught, of Overtoun, alleadges, denying the libell, that that article thereof anent receiving and intercommoning is not relevant in respect it neither condescends upon tyme, place nor persone, and repeats the haill defences proponed for Cairock and Cairnes, and particularlie that alleadgeance founded upon the act of indemnity, which he lykeways repeats for Fergusone and Cairnes.

The Lords having considered the lybell persewed by his Majesties Advocat, against Alexander M'kie, with the defence and reply relative thereto, finds the dittay relevant as it is libelled, and sustaines the defence, viz. that the pannall was never with the rebels, save once in the parioch of Crocemichell, and that he went ther of purpose to diswade them, and actually did diswade them therfrae, and immediately returned home, relevant to cleid the dittay in sua farr as concerns his being with the rebels in the said parioch of Crocemichell allenarie.

As to William Martyne of Dullurge, finds the dittay relevant and repells the defence.

As to James Ferguson of Cairock, Alexander Cairnes and M'Naught elder of Overtoun, finds the dittay relevant as to the rebellion, and as to the receiving of rebels, finds it relevant that they receipt, harboured, entertained, gave meat, drink, lodging and the lyke to the persons lybell declared traitors, or fugitives, or notorious rebels, who were holden and repute to have been in the rebellion. And as to the haill remanent defenders for whom no defence is proponed, finds the lybell relevant, and ordains the samen to passe to the knowledge of ane assyse.

The Lords having considered the lybell persewed by his Majesties Advocat against Patrick Fergusone younger of Dowaltoun, with the defence, reply, and duply relative thereto, they continue the dyet till the second Munday of February next, and ordaines him to find caution for his appearance that dyet. The Lords lykeways continue the dyet against Hugh Maxwell of Little Cuill, till the second Monday of January next, and ordaines him to find caution for his appearance at the said dyet.

They afterwards gave in a renunciation of their heritages, and the diet was deserted *simpliciter*.

Mr. Walter Pringle for William M'Clellan of Auchinguill, alleadges he is no heritor and offers to renounce, and produced a testificate upon his taking the benefite of his majesties indemnity, whereof the tenour follows:

Edinburgh, 18th September, 1679. The which day, the bond subscribed by William M'Clellan, who was in the rebellion, wherby he binds, obiedges, and enacts himself, that he shall not herefter take armes against his ma-

jestie nor his anuthoritie, was reported to his majesties privie councill, by Thomas Lidderdail of Isle, deput to the earle of Nithsdail, commissionat to that effect, conforme to his majesties gracious proclamation of the 27th day of July last, by past. Extract by me
Sic Subscribitur. WILL. PATERSONE.

The Lords continue the dyet till the second Monday of January, and ordaines him to find caution.

William M'Culloch of Cleichreid, prisoner, alleadges he is no heretor, and is content to renounce all his heretage excepting his *jus mariti*, and offers to take the test.

Martyne of Dulurge, alleages he is no heretor, and offers to renounce, and is content to take the test as a testimonie of his loyaltie. The lords continue thir two pannalls till Wednesday nixt, and ordaines Martyne to find caution to appear.

The Lords continue the dyet against the hail remanent Galloway rebels, till the 13th instant, and ordains them to find caution for ther appearance, except *William M'Culloch* of Cleichreid, whom they ordain to be carryed back to prison, and ordaines the witnesses and assysers to attend ilk person under the paine of two hundreth merks, and ordaines the witnesses in the meantyme to attend upon his majesties advocate, that they may be previouslie examined anent the defenders guiltiness of the crymes lybelled.

13th December, 1682.

Intran,

Alexander Cairnes, Nottar at Glenliemilne
James Fergusone of Cairloch
John M'Naught elder of Overtoun

Indyted and accused for the crymes of treason and rebellion, mentioned in ther dittay *ut in die precedente*.

Persener—*Sir George M'Kenzie* of Rosehaugh, his Majesties Advocat.

Procurators in defence, *ut in die precedente*.

His Majesties Advocat having declared, that he had examined the witnesses against the Galloway rebels previouslie, and that by their depositions it does not appear that *Alexander Cairnes* nottar at Glenliemilne, *James Fergusone* of Carroch, and *John M'Naught* elder of Overtoun, are guilty of the crymes lybelled, and that he would not insist against them. The lords justice generall and commissioners of justiciary therfor deserted, and be thir presents deserts the dyet, *simpliciter*, and discharges all new letters or dittay to be raised or taken up against the defenders, for the crymes above specifit, except by express warrant from his majestic, or the lords of privie councill, wherupon the saids defenders and their procurators, asked and took instruments, and protested for their cautioners relieff, and craved the bond of cautionrie might be delyvered up, which the lords admitted and ordained.

His Majestic's Advocat declaires he insists against

The deceist *Samuel Grierson*, of Dalgonar
William Grierson, of Lochquhurr
James Welsh, of Little Clouden
John Browne, heretor, in Newtoun
Henry M'Culloch, of Barholme
— *Halyday*, of Mayfield

Mr. Thomas Vernor, late minister at Balmaclellan

George Gordon, second son to the Laird of Holme

Alexander M'Naught, younger, of Overtoun

Anthomie M'Kie, of Cloncaird

Mr. Samuel Arnot.

Thomas Crichtoun, of Hole of Balhassie

— *Hoy*, of Arielland

Alexander Hunter, of Colqhassen

Andrew Martyne, of Little Aries

Alexander M'Kie, of Drumbowie

— *Fullertoun*, of Senwick.

The said *William Grierson*, brother and nearest of kine to the deceast *Samuel Grierson*, and his tutors and curators, and all others having or pretending to have interest, and the absent rebels remitted to the assyse, being of tythes called to have compared to hear and see process of forfaiture orderly led and deduced against them, and not coupeirand, the Lords according to the tenor of the act of parliament, did proceed to consider and give ther interloquitor, wherof the tenor followes :

The Lords finds the lybell relevant and remitts the same to the knowledge of the assyse.

ASSISA.

Sir John Dalnahoy

Sir Patrick Nisbet

Mr. James Ellies

John Brown, of Georgiemilne

Major James Wood

Mr. William Litle, of Overlibertoun

Alexander Henrysone, of Newhaven

Sir James Richardsone, of Swaitoun

John Mure, sone to Rowallan

John Brown, merchant

James Tait, merchant

John Kirkwood, merchant

Alexander Sympsone, merchant

James Kirk, merchant

William Reid, merchant.

The Assyse lawfullie sworn and no objection in the contrair ; his majesties Advocat declaires he will not insist against *Kennedy* of *Knocknalen* for a forfaiture at this dyet.

His Majesties Advocat for probation adduced the Pannalls Confessions under written with the witnesses efter deponing.

Anthony M'Kie, of Cloncard, confesses he rose and joynd in armes with the rebels the tyme libelled, and marched alongst with them from *Moniegaff* to *Hamiltoun Muire*, and continued with them in armes till their defate at

Bothwellbridge, and comes in will, and begs the Lords to interceed for his pardon; declares he has taken the test, and is willing to take it againe if the lords please.

Sic Subscritur, ANT. M'KIE.

James Chalmers, officer in Newtoun, aged threttie fyve, married, purged and sworne, depons he sawe the deceist Samuel Grierson, of Dalgonar, marching with the rebells in rank and ffile, with horse and armes, such as pistols and sword, at Dumfries Keirmoss, and knows that he marched alongst from Galloway to Dumfries; depones he sawe William Grierson, of Lochquhurr, and sawe him ryding with the rebells in town of Dumfries, and when they came out of it with a sword, and this is the truth as he shall answer to God.—

Sic Subscritur, JAMES CHALMERS.

Robert McClellan, of Barscobb, aged 36 years, married, purged and sworne, depons he knew Grierson; he knew Grierson Dalgonar, and sawe him at Dumfries ryding in a troupe of the rebells, and lykewayes ryding with them at Cumnock with a sword drawn; depons he sawe William Grierson, of Lochquhurr, at the Old Clachan of Dalry, on Thursday efter the defate, ryding with a troupe of the rebells in armes, to the number of fourtie horse; efter their flight, depons he sawe one who was designe John Brown, in Newtoun, in companie with the rebells at Straven, with the rebells, and lykewayes at the Newtoun of Galloway, and that he was called a smith to his trade; depons he sawe Henry M'Culloch, of Barholme, march and ryde all alongst with the rebells from Galloway to Bothwel Bridge, particularly at Sanquhar and Dumfries; depons he sawe Mr. Thomas Vernour, in companie with the rebells, at Hamiltone and Cumnock; depons he sawe George, sone to Holme, march alongst with the rebells in arms from Galloway to Bothwel Bridge, and that he had horse and armes; depons he sawe Alexander M'Naught, younger, of Overtoun, in companie with the rebells at their rendivouze at Cubbockshill, and march all alongst with them in armes to Bothwel-Bridge; depons he sawe Mr. Samuel Arnot march all alongst with the rebells from Galloway to Bothwel-Bridge, depons he sawe Thomas Crichton, of Hole of Balquhassie at Hamiltoun Muire with the rebells and a pyck in his hand, depons he sawe Hay of Arriealland with the rebells betwixt Mauchline and Newwilnes ryding in companie with the rebells in their march to Bothwel-Bridge; depons he sawe Fullertoun of Senwick at Kirkcudbright and Hamiltoun with the rebells in armes; and this is the truth as he shall answer to God.

Sic Subscritur, ROBERT M'CLELLAN.

John Wallace, in Dalgonar, aged fourtie years, married, purged and sworne, depons he sawe the deceist Samuel Grierson of Dalgonar in companie with the rebells in armes at the

croce of Mechle wood and thereafter with them in armes at Keir Moss, depones he cannot wrait.

Sic Subscritur, PERTH, I. P. D.

Thomas Corbie, messenger, aged fyftie or thereby, married, purged and sworne; depons, he sawe Grierson of Lochquhurr at Sanquhar Newmilns and towards Bothwelbridge, ryding in armes with the rebells. Depons he sawe John Brown, heretor, in Newtoun, ryding alongst with the rebells from Dumfries to Hamiltoun muire. Depons he sawe Henry M'Culloch of Barholme ryding with the rebells at Sanquhar and Hamiltoun muire. Depons he saw Mr. Thomas Vernor in companie with the rebells at Hamiltoun muire. Depons he sawe Mr. Samuel Arnot march all alongst with the rebells from Galloway to Hamiltoun muire, particularlie at Dumfries and Sanquhar with them; and this is the truth as he shall answer to God.

Sic Subscritur, THO. CORBIE.

Archibald Williamsone, in Little Dibban, aged fifty years, married, purged and sworne, depones he sawe Samuel Grierson, of Dalgonar, in companie with the rebells in armes at Cumnock and other places as they went alongst. Depons he sawe Grierson of Lochquhurr at Straven, ryding in companie with the rebells in armes; and this is the truth as he shall answer to God: depons he cannot wrait.

Sic Subscritur, PERTH, I. P. D.

James Grierson, in Craigwestoun, aged twentie three years, married, purged and sworne: depons he sawe William Grierson of Lochquhurr in companie with the rebells at Dumfries, Sanquhar, and within a myll of Hamiltoun, ryding in their troupees, in armes; and this is the truth as he shall answer to God.

Sic Subscritur, JAMES GRIERSON.

Robert Herries, in Castlefairne, aged threttie years, married, purged and sworne: depons, he sawe William Grierson, of Lochquhurr, ryding with the rebells, in armes, at the Milntoun of Orr; and that they were ane hundredth horse or thereby.

Sic Subscritur, ROBERT HERRIES.

Alexander Ker, in Glencairne, aged twentie fyve years, unmarried, purged and sworne: depons, he sawe Grierson of Lochquhurr in companie with a partie of the rebells, efter their fleight, with a sword. And this is the truth as he shall answer to God: depones he cannot wrait.

Sic Subscritur, PERTH, I. P. D.

James Gordoun, wreiter, in Kirkcudbright, aged twentie seven years, uamarried, purged and sworne: depones, he sawe John Brown, heretor, in Newtoun at Dumfries, Sanquhar, and all alongst to Hamiltoun, and at Hamiltoun muire, in armes with the rebells, on horseback. Depones he sawe Hendry M'Culloch, of Barholme, at Sanquhar and Cumnock, in armes with the rebells. Depons

he saw Halliday of Mayfield with the rebels, in armes, betwixt Dumfries and Cumnock. Depous he sawe George Gordon, sone to Gordon of Holme, at the water of Orr, Dumfries, and all alongst with the rebels in armes to Hamiltoune. Depous he sawe Master Thomas Vernor at Hamiltoune moure, rydeing with the rebels. Depous he sawe Alexander M'Naught, younger, of Overtoune, in company with the rebels, in armes, betwixt Dumfries and Cumnock. Depous he sawe Mr. Samuel Arnot in company with the rebels at Cumnock, and heard him preach to them. Depous he sawe Grierson of Dalgonar rydeing lykewayes with the rebels in armes: and this is the truth as he shall answer to God.

Sic Subscritur, I. GORDOUNE.

Robert M'Adam, sadler in Kirkcudbright, aged thretty years, married, purged and sworne: depous, he sawe James Welsh, of Little Cloudan, in company with the rebels at Dumfries and Sanquhar in armes. Depous he sawe John Brown of Newtoun on horseback in armes, in company with the rebels at Dumfries and Drumlanrick. Depous he sawe Halyday of Mayfield rydeing on horseback with the rebels at Dumfries and Sanquhar; and, at the same places, he sawe Mr. Thomas Vernour, and George Gordoun, sone to Holme, and Mr. Samuel Arnot, in company with the rebels, on horseback, in armes, and saw the man called Hay of Arriealland, at the same places with the rebels, in armes; and this is the truth as he shall answer to God.

Sic Subscritur, ROBERT M'ADAME.

John Corsan, taylor in Kirkcudbright, aged thretty two years, married, purged and sworne; depous, he sawe John Brown, heretor in Newtoun, march alongst with the rebels in Dumfries and Cumnock. Depous he sawe Henry M'ulloch, of Barholme, rydeing alongst with the rebels, in armes, particularly at the gate house of ———. Depous he sawe Halyday of Mayfield in company with the rebels in armes at Sibbets Milnes. Depous he sawe Mr. Thomas Vernour in company with the rebels, on horseback, and in armes, the day before the defate; and sawe Mr. Samuel Arnot with them, on horseback, in armes, at the same place; and this is the truth as he shall answer to God.

Sic Subscritur, JOHN CORSAN.

Captain John M'ulloch, of Grange, aged thretty four years, married, purged and sworne, depous, he sawe Henry M'ulloch of Barholme, in armes with the rebels at Dumfries, and betwixt, and Sanquhar. Depous, he sawe Alexander M'kie of Drumbowie in the town of Wigtoune, when the rebels were there on horseback in the streets, and being commanded by James Gordoun of Craichley to goe to Baldoun's Park, he refused; whereupon a motion was made to take his own horse from him, but at Craichley's desire they let him alone. Depous, he did not see the pannall till two

dayes thereafter, and then he sawe him two myles eastward from the milltowne of Orr, towards Dumfries with the rebels, to the number of three or four hundred, and there he sawe the pannall M'kie leave them, and sawe his man's horse taken from him. Depous, he had a sword, which they offered to take from him, but did not. Depous, when M'kie was at Wigtoune, he did not see him draw up with the rebels. And this is the truth, as he shall answer to God.

Sic Subscritur, JN. M'ULLOCH.

William M'kie, of Maitland, aged twenty-six years, married, purged and sworne; depous, he sawe the pannall M'kie of Drumbowie in the town of Wigtoune, the rebels were there, with a pistoll in his hand, which he said he had gott from a man to hold till he should take a pype of tobacco, and that he was on horseback. And this is the truth, as he shall answer to God.

Sic Subscritur, WILL. M'KIE.

Alexander M'kie in Glasnuik, aged forty-three years, married, purged and sworne; depous, he heard Alexander M'kie of Drumbowie, diswade Braickley and Culvenan to goe out to the rebellion, and said it was a sinfull thing to rise in armes against the king; and this he heard him express at the Kirk of Kirkcowane, before they went out to the rebellion. Depous, that Drumbowie lived orderly, and keepe the Kirk before and since the rebellion; and this is the truth as he shall answer to God. Depous he cannot writ.

Sic Subscritur, PERTH, I. P. D.

Alexander Herron at the Kirk of Kirkcowane, aged fourtie years, or thereby, purged and sworne; depous, *conformis precedente in omnibus*, and cannot writ.

Sic Subscritur, PERTH, I. P. D.

The pannall Alexander M'kie of Drumbowie, in presena of the Lords Justice General, and Commissioners of Justiciary, declares, That though through the want of witt, he might have bein in the rebels' company, he protests before God he was never of their faction, and at that tyme particularlie he had no intention to rebel, and however he throwes himself upon the king's mercy, and beg'd the Lords of Justiciary to recommend him to his majestie's privie councill, that they might interpose with his majesty for favour to him. And that he is willing to take the Test, or any other Oath shall be imposed by authoritie, as a demonstration of his loyalty.

Sic Subscritur, ALEX. M'KIE.

John M'Lesoch, servant to the Laird of Isle, aged twenty-three, married, purged and sworne; depous, he sawe Fullertoune of Sennick several tymes rydeing with the rebels in armes, in their march to Bothwellbridge. Depous, he knowes not what armes they ware. And this is the truth, as he shall answer to God.

Sic Subscritur, JOHN M'LESOCK.

William Gordon in Wigtoune, aged threttie-six years, marryed, purged and sworne; depons, he sawe Hay of Aricalland in company with the rebells on horseback, with a sword at the standing stones of Torras, and sawe Alexander Hunter of Alquhassen at the same place, on horseback, in armes with the rebells, and lykewayes at Wigtoune with them; and sawe Andrew Martyne of Little Aries at both the saids places in company with the rebells on horseback, in armes. And this is the truth as he shall answer to God.

Sic Subscritur, WILL. GORDON.

John Maxwell of Milntoune, aged thretty-seven years, or therby, purged and sworne; depones, that George Gordon sone to Holme, with twentie or threttie horse of the rebells, did apprehend the deponent in the wood of Buttell, and that he did not know Gordon till he told him his name, and declared he was so. Depons, the said Gordon tooke the deponent's armes, and therefter Gordon and his army going to Buttill, the deponent made his escape: and this is the truth as he shall answer to God.

Sic Subscritur, J. MAXWELL.

William Grierson, brother to Milnemark, aged twenty-seven years, or thereby, unmarried, purged and sworne; depons, he sawe Halyday of Mayfield, in company with the rebells at Cumnock, on horseback, in armes, and at severall other places, and lykewayes sawe Mr. Thomas Vernour in company with the rebells at Cumnock, and severall other places, and heard him preach to them. Depons, he sawe George Gordoune, sone to Holme, at Cumnock, in armes with the rebells. And sawe Alexander M'Naught, younger, of Overtonne at Cumnock and Hamiltoun, in armes with the rebells; and sawe Thomas Crichton, of Hole of Balhassie in company with the rebells at Straven. Depons, he sawe Hay of Aricalland, in armes with the rebells at Hamiltoune, on horseback; and that he sawe Fullertoune of Sennick, at Saquhar with the rebells on horseback, with armes: and this is the truth as he shall answer to God.

Sic Subscritur, WILLIAM GRIERSONE.

Walter Muir, miller at Little Aires, aged, &c. nihil novit.

James Panling in Kissoctoune, aged fyftie or therby, purged and sworne, depons he sawe Fullertoune of Sennick in armes with the rebells on horseback at Hamiltoune, and severall other places, and this is the truth as he shall answer to God.

Sic Subscritur, JA. PANLING.

Alexander Murray, late servant to the earle of Nithsdail, aged fourtie, marryed, purged and sworne, depons, he sawe James Welsh of Little Clouden, ryding alongst the bridge of Dumfries with the rebells on horseback, but knowes not if he had armes; depones he cannot write, and this is the truth as he shall answer to God.

John Irvine, merchand in Dumfries, aged fourtie or therby, marryed, purged and sworne, depones, he sawe James Welsh of Little Clouden at Dumfries, and sevin or eight score of the rebells horse being feeding on the deponents grass, James Welsh was ther holding his horse with a sword about him, and this is the truth as he shall answer to God.

Sic Subscritur, JOHN IRVINE.

Alexander Gordoun, in Wigtoune, aged thretty fyve or therby, marryed, purged and sworne, depons, he sawe Henry M'Colloch of Barholme, ryding with horse and arms with the rebells at Dumfries, and betwixt; and depones he sawe Thomas Crichtoun of Hole of Balquhassie, neir Airdmoss, with the rebells in their march to Bothwellbridge, and that there were three or four hundredth of the rebells with him; depons, he sawe Hay of Aricalland at Dumfries with the rebells, on horse with a sword, as he thinks, and march all alongst to Bothwell; depons, he sawe Alexander Hunter of Colquhassen, on horseback, with a sword, in company with the rebells at Dumfries, and all alongst in their march betwixt Dumfries and Hamiltoun; depons, he sawe Martyne of Little Aries, severall times in company with the rebells in their march to Bothwellbridge, and that he had horse and armes; and this is the truth as he shall answer to God.

Sic Subscritur, ALEX. GORDOUN.

The Lords ordaines the assyse to inclose and returne their verdict to-morrow, at twelve o'clock.

December 14, 1682.

The said day, the persons who past upon the assyse of the rebell heretors in Galloway, returned their verdict in presence of the saids Lords, where of the tenor follows:

The assysers all in one voice, by the mouth of master Ellies their chancellor, finds Samuel Grierson of Dalgonar, William Grierson of Loquhurr, James Welsh of Little Clouden, John Brown heretor in Newtoun, Henry M'Colloch of Barholme, — Halyday of Mayfield, Mr. Thomas Vernour, George Gordou son to the laird of Holme, Alexander M'Naught younger of Overton. Anthony M'Kie of Cloncard, Mr. Samuel Arnot, Thomas Crichtoune of Hole of Balhassie, — Hay of Aricalland, Alexander Hunter of Colquhassen, Andrew Martyne of Little Aries, Fullertoune of Sennick, Alexander M'Kie of Drumbowie, guilty of being in armes and joyning with the rebells in the rebellion, 1679.

Sic Subscritur, JA. ELLIES, Chancellor.

The assysers all in one voice, by the mouth of ther chancellor, above writen, finds the probation led for Alexander M'Kie of Drumboy, not to prove the defences proponed for him in his exculpation, in respect it is proven that he was at other places with the rebells, and that the diswasse used by him to Craichley and Kilvennan was at the kirk of Oven,

and not at the parioch of Crocemichael, conforme to the Lords interloquitor.

Sic Subscibitur, JA. ELLIES, Chancellor.

December 18, 1682.

The said day, the Lords Justice General, and Commissioners of Justiciary, having considered the verdict of assyse returned against the deceast Samuel Grierson of Dalgonar, William Grierson of Lochquhurr, James Welsh of Little Clouden, John Brown heretor in Newton, Henry M'Culloch of Barholme, ——— Halyday of Mayfield, Mr. Thomas Vernor some tyme minister at Balmaclellan, George Gordon second sone to the laird of Holme, Alexander M'Naught younger of Overtoune, Anthony M'Kie younger of Cloncard, Mr. Samuel Arnot, late minister at Tongland, James Crichtoun of Hole of Balquhassie, ——— Hay of Ariealland, Alexander Hunter of Culquhassen, Andrew Martine of Little Aries, Alexander M'Kie of Drumbowie, and ——— Fullertoune of Sennick, whereby they are found guilty of the crymes of treason and rebellion mentioned in their dittay. The saids Lords therfor be the mouth of James Johnstoune, dempster of court, decerned and adjudged the saids Alexander M'Kie of Drumbowie, and Anthony M'Kie of Cloncard, to be taken to the mercat croce of Edinburgh, upon the first Wednesday of July nixt being the day thereof betwix two and four o'clock in the afternoon, and there to be hanged on a gibbet till they be dead. And also decerned and adjudged the hail remanent persons above named, and ilk one of them (except Samuel Grierson of Dalgonar, who is dead) to be execute to the death, demained as traitors, and to underlye the paines of treason, and other punishment appoynted by the lawes of this realme, when they shall be apprehended, at such times, places, and in such manner, as the Lords justice generall, justice clerk, and commissioners of justiciary, shall appoynt, and ordaines their names, memories, and honors, and the name, memory, and honours of the deceast Samuel Grierson, and of the saids Anthony and Alexander M'Kies, to be extinct, and their armes to be riven furth and delete out of the books of arms, sua that their posteritie may never have place nor be able herefter to bruike or joyse any honors, offices, or dignities within this realme, in tyme coming, and to have forfault amitted and tint all and sundrie their lands, heretages, tenements, annual rents, offices, titles, dignities, tacks, steadings, rounes, possessions, goods and geir, whatsoever pertaining to them, to our soveraigne lord's use, to remaine perpetuallie with his majesty in propertie. Which was pronounced for doom.

Out of the transactions which occurred in Galloway during this year (1682) arose a curious litigation between two very considerable persons, sir John Dalrymple and the celebrated

Graham, of Claverhouse, of which Fountain-hall gives the following account:

“ December 14, 1682. At Privy Council, captain John Graham, of Claverhouse, his bill of complaint against sir John Dalrymple, advocate, was read. It bore, that sir John Dalrymple had weakened the hands of the government, in the shire of Galloway, in traversing and opposing the commission which the king's council had given to Claverhouse, containing a power, both civil, criminal and military; of sheriffship and justiciary, of executing the church laws against conventicles, withdrawing from the Kirk, unlawful baptisms, &c. under the pretence of his preferable jurisdiction, as heritable bailie of the regality of Glenluce; and that he studied to stir up the people to a dislike at the king's forces there; which projects, designs and methods, were the very same with these set on foot against sir James Turner, and sir William Banantyne in 1666, when they rose and came to Pentland-hills in arms, and have a natural tendency to sedition, and instilling rebellion; that he kept disloyal and disaffected persons to be his bailies and clerks to his regality, and did not administer the test to them, till long after January 1681, contrary to the act of parliament; and that he imposed mock-fines on delinquents, not the fiftieth or sixtieth part of what the law required, only to prevent Claverhouse's fines; and that he and his father offered him a bribe of 150*l.* sterling out of their fines, to connive at the irregularities of his mother the lady Stairs, his sisters and others; and did insolently laugh at the proclamation of a court, made and intimate by Claverhouse, and discharged his tenants to be present; that at the head-court, he produced a factions instrument against him, as if he had exacted free quarters; and did convocate, consult and combine with some gentlemen there, anent matters of state, contrary to his oath of the test, whereby he had incurred the crime of perjury; and had deprived and misinterpreted the king's law 1681, anent free quarters, as if the people were not bound to furnish corn and straw to the soldiers at all, and so had endeavoured to create discord and jealousies between the king and his subjects, whereby he had committed the crime, and merited the punishment of leasing-making; and that he had traduced and defamed Claverhouse, to the privy counsellors, as a contraveener of the said law against free quarters, and as one who had usurped and assumed the king's incommunicable prerogative in remitting and discharging at his own hand Hay, of Park, and others, for treason and other crimes beyond his commission; and had misrepresented him, as one who had cheated the king's treasury, in exacting the fines of heritors, and not accounting for them; at least, falsely giving in a charge to the Exchequer, far below his intromissions: and all which recriminations were contained in a libel drawu up by the said sir John, and intended to have been given in by him, against

Claverhouse, to the Council, and which he ought either to prove, or else be punished as the author of an infamous libel. Sir John's answers being also read; the chancellor reproved him for his tart reflections on Claverhouse's ingenuity. Then sir John urged, he might be allowed to adduce what witnesses he had in town, for proving some of the points of fact contained in his answers. This was denied him; and the chancellor appealed to the king's advocate, If a diligence was ever in form granted at privy council, to a defender to prove his defence, unless he were in a libel of reconvention. This was to compel him to give in his counter-libel. Then Claverhouse's witnesses being called, and his libel as relevant admitted to his probation; and sir George Lockhart, (who was so generous as to lay aside all former private resentments, and appear as one of sir John's advocates, on which side I also stood) being adduced as a witness, to prove that he heard sir John charge some of the above-mentioned things on Claverhouse: sir George answered, That such a preparative would be *passim exempli*, to force advocates to disclose their clients secrets. The chancellor thought he might be ordained to depone; but seeing sir John offered to raise a libel on thir very particulars; this rendered the examining witnesses on that point unnecessary. There was much transport, flame and humour in this cause: and the cloud on the late president's family was taken advantage of now; which shows the world's instability. Sir John alleging the people in Galloway were turned orderly and regular; Claverhouse answered, There were as many elephants and crocodiles in Galloway, as loyal or regular persons; meaning there was none of either; which was a bold accusation and reflection on a whole shire. And yet the council would not allow

sir John to complain of the exacting of fees quarters, in the name of any but of himself and his tenants only, without he had a commission from the rest of the shire, which they durst not then join; soldiers getting a more favourable hearing than country gentlemen, as appeared in John Chiesly's case, &c."

" February 13, 1683. At Privy Council, the probation led between Claverhouse and sir John Dalrymple, being advised, they found, that Claverhouse had done nothing but what was very legal, and consonant to his commission and instructions, and the chancellor complimented him so far, that they wondered that he not being a lawyer, had walked so warily in so irregular a country, (for he ascribed the reduction of the west to a peaceable conformity and reformation, to himself,) and therefore the chancellor gave him the council's thanks for his encouragement; and found that sir John Dalrymple, though a lawyer and bailie of the regality of Glenluce, had exceeded his bounds, and had weakened the hands of his majesty's authority and the council's, and their commissions, and interfered with them; and therefore they declared the said sir John to lose his heritable bailery during his lifetime, and to pay 500*l.* sterling of fine, and to enter that night into prison in the castle of Edinburgh, to ly there not only till he paid it, but during the council's pleasure. Some were for 1,000*l.* sterling fine. This rigour was thought absolutely necessary to discourage all from stopping or opposing their military commissions."

" Feb. 20, 1683. Sir John Dalrymple is this day liberate from prison on paying his fine, Hugh Wallace, cash-keeper, having reported his discharge, and upon a bill to the council relating the sentence, and acknowledging his rashness, and craving the council pardon."

343. Proceedings against JOHN SEMPLE, JOHN WATT, and GABRIEL THOMSON, for Treason: 36 CHARLES II. A. D. 1684. [Now first published from the Records of Justiciary at Edinburgh.*]

CURIA JUSTICIARII S. D. N. Regis tenta in Pretorio Burgi de Edinburgh, vigesimo quarto die mensis Novembris, anno millesimo sexcentesimo octogesimo quarto, per nobilem et potentem Comitem Georgium Comitem de Linlithgow, Justiciarium Generalent, et Honorabiles Viros Dominos Jacobum Foulis, de Colinton, Justiciarium Clericum, Johannem Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcars, et Alexandrum Seton de Pitmedden, et Patricium Lyon de Cars, Commissionarios Justiciarum, dicti S. D. N. Regis.

Curia legitime affirmata.

Intra,

John Semple, John Watt, and Gabriel Thomson, prisoners.

INDYTED and accused, That wber notwithstanding by the lawes of this and all well governed nations and by the lawes and practice of this kingdom, when ther is a warr declared by any within the kingdom, all his majesty's subjects are actualie obleidged to concur against those who have declared the warr, and much more that the said warr and declaration of warr is unlawfull, and that they acknowledge and assert it is so, and doe comitt treason when the refuse to testifie that these who de-

clared the said warr are traitors, being thereby art and part of these treasonable declarations, ther being no indifferece allowed by law in such cases of declared warr, all who are in the kingdom being repute either friends or enemies: Nevertheless it is of veritie, that some of his majestie's traitorous and disloyal subjects having most disloyallie and impiouslie assembled themselves together, they did, upon the twenty-eight of October last by past, emit a most hellish and barbarous proclamation, declaring that they be vertus of their obligation from the covenant disclaimed his majesty, and his authority, and that they were in a state of warr against him; and being so engaged in a warr, they not only owne, but invite all of their judgment to murder and assassinate all his majestie's justices, officers, magistrates, and all who should informe them, against them or their receptors. And did declare they would begin this their warre and assassination upon the nyinth of November, immediately after, the promulgation of this dreadfull and villainous paper, and this paper having been posted upon the church doors of Kilbryd, Linlithgow, and severall other places in the kingdome, the said John Semple, John Watt, and Gabriel Thomson, wer taken, and examined who wer the contrivers of that paper and their accomplices, and if they owned the said proclamation, and that they wer in a state of warr, and if they would assassinate, &c. They refused to dis-

* This prosecution was one of those which arose out of the publication of what was called, "An Apologetical Declaration and Admonitory Vindication," which was made by that class of vehement and enthusiastic Presbyterians, which was originally denominated, "Cameronians," from Mr. Richard Cameron (as to whom, see vol. 10, p. 865. See also as to the Cameronians, vol. 10, p. 850.) and which afterwards termed themselves "the Societies united in correspondence," and was generally called by others "Society People." This Declaration, as published by Wodrow, from a copy under Renwick's own hand, is as follows:

SOCIETY PEOPLE'S DECLARATION, especially against INFORMERS and INTELLIGENCES, Nov. 8, 1684.

"Albeit we know that the people of God in all ages, have been cruelly persecuted, and maliciously reviled by apostates from, and enemies to the truths of our Lord Jesus Christ; yet such hard usage, and virulent reproaching, hath not (at least ought not to have) abated the zeal of tender-hearted Christians, in the prosecution of holy and commanded duties. There-

fore, as hitherto, through grace assisting, we have not been driven to lay aside necessary obliging duties, because of the viperous threatenings of men, who are given up of an holy and wise God, to lay out all their might and power for promoting a course of wicked profanity by virulent persecution, and ignominious calumnies, (to all of whom nevertheless, that are reconcilable unto God, we heartily wish eternal salvation) so we declare our firm resolution of constant adherence to our Covenant and Engagements, where we are bound to have common friends and foes with our covenanted Reformation, and to look upon what is done to one, as done to all of us; and also our unanimous adherence to our faithful declaration, wherein we have disowned the authority of Charles Stuart, (not authority as God's institution, either among Christians or heathens) and all authority depending upon him, for reasons given elsewhere; (disclaiming all such things as infer a magistratical relation betwixt him and us) and wherein also we have declared war against him, and his accomplices, such as lay out themselves to promote his wicked and hellish designs. Therefore, that therein our

owne that paper in sua farr as it declares a warr against the king, and that it is lawfull to kill

mind may be the more clearly understood, and for preventing further mistakes anent our purposes, we do hereby joyntly and unanimously testify and declare, that as we utterly detest and abhor that hellish principle of killing all who differ in judgment and perswasion from us, it having no bottom upon the word of God, or right reason; so we look upon it as a duty binding upon us, to publish openly unto the world, that forasmuch as we are firmly and really purposed not to injure or offend any whosoever, but to pursue the ends of our Covenants, in standing to the defence of our glorious work of Reformation, and of our own lives: Yet, we say, we do hereby declare unto all, that whosoever stretcheth forth their hands against us, while we are maintaining the cause and interest of Christ against his enemies, in the defence of our covenanted Reformation, by shedding our blood actually, either by authoritative commanding, such as bloody counsellors (bloody we say) insinuating clearly by this, and the other adjective epithets, an open distinction betwixt the cruel and blood-thirsty, and the more sober and moderate, especially that, so called, justiciary, generals of forces, adjutants, captains, lieutenants, and all in civil and military power, who make it their work to embroe their hands in our blood, or by obeying such commands, such as bloody militia-men, malicious troopers, soldiers and dragoons; likewise, such gentlemen and commons, who, through wickedness and ill-will, ride and run with the foresaid persons, to lay search for us, or who deliver any of us into their hands, to the spilling of our blood, by inticing morally, or stirring up enemies to the taking away of our lives, such as designedly and purposedly advise, counsel, and encourage them to proceed against us, to our utter extirpation; by informing against us wickedly, wittingly, and willingly, such as viperous and malicious bishops and curates, and all such sort of Intelligencers, who lay out themselves to the effusion of our blood, together with all such as, in obedience to the enemies their commands, at the sight of us raise the hue and the cry after us; yea, and all such as comparing before the adversaries their courts, upon their demands delate us, and any who befriend us to their and our extreme hazard and suffering. We say all, and every one of such shall be reputed by us, enemies to God, and the covenanted work of Reformation, and punished as such, according to our power, and the degree of their offence; chiefly, if they shall continue after the publication of this our declaration, obstinately and habitually, with malice to proceed against us, any of the foresaid ways, not at all exclaiming from present punishment, such as formerly have been chief ringleaders and obstinate offenders. Withal leaving room for civil and ecclesiastic satisfaction, before lawful and settled judicatories, for the offences of such per-

sons as our power at this time cannot reach, or the degrees of whose punishment, according to their offences, is hard for us to be determined. Finally, we do hereby declare, that we abhor, condemn, and discharge any personal attempts, upon any pretext whatsoever, without previous deliberation, common or competent consent, with certain probation by sufficient witnesses, the guilty person's confession, or the notourness of the deeds themselves. Inhibiting also and discharging any of our emissaries whatsoever, to stretch forth their hands beyond the certainly known degrees of any the foresaid persons their offences.

sons as our power at this time cannot reach, or the degrees of whose punishment, according to their offences, is hard for us to be determined. Finally, we do hereby declare, that we abhor, condemn, and discharge any personal attempts, upon any pretext whatsoever, without previous deliberation, common or competent consent, with certain probation by sufficient witnesses, the guilty person's confession, or the notourness of the deeds themselves. Inhibiting also and discharging any of our emissaries whatsoever, to stretch forth their hands beyond the certainly known degrees of any the foresaid persons their offences.

“ Now let not any think, that (our God assisting us) we will be so slack-handed in time coming, to put matters in execution, as heretofore we have been, seeing we are bound faithfully and valiantly to maintain our Covenants, and the cause of Christ. Therefore, let all these foresaid persons be admonished of their hazard, and particularly all ye Intelligencers, who, by your voluntary informations, endeavour to render us up into the enemies their hands, that our blood may be shed; for by such courses ye both endanger your immortal souls, if repentance prevent not, seeing God will make inquisition for shedding the precious blood of his saints, whatever be the thoughts of men; and also your bodies, seeing you render yourselves actually and maliciously guilty of our blood, whose innocency the Lord knoweth. However, we are sorry at our very hearts, that any of you should choose such courses, either with bloody Doeg to shed our blood, or with the flattering Ziphites, to inform persecutors where we are to be found. So we say again, we desire you to take warning of the hazard that ye incur, by following such courses; for sinless necessity for self-preservation, accompanied with holy zeal for Christ's reigning in our land, and suppressing of profanity, will move us not to let you pass unpunished. Call to your remembrance, all that is in peril is not lost, and all that is delayed is not forgiven. Therefore, expect to be dealt with as ye dealt with us, so far as our power can reach, not because we are acted by a sinful spirit of revenge, for private and personal injuries, but mainly because by our fall Reformation suffers damage; yea, the exercise of godliness through ensnaring flatteries, and terrible threatening, will thereby be brought to a very low ebb, the consciences of many more dreadfully surrendered, and profanity more established and propagated.

“ And as upon the one hand we have hereby declared our purpose anent malicious injurers of us, so upon the other hand, we do hereby beseech, invite, and obtest all you who wish well unto Zion, to shew your good will towards us, by acting with us, and in your places and stations, according to your ability, counselling, encouraging, and strengthening our hands for

from the king, and informers, or to declare whither they had any hand in the emitting or

this great work, of holding up the standard of our Lord Jesus Christ. Think not that in any ways ye are called to lye by neutral and indifferent, especially in such a day; for we are a people by holy Covenants dedicated unto the Lord, in our persons, lives, liberties, and fortunes, for defending and promoting his glorious work of Reformation, notwithstanding all opposition that is, or may be made thereunto; yea, and sworn against all neutrality and indifferency in the Lord's matters. And moreover, we are fully perswaded, that the Lord, who now hideth his face from the house of Jacob, will suddenly appear, and bring light out of darkness, and perfect strength out of weakness, and cause judgment to return again to righteousness.

"Thus having declared our deliberate, lawful, and necessary purposes concerning this matter, in order to the publication of the same, we do hereby statute and ordaine, that upon the 8th day of November, copies of this our Declaration, be affixed upon a sufficient and competent number of the public market-crosses of the respective burrows, and of the patent doors of the respective kirks within this kingdom.—Given at _____, upon the 28th day of October, 1684.—Let King Jesus reign, and all his enemies be scattered."

This publication gave rise to the following Proclamation:

PROCLAMATION AGAINST A TREASONABLE DECLARATION, DEC. 30, 1684.

Present in Council.—Earl of Perth, Lord High Chancellor; Lord Archbishop of St. Andrews; Duke of Queensbury, Lord High Treasurer; Lord Archbishop of Glasgow; Marquis of Douglas, Earls of Drumlanrig, Mar, Glencairn, Strathmore, Southesk, Panmure, Tweddale, Balcarras, and Kintore; Lords Yester, and Kinnaird; Lord President of the Session; Lord Register; Lord Advocate, Lord Justice Clerk, Lord Castle-hill, and Gossford.

"Charles by the grace of God, king of Great Britain, France and Ireland, defender of the faith: To our Lyon king at arms, and his brethren, heralds, macers of our privy council, pursevents, and messengers at arms, our sheriffs in that part, conjunctly and severally, specially constitute, greeting. Forasmuch as severall insolent and desperate rebels, having frequently refused the reiterated offers of our clemency, have of late associated themselves, under a pretended form of government, in societies, fellowships, &c. and have, in their meetings, at last pulled off the mask under which they formerly endeavoured to disguise their bloody and execrable principles, and openly and avowedly declared in a late treasonable paper, emitted by them, and affixt at severall parish churches, (intituled, The Apolo-

publishing the said paper or proclamation, or who wer the publishers therof, or to disclaime

getical Declaration and Admonitory Vindication of the true Presbyterians of the Church of Scotland, especially anent Intelligencers and Informers) that they have disowned us and our authority, and have declared war against us; and from that do infer, that it is not only lawful, but a duty upon them, to kill and murder all who do any manner of way serve us, or bear charge under us, or who do assist our judgements, or forces in the execution of our laws (principles inconsistent with all government and society, and tending to the destruction of the lives of our loyal and honest subjects) therefore we, with advice of the lords of our privy council, do hereby ordain, that whosoever shall own the said most execrable and treasonable declaration, or assassinations therein mentioned, and the principles therein specified, or whosoever shall refuse to disown the same, in so far as it declares a war against his sacred majesty, and asserts that it is lawful to kill such as serve in church, state, army, or country, shall be tried, and executed to the death. And further, we hereby require and command all our good subjects, especially these dwelling in the souther and western shires of this our ancient kingdom, besouth the river of Tay, that they be ready upon all occasions, to concur with our magistrates and officers, in seeking, searching and apprehending; and that they, and each of them do their utmost endeavour, to seek, search, delate and apprehend any who shall own the said Apologetical Declaration, and the treacherous and assassinating principles therein mentioned, or refuse to disown the same, as said is; certifying them, if they fail herein, they shall be proceeded against, for their said collusion and connivance, with the utmost severity of our laws: as also that, when they are required, they shall actually concur to keep and secure (as prisoners) the said rebels, when they are taken; and to search for, and drive away their goods, when required by those commissioned by us. And since these rebels, after declaring their hellish intentions, for the better performance of their mischievous designs, do lurk in secret, and are never discerned, but in the acts of their horrid assassinations, and passing up and down unknown amongst our royal subjects, take opportunity to murder and assassinate, and it being necessary to provide a remedy against so imminent a danger, which cannot be so well done, as when the good are differenced from the bad by discriminating signs; at least constant inquiries may occasion a continual trouble, even to our good subjects: therefore, as a remedy for these inconveniences, we declare it to be our royal will and pleasure, and we hereby command and require all our subjects, within this our ancient kingdom, both men and women, past the age of sixteen years, not to presume to travel without testificates of their loyalty and good principles, which they are to have in manner following: and we hereby

them as treasonable: Wherthrow they and ilk one of them wer guilty of contryving, emmit-

command all heritors, liferenters, and wadsetters, and in their absence, their factors and chamberlains, to convocate all the inhabitants upon their lands in every respective parish, and to bring them before any of our privy counsellors, or our commissioners appointed by our council in the shires and bounds underwritten, viz. Lanerk, Renfrew, Air, Dumbarton, Stirling, Nithsdale, and Stewartry of Anandale, Wigton, and Stewartry of Kircudbright, Berwick, Selkirk, Fife, and Kinross, Mid. West, and East Lothians, and Bathgaw, (including our city of Edinburgh, with the suburbs and liberties thereof,) and bounds betwixt Spey and Ness, (including Strath-spey and Abernethy) or any three of them, or before the sheriffs of the shire, where there are no such commission, to deliver them an exact list of the names of all their inhabitants; and the master and all the inhabitants, shall, in solemn manner, in presence of the said commissioners, take the following oath, viz.

‘ I A. B. do hereby abhor, renounce and disown, in presence of the Almighty God, the pretended Declaration of War, lately affixed at several parish churches, in so far as it declares a war against his sacred majesty, and asserts, that it is lawful to kill such as serve his majesty, in Church, State, Army, or country.’

‘ And such as can subscribe, are to subscribe the same, on a large sheet of paper, for every parish: and on performance thereof, the said commissioners are hereby ordained to deliver to every such person, a testificate of the tenor following, viz.

‘ We A. B. &c. do, by these, testify and declare, that C. in the parish of D. did compare before us, and on his or her solemn oath before Almighty God, did abjure and renounce the late traitorous Apologetical Declaration, in so far as it declares war against his majesty, and asserts, that it is lawful to kill such as serve his majesty in chureh, state, army, or country.

‘ Which testificate we declare is to serve for a free pass to all who have the same for all time thereafter, and shall preserve them from all molestation and trouble in going about their affairs; and if it shall happen any of the said testificates to be lost by the persons who receive the same, that they are to have them renewed by them who first granted them, and the ministers of the respective parishes; certifying hereby, all such who shall adventure to travel without a testificate in manner foresaid, that they shall be holden and used as concourers with the foresaid execrable rebels, and as guilty of the foresaid treasonable Declaration, and accessory to the designs therein. And to the effect this our will and pleasure may be made known to all concerned, We hereby require and command all our sheriffs, and magistrates of our royal burghs respective, to cause intimate the same at all the parish-churches within this

ting and publishing the said treasonable declaration, at the least were adherers thereto, in

kingdom, upon the Lord's day after divine service, and that with all possible diligence; and that the heritors, liferenters and wadsetters in every parish give in their fore-said lists, before the regular incumbent minister, and such a person or persons as shall be appointed by the sheriff and steward of each shire and stewartry, within the space of fifteen days after the said intimation at the parish churches respective; and in case it shall happen any to be absent from their residences, at that time, upon lawful occasion, their master shall take a competent day to produce them, conform to the distance of the place; and all who are otherwise absent, and for whom their masters will not engage in manner foresaid, shall be considered as fugitives, their families seized on in order to their transportation, and their goods inventoried and secured; and it is hereby declared, that the master shall be answerable that none of the goods of the said persons be taken off the ground until those employed by us shall intromit with them; and if any of these who compare shall own the said traitorous declaration, and the principle, and practices therein asserted, or shall refuse to disown the same in manner above prescribed, the said commissioners are hereby required instantly to secure and apprehend their persons, and carry them to the next burgh, sheriff, hallie of regality, or any of our forces who are nearest: and any who shall receive them, are hereby required to carry them to the surest prison next adjacent there to be kept till our council be acquainted therewith, and give order therein; and the apprehenders are hereby impowered to call to their assistance, such of our lieges as they shall think fit for executing of our commands; and if any shall refuse to concur, we declare they are to be holden as concourers with and assisters of these rebels; and that if any heritor, liferenter or wadsetter shall fail in doing as foresaid, they shall be holden as guilty of the foresaid crimes, and pursued and punished accordingly: And we do hereby strictly prohibit and discharge all our lieges whether to burgh or laud, as well all other house keepers, as hostler houses, inn keepers, and other houses of common resort, to harbour, lodge, or entertain any person whatsoever, unless they have such certificates as is above prescribed, under the pain of being punished as reseters of, and intercommuners with rebels: And for further security and prevention of fraud, it is hereby required, that the users and havers of the foresaid testificates shall be holden and obliged to swear, that these testificates are true and unforged testificates, and that they are the persons mentioned and expressed in them, if the same shall be required of them. And finally, for the encouragement of such as shall discover any of the said traitors and assassins, or any who have been any ways in accession to the said traitorous and damnable paper, or

refusing to disclaim and disowne the same, and art and part therof, and of the crimes particu-

to the publishing and spreading of the same, as said is, or to have been a member of the said pretended societies and fellowships, &c. We hereby declare and ensure to them, and every one of them, who shall discover any of these assassins, or pretended members, a reward of the sum of five hundred merks Scots, for each of them who shall be discovered, so as to be apprehended, and found guilty. And to the effect that all our lieges may have notice of our pleasure in the premisses, our will is, and we charge you strictly, and commaund, that incontinent, these our letters seen, ye pass to the market cross of Edinburgh, and remanent market crosses of the whole head burghs of the shires of this kingdom, and there, in our name and authority, by open proclamation, make publication of these presents, that all persons concerned may give exact and punctual obedience thereunto, as they will be answerable at their highest peril. And we ordain these presents to be printed,

“ Given under our Signet, at Edinburgh the 30th day of December, 1684, and of our reign the 36th year.

“ Per actum Dominorum secreti Concilii.

“ WILL. PATERSON, Cl. Sec. Con.

“ God save the King.”

The Proclamation, with its title, is here printed, as I find it in the Appendix to *Wodrow*, N^o C. But it is to be observed, that that author in page 459, of the same volume, intimates that the title of the Proclamation ran “ against the horrid principle of assassination.”

Of the origin of the “ Apologetical Declaration,” and of the prosecutions and other proceedings more immediately connected with it, *Wodrow* gives the following account accompanied with many reflexions, several of which I have omitted.

“ The extraordinary severities exercised September and October last, 1684, with the barbarous murder of some honest country people in the fields, which shall be noticed in its own room, drew forth from the society people their Apologetical Declaration, and Admonitory Vindication, especially against intelligencers and informers, about the middle of October, when the courts described Section 5, were just at their thickest persecuting work.

“ As the state of the body of Presbyterians was at this time most lamentable through the kingdom, their ministers all turned out, and either in prisons, or forced to leave their native country, their gentlemen imprisoned, and most exorbitantly fined, their commons cruelly harassed, now by the army, and then by particular and more general courts; so the people united in societies, who, as we have heard, had withdrawn, since the death of Mr. Caspi, from the rest of the Presbyterians of this Church, were

larlie and generally above libelled; which being found to be an assyse, they ought to be

in a special manner hunted, yea, killed all the day long, and counted as sheep for the slaughter.

“ From what hath been pointed at, as to the condition of those wanderers and hiding persons, who, generally speaking, made up those societies (though many were upon their hiding, who did not joyn with them in their heights) the reader will easily guess at their circumstances. The sea ports were shut, they could not get off the kingdom, they were daily hunted for by the bloody and merciless soldiers, the whole country was sworn to discover them, and bound up from giving them meat or drink, and secret informers and intelligencers were bribed to joyn them, and find out their haunts and lurking places, and any who inclined to do them the least kindness, were terribly persecuted, and all they did in their own defence was reckoned murder, and the country abused for it. They were prescribed, and cast out of protection by the government, and no terms would be accepted but going over their light, and renouncing their principles.

“ All this, and much more than I can now narrate, gravaminous in their case, put their general society, which, by their original records I find, met October 15, to publish their Apologetical Declaration. Mr. James Renwick was employed to draw it; and it was published by some of their number, October 28.

“ When this paper had been published by some of the societies, it was affixed to several market-crosses, and November 8, posted up upon a great many church-doors in Nithsdale, Galloway, Air and Lanerk shires. I find it put on the church-doors of Kilbride, Strathvean, and many others.

“ November 11 or 12, copies of the societies paper came into the council, and put them in a perfect rage. I shall give some instances of it from the Registers, and then from some accounts I have from persons yet alive, who were present that afternoon when the prisoners were brought in before them.

“ By the Registers I find a very severe account John Semple. November 13. ‘ John Semple of Craighorn in the parish of Glasford, taken near the kirk of Glasford, and brought in prisoner, as suspect to have been a contriver of the late treasonable declaration against the king, or at least accessory to the affixing thereof at the said kirk, and some others, or at least as having knowledge of the persons, contrivers, affixers, or promoters thereof, being called before the council and having refused to give his oath upon the premisses, the lords of his majesty’s privy council ordained him presently to be tried by torture in the thumb-screw, boots, or both, until he be brought to a clear confession, they having first declared, that what he should declare should not militate against himself as to his life. And the said John being called in, and

punished with forfeiture of liff, land and goods, to the terror of others to commit the lyke herefter.

Perswair. Sir George Mackenzie, of Rosehaugh, his majestie's Advocat.

“interrogate in the thumb-screw, and having refused to declare, and at length turned faint, he was remanded to prison till to morrow at ten of the clock, at which time he is again to be tried by torture.” I meet with no more about him in the council-books; we shall just now meet with him to morrow before the Justiciary.

“By other papers, particularly one under Robert Goodwin's hand, of whom I have given some account before, I find, that November 15, he, with several other prisoners, was brought this afternoon before the council, and interrogate upon this paper, about which they knew nothing. In a great haste it was read over to them, and they were ordered immediately to hold up their hands and swear they did not adhere to it, and knew not the authors of it. Robert Goodwin in name of the rest said, and I doubt not but it was the case of all of them, that he had never heard it till it was now read, that he knew nothing about the forming of it, but would swear nothing about it; whereupon they were sent to the Iron-house.

“Another instance of their treatment of the prisoners this day, I have from one present, and witness to the terrible usage of William Niven smith in Pollock-shaws in the parish of Eastwood. We heard formerly, that last month he was banished to the plantations, and here I shall take occasion to narrate some other particulars of his sufferings, and that but in so many words.

“We heard of his trouble in the year 1678, and since that time he lived peaceably, following his trade, and had not been at Bothwell, nor was chargeable with any thing, but not hearing Mr. Fisher the episcopal incumbent, July 29 this year, about midnight a party came and took him out of his bed, and carried him to Glasgow's Tollbooth. They alledged he had been at a sermon of Mr. Renwick's, which was false. He lay three weeks there in irons, and then, with John Machan of the parish of Kilpatrick in Dumbartonshire, he was carried up to the bishop, and examined by him and colonel White upon the ordinary questions. Nothing was said against William save his not hearing Mr. Fisher, to whom I must do the justice to say, he was one of the soberest of his way, and he came into Glasgow, and used his interest with the bishop, and signified to him, that the prisoner was a good peaceable person, and as to his not hearing, he would take him into his own house.

“But nothing could prevail unless he would take the test, which he peremptorily refusing, was sent, with five others, two and two of them fettered together, into Edinburgh under a guard. There he lay in the irons night and

His majestie declares that he insists against the pannalls, and restricts the lybell in the following termes, viz. That the pannalls owne or refuse to disowne the traitterous proclamation mentioned in the indytement wherby warr

day, till May 1685, when he had his share in Dunnoter sufferings, as we shall hear, and afterwards was sent to New-Jersey with Pitlochry.

“This same day, when the accounts of the Apologetical Declaration came into Edinburgh, William with some others whom my informer hath forgot, but minds John Hodge armourer in Glasgow, John Campbel in Overmoor, John and Peter Russels in Muirhead of Shots parish, James Tennant, in West-calder, were brought most suddenly about six of the clock at night, from the Iron-house to the council or its committee. The chancellor posed William and the rest, whether they knew any thing of these treasonable papers that had been affixed to church-doors last Saturday night, or Sabbath. They all declared, they did not. Then they were interrogate if they owned the matter of them. The pannalls answered, they knew nothing about them, and could neither own, nor disown them.

“The lords appeared to my informer, to be in an unusual hurry and rage, and the clerk was bid read the paper, which he did as fast as he could run over it. Upon hearing of it, the pannalls declared ingenuously, that they could make no judgment of it upon so overly an hearing. They were again required, under the highest pains, to disown it as their opinion. They answered, they had no share in it, and would not take upon them to judge of it, since this came not to their door.

“Whereupon they were removed a little, and when called in, they were told they were sentenced to die that night at ten of the clock, and were removed two and two into corners of the laigh council-house, with a soldier or two to wait on them, there to continue till the hour of their execution. Happily for them something or other fell in that night which put the managers in confusion: It was said, it was some letters they received, and so about two hours after, they were carried back to the Iron-house, and for a good many weeks afterward they were made to expect every day they were to be executed at two of the clock, till the king's death fell in, and then they were no more directly threatened. This procedure is every way so far out of the road, that I should not have inserted it, if I had not had it from one whom I can depend upon, who was witness to it, yet alive, attesting it in all its circumstances.

“From this instance we may see the manner of this period, and what an handle was taken from every thing that fell out, to exercise the greatest severities upon people who could not be supposed to have any share in those incidents. To this likewise we must attribute the barbarous treatment of the prisoners from

is declared against his majesty, and asserting that it is lawful to kill all those who were employed by his majesty.

Dumfries, formerly spoken of. Old men, and women with their sucklings not three months old, women with child, and others near eighty years, upon the break of a storm of frost and snow, were forced to travel twenty, or twenty four miles about the shortest day, and through waters to the danger of their lives. None of them either could be concerned in this paper, and no account can be given of such barbarity, but their merciless temper exasperated by this declaration.

“ Next day, November 14, the managers go a farther length, and by the criminal records, I find before the justiciary, John Semple, John Watt, and Gabriel Thomson. They are libelled for high treason, as art and part in the paper lately posted up upon the Kirk-doors. The advocate restricts the libel in those terms, ‘ That the pannals own, or refuse to disown ‘ the traitorous proclamation mentioned in their ‘ indictment.’ The probation is John Semple his judicial declaration that he owns the proclamation, and would not disown it. Gabriel Thomson refuses to disown it. John Watt refuses to answer, or disown the paper. The assize bring in all the three guilty according to their confession, and the lords sentence them to be taken to the Gallow-lee, this day betwixt three and five of the clock in the afternoon, and forfeit them in common form.

“ I am well informed that John Semple was tortured most cruelly a second time in the boots, and taken from the torture to the justiciary, where sentence was past, and executed that same afternoon with the others. At the execution the soldiers were barbarous, and allowed the poor men scarce any time to pray. The people who looked on were surrounded by the soldiers, and had interrogatories and queries put to them, which when they refused to answer upon oath, ten or twelve were made prisoners, and carried from the scaffold to the Tolbooth.

“ After this, I find the lords of council delay the examination of the prisoners in the Cannongate and Edinburgh tolbooths, as to the treasonable declaration, and perhaps would have extended their enquiries into the country, had not the incident of killing of Kennoway and Stuart fallen in, which put the managers upon new, and yet more barbarous methods.

“ I have not so distinct an account of the murder of these two, as I wish I had, neither can I say whether it was in self defence or not, but it is generally said, it was premeditated by some persons in the neighbourhood, or society people lurking among them, they having been severely oppressed by Kennoway for many years; and if this was an assassination, nobody ought to defend it. They were both gentlemen, as the stile was, of the life-guard, and killed, as is said, coming out of the door of

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Follows the querie proposed be the lords of his majesty's privy council to the lords of his majesty's counsell and session, viz. Queritur,

the house at Swine-abbay, in the parish of Livingstone; and after the most narrow search that was made, none of the actors could ever be found, but I am assured, the society people refused to admit some persons to their fellowships, whom they suspected to be concerned in this murder. I have no account of Stuart, but Kennoway's oppressions in Livingstone, West-caldar, and that neighbourhood, from Pentland to this year, have been in part noticed, and I shall add a few other well vouch'd instances of his former carriage.

“ Thomas Kennoway was very active under general Dalziel at Pentland, and after the defeat of the west country army, he apprehended that excellent person formerly mentioned, Mr. Hugh Mackail at Brades-craigs, and went still on in spite and malice against the suffering party, year after year. Some years after, he with a party of the guards attacked a company of unarmed people hearing sermon at Thomas-moss in East-caldar in Mid-lothian, and shot one of them through the thigh, and beat and spoiled many others. The council and managers soon took notice of his activity and severity, and gave him frequent commissions, which he rigorously executed. At one time he attacked a meeting in the parish of Bathgate, and shot one James Davie, an heritor of that parish, dead in the spot, and took fourteen prisoners, who were afterwards sent off the kingdom. After Bothwell he seized Mr. John King, and brought him in prisoner to Edinburgh. In Mid-caldar, he seized an old man whom he alledged to have been at Pentland, and beat, and bound him in the most barbarous manner. Mean while some went into Edinburgh, and complained to the general of his cruelty, whereupon a letter coming out to him threatening him for his illegal severities, he forced the poor old man in fear of present death, to sign a paper, that Thomas Kennoway had never wronged him in his person or goods. In the parish of East-caldar he broke in upon an house, and missing the husband whom he was seeking, beat and abused his wife, who was with child, most inhumanely, and threatened before her eyes to force two of her daughters, all which put her to such a fright, that she parted with child, and never recovered, but died in a very little.

“ Indeed he was notoriously wicked and profane, a known adulterer, and a fearful drinker, and blasphemous curser and swearer. He used to say, ‘ Hell would be a good winter quarters, but ill summer quarters.’ And one in company asking, if he was not afraid to speak so of Hell; he said with a new oath, ‘ He was never afraid of Hell, but sometimes ‘ he was afraid some of the rebels would shoot ‘ him dead at a dyke-side.’ This was some years before his death.

“ Instances of his grievous oppression of the

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whither any of his majesties subjects being questioned by his majestic's judges or commis-

parishes of East, Mid, and West-calders, and Livingstone, have been given, and many might be added: He was indeed a terror to all that country side. And he was constantly almost among them, fining and oppressing multitudes, of which I have accounts before me too long to be insert here. One thing I shall notice, because it was much observed after his death. Some time before Meldrum's court, of which an account hath been given, Kennoway had for some time continued drinking at Swine-abbay till all the money he had was spent, and he had not wherewith to pay his reckoning, he went out, and seeing a poor countryman coming by on the road with a bag of oats, by mere force he took it from him, and threatened him dreadfully if ever he looked after them, and with the poor man's oats he paid his lawing, and had some little more money to drink upon in some other place. And in this very place he was sent into eternity.

"November 17. He came out of Edinburgh, with a roll of persons, he said, he had a commission, from the council, to apprehend in the country, upwards of 150 men, probably of his own upgiving. He alighted at Livingstone, where he met with the other Duncan Stuart, to whom he shewed his commission, and told him, in a few days he hoped to be as good a laird as many in that country, and they fell a drinking. He regretted much that he was turning old, and would not get the lands he now reckoned as his own, long enjoyed. In the way to Swine-abbay he described and pointed out the places he had in his eye to possess, to his comrade Stuart, till they came thither, and there they continued drinking and laying their projects until the 20th of November, when they were cut off; the particular circumstances whereof I cannot relate, none being witnesses but the actors, who got off and were never taken.

"This is all the account I can give of this matter, and I do not set down those things to vindicate the actors, but to shew how righteous the providence was, that this wicked man is cut off in the midst of his days and projects, however blameable the persons might be in their manner of doing it. Before I leave those two persons, I only insert the council's act December 9, anent their widows, to shew the concern they shewed for the relatives of such as had been active in the persecution. 'The council having considered the petition of Janet Stuart relict to Thomas Kennoway, one of the gentlemen of his majesty's guard, and Jean Jaffrey, relict to Duncan Stuart, another of them, lately inhumanely murdered and butchered by some desperate rebels and fugitives, at the house of Swine-abbay in the night-time, do recommend them to the Treasury for charity.'

"But I come forward to the Council's more public actings as to the society people's decla-

sioners if they own a late proclamation in as far as it declares warr against his sacred ma-

ration, and this murder at Swine-abbay, and we shall find them very singular. From thence they take occasion, first to order a particular search to be made in Edinburgh, which was not so unreasonable, and then, after some reasoning and opposition to so much barbarity, they agree upon the bloody orders to murder in the fields all who should not expressly disown the foresaid declaration, without any libel or legal process, and lastly give out a terrible commission for harassing the country round the place where the two soldiers were killed, and after that commission is executed, they grant more general powers to particular trustees, to harass of new the west and south country. Of all which in their order, and from the public records.

"November 21, the Council make the following act. 'The lords of his majesty's privy council, having just reason to suspect that several of those desperate rebels who have lately emitted a most traiterous declaration, whereby they declare war against the king's most sacred majesty, and all in authority, civil, ecclesiastical, and military, under him, may lurk in the town of Edinburgh, and who in the prosecution of the same have lately murdered some of his majesty's soldiers, require the magistrates to take all effectual methods to discover them, and to take up lists of all in the burgh that are householders, and the oaths of heritors as to the tenants they set their houses to; and by the help of the ministers and elders of the respective parishes, to make up rolls of the inhabitants according to the respective parishes; and empower ministers and elders to examine masters or mistresses of families, upon oath, as to the number of their servants, their names and surnames; and likewise to give up the lists of subtenants, if any, and to take up lists of lodgers in any house or tavern, so as all put together may comprehend the whole people, and to take an account of all persons who have neither family nor residence.' A little after this followed the search which hath been accounted for Section 1.

"More general and extensive measures were for some time under deliberation among the managers, and, as soon as could be, they authorised what had been now and then practised by the soldiers with impunity, the killing people in the fields in cold blood who would not answer their queries, without any libel, process, or jury. It would be hard to persuade the present or after ages that any such orders were judicially agreed upon by the council, if we had not the original records to vouch this, and until I had access to them, I could not fully give credit to what I had by a general report, that soldiers had orders to kill in the fields, and at most reckoned it was some particular warrants, given under some of the managers hand, that were pretended for this barbarity, and it is more

jesty, and asserts that it is lawfull to kill all those who are employed by his majesty, refusing to answer upon oath, are thereby guilty of

than I expected when I met with the order for it, standing as a black mark of the cruelty of this time in the registers.

“ It is altogether useless to make remarks upon those orders, they stand fairest in their native colour; and I am surpris’d at the confidence of sir George Mackenzie, who was conscious of those, and knew them well, and yet undertakes a vindication of this reign as full of mercy and clemency. The council inclin’d to have the concurrence of the lawyers, the lords of session, in this extraordinary step, and apply to them, and record their answer to their query, and form their act upon the whole. This matter stands in the register thus :

“ *Apud Edinburgh, November 22, 1684.*

“ *Sederunt.*—Chancellor, Glasgow, Douglas, Linlithgow, Balcarras, Yester, Lundin Secretary, Register, Advocate, Justice-clerk, Castlehill, Drumelzier, Abbotshall, Gosford.

“ Here follow the Query and Answer, as given in the text.

‘ It being put to the vote in council, whether or not any person who owns, or does not disown the late traitorous declaration upon oath, whether they have arms, or not, should be immediately killed before two witnesses, and the person or persons who are to have instructions from the council for that effect? Carried in the affirmative.’

‘ The lords of his majesty’s privy council do hereby ordain any person, who owns or will not disown the late treasonable declaration upon oath, whether they have arms or not, to be immediately put to death; this being always done in presence of two witnesses, and the person or persons having commission from the council for that effect.’

“ I am informed, extracts of this act signed by the chancellor, advocate, or clerk, given to the officers of the army, and powers from them again given to their underlings, even so low as common centinels, were reckoned commissions sufficient for the executing of this horrible act. What may be in this I shall not affirm. The people who passed such an act as this, could easily give ample enough commissions, if they pleased. However, it is certain, that majors, captains, and soldiers, pretended all to act by virtue of this act; and though I shall not say, that all the murders we shall meet with in the fields next year, were committed by warrants from the council, which at this distance can scarce be known; yet no doubt Claverhouse, Balfour, and others had them, and we shall meet with Balfour calling witnesses to his murder in the terms of the act, and private centinels alledged orders for what they did this way; so that upon the whole, I cannot help thinking, that as several murders in cold blood committed before

high treason, and are art and part of the said treasonable declaration?

“ The Lords of counsell and session having

this act, as we have noticed, and shall hear of were thereby made the council’s deed, so the blood for several years shed in the fields and houses, the blood of many scores of innocents, is all to be charged upon this unnatural and unaccountable act.

“ It is time now to come forward to the commissions the council gave. The day after this former bloody act, November 23, they give a commission to try, judge, and execute in the parish where Kennoway and Stuart were killed, and others about, mentioned in their instructions. As I abominate murder in cold blood as much as any, so I cannot but equally hate cruelty and oppression, under the colour of law; and I could not but be surpris’d, to meet with such instructions agreed on by the council, especially when they were a pattern by which the soldiers were careful to act in other places of the country.

“ The commission with a Justiciary power is given to the Lord Livingstone, Lord Ross, Lord Torphichen, Lieutenant Murray, Sir Mark Carse, and George Hume, cornets of the guards, the Lairds of Barbachlay, Pockemmat, Pottishaw, and Badds, or any five of them, the lord Livingstone, or commanding officer being always present. The commission is in the ordinary stile of those formerly narrated; but the instructions are every way singular, and follow under this title, as appears to me, to empower any of the forces under the commanding officer, to execute all those severities.

“ INSTRUCTIONS to the Forces to be sent to the parish of Livingstone, Batbgate, Torphichen, and Calders.

‘ You shall convocate all the inhabitants, men and women, above fourteen years of age, within the parishes of Livingstone, Batbgate, Torphichen, Calders, easter, wester, and middle, and ye shall examine every person; and after the oath of abjuration, [we shall meet with it just now] such as take the oath you shall dismiss, unless you have grounds of suspicion of their guilt.’

‘ And if any own the late traitorous declaration, or assassination of the soldiers, you shall execute them by military execution upon the place.’

‘ And such as refuse to answer or depone, or will not disown the said traitorous declaration, and the principle and practice of assassinations, you shall give them a libel instantly, call fifteen men as a jury, and let them judge them, and instantly execute the sentence of death on such as do so refuse to disown, or to answer to the questions before the said jury.’

‘ And ye shall seize their goods, delivering as much of them as will pay one year’s rent, to such masters as either have, or will take the text.’

considered the above written querie, its their unanimous judgement, that a lybell in the terms of the said querie is relevant to infer the cryme of treason as art and part of the said treasonable declaration against the refusers.

Sic Subscribitur.—Perth, C. J. Falconer, Geo. Mackenzie, James Foulis, J. Lockhart, David Balfour, James Foulis, I. Beton, Patrick Ogilvie, Roger Hog, A. Birnie, George Nicolson, I. Stewart, J. Wauchop, P. Lyon.
The principall at the councill office.

‘ And if any be absent, ye shall burn their houses, and seize their goods, unless their master, or some other sponisible man bind to produce them in a competent time; the master or cautioner being always one who hath, or shall take the test presently.’

‘ You shall likewise examine all persons upon their knowledge of any accessory to the said proclamation or assassination, and such as refuse to depone upon their knowledge you shall keep prisoners.’

‘ You shall examine all upon their oath anent harbourers, reseters, or concealers of the assassinations, or such as were accessory to the proclamation; and if any refuse, make them prisoners, bring them into Edinburgh, and cause secure their goods.’

‘ And as to the families of such as you condemn or execute, you shall make prisoners of all persons in their families, above the age of twelve years, in order to transplantation.’

‘ As also you shall take the oaths of all who compear, that they shall not harbour, reset, or conceal any of those dangerous rebels, whether pretended ministers, or adherents, but shall discover their persons, and assist to the taking or pursuing of them, and shall discover who shall harbour, reset, or entertain any of them, to some magistrate or heritor of the ground, that they may raise the country, and pursue them, till they be apprehended; and who will not give oath in the terms above-mentioned, you shall bring prisoners to the Tolbooth of Linlithgow, there to be kept till further order.’

‘ You shall likewise apprehend all the near relations of Nimmo, and bring them to Edinburgh for further examination. For all which this shall be warrant to you, and all officers and soldiers employed by you.—Geo. Mackenzie, Geo. Mackenzie, Jam. Fowlis, Jo. Lockhart, And. Ramsay, James Graham, Perth Cancel. Douglas, Balcarras, Livingstone, J. Drummond, Dav. Falconar.’

‘ I have before me a large account of the procedure of this commission in the foresaid five parishes. The soldiers came out the day before, and charged all, young and old, to appear before the judges, under pain of death. They sat first at Livingstone, where many questions were put to some of the people anent the king’s authority, their keeping the kirk, and other matters quite extraneous to the de-

The Lords Justice Generall, Justice Clerk’ and Commissioners of Justiciary having considered the lybell persewed by his majestie’s Advocate against the pannalls, ‘ They find the same relevant as it is now declared and restricted, viz. That they doe owne, or at least refuse to disowne, the traitorous proclamation mentioned in the indytement, whereby warr is declaired against his majesty; and asserting that it is lawfull to kill all those who are employed by his majestie, to infer the cryme of treason, as art and part of the said treasonable

signed enquiry. The soldiers sat on horseback, with their swords drawn, round about the country people in the fields. Old and infirm people who had not been from their houses for many years, were brought out, and those who were not able to walk, were brought on horses, and such who were not able to sit, were tied to one another on horseback; none were permitted to return till the judges examined them. At night, the court adjourned to Mid-caldar, and all not examined were ordered to attend there, where the people were examined in the church. But, passing these circumstances, I only remark, that all this trouble the country was brought to, made no discoveries I can hear of.

‘ November 25. ‘ The lords of his majesty’s privy council approve the draught of the oath underwritten, to be offered to all persons whom they or their commissioners shall think fit.’

‘ I A. B. do hereby abhor, renounce and disown, in the presence of the Almighty God, the pretended Declaration of War lately affixed at several parish churches, in so far as it declares a war against his sacred majesty, and asserts that it is lawful to kill such as serve his majesty in church, state, army, or country, or such as act against the authors of the pretended declaration now shewn to me. And I do hereby utterly renounce, and disown the villanous authors thereof, who did, as they call it, statute and ordain the same, and what is therein mentioned. And I swear, I shall never assist the authors of the said pretended declaration, or their emissaries or adherents, in any point of punishing, killing, or making of war any manner of way, as I shall answer to God.’

‘ This is the first shape of the Abjuration Oath, we shall have it just now in the proclamation a little shortened, and this was new matter of severe persecution to the west and south of Scotland next year. That this might be the better pressed, the council send west lieutenant general Drummond, and, besides him, name many particular commissioners in the particular districts in the south and west. They are mostly the persons named in the beginning of this year, with some few others, some of whom will come in just now; it is their instructions and commissions will be of most use to the reader, to discover the temper of this period.

‘ And December 2. I find the council direct the following letter to the commissioners of the

paper, and remitts the same to the knowledge of one Assyse.—*Sic Subscritur*, Linlithgow, Jas. Foulis, I. Lockhart, David Balfour, Roger Hog, I. Beton; P. Lyone.

ASSISE.

William Galloway, wright
George Galbraith, merchant
James Ker, barber
John Black, vintner
Charles Murray, merchant
Andrew Cowie, merchant

George Gardner
Alexander Buchan, vintner
William Porteous, merchant
John Fleyming, baxter
John Wilkie, taylor
Robert Wilson, merchant
Robert Young, wright
James Brown, merchant
Edward Cunninghame, perriwig maker.

The Assyse lawfullie sworne, no objection in the contrare.

several districts in the southern and western shires.

“ 2. Right Honourable; The king’s majesty having granted an indemnity, February 26, last past, and the council considering there may be persons within your districts, who may fall in to share in that indemnity, and being willing none should fall short of it, have sent you the following instructions thereanent.

PERTH.

“ This is the first time I meet with this indemnity, though granted February last. What were the motives in the managers to keep it up till now, I shall not enquire, neither can I learn from the registers it was published at all. In February or March next year, an indemnity is published at the accession of king James, but till then I can learn of no other since the year 1679. However, they now elog the indemnity with the aljuration oath, and put it intirely in the hand of the commissioners, to apply the king’s pardon, or not, as they see cause. The instructions will best speak for themselves.

INSTRUCTIONS for applying his Majesty’s Indemnity.

“ 1. You are, conform to his Majesty’s Indemnity, to set at liberty, and free all persons imprisoned, or under bond, by you not fined; and though they be sentenced to banishment, they being under the degree of heritors, liferenters, wadsetters, or burgesses of burghs royal, and vagrant preachers.

“ 2. By vagrant preachers you are to understand indulged ministers, and such as are in orders, but not licensed according to law, whom you are not to dismiss or liberate, but upon their enacting themselves, or finding others caution for them, that they shall not hereafter exercise any part of the ministerial function within this kingdome, under the pain of five thousand merks, otherwise find caution under the same sum to remove off the kingdom within twenty days, and not to return without licence, and mean while to live peaceably.

“ 3. If any persons already declared fugitives, shall within twenty days after the date of his majesty’s proclamation, address to you, and testify their acceptance of the said pardon, by taking the allegiance, or finding caution to transport themselves out of his ma-

‘ jesty’s three kingdoms, before the twentieth day of May next, after the date of his majesty’s proclamation, and to live peaceably till then, and not to return without licence on pain of death, you are to admitt them.

“ 4. But before you offer his majesty’s said pardon to any of the forsaid persons, you are to cause them swear the late oath of abjuration, and that they shall never take up arms against the king, or any commissionate by him, upon any pretext whatsoever; and if they refuse so to do, you are to secure them in firmance, until you report to the council, and have further orders; and you are to give the ordinary pass to all such as take the said oath.

“ But to awe the country the more, beside the former commissioners, some are more especially appointed to traverse the country with a justiciary power lodged in them solely. Thus, December 4, the council send lieutenant-general Drummond to the west and south. His commission and instructions will best shew his powers.

COMMISSION and INSTRUCTIONS to Lieutenant-general DRUMMOND.

“ Charles, &c. Forasmuch as we and the lords of our privy council are certainly informed, that there are certain fugitive rebels now in arms, in several places in the south and western shires, who by themselves, their adherents and accomplices, do daily commit great abuses and insolencies, to the disturbance of our peace, and the disquiet of our loyal people.

“ We, to the effect that these rogues and villains may be reduced, do, with advice of our privy council, constitute lieutenant-general Drummond, master general of our ordnance, our justice in that part, to the effect underwritten, with power to him to go to the said south and west shires, or any parts thereof, where the said rebels and their adherents do mostly resort, and then and there, as he shall think expedient, to affix and hold courts of justiciary, call assizes, &c. (as in common form before specified) and call any of the said rebels or their adherents, or persons suspect, and cause justice be done on them according to law and practick, and acts of parliament of this realm, and instructions given by our council of the date thir presents.

John Semple, pannall, after swearing of the Assyse, declared he owned the treasonable pro-

' Promitten. to hold firm and stable ; and ordain this commission to continue and endure till the first of January next.'

INSTRUCTIONS given with the above specified Commission.

' 1. You are to go to the southern and western shires, where several rebels and their adherents are, or do haunt and resort, and do commit great insolencies and abuses ; and for your assistance in reducing and punishing them according to your commission you are to take with you the forces following. Half of the troop of his majesty's life-guard, four troops of Claverhouse's regiment of horse, the earl of Balcarras, Airly, and lord Ross their troops, six troops of general Dalziel's regiment, with two hundred foot out of the earl of Mar's regiment ; and with them you are to pursue, take, and apprehend and kill the foresaid rebels and their abettors.

' 2. You are to call before you all such persons who have been in the late rebellion, and have not taken the benefit of his majesty's indemnity, and their reseters, as also, all such who have been actors in contriving, accessory to the publishing, or affixing, or do any manner of way approve of, or allow the late treasonable paper and declaration.

' 3. You are to quarter the said troops under your command, upon your march up and down the said shires, either in burgh or land, as you shall find most expedient ; and you are to settle garrisons of horse and foot, and dragoons in such places, and consisting of such numbers, as are contained in a list given you for that purpose ; and to make such alterations in the said garrisons as you shall find most proper for the king's service, and the peace of the country ; and you are to require all sheriffs and magistrates where those garrisons are to be established, immediately to convene the commissioners concerned to provide them, and to certify the sheriffs and other magistrates, that if they prove negligent, they will be convened before his majesty's privy council, and fined therefore ; and if they be negligent, you are to allow the forces in that case to take what they want at their own hand ; and generally, you are to do every other thing necessary, which may most conduce to his majesty's service, and the good of the country.'

' At the same time the council write a letter to the duke of Hamilton, acquainting him, that they had sent west lieutenant-general Drummond, with a justiciary power to go through the western and southern shires, and try rebels and fugitives, and vagrant skulking persons in the said shires, and, where he finds it necessary, to establish garrisons, especially in Lanerksbire ; and desiring that his grace may convene the commissioners, who are proper to provide the garrisons with all necessaries.

clamation which was read publictly, that he would not disowne the same.

' Besides those powers granted to the lieutenant-general, some other commissions are granted to private persons, who would undertake them, to search for, and take suspected persons in places which the regular forces could not so easily reach. Thus I find a new highland host is brought down upon the shires of Renfrew and Dumbarton, under the laird of Orbistoun. The commission is a little singular, therefore I insert it. Date, December 8, 1684.

' Charles, &c. Forasmuch as we understanding there are several rebels and fugitives, who do haunt and skulk in the shires of Dumbarton and Renfrew, and that there are several outed ministers who reside within the same, to the great disturbance of our peace, if a present remedy be not fallen upon for preventing the abuses committed by the said rebels and fugitives, and our people from being debauched into disloyal and seditious principles by those outed ministers.

' Therefore we, with, and by advice of the lords of our privy council, do give and grant full power and authority to William Hamilton of Orbistoun, to levy voluntarily 200 highlandmen of the shire of Dumbarton, and with them, or any part of them, as oft as our service shall require, to march to any part of the said shires, and pursue, take, and apprehend the said rebels and fugitives, vagrant and skulking persons and their reseters, and commit them to some firmance or ward till they be legally tried.

' And in case any of the said persons be in arms resisting and refusing to be taken, we do hereby fully inpower the said laird of Orbistoun, and those with him, to kill, wound, and destroy them, and deliver such of them who shall be taken alive, to our next commissioned officer of our forces, to be brought in prisoners to the Tolbooth of Edinburgh, in order to be brought to a legal trial, or to be otherwise disposed of as our council thinks fit.

' And in pursuance of the said commission, we do authorize the said laird of Orbistoun, to imploy spies and intelligencers to go in company with the said rebels and fugitives, as if they were in their party, the better to discover where they haunt and are reset ; and, if they can, to apprehend and present them unto him for the effect foresaid.

' As also with full power to the said laird of Orbistoun, to take and apprehend the persons of all outed ministers, who shall be found within, or resort unto the said shires, and send them in prisoners to the Tolbooth of Edinburgh, or deliver them to the nearest officers of our army, to be brought in prisoners accordingly.

' It is also hereby provided, that the said laird of Orbistoun take care that those persons imployed by him, commit no disorders, and the country through which they pass, receive no damage by them.

Gabriel Thomson declares judicially he will not disown the treasonable paper read and produced.

John Watt refuses to answer or disown the treasonable paper produced.—*Sic Subscribitur*, Linlithgow, Ja. Foulis, J. Lockhart, David Balfour, Roger Hog, I. Beton, P. Lyon.

‘ And for the better encouragement of the said laird of Orbistoun, and those with him, we indemnify him or them in case of resistance, where persons may be killed, wounded, or mutilated, and for conversing with rebels and fugitives to the ends foresaid, and from all pursuits criminal or civil in all time coming; and do declare this our indemnity to him and them, to be as sufficient and valid as if the same were under our hand and great seal: And this our commission is immediately to begin and take effect, and to continue and endure till we or our privy council shall recall the same.’

‘ The hardships and difficulties the poor people in the west and south were brought under by this army sent upon them, are indeed inexpressible.

‘ At length, December 30, after all those steps taken to harass and persecute the country, before any previous warning given to them, of the danger of the societies Apologetical Declaration, and the necessity of the taking of the oath of abjuration, which, one would think, ought to have been the first step should have been taken, the council emit their proclamation against the declaration.

‘ I can scarce doubt, but some of the managers knew the nature of the meetings of the society’s people: Earlstoun had given a very fair account of them, and yet they take it for granted, their fellowships and societies for prayer and conference, were a form of civil government, and levelled at bloody and assassinating designs. I am apt to believe, some of the managers knew other things, though they speak thus.

‘ And upon this false supposition, the proclamation orders all that do own this declaration, or do not disown it, to be tried and executed to death. And that this was hard, will appear, not only from the scruples we have heard, against owning or disowning things, at the order of the persecutors, but will be yet plainer, if we charitably suppose, what, they say themselves, is true, that they were driven to this last shift, not from any design of assassination, which they say they abhor, but merely in self-defence, and they advance much to prove, that their assertions go no further. But I leave their defences to themselves.

‘ This I know, that many poor country people would not disown their paper, not from the least inclination to the principles the proclamation speaks of, but because they imagined the disowning of this paper, was a disowning of the poor persecuted people, and an

Follows the Verdict of Asyse.

The Assyse having twice chosen and elected George Galbraith Chancellor, They all in one voice find John Semple guilty of owning the treasonable paper and proclamation mentioned in his dittay. And finds John Watt and Gabriel Thomson, pannals, guilty of their refusing to disowne the traitorous paper, conforme to the

approbation of the cruelties and hardships put upon them; and it was certainly unaccountable to butcher multitudes of them merely for their opinion, and that in a very few minutes. I may take notice further, that the council, or rather criminal court by their direction, found the not giving poor country people’s opinion upon this paper, sufficient ground to execute them, even before this proclamation; and the proclamation orders a trial and execution upon the back of it: but the soldiers would not insist upon this nicety, but wherever they found people who would not answer their questions, they immediately dispatched them; and in this the act of council appears to warrant them, though I do not observe that the proclamation does.

‘ It needs scarce be remarked, that the proclamation involves the whole subjects, in assistance to magistrates and army, in those severe courses, which was hard enough, but now very common, and then under a pretext too, to ease the country, whereas it was really to involve them. All above sixteen years are obliged to have passes of their loyalty, and these were only to be had upon their swearing the abjuration oath, as in the proclamation.

‘ I shall say very little upon this oath; the more frequently oaths, and that in different shapes, upon every new turn, be imposed, the less they are for the real security of a government, and the design of them is lost. I own, for as short as the oath is, it runs very oddly to me: the swearer disowns, in the presence of God, this pretended declaration of war, in as far as it declares war; and it seems to need explanation as well as some parts of the test, and many things might hinder persons to swear such a proposition as this, who were heartily against assassination; and yet all must have this pass, otherwise must be reckoned concurers with the said execrable rebels, and owners of the said declaration. This made a short process, and, for any thing I can observe, all who wanted a pass, might be murdered by the next soldier who met them; and every one who refused to concur in harassing these poor people, is to be holden as guilty as the refusers; and all persons and public houses who entertain any wanting this pass, are laid under the pains of being punished as ressetters of rebels; and every body who is required (by an ostler, or stable keeper, for any thing I know) to swear that his pass is good and genuine, must do it; which, I fancy, will be found a clause peculiar to this time, and no where else to be found. And lastly, the proclamation offers 500 merks

Lords Interloquitor. As witness my hand, day and date forsaid.

Sic Subscribitur, GEO. GALBRAITH.

the discoverers of any that had accession to the societies paper, or any of the members of the societies or fellowships. Their price is much fallen. We have seen 9,000 merks set upon the discovery of an intercommuned minister, and 10,000 merks on the archbishops assassina- tors; and yet but 500 merks now is put upon the alleged patrons of assassination.

"Nobody can be more for a government's discouraging all things which tend to assassina- tion and murder than I; but this is an odd way of doing it, especially when disclaimed in the paper itself: and every body must observe, that the former orders and this proclamation, did, in the event, open a wide door to multitudes of murders and assassinations of some very pious persons, as we may afterwards hear.

"In short, the managers took occasion, from this unhappy paper of the societies, terribly to renew their oppression of the country, and maliciously and slanderously to charge it upon the body of suffering Presbyterians, who, as they knew nothing of it, so were very far from approving it: yea, the reader will find the societies themselves, afterwards, in the in- fortunate vindication, disown it as a declaration of war, almost in the very terms the govern- ment require it to be disowned, and asserting, that in this paper they acted merely *ad ter- rorem*, and for self-preservation, and expressly disclaiming all authoritative and magistratical power: however, dreadful was the havoc and trouble the whole country was brought under for it.

"This will in part appear from the com- mission given the same day the proclamation is emitted by the council, to great numbers in every shire almost, to hold courts, and bring every body to trouble, and the instructions and powers granted them, which I shall next insert. The execution of those commissions will come in next year.

"December 30. The council give the under- written commission to the persons named in it:

COMMISSION.

'Charles, &c. Forasmuch as, notwith- standing all the fair and legal methods used by us and our privy council, for reducing those who have been debauched with schis- matical and seditious principles, yet several of them do not only continue in their former ir- regular practices; but also considering, that several desperate rebels and fugitives, who have been still reset, sheltered, and supplied in the country, since the year 1679, have now of late erected themselves in a mock form of government, do disown us, our authority and laws, and have declared war against us, and from that do infer, that it is not only lawful, but duty on them to kill us, and all who serve under us; and yet such inhumane monsters, who, in pursuance of their traitorous declara-

After opening and reading of the whilk verdict of assyse, The Lords Justice General, Justice Clerk, and Commissioners of Jus-

'tion, are daily committing bloody and exe- crable murders, are sheltered, supplied, reset, and connived at in several of our shires; and we being fully resolved, that those accessory to the late rebellion 1679, or who reset any who was there, and that those bloody wretches, and all who any manner of way have harboured, reset, sheltered, supplied, connived at, or has seen or heard of any of them, and hath not given tuncous advertise- ment to our nearest magistrates or officers of the forces, or have not observed the prescript of our laws against irregularities and disorders in ecclesiastical matters, should be brought to due and condign punishment: we, with con- sent of the lords of our privy council, have thought fit to grant our full power, authority, and commission, to the persons after-men- tioned, for prosecuting the persons guilty of the said crimes, in the bounds and manner after specified.

'Likeas, we give and grant full power and authority, and commission, to John earl of Carnwath, William Hamilton of Orbistoun, Cromwel Lockhart of Lee, John Johnstoun provost of Glasgow, and James Lundy of Strathardly, for the shire of Clydesdale, the said earl being convener.'

'To the earl of Glencairn, lord Cochran, lord Ross, the said William Hamilton of Or- bistoun, Houstoun younger of that ilk, and John Schaw younger of Greenock, for the shire of Renfrew, the said lord Ross con- vener.

'To lord Bargeny, Blair of that ilk, sir Archibald Kennedy of Colzean, sir William Wallace of Craigie, Hugh Cathcart of Carl- toun, and Robert Hunter provost of Air, for the shire of Air, the lord Bargeny convener.

'To the said Wm. Hamilton of Orbistoun, the laird of Luss, major-general Arnot, lieu- tenant-governor of the castle of Dumbarton, the laird of Ardincaple, and John Graham of Dougalstoun, for the shires of Dumbarton and Stirling, the said laird of Orbistoun being convener.

'To the earl of Anandale, sir Robert Dalziel of Glenae, sir Robert Grierson of Lag, sir James Johnstoun of Wester-raw, Thomas Kilpatrick of Cloburn, and Robert Lawrie of Maxwelltoun, for the shire of Nithsdale and stewartry of Anandale, earl of Anandale con- vener.

'To John viscount of Kenmuir, the said laird of Lag, David Dunbar of Baldune, sir Godfrey McCulloch of Miretoun, and Mr. David Graham sheriff-depute of Galloway, for the shire of Wigtoun and stewartry of Kirkecudbright, Kenmuir convener.

'To the lord Jedburg, lord Cranstoun, M'Doual of Makerstoun, sir William Douglas of Cavers, sir Wm. Ker of Greenhead, sir Wm. Elliot of Stobs, and Wm. Ker of Chatto,

‘dictary, having considered the verdict of assize, They therfor, be the mouth of James

‘for the shire of Teviotdale, lord Jedburgh convener.

‘To John Riddel of Hayning, sir Francis Scot of Thirlstone, Tho. Scot of Whiteslaid, sir Robert Pringle of Stichel, James Murray of Dewchar younger, for the shire of Selkirk, the said laird of Hayning convener.

‘As also to the commanding officer of our garrisons, in the respective bounds and shires.

‘To meet and convene at the head burgh of the respective shires, and their first meeting to be upon the 15th day of January next; and in case of absence of the conveners named, with power to choose their own convener.

‘Appointing them, or any three of them, in the foresaid shires and bounds respectively, to proceed against, punish and sentence, according to our laws, such persons therein as they shall find, by their own confession, or other legal probation, guilty of being present at house or field-conventicles, withdrawing from public ordinances, disorderly marriages and baptisms, and other ecclesiastical disorders.

‘And we do further appoint the foresaid, or their *quorum*, within the respective shires and bounds, to be our justices in that part, with full power to meet at such times and places as they shall find convenient, and then and there to affix and hold courts, &c. (as in common form) and this to endure until the 1st of March next.’

‘January 15, next year, I find the Council add another commission to the sheriff of Berwick, to sir Archibald Cockburn of Lantoun, sir James Cockburn of that ilk, Hume of Linthill, and Mr. Charles Hume of Aytoun, with the earl of Hume their convener.

‘And to sir Archibald Murray of Blackbarony, David Murray of Stenhopc, James Nasmyth of Posso, James Gcddes of Kirkkil, Richard Murray of Spittlehaugh, and William Horsburgh of that ilk, for the shire of Peebles, Black-barony convener.’ The day of their meeting is January 22.

‘The Council, with this commission, gave them very particular instructions, which deserve a room likewise here.

INSTRUCTIONS to Commissioners to meet January 15th next.

‘1. You shall meet together, three being a *quorum*, the 15th day of January, and according to the proclamation, examine all in each parish on oath, upon the interrogatories contained therein. And for so-doing, each of you may examine a parish apart, and secure such as refuse, and each of you may likewise give passes, in the terms of the proclamation, to such as disown those horrid principles.

‘2. If any person own the principles, or do not disown them, they must be judged at least by three. And you must immediately give

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Johnstoune, dempster of court, decerned and adjudged the said John Semple, John Watt

‘them a libel and the names of the inquest and witnesses, and they being found guilty are to be hanged immediately in the place, according to law. But at this time you are not to examine any women, but such as have been active in the said courses in a signal manner, and they are to be drowned.

‘3. You are to proceed against the absent men, not by denouncing them rebels, but by holding them as confest upon a pecuniary mulct, and they being thereupon decerned, conform to the king’s letter, their moveables are to be inventared and sequestrate.

‘4. You must proceed against all who are guilty of having been at Bothwel-bridge, or were in accession thereunto, except they have taken the indemnity; but you are not to proceed so summarily, but give them time. And if they take the test, and be very penitent, let them find caution, or enact themselves to appear when called.

‘5. You must likewise proceed against heritors guilty of church-disorders, since their former fining. And if any have not been adequately fined, you may proceed against them for the superplus.

‘6. You may examine witnesses, as you see cause, against such as are given in the list, to be pursued before the parliament.

‘7. If you find probation against heritors not yet delated, you may take them before you, both as to the rebellion, and the late conspiracy.

‘8. You are likewise to cause the whole pack-men, cudgers and drovers, within the bounds of your shire, find caution not to carry letters or intelligence to the rebels, or to sell to them, or give them ammunition, or supply them any other manner of way.

‘9. You are to cause the whole merchants of your shire, who have any powder, lead, or any sort of ammunition, or were in use to sell the same, give their solemn oath as to the quantity and quality thereof, and find sufficient caution that the same shall not be given or sold to rebels. And if they fail to give the said caution, all the ammunition is to be secured and taken from them, until the same be called for by the master of the ordnance, and brought to his majesty’s magazines.

‘10. If the foresaid pack-men and other wandering persons in your shire, shall not compare, and shall refuse to find the foresaid caution, that by order of the said commissioners their packs be seized, and their persons secured till further order from the Council.

‘11. You shall call for, to your assistance, such parties of horse or foot in your district, as you shall have occasion for, who are hereby ordered to obey you. And you are to meet at such convenient times and places, as may be most for the ease of the people.’

‘I meet with no more in the Registers relating to this business.’

3 R

and Gabriel Thomson to be taken to the Gallowie betwixt Leith and Edinburgh this present afternoon, betwixt three and fyve a'clock,

tive to this Declaration, but what will come in next year, under the rigorous execution of those commissions and instructions, unless it be that, January 9, the Council impower the magistrates of burghs to tender the oath of abjuration to all concerned, conform to the proclamation.

"The last thing I promised in this section, was to give an account of the criminal prosecution before the justiciary, and public executions of some country people, who refused to disown this paper of the societies, about which so terrible a bustle was made. I shall first give an account of their process, from the Justiciary Registers, and then give some further hints of them from some other papers.

"December 8. George Jackson, Thomas Wood, Alexander Heriot, James Graham, and Thomas Robertson, and with them Patrick Cunningham, John Watt, James Kirkwood, Alexander Vallange, and James Glover, are indicted, 'That upon the 28th of October last bypast, they did emit a most barbarous and hellish proclamation, that they would begin their assassination and war. Upon the 9th of November, after the promulgation of this villanous paper, and this paper having been posted upon the kirk-doors of Kilbride, Linlithgow, and other places, the pannels were taken, and at their examination, owned ilk one of them, or would not disown that paper upon oath, in so far as it declares war against the king, and that it is lawful to kill the king's officers of state, counsellors, justices, soldiers, or informers, or declare, if they had any hand in emitting of that paper. Wherethrough ilk one of them are guilty of contriving, emitting, and publishing the foresaid treasonable Declaration, at least are adherers thereto, in refusing to disown and disclaim the same by oath, and ought to be punished with forfeiture of life, land, and goods, to the terror of others.'

"The five last named, as in presence of Almighty God, renounce and disclaim the principles above mentioned, at the bar, and their diet is deserted *simpliciter*. The diet against the other five is continued till to-morrow.

"December 9. The Lords find the libel relevant, viz. That the pannels own, or refuse to disown the traitorous proclamation, whereby war is declared against his majesty, and asserting, that it is lawful to kill those employed by his majesty, to infer the crime of treason, as art and part of the said treasonable paper, and remit the same to an assize.

"The probation adduced by the advocate, is the pannels judicial confession in the court yesterday, whereby they refused to disown the said paper when read to them, to which the pannels adhered, and disowned the king's authority. Alexander Heriot disowns the proclamation, and at the bar acknowledges upon oath,

and ther to be hanged on a gibbet till they be dead, and all ther lands, heretages, goods and gear whatsomever, to be forfait and escheat to

that it is not lawful upon any pretext whatsomever to rebel against his majesty, or any in authority under him; and the diet is deserted as to him, *simpliciter*.

"The assize bring in the other four guilty, by their own confession. And the Lords sentence them to be taken to the Gallow-lee this day, December 9, 'twixt two and fyve in the afternoon, and hanged.

"Thus this matter stands in the Records. I have some other hints as to those good men, from other papers, which deserve a room here. George Jackson lived in the parish of Eastwood, and we have heard that this fervent zealous country-man was taken at Glasgow, being overheard praying in a house. A little after he was seized he was carried before the bishop, and by him examined upon several questions very captious. It may not be unfit to point at some of them, that the reader may have some further taste of the bloody and bitter temper of the prelates, and the methods they used.

"The bishop asked him, if he was at Bothwell-bridge. He answered, Yes. He was next asked if he was an officer, and said, No; for he was but sixteen years of age. The bishop then asked him, if he was at Bothwell rebellion. George answered, he allowed himself in no rebellion against God. The bishop asked, if it was rebellion against the king. The other said, he had answered that already. The bishop asked, if he would pray for the king. He answered, he reckoned it his duty for all within the election of grace. The bishop asked, is the king within the election of grace, or not. George answered, if you were such a man as you pretend to be, you would not ask me such a question. Then he was asked, if he owned authority. He answered, he owned the king and inferior magistrates, in as far as they were a terror to evil-doers, and a praise to them who do well. The bishop asked, are they not so. George answered, when the Lord Jesus shall sit Judge, they, and you, and the like of you, will count for it, whether you be or not. He was asked, if the bishop's death was murder; and answered, he was not concerned with those matters. The bishop left him, with saying in a considerable heat, Sir, the boots will make you free in your answers.

"All the last winter he was kept in the irons, without any fire; and May last he was carried into Edinburgh, where being called before a Committee of the council, he came in with a bible in his hand; perhaps he would not leave it in the iron-house, and had none to give it to till he came back. I would not notice this circumstance, were it not to discover the jeering scoffing temper of the persecutors. The advocate says when he came near, there comes he and his bible, let us see where the text is. George calmly answered, he was not a minis-

our sovereign lord's use, which was pronounced for doom.

Fountainhall's account of the proceedings against these three persons is inserted in a Note, vol. 10, p. 846.

"Upon the 14th day of November, 1684, suffered John Watt, in the parish of Kilbride,

ter. Put up your bible, says the other, we are not for preaching at this time. He answered, he was not come to preach, but since they insisted upon his bible's being in his hand, which was no crime, he wished they would make it the rule whereby he was to be judged; for they would ere long be judged by it. It was replied, he was now come to be judged, and not to judge them. And then the ordinary questions were put to him, which he answered much the same way as above to the bishop.

"He continued in the irons till the bustle about the societies paper, and then was posed, if he owned that declaration. He answered, as far as was agreeable to the word of God; but he allowed of no murder. The council remit him to the Justiciary, where we have heard his sentence. He died in much comfort and serenity.

"Thomas Wood, we formerly heard, was taken after the rescue at Enterkin-path. I have before me his account of his examination under his own hand. November 12, when the managers are in a rage upon the societies declaration, he with others were called in, and had that paper read to them; and Thomas was asked what he had to say of it. He answered, he never heard of it till now, and could scarce understand it, the clerk read it so fast. He was asked, but do you adhere to it. He answered, as far as it is agreeable to the word, but no further. But, added they, the Covenants are in it, do you adhere to these. He answered, I do. And, after some questions, if he was at Bethwel, or Aird-moss, where he was not, he was dismissed.

"James Graham, taylor in the parish of Corsmichael in Galloway, when coming home from his work to his mother's house, he was overtaken in the high way by Claverhouse and a party of soldiers. They knew him not, and had nothing to lay to his charge, but searching him, and finding a bible in his pocket, they took it and his tools from him; and, without asking any more questions, no doubt reckoning him a disloyal person, carried him with them to Kirkcudbright. From thence they took him to Wigtoun and from thence to Dumfries, where he was some time in the irons, because he would not answer their interrogatories. He was in a little time taken in to Edinburgh, and questioned upon the declaration of the societies, and refusing to answer, was condemned, and died most comfortably.

"Thomas Robertson had fled out of the south country, and lived some time at New-castle; he was there imprisoned upon his re-

and John Semple in the parish of Glassart; whose testimonies (if they be extant) came not to the hands of the publishers of this collection; only it is certain from their indictments that they died for their adherence to the same truths, at the Gallowec, which was in the twilight of the evening. While they were singing the 11th section of the cxix psalm, particularly these words in the 84th verse, 'How

fusing to take the English oaths. By some means or other he got out of prison, and came to Edinburgh, where, at the general search November last, he was taken; and, when brought before the council, he was soon ensnared by their interrogatories, and remitted to the justiciary, where he was condemned with the rest. By his last speech he appears to have been a serious pious man.

"Thus we see, none of those persons were or could be concerned in the societies paper, they being in prison and else where at the time, and since: yet precisely upon their refusing to judge about it, and condemn it, they are sentenced, and die, to be a pattern to the soldiers in their more summar sentences up and down the country, or to satisfy the present rage the managers were in from the societies paper."

In the Cloud of Witnesses is given a fuller account (abstracted, as is there said, out of his own Letters) of the 'Interrogations of George Jackson,' as follows:

"At Glasgow after he was taken, and had been asked some few questions by them who apprehended him, he was brought before the bishop of Glasgow, who interrogate him thus:—Q. What now, Mr. Jackson? A. I was never a scholar.—Q. Can you read the bible? A. Yes.—Q. Was you at Bothwell-bridge? A. Yes.—Q. What arms had ye? A. A halbert staff.—Q. Was ye an officer? A. No, I was but sixteen years of age.—Q. Who was your captain? A. A young man.—Q. How called they him? A. I am not bound to give an account to you.—Q. Was you at Bothwell rebellion, or not? A. I allow myself in no rebellion against God.—Q. Whether was it rebellion against the king, or not? A. I have answered that question already.—Q. Would you go to it again? A. The question is like yourself, I know not.—Q. Will ye say, God save the king? A. It is not in my power to save or condemn.—Q. Will ye pray for him? A. I will pray for all within the election of free grace.—Q. Whether is the king within the election or not? A. If you were the man you profess to be, you would not ask such a question at me; it belongs only to God.—Q. Do you own the authority as it is now established? A. No, but I own all authority, so far as it is according to the written word of God.—Q. Do you own the king, and inferior magistrates? A. In so far as they are a terror to evil-doers, and a praise to them that do well.—Q. Are they not that? A. When the Lord

‘many are thy servant’s days? when wilt thou execute just judgment on these wicked men that do me persecute?’ The soldiers made such a hellish noise, and turned back so upon the people that were spectators of the action, that the people verily conceived they should have been trodden down and massacred on the spot, which occasioned all to flee, so that none of their Christian friends durst stay to do the last duty to them, in dressing their dead bodies, but they were left to the insolent soldiers’ disposal.

“A COPY of a LETTER, written by JOHN SEMPLE in Craigthorn, while in Prison. Directed to his Mother and Sister, who were then in Prison.

“Loving Mother and Sister;—This is to let

Jesus Christ shall sit judge, they and you, and the like of you, will count for it, whether ye be or not.—Q. Is the bishop’s death murder, or not? A. If your questions be upon these matters that I am not concerned with, I will keep silence. Then the bishop asked him concerning some papers that were found in the room where he was apprehended; he refused to answer any further anent them, having answered the same question in the guard to those who took him. Whereat the bishop enraged said, Sir, the boots will make you free. To which the said George replied, if my master think me worthy of them, I will get them, and if not, it is in his power to preserve me.—Q. Will ye subscribe what ye have said? A. No.—Q. Wherefore will ye not? A. Because it is an acknowledgment of your unjust laws. After this he was transported from Glasgow to Evandale on the Lord’s day. He relates in his letters, what sweet joy and consolation he had by the way. After his having gone about the worship of God, in presence of the soldiers, who at first kept on their hats, but afterwards ere he had done, uncovered; in came one Bonsay their commander, and said, prepare you for a bare horse back to-morrow, and your head and feet shall be bound hard and fast together. George answered, it is not in your power to do it. Bonsay said, I will let you know it shall be in my power, and offered him the king’s health: he refused saying, I am not dry to drink healths, especially on the Lord’s night. To-morrow when they were set on horseback, Bonsay caused sound a trumpet, holding it to George’s ear, and said, sound him to bell; at which the martyr smiled. So they came to Edinburgh upon the 13th of May, 1634. Being called before a committee of the council, he came with his bible in his hand. The advocate jeeringly said, there’s him and his bible; come away, let us see where the text is. George answered, I was never a secker out of texts; that is the proper work of a minister. Then the advocate said, put up your bible, for we are not for preaching at this time. He answered, I am not come to

know, that that day which I was brought to the Tolbooth of Canongate, and we were put into the irons, and the shackles put upon our armes, and to-morrow about eleven o’clock, I was brought before the council, and they shewed me the paper which was found upon the crosses and kirk doors, and they asked if I knew it? I answered, what know I what is in that paper? The duke having it in his hand and the rest of the council bade him read it to me; he read some lines of it, and then said to the rest, it would take a long time to read. They offered to give it to me to read, and promised me time to consider it, if I would give my judgment of it. A. I will not have it, neither will I be judge of papers.—Q. Own ye the king’s authority, as it is now established? A. I own all authority, as is agreeable to the word of God.—Q. Will ye own this pa-

preach, for I never could; but, Sir, this is the word of God, whereby I am come here to be judged, and I charge you, and not only you, but all of you, that as ye shall answer in one day before our Lord Jesus Christ, when he shall sit and judge betwixt the just and the unjust, that ye judge me by what is written in this holy bible; otherwise remember ye, and the rest of you, shall make account for it in that day, when our Lord shall sit as judge, and ye shall stand naked and bare before him; and if ye do it not, I shall be a witness against you. To this they returned, that he was come to be judged, not to judge. And after a while’s silence, when he demanded who were his accuser, the advocate replied, I am your accuser; and interrogate him thus:—Q. Was you at Bothwell? A. I have answered that in my first examination.—Q. But, said the advocate, you must answer it now? A. It being criminal by your law, you must prove it.—Q. Do you hold these that were there as rebels? A. I allow myself to be among no rebels; but whom call you rebels? The advocate said, these that are rebels to the king. George answered, if they be not rebels to God, the matter is the less.—Q. Do you approve of them? A. Yes, in as far as they were for Christ and his cause.—Q. Do you allow yourself to rise in arms against the king? A. No.—Q. Wherefore then did ye rise in arms? A. I have warrant in the word of God to rise in arms in defence of the gospel, and work of reformation, according to our solemn engagements, wherein we are sworn to uphold and defend to the utmost of our power the work of reformation.—Q. What are ye engaged to be against your king? A. You heard not me say that, but I said I am for the king and all authority, as far as they are for the work of God, but no further.—Q. Do you own the present authority? A. I own no unlawful authority.—Q. Will you take the bond of regulation, and you shall win your way? A. I will have nothing to do with you or your bonds either. Being desired to subscribe what they had wrote down as his confession, he refused.”

per or not? *A.* What know I what is in that paper. Then they said, to be short with you, Own ye the covenant and presbyterian principles? *A.* I own the covenants and presbyterian principles with my whole heart. Then said they, so, that is a frank and free fellow. Then they caused to take me away for a while; and I was brought before them again; and then they said, come and declare the truth, and give your oath, what you know concerning the contrivers and publishers of these papers. *A.* I am not bound to wrong my neighbours, neither will I give an oath. After some questions and answers, the chancellor said, he should make me do it; for he said he would make me as small as stuff. I answered, sometimes, the persecutors have caused the saints to blaspheme. The bishop's brother said I was a liar, for the scripture said no such thing. I said that it says the same thing, and I told him where it was. Then they caused take me away; and then, a little after, they brought me before them again the third time, and pressed upon me again to declare; I utterly refused. Then they caused the executioner to take me a little aback, and made me sit down with my back to the bar, and threw on the thumbkinds upon my thumbs, until I fell into a swoon; and when I overcame again, they were standing about, looking upon me, and bidding me rise; and then I rose. Then some of them said, what will you say now to the chancellor? I said, I will say nothing to him. Then they took me to the town Tolbooth, to the iron house.

"Now, I desire that I could bless the Lord for this, that he kept me, for in the time of the torture I spake not a good word or bad, but got it borne, until I fell into a swoon. All their countenances dashed me nothing; for I did not fear their faces, nor the faces of hundreds who were gazing upon me, from about eleven o'clock, till seven o'clock in the afternoon. And I thought that that was a sign of God's presence; but the shining of his countenance was not with my spirit. But I was helped to believe and hold fast; for I knew not

but that day or to-morrow might have been my last day.

"The next morning, I was brought before one of them into a chamber; he said, how are you advised to-day? I said, as I was.—*Q.* What is the reason that ye will not tell the truth to the chancellor? for it is a sin not to do it. *A.* Doeg told the truth, when he told Saul that he saw David come to Ahimelech, and that Ahimelech gave him bread, and did enquire of God for him; and yet the scripture calls it lying, Psalm lii. 3. And therefore there is a sinful pernicious speaking of the truth which is a great sin, and accounted as a lie. I said to him also, that I knowing the terror of the Lord, I thought that the terror of men was the lighter to be borne, and that I would say no more than I had said, though they should torture all the fingers and toes that I had, till they should be cut off; but as the Lord should give me strength, I would stand.

"After this, he never opened his mouth more, but humbled and rose up, and went his way, and the keeper brought me back to the iron-house, where I remain. One thing is come to my mind, which he said more; that it was for rebellion against the king that they were pursuing for. I answered, so did the persecutors of the Son of God say, that it was for rebellion; for they called him an enemy to Cæsar. Moreover they threatened me with the boots. Now what the Lord will permit them to do, I know not; but there are hard things determined against me; and I am very weak, for flesh and blood is but weak; therefore forget not my case. I am well contented with my lot, blessed be the Lord, only I am afraid of my own weaknesses, lest I wrong the truth.

"No more at present, but wisheth that the Lord's presence may be with you, my dear mother and sisters. I am in good health, blessed be God; my thumbs, they are not very sore, only they are something feelless; I and others thought, they should scarcely have ever served me at least for a long time. JOHN SEMPLE." Cloud of Witnesses, p. 260.

344. Proceedings against DENHOLME of Westshiels, and others, for Treason and Reset of Traitors : 1 JAMES II. A. D. 1685. [Now first printed from the Records of Justiciary at Edinburgh.*]

CURIA JUSTICIARII, S. D. N. Regis, tenta in pretorio Burgi de Edinburgh, decimo sexto die mensis Julii, anno millesimo sexcentesimo octuagesimo quinto, per nobilem et potentem Comitem Georgium Comitem de Lamlithgow, Justiciarium Generalem, et Honorabiles viros Dominos Jacobum Fouls, de Collingtoun, Justiciarium Clericum, Johannem Lockhart de Castlehill, Alexandrum Seton de Pitmedden, et Patricium Lyon de Cars, Commissionarios Justiciarum S. D. N. Regis.

Curia legitime affirmata.

THE said day aont the criminal action and process of treason first intended and persewed before the estates of parliament, and now insisted in before the Lords Justice Generall, Justice Clerk and Commissionaers of Justiciary, at the instance of sir George Mackenzie, of Rosehaugh, his majestie's advocat for his highnes interest, against William Denholme, of Westshiels, James Stewart, son to sir James Stewart, sometyne provost of Edinburgh, and Mr. Gilbert Eliot, wryter, in Edinburgh, mak and mention that wher be the laws and acts of parliament of this kingdome, and constant practice thereof, the crymes of treason, rebellion, harbouring, recepting, conversing, and intercomoning with, or doing favours to, rebells or traitors, are punishable with forfeiture of lyfe, lands and goods; Neverthelesse it is of veritie, that the saids William Denholme, of Westshiels, James Stewart, and Mr. Gilbert Eliot, shaking off all fear of God, respect and regard to his majestie's authoritie and laws, have presumed to commit and are guilty of the saids crymes in sua far as the said William Denholme did most treasonable outhound to the rebellion 1679, and thereafter receipt and harbour- ed † on his ground and lands, from the said re-

bellion, till the last justice Ayre, the persons aiter named, notour and manifest rebells and traitors, viz. Gilbert Gray, in Muirhall, Alexander Gray his sone, Robert Brown ther, John Marshall of Killisyth, James Coupar in Westshiells, John Meek in Hinselwood, and William Vansie, who was a captain to the rebells, and sicklyke in the moueths of July, August, and September 1682, did treasonable converse, intercomon, correspond with, and do favours to Mr. John Cunninghame, somtyne of Bedland, a forfault and declaired traitor and rebell, sent letters to and received answers from him, and did send money and supplie to, and answered bills and payed money for, the said forfault traitor severall tymes, and to severall persons, particularie payed to Mr. Robert Blackwood, merchant, in Edinburgh, his wyff, ten pound sterling upon the said traitor his bill and order.

And the said James Stewart, being the sone of a traitorous and rebellious father, he himself no sooner appeared in the world, then he made it his great endeavour to oppose his majesties authoritie, disturb his government and by his wryting and practices to sow the seeds and bring furth the fruits of treasons and rebellion, and being severall tymes delated and accused for these practices, he fled and absented himself to England, Holland, and other places, and ther lurked till his majesty issued furth his acts of grace and indemnity, and then he returned and sett about his treasonable practices, and most perfidiouslie and disloyallie dared and presumed to wreit and speak and against his majesties royall person, dignitie and authority, and against his laws, and the just procedor of his judicatories, particularie did wreit and draw a Representation of the late earle of Argyle's Case* which paper was designed to have

"In the parish of Saint Mungo," says he, "there was a boy not above sixteen years of age cited to one of the Courts for not keeping the church, and his age made him free of any other thing. When he did not compear, cornet Graham sent a party of soldiers to quarter upon his father, who was regular enough. Meanwhile the father was cited to the court next meeting, where the cornet required a bond of him never to reset, converse with, countenance, or any way supply his own son."

* See 1 Fountainhall's Decisions, 386. 2 Wodrow's History of the Sufferings of the Church of Scotland, 296. 492; and sir Patrick Hume's Narrative subjoined to Mr. Rose's Observations on Mr. Fox's Historical Work. See, also, the Examinations inserted in the Introduction to the Trials for the Rye-House Plot, vol. 9, p. 357, and the Scots Cases in vol. 10, of this Collection.

† As to Receipt or Reset of Rebels, see in this Collection, vol. 10, p. 1049.

Wodrow, vol. 2, p. 241, mentions another disgusting and shocking instance of the extent to which the prohibition of *reset* was practised:

* Wodrow thus mentions some particulars of what had previously befallen Mr. Stuart and sir Patrick Hume:

"1675. Two other worthy gentlemen were attacked this year, though upon reasons differ-

been printed, wherein he did extreamlie reflect upon the parliament and test, as if the said

ing from the lord Cardross's case, and at this time they were properly sufferers for liberty. I begin with Mr. Stuart, son to sir James Stuart formerly mentioned, whom we shall afterwards meet with. He was at this time noticed for his extraordinary abilities in law, though there was no access for one of his piety and principles to act publicly; but after the revolution he was a honour to his country, and to the gown in the office of king's advocate, for many years. This gentleman was jealous by the managers for writing, at least having a share in publishing the known Paper, intituled, 'An Account of Scotland's Grievances, by reason of the duke of Lawderdale's Ministry, humbly tendered to his sacred majesty.' [See it at p. 157.] "This Account galled the party, and fretted them exceedingly, and yet I do not find that they were able, or ever essayed to answer the matters of fact alledged there against them.

"Upon this score, and because he was a known Presbyterian, and very useful to these people, letters came down from the court, of the date February 27th this year, ordering, 'James Stuart, son to sir James Stuart, late provost of Edinburgh, to be apprehended, wherever he was, with all his books and papers whatsoever, and made close prisoner in Edinburgh, and no communication to be allowed him with any living by word or writ.'

"These were the illegal and arbitrary orders given at this time about the best of men, without any reason, save the will and pleasure of angry courtiers; so that nobody could be safe, had not kind providence interposed, as in this case: Mr. Stuart had some notice given him, and escaped most narrowly. However, when he got a little out of the way, upon the 10th of March, all his cabinets were sealed by order of council, and the magistrates of Edinburgh appointed to search for him through the town, and to seize all papers or trunks belonging to him, wherever they could be found; and because they apprehended he might be hiding about his brother's house at Coltness, or his brother in law's, sir John Maxwell of Nether-Pollock, orders are given to the lord Ross and his troop to search for him and his papers.

"I find by a missive letter dated March 11th, that a most strict search was made at Edinburgh for apprehending Mr. Stuart, for his alledged penning of the Grievances; and that Mr. William Carstairs was apprehended at London upon the same reason, and was to be sent down to Scotland to be tried.

"Upon the 11th of March, the council order the sealed cabinets to be opened by the archbishop of Glasgow and treasurer-depute, and any papers belonging to Mr. Stuart to be taken out. What they found I know not, but, for any thing I can learn, they made no discoveries. Mr. Stuart was forced to abscond

parliament had made an act inconsistent with the protestant religion and with itself, and such

and retire for some time, and improved his time, during his hiding, in religion and close study, so as, through the blessing of God, he was prepared thereby to make that bright and extraordinary figure he afterward made in the world. His troubles continued for some years, and then he ventured to appear again, though still in a private way.

"The other gentleman attacked this year, was sir Patrick Hume of Polwart, now the aged earl of Marchmont, who since the revolution hath been honoured to serve his country in the highest stations, and managed them with that firmness to the revolution-interest, and regard to religion, that his gray hairs in the way of righteousness cannot but be a crown to him. The committee appointed to bring in their opinion anent Mr. John King's affair, proposed the garrisoning the country; and it was thought they had a particular eye to the house of Cardross in so doing. Sir Patrick Hume, who had made a bold step against encroachments upon the liberty of parliaments, as we have heard, could not away with the setting up of garrisons in a peaceable and loyal country, as being a sensible encroachment upon the liberties of the subject; and so refused the contributions for support of the garrisons in the shire he was concerned in: For which a sentence was passed against him, and he gave in a bill of suspension to the lord Collingtoun, and took instruments, upon his refusal, that he had offered it. Sir Robert Sinclair, and some other gentlemen in the shire of Berwick, joined him in this matter; I think, at first the most part, but afterwards several fell from it.

"The council, and particularly the bishops, could not bear any thing that looked like a crossing of so darling a project as the oppressive garrisons: So, upon the 2d of September, they take this matter under their consideration, and come to this resolution. 'The lords of his majesty's privy council, considering a petition given in to them by sir Patrick Hume of Polwart, and subscribed by him, as likewise the bill of suspension presented by him to the lord Collingtoun, which is of an insolent nature; as also, that after the lord Collingtoun had refused the same, he took instruments on his offer thereof, and that he had likewise taken instruments at the houses of some other of the counsellors, at Edinburgh; the council commit him to prison, till the king's pleasure be known.'

"Mean while accounts came in to the council from all corners, of the general dissatisfaction with the appointment of garrisons, and that few or none of the commissioners of the excise could be prevailed with to meet, as had been ordered: Thereupon now orders are sent to the commissioners to meet in each shire where they were established, and provide for the maintenance of the garrisons.

"September 3d, the council write to the king,

ane oath as no honest man would take or keep, and dared and presumed to drawe and wreitt rea-

‘complaining of the laird of Polwart’s giving in a bill of suspension to the lord Collingtoun, upon a charge given by the council to the commissioners of excise in the shire of Berwick, concerning the provision of the garrisons of that shire; and when the said lord justly refused it, that he took instruments of his offering it.’ The same day the lairds of Langtoun, Cockburn, and some other commissioners of the excise, give in a petition to the council, ‘signifying their dissent from the commission given to Polwart and sir Robert Sinclair, to present the foresaid bill of suspension, and withal gave in warrants for themselves to provide the garrison in necessaries for their parts.’

“An answer to the council’s letter, of the date of September 30th, comes to their hand October 5th, wherein his majesty ‘approves of their imprisoning of Polwart as being a factious person, and having done what may usher in confusion; and requires them to declare him incapable of all public trust, and send him close prisoner to Stirling Castle until further orders.’”

“1679. By a letter from the king dated July 17th, sir Patrick Hume of Polwarth is liberate. The letter bears ‘that he had been imprisoned for reasons known to his majesty and tending to secure the public peace: And now the occasions of suspicion and public jealousy being over, he is ordered to be liberate.’”

“By a letter of that same date, Mr. Stuart is restored to his liberty. And the king’s letter February 1675, ‘ordering him to be seized and imprisoned is recalled upon information of his peaceable behaviour since. He is indemnified from all that can be laid to his charge, reposed to the king’s protection; and this letter is to be recorded, and extracts allowed him.’”

“The earl of Argyle’s escape was the occasion of a great deal of trouble to Mr. Stuart, since the Revolution sir James Stuart of Goodtrees, formerly mentioned. This great lawyer was employed in private, (for he could not plead in public without taking the oaths) to draw up the state of the earl of Argyle’s case, to be sent up to London with the gentleman the earl dispatched. Three copies were writ of it by his servants; and, before he sent them to the earl, he caused them to be read over, holding one of the copies in his own hand, upon the reading of which, he made an amendment or two with his own hand upon the copy he held, and the two servants amended the other two copies. He sent all the three to the earl, and desired that copy, with his hand on the margin, might either be returned or destroyed; the other copies were sent up to London, and the third was found in the earl’s coat pocket, after he escaped from the castle. The paper was very home and close and abundantly

sons against the said test and most laudable law, wherin he misrepresented the same in manner

heavy in point of argument, and consequently not a little irritating to the counsellors. The amendment was soon known to be Mr. Stuart’s hand, and the paper concluded to be his: Whereupon a party was sent to his mother’s house, the excellent lady Goodtrees, but he was happily abroad. His two servants Mr. Spence and Mr. Montgomery, now laird of Langshaw, were next searched after, but they thought it convenient to step out of the way a little; and Mr. Montgomery, though but a youth, found he was not in safety in Edinburgh, and was obliged to retire to Ireland to his relations, where he continued much till the liberty, in the year 1687. From this gentleman last named I have this account; and when I name him, I must acknowledge my obligations to him, for his obliging kindness, in allowing me access to the criminal books, and giving me several valuable hints of the severities of this period, which he had from his worthy father, whom we shall meet with in a year or two. Mr. Stewart was obliged, after lurking a while, to retire to Holland, where he continued until the toleration.”

“Upon the 2nd of April 1683 a process of forfeiture is raised before the judiciary, against the underwritten persons. I have a copy before me, of the criminal letters against them, of three or four sheets, too long to be inserted here or in the appendix, and therefore I shall only give an abstract of the most material articles here. ‘Aneat criminal letters raised by sir George Mackenzie of Rosehaugh his majesty’s advocate, against John Balfour of Kinloch, called captain Burleigh, John Russel portiouer of Kettle, Robert Hamilton brother to sir William Hamilton of Prestoun, Mr. John Hog minister at Rotterdam, Mr. Robert Fleming there, — Smith, Mr. Robert Langlands, Andrew Russel factor, John Russel factor, and James Stuart son to sir James Stuart lord provost of Edinburgh; making mention, that notwithstanding of many acts of parliament, against treason, rebellion, and rising in arms, which they have broken; and whereas by Act 11, Sess. 1. Parl. 2. Char. II. the king’s advocate, warranted by the privy council, may and ought to insist against such persons in absence; and if cited and not comparing, the lords are to proceed to forfeiture, as if they were present: And it is so verily, that the said John Balfour, and John Russel, with the deceased David Hackstoun of Rathillet, and others, discharged several shots in the coach of his grace James archbishop of St. Andrews, about two miles from the city of St. Andrews, in Magus-muir, when travelling, with his daughter, most securely, and most sacrilegiously invaded him and his daughter; and his grace having opened the door, and come forth, and fallen down on his knees, begging mercy, & time to recommend his soul to God, and to pray for his murderers,

forsoaid, most treasonable asserting that his majesties subjects wer bound by the covenant and confession of faith, to oppose the civill magistrate in defence of religion, and to debar him from the imperial crown of this realm if he were not a protestant; and ther being in the year 1683, ane hellish and damnable plott and con-

so cruel and inhumane were they, that without pitying his grey hairs, or the shrieks of his weeping daughter, or respecting his character or office, most cruelly and furiously gave him many bloody and mortal wounds in his head and other places, and left him dead and murdered on the place; and then went unto the west, and rose in rebellion at Bothwell-bridge, under the command of the said Robert Hamilton. And when, by the diligence of his majesty's forces, they could no longer stay in the nation, they fled to the united provinces of Holland, where the said Mr. John Hog, Mr. Robert Fleming, Mr. Robert Langlands, &c. conversed with them, harboured, supplied, and furnished them with money and necessaries, in the years 1679, 1680, 1681, or 1682. And the said Messrs. Hog, Fleming, Smith, and Langlands, did, in one of the months of the years foresaid, employ Mr. Donald Cargil, Mr. Richard Cameron, Mr. John Rae, Mr. David Hume, Mr. John King, Mr. John Kid, Mr. John Weir, Mr. Thomas Hog, Mr. Andrew Anderson, Mr. John Ross, Mr. Alexander Wilson, Mr. Alexander Bertram, Mr. Francis Irvine, Mr. John Wellwood, Mr. Thomas Macgil, ministers, fled from their native country, for their hand in the rebellion 1679, and who were intercommuned. And the said Messrs. Hog, Fleming, Smith and Langlands, are arrived at that height of impiety, to own and maintain that treasonable and sacrilegious covenant, (which occasioned so much bloodshed, and the loss of the lives of so many good subjects, and was the engine of the whole catastrophe of the rebellious, and unparalleled, and accursed murder of our sovereign Charles I. to the everlasting reproach of the Protestant religion) and, in an impious and insolent manner, did take upon them to debar from the Lord's table such as owned his majesty's authority, or assisted and served him in the government, as enemies to Christ and his kingdom; and consulted and treated for admitting the said John Balfour to the table of the Lord; that during the Dutch war, they prayed publicly for the success of the forces of the States, against their sovereign lord the king: And the said James Stuart, being the son of a father whose disloyal principles and practices tended to the destruction of his majesty's authority and government, in the time of the late Rebellion: and he no sooner arrived to any height of knowledge, than he used all endeavours to disturb the government both in church and state, and by his writings and practices to sow sedition: And after he was forced to lurk and flee the nation, when

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spiracy entered into by the late earles of Shaftesbury,* Essex† and Argyll,‡ the lords Russill,§ and Gray||, major Holmes, colonel Richard Rumbold,¶ sir John Cochran**, sir Hugh and sir George Campbells††, elder and younger, of Cessnock, David Montgomerie, somtyme of Langshaw, Thomas Stewart, somtyme of Cultness, brother to the said James Stewart, sir Patrick Hume, somtyme of Polwort, George Pringle, somtyme of Torwoodlie, Mr. Robert Martine, Mr. Robert Ferguson,‡‡ and other rebels and traitors, subjects of this

returned after the indemnity, he wrote and drew a representation of the late earl of Argyll's case, which paper was designed to be printed, wherein he extremely reflected on the late parliament, and test, appointed to be a bulwark to the Protestant religion and his majesty's government; and drew and wrote reasons against the said test, treasonably asserting, that subjects were bound by the covenant and confession of faith, to oppose the civil magistrate in defence of religion; and hath assisted, supplied, and done favours to the said John Balfour and Russel, and continues in a desperate state of rebellion and treason. Wherefore these things being proven, the whole of the above named persons ought to be punished with forfeiture of life, and lands, and goods.

"The advocate produces warrants to pursue, and the summons upon sixty days, as ordinary in cases of persons being out of the kingdom: and at present insists against Robert Hamilton and John Balfour. The lords find the dittay relevant, and remit it to probation before an assize. Witnesses appear, and depone they saw Robert Hamilton general at Bothwell bridge, and Balfour captain of a troop of horse. Another witness depones, That when Balfour was fleeing, he heard him say he had received a shot, the devil cut off the hands that gave it. The assize bring them in guilty of what is libelled, and the lords adjudge them to be executed and demeaned as traitors, when apprehended, and their name fame and memory to be extinct, and their lands to fall to his Majesty, as in common form. Upon absence, after citation, John Russel portioner of Kettle, Messrs. John Hog, Langlands, and Smith, and James Stuart, are put to the horn and forfeited."

As to sir James Stuart, the father, see 1 Wodrow, pp. 6. 141. 280. 316. 531.

* See his two Cases, vol. 6, p. 1269; vol. 8, p. 759.

† See the Case of Speke and Braddon, vol. 9, p. 1127.

‡ See his Case, vol. 8, p. 843.

§ See his Case, vol. 9, p. 577.

|| See some account of him, vol. 9, p. 359.

¶ See his Case, p. 873 of this Volume.

** See his Case, vol. 10, p. 990.

†† See their Case, vol. 10, p. 919.

‡‡ See the Case of Spruel and Ferguson vol. 10, p. 725.

§ §

kingdome and of England, for killing and murdering, at least seizing upon the persons of his sacred majesty and his royall brother, our late gracious soveraigne king Charles the second, and for raising open war and rebellion in both kingdomes, and for furnishing men, money, ships and armes, to the late earle of Argyle, for raising warr and invading this his native cuntry, the saids William Denholme of Westsheills, James Stewart and master Gilbert Eliot, went over to Holland, and ther most treasonable and industriouslie did negotiat, treat, consult, devyse and contrive the said horrid rebellion and invasion, with the said earle of Argyle, a forfait and declared traitor and rebell, and did treasonable and daylie converse, correspond and intercommon with him, and with Mr. W. Veatch, another forfait and declared traitor, anent the carrying on of the said rebellion, furnished money and did favours to them, and that not once but often upon the first, second, third or ane or other of the dayes of the months of January, February, March, or ane or other of the months of ane or other of the years 1682, 1683, 1684, and 1685 years, and did most treasonable bear, conceal and did not reveall the said horrid plot, conspiracie, and intendit rebelloin, of the which crymes of lese majestie, conversing, intercommuning and corresponding with rebels and traitors, hearing, concealing and not revealing treason, the saids William Denholm, of Westsheills, James Stewart and Mr. Gilbert Eliot, are actors, art and part; which being found be ane assyse, they ought to be punished with forfeiture of life, land and goods. to the terror of others to committ the like herefter.

Which criminal action and cause being this day called in presence of the Lords Justice General, Justice Clerk, and Commissioners of Justiciary, compeired sir George M'Kenzie, of Rosehaugh, his majesties advocat, and produced the principall lybell raised before the parliament against the saids William Denholme, of Westsheills, James Stewart and Mr. Gilbert Eliot, with the executions therof, and verifications of the same, in face of parliament, by the heraulds and persevants, which were given back to be kept in the records of parliament: The said lybell containing severall persons therein already forfaited before the parliament.

His majesty's Advocat produced ane act of parliament remitting the process of treason before the parliament against Denholme of Westsheills, James Stewart, sone to sir James Stewart, sometime provest of Edinburgh, master Gilbert Eliot, and others, to the justice court, wherof the tenor follows:

Att Edinburgh, the 16th day of June, 1685, Our soveraigne lord with consent of the estates of parliament doe hereby remitt to the commissioners of justiciary, the process of treason intended against the airs of the deceist James earle of Loudoun, sir James Dalrymple, of Stairs, James Stewart, son to the deceist sir James Stewart, late provest of Edinburgh, Colin Campbell, of Ardinglass, William Den-

holme, of Westsheills, John Weir, of Newton, John Hay, of Park, sir William Scott, younger, of Harden, Andrew Fletcher, of Saltoun*, Huunc, of Bessindean, Mr. Gilbert Eliot, wryter, in Edinburgh, and Walter Lockhart, of Kirkton, to be discust be them upon the summons persewed before the parliament, which is heirby declared to be as valid as if the forsaid persons and ilk ane of them had be-in summoned before the justices in the first instance, and heirby authorizes and impowers the lords of justiciary to proceed to forfeiture against them for the conspiracy, art and part therof, concealing and not revealing the same, and other crymes mentioned in the summons, notwithstanding they be absent, and that lists of assysers and witnesses were not given to the defenders; Extract furth of the records of parliament by George viscount of Tarbat, lord M'Leod and Castlehaven, clerk to his majesty's parliament council, registers and rolls.

Sic Subscribitur, TARBET, Cl. Register.

His Majesties Advocat produced the principall lybell raised before the parliament against the said William Denholme, of Westsheills, James Stewart, and Mr. Gilbert Eliot, with the executions therof, and verifications of the same, in face of parliament by the heraulds and persevants, which wer given back to be kept in the records of parliament, the said lybell containing severall persons therein already forfait before the parliament. His majesties advocat declares he insists against William Denholme, of Westsheills, James Stewart, and Mr. Gilbert Eliot, for their conversing and intercommuning with the late earle of Argyle, a forfait and declared traitor, but prejudice to him to insist upon the other articles of the dittay when he pleases, or to raise a new lybell against them when he shall think fit.

The defenders being absent, the Lords conforme to the forsaid act of parliament, to the eleventh act, first session, second parliament, king Charles the second, did proceed to consider and give their interloquitor upon the lybell, wherof the tenor follows:

INTERLOQUITOR.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the lybell pursued by his majesty's advocat against Denholm, of Westsheills, James Stewart, and Mr. Gilbert Eliot, with his majesties advocates declaration, wherby he insists at present upon that article anent their conversing, intercommuning, and corresponding with the late earle of Argyle, a forfait and declared traitor, they find that article of the lybell relevant to infer the paine of treason, and remitts the same to the knowledge of the assyse.

ASSISA.

John Boyle, of Kilburne.

Master John Dempster, of Pitliver.

* See in this Collection the Case of the duke of Buccleugh and Monmouth, and others. A. D. 1686.

Sir William Binning, of Valleyfield.
 Walter Scott, of Letham.
 Andrew Brown, of Gorgie Myln.
 Patrick Smith of Methven.
 John Johnstoun, of Clachrie, provest of Glasgow.
 John Carnegie, of Cookstoun.
 William Steinsone, late baillie of Edinburgh.
 Robert Sandielands, merchant there.
 Thomas Hamiltoun, mason.
 Thomas Mowbray, merchant.
 James Pollock, merchant.
 James Cranstoun, merchant.
 James Brodie, mason.

The Assyse lawfullie sworn, no objection of the law in the contrair.

His Majesties Advocat, for probation, adduced the witnesses efter deponing, who were all purged of malice, prejudice, hatred, ill-will, and partiall counsell.

John Cochran, somtyme called sir John Cochran, of Ochiltre, aged forty nyn years, married, purged and sworn, depons that in the moneths of March or April last, James Stewart was at a meeting with the late earle of Argyle in Holland, anent the invading of Scotland, and that James Stewart did complain that Argyle would linger too much in the highlands of Scotland when he came there; depons he knowes William Denholme, of Westsheills, and that within thir three moneths he saw him severall tymes conversing with the late earle of Argyle in Holland, and that he came alongst with the said late earle, and that he was and did continue in armes with him till the rebells were defate; depons he saw master Gilbert Eliot, and saw him in Holland, within the tyme forsaid, converse severall tymes with the late Argyle, and in his company, and that Mr. Gilbert Eliot came over in the ship with the late Argyle to Scotland and landed with him, and was and continued with him and the rebells till they were dissipat; and this is the truth as he shall answer to God.

Sic Subscritur, JO. COCHRANE.

John Cochran, called somtyme of Watersyd, solemnlie sworn and purged, aged twentie-two years, or therby, depons he knowes James Stewart, and saw him in Holland in the moneth of March or Aprill last, with the late earle of Argyle, and that the deponent spock to James Stewart anent the invading of Scotland; depons he knowes Denholm, of Westsheills, and sawe him in Holland, within the tyme foresaid, in company with the late earle of Argyle, and conversing with him, and that he came to Scotland with them, and was and continued in armes with them till they were dissipat; declares he sawe the person called Mr. Gilbert Eliot or Gilbie Eliot, whom he believes to be the same, conversing with the late Argyle severall tymes in Holland, about the time foresaid, and that he was clerk to the rebells in their meeting ther, and that he came over with them to Scotland and was in armes with them thier;

and depons he believes that Mr. Gilbert Eliot and Denholm of Westsheills, whom he conversed with and anent whom he depons, are the same persons indyted before this court; and this is the truth as he shall answer to God.

Sic Subscritur, JO. COCHRANE.

Mr. William Blackader, doctor of medicine, aged thretty years, unmarried, purged and sworne, depons he knowes James Stewart, and has seen him and the late Argyle in ane roume together in Holland, within thirtwelve moneths or therby; depons he knowes Denholm, of Westsheills, and that within the time forsaid he saw him in Holland with Argyle, conversing with him, and that he came over in the same ship with Argyle, and sawe him at table with him. Depons he knowes Mr. Gilbert Eliot and saw him in Holland within the tyme forsaid with the late Argyle, and saw him at the sea in the ship with the late Argyle, and that it was in winter last that they conversed with the late Argyle in Holland, and this is the truth as he shall answer to God.

Sic Subscritur, WILLIAM BLACKADER.

David Stewart, younger, of Cultness, aged twenty-six years, unmarried, purged and sworne, depons he has seen James Stewart, his uncle, converse severall tymes with the late Argyle in Holland, in winter last; depons he sawe Denholme, of Westsheills, and Mr. Gilbert Eliot, converseing with the late earle of Argyle severall tymes in Holland, in winter last; and this is the truth as he shall answer to God.

Sic Subscritur, DAVID STEWART.

Mr. Thomas Archer, pretended preacher, aged thretty-two years, unmarried, purged and sworne, depons he knowes James Stewart, and saw him about two years ago with the late Argyle at Utrecht, and that the late Argyle stayed at James Stewart's house; depons James Stewart and the deponent spock together, anent their invading of Scotland in generall, but does not remember the particulars; depons he knowes William Denholme, of Westsheills, and has seen him with James Stewart and the late Argyle the first night Westsheills came to Holland, and that Westsheills came over to Holland with the rest, and had a buff coat, and was with them at the castle of Islandgreig; depons he knows Mr. Gilbert Eliot, and saw him with the late Argyle, and that Eliot came over with the rest and was in armes with the rebells; and this is the truth as he shall answer to God.

Sic Subscritur, THO. ARCHER.

His Majestie's Advocate for proving that the late earle of Argyle was a forfait traitor, produced the books of adjournal and doom of forfeiture pronounced against him, upon the 23rd of December, 1681.

Intran,

David Stewart, of Cultness,

Mr. William Spens, somtyme servant to the late earle of Argyle,

Indyted and accused, That wher notwithstanding be the common lawes, lawes, and acts of parliament of this kingdom, particularlie be the fyft act first session, second act second session, first parliament king Charles the second, and ane hundreth and fourty fourth act, twelt parliament king James the sixth, and diverse other lawes and acts of parliament, the rising in armes against his majesty or his authoritie, upon any cause or pretext whatsoever, the plotting, contriving or intending the death or destruction of the king's most sacred majesty, or any bodily harm to him, or the depriving, deposing and suspending of him from the style, honour, or kinglie name of the imperiall crowne of this realme, or the overturning of the government of the monarchie, or the concealing and not revealing of any of these crymes, and the intercommuning, conversing or corresponding with rebels and traitors, are crymes and poynts of high treason, rebellion and lese majesty, and punishable with forfeiture of lyff, lands and goods: Nevertheless it is of verity that the said David Stewart, sone to Thomas Stewart, sometyme of Cultnes, and Mr. William Spens, shaking off all fear of God, respect and regard to his majesty's authority and lawes, have presumed to committ, and are guilty of the said crymes, in sua farr as there being in the year 1683, ane hellish and damnable plott and conspiracy entered into by the late earles of Shaftsbury, Essex, and Argyle, the lords Russell and Gray, and sir John Cochran, sir Hugh and sir George Campbles, somtyme of Cessnock, David Montgomery, somtyme of Langshaw, Thomas Stewart, sometyme of Cultnes, James Stewart, his brother, sir Patrick Home, of Polwort, George Pringle, somtyme of Torwoodlie, Mr. Robert Martin, Mr. Robert Ferguson, major Holmes, and collonell Ritchard Rumbold, and other rebels and traitors subjects of this kingdom and of England, for killing and murdering, at least seazing upon the person of his sacred majesty and of his royall brother, our late gracious soveraigne king Charles the second, and for raising open warr and rebellion in both kingdomes, and furnishing men, money, ships, and armes to the late earle of Argyle for that effect; for the closer carrying on whereof, the saids conspirators did converse and correspond with each others in hyroglyphicks and figures, and in obscure and mistriall termes, the keyes whereof were kept and known by the said Master William Spens, and they and the said David Stewart, did negotiat, treat and consult, theraent did devise, contrive, know, conceal and did not reveal all the same, though the said Mr. William Spens suffered torture for discovering thereof; but the said plott being otherwayes brought to light, and they having, upon a remission, deciphered some of these letters, he no sooner obtained the said remission then he went over to Holland to the said late earle of Argyle, a forfait and declared traitor, and did treasonably converse, correspond and intercommon with him, and entered into his actual service,

and kept the said plott on foot, and gave him intelligence of the state and designes of this kingdom, and the said earle and other traitors and rebels in Holland did conspire the overturning of the government of this realme, and accordinglie the said late earle of Argyle and severall other traitors and rebels did invade this kingdome, with ships, men, armes and amunition, and landed with them in the west highlands of Scotland, upon the day of May last (Doctor Blackader and the said Mr. William Spens being sett ashore at Orkney, to get intelligence ther) and the said late earle of Argyle and the said David Stewart, and the rebels and traitors with them, did issue furth treasonable declarations, did convocat and gather together his majesty's subjects to the number of _____ within the shyres of Argyle, Tarbat, Highlands, and Isles thereabout, in open rebellion against his majesty and his authority, did take in and maintaine forts, strengths and garrisons, against him and his forces, did robb and plunder the goods and houses of his majesty's goods and subjects, redivouzed and exercised themselves, did scout furth, kill and murder, severall of his majesty's good subjects and souldiers, and did continue in open and avowed rebellion against his majesty and his authority, committing all acts of hosulity and high treason, untill at length they were dissipate and defate, and taken prisoners; Of the whilk horrid crymes of treason, rebellion, and lese majesty, they and ilk one of them, are actors, art and part, and have concealed and not revealed the samen, which being found be ane assyse, they ought to be punished with forfeiture of lyff, lands and goods, to the terror of others to committ the lyke herefter.

Persewer.—Sir George Mackenzie, of Rosehaugh, his majesty's Advocate.

David Stewart, sone to Thomas Stewart, somtyme of Cultnes, confesses and acknowledges, that he went over to Holland about two years agoe, and was twice in company with the late Argyle and James Stewart his uncle ther, and that he came over in May last in the ship with the late Argyle, from Holland to Scotland, and landit in the highlands with the rest, and was and continued with the rebels till he was taken, and that he had a sword. He ownes the king's authority, and that king James the seventh, who now reigns, is his lawful king and soveraigne, comes in will and begs his mercy, and begs the Lords would be pleased to recommend him to his majesties gracious clemency.

Sic Subscibitur, DAVID STEWART.

His *Majesties Advocat* declares, he insists on that article of the dittay against Mr. William Spens, anent his conversing with Argyle in manner lybelled, and for his treasonable joyning with him and coming alongst with him in the ships with men and armes, for invading this kingdome.—The Lords having considered

the lybell persowed be his majestie's Advocat against David Stewart and Mr. William Spens, with the king's Advocat's declaration, they find the same relevant as the samen is lybelled and restricted, viz. That David Stewart conversed with the late Argyle, a declared traitor, and joynd with him in rebellion in manner mentioned in the lybell, and that Mr. William Spens conversed with the late Argyle, a forfaulted traitor, since the said Master William Spens gott his majestie's remission, and joynd and came alongst with him in ships with men and armes, relevant, and remitts the same to the knowledge of the assyse.

ASSISA.

John Boyle, of Kelburn,
Mr. John Dempster, of Pitliver,
Sir William Binning, of Valefield,
Walter Scot, of Letham,
Andrew Brown, of Gorgiemyln,
Patrick Smith, of Methven,
John Johnstoun, of Clachrie, provost of Glasgow,
John Carnegie, of Cookstun,
William Steivinson, late baillie of Edinburgh,
Robert Sandielands, merchant there,
Thomas Hamiltoun, mason,
Thomas Mowbray, merchant,
James Pollock, merchant,
James Cranstoun, merchant,
James Broadie, mason.

The Assyse lawfullie sworn, no objection of the law in the contrair, his majestie's Advocat for Probation, adduced the Commission of David Stewart, above written.

Mr. Thomas Archer being re-examined, purged and sworne, Depons he knows Mr. William Spens, and sawe him with the late Argyle in Holland, a litle before they came to Scotland, and that Mr. Spens was then Argyle's actuall servant; depons he knows David Stewart younger, of Cultnes, and saw him in Holland in his father's house, in Roterdame, and saw him with the rest of the rebels in the Highlands in June last; and this is the truth as he shall answer to God.

Sic Subscritur, THOMAS ARCHER.

Mr. William Bleckader, doctor of medicine, aged thretty years, unmarried, purged and sworn, depons he knows Mr. William Spens the panhall, and sawe him in company with the late Argyle aboard of the ship with the rest, coming from Holland to Scotland, and that Mr. William Spens came out of the ship at Orkney with the deponent, and was taken ther and brought prisoner with him to Edinburgh; depons that Master Spens, before they came from Holland last attended Argyle as the deponent and others did; and came alongst with him in the same ship; depons he saw young Cultnes in the ship with Argyle coming from Holland to Scotland; and this is the truth as he shall answer to God.

Sic Subscritur, WILLIAM BLECKADER.

David Dunbar, chirurgeon, aged twenty-six years, unmarried, purged and sworne, depons he knows Mr. William Spens, and saw him in the ship with the late Argyle coming from Holland to Scotland in May last, and speaking and conversing with him, and waiting on him in the cabbin, and that he knows young Cultnes, and sawe him aboard of the ship with the late Argyle, and saw him in the Highlands with the rest, and that he had a sword; and this is the truth as he shall answer to God.

Sic Subscritur, DAVID DUNBAR.

Followes the Verdict.

The Assyse having elected Patrick Smith, of Methven, their chancellor, they all in one voice find the lybell against William Deuboln, of Westshiells, James Stewart son to sir James Stewart, late Provost of Edinburgh, Master Gilbert Eliot, for the treasonable conversing, corresponding and intercomuning with the late earle of Argyle, a forfault and declared traitor, sufficiently proven. Lykeas finds the lybell against David Stewart, younger, of Cultnes, for the treasonable conversing and corresponding with Argyle, and of the treasonable invading of this kingdome, and being with Argyle and the other rebels in the Highlands in May and June last, sufficientlie proven; and finds the lybell against Mr. William Spens, for the treasonable conversing, corresponding and intercomuning with the forsaid late earle of Argyle, since he obtained his majestie's remission, and of joyning and coming alongst with him in the ship from Holland, sufficientlie proven. Written in the parliament house of Edinburgh, this 16th of July, 1685. years, by me Walter Scott, of Letham, elected clerk by the rest of the members of the inquest.

Sic Subscritur, PATRICK SMITH of Braw.

Followes the Doom :

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the verdict of assyse above written, they therefore be the mouth of John Leslie, dempster of court, decerne and adjudge the said David Stewart, sone to Thomas Stewart, sometyme of Cultnes, and Mr. William Spens, servant to the late Argyle, to be taken to the marcat Croce of Edinburgh, upon Wednesday next, being the twenty-two day of July instant, betwixt three and fyve a clock in the afternoon, and there to be hanged on a gibbet till they be dead; and ordained all their lands, heretages, titles, offices, tackts, steddings, roomes, possessions, goods, and gear, whatsoever pertaining to them, to be forfault and escheat to our soveraigne lord's use, to remaine perpetually with his highnes in property, which was pronounced for doom.

And also having considered the verdict of assyse returned against the said William Deuboln, of Westshiells, James Stewart, son to the decessat sir James Stewart, sometyme

provost of Edinburgh, and Mr. Gilbert Eliot, wrighter in Edinburgh, they therefore be the mouth of the said John Lesley, dempster of court, decerned and adjudged the saids William Denholme, James Stewart, and Mr. Gilbert Eliot, to be excute to the death, demained as traitors, and to undergoe the pains of treason and utter punishment appoynted by the lawes of this realme, whenever they shall be apprehended, at such tymes and places, and in such manner as the Lords Justice Generall, Justice Clerk and commissioners of Justiciary shall appoynt, and ordains, their name, fame, memory and honours, to be

extinct, their blood to be tainted, and their armes to be riven furth and delate out of the books of armes, sua that their posterity may never have place nor be able herefter to bruik or joyse any honours, offices, titles or dignities within this realme in tyme coming, and to have forfait amitted and tint all and sundry their lands, heretages, goods and geir whatsomever, tacks, steddings, rounes, possessions, titles, and offices whalsomever, to our souveraigne lord to remaine perpetuallie with his highnes in property, which was pronounced for doom. Whereupon his majestie advocat asked and took instruments.

345. Trial of DAVID MOWBRAY, for a Tumult* within Burgh :
2 JAMES II. (of England) A. D. 1686. [Now first printed
from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARII, S. D. N. Regis tenta in pretorio burgi de Edinburg, octavo die mensis Februarii 1686, per nobilem et potentem Comitem Georgium de Linlithgow, Justiciarium Generalem, Domino Jacobum Foulis de Collingtoun Justiciarium Clericum, Johannem Lockhart de Castlehill, Davidem Balfour de Forrett, Rogerum Hog de Harcars, Alexandrum Seattoun de Pittmedden, Patricium Lyone de Carsa, Commissionarios Justiciarii dicti S. D. N. Regis.

Curia legitime affirmata.

Intran,

David Mowbray, shoemaker.

YE are indyted and accused for that albeit be the common law and lawes and practice of this kingdom, the makeing of seditious conventions

and assemblies, off tumults and uproart, and the convocations and raising off people in armes in a tumultuarie and seditious way, without the special licence of his majestie or the magystrats off the place, ar crymes off ane high and bynous nature, and off a dangerous consequence, and ought and should be severlie punished with the paine off treason, at least capitalie, and with the paine of death; and in speciall be the seventieth seven act fourteenth parliament king James the Second, it is statut, that within the borrowes within throwout the realme, no convocations or ryseing off commons should be made in hindering off the common law, but at the comandement off ther head officer, and if any does in the contrair, ther goods shall be confiscatt to the king, and ther lives in the king's will; And be the seventeth fyfth act off queen Mary, her nynth parliament, it is statute that no maner off persone off

* Fountainhall thus writes of this Case, and of the tumult which gave rise to it:

"January 31, and February 1, 1686. There was a tumult and riot in the town of Edinburgh, being a convocation and gathering of the apprentices and rabble, against the avowed and public meetings for saying of mass, and and other popish worship, who disturbed the chancellor's lady and others at their skailing, by throwing dirt, and otherwise affronting them. This was taken so ill, that some of the boys being apprehended, the privy council met this day, and ordained a Baxter lad to be whipped through the Cannongate. While the hangman is going about it, the boys again rose, beat the hangman, rescued the lad, and so continued all night making disorder: the council called in to the assistance of Graham's company, major White's men in the castle, and likewise the king's footguards; and the soldiers being drunk, they shot with ball amongst the boys and killed a woman and a man, and Robert Mein the postmaster's apprentice,

though he was in no confluence at all; which some called a murder. Then all were commanded off the streets, and all ordained to hang out bowets; and some being apprehended, the next day a woman and two men were scourged; but to shew how afraid they were of the common people's inclinations, they had them guarded all the way betwixt two files of musqueteers and pikemen, for fear of being deformed again. One of the rescuers called Mowbray, an embroiderer, was apprehended, and got an indictment for his life. One asked, what the king's advocate would answer, if the pannel should propone this defence and exculpation? 'The mass is a meeting declared treasonable by law, I was only dissipating such an assembly; if it had been a fanatical conventicle I would have got thanks; ergo, the disturbing this meeting at least will not merit death.' The court party gave it out for a great riot, and of bad example; so that Queensberry said privately, he by their descriptions would have believed it to have been worse than

whatsomever estaite, conditione, or degree they be off, attempt to doe or raise any bands off men with pistolls, culverings, or other munition bellicall, without licence off her or her

Masaniello's Neapolitan insurrection, had he not seen it. Our bishops and others wilfully dissembled as if they had been ignorant of the rise and cause of it. A drummer is delated by two papists for drawing his sword, and saying, he could find in his heart to run that through them; which they exponed of the papists, but he said that he meant the boys. A grenadier was remitted to a council of war, for saying he would not fight in that quarrel against the protestants, for he was sworn to that religion. One Littlejohn was examined for speaking against the papists; but, on a representation that he was sometimes mad, he was dismissed.

"The treasurer and his faction aggravated this tumult mightily, of purpose to irritate the chancellor to take some rigorous course, and to put them to extremities; but the chancellor was advised to carry moderately, lest it should mar his designs of advancing: But as Spotswood, in his history *ad annum* 1596, page 432, observes from Tacitus, that all such attempts when crushed advance the sovereignty; so it is to be feared, that this may further the popish designs without control, and be an argument in parliament to crave an act, rescinding all the penal laws against them, that they may live securely amongst us. See the 5th act of parliament 1567, against hearing of mass. But the acts of parliament on which our judges proceeded to punish this tumult, were (without considering the occasion of it) act 83, 1563; act 187, 1593; and act 17, 1606.

"February 8, 1686. At criminal court, two men are pannelled for being accessory to the late tumult on the 1st of February, against the avowed and publick meetings for saying of mass, wherein some were killed; and for rescuing the Baxter lad from the bangman when he was to be scourged. The lords found the dittay relevant to infer the pains of death, tho' they had no arms; in regard the king's advocate adduced two instances where the same was found; 1mo, in the tumult against sir Walter Seton. 2do, in Liermont's case in September 1678, when one Hog was killed by the conventiclers. There was some demur among the lords, whether the libel should be found relevant to infer the pain of death, or only to put the pannel's life in the king's will and mercy. Their accession being proven, the assize returned them guilty, so they were condemned to be hanged on the 10th of February: But the privy council which sat on the 9th, reprieved them to a longer day, that they might obtain a pardon, for they thought not fit to irritate the mobilee too much.

"Feb. 9. At privy council, there is an act made in regard of the late tumult, that all masters of families, especially tradesmen, shall enact themselves by a bond for their servants and prentices, that they shall not be present, nor

successors under the paine of death, to be executed upon the raisers off the saids bands, as also upon them that convene and ryse in bands. And be the aughtieth third act off the same

join in any tumults or uproars, under the penalties of such fines as the privy council shall impose. And because it was informed, that some writer lads were also accessory, the keepers of the signet were called, to intimate to the writers to be liable for their men.

"Feb. 16, 1686. At privy council, two letters from the king were read, one aent the late tumult, declaring he resented very warmly any injury or attempt against his chancellor, whom he would protect to the uttermost, and commanded them to make strict search into the authors of it by torture or otherwise; and accordingly they named two committees for examining it, one of privy counsellors, and the other of officers of the army; and because a landlady near Heriot's-work had caused point the press and other goods of one Watson, a popish printer, for his mail, this was made a combination, and his goods were violently taken back and brought down to the abbay, and he protected there. It was said, there was a privy letter from the king to the chancellor, checking them for their too open masses, and recommending to them to be more cautious and private.

"February 23, 1686. The drummer, mentioned 1st February current, is this day shot in the links of Leith by martial law, for saying he could run his sword through all the papists; though he denied these words to his last; yet he declared he would not redeem his life by turning popish. The two witnesses that deponed against him were papists, viz. Irvine of Boushaw and _____ (who, falling out since, called one another perjured;) though our law rejects papists from witnessing: but that is where they are declared and convicted.

"March 4, 1686. At privy council, the narrative of the late tumult against the mass, being read in council, is extended, and swelled to a great bulk, and sent to the king. One part bore, some had spoke contumeliously against our Lady, which was scored out, and the Virgin Mary put in. One design was, to load colonel Douglas as negligent, and to get Clavers put in his place."

Arnot has given a brief report of this Case; he calls Mowbray a shoemaker agreeably to the Record, not an embroiderer as Fountainhall terms him, and noticing Fountainhall's mention that two persons were tried on February 8th, 1686, for being concerned in the tumult; he says, "The Records of Justiciary testify, that no person was tried or outlawed on account of this tumult, at this time, except Mowbray, nor at any other time that I know of, except on the 26th of that same month, when Keith was tried and convicted." See the next Case.

To his Report he has subjoined some obser-

parliament of queen Mary, intituling Ament the stenshing off tumults within burghs, it is statut, that none of his majesty's subjects presume or take upon hand to make any privat conven-

tions or assemblies within burgh, or take upon hand cloath themselves with weapons in any tyme heirefter, without the speciall licence off his majestic and magistrates within burgh, wher

posse with much fortitude and address. The imprisonment of these youthful patriots was resented by the populace. The blue ribbon of the covenant, [Hence a true blue whig, from the favourite colours of the covenant, adopted, it is said, from an injunction to the Jews (Numbers, xv. 38.) Fountainhall's Mem. MS.] was revived by boys and apprentices, with an inscription against the pope; and the court party retorted by wearing red ribbons, with a device expressive of their abhorrence of fanaticism. Amidst these absurd disputes the provost's house was burnt to the ground. The accident was ascribed to revenge, and although no discovery was made, the University was shut up, and the students were expelled for a time from the town. These incidents convinced the discerning Churchill that the duke was unable, without his brother's support, to maintain himself in Scotland, much less to assert his right of succession by arms."

Wolrow's more circumstantial account is as follows:

"The preamble to one of our old statutes emphatically describes the disorders which prevailed in this country from one of the worst of political evils, the relaxed arm of the civil magistrate. 'Forsameikle (says the statute) as the oversight and negligence of the civil magistrates, and judges ordinar within this realm, in putting of decreets to execution, punishing of malefactours and rebels, and uthewise using of their offices, as becummis, partelie for regard, and feare of strang pairties, and hazard of their own lives; and partily throw want of sufficient preparation for that effect, is the original and principale cause and disorder of this lande in all estaites procerdis.' [Mary, Parl. 9, c. 83; James 6, Parl. 13, c. 184, Parl. 18, c. 17.] Therefore by this, and other acts of parliament, it is statuted, that the raising or assembling within borough, conventions of the people, without special licence of the sovereign, or authority from the magistrates of the borough; especially, if such people should presume to arm themselves, to display banners, to beat the drum, or sound the trumpet, or to make use of other warlike instruments whatever, it is statuted, that persons thus offending shall suffer the pain of death. It is further enacted, that whoever shall disobey and resist the authority of the magistrates of Edinburgh, or their officers, in the execution of their duty, shall suffer the like penalty."

He also thus mentions a disturbance which had occurred in Edinburgh a few years before:

"Upon Christmas-day, A. D. 1680, the magistrates of Edinburgh, from that decem respect which was due to the duke of York, who was then in the city, interrupted the students in their solemn procession of a Pope-burning; so that they were fain to burn him post-haste in an obscure part of the town. On the 11th of the ensuing month of January, the house of Priestfield, the seat of sir James Dick, lord provost of Edinburgh, was wilfully set on fire, and with all the furniture, burnt to the ground, not without the most pregnant suspicion that it was set on fire by some students at the University."

Of this disorder Laing writes thus:

"The students at the University of Edinburgh, had engaged by an oath to burn the Pope in effigy at Christmas. Notwithstanding the vigilance of the magistrates and the military, to prevent this juvenile insult to the duke's religion, they accomplished their pur-

such tumults and uproars chanceth to be, under the paine of death; and be the seventeenth act, aughteinth parliament off king James the Sixt, all and whatsonnever acts made

struck, for he had relations among them, and got their business done.

“The rise of this appearance the students made, was this, as I am informed by one of them, now a reverend minister of this church. Several of them happened to be together in a tavern, where there was hanging a copper plate, representing the manner of burning the pope at London, which pleased them so, that in a very little they entered in a concert to do the same at Edinburgh. The matter came to take air, and Mr. George Ridpath, who had been very active in the project, was seized and put in prison the very day before the design was to be executed, and a severe search made for the effigies, but in vain. As we have seen, the scholars got their business done, but next day several gentlemen’s sons were called before the council, and particularly examined whether any Presbyterian gentlemen, or ministers, did contrive, assist, or direct them in burning the pope; they all declared, they did not. The chancellor was civil and favourable to the young gentlemen. The bishops endeavoured to ensnare the scholars with questions about their conformity, and other captious heads; however, no advantage was got of them, and they were dismissed that day.

“Only Mr. Ridpath then entering upon his philosophy, and a youth of promising genius, was very hardly treated. Sir William Paterson was rude to him, and, I am told, he was beat, and had his hair torn by the council servants; and either by the council, or their committee, he was banished his native country, for no other cause than his accession to this matter.

“About the same time the same spirit was working at Glasgow, in a different manner. They only put on favours, and coloured ribbons, and other marks of distinction, as, they said, tokens of their being protestants. For this, several of their leaders, and particularly the present marquis of Annandale, then a student there, were called before the masters and archbishop. Annandale defended himself and his fellows, with briskness enough, and speaking to the bishop, called him only Sir. Mr. Nicolson his regent took him up, and said, William, you do not understand whom you speak to, he is a greater person than yourself. Annandale very quickly answered him, I know the king has been pleased to make him a spiritual lord, but I know likewise that the piper of Arbroth’s son and my father’s son are not to be compared; and added, he had the vanity to say, he had more noble blood in his veins, than all the fourteen put together. Nothing further could be made of this.

“At Edinburgh, several of the students were imprisoned, besides Mr. Ridpath, which irritated the rest so far, that they threatened to burn the provost’s house at Priestfield, who,

be his majestie and his royall progenitors, and the estaits off the realme, for stayeing of tumults and unlawfull meetings and conventions within burgh, ar ratified and approve and or-

they reckoned, should have interposed in behalf of the students, since the town of Edinburgh are patrons to the college, and yet, it seems, he had been very virulent by his proclamations and otherwise against them: and in a few days the house of Priestfield was accordingly burnt; whereupon the council emit a proclamation, January 13, this year, offering two thousand merks and a remission, to any who would discover the actors: but I don’t find any discovery was made; yea, some wanted not their jealousies, his house was burnt with a view to bring an odium on some people who had not the least share in the burning.

“January 4. The masters of the college of Edinburgh present a petition to the council, declaring their abhorrence of the late tumultuary gathering of their scholars and others, December 25 last. The council remit it to the committee for public affairs, and so I can give the less distinct account of what was done. In the council-books I meet with what follows, January 6. ‘The lords of privy council considering, that bonds and combinations have been entered into by the students of the college, and several tumults raised thereupon in the city, and the government itself is defamed by them, ordain the magistrates of Edinburgh instantly to cause shut the college gates, and cause the classes be dissolved till further order, and ordain the said magistrates to appear before the council, that they may hear what they have to offer for the security of the city, and the king’s peace therein.’

“Upon the 21st of January, the council emit another proclamation concerning the students in the college, wherein they charge them with entering into bonds and combinations, obliging themselves to adhere one to another, in case of them should be called in question, which, they say, appeared from the confessions of the masters and some students: they complain likewise of their assembling, December 25 last in a tumultuary way, (but not a word of burning of the pope) and associating themselves with prentices, and introducing a new way of tumultuating, by putting up blue ribbons as signs and cognizances; and that being justly threatened for these things, they made tumults in the streets, disquieted the nobility and gentry in the streets, and threatened the provost with burning his house, which in a few days was done. Whereupon the council by an act of this day’s date, having ordered the college gates to be shut, till they take further trial thereanent, do now command all the students to retire fifteen miles from Edinburgh, within twenty four hours, and not to come within the said limits without leave of the council, under the pain of being treated as seditious persons.’

“This matter ended in an Act of Council

dain'd to be putt to executione against the contraveeners theroff in all poynts, with this additione, that no persone or persons within burgh, off whatsomever rank, qualitic, or conditione, presume or take upon hand, under whatsomever collour or pretext to convocat or assemble themselves together at any occassione, except they make dew intimatioune off the lawfull caus of ther meeting to the provist and haizlie off the burgh, and obtaine ther licence therto, and be the said act the saids unlawfull meetings,

February 1, ordering all the students to take the oath of allegiance; and if the masters accept of any scholars otherwise, they are *ipso facto* to be deposed."

COUNCIL'S ACT about the College of Edinburgh, February 1, 1681.

"Forasmuch as there being a petition presented to his majesty's privy council, by the magistrates and council of Edinburgh, and principal masters, and regents of the college thereof, desiring, that upon the considerations therein contained, and upon the obligements offered by them, they might be allowed to make open classes, and receive the scholars, notwithstanding of the late act and proclamation of council: The lords of his majesty's privy council, upon consideration of the foresaid petition, and of a report made by a committee of their own number, in the said matter, do allow the magistrates of Edinburgh, principal, masters, and regents of the college thereof, to make open the said college, notwithstanding of the late act and proclamation; and do ordain the said magistrates, before re-entry of the students, or any other students to be entered for this year, to take their fathers, tutor, or friend cautioner for them, by bond, for their orderly and peaceable behaviour in time coming, and according to the bond, and under the penalties aftermentioned, viz. a nobleman's son, under the penalty of four thousand merks, a baron or chief gentleman, two thousand merks, a merchant or burges's son, one thousand merks, the son of a tradesman, or person of other inferior quality, five hundred merks Scots money; and that the said magistrates be answerable for the sufficiency of the cautioner, and report an account of their diligence once every month, until the ordinary time of the rising of the college. Follows the tenor of the bond above mentioned. I _____ bind and oblige me, my heirs and successors, as cautioner and surety, actel in the books of privy council, for _____ student in the college of Edinburgh, that the said _____ shall during the whole time and space that he shall remain a student in the college of Edinburgh and a member of that society, live orderly and peaceably; and that he shall not be accessory to the breach of the public peace, neither by his knowledge, causing, sending, hounding out, or ratification; and that he shall engage himself in no unlawful bonds or

and the persons present therat are declared to be factious and seditious, and ordained to be punished in ther bodies, goods and gear, with all rigour, conforme to the lawes of this realme. Lykas be the fyfth act, first session, first parliament king Charles the Second, it is declared, That it is and shall be high treason to the subjects off this realme, or any number off them, more or less, upon any ground or pretext whatsomever to ryse in armes without his majestie's speciall authoriie and approbatione

combinations, or shall be accessory to any tumults or unlawful convocations, under the penalty of _____ in case of failie. Consenting thir presents be registrate in the books of privy council, that letters of horning on six days and others, may be direct hereupon, and constitutes _____ my procurators, &c. And further, the said lords do ordain the principal and regents of the said college, before they receive any of the students of the three upper classes, being the semi, batchelor, and magistrand classes, into their said respective classes, to see them take the oath of allegiance, in presence of the bishop of Edinburgh, which is not to hinder the taking of the said oath by such as shall receive degrees. And the said lords declare that in case the principal or regents shall re-enter any of the said students, or receive others, without giving in the security, and taking the oath of allegiance, as aforesaid, then and in that case, the principal and regents shall, *ipso facto*, be deprived of their said offices and function in the said college, and their places ordained to be declared vacant, by the magistrates of Edinburgh, patrons of the college, and they allowed to appoint others to supply the same. And the said lords do ordain, that before the said students re-enter, or new students be received in the said college, such students first engage under their hands, before the bishop of Edinburgh, (when they take the oath of allegiance) that they shall keep the church, and wait upon divine worship, according to law, which the said principal and regents are hereby ordered to see done, and not to receive into the said college, any such students entered or to be entered, without doing of the same, under the certification aforesaid. And the said lords do ordain and appoint that at the visitations of the other universities of the kingdome, the foresaid rules for taking the oath of allegiance, and engagements to keep the church, be put in execution in these respective universities, and that the principal masters, and regents thereof, return to to his majesty's privy council, an account of what obedience has been given to their act, enjoyning the students to take the oath of allegiance at their laureation: And the said lords do discharge any of the rest of the universities, to receive any such students as have left or shall leave the college of Edinburgh, upon the account of their refusal of the engagements above written, as they will be answerable."

first interponed thereto, as in the saids laws and acts off parliament at more length is contained.

Nevertheless it is off veritie, that the said David Mowbray shacking off all fear off God, regard and conscience off his duty, and alleadgence and respect to authoritie, has presumed to violat and contraveen the saids laws and acts off parliament, and to committ the foresaid hynous cryms therby prohibit, in sua farr as upon the last day off January 1686 years, a most seditious and numerous comination and ryseing off commons, and unlawfull convocatione, and a privie and tumultuous convention, assemble, and uproar, was made and raised be severall persons within the Cannogaitte and his majestie citie off Edinburgh, being the chieff toune ane burgh off his ancient kindome, and a place wher for a long tyme his majestie and his prediccors has been graciouslie pleased that his authoritie should be eminentlie represented in the high and supream judicatories off parliament, privie councill, sessione, justice court, addmiralitie and others, which doe ordinarlie sitt and ar kept ther to the great benefite and inhabitants off the said burgh upon occasione off the confluence off repairing off the nobilitie, gentrie, and people off all qualities from all the corners off this kingdome, and wher (at least at his majestie's palace near the same) his majestie's high chancellor and officers off state, were and are residing ffor the tyme, and about three or four a'clock in the efternoone a most seditious and mutunous convocatione and unwarrantable ryseing was made and convened in the Cannogaitte, and a great many persons off the rabble and rascalitie off the people, did ryse, convene, convocat and assemble together, without comand off the head officer and commander off the place, and without any other lawfull warrant, armed with pistolls, swords, durks, and other weapons offensive, and did presume in a most bold and rebellious maner to come and appeir in the high and most publick place off the high street off the Cannogaitte, wher for a long tyme the said tumult and uproar did continew with great cries and outrageous speeches, threatuings and menacing, and all the circumstances off insolence which ar incident to popular tumults and furie, invaded, assaulted and sett upon severall off his majestie's good subjects, beatt and wounded them, robbed and ruffled the cloaks, hatts, perivicks, and other abulziaments, draged some of them through the streets, threwe stones, dust and other materials at them, and committed all other acts off indignitie, violence and furie, to the high and manifest contempt off his majestie's authoritie and lawes, and not being satisfied therewith they in a most seditious and tumultuary maner, came up the streets of the Cannogaitte in a full body, entred within the Nether Bow off his majestie's ancient citie, assaulted the houses off severall off his majestie's good subjects, and with barrs off iron and other instruments, endeavoured to brake open their doores; lyk as during the tyme forsaid, they did proceed to that hight off seditious and rebellion, that his excellencie his majestie's generall off his forces haveing apoynted the guairds off the citie to be assistant to the lord provost and magistrates off the burgh, in dissipateing and queting off the said tumult and uproar, and his excellencie being present himself with severall others off his majestie's officers, they did resist and withstand, and with stones did wound severall off his majestie's souldiours and other good subjects, continewed their insolence and tumults, and advanced and gathered together in severall other pairs off the cittie, invading and setteing upon his majestie's subjects and souldiers and committing ail acts off furie and oppressione, untill they were overpowered and dissipat by the magistrates forces; and in the said uproar, ther being severall prisoners taken and apprehendit, the magistrates of Edinburgh the next day being the first day of February instant being solemnlie mett in a court, and efter examination, haveing found that Robert Grieve servitor to widdow Annand, Baxter [Baker] in the Cannogaitte, was a maine actor in the said insurrectione, they ordained him to be whipt in maner perscrybit be ther sentence, and haveing ordered the towne officer, with the common executioner, to carry him to the Cannogaitte, being the place wher the tumult first did begin, ther to undergoe his punishment; which being accordingly done, and the said Robert Grieve being brought to the place, and the common executioner being to doe his dutie, you the said David Mowbray, and severall others off the rascalitie and meanest sort of the people, did off new most disloyallic and indutifullie and unwarrantfullie, convocat and assemble yourselves together in a most seditious and tumultuous maner, invadit and sett upon the towne officers and others assistant to them in executione off his majestie's lawes, and be force and violence rescued and took from them the said Robert Grieve, and in a bravading and insolent maner carryed him downe the streets, sett him at freedom and libertie, and with great cries, outrageous speeches, and menaces, threatned and terrified his majestie's good subjects; and the towne officers haveing disyred you to begone, you answered you would not, but abyde be the trades, in high and manifest contempt off his majestie's authoritie and lawes, and to the effect you and the rest off the rabble might confirme your disloyaltie and unwarrantable convocatione in maner forsaid, you and many others off the rascalitie forsaid, to the number of fyve hundred persons, or therby, the same evening, about sevine a clock at night, did in the Cannogaitte and cittie off Edinburgh, assault and invade the dwelling houses of severall loyall subjects, searching for them, ruffled ther goods, broke up ther doors and windowes, and thereafter invadit and sett upon his majestie's officers and souldiours, beatt, bruised, and would many of them beat up and down the streets in a most seditious and tumultuarie manner, comitteing all acts off hostilitie, op-

pression and furie, most disloyallie and seditiouslie opposed and withstood his majestie's authoritie, in the persons of the saids magistrates, officers and souldiours, untill ye were overpowered and dissipat, in which tumultuous convocacione and assemblee ther were two off his majestie's good subjects killed; Wherthrow you the said David Mowbray is guiltie off seditioun and off a complication, off remaineing in hynous crymes, of convocacione and rysing off tumults within brughs, treasons, mutiny and contraveining of the fornaids lawes and acts off parliament, at least off aue or other off them, and was actor, at least present, in the said tumult and commotione, and committinge the crymes forsaid, and airt and part off the same, and has incurred the paine of death and loss of lyfe and moveables, and the samen ought to be execute and inflicted upon you the said David Mowbray to the terror and example off others to comitt the lyke herefter.

Perseuer.—Sir George M'Kenzie of Rosbaugh, his majesties advocat.

His *Majesties Advocat* produced ane Act and Order off Councill for persewing of the persone above named, wheroff the tenor followes: Edinburgh, the second off February, 1686 years. The lords of his majesties privie councill having considered the examinatione of David Mowbray, shoemaker, and the depositions off the towne officers, provinge that he was active in the tumult yesterday, att the rescuing off the Baxter boy, who was ordured to be scourged by the magistrats off Edinburgh for accessione to the tumult on Sundayes night, doe heirby give order and warrant to his majesties advocat to processe the said David Mowbray before the Lords Commissioners off Justice for the said cryme upon Munday nixt; as also to processe Robert Greive, the Baxter boy, who was rescued yesterday, for the said cryme, in order to his beinge declared fugitive. Extract by me,

Sic Subscritur, WIL. PATERSON, Cl. Cou.

The Lords gave warrant and allowance to sir Patrick Hume, or sir David Thoires, or any other advocat the pannall should requyre, to appear and plead his defence.

David Mowbray, pannall, confesses and declares judiciallie, in presence of the justices and assysers, that he was present on Munday last at the convocacione lybelled, and assisted in rescuinge the Baxter from the towne officers, craves God and the kinge pardone for his offence, and comes in his majesties will, and declares he is heartillie sorrie and penitent therfor, and that he should have had the least accessione thereto.

Sic Subscritur, DAVID MOWBRAY,
LIDLITHGOW, I. P. D.

His *Majesties Advocat* declares, he restricts the lybell to that pairt thereof anent the pannall's accessione to the tumult on Munday in the forenoone in rescuinge the Baxter from

the executione off justice, and the pannall's beinge airt and part theroff.

The Lords finds the dittay relivant as it is restricted to infer the paine of death.

ASSISA.

Mr. John Dempster, of Pitliver.
Collonell James Meinzie.
James Justice, of Easter Crichton.
John Maxwell, of Overmayns.
James Wire, merchand.
Mr. James Ellies, of Stenousemill.
Robert Campbell, merchant.
Pat. Steill, vintiner.
Mungo Wood, merchant.
Duncan M'Intosh, merchant.
Sir Patrick Nesbit of Deane.
Alexander Cruickshanks, merchant.
William Cockburne, merchant.
Thomas Adair, barber.
Michael Allane, merchant.

The Assyse lawfullie sworn; no objection of law in the contrair.

THE PROBATION.

His *Majesties Advocat* for probation adduced the pannall's own judiciall Confession, above written, which was received in presence of the Assyse beinge sworne, together with the witnesses efter deponing.

George M'Farlane, ane off the towne officers off Edinburgh, aged threttie five years, married, purged, and sworne, depones that on Monday last he beinge ane off the towne officers, who was employed by the magistrats to execute the sentance against Robert Greive, the Baxter, he sawe the pannall, David Mowbray, present in the tumult when they came to rescue the Baxter, and that the deponent called to Mowbray, and desyred him to be gone, which he refused to doe and said that he would take part with the trade, and efter the Baxter was rescued from the officers hands, he sawe the pannall take him by the hand and carry him downe the way in the tumult, depones the persons present in the tumult were cryinge and swearinge outrageously *causa scientie putet*; and this is the truth as he shall answer to God; depones he had a stick in his hand.

Sic Subscritur, G. M'FARLANE, Officer.

William Mayne, officer, aged twentie seven years, married, purged and sworne, depones that on Munday last, the tyme of the tumult, in the forenoone, he sawe David Mowbray, the pannall, present in the midst of the tumult, and the deponent desyred him to goe home; to which he answered that he would stay a while and take a share with the rest, and therfter the persons present in the tumult did rescue the Baxter from the towne officers, and threwe three off them to the ground, and this the truth as he shall answer to God.

Sic Subscritur, WILLIAM MAINE.

John Thomson, towne officer, aged threttie

sevine years, married, purged and sworne, depons that on Munday last, in the forenoone, he sawe the pannall, David Mowbray, present in the tumult in the head of the Cannogate, when the Baxter was rescued; and he heard the pannall say that he would owne the trade; depons that on Munday last he was present himself at the tumult in the heade of the Cannogate, wher the Baxter was rescued, and sawe the pannall David Mowbray ther, and sawe him enter amongst the rest of the tumult, and after the Baxter was rescued he sawe the pannall, David Mowbray, take the Baxter be the hand and bid him goe away, and this is the truth as he shall answer to God;

Sic Subscribitur, JOHN THOMSONE.

James Young, servitor to John Bleckie, shoe maker, in Edinburgh, aged twentie years or therby, unmarried, purged and sworne, depons that on Munday last he was present himself at the tumult in the heade of the Cannogate, wher the Baxter was rescued, and sawe the pannall David Mowbray ther, and sawe him enter amongst the rest of the tumult, and after the Baxter was rescued he sawe the pannall, David Mowbray, take the Baxter be the hand and bid him goe away, and this is the truth as he shall answer to God; depons he cannot wreit.

Sic Subscribitur, LINLITHGOW, I. P. D.

His Majesties Advocat protests for an Assyse off Error.

The Assyse all in voice, by the mouth of

sir Patrick Nisbet, of Dean, ther Chancellor, finds the pannall's presence and accessione in the tumult in rescuing off the Baxter from the executione off justice on Munday last in the forenoone, conforme to the pannalls indytmnt, as it is restricted by his majesties advocat, provine in respect off the pannall's judicciall confessione.

Sic Subscribitur,

PAT. NISBET.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, haveing considered the said Verdict of Assyse, they therfor, be the mouth of John Leslie deupster off court, decerne, and adjudge the said David Mowbray to be taken to the marcat croce of Edinburgh upon Wednesday nixt, the tenth off February, instant, betwixt two and four a clock in the efternoon, and ther to be hanged on a gibbet till he be dead, and all his moveable goods and gear whatsoever to be esobeatt and inbrought to his majesties use. Which is pronounced for Doom.

"It appears that the privy-council granted the prisoner a reprieve till a short day. Whether he got any farther respite, or was then hanged is uncertain, as the Records of Privy Council for A. D. 1686, are missing." Arnot's Collection and Abridgement of Celebrated Criminal Trials, p. 42.

346. Trial of ALEXANDER KEITH,* for Sedition, Mutiny, and Tumult, in Burgh: 2 JAMES II. (of England) A. D. 1686. [Now first printed from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in Prætorio Burgi de Edinburgh, viginto sexto die mensis February, 1686, per nobilem et potentem Comitem Georgium Comitem de Linlithgow, Justiciarium Generalem, et honorabiles viros Jacobus Foulis de Collingtoun, Justiciarie Clericum, Joanein Lockhart de Castlehill, Rogerrum Hoge de Harcars, Alexandrum Seaton de Pitmedden, Patricium Lyon de Carss, Commissionarios Justiciarie dictæ S. D. N. Regis.

Curia legitime affirmata.

Intran'

Alexander Keith, prisoner.

YE ar indyted and accused, that wher notwithstanding be the common law and laws and practices off this kingdome, the makeing off seditious conventions and assemblies, and off tumults and uproares, and the ryseing and convocation in armes in a tumultuary and seditious way, without the speciall licence off his majestie or the magistrats off the place, ar crymes off ane high and hynous nature and off a dangerous consequence, and ought and are to be

* See the preceding Case.

severallie punished with the paines off treason, and at least capitalie, and with the paine off death, and in speciall be the aughtieith third act off queen Mary's synth parliament intituled Anent the stenshing off tumults within burgh, it is statute, that none off her majestie's subjects presume, pretend or take upon hand, to make any privat conventions or assemblies within burgh, cloath themselves with weapons in tyme heireafter without the speciall licence off her majestie and magistrats within burgh, wher such uproares and tumults chanceth to be, under the paine off death: And be the seveniteenth act and aughtieith parliament off king James the sixt, all and whatsoever acts made be his majestie and his royall progenitors and the estais off the realme for staveing off tumults and unlawfull meetings and conventions within burgh, ar ratified and approven, and ordaines to be put to executione against the contraveeners theroff in all poynts with this additione, that no person or persons within burgh off whatsoever rank, qualitie or conditione they be off, presume or take upon hand under whatsoever collar or pretext to convocat' or assemble themselves together at any occasione, except they make dew intimatione off the lawfull caus off ther meetings to the provist baizlies off that burgh and obtaine ther licence

thereto, and that nothing be done or attempted by them in their said meetings which may tend to the derogation or violation of the acts of parliament laws and constitutions made for the weill and quiet of the said burghs, declaring the said unlawfull meetings and the persons present therat, to be factious and seditious, and all proceedings therein to be null and of nowe avail, and the said persons to be punished in their bodies, goods and gear, with all rigour conforme to the laws of this realme; Lykas by the fifth act first session first parliament of king Charles the second, it is declared, That it is and shall be high treason to the subjects of this his realme, or any number of them, more or lesse, upon any colour or pretext whatsoever to ryse in armes without his majesties speciall authoritie and approbatione, first interponed thereto as in the said laws and acts of parliament at more length is contained: Nevertheless it is of veritie that the said Alexander Keith shacking off all fear off God, regard and conscience off his duty, alleadgance and respect to his majestie and his authority, has presumed to violate and counterveen the said laws and acts of parliament, and to commit the forsaid hynous crimes thereby prohibit, in sua farr as upon the last day off January last 1686 yeares, a most seditious and numerous conventione and ryseing off commons and unlawfull convocations, and a privie tumultuous conventione assemblee and uproar was made and raised within the Cannogate, and his majesties cite of Edinburgh, and about three or four a clock in the efternoon a most seditious and untymous convocatione and unwarrantable ryseing was made and convened in the Cannogate, and a great many of the rable and rascallitie off the people did ryse, convene, convocat and assemble together, without command off the head officer, magistrate or commander of the place, or without any other lawfull warrand, armed with swords, durks, pistols, staves, or any other invasive armes, and did presume, in a most bold and rebellious maner, to come and appear in the high and most publick place of the high street of the Cannogate, wherfor a long tyme the said tumult and uproar did continue with great cries, outrageous speeches, threatenings and menaces, and all the circumstances off insolence which are incident to popular tumults and furie, invaded, assaulted and sett upon severall off his majestie's good subjects, beate and woundit them, robbed and rifed them off ther cloathes, draged them throw the streets, threw stones at them, and committed all acts off indignitie, violence and furie in high and manifest contempt of his majesties authoritie and laws; And not being satisfied therewith, they in a most seditious and tumultuary maner came up the streets off Edinburgh, in a full bodie, entred within the Netherbow, his majesties said ancient cite, assaulted the houses off severall off his majesties good subjects, and with barrs of iron and other instruments, endeavoured to brake open ther doores, and

aryved to that hight off seditious and rebellious, that his excellencie his majesties generall off his forces haveing apoynted the guards off the cite to be assistant to the Lord Provost and magistrates off the burgh, in dissipateing and queyeting off the said tumult and uproar, and his excellencie being present himself with the Lord Provost and other magistrates, and severall officers off his majestie's forces, they did resist and withstand, and with sious and other materials, and weapons, did wound severall off his majestie's good subjects, contineued ther insolence and tumults, and advanced and gathered together in severall other pairts off the Cite, invadeing and setting upon his majestie's subjects and souldiers, and committing all acts off furie and violence, until they were overpowered and disipate by his majestie's forces; Dureing the which tumult and uproar, the said Alexander Keith, fencing inaster, with severall others tradsmen, prentises or the lyke, to the number off eighteen or therby, did most unwarrantable and treasonable convocat and assemble themselves together in a cellar posset be Margrat Angus, on the south syde of the high street off Edinburgh, at Grayes close head, pertaining to widdow Girdwood, and ther most treasonable discoursed and talked of the said tumult and uproar, and the persons present therat, and drank severall healths to the confusione off the Papists, a health to the colligners, and a health to the trades; and the said Alexander Keith avowed and said, that be and the trads lads should be avenged on the toune guaird, and particularie upon Johnstoune, sone to the deceast Major Johnstoune, who offred to beat them iff they would not goe off the streets the tyme of the tumult, consulted, advysed and determined to ryse, concurr with, and aid any persons that should thereafter ryse in tumults or uproars, within the cite off Edinburgh or suburbs theroff, and particularie the said Alexander Keith did begine the forsaid healths, and ther it was publictie talked that ther would be a great tumult in the toune, and that it was fit for as many armes as they could, and being of severall bodies and incorporations, they did all undertake to speake those, and that it was fit in the first place to rescue two lads that wer taken in the tumult; and the said Alexander Keith declared, that he would help them in rescuing of these two lads and raising the tumult, and they did resolve that they would goe to the towns guaird, commandit by captaine Grahame, and maister them, and take ther armes from them, and that they would gett assistance from the country, and would pull downe the papists houses and stopt ther meetings. Wherthrowe you the said Alexander Keith ar guilty off seditious, mutinie, conversacione, ryseing in tumult, and uproares, within burgh, conventions and assemblies, unlawfull meetings and convocations, and the other crymes above specified, or one or other of them, and was actor at least airt and part of the samen, and has incurred the paines off treason, at least the paine of death, and

losse off lyfe and moveables, and same ought to be execut and inflicted upon you to the terror and example off others to committ the lyke heirefter.

Persewer—His *Majestie's Advocat*. His *Majestie's Advocat* produced ane act and warrauld off his majestie's privie councill for persewing off the said Alexander Keith, whereof the tenor follows :

The Lords off his majestie's privy council doe heirby give order and warrauld to his majestie's advocat to persew a process at his instance before the Lords Justice General, Justice Clerk and remanent Lords Commissioners off Justiciary, against Alexander Keith, fencing maister, prisoner in the Tolbuth off Edinburgh, for his accessione in the late tumult, within the towne off Edinburgh, and to pre-cognosse witness against him therfor, or any other crymes that is to be lybelled against him. Extracted by me—Signed WM. PATERSON. Cl. S. Con.

His *Majestie's Advocat* declaires, that he restricts the lybell to the meeting at the cellar, and his being present, and concurrering with his accomplices at the discourse that was ther, concerning the designe off ryseing in armes, and the falling upon captaine Gram's guards, and aproveing off the tumult in maner mentioned in the dittay, and that the same inferre the loss of lyfe and moveables, alienarie.

The Lord Justice General, Justice Clerk, and Commissioners of Justiciary, haveing considered the lybell with his majestie's Advocats restrictione, they find the samen and airt and pairt theroff, as its restricted, relivant, and remits the samen to the knowledge of ane Assyse.

ASSISA.

Mr. David Grahame, brother to Claverhouse,
Thomas Lidderdail, of St. Mary's Isle,
—— Livingstone, off Saltcoats,
Mr. John Purvis, of Aylehill,
Andrew Fraser, off Kilmundie,
—— Cochran, of Balbanchlaw,
William Raite, of Halgreine,
—— Forbes, of Ballogie,
Major James Wood,
Thomas Browne, laite baizlie,
Wm. Stevinstoune, laite baizlie,
James Browne, felt-maker,
James Edmonstoune, merchant,
John Black, vintiner,
Mr. George Jollie, merchant.

The Assyse lawfullie sworne, no objection off the law in the contrair.

His *Majestie's Advocat* for probation, aduced the witnesses, efter deponeing, they ar to say :

Joseph Kerr, servitor to Patrick Drysdall, blacksmith, in Edinburgh, aged twentie years, unmarried, purged and sworne, depons that upon the threthieth one of January last, being Sundays night, the first night of the tumult, ther was a meeting of trades prentises, and others, in Margratt Angus cellar, to the num-

ber of seventein or aughteine, or therby, wher it was publicly talked amongst them, that ther would be a great tumult in the towne, and that it was fitt for every persone to gett as many armes as they could, and they being of severall bodies and incorporations, they did all undertake to speake to those off ther owne incorporations, and that it was fitt in the first place to rescue two lads that wer taken prisoners ; depons that the pannall, Alexander Keith, was present at the said meeting, and that the healths off the severall trades and colliginers was drunken, and the pannall began the healths, and said he would doe his endeavour in rescueing these lads and raising the tumult, and that it was resolved that they would goe to Grahames guard and maister them, and take ther armes from them, and that they would gett assistance from the countrey, and would pull downe the Papists houses, and stopt ther meetings. *Causa scientia* he was present, and heard and sawe what he has deponed, and this is the truth as he shall answer to God ; depons he cannot wreitt.

Sic Subscritur, LINLITHGOW, I. P. D.

John Pulling, servitor to John Simpstone, gunsmith, burges off Edinburgh, aged nynteine years or therby, unmarried, purged and sworne, depons that on Sundayes night, the first night off the tumult, he was present at the meeting in Margratt Angus cellar, and that the pannall, Alexander Keith, was ther present, and that it was discoursed amongst them, that there would be a great tumult in the towne, and that it was fitt for every persone to have armes, and that evry man should speake to his neighbours to provyde armes, and that two lads being falslie taken prisoners in the tumult as they alleadged, it was fitt they should not be suffered to be into that conditione, wherupon severall healthes was begune and drunken, viz. a health to the trades, a health to the colliginers, and a health to the confusione off all Papists, and that Alexander Keith, the pannall, begane some off them ; depons it was resolved to goe to Grahames guaird, and take ther armes from them. *Causa scientia* he was present, and this is the truth as he shall answer to God.

Sic Subscritur, JOHN PULLING,
LINLITHGOW, I. P. D.

Gilbert Hay, student in the collidge off Edinburgh, aged nynteen years or therby, unmarried, purged and sworne, depons he was present in Margratt Angus cellar, and saw the pannall, Alexander Keith, ther, and that ther was severall trades prentises and others at that meeting ; depons ther wer severall healths drunken, viz. to the trades, colliginers, and confusion to the Papists ; depons he was not present all the tyme off the meeting, but he heard it talked, that it was a shame that trades lades should be so used as to be put in prisone ; this is the truth as he shall answer to God.

Sic Subscritur, GILBERT HAY,
LINLITHGOW, I. P. D.

Gabriell Wilson, servitor to the laird off Blackhall, aged twentie six yeares, unmarried, purged and sworne, depons he was present at the meeting the Sunday's night lybelled, and that the pannall, Alexander Keith, was ther, and this is the truth as he shall answer to God, and that he heard a health drunk to the trades.

Sic Subscibitur, GABRIEL WILSONE.

The said *Gabriell Wilson* farther depons, that at the said meeting, he heard one say that ther wer many well-wishers to the trades, to whom the pannall, Alexander Keith, said, they needed not to fear that; depons he heard one say to the pannall, were I as weell fenced as ye, I would not fear to fight with captaine Grahame and all his men; and that the same man sayed, that they should be better prepared for captaine Grahame and his company against the nixt night; and that Alexander Keith should have been with them all the tyme, and that one off them said he hade two pistols, and that he should have them against the nixt night readie, and that the pannall, Alexander Keith, was present at the tyme, and this is the truth as he shall answer to God; depons it was Kerr, the smith, that spoke so.

Sic Subscibitur, GABRIEL WILSONE.
LINTITHGOW, I. P. D.

His Majestie's Advocat protests for ane Assyse of Error.*

The whole Assyse, all in one voice, be the mouth of William Raite, chancellour, finds the pannall, Alexander Keith, guilty and culpable off being present at the seditious assemblie or meeting mentioned in his dittay, and off his joyning with his accomplices in his lawfull † resolutions and order to a tumult, and ar airt and part off the samen seditious meeting, in respect they find the same sufficientlie provine by the witnesses depositions.

Sic Subscibitur, Wm. RAITE, Chancellour.

Efter opening and reading off the whilk Verdict of Assyse,

The Lords Justice Generall, Justice Clerk, and Commissioners of Justiciary, be the mouth off John Leslie, dempster of court, decreed the said Alexander Keith, to be taken to the Marcat Croce off Edinburgh, upon Friday the fyfth day of March nixt to come, betwixt two and four o'clock in the efternoone, and ther to be hangd on a gibbet ther untill he be dead, and all his moveable goods and gear to be escheat and inbrought to his majestie's use. Which was pronouced for doome.

* See p. 75, of this volume.

† So in the Original.

347. Proceedings against JAMES sometime Duke of Buccleugh (and MONMOUTH), Sir JAMES DALRYMPLE of Stair, ANDREW FLETCHER of Saltoun, and others, for High Treason and Rebellion:* 1 & 2 JAMES II. (of England) A. D. 1685, 1686. [Now first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIA, S. D. N. Regis teuta in Pretorio Burgi de Edinburgh, viginti primo die mensis Decembris, 1685, per nobilem et potentem Comitum Georgium Comitem de Lintithgow, et Honorabiles viros Jacobum Foulis de Collintoune, Justiciarii Clericum, Joanein Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcarss, Alexanderum Scaltoune de Pitmedden, Patricium Lyone de Carss, Commissionarios Justiciarum dicti S. D. N. Regis.

Curia legitime affirmata.

THE said day anent the criminall letters raisit at the instance off sir George M'Kenzie of

Rosehaugh, our soveraigne lord's advocat, for his highnes interest, against the deceast James Scot, sometyme duke off Buckleugh, and Anna dutches off Buckleugh, his relict, Henry and James Scots ther children, and sir James Dalrymple off Stairs, and Andrew Fletcher off Saltoune, for the crymes off high treason and rebellion, and others at length mentioned in ther dittay; makeand mentione, That wher be the common lawe and laws and acts of parliament of this his majesties kingdome and constant practice therof; particularlie be the third act first parliament, and the threthieth seventh act second parliament, of king James the first, and be the fourteenth act sixt parliament and fourtieth act twelt parliament, king James the

* The following passages in Fountainhall relate to this Case, and to the Proceedings against the persons who, in Scotland, cooperated with Monmouth:

"April 28, 1685. The Privy Council made an act for putting the whole kingdom in a posture of defence against the enemies of the king

and government. The occasion of it was, some skippers had come from Montrose and Borrowstounness, and deponed that they being lately at Rotterdam, they heard a report of Scots ships being freighted for Scotland, loaded with arms and ammunition, and that the Scots ministers there prayed for the good success of

second, nyntie sevent act seventh parliament, king James the fyfth, and hundreth and fourtie fourt act twelvt parliament, king James the sixt, and fyft act first session first parliament,

their navy employed in the cause of God. This was conjectured to be Monmouth, Argyle, lord Gray, and that desperate party, who were now driven to their wits end, and as the last effort, would attempt something by landing here. Some concluded it to be a mistake, arising from this ground, that the Dutch commonly hire stranger botoms to carry arms and powder, which they privily send to Barbary, and sell to the Turks at a good rate. But it proved no mistake.

"May 7, 1685 At Privy Council, all the vassals and feuars of Argyleshire having been cited on the noise of Argyle's being at sea, and designing to land; there appeared above 160 of them, and the Council retained about 16 of the greatest as pledges; and in regard the rest of them could not find low-land nor burgess-caution for their peaceableness, they remitted them home to my lord Athole's depute, to take such caution of them as they could find.

"May 11, 1685. The Privy Council, on the news of Monmouth, Argyle, Gray, &c. being at sea, and designing to land, commanded all the heritors of Scotland to be in readiness to wait on the king's host, with 20 days provision, and well armed, on 24 hours advertisement, whenever called; and the militia regiments were ordained to rendezvous on the 19th of May: Which, because it was the very day whereon the English parliament was to sit down, some conjectured this preparation was all but a sham to boast them; but it proved otherwise; For, on the 14th of May, an express came from the bishop of Orkney, at Kirkwall, that Argyle had touched there with three ships, which put all in great consternation.

"The news of Argyle's being on the coast, moved our statesmen to send for the prisoners lying at Glasgow, and other western places, where it was suspected he would land, (as he did at Dunstaffnage). And on the 17th of May there came in near 100 men and women prisoners, who were suspected for conventicles, &c. and they are either to be delivered to Pitlochrie, to carry to the plantations in America, or be sent north to Dunnotar Castle, (which the king was buying from the earl of Marshall, to be a royal prison like the Bass) to be kept close there.

"The countess of Argyle was the same day secured in the castle of Edinburgh, and Mr. James, one of his sons, with lady Sophia Lindsay, her daughter by Balcarhouse, because by her means Argyle had formerly escaped; and his brother lord Niell were confined: all which was done that they might not join with him. Sundry burgeses of Edinburgh are also secured, as James Row and Hary Fletcher, Salton's brother.

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king Charles the second, the crymes of treason and rebellion, and the raying and joyning in armes against his majestie and his authority, and the abnitteing, assisting, recepting, inter-

"On the 18th of May, Argyle's printed manifesto, and declaration of his intentions, came to the Privy Council, with the summons he had sent to his vassals and people, to come in and assist him. And accordingly sir Duncan Campbell of Auchinbreck, with 200 men, went to him, under the pretence he was bound by his charter to assist him; which cannot oblige him against the king, nor defend him for treason. And on the 19th, not only the heritors above 100*l.* Scots valuation, (as was ordered by the proclamation of the 11th of May) but all heritors, though within it, are commanded to go out with the king's standard and royal army, on horse or foot as they can; and the said heritors under 16 or past 60, though excemed in person, yet are allowed to send out one well appointed and armed.

"June 3, 1685. The marquis of Athole, commander of the highland forces at Inverary, against Argyle, by warrant from the king's council, emitted a proclamation offering an indemnity to all the common soldiers who had joined with Argyle, provided they laid down their arms, and deserted his service; but this did not extend to the heritors and gentry with him.

"June 6, 1685. The two prisoners taken in Orkney, viz. Mr. William Spence, and Mr. Blackater, arrived at Edinburgh: and the next day, being Sunday, there was a great fray and stir in Edinburgh, on the apprehension that Argyle being forced to leave the sea by the king's men of war, who were come up, he had landed in Cowell, and aimed to surprise Stirling; whereupon the militia regiment of Edinburgh was instantly appointed to march away to Stirling.

"June 9, 1685. The duke of Monmouth is, by a proclamation at the market-cross of Edinburgh, cited to appear at the Criminal Court on sixty days, to answer an indictment of high treason. It must be for crimes posterior to his remission from the last king, in December, 1683; and the fee of Buccleugh it was thought could not be forfeited for his fault, his lady and children standing in the right of it, and he had only a liferent out of it.—Monmouth's landing in England was not at this time come to our ears.

"By order of the Privy Council, the signal of the fiery cross is sent through the west of Fife and Kinross, as nearer to Stirling, that all betwixt 60 and 16 years may rise and oppose Argyle and his forces.

"June 19, 1685. News came to Edinburgh, that the earl of Argyle was taken prisoner. They were resolved to have regimented and armed the College of Justice; but this put a stop to it, as no more necessary. And, upon the 20th of June, Argyle is brought in captive to Edinburgh Castle.

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conning, and keeping correspondence with such rebels, supplying them with money, arms, provisione, help, red or counsell, or giving them any relieffe or comfort, and the

“ August 21, 1685. At Criminal Court, messieurs Charles and John Campbells, sons to the late Argyle, and lord Neill, Campbell's son, are pannelled, and forfeited on their own confessions, that they were present with Argyle in this rebellion: Notwithstanding whereof, the king is so favourable to them, that he spares their life, and ordains them only to be banished, on their bond never to return again, under the pain of death. Mr. Charles affirms, sir Evan Cameron of Lochiell, was keeping secret correspondence with Argyle his father.

“ September 24, 1685. By a special warrant from the king, the heirs of the late duke of Monmouth, with sir James Dalrymple of Stair, (on sir John Cochran's delation) and Andrew Fletcher of Salton, are cited on 60 days to the Criminal Court for treason, at the market-cross of Edinburgh, pier and shore of Leith.

“ December 21, 1685. At Criminal Court; this day having been fixed for the trial and forfeiture of the duke of Monmouth, (to which his heirs were cited) and of sir James Dalrymple of Stair, and Andrew Fletcher of Salton: They demurred as to Monmouth, because, though the probation was clear enough, yet it might afterwards be pretended to be a nullity and informality, that his heirs were cited on 60 days, and they were not at liberty to appear, being either in the Tower of London, or otherwise under restraint.

“ As for Stair, they wanted one of their witnesses, viz. sir John Cochrane, who was not come home; and, as for Salton, they brought his two witnesses to the court, (the same they had brought against Monmouth) viz. captain Bruce and Monsieur Busse the Brandenburger: but they could not get an assize; for of all the 45 there were but 13 present, so they were fined for absence, the noblemen in 500 merks, and the gentlemen in 100 merks, with this declaration, that those who should appear the 4th of January, to which the diet was continued, and alledge a reasonable excuse for their absence, should be liberate, and that the act amerceding such absents should not be booked till the next meeting, that there might be room for craving to be reponed by bills.—Their being out of the country (as some of the assizers were) was alledged by the king's advocate not to be a sufficient essoigney, not only if they went away after the citation, but even though before; because I will get one (if not holden as confessed, yet at least) decreed for 100.000 merks, on a citation at the pier and shore of Leith on 60 days. But the disparity lies here, that in civil causes, they may leave procurators to answer in their defence; but they cannot leave one to be an assizer in their room. Some thought Monmouth's heirs (he being now forfeit and dead) needed not an assize of

usurping the style, honour and dignitie of the imperall crowne of this his majesties realme, are most detestable, hynous, horrid, and abominable crymes of rebellion, treasons and lese

peers, because he ceased to be one: but he is not yet forfeit in Scotland. Mr Thomas Gordon, criminal clerk, alledged that part of his assize who were gentlemen beloved to be barons, holding of the king *in capite*, and their lands erected into a barony; and, on this head, he refused Mr. James Elies of Stanhopemills: but on the 4th of January he was admitted one of the assizers, seeing his lands were kirk lands holden of the king. They resolved then, if they could get no more of Stair, at least to denounce him fugitive, by which they would get his escheat during his life; but sir John Dalrymple, his son, by his policy prevented this.

“ December 30, 1685. Five remissions came down from the king, to be past in exchequer, viz. for sir John Cochrane and his son, for Mr. Bruce, and the German, (to be witnesses against Salton,) and to sir William Scot younger of Harden, who had given security for 3,500*l.* sterling of fine imposed on him.

“ January 4, 1686. At Criminal Court, the king's advocate insisted against Andrew Fletcher of Salton, who was on the 21st of December continued to this day. The libel set forth his being in the conspiracy with Jarviswood, &c. and coming over to England with Monmouth. The king's advocate caused read his warrant to insist, with the remit from the parliament of these processes to the justices; and then declared he restricted the dittay to his invading England. Mr. Bruce was first led as a witness, and then Antony Busse the German: The first deponed on certain knowledge: The second only described Salton, and that he heard he was a Scotsman of a good estate. Their remissions were long of coming to the court, because Enterkin refused to seal them till he was paid, (the chancellor having discharged to pass any thing gratis) but this was in the king's service. The king's advocate stormed exceedingly, because he behoved to shew they were remitted and free, and under no impression, awe, nor fear, to depon for the king; yet they coming before the witnesses had done with deponing, it were a slender ground whereon to quarrel the forfeiture, seeing men unremitted may be witnesses in treason; but the earl of Dumblarton donater to this forfeiture might look to that. Then was read a declaration of one Mr. William Williams, the duke of Monmouth's servant, lying in Newgate, taken by sir Andrew Foster, and bearing that Salton came over to Lyme with Monmouth, and was very familiar with him, and was to have been a lieutenant colonel of horse, but was forced to flee by his killing Dare the goldsmith. This was only used as an admixture. The king's advocate having spoke to the inquest; they inclosed. Three or four of them thought, that there was only one probative witness, and that the stranger de-

majestie, and are punishable with forfeiture of lye, lands and goods; and be the second act second session first parliament, king Charles the second, it is declared high treason to plott, contrive, or intend death or destructione to his majestie, or to put any restraint upon his royall persone. or to deprive, depose or suspend him from the style, honour, or kingly name of the imperiall crown off this his realme, or from the exercise off his royall government, or to leavie warr or take up armes against his majestie, or any commissionat by him, or to intyse any strangers or others to invade any of his majesties dominions, or to writt, print, or speake any thing that may express or declare furth ther treasonable intentions, and is punishable with forfeiture of lye, lands and goods; and be the second act third parliament, king Charles the second, it is declared high treason in any off his majesties subjects of this his

poned allenarly on hear-say, and might be mistaken; yet it was carried by plurality, that he was proven guilty: So the sentence of forfeiture was pronounced against him with all the formalities of sound of trumpet, tearing his armes, reversing them on the cross, &c.

The Secret Committee had a long deliberation, if they should proceed to the forfeiting of Monmouth. The scruple was, his heirs when cited were prisoners. The king's advocate contended this was nothing, seeing the crime was notour, and he was executed for it in England; and it was not safe to let his children at liberty, because it might prove pernicious to the government, if they were afterwards made use of as the head of a faction and rebellion; and by the 135th act of parl. 1651, they could never be permitted to impugn the forfeiture till they either acknowledged the crime, or got a remission. The criminal court not concurring with him in this judgment, the trial was delayed till the next day, and then continued till the fifth of February next; and *medio tempore*, they were to consider if they would desire to have the children sent down hither to the castle of Edinburgh.

January 23, 1686. A gift of the forfeiture of Andrew Fletcher of Salton was passed in favours of the earl of Dumbarton, his heirs and assignees.

Feb. 11, 1637. Sir John Dalrymple, now king's advocate, arrived. He was lately twice in prison as a malefactor, and in very bad circumstances with the government. He has got a precept from the king for 1,200*l.* sterling, whereof 500*l.* was his fine which Queensbury and Clavers exacted from him three years ago; and the other 700*l.* sterling for his charges in this last journey, and for the loss of his employment and absence. He brings also home with him an ample and comprehensive remission of all crimes to his father, my lord Stair, to his mother, his brethren and sisters, and particularly for their reset, and converse with traitors, and to his little son, who accidentally shot his brother."

realme, by writting, speaking, or any other manner of way to endeavour the alteratione, suspensione, or diversione off the right of succession, or debarring the next lawfull successor; and be the seventh act of first parliament, king James the seventh, It is statute and declared, that the concealing and not revealling of supplies given to or demandit for traitors forfeited for treasone against his majesties persone or government, is treasone, and they are to be judged accordingly; and be the eleventh act first sessione second parliament king Charles the second, forfeitures are appointed to proceed in absence, and be the sixtie nyot act sixt parliament, king James the first, it is appointed, concluded, and delivered that the aire may be forfeited for treason committed by his predecessor, conforme to the common lawe, good equitie and reasone. Nevertheless it is of veritie, That the said James Scot son-etyme duke off Buckleugh and Monmouth,* sir James

* Of Trials for Treason after death, Mr. Laing says:

"Although Logan and his servant were already dead, his memory was still exposed to persecution, and his innocen offspring reserved for punishment. According to a legal maxim, that no person can be condemned in absence, his bones were dug up, and in the succeeding parliament produced and arraigned at the bar. His letters were also produced, and as the handwriting was authenticated by the most respectable witnesses, his estates were confiscated, his name abolished, and his issue attainted. The sentence was not less illegal than odious, for trial after death was limited by statute, to those whose treason was notorious during their lives. Nor was the sentence unanimous, till, in consequence of the urgent persuasions of Dunbar, the lords of articles acknowledged, with tears of joy, their entire conviction of the truth of a conspiracy formerly doubtful, and still so obscure."

Of Trials in absence he says, (when relating the persecution of 1607:)

"It was an established maxim, adopted from the Roman law, and even in questions of treason confirmed by statute, that none could be condemned when absent, or deprived by outlawry of a legal trial on their appearance in court. A salutary maxim, necessary to prevent the indiscriminate proscription of adverse parties, had been so firmly established, that when trial after death was introduced by statute, the bones of the deceased, to preserve the forms, if not the spirit of justice, were presented at the bar; and when decrees of forfeiture were pronounced in parliament, against the absent, no sentence was passed till they were produced and heard in their own defence. But the gentlemen, whose estates the government was desirous to confiscate, remained concealed or were preserved by flight; and the authority of the court of session was required for their conviction. The officers of state

Dalrymple off Stair, and Andrew Fletcher, off Saltoun, shaking off all fear off God, respect and regard to his majestie and his authoritie and lawes, and have presumed to committ, and are guilty of the saids crymes, in sua farr as in the year 1683, they did enter into ane damnable plott and conspiracy with the deceast earles of Shaftsbury, Essex, Argyle, lord Russill, and others, for killing and murdering at least for seazing upon ther late gracious soveraigne, and his present majesty, and for raisinge oppen warr and rebellion in both kingdomes, and for contributeing money for the same both by strangers and natives, in which conspiracie his majesties officers off state and garisons wre to be seized, and for that effect, they did not only most reasonable keep severall consultations and meetings with the conspirators in England, and with the lord Melvill, sir John Cochran, and others there, but in farder prosecution of the said execrable conspiracie, they did goe over to Holland and Flanders, and ther continued the said treasonable consultations with the said late earle of Argyle, lord Melvill, sir John Cochran, John Cochran of Watersyde, his sone, William Denholme, of Westsheills, Thomas Stewart, off Culnes, and others forfault and declared traitors and rebels in Holland, and did frequently and commonly intercommon, converse and keep correspondance with them, theranent within severall townes off the Low Countries, upon the first, second, third, or ane or other of the dayes of the moneths of January, February, March, and remanent moneths of the years 1683. 1684,

having privately tampered with the judges, presented a series of questions to the court: where the treason is notorious, if trial be competent after death, why not in absence? if forfeitures in absence can be pronounced by the legislature, why not by the court of justiciary, to whom, whatever is just in parliament, must be equally competent? an obsequious court, in opposition to the established laws of the realm, did not hesitate, on such tallacious deductions, to deliver a solemn opinion, that the justiciary court might proceed, in the absence of the accused, to the trial and condemnation of such contumacious traitors as refused to appear."

Fountainhall observing upon the sentence passed December 22, 1681, against the earle of Argyle, in his absence, says:

"*Nota.* The act of parliament allowing forfeitures in absence, is only in the case of perduellion, and rising in arms against the king by notour rebellion; which was not the species of my lord Argyll's crime: but they will get what they have done against him ratified in the first parliament that meets; and the judges are not secure without it. Likeas, he could not be esteemed altogether absent, seeing he was present at the debate, interloutor, closing the asize, and reading the verdict, and only escaped before sentence pronounced: yet some quibbled that a citation should have preceded to hear sentence pronounced."

1685 years, or ane or other off the dayes of ane or other off the moneths, off ane or other off the saids years, and accordingly they did actually furnish and outreck the said late earle of Argyle, with three severall ships full of men, armes, and amunition for invading this kingdome, who accordingly did upon the day of last, land the saids men and armes in the abyre of Argyle and Westhighlands, and did leavie warr, seaze upon our magazines, summoned our garrisons, and continued in open rebellion till he was defate: particularly the said sir James Dalrymple of Staires, did upon the first, second, third or ane or other off the days off January, February, March, April, or May last, or ane or other of them, most treasonable contribute to the said rebellion, in sua fare as he did signe ane bond off ane thousand pound sterlin, less or more, at the dysyre of the said late earle of Argyle, the bond being sent to him be Mr. William Spence the earle's servant, and which soume contained in the said bond was to be employed for buyeing armes, amunition, and other provisione and furniture to the said rebels, at least it was a supplie given to the said late earle of Argyle himself, who was a forfault and declared traitor, and was given by the interpositione of the said Mr. William Spence, who was knowne to be the earle's servant, and confessed his being employed by the earle, and who was for him self tortured for his accessione to the said plott, and did conceal and not reveal supplies given to or demandit be the said late earle of Argyle, a forfault traitor; and according as they had plottet and conspired, the said late earle of Argyle having raised rebellione in this kingdome as said is, the said James Scot, late duke of Buccleugh, and Monmouth, and Andrew Fletcher, of Saltoun, the lord Gray, and severall others their accomplices, did upon the — day of June last, most treasonable ryse in armes and oppen rebellion against his majestie and his authoritie within his majesties kingdome of England, and with men, ships, armes and amunitione, landit within the toune off Lyme, and did emitte and issue furth most treasonable declarations and proclamations,*

* Collins (vol. 5, p. 48, edition of 1750) says, that Monmouth at Taunton published three Proclamations, one setting a sum of money on king James's head, the second declaring the parliament of England a seditious Assembly, and the third commanding the duke of Albermarle to lay down his arms under the penalty of suffering as a traitor. The Declaration (which appears to have been prepared by Ferguson) issued by Monmouth (at Lyme, as I apprehend upon his landing) was as follows:

THE DECLARATION of JAMES, Duke of MONMOUTH, and the Noblemen, Gentlemen, and others, now in arms for the Defence and Vindication of the Protestant Religion, and the Laws, Rights, and Privileges of England.

As government was originally instituted

and marched up and down the countrie, robbing the horse and armes off his majestie's good subjects, did convocat and gather together our leidges to the number of ——— thousands in

' by God, and this or that form of it chosen
' and submitted to by men, for the peace,
' happiness and security of the governed, and
' not for the private interest, and personal
' greatness, of those that rule; so that govern-
' ment hath always been esteemed the best,
' where the supreme magistrates have been in-
' vested with all the power and prerogatives
' that might capacitate them, not only to pre-
' serve the people from violence and oppres-
' sion, but to promote their prosperity; and
' yet, where nothing was to belong to them by
' the rules of the constitution, that might
' enable them to injure and oppress them.
' And it hath been the glory of England,
' above most other nations, that the prince had
' all intrusted with him that was necessary,
' either for the advancing the welfare of the
' people, or for his own protection in the dis-
' charge of the office; and withal stood so
' limited and restrained by the fundamental
' terms of the constitution, that without a
' violation of his own oath, as well as the
' rules and measures of the government, he
' could do them no hurt, or exercise any act of
' authority, but through the administration of
' such hands as stood obnoxious to be punish-
' ed in case they transgressed: So that accord-
' ing to the primitive frame of the government,
' the prerogatives of the crown, and the priv-
' ileges of the subject are so far from jostling
' one another, that the rights reserved unto
' the people tended to render the king honour-
' able and great, and the prerogatives settled
' on the prince were in order to the subjects
' protection and safety. But all human things
' being subject to perversion, as well as decay,
' it hath been the fate of the English govern-
' ment to be often changed, and wrested from
' what it was in the first settlement and insti-
' tution. And we are particularly compelled
' to say, that all the boundaries of the govern-
' ment have of late been broken, and nothing
' left unattempted for turning our limited
' monarchy into an absolute tyranny: For
' such hath been the transaction of affairs
' within this nation for several years last past,
' that though the Protestant religion and lib-
' erties of the people were fenced and hedged
' about by as many laws as the wisdom of
' man can devise for their preservation against
' popery and arbitrary power, our religion
' hath been all along countermined by Popish
' counsels, and our privileges ravished from us
' by fraud and violence. And more especially
' the whole course and series of the life of the
' duke of York hath been but one continued
' conspiracy against the reformed religion, and
' the rights of the nation: For whoever con-
' siders his contriving the burning of London,
' his instigating a confederacy with France, and
' a war with Holland, fomenting the Popish Plot,

open rebellion against his majestie, our towns
off Tantouue, and there the said late duke of
Buckleagh did most treasonable usurp the
style, honour and kinglie name of the impe-

' and encouraging the murder of sir Edmund-
' bury Godfrey, his charging treason against
' protestants, suborning witnesses to swear the
' patriots of our religion and liberties out of
' their lives; his hiring execrable villains to
' assassinate the late earl of Essex, and caus-
' ing those others to be clandestinely out off,
' in hopes to conceal it; his advising and pro-
' curing the prorogation and dissolution of par-
' liaments, in order to prevent their looking
' into his crimes, and that he might escape
' the justice of the nation; such can imagine
' nothing so black and horrid in itself, or so
' ruinous and destructive to religion and the
' kingdom which we may not expect from him.

' The very tyrannies which he hath exer-
' cised since he snatched the crown from his
' brother's head, do leave none under a possi-
' bility of flattering themselves with hopes of
' safety either in their consciences, persons,
' or estates; For in defiance of all the laws
' and statutes of the realm, made for the secu-
' rity of the reformed Protestant religion, he
' not only began his reign with a bare-faced
' avowing himself of the Romish religion, but
' called in multitudes of priests and Jesuits,
' for whom the law makes it treason to come
' into this kingdom; and hath impowered
' them to exercise idolatries: And besides his
' being daily present at the worship of the
' mass, he hath publicly assisted at the
' greatest fopperies of their superstition. Nei-
' ther hath he been more tender in trampling
' upon the laws which concern our properties,
' seeing in two proclamations, whereof the
' one requires the collecting of the customs,
' and the other the continuing that part of the
' excise which was to expire at the late king's
' death, he hath violently, and against all the
' law of the land, broken in upon our estates.
' Neither is it any extenuation of his tyranny,
' that he is countenanced in it by an extrajudi-
' cial opinion of seven or eight suborned and
' forsworn judges; but rather declaring the
' greatness and extent of the conspiracy
' against our rights; and that there is no means
' left for our relief, but by force of arms:
' For, advancing those to the bench that
' were the scandal of the bar: and con-
' stituting those very men to declare the laws,
' who are accused and branded in parliament
' for perverting them, we were precluded all
' hopes of justice in Westminster-hall: And
' by packing juries together by false returns,
' new illegal charters, and other corrupt
' means, he doth at once deprive us of all
' expectations of succour where our ancestors
' were wont to find it; and hopes to render that
' which ought to be the people's fences against
' tyranny, and the conservator of their lib-
' erties, the means of subverting all our laws,
' and of establishing of his arbitrariness, and

riall crowns of Scotland, England, France and Ireland, and caused himself to be proclaimed king, and did take upon him to be king, and was saluted by the people as king, and they

confirming our thralldom. So that unless we could be contented to see the reformed Protestant religion, and such as profess it extirpated, Popish superstition and idoiatry established, the laws of the land trampled under foot, the liberties and rights of the English people subverted, and all that is sacred and civil, or of regard amongst men of virtue or piety, violated; and unless we could be willing to be slaves as well as Papists, and forget the example of our noble and generous ancestors who conveyed our privileges to us at the expence of their blood and treasure; and withal, be unmindful of our duty to God, our country and posterity; deaf to the cries and groans of our oppressed friends, and be satisfied not only to see them and our selves imprisoned, robbed and murdered, but the Protestant interest throughout the whole world, betrayed to France and Rome; we are bound as men and Christians, and that in discharge of our duty to God, and our country and for the satisfaction of the Protestant nations round about us, to betake ourselves to arms; which we take heaven and earth to witness, we should not have done, had not the malice of our enemies deprived us of all other means of redress; and were not the miseries that we already feel, and those which do further threaten us, worse than the calamities of war. And it is not for any personal injuries, or private discontents, nor in pursuance of any corrupt interest, that we take our swords in our hands; but for vindicating our religion, laws and rights, and rescuing our country from ruin and destruction, and for the preserving ourselves, wives and children, from bondage and idolatry. Wherefore, before God, angels and men, we stand acquitted from, and do charge upon our enemies, all the slaughter and devastations that unavoidably accompany intestine war.

Now, therefore, we do hereby solemnly declare and proclaim war against James Duke of York as a murderer, and an assassin of innocent men, a traitor to the nation, and a tyrant over the people: and we would have none that appear under his banner to flatter themselves with expectation of forgiveness, it being our firm resolution to prosecute him, and his adherents, without giving way to treaties and accommodations, until we have brought him and them to undergo what the rules of the constitution, and the statutes of the realm, as well as the laws of nature, scripture, and nations, adjudge to be punishment due to the enemies of God, mankind, their country, and all things that are honourable, virtuous, and good.

And though we cannot avoid being sensible that too many have, from cowardlice, cove-

kissed his hands and cried God blisse the king, and he was called sir, and his majestie, and was prayed for as king, and commandit as king, and payed the arnie, and touchet children of

tousness and ambition, co-operated to the subverting of our religion, and enslaving their country; yet we would have none, from a despair of finding mercy, persevere in their crimes, nor continue the ruin of the kingdom: for we exclude none from the benefit of repentance, that will join with us in retrieving that they have been accessory to the loss of; nor do we design revenge upon any, but the obstinate, and such as shall be found at this juncture yielding aid and assistance to the said James Duke of York.

And that we may both govern ourselves in the pursuit of this glorious cause wherein we are engaged, and give encouragement to all that shall assist us in so righteous and necessary an undertaking, we do in the presence of the Lord, who knoweth the secrets of all hearts, and is the avenger of deceit and falsehood, proclaim and publish what we aim at; and for the obtaining whereof, we have both determined to venture, and are ready to lay down our lives. And though we are not come into the field to introduce anarchy and confusion, or for laying aside any part of the old English government, yet our purposes and resolutions are, to reduce things to that temperament and balance, that future rulers may remain able to do all the good that can be either desired or expected from them; and that it may not be in their power to invade the rights, and infringe the liberties of the people.

And whereas our religion, the most valuable thing we lay claim unto, hath been shaken by unjust laws, undermined by Popish counsels, and is now in danger to be subverted, we are therefore resolved to spend our blood for preserving it to ourselves and posterity: nor will we lay down our arms till we see it established and secured beyond all probability of being supplanted and overthrown, and until all the penal laws against all protestant dissenters be repealed, and legal provision made against their being disturbed by reason of their consciences, and for their enjoying an equal liberty with other protestants.

And that the meekness and purity of our principles, and the moderation and righteousness of our end, may appear unto all men, we do declare, that we will not make war upon or destroy any for their religion, how false and erroneous soever: so that the very papists, provided they withdraw from the tents of our enemies, and be not found guilty of conspiring our destruction, or abettors of them that seek it, have nothing to fear or apprehend from us, except what may hinder their altering our laws, and endangering our persons in the profession of the reformed doctrine and exercise of our Christian worship.

Our resolution in the next place is, to maintain all the just rights and privileges of

the king's evil, and did exercise the other functions of royall dignitie, and kepte ane armed force and guard about his persone, did lead and conduct them, and did assault, feight,

parliament, and to have parliaments annually chosen and held, and not prorogued, dissolved or discontinued within the year, before petitions be first answered, and grievances redressed.

And seeing many of the miseries under which the nation doth groan, arise from displacing such out of the number of judges as would not for the promoting Popish and arbitrary designs, wrest and misapply the laws, and from constituting corrupt and mercenary men in their rooms, on purpose to stretch the laws beyond the reason and intention of them; and to declare that for law which is not; we can neither with silence pass over the mentioning of them; nor should we have peace in ourselves if we did not endeavour to prevent the like mischief in time to come: for by reason of ill men's being advanced to the bench, and holding their places only *durante bene placito*, many persons have been condemned in exorbitant fines for no crimes, or for very small ones: many statutes made for the safety of the subject, particularly the Habeas Corpus act, have been wickedly eluded, to the oppression of the innocent and loyal men. The Popish lords that were impeached in parliament for a most hellish conspiracy, have, to the subverting the rights of the house of lords, been discharged and set free. The imposing a mayor and sheriffs upon the city of London by fraud and violence, have been justified, and those who in discharge of their duty opposed it, illegally prosecuted, and arbitrarily punished. London, and other cities and corporations, have been robbed of their charters, upon unrighteous judgments of pretended forfeitures. Sir Thomas Armstrong executed without being allowed the benefit of a trial. Colonel Algernoon Sidney condemned to die upon the deposition of one scandalous witness. And that loyal and excellent person, the late William lord Russell, murdered for alleged crimes; in reference to which, if all had been true which was sworn against him, yet there was nothing which according to law could have reached his life. Upon the considerations aforesaid, we further declare, that we will have care taken for the future, for the debarring ignorant, scandalous and mercenary men from the administration of justice; and that the judges shall hold their places by the ancient tenure of *quam diu se bene gesserint*; and to leave it to the wisdom of a parliament, to settle some way and method for the approbation of such as shall be advanced to the degree and dignity of judges.

And forasmuch as the invasion made on the right of cities, burroughs, and towne corporations; the seizure of their charters, whether by surrender, or upon pretence of forfeiture, have been wholly arbitrary and illegal; we likewise

resist and oppose his majestie's armie and forces, and did continue in open avowed and desperat rebellion against his majestie and his authoritie, untill they were defeat at _____ upon the

therefore declare, we will, to our utmost, endeavour to see them repossessed in what they formerly had, and could legally lay claim to; and that we do esteem all judgments given against them, and all surrenders made by a corrupt and perjured party amongst them, null and void in law; and do hold and declare their old charters, notwithstanding the new ones lately granted, to be good and valid: and accordingly, we do invite and encourage all honest burghesses and freemen to re-assume the rights and privileges, which by virtue of the said old charters, belonged to their severall and respective corporations; and to deliver themselves from those late parasites, and instruments of tyranny set up to oppress them.

Moreover, for the restoring the kingdom to its primitive condition of freedom and safety, we will have the corporation and militia acts repealed: and all outlawries of treason against any person whatsoever, upon the late pretended protestant plot, reversed; and also, all other outlawries, banishments, warrants, judgments, imprisonments, and injurious proceedings against any other persons, upon any of the penal statutes made against protestant dissenters, made null and void. And we will have new laws enacted for placing the election of sheriffs in the freeholders of the severall counties, for settling the militia in the severall shires, and for preventing all military standing forces, except what shall be raised and kept up by authority and consent of parliament.

And whereas several gentlemen, and others who have been worthy and zealous assertors of the protestant interest, and laws of the kingdom, are now in custody in divers places within the realm, upon most unjust accusations, pretences, proceedings and judgments; we do hereby further declare their said imprisonments to be illegal; and that in case any violence shall be offered to them, or any of them, we will revenge it to the utmost upon such of our enemies as shall fall into our hands.

And whereas the said James Duke of York, in order to the expediting the idolatrous and bloody designs of the papists, the gratifying his own boundless ambition after a crown, and to hinder enquiry into the assassination of Arthur, earl of Essex, hath poisoned the late king, and thereby manifested his ingratitude, as well as cruelty to the world, in murdering a brother who had almost ruined himself to preserve and protect him from punishment; we do therefore further declare, that for the aforesaid villainous and unnatural crime, and other his crimes before mentioned, and in pursuance of the resolution of both houses of parliament, who voted to revenge the king's death in case he

— day of July last, and the said late duke taken prisoner, attainted by his majestie's Eng-

‘ came to an untimely end. we will prosecute the said James duke of York, till we have brought him to suffer what the law adjudged to be the punishment of so execrable a fact.

‘ And in a more particular manner, his grace the duke of Monmouth, being sensible of the barbarous and horrid parricide committed upon his father, doth resolve to pursue the said James duke of York, as a mortal and bloody enemy; and will endeavour, as well with his own hand, as by the assistance of his friends, and the law, to have justice executed upon him.

‘ And the said James, duke of Monmouth, the now beal and captain general of the protestant forces of this kingdom, assembled for the end aforesaid, from the generosity of his own nature, and the love he bears to these nations, whose welfare and settlement he infinitely prefers to whatsoever concerns himself, doth not at present insist upon his title, but leaves the determination thereof to the wisdom, justice and authority of a parliament legally chosen, and acting with freedom; and in the mean time doth profess and declare, by all that is sacred, that he will, in conjunction with the people of England, employ all the abilities bestowed upon him by God and nature, for the re-establishment and preservation of the protestant reformed religion in these kingdoms, and for restoring the subjects of the same to a free exercise thereof in opposition to popery, and the consequences of it, tyranny and slavery. To the obtaining of which end, he doth hereby promise and oblige himself to the people of England, to consent unto, and promote the passing into laws all the methods aforesaid; that it may never more be in the power of any single person on the throne to deprive their subjects of their rights, and to subvert the fundamental laws of the government designed for their preservation.

‘ And whereas the nobility and gentry, and commons of Scotland, are now in arms upon the like motives and inducements that we are, and in prosecution of ends agreeable with ours, we do therefore approve the justice of their cause, commend their zeal and courage, expecting their, and promising our assistance, for carrying on that glorious work we are jointly engaged in; being obliged, avoiding tediousness, to omit the recounting many oppressions under which that kingdom hath groaned, and the giving a deduction of the several steps that have been taken for introducing of popery and tyranny. We think fit therefore to signify both to our countrymen and foreigners, that we intend a larger testimony and remonstrance of the grievances, persecutions, cruelties and tyrannies we have of late lain under; and therein a more full and particular account of the unparalleled crimes of the duke of York. And

lish parliament* for the said rebellion, and executed at Towerhill, upon the — day off

‘ we make our appeal unto God, and all protestant kings, princes, states and people, concerning the justice of our cause, and the necessity we are reduced unto, of having our recourse to arms. And as we do beseech, require and adjure all sincere protestants, and true Englishmen, to be assisting to us against the enemies of the gospel, rights of the nation, and liberties of mankind; so we are confident of obtaining the utmost aid and succour which they can yield us with their prayers, persons and estates, for the dethroning the said tyrant, &c. Nor do we doubt being justified, countenanced, and assisted by all protestant kings, princes, and commonwealths, who either regard the gospel of Jesus Christ, or their own interest. And above all, our dependance and trust is upon the Lord of Hosts, in whose name we go forth, and to whom we commit our cause, and refer the decision betwixt us and our enemies in the day of battle. Now let us play the men for our people, and for the cities of our God; and the Lord do that which seemeth good unto him.’

* Bishop Burnet (*Own Times*, vol. 1, p. 611.) says, “The alarm of the duke of Monmouth’s landing was brought to London, where upon the general report and belief of the thing, an Act of Attainder passed both Houses in one day, some small opposition being made by the earl of Anglesey, because the evidence did not seem clear enough for so severe a sentence, which was grounded on the notoriety of the thing.” Mr. Rose, in his “Paper respecting the degree of reliance which should be placed on Bishop Burnet’s Statements of Facts and Circumstances,” (*Observations on Mr. Fox’s Historical Work*, Appendix, No. 6.) has inserted this among the “Mis-statements in the Bishop’s History, contradicted by Records,” in support of his charge against Burnet of want of veracity; and he says, “It is so far from being true, that the legislature adopted the measure against the duke of Monmouth, on a general report, and that it was grounded on the notoriety of the thing, that the king on the 13th of June communicated to the two Houses, a Letter from Alford the mayor of Lyme, giving a particular account of the duke’s landing there, and taking possession of the town.”

Mr. Serjeant Heywood, in his “Defence of the Veracity of Bishop Burnet in his Statements of Facts and Circumstances,” (*Vindication of Mr. Fox’s Historical Work*, Appendix, No. 5.) justifies the account given by the Bishop:

“Burnet,” says he, “might conceive according to some new system of consistent reasoning, though hearsay stories ought not to be admitted in history, a letter sent to the king, and by him laid before both Houses of Parliament, may be received as sufficient evidence

1685 years; And the said Andrew Fletcher, off Saltoune, did come over with the said late duke off Monmouth, and landit with him, and rode up and down the countrie with

of the facts mentioned in that letter, in order to criminate and even attaint an individual. Bishop Burnet might be of a contrary opinion, and conceive according to the rules by which the municipal tribunals of the country regulate their proceedings, that the person who wrote the letter ought himself to have been produced, and that in his absence what he wrote ought to be treated as no evidence at all. But upon referring to the Journals, the Bishop's account of this act will be found perfectly correct. Upon Saturday, the 13th of June, 1685, the king laid before both of the Houses of Parliament the letter from the mayor of Lyme, giving an account of Monmouth's landing there, and acquainted the Commons that two messengers, who brought the letter, had been examined upon oath at the council table. The Commons examined the messengers, who testified 'the truth of the matter,' but the Lords did not. Both Houses agreed to address the king, and the address of the Lords thanked him for imparting the intelligence. The letter of the mayor might be sufficient to authorize an address, but not a bill of attainder, a sort of prerogative trial, in which the legislature by an extraordinary interference, removes the consideration of an offence from the common tribunals, and takes it upon itself. The Commons, having voted the address, ordered a bill to be brought in for the attainder of the duke of Monmouth, without any further examination of witnesses. On Monday the 15th, the bill was read three times, and passed, and sent up to the Lords, where it was also read three times on the same day, without the production of any evidence, and passed; and on the next day, Tuesday the 16th of June, it received the royal assent. These circumstances must have been well known to Mr. Rose, and from his having omitted to mention the examination of the two messengers by the Commons, we presume that as their depositions are not preserved in the Journals, he thinks they do not affect the question, and chuses to rest his objection upon the production of the letter only. He conceives the same evidence, as he styles it, to have been laid before both Houses, and the only difference between their proceedings to be that the Lords were occupied with the bill a few hours later than the Commons. In this view of the subject, besides the answer before alluded to, that the letter was no more than hearsay, and not admissible at all in evidence, we learn, that in fact, as a foundation for the act of attainder, that letter was never read. It was merely, to use an expression in the address of the Lords, the imparting of intelligence, and the act passed afterwards must have been founded upon general report and belief, and the notoriety of the thing, as the Bishop has described it. The Bishop does not

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him, and was in great esteem with him at Lyme for two or three dayes, and continued in open rebellion with him, till having killed one Daer, ane English goldsmith, who

stand single and uncorroborated in his opinion of the manner in which this business was conducted, for the earl of Lonsdale, who was at that time an assiduous member of the House of Commons ends his memoir" [as to this, see Heywood's Vindication, p. 230,] "with an expression, which shews that he conceived the charge to be well founded as far as the House of Commons was concerned: 'they,' says he, 'passed a bill of attainder against the 'duke of Monmouth, without examining witnesses, in one day,' and he could not be mistaken about this fact. Burnet says, that the earl of Anglesey opposed this bill in the Lords, because he thought the evidence not sufficient to authorize so severe a sentence. This leads to a suspicion that the Bishop was perfectly aware of what Mr. Rose triumphs in producing, namely, the letter of the mayor, for a noble lord did oppose the bill on account of a defect in the evidence, and the advocates for it probably resorted to the notoriety of the facts, as the best justification of the measure. It is evident that the earl of Lonsdale considers the examination of the two messengers by the Commons, to have had no relation whatever to the bill, and it is also manifest that the essential requisites of justice were not attended to, no specific charge was made the foundation of the attainder, no evidence was required of the guilt of the culprit, no witnesses examined to prove it. We may therefore beg of Mr. Rose to disclose any other ground, upon which the proceedings of either House can be supported or defended, but that which he objects to because suggested by bishop Burnet, namely, the general report and belief, the notoriety of the thing. It may be readily conceived, that the mode, in which this act was passed, occasioned much conversation at the time, more especially if what sir Edward Seymour said in a debate on sir John Fenwick's bill [See the case in this Collection, A. D. 1696,] is true, that this bill against the duke of Monmouth, was the first bill of attainder which had ever originated in the House of Commons, where witnesses could not be examined upon oath."

Of this important passage, I have not ventured to suppress any part, although it must be confessed, that the tenor of it is too polemical for abstract history.

What is entered in the Lords' Journal, as the Letter from the mayor of Lyme, is as follows:
*Honiton, 11th June, 1685,
 near 12 at Night.*

"May it please your sacred majesty;

"This evening betwixt 7 and 8 of the clock, there came in a great ship into the road of Lime, not shewing any colours, the off side of the ship unseen by us on the shore; she filled five great boats full of men, which they speeked behind the cob, and so landed them to

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was likewise with them in the said rebellion, he was forced to flee to the frigotts in which they came, and make his escape; And the said sir James Dairymple, of Stailes, did, before he

the westward of the town: They went over the cliffs; and presently were in the town at least three hundred men, the duke of Monmouth in the head of them; so that they became masters of the town. I presently, well knowing that I should be the first seized, took my horse, and came with speed to this town, and gave notice to all the country as I came; and sent my servants, that notice should be given to Somerset and Dorsetshires; and I hope to be at Exeter, to give an account of it to the duke of Albermarle, within two hours.

"With the great ship, there is a ketch of about one hundred tuns, and a flyboat, which I judge to be about two hundred tuns: neither of them had landed any men when I came thence; but we suppose them to be full of men.

"I find this place, and all the country, to be very ready to betake themselves to their arms, against the rebels. In the morning, at Chidocke in our Bay, they landed two men; which I understanding, sent by all ways to apprehend them. Whether they are taken, I know not: so I humbly beseech your majesty to pardon this distracted relation, nor doubting but they have plundered me. I am, your majesty's most humble and obedient servant and subject,

"GREGORY ALFORD, Mayor."

Shortly afterwards was passed by the Commons, the "Bill for the better Preservation of his Majesty's Person and Government;" which contained a clause concerning Monmouth. The account given by Burnet of this Bill, has been much discussed by Ralph, Mr. Fox, Mr. Rose, and just now by Mr. Serjeant Heywood, from whom I transcribe the following particular relation of its origin and progress:

"Since the publication of lord Lonsdale's Memoir, we are enabled to make out the history of the proceedings on this Bill, with a considerable degree of precision. From the Journals, it appears that on the 13th of June, 1685, the account of Monmouth's landing was communicated to the House of Commons, and it was referred to the same committee, which had been appointed to draw up an address, to prepare and bring in a Bill, for preservation of his majesty's royal person and government, and also a Bill for the attainder of the duke of Monmouth. On the 15th instructions were given to the committee, to add a clause declaring it high treason, for any person to assert the legitimacy of the duke of Monmouth, or his title, or pretence to the crown. On the 19th, it was read a first and second time, and committed to a committee of the whole House, and at that date, consisted, we presume, of the Bill as it now stands in Mr. Fox's Appendix, except the fourth, fifth, and eighth clauses. On the 25th the Bill was in a committee of the whole House, and the Speaker having resumed the chair, a select committee, consisting of Mr.

fled this kingdom, most treasonable upon the first, second, third, or one or other of the months of January, February, March, and the remanent months of the year 1679, 1680,

Serjeant Maynard, Mr. Solicitor General, (Finch), sir Christopher Musgrave, sir John Lowther, (afterwards earl of Lonsdale, and author of the Memoir), Mr. North, sir Thomas Meres, sir Richard Temple, Mr. Etherick, Mr. Tipping, and Doctor Brady, and they or any three of them were impowered, to prepare and bring in a clause, to be added to the Bill, that none should move in either House of Parliament, for alteration of the succession of the crown in the right line. On the 27th the clause was reported from the committee, and ordered to lie upon the table; and in the afternoon of the same day, sir Edward Herbert reported the Bill from the committee of the whole House, with some amendments to be made, and a proviso to be added, which were agreed to, and the proviso ordered to make part of the Bill. This proviso now makes the eighth clause of the copy of the Bill. On the 29th of June, the ingrossed Bill, after an amendment had been made at the table, was passed, with the title of, 'An Act for the better preservation of his majesty's person, and government,' and ordered to be carried up to the Lords, which was done the next day. It was read a first time in the Lords, on the 30th of June, and ordered to be read a second time on the morrow; it does not appear to have been read a second time, and on the 2nd of July, both Houses adjourned to the 4th Aug. by the king's orders, and the Bill was heard of no more."

Mr. Fox, I believe, first caused this bill to be published, from the Papers of the House of Commons. It is as follows:

"A BILL for the Preservation of the Person and Government of his Gracious Majesty King James the Second.

"Whereas impudent, scandalous, and seditious speeches and pamphlets have oft, (by sad experience,) produced insurrection and rebellion within this kingdom, and great contempt of the sacred person of the king and the best of governments both in church and state, now established in this realm; which audacious mischief, seldom heard of in other kingdoms, is now more frequently practised in this kingdom than formerly. An horrid effect whereof appeared very lately in the barbarous assassination and hellish plot, design'd upon and against our late merciful and blessed sovereign, king Charles 2d, and his dearest brother and undoubted successor, our most gracious sovereign, king James 2d, (whom God long preserve); and whereas it is still plain, that the same or the like damnable plotts are yet design'd and carrying on by the same means and by persons of the same malicious and irreconcilable spirit against the happy peace and settlement of these three kingdoms: We therefore, the Lords and Commons, in parliament

1681, 1682, 1683, or ane or other of the days of ane or other of the saids moneths, receipt and harbour on his ground, received meall and duty from rebels and traitors, particu-

larlie from John Dick, in Benbane, Quintian Dick ther, William M'Onquie in Dalmeiling-toune, Hugh, John, and William Camrons ther, James Cathcart ther, Quintian M'Adam

assembled, having duly considered the premises; and remembering that in the thirteenth year of the reign of queen Elizabeth, (of ever blessed memory,) a right good and profittable law was made for the preservac'on of her maj'ties person, and that in the thirteenth year of the reign of king Charles 2d, (of happy and glorious memory,) another right good and profittable law, was made for the safety of his majestie's person and government, against treasonable and seditious practices and attempts, Doe most humbly beseech yo'r most excellent majestie that it may be enacted, and he it enacted by the king's most excellent majestie, by and with the advice and consent of the Lords Spirituall and Temporall and Commons in this p'esent parliament assembled, and by the authority of the same, That if any person or persons whatsoever, after the first day of July, in the year of our Lord 1685, during the naturall life of our most gracious sovraigne lord the king, (whom Almighty God preserve and bless with a long and prosperous reign,) shall, within the realme, or without, compass, imagine, invent, devise, or intend death, or destruction, or any bodily harme tending to the death or destruction, maim, or wounding, imprisonment, or restraint of the person of the same our sovraigne lord the king, or to deprive or depose him from the stile, honour and kingly name of the imperial crowne of this realme, or of any other his maj'ties dominions or countries, or to levy warr against his majestie within this realme, or without: or move or stirr any foreigner or strangers with force to invade this realme, or any other his majesties dominions or countries being under his majesties obeysance: And such compassings, imaginac'ons, inventions, devices, or intentions, or any of them, shall express, utter or declare, by any printing, writing, preaching, or malicious and advised speaking, being legally convicted thereof, upon the oaths of two lawful and credible witnesses, upon tryal, or otherwise convicted or attainted by due course of law, then every such person or persons, so as aforesaid offending, shall be deemed, and declared, and adjudged to be a traitor or traytors, and shall suffer pains of death, and also lose and forfeit as in cases of High Treason.

“ And be it further enacted by the authority aforesaid, that if any person or persons at any time, after the first day of July aforesaid, shall by any printing, writing, preaching, or other malicious or advised speaking, declare or assert that James late duke of Monmouth is the legitimate sonn of our late blessed sovraigne king Charles the second, or that the said James hath a tittle or good claim to the imperial crowne of this realme, or of any other his maj'ties dominions and countries; that then every such person or per-

sons so offending, and upon the oaths of two lawful and credible witnesses, upon tryal, or otherwise convicted or attainted by due course in law; then every such person or persons shall bee deemed declared and adjudged to be a traytor or traytors, and shall suffer paines of death, and also lose a forfeit as in case of High Treason.

“ And be it further enacted by the authority aforesaid, that if any person or persons at any time after the first day of July, in the year of our Lord 1685, during his maj'ties life shall maliciously and advisedly, by writing, printing, preaching or other speaking, express, publish, utter, or declare any words, sentences, or other thing or things, to incite or stir up the people to hatred or dislike of the person of his maj'tie or the establish't government, then every such person and persons being thereof legally convicted, shall be disabled to have or enjoy, and is hereby disabled and made incapable of having, holding, enjoying, or exercising, any place, office, or promotion, ecclesiastical, civil, or military, or any other employment in church and state, and shall likewise be liable to such further and other punishments as by the common law and statutes of this realme may be inflicted in such cases.

“ Provided always, and be it declared, that the asserting and maintaining by any writing, printing, preaching, or any other speaking, the doctrine, discipline, divine worship or governm't of the church of England, as it is now by law established, against popery, or any other different or dissenting opinions, is not intended and shall not be interpreted or construed to be any offence w'thin the words or meaning of this act.

“ Provided always, that no person be prosecuted upon this act, for any of the offences in this act mentioned, unless the information thereof be given upon oath, before some justice of the peace, and taken in writing within forty-eight houres after the words soe spoken, or the fact discovered, and unless it be by order of the king's majestie, his heirs or successors, under his or their sign manuel; or by order of the councill table of his majestie, his heirs or successors directed unto the attorney general for the time being, or some other of the councill learned to his majestie, his heirs or successors, for the time being, nor shall any person or persons by vertue of this present act, incur any of the penalties herein before menc'oned; unless he or they be prosecuted within six months next after the offence committed, and indicted thereupon within three months after such prosecution, any thing herein conteyned to the contrary notwithstanding.

“ Provided always, and be it enacted, that no person or persons shall be indicted, arraigned, or condemned, convicted or attainted for

ther, James M'Lure, in Chalmerstoune, Thomas Muire, in Craigmall, John M'Neish, in Monevey, Walter Hunter, John and David Wallets, in Dalmelingtoune, and John Hunter in Crabrochmaynes; And lykeweyes did treasonable recept and harbour Mr. Alex. Lennox, Mr. Alexander Rosse, Mr. Alexander Pedezean, and Mr. Alexander Hamiltoune, vagrant preachers, in his house of Carscleugh, permitting them to preach ther, and lykeweyes harboured and entertained James Gordone, younger, off Craichley, William Gordon, of Culvenan, Alexander Hunter, off Cultquassen, gave Craichley a passe key off all his roumes, sent meat and drink by some of his children and servants to the house of Edward Lowrie, in Dirbaird, for the use of the said Craichley, and lykeweyes did gather collections for the rebels, and suffered the said Mr. Alexander Lennox and other rebella. preachers, to baptize children in his house, and lykeweyes did most

treasonable harbour, recept, converse and interconnon with and doe favours to Hay, of Arrieallan, ——— M'Dowall, of French, forfaulted and declared traitors, and the other persons above-named, in and about his own house, and else where, did consult and adryse them for selling and disposing upon ther estates and fortunes in our prejudice, did draw petitions and representations for them, and did otherways favour and assist them. Wherthrow the said James Scot, late duke of Buckleugh and Monmouth, sir James Dalrymple, off Staires, and Andrew Fletcher, of Saltoune, have comited and are guiltie of the crymes above mentioned, or one or other of them, and are actors airt and part of the samen, which being found be one Assyse, the deceast duke of Buckleugh ought to be forfaulted in his lands, heretages, titles, offices, goods, and gear whatsomever, and his name, fame, memory and honours, and the other persons above named, they ought to be

any of the treasons or offences aforesaid, unless the same offender or offenders be thereof accused by the testimony and deposition of two lawful and credible witnesses, upon oath, which witnesses, at the time of the said offender or offenders arraignment, shall be brought in person before him or them, face to face, and shall openly avow and maintain upon oath what they have to say against him or them concerning the treason or offences conteyned in the said indictment, unless the party or parties arraigned shall willingly without violence confess the same.

“ Provided always, and be it enacted, that this act, or any thing therein conteyned, shall not extend to deprive either of the Houses of Parliament, or any of their members, of their just ancient freedom and priviledge of debating any matters or busines which shall be propounded or debated in either of the said Houses, or at any conferences or committees of both, or either of the said Houses of Parliament, or touching the repeal or alteration of any old, or preparing any new laws, or the redressing of any public grievance. But that the said members of either of the said Houses and the assistants of the House of Peers and every of them shall have the same freedom of speech, and all other priviledges whatsoever, as they had before the making of this act: any thing in this act to the contrary thereof in any wise notwithstanding.

“ Provided alwayes, and bee it further enacted, that if any peer of this realme, or member of the House of Commons shall move or propose in either House of Parliam't the disherision of the rightfull and true heir of the crown, or to alter or change the descent or succession of the crown in the right line; such offence shall be deemed and adjudged High Treason, and every person being indicted and convicted of such treason, shall be proceeded against, and shall suffer and forfeite, as in other cases of High Treason mentioned in this act.

“ Provided always, and be it ordained and

enacted, that no peer of this realm shall be tryed for any offence against this act but by his peers: and if his majestie shall grant his pardon to any peer of this realm or commoner convicted of any offence against this act after such pardon granted, the peer or commoner so pardoned shall be restored to all intents and purposes, as if he had never been convicted: any thing in this law to the contrary in any wise notwithstanding.”

Mr. Fox had said: “ Perhaps some persons might think it more discreet, to leave such a production in obscurity, lest it should ever be made use of as a precedent; but whoever peruses with attention some of our modern statutes, will perceive, that though not adduced as a precedent, on account, perhaps, of the inauspicious reign in which it made its appearance, it has but too often been used as a model.”

In justification of this last position, which had been questioned by Mr. Rowe, Mr. Sergeant Heywood (*Vindication* p. 238) has exhibited a comparison of part of the Bill with part of the statute 36 Geo. 3, c. 7.

The Act of Attainder was as follows:

An Act to Attain James Duke of Monmouth of High-Treason.

“ Whereas James duke of Monmouth has in
 “ an hostile manner invaded this kingdom, and
 “ is now in open rebellion, levying war against
 “ the king, contrary to the duty of his allegiance; 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 this parliament assembled, and by the authority of the same,
 “ That the said James duke of Monmouth
 “ stand and be convicted and attained of high-treason, and that he suffer pains of death,
 “ and incur all forfeitures as a traitor convicted
 “ and attained of high-treason.”

punished with forfeiture of life, lands and goods, to the terror of others to commit the like in tyme coming, as in the saids criminal letters and dittay within specificit insert therein at more length is contained.

Executions Verified.

His *Majesties Advocat* produced the criminal letters dewly execute against the said sir James Dalrymple, off Staires, and Andrew Fletcher, off Saltoun, and also against Anna dutches of Buckleugh relict, Henry and James Scots, children to the said deceast James Scot, sometyme duke of Buckleugh, upon three score dayes warning by sound of trumpet, open proclamation, with displayed coat, and using other solemnities necessary at the marcat croce of Edinburgh, Peir and Shoar of Leith, as being out of the kingdome for the tyme; and lykewayes produced executions against the relict and children of the said deceast James Scot, some tyme duke of Buckleugh, sir James Dalrymple, off Staires, and Andrew Fletcher, at their dwelling houses within this kingdome, and marcat croce efter specificit, viz. against the relict and children off the said James Scot at the castle of Dalkeith, and market croce of Dalkeith, Jedburgh and Selkirk against Andrew Fletcher off Saltoun,*

* Fletcher of Saltoun had, in 1681, upon the attainder of Argyll, retired to the continent. He engaged in Monmouth's expedition although he disapproved of it. At the Revolution he returned with the prince of Orange. He vigorously opposed the union between England and Scotland, and on occasion of the attempt upon the latter kingdom in 1708 he was for a time imprisoned: See 4 Laing's History.

"Fletcher," says Mr. Laing, "was apparently the early pupil of Burnet; but his virtues were confirmed by mature study, foreign travel, persecution, and exile. When he withdrew from the oppressive government of the duke of York, he engaged as a volunteer in the Hungarian wars; and, rather than desert his friend, embarked in Monmouth's unhappy expedition, of which he disapproved. At the revolution he returned with the prince of Orange, whose service he declined when that prince was advanced to the throne. From the study of the ancients, and the observation of modern governments, he had imbibed the principles of a genuine republican. Disgusted at William's authority as inordinate, he considered the prince as the first and most dangerous magistrate of the state, to be severely restrained, not indulged in the free exercise, or abuse of power. His mind was firm and independent, sincere and inflexible in his friendship and resentment, impatient of contradiction, obstinate in his resolves, but unconscious of a sordid motive, or an ungenerous desire. His countenance was stern, and his disposition unaccommodating, however affable to his friends; but his word was sacred; his probity was never called by the breath of suspicion; and equally

at his house of Saltoun, the marcat croce of Haddingtoun, against sir James Dalrymple, of Staires, at his house of Staires, and marcat croce of Aire, upon fourtie dayes warning, by sound of trumpett, with displayed coat, open proclamation, leaving and affixing at ilk house croce and place, full doubles off the letters, word by word, with lists of the hail witnesses and assysers names to be adduced against the defenders, and using other solemnities necessary.

Compeired lykewayes James Guthrie, Dingwall, pursevant, executer of the saids Letters, Robert Childers, trumpitur, John Douglas, Robert Hall, James Berrie, indwellers in Edinburgh, his witnesses, and being solemnlie sworne, made faith upon the truth and veritie of the executions in all points.

Warrant for pursuing.

His *Majesties Advocate* produced an act of his majestie's privie councill for persewving the Aires of the late duke off Monmouth, and

tenacious of his dignity, and scrupulous in the observance of every point of honour, his spirit was proverbially brave as the sword he wore. [The same expression is used without communication by Lockhart and Macky; but the last is peculiarly happy in his character of Fletcher. 'He is a gentleman steady in his principles, of nice honour—brave as the sword he wears, and bold as a lion—would lose his life readily to serve his country, and would not do a base thing to save it.'] His schemes were often eccentric and impracticable; but his genius was actuated by a sublime enthusiasm, and enriched by an extensive converse with books and men. His eloquence is characterised by a nervous and concise simplicity, always dignified, often sublime; and his speeches in parliament may be classed among the best and purest specimens of oratory which the age produced. [It appears from sir John Clerk's Memoirs, that Fletcher was not expert at extemporary replies. His speeches, to be distinctly understood, must be read historically, as they refer to the different clauses of the act of security and limitations on the crown. In this view, his Conversation on Governments, written to vindicate the proceedings of this session, appears to me to be one of the best specimens of dialogue writing in modern times.] His free opinions were confined to no sect in religion nor party in the state. The love of his country was the ruling passion of his breast, and the uniform principle of his whole life. In a corrupt age, and amidst the violence of contending factions, he appeared a rare example of the most upright and steady integrity, the purest honour, the most disinterested patriotism; and while the characters of his venal, but more successful competitors, are consigned to infamy or oblivion, his memory is revered and cherished as the last of the Scots."

Fletcher of Saltoun's forfeiture was rescinded by act 16, 1st Parliament, June 30, 1690.

Fletcher, off Saltoune, for the crymes lybelled (whereof the tenour followes:) Edinburgh 30 day of July 1685, the lords of his majestie's privie councill doe hereby give order and warrant to his majestie's Advocat, to proces and persew before the Lords Commissioners of Justiciary the Aires of the late duke of Monmouth, and Andrew Fletcher, of Saltoune, for their laite rebellion and invasione, and the other crymes to be lybelled, with power to the saids lords, to examine witnesses previoulsie if need beis conforme to his majestie's letter.

Extracted by me,
Sic Subscritur, WIL. PATTERSONE, Cl. S. Con.

The Lords Justice Generall, Justice Clerk and Commissioners of Justiciary, for severall good reasons and considerations moveing them, continue the process and tryall of forfaiture against the forenamed persons till the fourth of January next to come, and ordaines the assysers to attend, ilk under the pane of 500 merks, and ordaines the witnesses against the laite duke of Monmouth and Saltoune to be detained prisoners, and the witnesses against Staires to attend, and recommends to his majestie's cash keeper to alimnt them in the mean time at the rate off sixtean pence per diem for ilk horsman, and eight pence per diem for ilk footman, and declare they will take their farder expences to consideration at the event of the process.

4th day of January, 1686.

The said day anent our soveraigne Lord's criminal letters off treason, raised at the instance of sir George M'Kenzie, of Rosehaugh, his majestie's Advocat for his highnes interest against Andrew Fletcher, of Saltoune, and the laite duke of Buccleugh and Monmouth, and sir James Dalrymple, of Staires, for the crymes off high treason and rebellion, lybelled against them *ut in precedente die*.

The Lords for severall causes moving them continued the dyet against sir James Dalrymple, off Staires, till the first Munday of April next.

The Lords continue the tryall off the late duke of Monmouth till to-morrow, and ordaines all the assysers to attend, ilk persone under the pane of 500 merks. Andrew Fletcher, off Saltoune, being often tymes called and not compeirand to underlye the law for the crymes above written, was declared fugitive, and his majesties Advocate declared he insisted against him ffor his forfaiture; and the lybell being publickly read, the Lords, conforme to the eleventh act of the first session second parliament of king Charles the second, did proceed to consider and give ther Interloquitur upon the lybell.

His *Majesties Advocate* declaires he restricts the lybell against Fletcher, off Saltoune, to that article of treason and rebellion mentioned in the lybell anent his invading the kingdome of England with the duke of Buccleugh.

INTERLOQUITUR.

The Lords Justice Generall, Justice Clerk and Commissioners of Justiciary finds the lybell as it is restricted by his majestie's Advocate to Fletcher of Saltoune, his invading of the kingdome of England, relevaut, and remitts the same to the knowledge off ane assyse.

ASSISA.

The Marquis of Douglas
The Earle off Marr
The Earle off Wintoune
The Earle off Landerdaille
The Earle off Panauire
The Earle of Balcarras
The Earle of Calendar
The Lord Livingstoune
The Lord Sinclair
The Lord Torplichen
The Lord Elibank
Mr. James Elies, of Stenismilnes
James Somervell, of Drum
Sir John Clerk, of Penniecooke
Sir John Dalmahoy, of that ilk.

The Assyse lawfullie sworn, no objection of the Lawe in the contrarye.

His *Majestie's Advocate* for Probation adduced the witnesses efter deponing, viz. capitaine Robert Bruce and captain Anthony Biuse, lately in the Duke of Brandrugh's service.

His *Majestie's Advocate* produced remissions under the great seall in their favours for their being engagid in the said rebellion.*

* As to the admissibility of the testimony of accomplices in general, Mr. Hume says;

"Under the head of interest in the issue of the trial, we are naturally led to inquire concerning the situation of a *Socius Criminis*, and how far he is a receivable witness against his associates who are under trial. The objection to such a one, as it has generally been argued, rests on two severall grounds; that of the infamy of the witness, according to the story which he is to tell of himself; and that of his interest to load and convict his associate, in order the more to lighten his own share in the foul deed, and the better to recommend himself to the favour of the prosecutor, at whose mercy he in some measure is. With the judges of former times, according to Mackenzie, part 2, tit. 26, no. 10, these considerations had been of sufficient weight, to determine them against receiving a *Socius Criminis* except in the trial of such crimes as could not otherwise be proved at all. And in support of what Mackenzie has said, it may be alleged, that in the debate on this head in the trial of Macleod of Assint for treason, Feb. 2d, 1674, the prosecutor seems to allow, that such may be the law with respect to those at least, who having themselves been charged with the crime in question, have emitted declarations

Captaine Robert Bruce, laity captaine in the duke of Brandeburgh's service, aged threttie six years or therby, unmarried, purged of malice, prejudice, partiall councill, ill will, &c. and solemnlie sworne, he knewe Andrew Fletcher, of Saltoune, and that he saw him come over in the shipe from Holland, with the late duke of Monmouth, the tyme lybelled; and that he landed with him in England and was in his company, and had horse and armes, and that the day off the randevouze that was appoynted by the laite Monmouth, efter he landed in England, as Saltoune was going ther he killed one Daer, ane English goldsmith, and thereafter fled; Depons, he knowes Saltoune was verie intimate with the duke of Monmouth; Depons, that Saltoune efter the slaughter of Daer fled to the ship in which the duke of Monmouth came, and depons, he saw

him in that ship; Depons, he knowes captaine Anthony Buise, a Brandeburger, and saw him in the ship with Monmouth and Saltoune, and saw him converse with them familiarlie; and this is the truth as he shall answer to God.

ROBERT BRUCE. LINLITHGOW, I. P. D.

Captaine Anthony Buise, laity a captaine in the duke of Brandeburghs service, aged threttie years or therby, unmarried, purged off malice, prejudice, ill will, partiall councill, and solemnlie sworne, depons he came over from Holland, the tyme lybelled in the ship, with the laite duke of Monmouth, wher he did see a gentleman who was called Fletcher of Saltoun, who was a little man and had a brown perivick, of a lean face, puckermarked, and that he saw him converse with the laite duke of Monmouth and with captaine Bruce, the other wit-

accusing others. Reference may be made also to the trial of the Robertsons, March 9th, 1671, for casting down of houses; where, after an argument at some length, between sir John Nisbet and sir George Mackenzie, judgment was given sustaining this objection: whereupon, two witnesses having been interrogated *in limine* touching their own participation of the crime, and having acknowledged that they were present and assisting on the occasion, their examination was here cut short, and the assize straightway found a verdict for the pannels. But the crime, in this instance, was one of a very public nature, the riotous demolishing of a house, with respect to which there could be no penury of unsuspected witnesses: and there was reason also to believe, that the pannels, two of whom were boys under fourteen years of age, and acting under the influence of their father, were more excusable than the very persons their associates, who were now called as witnesses against them. That judgment, therefore, was in nowise decisive of the law, nor indeed am I satisfied by any thing which has fallen under my own observation, that any such rule ever gained so firm a footing in our practice, as Mackenzie has alleged. Certain it is, that soon after Mackenzie's own time, a deliberate judgment was given the other way. This was in the trial of Samuel Smith, July 3d and 4th, 1693, for breaking into the house of Pennycuick: a precedent which is the more remarkable on this account, that Faa and Wilson, the two *Socii*, were not free from other reasons of suspicion; and that Smith was convicted and suffered death on the testimony of these two persons alone, whose depositions form the entire proof in the case.

"But on this head I shall not enlarge, because, whatever scruples may once have been entertained, these have been resolved in the opinion and practice of later times. It is now argued, respecting him who is challenged as *socius criminis*, that though not so creditable a witness as one who is liable to no such imputation, yet still he cannot be more infamous

in jure with relation to this, than to any other trial; and that in all other trials he is a lawful witness, not having had any mark of infamy impressed on him by the sentence of a court of law. And as to any bias which may arise from fear of the prosecutor; this too is obviated, if it be held, which is now the established opinion, and was positively delivered on the bench, in the noted trial of Smith and Brodie, that by the very act of calling him as a witness, the prosecutor discharges all title to challenge him for the future, with relation to the crime in hand.

"By Stat. 21 George 2, c. 34, No. 21, it was declared, that in all trials in Scotland for theft of cattle, it should not be a good objection to any of the prosecutors witnesses, that he was *socius criminis*, and that such witness should not be liable to prosecution on account of his accession to such offence.

"I know not whether the construction which is now applied in all cases to the act of the prosecutor, calling such witnesses, was suggested at first by this statute which obviated in that way the objection of *socius criminis*. See the debate in the case of Macdonald and Jamieson, in August 1770, which being explained to the witness before he depones, he is in a state of absolute freedom as to the story he shall tell. For these reasons, in the course of this century, and especially in the latter part of it, the objection of *socius criminis* has been frequently overruled, so frequently indeed, that it is now only moved, in order to obtain, if the circumstances make it reasonable, a reservation of the credibility of the witness, as liable to be affected, in some cases, by the account which he may give of his own misdeeds." Commentaries respecting Trial for Crimes, vol. 2, p. 175.

Mr. Hume also notices that "In some of the late trials for sedition, though a crime in nowise of an occult nature, in least in those particular instances, (for the mischief stalked abroad for a while in open day) the evidence of Aitchison, and other associates in the conspiracy, was taken without reserve."²¹

ness who ordinarily termed [him] Mr. Fletcher, off Saltoune, and told the deponent that he was a Scots gentleman off a good estate. Depons he saw Mr. Fletcher, of Saltoune, sit at the table with the duke off Monmouth, and saw him ryding on horseback with him, and a pistoll in his hand, to the camp, efter they had landit in England; depons that the said Mr. Fletcher, off Saloune, had some tyme a fuzie, and depons that the said Mr. Fletcher haveing killed a man, which is notorie known, he thereafter fled to the shipe in which Monmouth came; depons that the passage that Fletcher, off Saltoune, killed, was called Thomas Duer, of Tartoune. *Causa scientie* he was present and conversed with Monmouth and Mr. Fletcher; depons he saw Fletcher flee to the shipe; and this is the truth as he shall answer to God. ANTHONY BOYCE. LINLITHGOW, J. P. D. Com.

His Majesty's Advocate for farther probatione, produced the Deposition of William Williams, late servant to the late duke of Monmouth, taken by sir Andrew Forrester, at Newgaitte, the 18th day of November, 1685, whereoff the tenor follows: Newgate the 18th of November, 1685. William Williams, late servant to the late duke of Monmouth, declares that he does not remember to have seen Fletcher, off Saltoune, untill about a year agoe at Bruxells, wher he saw him often at diner with the late duke off Monmouth; that soone efter the decease of his late majestie, he carryed a letter from the said late duke (who was then incognito at Amsterdame,) to the said Mr. Fletcher then at Bruxells, but does not know what were the contents of that letter; that some fewe dayes befor the said late duke's last embarquing for England, he saw the said Mr. Fletcher with the said late duke, at his lodging in Mr. Dare's house, in Amsterdame, wher they two and severall others, who were concerned in the late rebellion, had private conversation; that some fewe dayes efter he (in waiteing on the said late duke) in company with the said Mr. Fletcher, and betwixt 30 and 40 more, imbarqued at Amsterdame in a close lighter, or some such vessel, which in 7 or 8 dayes carryed them to the Texell, wher the ship lay which carryed the most of them and a good many more to Lyme, in England; that during the voyage from Holland to England, he was constantly conversing with the said Mr. Fletcher, and so knows him perfectly well, as he did ever since the first tyme he saw him at Bruxells; that he saw him landing with the said late duke at Lyme, and severall tymes thereafter on shore, particularly at dinner with the said late duke the same day that he (the said Mr. Fletcher) shot the same Mr. Dare, which was done in the afternoon, but that he was not then present; that he understood iff the said accident of killing Mr. Dare had not happened, the said Mr. Fletcher was to have been a lieutenant colonell off horse amongst the rebels.

This examinatione haveing been twice read

to Mr. Williams, was by him owned to be true in all the contents thereof, and is ready to deliver it upon oath whenever his majestie's service shall require his so doing. Taken and attested by
AND. FORRESTER.

Together with ane Act of Parliament, remitting him to be persewed befor the justices for the crymes of high treason lybelled against him, which is recordit upon the sixteenth of July last, whereof the tenor follows:

Att Edinburgh, the sixteenth day off June, 1685, our sovereigne lord, with consent off the estates off parliament, doe heirly remitt to the Commissioners of Justiciarie, the process of treasone intended against the aires of the deceased James earle of Loudoun, sir James Delrymple, of Staires, James Stewart son to the deceased sir James Stewart, late provost of Edinburgh, Colline Campbell, of Ardinglas, William Denholme, off Westsheills, John Weir, of ———, John Gray, of Park, sir William Scot, younger, off Farden, Andrew Fletcher, off Saltoune, ——— Home, off Bassindeane, Gilbert Elliot, wrytter, in Edinburgh, and Walter Lockhart, of Kirktoone, to be discuit be them upon the sumonds persewed befor the parliament, which is heirly declared, to be as valid as iff the forsaids persons and ilk one of them had been sumond befor the justices in the first instance; and doe heirly authorise and empower the Lords off Justiciary to proceed to forfaiture against them for the conspiracie, airt and part thereof, concealling and not recalling of the same, and other crymes mentioned in the said sumonds, notwithstanding they be absent, and that lists off the assysers and witnesses were not given to the defenders. Extracted furth of the records of parliament by George viscount of Tarbett, lord M-Leod, and Castillhaven, clerk to his majestie's parliament, counccill, registers and rolls.

Sic Subscritur, TARBET, Cl. Register.

Verdict.

The Lords ordaines the Assyse to inclose and retorne ther Verdict, who accordingly removed altogether furth of the court to the assyse house, wher having reasoned and voted upon the poynts and articles of the lybell and probatione above written, and therewith well and ryply advised, they re-entered againe in court, and returned ther Verdict in presence off the saids lords, whereoff the tenor follows:— The Assyse be plura tite of voices, by the mouth off the earle of Lauderdale, finds Andrew Fletcher, off Saltoune, guiltie off invading off the kingdome of England, in armes, in company with the late duke of Monmouth, the tyme lybelled, in respect the same is sufficiently proven.

Sic Subscritur, LAUDERDAILL.

Efter opening and reading off the Verdict off Assyse, the Lords Justice Generall, Justice Clerk, and Commissioners of Justiciary, therfor be the mouth off John Leslie, dempster

off court, decerned and adjudged the said Andrew Fletcher off Saltounne, to be execut to the death, demaied as a traitor, and to undergo the paines of treason, and utter punishment appoynted by the lawes off this realme when ever he shall be apprehended, at such a tyme, place and in such a manner as the saids lords shall appoynt, and ordaines his name, fame, memory and honours to be extinct, his blood to be tainted, and his armes to be riven furth and delate out off the books of armes, so that his posteritie may never have place, nor be able herefter to bruike or joyse any honours, offices, titles or dignities within this realme in tyme coming, and to have forfait and tiut all and sundrie his lands, heretages, tacks, steadings, rooms, possessions, titles, offices, goods, and gear whatsomever pertaining to him, to our soveraigne lord to remaine perpetuallie with his highnes in property, which was pronounced for doom.

5th day of January, 1686.

The diet continued against the late duke of Buccleugh till the third Munday of February.

15th day of February, 1686. *Lybell against the late Duke of Buccleugh.*

The said day auent the criminall cause and action off treason intented and depending at the instance of sir George Mackenzie, of Rosehaugh, his majestie's advocat for his highnes interest, against the deceast James Scot, sometyne duke of Buccleugh, and of Monmouth, Anna dutches of Buccleugh his relict, James and Henry Scots, his children and nearest of kine, for ther interest. Makand mentione, That wher, notwithstanding be the common law, lawes and acts of parliament of this his majestie's kingdome, and constant practise theroff, particularie be the third act first parliament and threttie seventh act second parliament off king James the first, and be the fourteenth act sixteenth parliament and fortieth nyynth act twelt parliament king James the second, nyntieth seventh act seventh parliament off king James the fyfth, and hundred and fourtie fourt act twelt parliament king James the sixt, and fyfth act first session first parliament king Charles the second, the crymes of treasons and rebellion, and the ryseing and joyning in armes against his majestie and his authoritie, and the abaitting, assisting, re-cepting, intercomoning and keeping correspondence with such rebels, suplieing them with money, armes, provisione, help, red or councill, or giving them any relieff or comfort, and the usurping the style, honour or dignitie of the imperial crowne of this his majesties realme, are most detestable, horrid, hynous and abominable crymes off rebellion, treasons and lese majestie, and are punishable by forfaiture of lyfe, land and goods. And be the second act second sessione first parliament, king Charles the second, It is declared high treason to plott, contrive or intend death, or destructione to his majestie's style, kinglie name

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or honour of the imperial crown off this his majestie's realme, or from the exercise of his royall government, or to leavie warr or take up armes against his majestie or anie commissionat by him, or to intyse any strangers or others to invade any of his dominions, or to wreitt or speak any thing that may express or declaire such treasonable intentions, and is punishable with forfaiture of lyfe, lands and goods. and be the second act third parliament king Charles the second, it is declared high treason in any off the subjects of this his majestie's realme, by wreitting, speaking or anie other maner off way to endeavour the alteratione, suspensione, diversione of the right off successione, or debarring the nixt lawful successor : And be the eleventh act first sessione second parliament king Charles the second, forfaitures are appoynted to proceed in absence ; And be the sixtie nyynth act sixt parliament king James the fyfth, it is appoynted, concluded and delivered, that the aire may be forfaitured for treason comitted be his predecessor conforme to the common law, good equity and reason. Neverthelesse, it is off veritie, that the said deceast James Scot, sometyne duke of Buccleugh and Monmouth, shacking off all fear of God, respect and regard to his majestie and his authoritie and lawes, have presumed to comitt, and is guilty off the saids crymes in sua farr as in the year 1683 he did enter into ane damnable plott and conspiracie with the deceast earles of Shaftsberry, Essex, Argyle, lord Russill, and others, for kiling and murdering, at least for seazing upon ther late gracious soveraigne and his present majestie, for raisinge open warr and rebellion in both kingdomes, and for contributing money to the laite earle of Argyle, for raising a warr in this his majesties kingdome, and for invading the same, both by strangers and natives, in which conspiracie our officers of state and garrisons were to be seized, and for that effect he did most treasonable keep severall consultations and meetings with the conspirators in England, and with the lord Melville, sir John Cochran, and others ther ; but in farther prosecution off the said conspiracie, they did goe over to Holland and Flanders, and ther continued the saids treasonable consultationes with the said laite earle off Argyle, lord Melvill, sir John Cochran, John Cochran, of Wattersyde, his sone, William Denholme, of Westsheills, Thomas Stewart, off Culnes, and others, forfait and declaired traitors and rebels in Holland, and did treasonable and often intercommon, converse and keep correspondence with them thereanent, within severall townes off the Low Countries, upon the first, second, third, or ane or other off the dayes off the moneths of January, February, March, and remanent moneths of the years 1683, 1684, 1685, or ane or other off the dayes off ane or other off the moneths off ane or other off the saids years ; and accordingly they did actualie furnish and outreik the said laite earle off Argyle with three severall ships, full of men, armes and ammu-

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nitions, for invading this kingdom, which accordingly they did upon the — day of May last, land these men and armes in the shyre of Argyll and West Highlands, and did leavie warr, seaze upon our magazines, sumoud our garrisons, and continew in open rebellione till he was defate: And the said James Scott, late duke off Buccleugh and Monmouth, did upon the last day of June last, most treasonable ryse in open rebellione and armes against his majestie and his authoritie, within his kingdome of England, and with men, ships, armes and amunitioun, landit within the towne of Lyme, and did emitt and issue furth most treasonable declaratioun and proclamations, marched up and down the countrey, robing the horses and armes off his majesties good subjects, did convocat and gather together his majesties subjects to the number off ——— thousands in open rebellione against his majestie, invadit the towne off Tantoune, and ther the said late duke of Buccleugh did most treasonable usurp the style, honor, and kinglie name off the impernall crowns off Scotland, England, France, and Ireland, and caused himself to be proclaimed king, and did take upon him to be king, and was saluted by the people as king, and they kissed his hands and cryed ‘God ‘blisse the king,’ and he was called Sir, and his majestie, and he was prayed for as king and commandit as king, and payed the arnie, and touched children off the king’s evill*, and did

* In the indictment in Rosewell’s Case, vol. 10, p. 150, he is charged with having said among other words, that the people “made a flocking to our said sovereign lord the king upon pretence of Healing the King’s Evil which he could not do.” [N. B. It is said in the “Bloody Assyses,” “About the same time Mr. Rosewell, a very worthy divine, was tried for treasonable words in his pulpit, upon the accusation of very vile and lewd informers; and a Surry Jury found him guilty of high-treason, upon the most villanous and improbable evidence that had been ever given, notwithstanding sir John Talbot (no countenancer of dissenters) had appeared with great generosity and honour, and testified, That the most material witness was as scandalous and infamous a wretch as lived. It was at that time given out by those who thirsted for blood, that Mr. Rosewell and Mr. Hays should die together; and it was upon good ground believed, that the happy deliverance of Mr. Hays did much contribute to the preservation of Mr. Rosewell; though, it is very probable, that he had not escaped, had not sir John Talbot’s worthy and most honourable detestation of that accursed villainy, prompted him to repair from the court of King’s-Bench, to king Charles 2, and to make a faithful representation of the case to him; whereby, when inhuman bloody Jeffreys came a little after in a transport of joy, to make his report of the eminent service he and the Surry jury had done in finding Mr. Rosewell guilty; the king (to his disappointment) ap-

exercise the other functions off royall dignitie, and kept one armie, force, and guard about his persone, did lead and conduct them, and did assaill, resist, feight and oppose his ma-

peared under some reluctancy, and declared, that Mr. Rosewell should not die. And so he was most happily delivered.”]

Mr. Barrington gives some information upon the subject of cure by the royal touch. “I cannot,” says he, “help mentioning what I once heard from an old man who was witness in a cause, with regard to this supposed miraculous power of healing. He had, by his evidence, fixed the time of a fact by queen Anne’s having been at Oxford, and touched him, whilst a child, for the evil; when he had finished his evidence, I had an opportunity of asking him whether he was really cured? upon which he answered with a significant smile, that he believed himself to have never had a complaint that deserved to be considered as the evil; but that his parents were poor, and had no objection to the bit of gold. It seems to me, that this piece of gold, which was given to those who were touched, accounts for the great resort upon this occasion, and the supposed afterwards miraculous cures. Gemelli (the famous traveller) also gives an account of 1,600 persons offering themselves to be cured of the evil to Lewis the Fourteenth on Easter Sunday, in the year 1686. Gemelli was himself present at this ceremony, and says the words used were ‘Le roy te touche, Dieu te guerisse.’ Every Frenchman received 15 sous, and every foreigner 30, after being touched: to some of the supposed patients the king said, ‘Are you sick too?’ This power of healing by the kings of France occasioned great resort to Francis the First (whilst prisoner at Madrid) by the Spaniards, who did not conceive that their own king’s touch would effect the cure.” Favon’s Theatre d’Honncur, vol. 1, p. 261.

An indifferant poet of the times alludes to this:

“Ergo manu admotâ sanat Rex cheradas, estque
Captivus superis gratus, ut ante fuit.
Indicio tali, Regum sanctissime, qui te
Arcent, invisos suspicor esse Deo.”

It appears by a proclamation of the 25th of March, and 14 Jan. 1, that the kings of England would not permit any resort to them for these miraculous cures in the summer time.

By another proclamation of the 18th of June 1626, it is ordered, “that no one shall apply for this purpose, who does not bring a proper certificate that he was never touched before. This regulation undoubtedly must have arisen from some supposed patients, who had attempted to receive the bit of gold more than once.” Observations on Statutum Gloucestræ, 6 Edw. 1. A. D. 1278.

In the Book of Common Prayer, &c. printed at Oxford in 1719, is inserted the following Service, to be used as it seems when the royal touch was applied for the cure of the king’s evil.

jesties armie and forces, and did continew in open, avowed and desperatt rebellione against his majestie and his authoritie, untill they were defeated att ———, upon the ——— day off July last, and the said laite duke taken prisoner, attainted by the English parliament for the said rebellion, and executed at Towerhill upon the ——— day of ———, 1685 years; Wherthrowe the said James Scot, laite duke off Buckleugh and Monmouth, hath committed and is guilty off the crymes above mentioned, one or other of them, and is actor airt and part off the samen, which being found be one assyse, the deceast duke of Buckleugh ought to be forfaitured in his lands, heretages, titles, offices, goods and gear whatsoever, and in his name, fame, memory and honours, to the terror off

others to committ the lyke in tyme coming. Which criminal action one cause being formerly called upon the said twentie first of December last, the executions were verified, and the defenders being oft tymes called and not compeirand, The lords for severall causes moving them continued the same criminall actione and cause from tyme to tyme till this day, and the samen being this day called, His Majesties Advocat produced a letter from the dutches off Buckleugh to his lordship, wheroff the tenor follows:

LETTER from the Dutches of BUCCLEUGH.

' My Lord, Ther being a process off forfeiture raised at your instance for his majesties interest against my late husband the

' AT THE HEALING.

' Prevent us, O Lord, in all our doings, with thy most gracious favor, and further us with thy continual help, that in all our works begun, continued, and ended in thee, we may glorifie thy holy name, and finally by thy mercy obtain everlasting life, through Jesus Christ our Lord. Amen.

' The Holy Gospel is written in the 16th chapter of saint Mark, beginning at the 14th verse: Jesus appeared unto the eleven as they sat at meat, and upbraided them with their unbelief and hardness of heart, because they believed not them which had seen him after he was risen. And he said unto them, Go ye into all the world and preach the gospel to every creature. He that believeth and is baptized, shall be saved; but he that believeth not, shall be damned. And these signs shall follow them that believe; In my name they shall cast out devils, they shall speak with new tongues, they shall take up serpents, and if they drink any deadly thing it shall not hurt them; ("they shall lay their hands on the sick, and they shall recover.") So then after the Lord had spoken unto them, he was received up into heaven, and sat on the right hand of God. And they went forth and preached every where, the Lord working with them, and confirming the word with signs following.

' Lord, have mercy upon us.

' Christ, have mercy upon us.

' Lord, have mercy upon us.

' Let us pray.

' Our Father which art in heaven,' &c.

' [Then shall the infirm persons, one by one, be presented to the king upon their knees, and as every one is presented, and while the king is laying his hands upon them, and putting the gold about their necks, the chaplain that officiates, turning himself to his majesty, shall say these words following:]

' God give a blessing to this work, and grant that these sick persons on whom the king lays his hands, may recover, through Jesus Christ our Lord.

' [After all have been presented, the chaplain shall say.]

' Vers. O Lord, save thy servants.

' Resp. Who put their trust in thee.*

' Vers. Send them help from thy holy place.

' Resp. And evermore mightily defend them.

' Vers. Help us, O God of our salvation.

' Resp. And for the glory of thy name, deliver us, and be merciful unto us sinners, for thy name's sake.

' Vers. O Lord, hear our prayers,

' Resp. And let our cry come unto thee.

' Let us pray.

' O Almighty God, who art the giver of all health, and the aid of them that seek to thee for succour, we call upon thee for thy help and goodness mercifully to be shewed upon these thy servants, that they being healed of their infirmities, may give thanks unto thee in thy holy church, through Jesus Christ our Lord. Amen.

' [Then the Chaplain, standing with his face towards them that come to be healed, shall say:]

' The Almighty Lord, who is a most strong tower to all them that put their trust in him, to whom all things in heaven, in earth, and under the earth, do bow and obey, be now, and evermore your defence, and make you know and feel, that there is none other name under heaven given to man, in whom, and through whom you may receive health and salvation, but only the name of our Lord Jesus Christ. Amen.

' The grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with us all evermore. Amen.'

Though this Service was thus retained in a Prayer Book printed in the 5th or 6th year of the reign of king George the First, it is said that queen Anne was the last sovereign who touched for the cure of the Evil.

* These Answers are to be made by them that come to be healed.

‘ duke of Monmouth, in which his aires or representatives ar or ar to be cited for ther interests, and his majestie haveing been graciously pleased to send the right honorable the earl of Murray, with his gracious offer to leave it to my choice whither my children and I shall goe down thither to answer personallie, or will appoynt a procurator or procurators to propose what they or I have to say or offer in our legall defence, I doe now (in a dew sense off his majesties grace and favour) nominate and appoynt sir John Lauder, Mr. Thomas Learnout, and Mr. James Graham, Advocats, or any off them, to be procurator or procurators for my children and me, to appear and propose whatsoever is fitt and proper to be offered for them and me in the process aforesaid, which I doe heirby declare to be as valid and sufficient as iff they and I wer personallie present at the tryall. In testimony wheroff, I have signed and sealed these presents at Westminster, the 16th day off January, 1686, according to the Scots style, before these witnesses, sir Andrew Forrester knight, and David Nairne, our servitor wrietter heiroff.’

Sic Subscribitur, ANNA BUCKLEUGH.*

A. Forrester, Witness,

David Nairne, Witness.

Sir John Lauder comparend in presence off the court, and Mr. James Grahame, and the letter above recordit being intimate unto them, his majestie's advocat declared that he allowed them to compare for Anna dutches off Buckleugh and James and Henry Scots, her children, parties called, and to propone such defenses as were competent against the lybell, and that either be vertue off a commissione or without a commissione, or the commission's being recordit. To which they answered, that they would propone nothing in the process unles the commissione granted be the dutches off Buckleugh to them were read and recordit,†

* Upon the marriage of Monmouth with the countess of Buckleugh, he was created duke and she was created duchess of Buckleugh, &c. in Scotland, by letters patent, April 20, 1663. Collins. Beatson.

† See Fountainhall's account in the note at the beginning of this Case.

Sir John Lauder (lord Fountainhall) and Mr. James Graham, together with the other advocates for the earl of Argyle, had incurred the displeasure of the court by their exertions on behalf of the earl, and measures were taken for the purpose either of punishing them or at least of intimidating them by the apprehension of punishment; Fountainhall gives the following account of them:

“ December 15, 1681. The Privy Council, to strike terror in any who complained of the injustice of Argyle's interlocutor, and to preserve Strathaird, Earret and Newton from opprobrium: in voting the explanation reasonable, Collington having been ‘ non liquet,’ Har-

and declared they had no defence to propone in this cause.

His Majesty's Advocat took instruments upon the advocates being present and com-

mons voting it was not treason, and Queensberry Justice-General concealing his vote, in regard it was carried affirmatively ere it came to him, the council named a Committee to call my lord Argyle's eight advocates, viz. sir George Lockhart, sir John Dalrymple, Messieurs Walter Pringle, David Thoirs, Patrick Home, John Stewart, James Graham, and myself, for subscribing our opinion, that his explanation contained nothing treasonable in it. We were examined, but not upon oath; and it was called a new practice to sign opinions with us, especially in criminal cases importing treason, and a bad preparative; though lawyers should not be prelimited nor over-awed freely to plead in defence of their clients; the privy council having authorized us to that purpose. — Though some aimed at imprisoning, and depriving us, yet after we had spoke with his royall highness, he was pleased to pass it, though he said if any bad use were made of our signed opinion, by spreading it abroad in England to incense them, or reproach the duke to the judges, he could not but blame us. It was afterwards printed in England, and Argyle's trial, with another piece called, A Scots Mist, to wet an Englishman to the skin; being sundry Animadversions on Argyle's Process.”

Respecting the conviction of Argyle, Fountainhall, under date December 12 and 13, 1681, writes:

“ There was a great out-cry against the criminal judges their timorous dishonesty. The marquis of Montrose was chancellor of his assize. Sir George Lockhart called it lucrative treason, to the advantage of Church and State; and admired how a man could be condemned as a traitor, for saying he will endeavour all amendments he can to the advantage of church and state; For this is not to conspire ‘ in necem et perniciem reipublicæ.’ — But the treason was alledged to lie in this, that his explanation did not bear that he should endeavour alterations to the better with his majesty's consent; but without any regard whether his majesty dis-assented nor not, he made himself sole judge what alterations were advantageous, and of the lawfulness of the means, and endeavours to alter, which resembled too much the words and meaning of the treacherous solemn league and covenant. 2do, These words, “ any alteration,” are indefinite, and equipolent to the universal, “ all alterations,” (this is so sophistical,) without so much as excepting the monarchy and fundamentals of the government. 3do, These words ‘ consistent with my loyalty,’ were judged taxative and restrictive, seeing his loyalty might be far below the standard of true loyalty, not five-penny fift, much less eleven-penny. Whatever ambiguity might be in the words if strained, (the clearest paper in the world may be

pearing, and that they had no defence to propose in this cause nor against the lybell.

His Majesty's *Advocat* declares he restricts the lybell against the late duke of Buccleugh and Monmouth to his invading the kingdome off England, and other subsequent acts lybelled.

The Lords Justice General, Justice Clerk, and Commissioners off Justiciary, having considered the lybell persewed against the late duke off Buccleugh, with his majesty's advocat's restrictione above-written, they find the samen as its restricted, and each particular act of Treason relevant *separatim* to infer the paine off treason, and remitts the samen to the knowledge off ane Assyse.

Assisa.

The marquis off Douglas.

The earle off Marr.

The earle off Hume.

The earle off Lauderdale.

The earle off Callender.

The lord Rosse.

The lord Elibank.

The lord Torphichen.

The lord Aberdour.

Sir William Drummond, off Hathornden.

James Somervail, off Drum.

Mr. James Ellies, off Stenhousmyle.

Sir John Delmahoy, off that ilk.

Mr. James Lowes, off Merchystoune.

Sir Patrick Murray, off Douchar.

The Assyse lawfullie sworne, no objection of the law in the contrare.

His Majesty's *Advocat* for probation adduced the witnesses after deponing, they are to say captaine Bruce and captaine Buyse.

His Majesty's *Advocat* repeated and produced the remission to the said witnesses under the quarter seall for ther being ingaiged in the rebellion with the said late duke of Monmouth, wherby they ar rendered habile witnesses, and frie of all impressiones.

thus made to infer treason if tortured,) or inconsiderateness in this explanation, yet all were fully conviuced, that in such cases one ought to be allowed to interpret his own words, which Argyll did very neatly, in a speech to the lords, and also modestly represented his great sufferings and services for his majesty: And that though they deserved some lesser punishment, yet it was called a diabolical alchery to screw them to treason.—But desperation since this time has made him shipwreck his loyalty and all, so that no more charity can be bestowed upon his explanation. The design was to low him, that he might never be the head of a protestant party, and to annex his jurisdiction to the crown, and to parcel out his lands; and though he was unworthily and unjustly dealt with here, yet he ought to observe God's secret hand punishing him for his cruelty to his own and his father's creditors and vassals, sundry of whom were starving."

Captaine Robert Bruce, late captaine in the duke of Brandenburg's service, aged threttie sex years or therby, unmarried, purged of malice, prejudice, partiall counsell, and ill-will, sworns, depons that in the letter end of May or beginning of June last the deponer mett with the late duke of Buccleugh, in the cite of Amsterdame, in Holland, and that same day the deponent went aboard of a small shipp with the said late duke and others in company, and thereafter went aboard of the frigget and landed at Lyme in England, and thereafter went to Tantoune, thrie ships landed with Monmouth at Lyme, with men and armes, and when he went to Tantoune, he heard him proclaimed king, and he saw him assume the title of king, and receive from the people the acclamations of 'God save the King,' and saw him tutch a boy for the king's evill; and sawe the said duke command the armes of the rebels against his majesties forces, and the deponent knowes that the said duke did sometym pay the souldiers who wer in rebellione with him, and sawe him head a great many of rebels, and under his conduct and command, they did invade and feight his majesties forces, depons he sawe the said late duke of Buccleugh and Monmouth admit people to kiss his hands as king upon the knee: *causa scientia*, he was present, and saw and heard what he has deponed; and this the trewth as he shall answer to God.

Sic Subscritur, ROBERT BRUCE,

LEITHGOW, I P. D.

His Majesty's *Advocat*, adduces captaine Anthony Buyse, another witness, and though he now can speak English, he adduces Robert Sandilands, merchant, in Edinburgh, who was sworne interpreter to what he should not properly express.

Captaine Anthony Buyse, latlie captaine in the duke of Brandenburg's service, aged threttie years or therby, unmarried, purged of malice, prejudice, hatred, ill-will, or partiall counsell, solemnlie sworne, depons that in the letter end of May or beginning of June last, he came in the frigget with the late duke of Buccleugh and Monmouth, from Holland to England, and landed at Lym, and that ther wer three ships cam alongst with him, with men and armes; depons from Lym, the duke and thos that wer with him went to Tantoune, wher he heard him proclaimed king, and that the people called him his majestie, and saw him tutch a boy for a disease, which he understands since they call the king's evill; depons he saw the people kiss his hands as king when he was on horseback, and on ther knees, and that he saw the said late duke command the armie of the rebels consisting of 5,000 or therby, and that he payed them sometym when he hade monie, and that he saw the late duke command the rebels the day they fought against his majesties forces, and ordered the troups and caried himself as commander in chief. *Causa scientia*; he was with the duke and fled with him after the defeate; and this is the trewth,

as he shall answer to God. His deposition was omitted by the deponent in English, having now learned the language.

Sic Subscritur, ANTONY BUYS,
ROBERT SANDILANDS, Interpreter.
LINLITHGOW, I. P. D.

His Majesties Advocat protested for an Assyse of Error.* After leading and adducing of the whilk probationes, the persons of Assyses above named, removed altogether furth of the court to the Assyse house, wher having reasoned and voted the points and articles of the lybell, interloquitur and witnesses depositions above written taken in ther presence, and being therwith well and ryple, advysed, they re-entere againe in court, return ther verdict in presence of the saide lords, wherof, the tenor follows: The Assyse all in one voice, be the mouth of the earle of Lauderdale, ther chancellor, finds the deceit James Scott, sometyme duke of Buccleugh and Monmouth, guilty and culpable of the treasonable invading of the kingdome of England in the moneth of June last, with shippes and armes, and of his treasonable assuming the title of king, acting and behaving as king, commanding the armie of rebells and feighting against his majesties forces in manner lybelled: in respect they find the samen sufficientlie proven.

Sic Subscritur, LAUDERDAILL, Chancellor.

After opening and reading of the whilk verdict of assyse, the Lords Justice Generall, Justice Clerk and Commissioners of Justiciary having considered the said verdict of assyse, they therfor, be the mouth of John Leslie dempster of court, decerned and adjudged the said James Scott, late duke of Buccleugh and Monmouth, now deceiver, his name, fame, memorie and honours to be extinct, his blood to be tainted, and his arms to be riven furth and delate out of the booke of arms, sua that his posteritie may never have place nor be able heirafter to bruike or joyne any lands, lordships, titles, dignities of offices, privileges, goods or geir whatsoever, moveable or immoveable, within this realm, in tym coming, and to have forfaiture annulled and tint all and sundrie lands, lordships, titles, dignities, offices, privileges, goods or geir whatsoever, moveable or immoveable, pertaineing to the said deceiver duke of Buccleugh and Monmouth, to our sovereign lord, to remaine perpetually with his majestie and his successors in proppertie. Which was pronounced for doom, and whereupon his majesties advocat asked and tooke instruments.

N. B. Sir James Dalrymple of Stair is continued from time to time till the 28 March 1687, when a Remission in Latin for him is recorded.

* Concerning the Assyse of Error, See p. 75 of this Volume.

ACCOUNT OF THE EXECUTION OF THE
DUKE OF MONMOUTH, ON WEDNES-
DAY, THE 15TH OF JULY, 1685, ON TOWER-
HILL.

The late duke of Monmouth came from the Tower to the scaffold, attended by the bishop of Ely, the bishop of Bath and Wells, Dr. Tension, and Dr. Hooper; which four the king was graciously pleased to send him, as his assistants to prepare him for death, and the duke himself intreated all four of them to accompany him to the place of execution, and continue with him to the last. The two bishops going in the lieutenant's coach with him to the bars, made reasonable and devout applications to him all the way; and one of them desired him not to be surpris'd, if they to the very last, upon the scaffold, renewed those exhortations to a particular repentance, which they had so often repeated before.

At his first coming upon the scaffold, he looked for the executioner, and seeing him, said, Is this the man to do the business? Do your work well.

Then the late duke of Monmouth began to speak, some one or other of the assistants, during the whole time, applying themselves to him.

Monmouth. I shall say but very little; I come to die; I die a Protestant of the Church of England.

Assistants. My lord, if you be of the Church of England, you must acknowledge the doctrine of Non-Resistance to be true.

Monmouth. If I acknowledge the doctrine of the Church of England in general, that includes all.

Assistants. Sir, It is fit to own that doctrine particularly, with respect to your case. [Here he was much urg'd about the doctrine of non resistance, but he repeated in effect his first answer, Then he began, as if he was about to make a premeditated speech, in this manner.]

Monmouth. I have had a scandal raised upon me about a woman, a lady of virtue, and honour. I will name her; the lady Henrietta Wentworth. I declare that she is a very virtuous and godly woman. I have committed no sin with her, and that which hath passed betwixt us, was very honest and innocent in the sight of God.

Assistants. In your opinion perhaps, Sir, as you have been often told (i. e. in the Tower); but this is not fit discourse in this place.

Mr. Sheriff Golin. Sir, were you ever married to her?

Monmouth. This is not a time to answer that question.

Mr. Sheriff Golin. Sir, I hoped to have heard of your repentance for the treason and bloodshed which hath been committed.

Monmouth. I die very penitent.

Assistants. My lord, it is fit to be particular; and considering the public evil you have done.

you ought to do as much good now as possibly you can, by a public acknowledgment.

Monmouth. What I have thought fit to say of public affairs, is in a paper which I have signed; I refer to my paper.

Assistants. My lord, there is nothing in that paper about *resistance*, and you ought to be particular in your repentance, and to have it well grounded. God give you true repentance.

Monmouth. I die very penitent, and die with great cheerfulness, for I know I shall go to God.

Assistants. My lord, you must go to God in his own way: Sir, be sure you be truly penitent, and ask forgiveness of God for the many you have wronged.

Monmouth. I am sorry for every one I have wronged; I forgive every body: I have had many enemies. I forgive them all.

Assistants. Sir, your acknowledgment ought to be public and particular.

Monmouth. I am to die; pray, my lord — I refer to my paper.

Assistant. They are but a few words that we desire: We only desire an answer to this point.

Monmouth. I can bless God that he hath given me so much grace, that for these two years last past I have led a life unlike to my former course, and in which I have been happy,

Assistants. Sir, was there no ill in these two years? In these years, these great evils have happened, and the giving public satisfaction is a necessary part of repentance; be pleased to own a detestation of your rebellion.

Monmouth. I beg your lordship that you will stick to my paper.

Assistants. My lord, as I said before, there is nothing in your paper about the doctrine of non-resistance.

Monmouth. I repent of all things that a true Christian ought to repent of: I am to die, pray, my lord —

Assistants. Then, my Lord, we can only recommend you to the mercy of God; but we cannot pray with that cheerfulness and encouragement as we should, if you had made a particular acknowledgment.

Monmouth. God be praised, I have encouragement enough in myself: I die with a clear conscience; I have wronged no man.

Assistants. How Sir! No man! Have you not been guilty of invasion, and of much blood, which has been shed, and it may be of the loss of many souls who followed you? You must needs have wronged a great many.

Monmouth. I do, Sir, own that, and am sorry for it.

Assistants. Give it the true name, Sir, and call it rebellion.

Monmouth. What name you please, Sir, I am sorry for invading the kingdom, and for the blood that has been shed, and for the souls which may have been lost by my means; I am sorry it ever happened (which he spake softly.)

Mr. Sheriff Vandeput. (To some that stood

at a distance) He says he is very sorry for invading the kingdom.

Assistants. We have nothing to add, but to renew the frequent exhortations we have made to you, to give some satisfaction for the public injuries to the kingdom: there have been a great many lives lost by this resistance of your lawful prince.

Monmouth. What I have done has been very ill, and I wish with all my heart it had never been; I never was a man that delighted in blood; I was very far from it; I was as cautious in that as any man was; the Almighty knows how I now die, with all the joyfulness in the world.

Assistants. God grant you may, Sir; God give you true repentance.

Monmouth. If I had not true repentance, I should not so easily have been without the fear of dying. I shall die like a lamb.

Assistants. Much may come from natural courage.

Monmouth. I do not attribute it to my own nature, for I am fearful, as other men are; but I have now no fear, as you may see by my face; but there is something within me which does it, for I am sure I shall go to God.

Assistants. My lord, be sure upon good grounds; do you repent you of all your sins, known or unknown, confessed or not confessed, of all the sins which might proceed from error in judgment?

Monmouth. In general for all. I do with all my soul.

Assistants. God Almighty of his infinite mercy forgive you. Here are great numbers of spectators; here are the sheriffs, they represent the great city, and in speaking to them you speak to the whole city; make some satisfaction by owning your crime before them.

He was silent here.

Then all went to solemn commendatory prayers, which continued for a good space; the late duke of Monmouth and the company kneeling, and joining in them with great fervency.

Prayers being ended, before he and the four who assisted him, were risen from their knees, he was again earnestly exhorted to a true and thorough repentance.

After they were risen up, he was exhorted to pray for the king; and was asked whether he did not desire to send some dutiful message to his majesty, and to recommend his wife and children to his majesty's favour.

Monmouth. What harm have they done? Do it if you please; I pray for him and for all men.

Assistants. Then the versicles were repeated. O Lord, shew thy mercy upon us!

Monmouth. (He made the response) And grant us thy salvation.

Assistants. (It followed) O Lord save the king.

Monmouth. And mercifully hear us when we call upon thee.

Assistants. Sir, do you not pray for the king

with us? (The versicle was again repeated.)

O Lord save the king!

Monmouth. (After some pause he answered) Amen.

Then he spake to the executioner concerning his undressing, &c. and he would have no cap, &c. And at the beginning of his undressing, it was said to him in this manner:

Assistants. My Lord, you have been bred a soldier, you would do a generous Christian thing, if you please to go to the rail, and speak to the soldiers, and say, that here you stand a sad example of rebellion, and intreat them and the people to be loyal and obedient to the king.

Monmouth. I have said I will make no speeches. I will make no speeches. I come to die.

Assistants. My Lord, ten words would be enough.*

Then calling his servant, and giving him something like a tooth-pick case, "here," (said he) "give this to the person to whom you are to deliver the other things."

Monmouth. (To the executioner) Here are six guineas for you; pray do your business well; do not serve me as you did my lord Russel; I have heard you struck him three or four times.

"Here" (To his servant) "take these remaining guineas, and give them to him if he does his work well."

Executioner. I hope I shall.

Monmouth. If you strike me twice, I cannot promise you not to stir.

During his undressing and standing towards the block, there were used, by those who assisted him, divers ejaculations proper at that time, and much of the 51st psalm was repeated, and particularly, Deliver me from blood-guiltiness, O God! Thou God, &c.

* Mr. Fox has exhibited, in a simple and affecting Narrative, this account of the last scene of Monmouth's life. And he observes, "that the manner in which the importunities of the divines on the one hand, and the answers of the sufferer on the other, were repeated over and over again, could not be believed, if the facts were not attested by the signature of the persons principally concerned." As to the importunities on the subject of non-resistance, with which lord Russel was assailed in the last moments of his life, see vol. 9 of this Collection, p. 811. 818. See there also, the different conduct pursued by Charteris the Divine, who attended Argyle, previously to his execution. See too in vol. 8, p. 1016, in a note to lord Anglesey's case, bishop Morley's prediction as to the practice of the church of England respecting non-resistance. It should be mentioned, however, that Kenn and Turner, who attended Monmouth, though two of the seven bishops whom king James imprisoned in the Tower, suffered deprivation of their bishopricks, in consequence of their refusal to take the oaths to king William and queen

Then he lay down, and soon after he raised himself upon his elbow, and said to the Executioner, Prithee let me feel the ax; he felt the edge, and said, I fear it is not sharp enough.

Executioner. It is sharp enough, and heavy enough.

Then he lay down again.

During this space, many pious ejaculations were used, by those who assisted him, with great fervency. Ex. gr. 'God accept your repentance, God accept your repentance, God accept your imperfect repentance; My lord, God accept your general repentance; God Almighty shew his omnipotent mercy upon you; Father, into thy hands we commend his spirit, &c. Lord Jesus receive his soul.'

Then the Executioner proceeded to do his office.

This is a true account, witness our hands.

(Signed,) FRANCIS ELY,
THOMAS BATH and WELLS,
THOMAS TENISON,
GEO. HOOPER,
WM. GOSLIN, } Sheriffs.
PETER VANDEPUT, }

A COPY OF THE PAPER, TO WHICH THE LATE DUKE OF MONMOUTH REFERRED HIMSELF IN THE DISCOURSES HE HELD UPON THE SCAFFOLD.

'I declare, that the title of king was forced upon me, and that it was very much contrary to my opinion when I was proclaimed: for the satisfaction of the world, I do declare, that the late king told me, he was never married to my mother. Having declared this, I hope that the king, who is now, will not let my children suffer on this account. And to this I put my hand this fifteenth day of July, 1685. (Signed) MONMOUTH.'

Declared by himself, and signed in the presence of us:

FRANCIS ELY,
THOMAS BATH and WELLS,
THOMAS TENISON,
GEORGE HOOPER.

A COPY OF THE DUKE OF MONMOUTH'S LETTER TO THE KING, DATED FROM RINGWOOD, THE 8TH OF JULY, 1685.

"Sir;

"Your majesty may think it is the misfortune I now lie under, makes me make this application to you; but I do assure your majesty it is the remorse I now have in me of the

Mary. See too, as to the doctrine of non-resistance, the Case of Dr. Sacheverell, A. D. 1709, and Mr. Burke's Appeal from the New to the Old Whigs.

wrong I have done you in several things, and now, in taking up arms against you. For my taking up arms, it never was in my thoughts since the king died. The prince and princess of Orange will be witness for me, of the assurance I gave them, that I would never stir against you; but my misfortune was such, as to meet with some horrid people, that made me believe things of your majesty, and gave me so many false arguments, that I was fully led away to believe that it was a shame and a sin before God, not to do it. But, Sir, I will not trouble your majesty at present with many things, I could say for myself, that I am sure would move your compassion; the chief end of this letter being only to beg of you, that I may have that happiness as to speak to your majesty: For I have that to say to you, Sir, that I hope may give you a long and happy reign*. I am sure, Sir, when you hear me, you will be convinced of the zeal I have for your preservation, and how heartily I repent of what I have done. I can say no more to your majesty now, being this letter must be seen by those that keep me; therefore, Sir, I shall make an end, in begging of your majesty to believe so well of me, that I would rather die a thousand deaths, than excuse any thing I have done, if I really did not think myself the most in the wrong that ever any man was, and had not, from the bottom of my heart, an abhorrence for those that put me upon it, and for the action itself. I hope, Sir, God Almighty will strike your heart with mercy and compassion for me, as he has done mine with the abhorrence of what I have done. Therefore I hope, Sir, I may live to shew you how zealous I shall ever be for your service, and could I say but one word in this letter, you would be convinced of it; but it is of that consequence that I dare not do it. Therefore, Sir, I do beg of you, once more to let me speak to you, for then you will be convinced how much I shall ever be, Your majesty's most humble and dutiful, *MONMOUTH.*"

[The following Letter from Lloyd, bishop of St. Asaph, to Fell bishop of Oxford, contains an Account of the Execution and last behaviour of the duke of Monmouth. It is taken from Heminford's History of the first three Edwards, edited by Hearn, vol. 1, p. 177, Appendix. I here insert it because it contains a passage stating, as Mr. Rose has noticed on the authority of the bishop of Ely, the duke's acknowledgement on the scaffold of the nature of his intercourse with lady Harriet Wentworth, in terms more direct than has any where else been met with, but as that was probably, as Mr. Rose has observed, rather a construction of what the bishop of Ely communicated, than what he actually

* As to this see Fox and Dalrymple, particularly the former.

said, is certainly not to be so much relied on as the declaration of the same bishop and others of what passed in the duke's last moments attested under the hands of all the parties and published by authority:]

" My Lord; July 16, 1685.

" I received your lordship's letter by the last post, with two enclosed, one to the D. of Ormond, the other to the lord privy-seal; both which letters I delivered to their owne hands, and they promised to answer them.

" For the king's inauguration, I know my lord of Cant. has made ready an office to be used every year the 6th of February, so that there will need no question concerning it.

" I was this day again at sir St. Foxe's, to speak with him, but he was not at home, I will try again to morrow.

" I told your lordship in my last, the bishop of Ely was appointed by his majesty to attend the D [uke] of M [onmouth] and to prepare him to dy the next day. The D. wrote to his majesty representing how usefull he might and would be, if his majesty would be pleased to grant him his life. But if that might not be, he desired a longer time, and to have another Divine to assist him, Dr. Tenison, or whom else the k. should appoint. The king sent him the bishop of Bath and W. to attend, and to tell him he must dy the next morning. The 2 bishops sate up in his chamber all night, and watcht while he slept. In the morning, by his majesties order, the lords privy-seale and Dartmouth brought him also Dr. Tenison and Dr. Hooper. All these were with him till he died.

" They got him to owne the king's title to the crown, and to declare in writing, that the last king told him, he was never married to his mother, and by word of mouth to acknowledge his invasion was sin, but could never get him to confess it a rebellion. They got him to owne that he and lady Harriet W [entworth.] had lived in all points like man and wife, but they could not make him confess it was adultery.

" He acknowledged, that he and his dutches were married by the law of the land, and therefore his children might inherit, if the k. pleased. But he did not consider what he did when he married her. He confest, that he had lived many years in all sorts of debauchery, but said he had repented of it, and askt pardon, and doubted not that God had forgiven him. He said, that since that time, he had an affection for lady Herriot, and prayed, that if it were pleasing to God, it might continue; otherwise, that it might cease, and God heard his prayer; the affection did continue, and therefore he doubted not it was pleasing to God; and that this was a marriage, their choice of one another being guided not by lust, but by judgement upon due consideration.

" They endeavoured to shew him the falsehood and mischievousness of this enthusiastical principle. But he told them it was his opinion, and he was fully satisfied in it. After all, he

desired them to give him the communion next morning. They told him they could not do it, while he was in that error and sin. He said he was sorry for it.

"The next morning, he told them, he had prayed, that if he was in an error in that matter, God would convince him of it; but God had not convinced him, and therefore he believed it was no error.

"When he was upon the scaffold, he profest himself a protestant of the church of England. They told him, he could not be so, if he did not owne the doctrine of the ch. of E. in that point of non-resistance; and if he persisted in that enthusiastic persuasion. He said, he could not help it, but yet he approved the doctrine of the church in all other things. He then spoke to the people, in vindication of the lady Herriot; saying, she was a woman of great honour and virtue, a religious godly lady (those were his words). They told him of his living in adultery with her. He said, for these 3 years last past he had not lived in any sin that he knew of: and that he had never wronged any person, and that he was sure when he died to go to God, and therefore he did not fear death, which (he said) they might see in his face. Then they prayed for him, and he kneeled down and joined with them. After all they had a short prayer for the king: at which he paused, but at last said *Amen*. He spoke to the headsman, to see he did his business well, and not use him as he did the lord Russell, to give him 2 or 3 strokes: for if he did, he should not be able to ly still without turning. Then he gave the executioner 6 ginnies, and 4 to one Marshall a servant of sir T. Armstrong's that attended him with the king's leave: desiring Marshall to give them the executioner, if he did his work well, and not otherwise. He gave this Marshall overnight his ring and watch; and now he gave him his case of pickteeth: all for lady Herriot. Then he laid himself down: and upon the signe given, the headsman gave a light stroke, at which he lookt him in the face; then he lay'd him down again, and the headsman gave him two strokes more, and then lay'd down the ax, saying he could not finish his work; till being threatened by the sheriff and others there present, he took up the ax again, and at two strokes more cut off his head.

"All this is true as to matter of fact, and it needs no comment to your lordship. I desire your prayers, and remain, Your lordship's most affectionate,
W. ASAPH.

[Mr. Rose, in his *Observations on Mr. Fox's Historical Work*; Appendix, N^o 8, has published from a Manuscript belonging to the family of Buckleugh the following Account of the Actions and Behaviour of the Duke of Monmouth from the time he was taken to his execution, which, with his permission, I here insert.]

An Account of the Actions and Behaviour of the Duke of Monmouth from the time he was taken to his Execution.

London, 16th July 1685.

"The Duke of Monmouth, from the time of his being taken in the West, shewd a wonderful concern'dness to save his life; and stuck at nothing that could secure to him the hopes of dooing it. His majestie was the first person that he made his application to, by a humble and submissive letter: the queen dowager, that formerly had the reputation of being his friend, during his disgrace with the late king, was not forgot: and my lord treasurer was importuned on that same head. He thought he would not fail in his request to the king, if he would be so happy as to be admitted to the honour of seeing him in private; giving the king to understand that he has such important maters to communicate to his majestie, that should secure his whole nations against the fears and disturbances of rebellion and sedition ever after: and that by the satisfaction he imagines this discovery would give the king he doubted not, but in some measure, to deserve pardon upon this consideration. He was admitted to see the king at Mr. Griffin's; where, at his majestie appearing, he fell down on his knees, and with much earnestness begged his life, and his majestie's pardon for what he had done. The king told him, of the latest. The substance in generall of what he had told his majestie, and as yet has come to my knowledge was: that he was deceived and imposed upon by a company of rogues and vilans, that flattered him with the hopes and promises of achieving of great matters; and that if he land once on English ground all the nation would appear for him; that several cities and counties would declare for him at the first report of his being ready to head them: that he had frequent encouragements to undertake that unfortunate expedition: that his assumeing to himself the title of king, & causing the same to be proclaimed, was both against his judgement & inclination: but that it was ane artifice they made use of, to make him believe that by so doing, all the gentry, as well as the rabble, would come in to him: That Fergusone was chiefly the person that instigat him to set up his title of king, & had been a main adviser and contriver of the whole affair, as well to the attempting as acting what was done: that it was Fergusone that penned the declaration, & published it afterwards, & had the greatest share in the worst designe & resolution that was taken: that the designe of invading the nation in that manner he did, was not formed three weeks or ane moneth before it was executed: that the supplies of money came from private hands & none from publiick. That one Look, an Anabaptist in Holland, had helped him to a thousand pounds for his own share, & had promised to have followed him into England in five days after his landing there with a very considerable soume of money, that he assured

him would be gathered amongst persons of his own acquaintance & well affected to the designe: that it was by much importunity of these rogues he was prevailed upon to take that expedition. This is what I have learned of what passed in general; but as to particular persons and things, I have no light into.

“That night he was carried away to the Tower; and the duchess his lady, having obtained leave of his majestie to see him, and desiring my lord privie seall might be by all the while, that no discourse might pass betwixt them but what was fitting his majesty should know, was conducted to him by his Lo. The first interview was melancholy enough. He saluted her, & told her he was very glade to see her; most of the discourse that passed afterward was directed to my lord privy seall, & insisted of much what he had said to his majestie, but enlarged on the topicks that might induce his majestie to save his life; fancieing withall, that he hoped he had given his majestie satisfaction so as not to despair of pardon.

That his life would be of service to the king, as knowing the bosome of all the disaffected persons in his dominions, & therefore capable of all their ill designs & preventing thereof against his person or government. The lord privie seall told him that he had no order or commission from his majestie to say any thing to him, but to wait on his lady & conduct her to him. That if he had any thing to say to him in relation to his affairs and children, that he would lose no time in doing of it: that if he was not willing he should be present at what he had to say to his lady, he would withdraw into the next room: and for his hopes of satisfying the king, he knew best himself what was past betwixt them, and what ground he had to hope when he parted from the king. At his being convinced now of the villany and knavery of these men that set him upon that false desigue, and concurred with him in the execution of it, was no more then what was long before, having declared so frequently to the late king in the hearing of so many persons that they were knaves & villans; that Ferguson was a bloody rogue & alwayes advised to the cutting of throats, & how should it happen that he should suffer himself to be ruled and imposed upon by them. This was the substance of his Lo. discourse, to which at several times he made replys, that he had nothing to say to the lady but what his Lo. might safely hear: that he was obliged to his Lo. for the great friendship & kindness he was pleased to shew her, for the last in particular. But the notion of hoping for pardon running strangely in his head as done

Nothing was called of what always came in, askeing frequently if there were no hopes of mercy, alleadgeing that his . . . desire he had of making the king's reigne happy & easie, which he fancied would certaintie happen if his life were spared. Then the duchess took the liberty to interrupt him in these digressions and imaginary expectations of life, & after

some general things asked him, If ever she had the least notice & correspondence with him about these matters? or had ever assented to or approved of his conduct during those 4 or 5 last years; if ever she had done any thing in the whole course of her life to displease or disoblige him or ever was uneasie to him in any thing but two, one as to his women, & the other for his disobedience to the late king, whom she always took the libertie to adryse him to obey & never was pleased with the disobedient course of life he lived in towards him? If in any thing else she had failed of the duty and obedience that became her as his wife, she humbly begged the favour to disclaim it, & she would fall down on her knees & beg his pardone for it. To which moving discourse he answered, that she had always shewen herself a very kind, loveing & dutiful wife toward him, & had nothing imagineable to charge her with; either against her virtue & duty to him, her steady loyalty & affection to the late king, or kindness or affection towards his children: that she was always averse to the practise of his life and behaviour towards the late king & advised to great compliyanse and obedience towards his commands.

“This is in short what was most remarkable in the first interview and conversation. Munday night, the next day, the intimation of his execution to be on Wednesday thereafter, was first brought to him by the bishops of Eli, Bath and Wales, who stayed the most of the day & night with him. All the while he importuned more of his former acquaintance, especially such as he thought to have any credit or interest with the king, to intercede for him; at least for a longer respyte. The lord Anandale & the lord Dover were frequently sent for to come and speak with him. The latter not being in town, could not give him that satisfaction he promised himself if he saw him. The first had leave to go & see him; & the business was, that he would be pleased to go & wait on his majestie, & reinforce the arguments he had formerly used towards the saving of his life. The queen had a letter from him to that purpose, as also the queen dowager. But all signified nothing. And when he saw all his endeavours & solicitations to be unsuccessful, he layed down his hope of living & bethought himself of the well-employing the few hours that remained.

“The two bishops I named were attending to the last minute upon the scaffold, as also Dr. Hooper, Dr. Tinnison of St. Martine's-in-the-Fields, whom he usually heard when he lived in London, before his first disgrace. The heads of the divines discourse with him, was to make him sensible of the former course of life he led, & of the rebellious part of the last of it; he having abandoned himself to all sorts of lusts without regard to the laws of God or man: & living for the last two years in the public practise of it with the lady Henrietta Wentworth. Most of their discourse insisted upon these two things; & their chief labour

was to make him sensible how grievous & unpardonable these crimes were, unless humbly confessed & sincerely repented of. The substance of what he said to both these points was; that he was none of those whom the world called Atheists, that believed not a Supreme Being or future state, that with all profound respect and suitable adoration he believed both; that he was of the religion of the Church of England, & believed all the articles & doctrine of it, without excepting any; that it was too true that he had for a long time lived a very dissolute & irregular life, & being guilty of frequent breaches of the conjugall vow: that he had oft humbled himself for it before God, & hoped he would pardon him: that as for his conversation with the lady Henrietta Wentworth, whom the world had much aspersed because of that, he knew her to be a vertuous and godly lady (these were his own words) & far from deserving the unkind censure she ly's under on his account; that it is true that their conversation was very intimate together; & whatever was of it he had consulted God in prayer about it, to know his pleasure & approbation, & had not met with anie returne that marked his dislike or discountenancing of their conversation: that for the last two yeares he had made it his business to lead a more sober & regular course of life then he had done before, & especially to guard himself against the sins of incontinencie & lust; towards the effecting thereof he did what he could to subdew & mortifie his body by frequent fasting & prayer & had not the temptations of anie irregular desire or appetite towards that lady, but was the farthest from it in the worlde; but if at anie tyme through inadvertencie or suddenie of passion ane oath proceeded from him, he seldom faillized of retyreing himself, & beging God pardone for it: and as to the other point he said it was true he offended the king in invading the nation in ane hostile way, & that it was his misfortune to be . . . into it by . . . persuasions of ill men that haunted his companie: that he was sorrie for it, and begged God pardone for it & the king; that he owned the king to be the only true and lawfull king, & renounced & disclaimed all title & pretentions to the crowne, the leat king having told him he was not his lawfull son, which did abundantly remove from him all the hopes & notions wherwith he might have flattered himself with; this last part he wrote & signed with his hand to be delyvered to his majesue & published to the world, the two bishops and two doctors having signed as witnesses to it.

"This branch of his discourse pleased them more than the former; which he perceiving & desyring he might have the sacrament, but they finding him not qualified for it by reason of his not owning his sinfulness of his conversation with that lady, nor ane signe off repentance for what had bein betwixt them, thought fitt to refuse him. They laboured much to remove that erroneous opinion that

betrayed to that unjustifiable conversation with her, of which the world has talked soe scandalouslie of late yeares. They told him by noe law ever observed or practized amongst Christians, no by anie law of the land, could it be allowed him to have anie other woman but his wyfe, that he was lawfullie married to & had solemnly vowed to have none other dureing his lyfetye: that of necessitie, for all that her virtue & goodnes that he talked of, she must be either his whore or his wife; this she could not be because he was married before to his lady the duches of Monmouth, & had lawfull begotten children of her, and the law could not allow of two wives, for she most needs be no better than his whore, of which he had reasons to repent & acknowledge his guilt. To which he said, that when he was married to the duchess of Monmouth he was verie young, & under age, & did not weel know what he did or obledge himself to performe on that account: That he had not that perfect love & affectione for her that either she deserved or he wished himself to have had towards her, which was the occasione of his going so frequently astray from her & the running after other women: That the ladie Henrietta Wentworth was the persone in the world that cured him of that wandring appetite, having mett with in her conversatione all the blessings he could promise himself or expect: That they had consulted God by prayer and fasting about it, & was satisfied in their consciences of the innocencie & sinceritie of the intentione; and talking thus enthusiastically on that head, and giving noe better reasons for his opioune & practice then what is her sett doune, he went on to the great amazement of those learned & pious divynes. And to interrupt him, one of them asked him, if he allowed of polygamie, of fornicatione, & adulterie, or thought them to be sins. He answered by a full disowning of polygamie, adulterie & fornicatione; & believed them to be damnable sins, which unless repented of, they who are guilty of them cannot be saved. Yet for all this they could not disengage him of these od notions he intertained off his conversatione with that ladie. Aneother asked, if he owned the dutches of Monmouth to be his lawfull wife, and his children to be his lawfull children? To which he replied, That she was his lawfull wife & he owened her as such; that his children were his lawfull begotten children. This is in substance what passed on Tuesdaye.

"On Wednesdaye untill he was led furth to executione the divines continowed & renewed their pious endeavours to prepare him for aneother world. Frequent pious discourses and repeated prayers were used by all of them. Sometyes they prayed with him, & sometyes he was left to praye himself alone. His behaviour all the tyme was brave & unmoved, & even dureing the last conversatione & farewell with his ladie and children, which was the mourningest scene in the world, and noe bystanderes could see it without melting in

tears, he did not shew the least concernedness. He declared before all the companie how averse his duches had bein to all his irregular courses; that she had never bein uncase to him on any occasione whatsoever, but about women and his failzing of dute to the leat king; and that she knew nothing of his last desaigne, not having heard from himself a year before, which was his owen fault, & noe unkindness in her, because she knew not how to direct her letteres to him. In that he gave her the kindest character that could be, & begged her pardone of his many failzeings and offences to her, and prayed her to continow her kyndnes an' caire to his poor childeren. At this expression she fell down on her knees with her eyes full of teares, and begged him to pardone her if ever she had done any thing to offend and displease him, and imbraceing his knees fell into a sound, out of which they had much adoe to raise her up in a good whyll after. A little before his childeren were brought to him, all crying about him; but he acquytt himself of these adewes with much composednes & sinceritie of temper, shewing nothing of weakness or unmanlienes.

"About ten a clock he was carried out of the Tower in coach. And after having passed the bridge was delyvered into the sherifs hands, who led him alonge up to the scaffold. Noe man observed more couradge, resolutione & unconcernedness in him, any time before then appeired in him all the whyll he walked to the scaffold, whyll he mounted the scaffold, and whyll he acted the last part upon it. As he walked to it all the horse & foot guards were drawn up round about the scaffold on Towerhill. He saluted the guards & smyled upon them. When he was upon it, the sherif asked him if he had any thing to say. He told him he was never good at the making of speeches, & would not begin now; for he was sure he would not be heard; & if he were it would signifie nothing. Only he told him he had on thing to say which related to the reputatione of a verie vertuous & worthie young lady, which had suffered much on his accompt, & therefore would give the world that publick & last testimonie of her innocencie & vertue; & so run on in her comendatione, till that the sherif interrupted him, by asking if he was married to her, that he took soe much paines to vindicate the familiaritie of his conversatione with her. To which the duek answered with some motione, that it was no tyme now to answer particular questiones; he being full of her ever to the verie last, could not forbear concludeing his lyfe with breacking furth the last testimonie of his esteem & affectione to her. He declared that he dyed in the belief of the doctrine of the Church of England. Then they went to prayer. He said amen, heartilie to all the articles of the Letanie, and prayed heartillie for the king. In his owen partikular prayeres, he desyred that God would pardone him all his knowen & unknowen sins; especially those of the last part of his life, &

the blood that had bein shed upon his accompt, if anie poor soul were lost upon that occasione, & not laye it to his chaarge. And the divines, addressing him anew, with a renuesing of that erroneous opinione about that ladie, he said, if he was mistaken in that opinione, he begged God pardone for it, & of all the consequences of it.

"After that the devotionarie & interrogatorie pairt had been over, he went to that part of the scaffold where the block & ax laye. The axe he took into his hand, and felt the edge of it, saying to Jack Ketch, the executioner, that sure the ax did not feill as if it were sharp enough, & prayed him that he would doe his office weill, & not serve him as he was told he had done the late lord Russel; for if he gave him tuo stroaks, he would not promise him that he would lye still to receive the third; & putting his hand in his pocket, gave him six guineas; telling him, that if he did his dutie weill, he left six more in his servaut's hands to be given him after he was dead, provyding he did his business handsomely. All this he said with alse much indifferencie & unconcernednes as if he were giveing ordours for a sute of cloathes. Noe change or alteration of countenance from the first unto the last; but stript himself of his coat; & having prayed, layed himself doune, and fitted his neck to the block, with all the calmnes of temper and composer of mynd that ever hath bein observed in any that mounted that fatall scaffold before. He would have no cap to his head, nor be bound, nor have anie thing on his feace; and yett for all this the butcherly dog, the executioner, did so barbarously act his pairt, that he could not, at fyve stroaks of the ax, sever the head from the body. At the first, which made only a slender dash in his necke, his body heaved up & his head turned about; the second stroak he made only a deeper dash, after which the body moved; the third, not being the work, he threw away the ax, & said, God damn me, I can do noe more, my heart fails me. The bystanders had much adoe to forbear throwing him over the scaffold; but made him take the ax againe, threatening to kill him if he did not doe his dutie better, which two stroaks more not being able to finish the work, he was fain at last to draw furth his long knife, & with it to cutt off the remaining pairt of his neck. If there had not bein a guard before the shouldiers to conduct the executioner away, the people would have torne him to pieces, soe great was their indignatione at the barbarous usage of the late duek of Monmouth, received at his hand. There were many that had the superstitious curiositie of dipping their handkerchiefs in his blood, & carreying it away as a precious relique.

"Thus I have delyvered your Lo. a rude historical draught of what has come to my knowledge from original hands, concerning the last three dayes of that unfortunate gentleman's life; having marked the most substantial and materiall thing I could gather from the tyme he came to Whythall till the

last act of his life, and his coffin. They are soe unusuall and inconsistent in a maner that on knowes not how to reconceill them to one other, & I am to believe on shall hardly meitt in historie the life of aine hero, ancient or moderne, so manie surprysing & -unsuteable characteres concurring in on persone, to be excessively fond of life, & yet very unconcerned at pairing with it. But thes calculationes I leave to your wittes and philosophers of the age.

“He left noe other peaper, then that where these few lines were writt, where he declared he had noe title or clame to the crowne, because he was illegitimate, & that the late king had told him and assured him of it; wherefore he humbly begged the king that he would be pleased to be kynd to his poor children. The dutchess of Monmouth has demained herself, dureing this severe tryall & dispensatione of providence with all Christian temper & compositione of spirit, that possibly could appeir in a soule soe great & vertuous as hers. His majestie is exceedingly satisfied with her conduct and deportment all alonge, and has assured her that he will take a cair of her & her children. In the afternoone many ladys went and payed the complement of condolance to her, & when they had told her how great reasone she had to bear this dispensatione with that vertue that has appeired alwayes in the actiones of her life, and how the world celebrated her prudence & conduct dureing her late late lord's disloyaltie and behaviour to the late king, and his unkyndness to her; that justly gave her a name that few of the former or present ages ever arryved at. To which she modestly replied, that she had bought that commendation dear.

“I forgot to tell you Lo. that among other discourses that past betwixt her husband & her, she declared that for the last four or fyve years she had received but out of her estate in Scotland 1,100*l.*; all the rest being employed by him. He was cloathed in a gray cloath sute, plaine linings & dark periwig. His bodie & head was put into a coffin, & that into a black herse. My Lord, Your Lordship's

“I. F.”

Mr. Serjeant Heywood has just published (Appendix to his Vindication of Mr. Fox's Historical Work, No. 4) a curious Account of Monmouth's rebellion as given in a Letter which is preserved in the British Museum, from a clergyman named Paschall, who lived at Chedsey, close to the field of battle. In this Account is given a Proclamation against Albemarle, which I suppose to be that mentioned by Collins. It is as follows:

“*The Duke of Monmouth's Commission, procured by the Quaker, and published at the meeting of the Club men, on Pcalden Hill, Wednesday, June 24, 1685.*”

“James R.

“Whereas we are given to understand that our faithful and loyal subjects, in and about Brent Down and Uphill, and other places adjacent in our county of Somerset, have taken

arms, and in defence of our person and of the righteous cause we are engaged in, we could not but in a particular manner take notice of their affection and commend their zeal, which they have given such early marks of against popery and tyranay. And therefore we do hereby justify and allow whatsoever they have already acted on our behalf. And further we do authorize them or any of them, and by these presents give them our royal warrant and commission to arm themselves in the best maner they can, and to disarm, seize, take, prosecute, and kill, and with force and arms subdue all manner of person and persons, that shall appear in arms for James duke of York, the usurper, or that shall act by any authority, derived, or pretended to be derived from him. And persons whatsoever, whether French or Irish, papists or others, that shall land upon the coast, and in a more particular manner to prosecute, subdue, and kill Christopher duke of Albemarle, and his adherents, whom we have already declared rebels and traitors. And we do hereby likewise authorize, and require all our loving subjects, in all other parts and places upon the coast in the said county of Somerset and Devon toward the said coast, which will otherwise be speedily invaded by French and Irish papists, sent for over, and called in to that purpose, which will be to the utter ruin and devastation of our kingdom, and all our loving subjects. Dated at our camp at Glastonbury, the 23d of June, 1685, the first year of our reign.”

Serjeant Heywood also refers to Wade's “Farther Information” (on which Mr. Fox so much relies) published in the Hardwicke State Papers; and to another Narrative (which he suppose to be the work of James) of Monmouth's proceedings published in the same Collection.

The following Extracts from what Macpherson calls “The Life of James the Second written by himself” (see vol. 6, p. 297, & seq.) relate to Monmouth's share in the Plots of 1683, and to his landing in 1685, and the proceedings had thereupon.

“The king was slow in crediting it (the Rye House conspiracy;) but the duke of Monmouth, at last, confessed it. He submitted, when the proclamation was issued out against him, and owned his knowledge, naming all the conspirators. But getting his pardon, herded in with his factious councillors; and though he had left a letter with the king owning all, he got the king to return it, and then denied every word of it. He was banished from court, and retired abroad to Zealand.

“Dec. 8th, 1683. The duke of Monmouth owned to the king, in presence of the duke of York, at secretary Jenkins's, that he knew of the whole conspiracy except the designed assassination; and all the persons, who were concerned in it with him; and did not contradict any thing lord Howard said; but in one point not very material. He owned what

colonel Rumsey had said, as to lord Russel's saying, when Trenchard had failed them, that he would immediately put on his boots, go down into the West, to Taunton, and make them rise himself. He wondered no more witnesses came in against Wildman, since no man was more active in the conspiracy. He said, that the council of six gave fifteen pounds a man, to send down Aaron Smith to Scotland; that sir Wm. Courtney, sir — Drake, and other gentlemen, knew of it, in the West; that Mr. Booth was the person they depended on Cheshire, and sir J. Hotham in Yorkshire. He owned his visiting the Guards, in order to the surprize; that doctor Owen, Mr. Mead, and all the chief of the North country ministers, were privy to and active in the conspiracy; that major Hurst, of Chichester, said, that it was easy to surprize Portsmouth; and that he was ready to undertake it; for the officers on the guard were, for the most part, drunk every night. The duke of Monmouth being asked by the king, whether they had any correspondence with any in the guards or court, he positively denied it. As for Scotland, that sir J. Cochrane and Monroe's coming up hither about the Carolina business was but a pretence; it being really to adjust matters, as to the rising there, at the same time that it was to begin here: That Cesnock, Rouallen, Bailey, and the other Scots so told, were all engaged in it; that they complained they only wanted arms, but not good will; that Argyll could bring many men to help the western men; and that they had laid a design to surprize Sirling Castle, by an old gutter, or sally port, towards Balangwith, where there were no centinels; that they were to seize the chancellor and treasurer, in Edinburgh, which they thought they could do with forty or fifty horse, which they could easily get into the town, without notice being taken.

“ May 20th 1684. The duke of York to the Prince of Orange. He found, Monmouth had been to see him, without advertising him of his coming. This was odd enough, after engaging in a conspiracy, for altering the government and ruining our family; and refusing, since he had his pardon, to own, that, under his hand, which he had confessed to the king, in the duke's presence. This was to keep up his credit with his rebellious party, and vain pretensions to the crown: For nothing else could make him refuse to sign it.

“ 1685. The prince of Orange considered the king, who was the present possessor, and the duke of Monmouth, the pretender to the crown, as equally obstacles to his aims. He, therefore, had been formerly advised, by the pensionary Fagel, that his business was to play the one against the other; and that whoever got the better would equally advantage his pretensions. If the duke of Monmouth succeeded, it would be easy for him, that was a protestant as well as he, and in the right of his wife, the next heir, to shove him out of the

saddle. If on the contrary, the duke of Monmouth was worsted, he got rid of a dangerous rival; and was sure all his party would then have recourse to him; which proved afterwards true. This made him, underhand, do all he could to inflame this young man's fury and ambition; and send him out, like a victim to the slaughter; playing a sure game himself, to whomsoever fortune should give the advantage at present.

“ The king had been long informed, even in the life of the late king, by one Monpoleam, a companion at their drinking bouts, of the strict correspondence and friendship betwixt the prince of Orange and Monmouth. Upon which the late king said, it seemed strange to him how those two should appear so good friends and agree so well together, as they aimed both at the same thing.

“ There were so many persons, in the mean time, ready to second the duke of Monmouth's request, and among the rest the queen Dowager, that the king, contrary to his judgment, consented to see him, which he should not have done, unless he had been disposed to pardon. He was willing to hear more of the matter, related by Mr. Sheldon.* It was strange my lord Sunderland did not oppose it; unless, as was said afterwards, he underhand assured the duke of Monmouth of his pardon, if he confessed nothing; and then when he had destroyed his own credit, by contradicting himself, he took care to have him dispatched as soon as possible afterwards. If Monmouth's head and heart had been answerable to his mien and personal outside, he had certainly great opportunities of pursuing his aims, by the turbulence of the times, whom my lord Shaftesbury, by his great dexterity, had so much inflamed against the duke of York.

“ The punishment of Monmouth's followers raised discontents. A commission of Oyer and Terminer was issued to the Lord Chief Justice Jefferyes, to go down into the West, and inflict such punishments as the example of former reigns and the security of the present seemed to require. But imprudent zeal, or, as some said, avarice, carried him beyond the terms of moderation and mercy; and he drew great obloquy upon the king's clemency, not only in the number, but in the manner too of several executions; and in shewing mercy to so few, particularly to an old gentlewoman, one Mrs. Alice Lisle, who was condemned and executed, only for harbouring one Nick and

* He had sent Sheldon to meet the duke, on his way to London. Monmouth confessed every thing to Sheldon. He discovered the intrigues of the prince of Orange and his own abettors in England. But Sunderland, it seems, afterwards induced him to deny the whole when he was brought before the king; assuring him, that he was certain of his pardon, and therefore ought not to betray friends, that might be useful to him, on a future occasion.

Nelstrop, both ill men enough indeed, and the latter in a proclamation. But, as she pretended, was ignorant of it, and therefore, perhaps, might suffer for a common act of hospitality. But this severity was contrary to the king's intentions; as appears from the different treatment one major Holmes met with from the king and the Chief Justice. Holmes had lost his son and an arm in the battle. He was brought up prisoner to town. The king being desirous to see him, he behaved himself in such a manner, as gained esteem from every body. His carriage was free from dejection, but full of respect. He had recourse to the king's mercy; and said, the favour he had asked was more beneficial to the king than to him, considering his losses and his years. The king, who loved courage even in an enemy, could not refrain from countenancing him. He discoursed freely with him, and no one was more frequently in the antichamber, till it was thought fit to send him down to the west, to inform Jefferies of those who most deserved mercy. He was hanged with the rest.

"The king questioned the chief justice, but he palliated his severities with the pretence of necessary justice, which the king knew not how to contradict, since he had the precaution, not only to send four other judges as his assistants, along with him, but Mr. Pollexfen likewise, in quality of his solicitor; who, being a known favourer of the presbyterian party, he hoped would moderate the chief justice's heat. This made the king acquiesce in what had been done, though it was of great disservice to him at bottom. The cruelties of Kirk were still more inexcusable than the severities of Jefferies. He caused many to be hanged more out of a bloody disposition, and to satisfy his own brutal passions, than love of justice or his master's service. It is not improbable, but even then he had it in his view to draw an odium on the king.

"On the 11th of June, Monmouth landed with 150 persons, at Lyme in Dorset. Besides the information of Sheldon and the prince of Orange, the king had been informed of it by one Monpouleam, a bottle companion of Monmouth's; who also informed him of the strict correspondence between the prince of Orange and Monmouth, when he was first in Holland. When Monmouth was taken, he wrote, on the road, to desire admission into the king's presence; having somewhat to say, that would give him a happy reign. Ralph Sheldon was sent to meet him; and being asked who had the chief confidence with the king, he said Sunderland, Monmouth then, knocking his breast in a surprise, said, 'Why then, as I hope for salvation, he promised to meet me.' He desired Sheldon to acquaint the king with it, and that he would inform him of all his accomplices, seeing some of them had the king's confidence. Sheldon, on his return, was giving the king an account, when Sunderland, pretending business, came into the closet, and Sheldon stopt, desiring to speak to the king in

private. But the king told him he might say any thing before that lord, which put Sheldon to great perplexity; yet he told what Monmouth said. Sunderland seemed at first struck; but, after a short time, said with a laugh, If that be all he can discover to save his life, it will do him little good. Monmouth, after he was brought to the king, begged for mercy; but made no great matter of discovery. He would not see his dutchess his wife in law, nor in the sight of God.

"Proclamation against colonel Danvers, J. Trenchard, George Speke, Francis Charlton, and J. Wildman. The lords Stamford, Delamere, and Brandon seized, and put in the Tower. Jefferies sent to the west. Major Holmes sent to inform Jefferies of the most criminal, and of such as deserved mercy, was hanged with the rest. Kirk, with his troops, made strange havock. Lord Brandon Gerard was tried and found guilty, on the 26th of November, but was afterwards pardoned. Hampden pleaded guilty. Delamere was acquitted, and Seaton found guilty of perjury. Stamford was not tried, but pardoned. Dangerfield was tried, on the 28th of June, and found guilty of perjury. Having been whipped to Tyburn, as he was returning in a coach, one Mr. Francis asking him, in derision, how his back did, Dangerfield making an abusive reply, and Francis thrusting in his cane, unfortunately hurted his eye; of which he died in some days. Francis was tried and condemned; and though he deserved well of the king could obtain no pardon. Hook was sent from Bridgewater to London, for the insurrection there. On this, the king had augmented the guards to 12 or 14,000 men."

With respect to king James's giving an interview to Monmouth, whom he was determined not to pardon, Wellwood says, "King James, in ordering him to be brought into his presence, under the sentence of death, was pleased to make one exception against a general rule observed inviolably among kings, Never to allow a criminal under the sentence of death, the sight of his prince's face, without a design to pardon him." Wellwood's Memoirs, p. 170.

When it was told the duke of Ormond that Blood was taken, and that his majesty desired to see him, "Then," said he, "the man need not despair, for surely no king should wish to see a malefactor but with intentions to pardon him." Sir Robert Southwell's Life of the First Duke of Ormond, inserted in Lord Mountmorres's History of the Principal Transactions of the Irish Parliament, vol. 1, p. 274.

Of Monmouth's progress in quest of popularity (See 1 Ralph, p. 497, and 1 Oldmixon, 643.) mention has been made in this Collection, vol. 10, p. 1336.

The following passage of Dalrymple's Memoirs, part 1, book 1, p. 14, 4to edition, is curious as exhibiting his disgraceful and ab-

most incredible ignorance of the nature of the writ of Habeas Corpus. "In the midst of Monmouth's triumphs, Charles gave orders to take him into custody. The day he was arrested, he was to dine in the public streets of Stafford with all the inhabitants, in consequence of an invitation which they had given him. A single messenger entered the town, shewed his writ, and carried him off. Monmouth dispatched air Thomas Armstrong to London for a Habeas Corpus; It was instantly granted: but Monmouth, instead of returning to his friends, continued his journey to London. Men knew not which most to admire, the reverence of the people for the laws when they saw them displayed, or the noble nature of the law of personal freedom, which gave security even to a disturber of the state, until a legal charge was brought against him."

How far it is likely that after Monmouth had advanced from Lyme he could by any means have effected the success of his expedition or the escape of himself, I do not pretend to determine. Hume (with great rashness, no doubt, as Mr. Fox has observed) asserts unqualifiedly that the insurgents would, notwithstanding the failure of their ammunition, have at last obtained a victory, had not the misconduct of the Duke and the cowardice of Grey prevented it.

Reresby, (See vol. 8, p. 218, of this Collection) mentions the fear which was entertained that should Monmouth give a blow to the king's forces there would be an insurrection in London: and it is stated in Macpherson's 'Life of James the Second written by himself,' that if Monmouth had not been beaten a rising would have taken place in London, for which men were ready. Certain it is, that success was rendered impossible by the misconduct of Grey, both in council and in the field, for which as appears to me it is impossible to account but by the operation of the foulest treachery, though I observe that Mr. Fox, who speaks of Grey as in all instances the Evil Genius of Monmouth, imputes to him cowardice alone.

Roger North, (Examen, part 1, chap. 2, s. 93) noticing lord Grey's refusal in Charles the second's time to serve under Monmouth against the Scots insurgents, adds, "but whether really for this cause [a scruple, which he tells us was raised, that the march into Scotland of English troops would be a violation of the contract between the two nations, that neither should hostilely invade the other] or other private reasons against the duke of Monmouth (whom for domestic causes he hated) did not appear. But afterwards in the reign of king James the second, when the duke came from Holland, the lord Grey of Wark served in the same command under him, and whether at the battle of Sedgmore he did not more regard revenge to his private wrongs, than the success of that enterprise, is as dark as the other."

Welwood (Memoirs 172) says, that "Mon-

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mouth was inflexible against assuming the title of king, until it was told him that it was the only way to provide against the ruin of those that should come in to his assistance in case he failed in the attempt, that they might be sheltered by the statute made in the reign of Henry the seventh in favor of those that should obey a king *de facto*. Those that advised him had different ends in it; some to render the breach between king James and him irreconcilable, and thereby pave a way for a Commonwealth in playing them against one another; others to prevent a possibility of his being reconciled to king James by the merit of delivering up those that should join him, which was a thought unworthy of that nice sincerity he had shewn in all the former conduct of his life."

And in the preceding page he says, he remembers to have heard Rumbold say openly at his execution in Scotland [See his Case, p. 873 of this Volume,] that Monmouth had broken his word with him in declaring himself king.

Nelthorpe, in his last speech, declared, that he believed Grey and Mr. Ferguson were the chief prompters of Monmouth's being declared king. See pp. 356, 357, of this volume.

In Narcissus Luttrell's "Brief Historical Relation" is the following account of the behaviour of Monmouth and Grey:

"July 13th, 1685. The late duke of Monmouth and lord Grey were brought up to town, guarded by several troops of horse; the former seemed much dejected, the latter very cheerful, talking of dogs, hunting, racing, &c. They were both sent to the Tower, that evening by water, thousands of people being spectators, who seemed much troubled; it is said the duke writ a letter to his majesty, the effect we know not; and that he desired to speak with his majesty, which it is reported he was admitted to. Time must shew the truth.

"15th. There being a warrant for the execution of the duke on this day, he was accordingly brought from the Tower to a scaffold on Tower-hill, accompanied by the bishops of Ely and Bath and Wells, Dr. Cartwright, dean of Rippon, and Dr. Tennison. He was habited in a grey cloth suit lined with black, and a long peruke; he had a discourse with the bishops, and desired to have the Sacrament, which they refused, unless he would there make (as is said) a confession of his crimes; which he denying to do, he had it not: He gave a paper to the bishops and declared himself of the church of England: he was very composed; after near an hour he laid himself down, and the executioner did his office, but had five blows before he severed his head; which being at last done, he held it up, but there was no shouting, but many cried. This done, his body and head were put into a coffin covered with velvet, and carried back to the Tower, where after it was buried."

And in the same MS. is the following mention of some later particulars relative to Grey:

4 A

" Nov. 12, 1685. Ford lord Grey was brought to the King's-bench bar, and asked why execution should not be awarded against him, he being outlawed for high treason, in conspiring the death of the late king, &c. to which he said he desired the benefit of his majesty's gracious pardon, which was read, kneeling at the bar, and it pardoned all treasons, misprisions, rebellions, &c. till 30th of September last. So his pardon was allowed, and he discharged of his imprisonment; and he came into court and was sworn to give evidence to the Grand Jury against lord Brandon Gerard, and Mr. Charlton, and Goodenough was sworn to the same purpose, and colonel Rumsey as to that against Charlton.

" June 17th, 1686. The lord Grey of Warke came into the court of King's-bench, having a writ of error to reverse his outlawry for treason allowed him, the attainder was reversed for error, whereby his lordship was restored to his honor and blood."

In 1695, Grey was created earl of Tankerville, and towards the latter end of king William's reign he filled for a short time the offices first of First Lord of the Treasury and afterwards of Lord Privy Seal. See some farther account of him, vol. 9, pp. 361, 362.

Concerning the reported marriage of Charles the second to Monmouth's mother, Mr. Rose has, in addition to what was before in print, (as to which, see 2 Coke's Detection, 245, 246, 249. 3 Kennett's Complete History, (2d ed.) 366. 1 Oldmixon, 626. Echard, 988. 2 Rapin (fol.) 712. 1 Burnet (fol.) 260, 261. 1 Ralph, 497, 498, 499. Sandford's Genealogical History. Harris's Life of King Charles the 2nd: and 'A Letter to a Person of Honour concerning the King's disavowing the having been married to the duke of Monmouth's mother,' in the Harleian Pamphlets; which Letter, according to Ralph, was supposed to be written by the noted Ferguson), published (Observations on Mr. Fox's Historical Work, Appendix. No. 7), from the original Record in the Chapel of the Rolls, the following very curious document: which I here reprint, under Mr. Rose's ready permission:

ENROLMENT in Chancery of King Charles the Second's Declaration that he was not married to the Mother of the Duke of Monmouth. — Secunda Pars Claus' de Anno Regni Regis Caroli Secundi Tricesimo secundo.

REIGS DECLARAC'ONS. (30.) MEMORANDUM that Tuesday the fifteenth day of June in the two and thirtieth yeare of the reigne of our sovereigne lord Charles the second, &c. came into the High Court of Chancery the King's Attorney Generall; and according to an order made by the King in Councell the second of the same moneth of June in the said two & thirtieth yeare of his Majesties reigne, moved that the two severall declarac'ons of his Majesty hereafter menc'oned, both written by his

majestie with his own hand, be inrolled amongst the records of this Court for the safe custody of thein; and said that divers noble persons were by the King's com'and present to witnesse them.

Whereupon the court directed that the original declarac'ons themselves should be produced and read, and the witnesses to prove them sworne.

The former of which declarac'ons was thereupon produced and read in the words and figures following:

" There being a false and malicious report industriously spread abroad by some who are neither friends to me or the duke of Monmouth, as if I should have beene either contracted or married to his mother; and though I am most confident that this idle story cannot have any effect in this age, yet I thought it my duty in relac'on to the true succession of this crowne, and that future ages may not have any p'tence to give disturbance upon that score or any other of this nature, to declare as I doe here declare in the p'sence of Almighty God, That I never was married nor gave any contract to any woman whatsoever but to my wife queene Catharine, to whom I am now married. In witness whereof I set my hand at Whitehall the sixth day of January 1678-9. CHARLES R.

" And this Declaration I make in the p'sence

of,
W. CANT',
H. FINCH, Canc',
H. COVENTRY,
J. WILLIAMSON."

And then the archbishop of Canterbury, the lord Chancellor, Henry Coventry, esq. and sir Joseph Williamson, being the persons that subscribed the said declarac'on, did depose, and swear as followeth, that is to say:

The said Archbishop did depose that upon the sixteenth of the same January the king called him into a roome within his bedchamber, and read the declarac'on above recited to him, and then gave it into his owne hand and bade him read it himselfe; which he did, and after that his majestie was pleased to declare that it was all of his owne hand writing and of his owne inditing, and did very solemnly with his hands and eyes lifted up affirme in the p'sence of God that all the contents of that paper were true, whereupon he the said archbishop by the king's com'and did subscribe it by way of attestac'on just above the lord chancellor's name which he found subscribed to it before.

The Lord Chancellor deposed that on Sunday the twelfth of January in the morning, at Whitehall, after his majesty returned from chappel, his majesty comanded him to wait upon his majesty alone in his inner closet by the water side; and there read to him the paper now showne, written all with his majesty's owne hand, and subscribed Charles R. but not sealed, and his majestie com'anded him the said lord chancellor to write his name as a witness to it. The lord chancellor said it was fit for his majesty in the first place to add by way of postscript, ' And this declarac'on I make in

'the p'sence of,' which his majesty did immediately write with his owne hand. Then he the said lord chancellor desired to know of his majesty what other witnesses he intended to call to it, that he the said lord chancellor might write his name at a due distance; his majesty was pleased to say he would have him and the two secretaries. The lord chancellor then told him that to a businesse of this nature the most proper witness that could be called was the archbishop of Canterbury: So he the said lord chancellor left a space for his the said archbishop's name, and subscribed his owne as it now stands.

The said Henry Coventry deposed that both the former hands were set to it before he subscribed it, and that he did subscribe itt; and that this produced, is the very same paper, and that the king said it was his owne hand and protested the truth of it.

The said sir Joseph Williamson deposed that the king called him in into the inner closet and read the declarac'on, and bid him read it, and that the king did declare in the p'sence of God that it was his declarac'on: and declared the truth of it, and that he was never married to Mrs. Barlow.

Then the second Declarac'on was read, and also the cobby of it, as it is entred in the council bookes; and they being examined and compared agreed exactly, being in the words and figures following:

"For the avoiding of any dispute which may happen in time to come concerning the succession of the crowne, I doe here declare in the p'sence of Almighty God that I never gave nor made any contract of marriage, nor was married to any woman whatsoever, but to my p'sent wife queene Catharine now living. Whitehall the third of March 1678-9.

"CHARLES R."

After which immediately follow in the counsell bookes the words and letters following:

"His majesty com'anded us who were p'sent att the making and signing this declarac'on to attest the same.—Finch C. Danby. Lauderdale. Worcester. Essex. Bathe. Craven. Aylesbury. Ossory. Arlington. Sunderland. Clarendon. H. London. N. Durham. W. Maynard. G. Carteret."

And then the persons whose names are above subscribed, being all of them p'sent excepte the earle of Danby and the bishop of Durham, whoe were now absent, and sir George Carteret, who is now dead, did depose and swear as followeth, that is to say:

The Duke of Lauderdale, uppon viewing the counsell booke, did swear that he heard the king declare it, and that the king's hand is to it, and his owne hand is to it, and that he saw the king signe it, and that it is the same as it is now entred.

The Marquesse of Worcester did depose that the king produced the declarac'on in counsell

written and signed with his owne hand: and com'anded that it should be entred; that he saw the king signe the entry, and that he did subscribe it in the booke by the king's com'and, and that he likewise heard his majesty make the same declarac'on by word of mouth.

The Earle of Ossory deposed that the declarac'on was entred in the counsell booke by the king's com'and, and that the king did subscribe it, and that the earle of Ossory himselfe did subscribe it by the king's com'and.

The Earle of Arlington deposed, that he doth remember his majestie's producing in counsell the declarac'on in paper, that the king did underwrite that in the counsell booke being entred there by his com'and, and com'anded that it should be soe underwritten as it is by several lords p'sent, and remembers his owne name to be his owne hand writing.

The Earle of Sunderland deposed that he heard the king declare it; and com'anded it should be soe underwritten, as it is; that he saw the king signe it, and that he the earle himselfe did subscribe it.

The Earle of Clarendon deposed that he heard the king make the declarac'on and com'anded it should be entred in the counsell booke; and that he saw the king signe it after it was entred. His majesty then com'anded the lords who were p'sent to subscribe the same, which they did, and he the said earle subscribed it likewise.

The Earle of Essex deposed that he heard the king declare the words; and that the king did signe it and com'and it should be entred and subscribed; and it was done accordingly.

The Earle of Bathe deposed that he heard the king make the declarac'on; and com'and it should be entred and subscribed, which was done accordingly. That he saw the king signe the booke, and his the said earle's name is to it as a witness.

The Earle of Craven deposed that the king made the declarac'on above menc'oned; and com'anded it should be entred into the counsell booke, which being done his majesty signed it and required all the lords then p'sent to signe it alsoe, which was done accordingly by the said earle.

The Earl of Aylesbury deposed that he heard the king make the declarac'on; and that he did signe it and com'and it should be entred, and that he the said earle did subscribe it himselfe.

The Bishop of London deposed that he heard the king declare it; but he did not see the king signe it, but doth believe it is the king's hand; but he himselfe did subscribe it, and it is the same declarac'on.

The Lord Maynard deposed that he heard the king declare it, but did not see him signe it, being at the lower end of the table; That the king com'anded it should be entred, and he himselfe did subscribe it.

The Lord Chancellor deposed that he saw the king signe the declarac'on, and that he com'anded the lords to take notice of it and

that it should be entered, and he himself did subscribe it, and it is his hand that is to it.

Sir John Nicholas, one of the clerks of the council, deposed that he by the king's command entered the declaration with his own hand in the council books from the original written in his majesties owne hand, and it is the same, and that he saw the king and the lords now present and sworn subscribe the same; and that he saw the earle of Danby, the bishop of Durham, and sir George Carteret late vice chamberlaine to his majesty subscribe it alsoe.

William Bridgman and William Blathwayte esquires, two clerks of the council in extraordinary, depose that all that sir John Nicholas had nowsworne was true; and that they saw his majesty signe the declarac'on in the council booke, and the severall lords above named subscribe the same.

Whereupon it was ordered by the court that the said Declarac'ons and Deposic'ons should be enrolled in this court for the safe p'servac'on and custody of them.

Et memorand' qd' p'mandatum p'honob'lis viri Heneag', d'ni Finch Baron' de Daventry d'ni Cancellar' Anglie in bec verba videl't (Let the declarac'ons and deposic'ons aforesaid be entered and enrolled for safe custody in the office of the petty bagg and office of enrollments. H. Finch Canc') Declarac'o'es and deposic'o'es p'dict' de verbo in verbum prout p'scribant' irrotulant'.

It' vicesimo die Augusti anno R'. R'. Caroli sc'di p'de'tricesimo secundo.

Sir Patrick Hume (Narrative published by Mr. Rose, pp. 12, 13,) relating a conference which he had in Holland with Monmouth shortly before his Expedition, says, "I urged if he considered himself as lawful son of king Charles last deceased? He said he did. I ask'd, if he was able to make out and prove the marriage of his mother to the king Charles, and he intended to lay claim to the crown? He answered, he had been lately able to prove the marriage, and if some persons are not lately dead, of which he would inform himself, he would yet be able to prove it. As for his claiming the crown, he intended not to do it unless it were advised to be done by those who should concern themselves and join for the delivery of the nations," &c.: in a Note to which passage Mr. Rose extracts the important parts of the two curious letters (published in Thurloe's State Papers, and cited by Harris) to Charles the second, from his sister the princess of Orange, in which as it appears the mother of Monmouth is spoken of as the wife of Charles.

The duke of Monmouth was stiled in a warrant dated April 22, 1667, from the king to sir Edw. Walker, garter, concerning arms, 'Our dear son James D. of M. and Beccleugh.' In his commission, to be general, April, 1668, 'Our most entirely beloved and natural son, James

D. of M.' In a commission to be lord lieut. of the East Riding of Yorkshire April 1673, 'Our dear son James D. of M.' In a commission for the government of Hull April 1673, 'Our wellbeloved natural son James D. of M.' In a grant of forfeitures, Aug. 1675, 'Our dearly beloved natural son James D. of M.' In a grant of the office of register in chancery, Aug. 1676, 'Our dear son James D. of M.'

Welwood in the Appendix to his Memoirs has published some passages out of the duke of Monmouth's pocket-book that was seized about him, in the West. He has also published relating to Monmouth's expedition the following article:

A LETTER of the late DUKE OF MONMOUTH'S writ in his retirement in Holland, a little before his Attempt in the West.

(An Original.)

'I received both yours together this morn-
'ing, and cannot delay you my answer longer
'than this post; though I am afraid it will
'not please you so much as I heartily wish it
'may. I have weighed all your reasons, and
'every thing that you and my other friends
'have writ me upon that subject; and have
'done it with the greatest inclinations to fol-
'low your advice, and without prejudice.
'You may well believe I have had time
'enough to reflect sufficiently on our present
'state especially since I came hither. But
'whatever way I turn my thoughts, I find
'insuperable difficulties. Pray do not think
'it an effect of melancholy, for that was never
'my greatest fault, when I tell you, That
'in these three weeks retirement in this place,
'I have not only looked back but forward;
'and the more I consider our present cir-
'cumstances, I think them still the more
'desperate, unless some unforeseen accident
'fall out, which I cannot divine nor hope for.
'[Here follow sixteen lines all in cypher.]
'Judge then what we are to expect, in case
'we should venture upon any such attempt
'at this time. It's to me a vain argument,
'that our enemies are scarce yet well settled,
'when you consider, that fear in some, and
'ambition in others, have brought them to
'comply; and that the parliament being
'made up for the most part of members that
'formerly run our enemy down; they will be
'ready to make their peace as soon as they
'can, rather than hazard themselves upon an
'uncertain bottom. I give you but hints of
'what, if I had time, I would write you at
'more length: But that I may not seem ob-
'stinate in my own judgment, or neglect the
'advice of my friends, I will meet you at the
'time and place appointed. But for God's
'sake, think in the mean time of the improba-
'bilities that lye naturally in our way; and
'let us not by struggling with our chains
'make them straighter and heavier. For my
'part I'll run the hazard of being thought any
'thing, rather than a rash, inconsiderate man.
'And to tell you my thoughts without dis-

'guise, I am now so much in love with a re-
'tired life, that I am never like to be fond of
'making a bustle in the world again. I have
'much more to say, but the post cannot stay ;
'and I refer the rest till meeting ; being en-
'tirely, Yours.'

The following Documents relating to the
intercourse between the king and Monmouth,
as to the latter's share in the plots of 1685,
I have been permitted to have transcribed from
the State Paper Office (August, 1811.)

No. I.*

Indorsed. 'Written with his maj'ties own
'hand touching ye duke of Mon-
'mouth.'

"I'f the duke of Monm. desire to render
himself capable of my mercie he must render
him self to the secretary, and resolve to tell me
all he knowes, relying entirely upon my mercy
resining himself entirely to my pleasure."

No. II.

Indorsed. 'Mr. Secry's own hand-writing
'touch'g the D. of M.†

"His Ma'tie was pleas'd this day to acquaint
the Lords of the Councell that having for-
merly [some days since] imparted to them the
satisfaction he had received by the D. of Mon-
m'ths confession and entire submission to H.
M. and that thereupon he had granted him his
Pardon, and the s'd Duke having since given
his Ma'tie so great Cause of Displeasure that
he had forbidden him his presence, and
co'manded him to depart the Court H. M. now
thought fitt to lett th'r lo'pps know the occa-
sion of it.

"That soon after that ye D. of Monm'th
had made a confession of the late conspiracie
to seize the guards and rayse an insurrection
in the kingdom (denying all knowledge of the
other Desseing of assassinating H. M.) and
had by that confession confirm'd the evidence
given ag't the Principall Conspirators, Declar-
ing also [discovering also] diverse Circum-
stances, of the sayd Conspiracy w'ch H. M.
did not know of before, H. M. found that Re-
ports were spread abroad by Persons conver-
sant w'th the D. of Monm'th that he deny'd
the having any Knowledge of the sayd Con-
spiracie.

"That this was matter of great surprize to
H. M. who expected that ye D. of Monm. by
a clear behaviour upon all occasions, and an

* Of the passages which are printed with dots
under them, some are underlined and others
crossed through in the original ; those which
are here in brackets, are written in the margins
of the originals.

† This seems to have been a first draught
corrected, perhaps it was afterwards rejected
and the following substituted.

utter forsaking of that [Dangerous Restlesse]
factious Party should have satisfied the world
of his true Repentance ; And these Reports
being greatly to the Disadvantage of the sayd
Duke H. M. judg'd it necessary for the satis-
faction of all good men, and for ye D. of Mon-
m'ths vindication that he sh'd write a Letter
to H. M. in Contradiction of the s'd [such] Re-
ports.

"That the D. of Monm'th did thereupon
write [was thereupon permitted to write] a
Letter to H. M. but such a one as H. M. s'd
not approve of: H. M. therefore order'd an-
other draught of a letter to be made drawn up
in Termes so agreeable to Trueth, and so fitted
to the D. of Monm'th's circumstances that
there could no objection to it. [In so much that]
This Draught which being given [Shew'd] by
H. M. to the sayd Duke, he took it, he writ
it over w'th his own hand, He subscrib'd it, and
sent it to His Ma'tie.

"That notwithstanding he had thus receiv'd,
writ out and sent this Letter (as his own act)
to H. M. yet he came afterw'ds [not many
hours after] and press'd H. M. very earnestly to
have the Letter back again.

"That His M. seeing this, and wondring
very much at it advised him seriously to con-
sider very well of what he was then desiring
and going about [wisht him to take time] to
doe: and gave him time for his last Resolution
till the next morning.

"That the D of Monm'th coming after-
wards again next morning to H. M. and per-
sisting in y'e same Thoughts and desires H. M.
gave him the letter he had written to him back
again [and he delivered to H. M.] and the ori-
ginall draught whereby he had writt it out
being demanded of him he gave it back again
to His Ma'tie.

"That his Ma'tie being highly dissatisfied
with this manner of Proceeding he sent Mr.
V. Chamberlain to co'mand forthwith ye sayd
Duke to depart the court, and not to come to
his Presence.

"That H. M. having co'manded [giving]
the originall Draught abovesayd to be openly
read in Councell was pleas'd to Order that the
same together w'th this Relation sh'd be enter'd
and remain in ye Councell Books."

No. III.

Indorsed. 12 Dec. 83.—‘ His Ma’ties De-
‘ clar’on in Councill ab’t D. of
‘ Monm. & the Duke of Mon-
‘ mouth’s Letter to his Ma’tie.’

At the Court at Whitehall, December ye 12th
1683.

“ His Ma’ty was this day pleased to ac-
quaint ye Lords of ye Councill, that since he
had received ye Duke of Monmouth into his
mercy having had severall Reports, that the
said Duke’s Servants and others from him en-
deavoured to make it belived that he had not
made a Confession to his Ma’ty of ye late
Conspiracy, nor owned ye share he himself
had in it, His Ma’ty had thought fit for ye
vindication of ye truth of what ye said Duke
had declared to himself, his Royall Highnes
being present, to require from him in writing,
by way of L’re und’r his owne hand to ac-
knowledge ye same, which ye said Duke
having refused to do in ye termes that it was
co’manded him, His Ma’ty was so much of-
fended therewith, that he had forbidden him
His Presence, and co’manded him to depart
ye Court, and for ye further Information of
ye Councill directed ye letter that ye said
Duke had been required to signe to be entred
as follows, and was pleased to declare that he
did not intend ye same should be a secret :

‘ I have heard of some reports of me as if
‘ I should have lessened ye late Plot, and gone
‘ about to discredit ye evidence given against
‘ those who have died by Justice, Your Ma’ty
‘ and ye Duke know how ingeniously* I have
‘ owned ye late Conspiracy, and tho’ I was not
‘ conscious of any designe against your Ma-
‘ ty’s life, yet I lament ye having had so great
‘ a share in ye other part of ye said conspi-
‘ racy. Sir, I have taken ye liberty, to put
‘ this in writing for my owne vindication, and
‘ I beseech you to looke forward and endeavour
‘ to forget ye faults you have forgiven me,
‘ I will take care never to co’mit any more
‘ against you, or come within ye danger of
‘ being again misled from my duty, but make
‘ it ye busines of my life to deserve ye pardon
‘ your Ma’ty hath granted to your dutifull
‘ M.’

* Of this Letter there is upon a separate
paper in the Office a draught supposed to be
in the hand writing of the king. It agrees
with the recital here, except that this word
ingeniously is there spelt *ingeniously*. Ex-
cepting these two the search now made in the
Paper Office has not produced any article pur-
porting to be designed for the signature of
Monmouth; though sir John Dalrymple
(Memoirs part 1, Book 1, p. 40, 4to Edition)
says in a note, ‘ In the Paper Office there are
two copies of the Paper which it was intended
Monmouth should sign, the one is in sir Leo-
line Jenkins’s hand, and bears very hard upon
Monmouth, the other is in the king’s hand and
is much more delicate.’

James displayed his cruel and vindictive
character by causing two medals to be struck
to celebrate his triumph over Monmouth and
Argyle. On the one medal were represented
the heads of his victims placed on altars, their
bleeding bodies beneath, with an inscription,
‘ Sic utas et scepra tuemur.’ On the other,
their heads upon spikes with an inscription
‘ Ambitio maleuada ruit.’ See 4 Laing’s
History of Scotland, 166, Edition of 1804.

Mr. Serjeant Heywood (Vindication of Mr.
Fox’s Historical Work, 417, note.) notices
Dalrymple’s story (Mem. Part 1, Book 1, p.
63, 4to Edition) of the family report that king
James invited himself to breakfast with the
duchess of Monmouth on the day on which her
husband was to be executed, and that, being
admitted in the expectation that his visit was
to introduce a pardon for the duke, he be-
haved with fondness to her children, and de-
livered to her a grant of her great family es-
tate which had fallen to the crown by her hus-
band’s attainder.* And the learned author adds,
that, “ in an abstract of Royal Grants in
his possession, it is stated that in the month
of January, 1684-5, 36 and 37 Car. 2. a
grant was made to the trustees of the manors
of Spalding and Holbeck for 99 years, from
the death of his majesty’s royal consort at the
rent of 5l. per annum, and also of an acre of
land near the Mews, and stables built thereon,
for 29 years from the 15th of August, 1689, at
the like rent, for the life of the dutchess of
Monmouth, for her separate use, with remain-
ders over to her children. And there is the
abstract of another grant in the same month to
the same trustees, of all the chattels real, goods
and chattels, ‘ forfeited by the duke of Mon-
‘ mouth,’ (except the leases before mentioned)
in trust that the trustees ‘ shall convey the
‘ lease of the house, which the said duke had
‘ building for him in Soho Square, to Anthony
‘ Warl and Andrew Care, upon their payment
‘ of 1,200l. to the dutchess of Monmouth. And
‘ as to the rest of the chattels and goods shall
‘ suffer the dutchess to enjoy them so long as
‘ she lives, with further appointments thereof
‘ to her children.’ But in January, 1685-6,
a grant is mentioned to have been made to Ann
dutchess of Buccleugh and her heirs, of the
great house or lodge, and park called Moor
Park, and messuages and lands lying in Rick-
mansworth, in the county of Herts, or near
thereunto adjoining, ‘ forfeited to his majesty
‘ by the attainder of James late duke of Mon-
‘ mouth.’ Whether Moor Park ever had been
part of the family estate of the dutchess is not
stated. The date of the two first of these en-
tries must be incorrect, for the grants are sup-
posed to have been made in the reign of
Charles 2d, and six months before Monmouth’s
attainder, possibly they ought to have been
dated as of the January in the subsequent year,
when the grant of Moor Park was made.”

* I have reason to think that this story is
utterly false.

The following "Account of the Manner of publishing the late Duke of Monmouth," &c. was published by command of the king :

Immediately after the defeat of the rebels at Bridgwater, on Monday the 6th of July instant, the late duke of Monmouth, late lord Grey, and the Brandenburg fled ; and, coming between Gillingham and Shaftesbury, got a guide to lead them the way to the New Forest, most free from towns and watches. He led them by White-Sheet, four miles east of Shaftesbury, and thence by Cranborne-Chase ; where their horses being tired, they let them loose, and hid their bridles and saddles.

In the mean time the news of the said defeat coming to the lord Lumley, (then posted at Ringwood in Hampshire, with three troops of horse of colonel Stapley's regiment, commanded by major Bridger, captain Monk, and captain Peckham, and four companies of foot of col. Alford's regiment, commanded by lieutenant-cooper, captain Bickley, captain Best, and captain Carre ; all of the Sussex militia,) his lordship was pleased to send his scouts every way to take up suspected persons : and sir William Portman for the same end, had taken care for strong watches to be set, made up of his yellow-coats and others, on the roads from Poole to the most northern parts of Dorset.

Upon the 7th instant, about five in the morning, some of the lord Lumley's said scouts (riding in the road, near Holt Lodge in Dorset, four miles west of Ringwood) just at the turn of a cross-way, surprized and seized two suspected persons ; which, when the lord Lumley came up, proved to be the late lord Grey and the said guide. This put the lord Lumley upon a strict examining of the cottages with which that healthy country abounds, and calling in the neighbourhood, that were acquainted with the country, &c. Notice of this being brought to sir William Portman by some of his watches, &c. he hastened to the place, with as many horse and foot, as he could of a sudden get together.

It happened upon the lord Lumley's enquiry among the cottages, that a poor woman, one Amy Farrant, directed his lordship to a hedge, where she had seen two men go over, which hedge proved to be part of the out-bounds of very many inclosed grounds, some overgrown by fern and brakes, and others sown with rye, pease, or oats, &c. Whereupon a strict guard was put very near one another, round those outbounds, whilst other foot and horse did beat within. These guards kept their several posts so well, that though the late duke and the Brandenburg attempted at least thirty times to make their escape out, yet they always found each guard ready ; and, upon their last attempt to escape, two of the troopers firing on them, made them immediately to retire, and hide themselves a-part from each other, in some of the adjacent ditches where they were afterwards found.

Upon the eighth day, by five of the clock in the morning, the said Brandenburg was found ; who, upon examination confessed that he parted with the said late duke within the same out-bounds about one of the clock that morning. Whereupon, every individual person being encouraged thereby, and by the hopes of having a share in the five thousand pounds (as was before agreed on in the field) did renew the pursuit of him with the strictest search and diligence imaginable ; and about seven of the clock of the same morning, one Henry Parkin, servant to Samuel Rolles, esq. happened to discover the said late duke hid in a ditch, covered with fern and brakes, and calling to two of the Sussex troopers that were by him, all three seized him together. Sir William Portman, happening to be near that place, rid presently in, and quieted those that cried, "Shoot him ! shoot him !" He laid hands on him as his prisoner, and so preserved him from all violence and rudeness ; and immediately in the same instant, the lord Lumley came in and agreed that sir William Portman should search him : which was done, and as soon as they had found his George, they dispatched that, with the news, to his majesty, by captain Bickley and Mr. Chaldecote, Sussex and Dorset gentlemen.

The prisoners, after this, were kept two nights at Ringwood. On Friday the lord Lumley discharged the foot there, and with the said three troops of the Sussex horse, and one troop of the Dorset militia, commanded by captain Fownes, they were conveyed to Winchester, where joined them two troops of his majesty's in pay, and two of the Northampton militia troops, all which conducted them to Farnham-castle upon Saturday the 11th, and the next day to Guilford, and upon Monday the 13th to Vauxhall, where a regiment of the lord Dartmouth's received them, with other troops of his majesty's in pay ; and thence by barge they were carried to Whitehall.

The papers and books that were found on him, are since delivered to his majesty. One of the books was a manuscript of spells, charms and conjurations, songs, receipts, and prayers, all written with the said late duke's own hand. Two others were manuscripts of fortification and the military art. And a fourth book, fairly written, wherein are computes of the yearly expence of his majesty's navy and land-forces.

And, as for his gold, only twenty guineas were given to the said Parkin, and ten guineas a-piece to the two troopers that first seized him ; and the rest was returned to the said late duke.

As the prisoners passed through Rumsey, Winchester, Farnham, and Guilford, one would admire to see the very great numbers of the militia, with the deputy lieutenants and gentlemen of those parts, that were ready to guard them, and take off the fatigue of such as were on the march.

Within doors, none but commission officers were trusted to watch by them : and besides

those, the lord Lomley, and sir William Portman took their turns to watch in person, night and day, from the time of the taking of the said late duke, until they had delivered him safe at Whitehall, from whence he was conveyed to the Tower.

Collins says, that the attainder of Monmouth did not take place in North Britain: he, however, states that the posterity of Monmouth did not inherit the dukedom of Buccleugh, &c.

until the death of the duchess (to whom, as we have seen, p. 1063, those honours had been granted as well as to her husband) in 1738.

As to the grant of a barony to a man and his wife as joint-tenants in special tail, and the operation in such case of an attainder of the husband, living the wife, see Mr. Hargrave's learned Opinion and Argument respecting the Stafford-Barony-Claim as referred to in this Collection, vol. 7, pp. 1571, et seq.

Query, What was the extent of Monmouth's interest in his wife's landed property?

348. Proceedings against GILBERT BURNET, D. D. afterwards Bishop of Salisbury, for High Treason: 3 JAMES II. A. D. 1687. [Wodrow's History of the Sufferings of the Church of Scotland. Lord Fountainhall's Decisions of the Lords of Council and Session.*]

CRIMINAL LETTERS AGAINST DR. GILBERT BURNET.

JAMES, &c. To our lovits, &c. heralds, pursuivants, macers, and messengers at arms, our sheriffs in that part, conjunctly and severally, specially constitute, greeting: Forasmuch as

* Of this Case, Fountainhall writes:

"April 14, 1687. At Privy Council, there is a letter read from the king against Dr. Gilbert Burnet, ordaining an indictment of treason to be raised against him, for conversing with Argyle, and other forfeited traitors in London, Holland, &c. Though this was the pretence, yet the true quarrel was not so much his printed letters of travels, as some papers he had sent over to both houses of parliaments, containing reasons why they should not take away the laws against the Papists, and a private letter he had wrote, bearing that he had heard of, or seen at Rome a writ signed by all the popish princes, and the king of England with the rest, (which certainly is false) to extirpate the Protestants: upon this order a dittay was raised, and he was cited to appear on 60 days. They cannot forfeit him in absence, 1. Because they can only proceed in absence against perdition, and rising in arms. 2. None of the witnesses used against him, viz. sir John Cochran, and Waterside his son, West and Burn Englishmen, Mr. William Carstairs, and Mr. Richard Baxter ministers, are to be here then: but they will denounce him fugitive, which will operate the same effect to cut off all Scotsmen from conversing with him personally, or communicating with him by letters; which gave great scandal and offence, as tending to harden him."

"June 11. Dr. Gilbert Burnet, is of new cited upon an additional indictment, for the

it is humbly meant and complained to us, by our right trusty and familiar counsellor, sir John Dalrymple the younger, of Stair, our advocate, for our interest, upon doctor Gilbert Burnet.

That where, notwithstanding by the laws and acts of parliament, and constant practick of this our kingdom, the venting of slanderous,

letters he wrote to Middleton in May last, &c. shewing he had translated his allegiance, and threatening if they insisted, that he would publish an apology which might displease his majesty, and others; which was construed treason against his native originary prince: and the diet having been continued against him to the 29th of August, he was denounced fugitive for non-appearance."

As to Burnet's Travels, see 1 Fountainhall, 472.

According to Wodrow, vol. 2, p. 521, Burnet when in Scotland in 1683, said to the duchess of Hamilton, He believed it would never be well with Scotland, until we returned to that Covenant and renewed it.

As to forfeiture in absence, see p. 1030, of this Volume.

Of these proceedings against Burnet, Wodrow writes as follows:

"Dr. Burnet's vigorous appearances against popery exasperated the king and the jesuits about him, so far as to shew their spite against him by this mean process against him in absence, and when out of the nations by the king's own permission. And all the hurt they could do him, was to bring him in among the rest of the excellent and worthy patriots and protestants, who felt, in as far as they could be reached, the fury of this period.

"When, in common course, he behoved to be cited at the pier and shore of Leith, accounts

treasonable, and advised speeches and positions, and the reproaching our person, estate, and government, and the resetting, supplying, aiding, assisting, intercommuning with, and

were sent him by his friends of this impotent malice the king and managers here were shewing against him. Whereupon the doctor wrote a letter to the earl of Middleton, secretary, if possible, to divert this process; a copy of which being before me, I have inserted it here.

Hague, May 3, 1687.

‘ May it please your Lordship; The affairs of this province belonging to your lordship’s share in the ministry, this leads me to make this humble address to your lordship, and by you to his majesty. I have received advertisement from Scotland, that the king has writ to the privy council, ordering me to be proceeded against for high treason against his person and government, and that, pursuant to this, the king’s advocate has cited me to appear there. If any thing in the world can surprise and disorder me, this must needs do it; for as few men have written more, and preached oftener against all sorts of treasonable doctrines and practices than myself, so all the discoveries that have been made of late years, have been so far from aspersing me, that though there has been disposition enough to find fault with me, yet there has not matter been given so much as for examination.

‘ It is thirteen years since I came out of Scotland; for these last five years, I have not so much as mentioned the commonest news in any letter that I have written to any in that kingdom. I do not mention acts of indemnity, because I know that I need not the benefit of them. I went out of England by his Majesty’s approbation, and I have stayed out of it, because his Majesty expressed his dislike of my returning to it.

‘ I am now upon the point of marrying in this country, and I am naturalized by the states of Holland; but though by this, during my stay here, my allegiance is transferred from his majesty to the sovereignty of those provinces, yet I will never depart from the profoundest respect to his sacred person and duty to his government.

‘ Since my coming to these parts, I have not seen any person, either of England or Scotland, that is outlawed for treason; and when the king took exceptions to my access to the princess and prince of Orange, there was not a thing of this kind objected to me: so I protest to your lordship, I do not so much as imagine upon what it is that these informations, that it seems are brought to his majesty, are founded.

‘ My lord, as I am not ashamed of any thing I have done, so I am not afraid of any thing my enemies can do to me: I can very easily part with a small estate and a life of which I have been long weary; and if my engagement in this country could dispense

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doing favours to denounced rebels, or forfeited traitors, are punishable by forfeiture of life, land, and goods; and particularly by the 134 act of 8 parl. king Jam. 6, it is statute and

‘ with it, I would not avoid the coming to stand my trial. But as this cannot be expected in the estate in which I am, so I humbly throw myself at his Majesty’s feet, and beg that he may not condemn me, not so much as in his thoughts, till I know what is the crime that is objected to me, so as I may offer a most humble justification of myself to him.

‘ I shall be infinitely sorry, if any judgment that shall pass upon me in Scotland, shall oblige me to appear in print for my own defence. For I cannot betray my own innocence so far as to suffer any thing of this nature to pass upon me, without printing an apology for myself; in which I will be forced to make a recital of that share I have had in affairs those twenty years by past, and in which I must mention a vast number of particulars that I am afraid must be displeasing to his majesty; and as I will look upon this as one of the greatest misfortunes that can possibly befall me, so with all the duty and humility in the world, I beg that I may not be driven to it.

‘ I will not presume to add one word to your lordship, nor to claim any sort of favour or protection from you, for I address only myself to you as the king’s minister for those provinces.

‘ I am, my Lord, &c.’

“ This pathetic letter had no effect. Soon after, his indictment or criminal letters came to his hand. To those he drew up an answer, evincing clearly his innocence.

“ Those his answers the doctor sent inclosed in another letter to the earl of Middleton, which deserves a room here, and is as follows:

‘ May it please your Lordship;—The copy of the citation against me, has been sent me out of Scotland since I took the liberty to write last to your lordship; this puts me on a second address to you for conveying the inclosed answer, which I most humbly lay down at his majesty’s feet. I am confident, that the falshood of the matters objected to me, will appear so evident to his majesty, as well as to all the world besides, that he will not only order the proceedings to be quite discharged, but that he will also order some reparation to be made to me, for so public a blemish, as even a citation for so high a crime amounts to. I confess, the many hard things that have been of late cast on me, and in particular to young and old, and foreigners as well as Englishmen, that have been coming into those parts, make me see that my enemies have possessed his majesty with thoughts of me, that I must crave liberty with all humility, to say, that they are as undeserved as hard. What have I done or said, to draw on me so heavy and so

4 B

ordained, that none of our subjects of whatsoever degree, estate, or quality, shall presume or take upon hand, privately or publickly, in sermons, declamations, or familiar conferences,

‘ long a continued displeasure? But my comfort lies in the witness that I have within me, of my own innocence, so that I dare appeal to God, as I do now with all duty to his vicegerent.

‘ Since this matter is now become so public, and that now my name is so generally known, I must not be wanting to my own innocence, especially, when not only my life and reputation are struck at, but the religion I profess is wounded through my sides: therefore till I have put in order my memoirs for a larger work, I find it in some sort necessary to print the citation, together with this answer. But I had much rather have all this prevented by an effect of his majesty’s justice, in ordering an end to be put to this accusation; and that by some act that may be as public as the citation itself was, which may bear his majesty’s being satisfied with my innocence as to these matters; but if I have still as melancholy an answer to this, as I have had to all the former applications I have made, I must maintain my innocence the best way I can, in which I will never forget that vast duty I owe his majesty, whatsoever I may meet with in my own particular.

‘ If there is any thing, either in the inclosed paper, or in this letter, that seems a little too vehement, I hope the provocation that I have met with will be likewise considered; for while my life and reputation are struck at, and while some here are threatening so high, a man must be forgiven to shew that he is not quite insensible: though my duty to the king is proof against all that ever can be done to provoke me, yet I must be suffered to treat the instruments and procurers of my disgrace, who are contriving my destruction, with the plainness that such practices draw from me. I will delay printing any thing for a fortnight, till I see whether your lordship is like to receive any order from his majesty relating to him, who is, May it please your Lordship, your Lordship’s, &c.—At the Hague, May 17th, Old Style, 1697.’

‘ When the doctor’s letters were altogether neglected, before the publishing his apology in print, he sent a third letter to the secretary, which likewise follows.

‘ May it please your lordship:

‘ I venture once more to renew my addresses to your lordship, before I print the paper that I sent you by my last, of the 17th of May, together with the two letters that I wrote you; for I find it necessary to add this, and that it go with the rest to the press.

‘ I am told, that great advantages have been taken upon an expression in my first letter, in which I wrote, that by my naturalization, during my stay here, my allegiance was

to utter any false, slanderous, or untrue speeches, to the disdain, reproach, or contempt of us, our council or proceedings, or to the dishonour, hurt, or prejudice of us, or to meddle

‘ translated from his majesty to the sovereignty of this province, as if this alone was crime enough: and I hear that some who have been of the profession of the law are of this mind. I indeed thought that none who ever pretend to study law, or the general notions of the intercourse among nations, could mistake in so clear a point. I cautioned my words so, as to shew that I considered this translation of my allegiance only as a temporary thing, during my stay here. And can any man be so ignorant as to doubt of this? allegiance and protection are things by their natures reciprocal: since then naturalization gives a legal protection, there must be a return of allegiance due upon it. I do not deny but the root of natural allegiance remains, but it is certainly under a suspension, while the naturalized person enjoys the protection of the prince or state that has so received him. I know what a crime it had been if I had become naturalized to any state in war with the king; but when it was to a state that is in alliance with him, and when it was upon so just a ground as my being to be married and settled in this state, as it could be no crime in me to desire it, so I having obtained it, am not a little amazed, to hear any are so little conversant in the law of nations, as to take exceptions at my words. Our Saviour has said, ‘ that a man cannot serve two masters:’ and the nature of things says, that a man cannot be at the same time under two allegiances. His Majesty, by naturalizing the earl of Feversham and many others of the French nation, knows well what a right this gives him to their allegiance, which, no doubt, he as well as many others have sworn, and this is a translating their allegiance with a witness. That lord was to have commanded the troops that were sent into Flanders in 1678, against his natural prince: and yet though the laws of France are high upon the points of sovereignty, it was never so much as pretended that this was a crime. And it is so much the interest of all princes, to assure themselves of those whom they receive into their protection by naturalizing them, (since without that they should give protection to so many spies and agents for another prince) that if I had not very good ground to assure me that some have pretended to make a crime out of words, I could not easily believe it.

‘ My lord, this is the last trouble that I will give your lordship upon this subject; For it being now a month since I made my first address to you, I must conclude, that it is resolved to carry this matter to all extremities; and Mr. D’Aboville’s instances against me, and the threatenings of some of his countrymen, make me conclude, that all my most

in our affairs or estate bygone, present, or in time coming, under the pain of death, and confiscation of moveables. And by the 10 act, 10 parl. Jam. 6, it is statute and ordained, that all

‘humble addresses to his Majesty, are like to have no other effect but this, that I have done my duty in them, so that, it seems, I am to be judged in Scotland. I am sorry for it, because this must engage me in a defence of myself, I mean, a justification of my own innocence, which I go to much against my heart; but God and man see that I am forced to it: and no threatenings of any here will frighten me, for I will do that which I think fit for me to do, to day, though I were sure to be assassinated for it to morrow. But to the last moment of my life, I will pay all duty and fidelity to his Majesty.—My lord, I am with all possible respects, your lordship’s, &c.’

‘At the Hague, June 6, O. S. 1687.’

“Mean while the doctor gets a new citation, dated June 10, mostly upon his first letter to the secretary. Thus every thing was improved against the doctor and other worthy persons in this period, and turned to treason and the worst of crimes. In this citation there is no special law cited; and in law such a citation could scarce operate against him.

“Mean while this good and great man, when thus prosecuted by his own countrymen in absence, had this satisfaction, that so early as this or some time before, he foresaw, and made some proposals agreeable to the taking place of the protestant succession, in the then illustrious, and now royal family of Brunswick and Hanover; and under all the discouragements he had at home, his head was plodding abroad, upon what providence might do for the security of the holy reformation and protestant interest, so much at his heart now when popery was mounted the throne. And since his majesty king George’s happy accession to the throne, in his old age he had a congratulatory letter from the Hanoverian minister, acknowledging he had the honour to be the first person who suggested the distant prospect of that comfortable turn of affairs to him, and by him to his master the elector.

“A person thus giving up himself to act for the protestant interest, could scarce escape the fury of this melancholy time in Scotland. Accordingly July 7, an indictment of high treason is tabled against doctor Burnet before the lords of justiciary, for conversing and corresponding with James Stuart, Dr. Robert Ferguson, Thomas Stuart late of Cultness, and William Denholm of Westshields, forfeited rebels; and being cited at the pier and shore of Leith, and not appearing, the lords denounce him, and order him to be put to the horn.’

“I have observed no more about him in the registers.”

It has not been thought necessary to set forth the indictment, as the charges alleged

our subjects contain themselves in quietness, and dutiful obedience to us, our government and authority; and that none of them presume or take upon hand publicly to declaim, or pri-

in it appear to be comprehended in the Criminal Letters.

Mr. Justice Burnet, in the “Life” which he published of his father the Bishop, gives this account of these proceedings against him:

“The high favour shewn him at the Hague, alarmed king James, who was much incensed against him, for the account he had printed of his Travels; in which he had so strongly displayed the miseries those nations groan under, where Popery and arbitrary power prevail, that it seemed to have a sensible effect on the people of England. The king wrote two severe letters against him to the princess of Orange; and when the marquis d’Albeville was sent envoy to Holland, he had orders to enter upon no other matter of treaty, until our author was first forbid the court there; which, at his importunity, was done; but he continued to be trusted and employed in the same manner as before; Haleswyn, Fagel, and the rest of the Dutch ministers consulting him daily.

“The report, that he was then upon the point of marrying a considerable fortune at the Hague, having reached the English court; in hopes to divert this, a prosecution of high-treason was set on foot against him in Scotland. Before notice of this prosecution came to the States, he had been naturalized in order to his marriage: When therefore he undertook, in a letter to the earl of Middleton, to answer all the matters laid to his charge, he added, That being now naturalized in Holland, his allegiance during his stay there, was transferred from his majesty to the States. This expression was immediately laid hold of. So that dropping the former prosecution, they now proceeded against him for these words, as guilty of high-treason; and a sentence of outlawry passed upon him. D’Albeville thereupon first demanded him to be delivered up; and when he saw this demand was like to prove ineffectual, he insisted that he should be banished the seven provinces, in pursuance of an article in the last treaty between the two nations, which related to rebels and fugitives, though it could not be pretended that he came within either of these descriptions. The states, in their answer to the British envoy’s memorial, said, ‘That as Dr. Burnet, by naturalization, was become a subject of their own, they could not banish him, unless some crime was legally proved upon him; if his Britannic majesty had any thing to lay to his charge, they would compel him to answer it; and if his judges pronounced him guilty, they would punish him according to their laws; this was all that in reason or justice could be demanded of them.’ As this answer put an end to all farther application to the States, so it gave occasion to some unwarrantable designs

vately to speak or write any purpose of reproach or slander against our person, estate or government, or to deprave our laws and acts of parliament, or misconstrue our proceedings, whereby any dislike may be moved betwixt us, our nobility and loving subjects, in time coming, under the pain of death; and that these that do in the contrary shall be reputed as seditious and wicked instruments, enemies to us, and the common well of this realm, and that the said pain of death shall be inflicted upon them with all rigour, in example of others. And by the second act, 2 sess. of the 1 parl. of king Char. 2, we and our estates of parliament do declare, that in these positions that it is lawful for subjects, upon pretence of reformation, or any other pretence whatsoever, to enter into leagues or covenants, or to take up arms against us, or these commissionate by us, or to put limitations upon their due obedience and allegiance, are rebellions and treasonable; and that all persons who shall, by writing, preaching, or other malicious and advised speaking, express these treasonable intentions, shall be proceeded against, and adjudged traitors, and shall suffer forfeiture of life, lands, and goods; likeas, by the 3 act, 1 parl. king Jam. 1, and 37 act of his 2 parl. and by the 9 act of 13 parl. king Jam. 2, and 144 act, 12 parl. Jam. 6, and divers and sundry other laws and acts of parliament of this our kingdom, it is declared high treason for any of our subjects to reset, supply, or intercommune with declared or forfeited traitors, or give them meat, drink, house, harbour, or any relief or comfort; and if they do in the contrary, they are to undergo the same pains the said traitors or rebels ought

of seizing his person, and even destroying him, if he could not be taken. Of this our author had notice given him from several hands, and one in particular, by the following letter from captain Baxter, a gentleman of unquestioned honour and reputation, whose father was at that time steward to the duke of Ormond's estate.

Hague, Murch 14, 1688.

'Dear Sir;—Though I have no acquaintance with you, yet the esteem I have for your character, and the benefit I have received by your works, obliges me to tell you the proceedings against you in England. It happened the other day to go into the secretary's office, where I saw an order for three thousand pound, to be paid the person, that shall destroy you. I could hardly believe my eyes, that I saw the paper, it seemed so strange to me: This I communicated in private to my lord Ossory, who told me, it was true, for he had it from prince George. My lord desired me to be private in the thing, till I came to Holland, and then, if I pleased, to tell you of it. Sir, I am your friend, and my advice to you is, to take an especial care of yourself, for no doubt but that great sum will meet with a mercenary hand. Sir, you shall never want a friend, where I am.'

to have sustained, if they had been apprehended.

Nevertheless, it is of verity, that the said doctor Gilbert Burnet, shaking off all fear of God, conscience, and sense of duty, allegiance and loyalty to us his sovereign and native prince, upon the safety of whose person and maintenance of whose sovereign authority and princely power, the happiness, stability, and quietness of our subjects depend, has most perfidiously and treasonably presumed to commit, and is guilty of the crimes abovementioned, in so far as, Archibald Campbel, sometime earl of Argyle, James Stuart son to sir James Stuart, some time provost of Edinburgh, Mr. Robert Fergusson sometime chaplain to the late earl of Shaftsbury, Thomas Stuart of Cultness, William Denholme sometime of Westshiels, Mr. Robert Martin sometime clerk to our justice-court, and several other rebels and traitors, being most justly, by our high courts of parliament and justice-court, forfeited for the crimes of treason, and fled to our kingdom of England, and to Holland, Flanders, Geneva, and several other places, the said Doctor Gilbert Burnet did upon the first, second, and remanent days of the months of January, February, and remanent months of the years 1682, 1683, 1684, or January, February, March or April, 1685, converse, correspond, and intercommune with the said Archibald late earl of Argyle, a forfeited traitor, and that within the said Doctor Burnet his dwelling-house, in Lincoln's-inn-fields, near the Plough-inn in our city of London, or suburbs thereof, or some other part or place within our kingdom of England, defamed, slandered and reproached, and advisedly spoke to the disdain and reproach of our person, government, and authority, wrote several letters, and received answers thereto, from the said forfeited traitor, when he was in Holland or elsewhere, expressly contrary to his duty and allegiance to us his sovereign lord and king. And likewise, upon the first, second, and third days of the months of May, June, July, August, September, October, November, and December, 1685, and upon the first, second, and third days of the months of January, February, and remanent months of the year 1686, and first, second, and third days of the months of January, February, March, 1687, or any other of the days of any or other of the said months or years, the said Doctor Gilbert Burnet did most treasonably reset, supplied, aided, assisted, conversed, and intercommuned with, and did favours to the said James Stuart, Mr. Robert Fergusson, Thomas Stuart, William Denholme, and Mr. Robert Martin, forfeited traitors and rebels, in the cities of Rotterdam, Amsterdam, Leyden, Breda, Geneva, or some other part or place within the Netherlands, or elsewhere, publicly and avowedly uttered several speeches and positions, to the disdain of our person, authority and government, continues and persists in such undutiful and treasonable practices against us and our government, (we

being his sovereign lord and prince) expressly contrary to his allegiance and duty. By committing of the which crimes above specified, or either of them, the said Doctor Burnet is guilty and culpable of the crime of high treason, and is art and part thereof, which being found by any inquest, he ought and should suffer forfeiture of life, land, and goods, to the terror and example of others to commit the like hereafter. Our will is therefore, and we charge you straitly and command, that incontinent, this our letter seen, ye pass, and in our name and authority, command and charge the said Doctor Gilbert Burnet above complained upon, by sound of trumpet, with displayed coat, and using other solemnities necessary, to come and find sufficient caution and surety, acted in our books of adjournal, that he shall compare before our lords justice-general, justice clerk, and commissioners of justiciary, within the Tolbooth or criminal Court-house of Edinburgh, the 27th day of June next to come, in the hour of cause, there to underly the law for the crimes above-mentioned, and that under the pains contained in the new acts of parliament; and that ye charge him personally, if he can be apprehended, and failing thereof, at his dwelling-house, and by open proclamation at the market-cross of the head burgh of the shire, stewardry, regality, and other jurisdiction where he dwells, to come and find the said surety acted in manner foresaid, within six days, if he be within this our kingdom; and if he be out with the same, that ye command and charge him in manner foresaid, by open proclamation at the market-cross of Edinburgh, pier and shore of Leith, to come and find the said surety within threescore days next after he is charged by you thereto, under the pain of rebellion, and putting of him to our horn. Which six and threescore days respectively being bypast, and the said surety not being found, nor no intimation made by him to you of the finding thereof, that ye incontinent thereafter denounce him our rebel, and put him to our horn, escheat and bring in all his moveables, goods and gear to our use, for his contempt and disobedience. And if he come and find the said surety, intimation being always made by him to you of the finding thereof, that summons and assize hereto, not exceeding the number of 45 persons, together with such witnesses who best know the verity of the premisses, whose names shall be given you in roll, subscribed by the said complainer, ilk person under the pain of 100 merks. And that ye, within 15 days after his denunciation for not finding of caution, cause registrate, thir our letters, with your executions thereof, in our books of adjournal, conform to the act of parliament made thereanent, according to justice, as ye will answer to us thereupon. The which to do commits to you conjunctly and severally our full power, by thir our letters, delivering them to be by you duly executed, and indorsed again to the bearer.—Given under our signet, at Edinburgh, the 19th day of April, and of our reign the

third year, 1687.—‘*Ex deliberatione domino-
rum commissariorum justiciarum.*’

THO. GORDON.

The Witnesses against Doctor Gilbert Burnet are, Mr. William Carstairs, preacher, Robert Baird, merchant in Holland, Mr. Richard Baxter, preacher, sir John Cochran of Ochiltree, John Cochran of Waterside, Mr. Robert West, lawier, Englishman, Mr. Zach. Burn, brewer, Englishman.

DR. BURNET'S ANSWER.

I look upon it as a particular misfortune, that I am forced to answer a citation that is made in his majesty's name, which will be ever so sacred with me, that nothing but the sense of an indispensable duty could draw from me any thing that looks like a contending with that sublime character.

I owe the defence of my own innocence, and of my reputation and life, to myself; I owe also to all my kindred and friends, to my religion, as I am a Christian and a Protestant, and to my profession as I am a churchman, and above all to his majesty as I am his born subject, such a vindication of my loyalty and integrity, as may make it appear, that my not going to Scotland, according to the tenor of this citation, does not flow from any sense of guilt or fear, but merely from those engagements under which I am in Holland.

I hope my contradicting or refuting the matters of fact set forth in this citation, shall not be so maliciously perverted by any, as if I meant either to reflect on his majesty for writing to his council of Scotland, ordering this citation to be made, or on his advocate for forming it, and issuing it out: But as I acknowledge, that upon the information it seems was offered of those matters here laid against me, it was very reasonable for his majesty to order justice to be done upon me; so his advocate, in whose hands those informations it seems are now put, had all possible reason to lay them against me, as he has done; and therefore I will not pretend to make any exception to the laws and acts of parliament set forth in the first part of this citation; but I will only answer the matters of fact laid to my charge, and whatsoever I say concerning them, does only belong to my false accusers; and therefore I hope they will not be looked on as things in which even his majesty's advocate, but much less his sacred majesty is any way concerned.

I am first accused for having seen, conversed with, and held correspondence with the late earl of Argyle; and to make this appear the more probable, the place is marked very critically where I lived, and where, as it is pretended, we met: But it is now almost two years since the late Argyle was taken, and suffered, and that a full account was had of all his secret practices, in all which I have not been once so much as mentioned, though it is

now a year since I have lived and preached openly in these provinces. The truth is, that for nine years before the late earl of Argyle's forfeiture, I had no sort of correspondence with him, nor did I ever see him since the year 1676. After his escape out of prison, I never saw him, nor wrote to him, nor heard from him, nor had I any sort of commerce with him, directly nor indirectly; the circumstance of my house, and the place wherein I lived is added, to make the thing look somewhat probable: But though it is very easy to know where I lived, and I having dwelt in Lincoln-inn-fields the space of seven years, it was no hard matter to add this particular; yet so inconsiderate is the malice of my enemies, that even in this it leads them out of the way; for soon after Argyle's escape, and during the stay that, as is believed, he made in London, I had removed from Lincoln-inn-fields into Brook-buildings, this makes me guess at the informer, who saw me often in the one house, but never in the other; and yet even he who has betrayed all that ever past between us, has not impudence enough to charge me with the least disloyalty, though I concealed very few of my thoughts from him.

With this of my seeing the late Argyle, the article of the scandalous and treasonable words, pretended to be spoken by me to him, against his majesty's person and government, falls to the ground: It is obvious that this cannot be proved, since Argyle is dead; and it is not pretended, that these words were uttered in the hearing of other witnesses, nor is it needful to add that his majesty was then only a subject, so that any words spoken of him at that time cannot amount to treason; but I can appeal to all these with whom I have ever conversed, if they have ever heard me fail in the respect I owed the king; and I can easily bring many witnesses, from several parts of Europe, of the zeal with which I have on all occasions expressed myself on those subjects; and that none of all those hard words that have been so freely bestowed on me has made me forget my duty in the least.

I am in the next place accused of correspondence with James Stuart, Mr. Robert Ferguson, Thomas Stuart, William Denholm, and Mr. Robert Martin, since my coming out of England; and that I have entertained them and supplied them in foreign parts, particularly in the cities of Amsterdam, Rotterdam, Leyden, Breda, Geneva, or in some other parts within the Netherlands. This article is so very ill laid in all its branches, that it shews my enemies have very ill informations concerning my most general acquaintance, since, though there are amongst those who are condemned for treason, some that are of my kindred and ancient acquaintance, they have here cast together a company of men, who are all (James Stuart only excepted) absolutely unknown to me, whom I never saw, and with whom I never exchanged one word in my whole life, as far as I can remember; one of them, Mr.

Robert Martin, was, as I ever understood it, dead above a year before I left England; as for James Stuart, I had a general acquaintance with him twenty years ago, but have had no commerce with him now for many years, unless it was that I saw him twice by accident, and that was several years before there was any sentence past on him: my accusers know my motion ill, for I have not been in Breda these twenty three years. I settled in the Hague upon my coming into Holland, because I was willing to be under the observation of his majesty's envoy; and I chose this place the rather, because it was known that none of those that lay under sentences came to it. I have never gone to Amsterdam or Rotterdam in secret, and have never been there but upon my private affairs, and that never above a night or two at a time, and I have been so visible all the while that I was in these places, that I thought there was not room left even for calumny.

In the last place, it is said that I have publicly and avowedly uttered several speeches and positions to the disdain of his majesty's person, authority, and government, and that I continue and persist in these treasonable practices; this is so generally asserted, that it is enough for me to say, it is positively false: but I have yet clearer evidence to the contrary of this; I have preached a whole sermon in the Hague, against all treasonable doctrines and practices, and particularly against the lawfulness of subjects rising in arms against their sovereign, upon the account of religion; and I have maintained this so oft both in public and private, that I could, if I thought it convenient, give proofs of it, that would make all my enemies be ashamed of their injustice and malice.

The witnesses cited against me are, first, sir John Cochran, whom I have not seen above these four years last past, and with whom I have had no sort of commerce since I saw him. It is almost two years since he had his pardon, so it is probable he then told all that he has ever told concerning me; and it is not likely that the matter would have been let lie sleeping all this while, if he had said any thing to my prejudice. I confess I have been long acquainted with him; I look upon him as a man of honour, and I reckon myself so safe in his honour and in my innocence, that I do freely release him from all the obligations of friendship and confidence, and wish that he may declare every thing that has ever past between us; for then I am sure he will do me the right to own, that as oft as we talked of some things that were complained of in Scotland, I took the occasion to repeat my opinion of the duty of subjects, to submit and bear all the ill administrations that might be in the government, but never to rise in arms upon that account. The next witness is his son, whom I never saw but once or twice, and with whom I never entered into any discourse, but what became a man of my profession to so young a person, exhorting him to the duties of a Christian. The next two are Mr. West and Mr. Burn, whose faces I do

not know; after them come Mr. Carstairs and Mr. Baird, whose faces I know not either. It seems these are the witnesses to be led against me, for the article relating to the Netherlands; but as I am wholly a stranger to Mr. Carstairs, so I do not so much as know if there be such a person in being as Mr. Baxter; I have had no correspondence at all with him, these two and twenty years, unless it was, that once or twice I met him by accident, in a visit in a third place, and that once, about six years ago, I went to discourse with him concerning a matter of history, in which we differed; but as all our conversation at that time, was in the presence of some witnesses, so it was not at all relating to matters of state.

And now I have gone over all the matter that is laid against me in this citation, and have made such reflections both on the facts that are alledged, and the witnesses that are named, as will, I hope, satisfy even my enemies themselves, of the falshood and injustice of these informations; so that I presume so far on his majesty's justice, as to expect that all the indignation which is kindled against me, will be turned upon my false accusers.

To all this I will add one thing further, for my justification, though I am fully satisfied it is that which I am not obliged to do, and which, if I were in other circumstances, I would not do myself, as I would advise no other man to do it: For it is a part of that right that every man has, to preserve himself by all lawful ways, that he do not accuse himself, and, by consequence, that he do not purge himself by oath, of matters objected to him; and I do not so well approve of the courts of inquisition, as to give countenance to a practice which was first set on foot by them, of requiring men to answer upon oath to matters objected to them. If I were not a churchman, I would not do this which I am about to do, as I declare I will never do it again, let my enemies lay to my charge what they please; but the regard I have to this sacred function to which I am dedicated, makes me now, once for all, offer this solemn purgation of myself. I attest the great God, the searcher of all things, and the judge of all men, that all the matters of fact laid to my charge in this citation, are utterly groundless and absolutely false. This I am ready to confirm with my corporal oath, and to receive the Sacrament upon it.

And now I hope I have said enough to satisfy his majesty concerning my innocence, so that I am confident he will not only discharge all further proceedings against me upon this accusation, but that he will express his royal displeasure against my false accusers; but if the power of my enemies, and their credit with his Majesty, is still so great, that this matter shall be carried further, and that advantage shall be taken from my not appearing in Scotland, to proceed to a sentence against me, which some brutal men now in the Hague, are threatening before-hand, that they will execute it, I then make my most humble ap-

peal to the great God, the king of kings, who knows my innocence, and to whom my blood will cry for vengeance against all that may be any way concerned in the shedding of it: he will, at the great day, judge all men righteously, without respect of persons; it is to him that I flee, who, I am sure, will hear me. Judge me, O God, according to the integrity that is in me. GILBERT BURNET.
At Hague in Holland, 17 May, O. S. 1687.

DR. BURNET'S SECOND CITATION.

“ James, by the grace of God, &c. greeting. Forasmuch as it is humbly meant or complained to us, by our right trusty and familiar counsellor, sir John Dalrymple the younger of Stair, our advocate for our interest, upon Dr. Gilbert Burnet: That where, by the common law, by the acts of parliament and the municipal laws of this kingdom, the declining and impugning our sovereign authority, or putting treasonable limitations upon the prerogatives of our crown, upon the native allegiance due by any of our subjects, born Scotsmen, whether residing within our dominions or not, are declared to be high-treason and punishable by the pains due and determined in the law for treason. Nevertheless it is of verity, that Dr. Gilbert Burnet, who is a Scotsman by birth and education, being cited at the pier and shore of Leith, at the instance of our advocate, for several treasonable crimes, to underly the law, by virtue of particular command from us, direct to the lords of our privy council, and an act of our said privy council hereupon, ordering our advocate to intent the process; instead of appearing before the lords of justiciary, Dr. Gilbert Burnet did write and subscribe a letter, dated at the Hague the 3d day of May last, directed for the earl of Middleton, one of our principal secretaries of state for our kingdom of England: In the which the said Doctor shews, that in respect the affairs of the united provinces fall to his lordship's share in the ministry, therefore he makes the following addresses to his lordship, and by him to us, and gives an account that he is certiorate of the process of treason executed against him, at the instance of our advocate; and, for answer thereto, the Doctor writes, That he has been 13 years out of the kingdom of Scotland, and that he is now upon the point of marrying in the Netherlands, and that he is naturalized by the states of Holland, and that thereby, during his stay there, his allegiance is translated from us to the sovereignty of the province of Holland; and, in the end of his letter, he certifies, that if this declinature be not taken off his hand, to sist the process, he will appear in print in his own defence, and will not so far betray his own innocence, as to suffer a thing of that nature to pass upon him, in which he will make a recital of affairs that have passed these 20 years, and a vast number of particulars, which he believes will be displeasing to us; and therefore desires, that he may not be forced to it, which is a direct declining of our

authority, denying of his allegiance to us, and asserting, that his allegiance is translated from us to the sovereignty of the states of Holland, and a threatening us to expose, traduce, disparage and bely our government, and the public actings for 20 years past; though he acknowledges it will be displeasing to us, yet, by a most indiscreet and disloyal insolence, he threatens to do it in contempt, except forsooth we will acquiesce, and suffer the declinature of our royal authority, and pass from the process as having no allegiance due to us from the Doctor, &c. in common form."

Burnet himself, (*Own Times*, vol. 1, p. 708, fol.) mentions that White (created marquis d'Albeville) whom James the second had sent to succeed Skelton at the Hague, had orders before he entered upon business with the prince or princess, to ask of them not only to forbid Burnet the court, but to promise to see him no more, adding, "The king had writ two violent letters against me to the princess: she trusted me so far that she shewed them to me, and was pleased to answer them according to the hints that I suggested. But now it was put so home, that this was to be complied with, or a breach was immediately to follow upon it. So this was done: and they were both so true to their promise, that I saw neither the one nor the other till a few days before the prince set sail for England." (The prince, however, he says, constantly communicated with him by the intermediation of Dykvelt and Halewyn.) Having thus acquainted us with the dislike which king James entertained towards him, the Bishop afterwards (p. 726.) writes of this prosecution against him, as follows:

"After I had a staid year in Holland, I heard from many hands, that the king seemed to forget his own greatness when he spoke of me, which he took occasion to do very often. I had published some account of the short tour I had made in several letters; in which my chief design was to expose both popery and tyranny. The book was well received, and was much read: And it raised the king's displeasure very high.

"My continuing at the Hague made him conclude, that I was managing designs against him. And some papers in single sheets came out, reflecting on the proceedings of England, which seemed to have a considerable effect on those who read them. These were printed in Holland: and many copies of them were sent into all the parts of England. All which inflamed the king the more against me; for he believed they were writ by me, as indeed most of them were. But that which gave the crisis to the king's anger was, that he heard I was to be married to a considerable fortune at the Hague. So a project was formed to break this, by charging me with high treason for corresponding with lord Argile, and for conversing with some that were outlawed for high treason.

"The king ordered a letter to be writ in his

name to his advocate in Scotland to prosecute me for some probable thing or other, which was intended only to make a noise, not doubting but this would break the intended marriage. A ship coming from Scotland the day, in which this prosecution was ordered, that had a quick passage, brought me the first news of it, long before it was sent to D'Albeville. So I petitioned the states, who were then sitting, to be naturalized in order to my intended marriage. And this past in course, without the least difficulty; which perhaps might have been made, if this prosecution now begun in Scotland, had been known. Now I was legally under the protection of the states of Holland. Yet I writ a full justification of myself, as to all particulars laid to my charge, in some letters that I sent to the earl of Middleton. But in one of these I said, that, being now naturalized in Holland, my allegiance was, during my stay in these parts, transferred from his majesty to the states. I also said in another letter, that, if upon my non-appearance a sentence should pass against me, I might be perhaps forced to justify myself, and to give an account of the share that I had in affairs these twenty years past: In which I might be led to mention some things, that I was afraid would displease the king: and therefore I should be sorry, if I were driven to it.

"Now the court thought they had somewhat against me: for they knew they had nothing before. So the first citation was let fall, and a new one was ordered on these two accounts. It was pretended to be high treason, to say my allegiance was now transferred: and it was set forth, as a high indignity to the king, to threaten him with writing a history of the transactions past these last twenty years. The first of these struck at a great point, which was a part of the law of nations. Every man that was naturalized took an oath of allegiance to the prince or state that naturalized him. And, since no man can serve two masters, or be under a double allegiance, it is certain, that there must be a transfer of allegiance, at least during the stay in the country where one is so naturalized.

"This matter was kept up against me for some time, the court delaying proceeding to any sentence for several months. At last a sentence of outlawry was given: and upon that Albeville said, that if the states would not deliver me up, he would find such instruments as should seize on me, and carry me away forcibly. The methods he named of doing this were very ridiculous. And he spoke of it to so many persons, that I believe his design was rather to frighten me, than that he could think to effect them. Many overtures were made to some of my friends in London, not only to let this prosecution fall, but to promote me, if I would make myself capable of it. I entertained none of these. I had many stories brought me of the discourses among some of the brutal Irish, then in the Dutch service. But I thank God, I was not moved with them. I resolved to go

on, and to do my duty, and to do what service I could to the public, and to my country : and resigned myself up entirely to that providence, that had watched over me to that time with an indulgent care, and had made all the designs of my enemies against me turn to my great advantage."

After this, he has occasion to notice the transactions of Albeville with the States, respecting the occurrences at Bantam, after which he thus resumes his account of the proceedings against himself :

" Albeville's next negotiation related to myself. I had printed a paper in justification of myself, together with my letters to the earl of Middleton. And he in a memorial complained of two passages in that paper. One was, that I said it was yet too early to persecute men for religion, and therefore crimes against the state were pretended by my enemies : This, he said, did insinuate, that the king did in time intend to persecute for religion. The other was, that I had put in it an intimation, that I was in danger by some of the Irish papists. This, he said, was a reflection on the king, who hated all such practices. And to this he added, that by the laws of England all the king's subjects were bound to seize on any person that was condemned in his courts, in what manner soever they could : and therefore he desired, that both I and the printer of that paper might be punished. But now upon his return to the Hague, I being outlawed by that time, he demanded, that, in pursuance of an article of the treaty that related to rebels or fugitives, I might be banished the provinces. And to this he craved once and again a speedy answer.

" I was called before the deputies of the states of Holland, that I might answer the two memorials that lay before them relating to myself. I observed the difference between them. The one desired, that the States would punish me, which did acknowledge me to be their subject. The other, in contradiction to that, laid claim to me as the king's rebel. As to the particulars complained of, I had made no reflection on the king ; but to the contrary. I said, my enemies found it was not yet time to persecute for religion. This insinuated, that the king could not be brought to it. And no person could be offended with this, but he who thought it was now not too early to persecute. As to that of the danger in which I apprehended myself to be in, I had now more reason than before to complain of it, since the envoy had so publicly affirmed, that every one of the king's subjects might seize on any one that was condemned, in what manner soever they could, which was either dead or alive. I was now the subject of the states of Holland, naturalized in order to a marriage among them, as they all knew : And therefore I claimed their protection. So, if I was charged with any thing that was not according to law, I submitted myself to their justice. I should decline no trial, nor the utmost severity, if I

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had offended in any thing. As for the two memorials that claimed me as a fugitive and a rebel, I could not be looked on as a fugitive from Scotland. It was now fourteen years since I had left that kingdom, and three since I came out of England with the king's leave. I had lived a year in the Hague openly ; and nothing was laid to my charge. As for the sentence that was pretended to be past upon me, I could say nothing to it, till I saw a copy of it.

" The States were fully satisfied with my answers ; and ordered a memorial to be drawn according to them. They also ordered their ambassador to represent to the king, that he himself knew how sacred a thing naturalization was. The faith and honour of every state was concerned in it. I had been naturalized upon marrying one of their subjects, which was the justest of all reasons. If the king had any thing to lay to my charge, justice should be done in their courts. The king took the matter very ill ; and said, it was an affront to him, and a just cause of war. Yet, after much passion, he said, he did not intend to make war upon it ; for he was not then in condition to do it. But he knew there were designs against him, to make war on him, against which he should take care to secure himself : And he should be on his guard. The ambassador asked him, of whom he meant that. But he did not think fit to explain himself further. He ordered a third memorial to be put in against me, in which the article of the treaty was set forth : But no notice was taken of the answers made to that by the States : But it was insisted on, that, since the States were bound not to give sanctuary to fugitives and rebels, they ought not to examine the grounds on which such judgments were given, but were bound to execute the treaty. Upon this it was observed, that the words in treaties ought to be explained according to their common acceptation, or the sense given them in the civil law, and not according to any particular forms of courts, where for non-appearance a writ of outlawry or rebellion might lie : The sense of the word rebel in common use was a man that had born arms, or had plotted against his prince : and a fugitive was a man that fled from justice. The heat with which the king seemed inflamed against me, carried him to say and do many things that were very little to his honour.

" I had advertisements sent me of a further progress in his designs against me. He had it suggested to him, that, since a sentence was past against me for non-appearance, and the States refused to deliver me up, he might order private persons to execute the sentence as they could : And it was writ over very positively, that 5,000*l.* would be given to any one that should murder me. A gentleman of an unblemished reputation writ me word, that he himself by accident saw an order drawn in the Secretaries office, but not yet signed, for 5,000*l.* to a blank person that was to seize or destroy

me. And he also affirmed, that prince George had heard of the same thing, and had desired the person to whom he trusted it to convoy the notice of it to me: And my author was employed by that person to send the notice to me. The king asked Jefferies, what he might do against me in a private way, now that he could not get me into his hands. Jefferies answered, he did not see how the king could do any more than he had done. He told this to Mr. Kirk to send it to me: For he concluded, the king was resolved to proceed to extremities, and only wanted the opinion of a man of the law to justify a more violent method. I had so many different advertisements sent me of this, that I concluded a whisper of such a design might have been set about, on design to frighten me into some mean submission, or into silence at least. But it had no other effect on me, but that I thought it fit to stay more within doors, and to use a little more than ordinary caution. I thank God, I was very little concerned at it. I resigned up my life very freely to God. I knew my own innocence, and the root of all the malice that was against me. And I never possessed my own soul in a more perfect calm, and in a clearer cheerfulness of spirit, than I did during all those threatenings, and the apprehensions that others were in concerning me."

Henry earl of Clarendon, in his Diary, under date April 4, 1688, says, "I was at the king's levee: His majesty spake much of an answer Dr. Burnet had written to a pamphlet, called, 'Parliamentum Pacificum.' He asked me if I had read it? I said, No; I had not seen it. Upon which the king said, The Doctor was very angry, and used him, in his usual manner, with many rude and insolent expressions. His majesty added, He had not read the pamphlet which the Doctor pretended to answer;

but had heard, it was a good thing. Sir Jo. Lowther of Whitehaven, being there, said, He had read it; and did not remember any thing in it, which any one could except against."

Having already more than once adverted to the question of Burnet's veracity as an historian, (see vol. 8, p. 134, vol. 10, p. 757, and this present volume, p. 1040.) I will here notice that with respect to so much in particular of Burnet's *Own Times*, as relates to the reign of James the second, Burnet's own representation of the circumstances, under which he wrote it, should not be neglected. After having stated that an inglorious and unprosperous reign, which had been begun with great advantages, had, by poor management, bad designs, and worse conduct, come in conclusion under one of the strangest catastrophes that is in any history, he says, "Such an unexpected revolution deserves to be well opened: I will do it as fully as I can. But, having been beyond sea almost all this reign, many small particulars, that may well deserve to be remembered, may have escaped me; yet as I had good opportunities to be well informed, I will pass over nothing that seems of any importance to the opening such great and unusual transactions." *1 Own Times* 617, 618, fol. ed. of 1724."

Henry lord Clarendon, (who did not like Burnet) relating in his Diary what passed on the arrival of king James's commissioners, at Hungerford, (Dec. 8, 1688) to wait on the prince of Orange, says, "I told the prince how my lord Halifax had desired to see Dr. Burnet, upon which the prince said there would then be fine tattling: but he should not speak to Burnet in private, that he had no mind any of those who were with him, should converse with the commissioners."

349. Proceedings against Dr. HENRY COMPTON, Lord Bishop of London, in the Council-Chamber at Whitehall, by the Lords Commissioners appointed by his Majesty to inspect Ecclesiastical Affairs, for not suspending Dr. John Sharp, Rector of St. Giles's, August 1686: 2 JAMES II. A. D. 1686.*

[The ancient High Commission Court owed its origin to the stat. 1 Eliz. c. 1, which so far as it relates to this court, is as follows:

'An Act to restore to the Crown the ancient Jurisdiction over the estate Ecclesiastical and Spiritual, and abolishing all foreign powers repugnant to the same.

'Where in time of the reign of your most dear

* Burnet gives the following account of the origin of this court:

"Many of the clergy acted now a part that

'father, of worthy memory, king Henry the eighth, divers good lawes and statutes were made and established, as well for the utter extinguishment and putting away of all usurped and foreign powers and authorities out of this your realm, and other your highness dominions and countries, as also for the restoring and uniting to the imperial crown of this realm, the ancient jurisdictions, authorities, superiorities and prebe-

made good amends for past errors. They began to preach generally against Popery, which the Dissenters did not. They set them-

‘minencies to the same of right belonging or
 ‘appertaining, by reason wherof, we your
 ‘most humble and obelient subjects, from
 ‘the xxv. year of the reign of your said dear
 ‘father, were continually kept in good order,
 ‘and were dishurdened of divers great and

‘intollerable charges and exactions before
 ‘that time unlawfully taken and exacted by
 ‘such foreign power and authority as before
 ‘that was usurped, until such time as all the
 ‘said good laws and statutes by one act of
 ‘parliament made in the first and second

selves to study the points of controversy. And upon that there followed a great variety of small books, that were easily purchased and soon read. They examined all the points of Popery with a solidity of judgment, a clearness of arguing, a depth of learning, and a vivacity of writing, far beyond any thing that had before that time appeared in our language. The truth is, they were very unequally yoked: For, if they are justly to be reckoned among the best writers that have yet appeared on the Protestant side, those they wrote against were certainly among the weakest that had ever appeared on the Popish side. Their books were poorly but insolently writ; and had no other learning in them, but what was taken out of some French writers, which they put into very bad English: So that a victory over them need have been but a mean performance.

“This had a mighty effect on the whole nation: Even those who could not search things to the bottom, yet were amazed at the great inequality that appeared in this engagement. The Papists, who knew what service the bishop of Meaux’s book had done in France, resolved to pursue the same method here in several treatises, which they entitled Papists represented and misrepresented; to which such clear answers were writ, that what effect soever that artifice might have, where it was supported by the authority of a great king, and the terror of ill usage, and a dragoonade in conclusion, yet it succeeded so ill in England, that it gave occasion to enquire into the true opinions of that church, not as some artful writers had disguised them, but as they were laid down in the books that are of authority among them, such as the decisions of councils received among them, and their established offices, and as they are held at Rome, and in all those countries where Popery prevails without any intermixture with heretics, or apprehension of them, as in Spain and Portugal. This was done in so authentical a manner, that Popery itself was never so well understood by the nation, as it came to be upon this occasion.

“The persons, who both managed and directed this controversial war, were chiefly Tillotson, Stillingsfleet, Tension, and Patrick. Next them were Sherlock, Williams, Claget, Gee, Aldrich, Atterbury, Whitby, Hooper, and above all these Wake, who having been long in France, chaplain to the lord Preston, brought over with him many curious discoveries that were both useful and surprising. Besides the chief writers of those books of controversy, there were many sermons preached and printed on those heads, that did very much edify the whole nation. And this matter was managed

with that concert, that for the most part once a week some new book or sermon came out, which both instructed and animated those who read them. There were but very few proselytes gained to Popery: And these were so inconsiderable, they were rather a reproach than an honour to them. Walker, the head of University College, and five or six more at Oxford, declared themselves to be of that religion; but with this branch of infamy, that they had continued for several years complying with the doctrine and worship of the church of England after they were reconciled to the church of Rome. The Popish priests were enraged at this opposition made by the clergy, when they saw their religion so exposed, and themselves so much despised. They said, it was ill manners and want of duty to treat the king’s religion with so much contempt.

“It was resolved to proceed severely against some of the preachers, and to try if by that means they might intimidate the rest. Dr. Sharp was the rector of St. Giles’s, and was both a very pious man, and one of the most popular preachers of the age, who had a peculiar talent of reading his sermons with much life and zeal. He received one day, as he was coming out of the pulpit, a paper sent him, as he believed, by a priest, containing a challenge upon some points of controversy touched by him in some of his sermons. Upon this, he, not knowing to whom he should send an answer, preached a sermon in answer to it: And, after he had confuted it, he concluded shewing how unreasonable it was for Protestants to change their religion on such grounds. This was carried to court and represented there, as a reflection on the king for changing on those grounds.

“The information, as to the words pretended to be spoken by Sharp, was false, as he himself assured me. But, without enquiring into that, the earl of Sunderland sent an order to the bishop of London, in the king’s name, requiring him to suspend Sharp immediately, and then to examine the matter. The bishop answered, that he had no power to proceed in such a summary way: but, if an accusation were brought into his court in a regular way, he would proceed to such a censure as could be warranted by the ecclesiastical law: Yet, he said, he would do that which was in his power, and should be upon the matter a suspension; for he desired Sharp to abstain from officiating, till the matter should be better understood. But to lay such a censure on a clergyman, as a suspension, without proof, in a judiciary proceeding, was contrary both to law and justice. Sharp went to court to shew the notes of his

' years of the reigns of the late king Philip,
' and queen Mary, your highness sister, enti-
' tuled An Act repealing all statutes, articles
' and provisions, made against the see apos-
' tolick of Rome, since the twentieth year of

' king Henry the eighth, and also for the
' establishment of all spiritual and ecclesias-
' tical possessious and hereditaments con-
' veyed to the laity, were all clearly repealed
' and made void, as by the same act of re-

sermon, which he was ready to swear were those from which he had read it, by which the falshood of the information would appear. But since he was not suspended, he was not admitted. Yet he was let alone. And it was resolved to proceed against the bishop of London for contempt.

"Jeferies was much sunk at court, and Herbert was the most in favour. But now Jeferies, to recommend himself, offered a bold and illegal advice, for setting up an ecclesiastical commission, without calling it the high commission, pretending it was only a standing court of delegates. The act that put down the high commission in the year 1640 had provided by a clause, as full as could be conceived, that no court should be ever set up for those matters, besides the ordinary ecclesiastical courts. Yet in contempt of that a court was erected, with full power to proceed in a summary and arbitrary way in all ecclesiastical matters, without limitations to any rule of law in their proceedings. This stretch of the supremacy so contrary to law, was assumed by a king, whose religion made him condemn all that supremacy that the law had vested in the crown.

"The persons with whom this power was lodged were the archbishop of Canterbury, and the bishops of Duresme and Rochester, and the lord chancellor, the lord treasurer, and lord chief justice, the lord chauceitor being made president in the court *sine quo non*; for they would trust this to no other management. The bishop of London was marked out to be the first sacrifice. Sancroft lay silent at Lambeth. He seemed zealous against Popery in private discourse: but he was of such a timorous temper, and so set on the enriching his nephew, that he shewed no sort of courage. He would not go to this court, when it was first opened, and declare against it, and give his reasons why he could not sit and act in it, judging it to be against law: but he contented himself with his not going to it. The other two bishops were more compliant. Duresme was lifted up with it, and said, now his name would be recorded in history: and, when some of his friends represented to him the danger of acting in a court so illegally constituted, he said, he could not live if he should lose the king's gracious smiles: so low and so fawning was he. Dolben, archbishop of York, died this year. So, as Sprat had succeeded him in Rochester, he had some hopes let fall of succeeding likewise in York. But the court had laid it down for a maxim to keep all the great sees, that should become vacant, still empty, till they might fill them to their own mind: so he was mistaken in his expectations, if he ever had them.

"The bishop of London was the first per-

son, that was summoned to appear before this new court. He was attended on by many persons of great quality, which gave a new offence: and the lord chancellor treated him in that brutal way, that was now become as it were natural to him. The bishop said, here was a new court of which he knew nothing: so he desired a copy of the commission that authorised them. And, after he had drawn out the matters by delays for some time, hoping that the king might accept of some general and respectful submission, and so let the matter fall, at last he came to make his defence, all secret methods to divert the storm proving ineffectual. The first part of it was an exception to the authority of the court, as being not only founded on no law, but contrary to the express words of the act of parliament that put down the high commission. Yet this point was rather insinuated, than urged with the force that might have been used: for it was said, that if the bishop should insist too much on that, it would draw a much heavier measure of indignation on him; therefore it was rather opened, and modestly represented to the court, than strongly argued. But it may be easily believed, that those who sate by virtue of this illegal commission would maintain their own authority. The other part of the bishop of London's plea was, that he had obeyed the king's orders, as far as he legally could do; for he had obliged Dr. Sharp to act as a man that was suspended; but that he could not lay an ecclesiastical censure on any of his clergy without a process, and articles, and some proof brought. This was justified by the constant practice of the ecclesiastical courts, and by the judgment of all lawyers. But arguments, how strong soever, are feeble things, when a sentence is resolved on before the cause is heard. So it was proposed, that he should be suspended during the king's pleasure. The lord chancellor and the poor-spirited bishop of Duresme were for this: but the earl and bishop of Rochester, and the lord chief justice Herbert, were for acquitting him. There was not so much as a colour of law to support the sentence: so none could be given.

"But the king was resolved to carry this point, and spoke roundly about it to the earl of Rochester. He saw he must either concur in the sentence, or part with the white staff. So he yielded. And the bishop was suspended *ab officio*. They did not think fit to meddle with his revenues. For the lawyers had settled that point, that benefices were of the nature of freeholds. So, if the sentence had gone to the temporalties, the bishop would have had the matter tried over again in the king's bench, where he was like to find good justice, Herbert not being satisfied with the legality and

'peal more at large doth and may appear ;
'By reason of which act of repeal, your
'said humble subjects were efisoons brought
'under an usurped foreign power and autho-
'rity, and yet do remain in that boudage,
'to the intolerable charges of your loving
'subjects, if some redress (by authority of
'this your high court of parliament, with the
'assent of your highness) be not had and
'provided :
'And to the intent that all the usurped and fo-
'reign power, and authority spiritual and
'temporal, may for ever be clearly extin-
'guished, and never to be used or obeyed
'within this realm, or any other your ma-
'jesty's dominions or countries ; (2) May it
'please your highness that it may be further

'enacted by the authority aforesaid, that no
'foreign prince, person, prelate, state or
'potentate spiritual or temporal, shall at any
'time after the last day of this session of
'parliament, use, enjoy or exercise any
'manner of power, jurisdiction, superiority,
'authority, preheminance or privilege spi-
'ritual or ecclesiastical, within this realm,
'or within any other your majesty's domi-
'nions or countries that now be, or hereafter
'shall be, but from thenceforth the same
'shall be clearly abolished out of this realm,
'and all other your highness dominions for
'ever ; any statute, ordinance, custom,
'constitutions, or any other matter or cause
'whatsoever to the contrary in any wise
'notwithstanding.

justice of the sentence. While this matter was in dependance, the princess of Orange thought it became her to interpose a little in the bishop's favour. He had confirmed, and married her. So she wrote to the king, earnestly begging him to be gentle to the bishop, who she could not think would offend willingly. She also wrote to the bishop expressing the great share she took in the trouble he was fallen into. The prince wrote to him to the same purpose. The king wrote an answer to the princess reflecting severely on the bishop, not without some sharpness on her for meddling in such matters. Yet the court seemed uneasy, when they saw they had gained so poor a victory: for now the bishop was more considered than ever. His clergy, for all the suspension, were really more governed by the secret intimations of his pleasure, than they had been by his authority before. So they resolved to come off as well as they could. Dr. Sharp was admitted to offer a general petition, importing how sorry he was to find himself under the king's displeasure: upon which he was dismissed with a gentle reprimand, and suffered to return to the exercise of his function. According to the form of the ecclesiastical courts, a person under such a suspension must make a submission within six months: otherwise he may be proceeded against as obstinate. So, six months after the sentence the bishop sent a petition to the king, desiring to be restored to the exercise of his episcopal function. But he made no acknowledgment of any fault. So this had no other effect, but that it stopt all further proceedings: only the suspension lay still on him."

Dr. Compton was the 6th son of the second earl of Northampton, he had been educated at Oxford, but for some time was a Cornet in the Horse Guards. He afterwards, however, returned to the University, and having taken orders and possessed other successive preferments, became, in the year 1675, Dean of the Chapel Royal. He had a considerable share in bringing about the Revolution; and when, after prince George of Denmark had quitted the king, the princess Anne resolved upon the same measure, the bishop concerted the method of

the princess's departure, and accompanied her to Northampton, where, says Burnet, the earl of Dorset "attended on them with all respect, and quickly brought a body of horse to serve for a guard to the princess, and in a little while a small army was formed about her, who chose to be commanded by the bishop of London, of which he too easily accepted."

Quo semel est imbuta recens ;

Johnson in his life of Dorset says ;
"What is not the most illustrious action of his life, he was employed to conduct the princess Anne to Nottingham, with a guard such as might alarm the populace as they passed, with false apprehensions of her danger. Whatever end may be designed, there is always something despicable in a trick."

Not to notice the incorrectness of this representation, it seems to savour of party prejudice, to censure as a despicable trick a measure which any man who felt himself in any degree responsible for the princess's safety, might conscientiously believe to be a requisite precaution. Dalrymple with his usual licence improves upon the story, and tells us, "that the bishop rode before the princess with a drawn sword in his hand, and pistols on his saddle." *Memoirs*, part 1, book 6, vol. 4, p. 166, 4to Edition.

Bishop Butler, in his excellent Sermon upon the Government of the Tongue, has admirably portrayed a prominent feature in the character of Dalrymple as an historian. "If these people expect to be heard and regarded (for there are some content with merely talking) they will invent to engage your attention, and when they have heard the least imperfect hint of an affair, they will out of their own head and the circumstances of time and place, and other matters to make out their story and give the appearance of probability to it."

Bishop Compton appears, from Professor Martyn's edition of Miller's Gardener's Dictionary, to have been a very diligent, costly, and probably scientific introducer and cultivator of exotic plants. In commemoration of his encouragement to botany, Solander denominated the 'Comptonia.'

'ligion, which only concerne the confession
 'of the true Christian sayth, and the doc-
 'trine of the sacrament comprised in a
 'booke imprinted, intituled, Articles where-
 'upon it was agreed by the archebishops and
 'bishops of both provinces, and the whole
 'cleregye, in the convocation holden at Lon-
 'don in the yeare of our Lord God one
 'thousand five hundreth and sixty and
 'two, accordinge to the computation of the
 'Church of England, for the ordaining of
 'diversities of opinions and for establish-
 'inge of consent, touching true religion put
 'forth by the queene's authoritie, and that if
 'any person or persons beinge convented
 'before you, or any three of you, as afore-
 'said, for any such matter, shall persist
 'therein, or not revoke his or their error,
 'or after such revocation esloos affirmie
 'such untrue doctrine, then to deprive from
 'all promotions ecclesiasticall, all and every
 'such person and persons so mayntayning,
 'affirming and presistinge or so esloosnes,
 'affirming as is aforesaid; And further we
 'doe give full power and aucthority unto
 'you, or three of you, as is aforesaid, by
 'vertue hereof, to enquire, heare, determine,
 'and punish all incests, advowtres, fornica-
 'tions, outrageous, misbehaviours, and dis-
 'orders in unmarriage, and all other crymes
 'and offenses which are punishable or re-
 'formable by the ecclesiasticall lawes of this
 'our realme, committed and done, or here-
 'after so committed or done, in any place ex-
 'empt, or nor exempt within this our
 'realme, according to the tenor of the lawes
 'in that behalf, and according to your wis-
 'domes, conscience and discusions, willing,
 'commandinge and aucthorising you, or three
 'of you, as is aforesaid, from tyme to time,
 'hereafter to use and devise all such pol-
 'litique waies and means for the trial and
 'searchinge out of all the premisses as by
 'you or three of you as aforesaid shall be
 'thought most expedient and necessary, and
 'uppon due prooff thereof had, and the of-
 'fence or offences before specified, or any
 'of them sufficiently proved against any per-
 'son or persons, by confession of the party or
 'lawfull witnesses, or by any other due means
 'before you, or three of you (as is afore-
 'said,) that then you or three (as is afore-
 'said) shall have full power and authoritie to
 'order and awarde such punishment to
 'every such offender by fyne, imprisonment,
 'censures of the church, or otherwise, or
 'by all or any of the said waies, and to take
 'such order for the redresse of the same as
 'of your wisdomes, and discretions, or three
 'of you (as is aforesaid) shall be thought
 'meete and convenient: And further, we doe
 'give full power and aucthority unto you, or
 'three of you (as aforesaid,) to call before you
 'or three of you (as aforesaid,) from tyme
 'to tyme, all and every offender and of-
 'fenders in any of the premisses; And also
 'such as by you, or three of you as is afore-

'said, shall seme to be suspect persons in
 'any of the premisses, and to procede
 'against them, and every of them as the
 'qualitie of the offence or suspition shall
 'require all, also all such witnesses or any
 'other person or persons that can informe
 'you concerning any of the premisses, as
 'you, or three of you, as aforesaid, shall
 'thinke meete to be called before you, or
 'three of you as aforesaid, and them and
 'every of them to examyne uppon their
 'corporall othes for the better triall and
 'opening of the truth of the premisses
 'or any part thereof; and if you or
 'three of you as aforesaid shall finde any
 'person or persons obstinate, or disobe-
 'dient, either in their appaerance before
 'you or three of you as aforesaid, at your
 'calling and commaundement, or els in not
 'accomplishing or not obeying your orders,
 'decrees and commaundments or any thinge
 'touchinge the premisses, or any partie
 'thereof, and then you, or three of you, as
 'is aforesaid, shall have full power and auc-
 'thority to punish the same person or per-
 'sons so offendinge, by executions and other
 'censures ecclesiasticall, or by fyne accord-
 'ing to your discretions, or com't the
 'same person or persons soe offending to
 'word, there to remaine untill he or they
 'shall by you, or three of you, (as is afore-
 'said) enlarged and delivered, and because
 'there is great diversitye in the persons that
 'are to be called before you, some of them
 'dwelling far of from you, some being fugitive,
 'and some to be charged with greivous crymes
 'and faults, the speiall redres whereof is
 'most requisite, and therefore more spedye
 'or effectual and straighter prooff than by
 'your letters missive is required in most
 'part of those causes, wee, for the better
 'execution and furtheraunce of our service
 'herein doe give full power and aucthority
 'unto you or three of you as aforesaid to
 'commaund all and every our justice and
 'other officer and officers and subiects within
 'this our realme in all places as well exempt
 'as not exempt by your letters to appre-
 'hend or cause to be apprehended any per-
 'son or persons which you shall thinke meete
 'to be convented before you to answer to
 'any matter touchinge the premisses or any
 'part thereof, and to take such sufficient bond
 'to our use as you, or three of you, as afore-
 'said, shall by your letters prescribe for his
 'or their personall appaerance, to be made
 'before you, or three of you, as aforesaid,
 'and soe to attend as apperteineth; and in
 'case any such person or persons soe ap-
 'prehended be not able, or will obstinately
 'refuse to give sufficient bound to our use for
 'his or their personall appaerance before
 'you as aforesaid, then wee will, that in our
 'name, you, or three of you, as aforesaid,
 'give commaundement to such justice, of-
 'ficer or other persone, under whose charge
 'he or they soe to be convented before you

shall happen to remayne, either for the bringing him or them before you, or els to committe him or them to ward or other safe custodie, soe to remayne untill you, or three of you, as aforesaid, shall further order for his or their enlargement; and furthermore wee doe give unto you, or three of you, as aforesaid, full power and authoritie by theis presents, to take and receive by your discretions, of every offender and suspect person to be convicted and brought before you a recognizance or recognizances, obligation or obligations, to our use, in such some or sommes of money as to you, or three of you, as aforesaid, shall seeme meete and convenient, as well for their personall apparance before you, or three of you, as aforesaid, as also for the performance and accomplishment of such orders and decrees, as to you, or three of you, as aforesaid, shall seeme convenient in that behalfe; and further our will and pleasure is, that you shall assume our trustye and well-beloved subjecte William Bedell to be your register, whom wee by theis presents doe depute to that effect, or in his absence or default any other publike sufficient notarie or notaries whomsoever, you the archebishope of Canterburye, and bishoppe of London for the tyme beinge, shall by your discretions and considerations of the tyme and place judge moate meete and apt to further our service in this behalfe, for the registring of all your actes, decrees, and proceedings, by vertue of this our commission, and shall lymitt unto the said register, such allowance for the paynes of him or his clerke in that behalfe, as to your discretions shall be thought meete to be answered, as well of the parties before you, or any three of you, as aforesaid, to be convented, as of the fynes which you assesse and levie by force of this our commission as the case shall requier, and that in like manner you by your discretion shall appoynt one or moe messenger or messengers, and other officer or officers, to attend upon you for your service in this behalfe, and shall limitt unto him or them, for his or their paynes, such allowance as you shall thinke good, the same to be answered unto him or them in like manner and forme as before touching the said Register is appoynted, and further our will and pleasure is, that you, or three of you, as aforesaid, shall from tyme to tyme appoynt one sufficient person to be receiver, and to gather up and receive all such some or sommes of money as by you or three of you as aforesaid shall by vertue of this our commission be assessed or taxed, for any fyne or fynes upon any person or persons for their offence, and that every such receiver by you, or three of you, as aforesaid, to be appoynted, shall receive all such some or sommes of money for any such fyne and fynes, soe by you,

or three of you, as is aforesaid, to be assessed or taxed, and shall be acceptable for the same, and for the just receipte and true account thereof to be made, wee will and commaund that there shall be two paper bookes indented, made, the one to remayne with the said receiver, and the other with the said register, in both which bookes shall be entered all such fyne and fynes as by you, or three of you, as aforesaid, shall be assessed and taxed in that behalfe; and to every such entrey in either of the said bookes the hands of you, or three of you, as aforesaid, shall be subscribed, and the said receiver thereby charged, and that you, or three of you, as aforesaid, by bill or bills assigned with your hand, shall and may assigne and appoynt to the said receiver for his paynes in receiving the said sommes, and also to your register, messenger, and officers, and every of them, attendant upon you, for their paynes, travells and charges to be susteyned in our service about the premisses, or any parte thereof, of such some and sommes of money for their rewardes and paynes as to you or three of you, as is aforesaid, shall be thought convenient, willinge and commaunding you or three of you, as aforesaid, once in every Michalmas Tearme during this our commission, to certifie into our courte of Exchequer, as well the name of the said receiver, as also a note of all such fines as shall be sett or taxed before you and by him received, to the intent that the said receiver may be charged thereby, and upon the determination of his account, wee maye be answered of the residewe thereof, that to us shall apperteyne over and besides the allowances to the said register, messengers and other officers, by you, or three of you, as aforesaid, given and limited, willinge and commaunding also our audytors and other officers to whom it shall apperteyne upon the sight of the said bill signed with the hande of you or three of you as is aforesaid to make unto the said receiver due allowance accordinge to the said bills upon his said account, and whereas there were dyvers cathedral and colledge churches, grammar scholes, and other ecclesiasticall incorporations, erected, founded, or ordeyned by the late kinge of famous memorye, our deere father kinge Henry the eight, and by our late deere brother kinge Edward the sixth, and by our late sister queene Mary, and by the late lord Cardynall Poole, the ordinances, rules and statuts wherof, be either none at all are altogether imperfect, or beinge made at such tyme as the crowne and regiment of this realme was subject to the forreine usurped aucthority of the sea of Rowe, they be some poyntes contrarye, divers and repugnant to the dignitee and prerogative of our crowne, the lawes of this our realme, and the present state of reli-

'gion within the same, wee therefore doe
 'give full power and auctoritie to you or
 'sixe of you whom wee will you the fore-
 'named archebischoppe of Canterburie, the
 'bishops of London, Winchester, Elye,
 'Worcester, Norwich, Rochester, for the
 'tyme being, Gabriell Goodman, William
 'Deyor, Thomas Walte, alwaies to be one,
 'to cause and command in our name all and
 'singuler the ordinaunce, rules and statuts of
 'all and every the said cathedrall and colle-
 'giate churches, gramer scholes and other
 'ecclesiasticall incorporations, together with
 'theire severall letters patente, and other
 'writings, towching and in any wise con-
 'cerninge theire severall iurections and founda-
 'tions to be brought and exhibitid before
 'you, or sixe of you as is aforesaid, wil-
 'ling and commaundinge you, or sixe of
 'you, as is aforesaid, upon the paine, exhib-
 'iting and uppon diligent and deliberate
 'search and examination of the said statute,
 'rule and ordinaunces, letters patentes and
 'writings as is aforesaid, not only to make
 'speedye and undelayed certificats of the
 'enormities, disorder, defects, surpulsage,
 'or want of all and singular the statuts,
 'rules and ordinaunces, but also with the
 'same to advertise us of suche goode orders
 'and statuts, as you, or sixe of you, as is
 'aforesaid shall thinke meete and conven-
 'ient, to be by us made and sett fourth for
 'the better order and rule of the said
 'severall churches errection and founda-
 'tions, and ye possessions, and the reve-
 'newes of the same, and as maye best tend
 'to the honor of Almightye God the increase
 'of vertue and unity in the said places, and
 'the public weale and tranquillitie of this
 'our realme, to the intent wee maye there-
 'uppon further proceed to the altringe,
 'making and establishinge of the same, and
 'other statuts, rules and ordinaunces, accord-
 'inge to an acte of p'liament thereof made
 'in the first yeare of our raigne; and where-
 'also we are enforced that there remaineth
 'as yet still within this our realme, dyverse
 'perverse and obstinate persons, which doe
 'refuse to acknowledge ye jurisdiction,
 'power, privilege, sup'ioritie and prehemi-
 'nence, speciall and ecclesiasticall, over all
 'states and statuts within this our realme
 'and other our dominions, which is given to
 'us by vertue of the forsaide two actes, the
 'one intituled an acte for restoring to the
 'crowne the auncient jurisdiction over the
 'state ecclesiasticall and sp'uall, and abolish-
 'inge all forreine power repugnant to the
 'same, and the other intituled, an acte for
 'the assuraunce of the queene's ma'tie's
 'royall power over all states and subiectes,
 'within her dominions, we therefore doe
 'assigne, depute and appoynt, and by theis
 'p'sents doe give full power and auctority
 'and jurisdiction to you, or three of you,
 'whereof you the archebischoppe of Canter-
 'burie or bishops of &c. for the tyme

'beinge to be one, to tender and minister the
 'oath expressed and sett fourth in the said
 'acte, intituled an acte restoringe to the
 'crowne the auncient jurisdiction over ye
 'state ecclesiasticall and sp'uall and abo-
 'lyshinge all forreine power repugnant to
 'the same, to all and every archebischoppes,
 'bischoppes and other persons, officers and
 'ministers ecclesiasticall, and also to every
 'other person or persons appoynted or com-
 'pellable by either of the said actes to take
 'the said oath of what estate, dignitie, pre-
 'heminnence or degree soever he or they be,
 'and to receive and take the same oath of
 'the saide persons and every of them, ac-
 'cordinge to the tenor, forme and effect of
 'the said acte, or either of them; willing
 'and requiringe you, or three of you,
 'whereof the said archebischoppe of Can-
 'terburie, or the bishops of London, &c.
 'to be one, that after the refusall or refu-
 'sals of the same oath by any person or
 'p'sons aforesaid made to certifie us ac-
 'cordingly under the seales of you and
 'every of you as aforesaid, the refusall to
 'take the same oathe, and of the names, places
 'and degrees of the person or persons, for re-
 'fusing the same othe before us in our court
 'commonlye called the King's Bench. More-
 'over our will, pleasure and commaunde-
 'ment is, that you our said commissioners
 'shall diligently and faythfully execute this
 'our commision and every parte and
 'braunche thereof, in manner and forme
 'aforesaid, and according to the true mean-
 'inge thereof; notwithstandinge any appel-
 'lacion, provocation, priviledge or exemption
 'in that behalf to be made, had, pretended, or
 'alledged by any p'son or persons resiant or
 'dwelling in any place or places, exempte or
 'not exempte within this our realme, any
 'our lawes, statuts, proclamacions, other
 'grants, priveledges or ordinaunces, which
 'be or maye seme contrary to the premisses
 'notwithstandinge. And that for the better
 'credit and more manifest notice of your
 'doinge in the execuc'on of this our com-
 'mission, our pleasure and commaundement
 'is, that unto youre letters missive, pro-
 'cesses, decrees, orders and judgements,
 'from or by you, or any three of you as
 'aforesaid, to be awarded, sett fourth, had,
 'made, decreed, given or pronounced at
 'Lambeth or London, you or three of you,
 'as aforesaid, shall cawse to be put and af-
 'fixed a seale engraved with the Rose and
 'the Crowne over the Rosse, and the letter
 'C. before and the letter R. after the same,
 'with a ringe or circumference about the
 'same seale, conteyninge as followeth:
 'Sigit' Com'issar' Regn': Ma' Ad' Cas' Ec-
 'cleast': And fyneally wee will and com-
 'maunde all and singular justices of peace,
 'maiors, sheriffs, bayliffs, constables, and
 'other our officers, ministres and subjects in
 'all and every place and places, exempte
 'and not exempt, within our realme, uppon

any knowledge or request from you, or three of you, whereof you the said archbishop of Canterbury, or the bishopps of London, Winchester, Elye, Worcester, St. Davies, Norwich, Chichester or Rochester for the tyme beinge, or you the bushopp suffragan of Dover, or you the said Thomas Smith, &c. to be one of them or any of them given or made to be aydinge, helping and assistinge you, and at your commaundement in and for the due executinge of this our commission, as they and every of them tender our pleasure, and will aunswere to the contrarye at their uttermoste perills. In witnesse whereof, wee have caused theis our letters of commission to be sealed with our great seal, witness ourselfe, at Corambury, the xxivth daye of April; in the eighteenth yeare of our raigne.

Lord Coke 4 Inst. 326 says: "The first commission upon these statutes, whereby about 20 bishops were deprived, and many others of the popish clergy, is said to be lost, and inrolled it is not, as it ought to have been. And it is affirmed by some that have seen it, that it passed not above twenty sheets of paper copy wise; but now the high commission contains above three hundred sheets of paper. And it is likewise affirmed, that never any high commission was inrolled (as they all ought to have been) untill my lord chancellor Egerton's time, so as no man before that time, could know what their jurisdiction was till that time."

Against the proceedings in the High Commission Court complaints had been made in the reign of James the First. In the following reign these complaints were much imbittered; and by the stat. 16 Car. 1, the Court of Star Chamber and this Court were both abolished. The act (16 Car. 1, cap. 11) concerning the High Commission Court is as follows:

Whereas in the parliament holden in the first year of the reign of the late queen Elizabeth, late queen of England, there was an act made and established, intituled, An act restoring to the crown the ancient jurisdiction over the state ecclesiastical and spiritual, and abolishing all foreign power repugnant to the same; in which act, amongst other things, there is contained one clause, branch, article or sentence, whereby it was enacted to this effect; namely, that the said late queen's highness, her heirs and successors, kings or queens of this realm, should have full power and authority by virtue of that act by letters patents under the great seal of England, to assign, name and authorize, when, and as often as her highness, her heirs or successors should think meet and convenient, and for such, and so long time as should please her highness, her heirs or successors, such person or persons being

natural-born subjects to her highness, her heirs or successors, as her majesty, her heirs or successors should think meet to exercise, use, occupy and execute under her highness, her heirs and successors, all manner of jurisdictions, privileges and pre-eminence, in any wise touching or concerning any spiritual or ecclesiastical jurisdiction within these her realms of England and Ireland, or any other her highness dominions and countries, and to visit, reform, redress, order, correct and amend all such errors, heresies, schisms, abuses, offences, contempts and enormities whatsoever, which by any manner of spiritual or ecclesiastical power, authority or jurisdiction, can, or may lawfully be reformed, ordered, redressed, corrected, restrained or amended, to the pleasure of Almighty God, the increase of virtue, and the conservation of the peace and unity of this realm: And that such person or persons so to be named, assigned, authorized and appointed by her highness, her heirs or successors, after the said letters patents to him or them made and delivered, as aforesaid, should have full power and authority, by virtue of that act, and of the said letters patents under her highness, her heirs or successors, to exercise, use and execute all the premises, according to the tenor and effect of the said letters patents; any matter or cause to the contrary in any wise notwithstanding.

And whereas by colour of some words in the aforesaid branch of the said act, whereby commissioners are authorized to execute their commission according to the tenor and effect of the king's letters patents, and by letters patents grounded thereupon, the said commissioners have, to the great and insufferable wrong and oppression of the king's subjects, used to fine and imprison them, and to exercise other authority not belonging to ecclesiastical jurisdiction restored by that act, and divers other great mischiefs and inconveniencies have also ensued to the king's subjects, by occasion of the said branch and commissions issued thereupon, and the executions thereof: Therefore for the repressing and preventing of the foresaid abuses, mischiefs and inconveniencies in time to come;

Be it enacted by the king's most excellent majesty, and the lords and commons in this present parliament assembled, and by the authority of the same, That the foresaid branch, clause, article or sentence, shall from henceforth be repealed, annulled, revoked, annihilated, and utterly made void forever; any thing in the said act to the contrary in any wise notwithstanding.

And be it further enacted, That from and after the said first day of August, no new court shall be erected, ordained or appointed within this realm of England, or dominion of Wales, which shall or may have the like power, jurisdiction or authority, as the said

high commission court now hath, or pretendeth to have; but that all and every such letters patents, commissions and grants made, or to be made by his majesty, his heirs or successors, and all powers and authorities granted thereby, and all acts, sentences and decrees to be made by virtue or colour thereof, shall be utterly void, and of none effect.

Concerning this Court, see more in Coke's 4 Inst. cap. 74.

It may be worth notice, that Erhard, vol. 1, pp. 507, 508, speaks with regret, if not with sorrow, of "the ruin of these two Courts, which might have been of excellent use both to church and state."]

THE KING'S ECCLESIASTICAL COMMISSION.

JAMES the Second, by the grace of God, king of England, Scotland, France and Ireland, defender of the faith, &c. To the most reverend father in God, our right trusty and well beloved counsellor, William Lord archbishop of Canterbury, primate of all England, and metropolitan. And to our right trusty and right well-beloved counsellor, George lord Jodereys, lord chancellor of England. And to our right trusty and right well-beloved cousin, and counsellor, Lawrence earl of Rochester, lord high-treasurer of England. And to our right trusty, and right well-beloved cousin and counsellor, Robert earl of Sanderland, president of our council, and our principal secretary of state. And to the right reverend father in God, our right trusty and well-beloved counsellor, Nathaniel lord bishop of Durham. And to the right reverend father in God, our right trusty and well-beloved Thomas lord bishop of Rochester. And to our right trusty and well-beloved counsellor, sir Edward Herbert, knight, lord chief justice of the pleas, before us to be holden, assigned, Greeting. We, for divers good, weighty and necessary causes and considerations, us, hereunto especially moving, of our mere motion, and certain knowledge, by force and virtue of our supreme authority, and prerogative royal, do assign, name and authorise by these our letters patent under the great seal of England, you the said lord archbishop of Canterbury, lord chancellor of England, lord high treasurer of England, lord president of our council, lord bishop of Duresme, lord bishop of Rochester, and our chief justice aforesaid, or any three or more of you, whereof you the said lord chancellor to be one, from time to time, and at all times during our pleasure, to exercise, use, occupy and execute under us, all manner of jurisdictions, privileges, and pre-eminences in any wise touching or concerning any spiritual or ecclesiastical jurisdictions, within this our realm of England, and dominion of Wales, and to visit, reform, redress, order, correct, and amend all such abuses, offences,

contempts, and enormities whatsoever, which by the spiritual or ecclesiastical laws of this our realm can or may lawfully be reformed, redressed, corrected, restrained, or amended, to the pleasure of Almighty God, and increase of virtue, and the conservation of the peace and unity of this realm. And we do hereby give and grant unto you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, thus by us named, assigned, authorised and appointed, by force of our supreme authority and prerogative royal, full power and authority, from time to time, and at all times, during our pleasure, under us to exercise, use, and execute all the promises, according to the tenor and effect of these our letters patents, any matter or cause to the contrary, in any wise notwithstanding. And we do by these presents give full power and authority unto you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, by all lawful ways or means from time to time hereafter, during our pleasure, to enquire of all offences, contempts, transgressions and misdemeanours done and committed, and hereafter to be done and committed, contrary to the ecclesiastical laws of this our realm, in any county, city, borough, or other place or places, exempt or not exempted, within this our realm of England, and dominion of Wales, and of all and every offender or offenders therein, and them, and every of them, to order, correct, reform and punish by censure of the church. And also we do give and grant full power and authority unto you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, in like manner as aforesaid, from time to time, and at all times, during our pleasure, to enquire of, search out, and call before you, all and every ecclesiastical person or persons, of what degree or dignity soever, as shall offend in any of the particulars before mentioned, and them, and every of them, to correct and punish for such their misbehaviours and misdemeanours, by suspending or depriving them from all promotions ecclesiastical, and from all functions in the church, and to inflict such other punishments or censures upon them, according to the ecclesiastical laws of this realm. And further, we do give full power and authority unto you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, by virtue hereof, and in like manner and form as is aforesaid, to enquire, hear, determine and punish all incest, adulteries, fornications, outrages, misbehaviours, and disorders in marriage,* and all other grie-

* From the following passages in Narcissus Luttrell's MS. "Brief Historical Relation," it seems that the Ecclesiastical Commissioners exercised their jurisdiction in causes matrimonial:

"January 19th 1688. The affair between the Duke and Duchess of Norfolk [See the

vances, great crimes or offences, which are punishable or reformatory by the ecclesiastical laws of this our realm, committed or done, or hereafter to be committed or done, in any place exempt or not exempt, within this our realm, according to the tenour of the ecclesiastical laws in that behalf: granting you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, full power and authority to order and award such punishment to every such offender, by censures of the church, or other lawful ways, as is aforesaid. And further, we do give full power and authority unto you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, all and every offender and offenders in any of the premises, and also all such as by you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, shall seem to be suspected persons in any of the premises, and them to examine, touching every or any of the premises which you shall object against them; and to proceed against them and every of them, as the nature and quality of the offence, or suspicion in that behalf shall require: and also to call all such witnesses, or any other person or persons that can inform you concerning any of the premises, as you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor, to be one, and them, and every of them, to examine upon their corporal oaths, for the better trial and opening of the truth of the premises or any part thereof. And if you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, shall find any person or persons whatsoever obstinate or disobedient in their appearance before you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, at your calling and commandment, or else not in obeying, or in not accomplishing your orders, degrees and commandments, or any thing touching the premises, or any part thereof, or any other branch or clause contained in this commission, that then you, or any three or more of you, as is aforesaid, whereof you the said lord chancellor to be one, shall have full power and authority to punish the same person and persons so offending, by excommunication, suspension, deprivation, or other censures ecclesiastical; and when any persons shall be convicted or prosecuted before you, as aforesaid, for any of the causes above expressed, at the instance and suit of any person prosecuting the offence in that behalf, that then you, or any three or more of you

as is aforesaid, whereof you the said lord chancellor to be one, shall have full power and authority to award such costs and expenses of the suit, as well to and against the party as shall prefer or prosecute the said offence, as to and against any party or parties that shall be convicted, according as their causes shall require, and to you in justice shall be thought reasonable. And further our will and pleasure is, that you assume our well-beloved subject William Bridgman, esquire, one of the clerks of our council, or his sufficient deputy or deputies in that behalf, to be your register, whom we do by these presents depute to that effect, for the registering of all your acts, decrees, and proceedings, by virtue of this our commission; and that in like manner you, or any three or more of you, whereof you the said lord chancellor to be one, by your discretions shall appoint one or more messenger or messengers, or other officer or officers necessary and convenient to attend upon you for any service in this behalf. Our will and express commandment also is, that there shall be two paper books indented and made, the one to remain with the said register, or his sufficient deputy or deputies, the other with such person, and in such places as you the said commissioners, or any three or more of you, whereof you the said lord chancellor to be one, shall in your discretions think most fit and meet; in both which books shall be fairly entered all the act, decrees, and proceedings made, or to be made, by virtue of this our commission. And whereas our universities of Oxford and Cambridge, and divers cathedral and collegiate churches, colleges, grammar-schools, and other ecclesiastical incorporations, have been erected, founded, and endowed by several of our progenitors, kings and queens of this realm, and some other by the charity and bounty of some of their subjects, as well within our universities as other parts and places, the ordinances, rules and statutes whereof be either imbezelled, lost, corrupted, or altogether imperfect; we do therefore give full power and authority to you, or any five or more of you, of whom we will you the forenamed, the lord chancellor always to be one, to cause and command in our name, all and singular the ordinances, rules, and statutes of our said universities, and all and every cathedral and collegiate churches, colleges, grammar-schools, and other ecclesiastical incorporations, together with their several letters patents, and other writings, touching, or in any wise concerning their several erections and foundations, to be brought and exhibited before you, or any five or more of you, as is aforesaid, whereof you the said lord chancellor to be one; willing, commanding, and authorizing of you, or any five or more of you, as is aforesaid, whereof you the said lord chancellor to be one, upon the exhibiting and upon diligent and deliberate view, search, and examination, of the said statutes, rules and or-

Case in this Collection, A. D. 1691, 1692.] having depended some time before the Ecclesiastical Commissioners, they have determined the same, and ordered her 1,500*l.* per ann. for her maintenance.

"February 10th 1688. The lord Coventry summoned to attend the Ecclesiastical Commissioners on the complaint of his wife."

' dinances, letters patents and writings, as is
 ' aforesaid, the same to correct, amend and al-
 ' ter; and also where no statutes are extant, in
 ' all or any of the aforesaid cases, to devise and
 ' set down such good orders and statutes as
 ' you, or any five or more of you, whereof you
 ' the said lord chancellor to be one, shall think
 ' meet and convenient, to be by us confirmed,
 ' ratified, allowed, and set forth, for the better
 ' order and rule of the said universities, cathed-
 ' ral and collegiate churches, colleges and
 ' grammar schools, erections and foundations,
 ' and the possessions and revenues of the same,
 ' and as may best tend to the honour of Al-
 ' mighty God, increase of virtue, learning and
 ' unity in the said places and the public weal
 ' and tranquillity of this our realm. Moreover,
 ' our will, pleasure, and commandment is, that
 ' you our said commissioners, and every of
 ' you, shall diligently and faithfully execute
 ' this our commission, and every part and
 ' branch thereof, in manner and form afore-
 ' said, and according to the true meaning
 ' thereof, notwithstanding any appellation, pro-
 ' vocation, privilege or exemption in that be-
 ' half, to be had, made, pretended or alledged,
 ' by any person or persons resident or dwelling
 ' in any place or places, exempt or not exempt,
 ' within this our realm; any law, statutes, pro-
 ' clamations or grants, privileges or ordinances,
 ' which be, or may seem contrary to the pre-
 ' mises notwithstanding. And for the better
 ' credit, and more manifest notice of your so
 ' doing, in the execution of this our commis-
 ' sion, our pleasure and commandment is, that
 ' to your letters missive, processes, decrees,
 ' orders, and judgments, for or by you, or any
 ' three or more of you, as is aforesaid, to be
 ' awarded, sent forth, had, made, decreed, given
 ' or pronounced, at such certain public places,
 ' as shall be appointed by you, or by any three
 ' or more of you, as is aforesaid, for the due
 ' execution of this our commission,* you or

* In No. 31 of Owen Wynne's MS. in the
 Library of All Souls' College Oxford, is a re-
 port from the Solicitor General, sir Thomas
 Powys, containing a draught of the commis-
 sion which is stiled a commission ' for execu-
 tion of the Laws Ecclesiastical, within this his
 Majesty's realm.'

Neal, in his History of the Puritans, fails
 not to advert to the incongruity of a Papist
 prince exercising ecclesiastical supremacy.

Kennett, 3 Complete Hist. p. 454, in a Note
 (2 ed.) says:

" There was a second commission of the same
 tenor authorising and appointing the Lord
 High Chancellor of England, the Lord Treas-
 urer, the Lord President of the Council, John
 earl of Mulgrave then Lord Chamberlain, the
 Lords Bishops of Durham and Rochester, and
 the Lord Chief Justice Herbert, or any three
 or more, of which the Lord Chancellor to be
 one, to examine and judge in causes ecclesias-
 tical, *Teste Meipso apud Westmonasterium*
xxii Nov. Regni Secundo, 1686: And I think

' some three or more of you, as is aforesaid,
 ' wherof you the said lord chancellor to be one,
 ' shall cause to be put and fixed a seal, eugra-
 ' ven with a rose and crown, and the letter J.

another commission dated the 12th of January
 following constituting and appointing the Lord
 High Chancellor of England, the Lord Pres-
 ident of his Majesty's Council, the Lord
 Chamberlain of his Majesty's Household, the
 earl of Huntingdon, the bishops of Durham,
 Rochester, and Chester, sir Robert Wright,
 L. C. J. of B. R. sir Thomas Jenner, one of the
 barons of the Exchequer.*

This bishop of Chester was Cartwright, of
 whom Burnet says, that he " was a man of
 good capacity, and had made some progress in
 learning. He was ambitious and servile, cruel
 and boisterous; and by the great liberties he
 allowed himself he fell under much scandal of
 the worst sort. He had set himself long to
 raise the king's authority above law, which he
 said was only a method to which kings might
 submit as they pleased; but their authority was
 from God, absolute, and superior to law, which
 they might exert as oft as they found it neces-
 sary for the ends of government: so he was
 looked on as a man that would more effectually
 advance the designs of Popery than if he
 should turn over to it. And indeed, bad as he
 was, he never made that step even in the most
 desperate state of his affairs." 1 Own Times,
 695, fol. ed. Burnet also says, that Cartwright
 and Parker were pitched on as the fittest in-
 struments that could be found among the
 clergy to betray and ruin the church. See
 more concerning Cartwright in the proceed-
 ings against Magdalen College, Oxford, A. D.
 1687.

Against the above commission sir Robert
 Atkyns wrote the following Discourse concern-
 ing the Ecclesiastical Jurisdiction:

A DISCOURSE CONCERNING THE ECCLE- SIASTICAL JURISDICTION IN THE REALM OF ENGLAND: OCCASIONED BY THE LATE COMMISSION IN EC- CLESIASTICAL CAUSES.

THE preamble acknowledges, That the king
 justly and rightfully is, and ought to be, su-
 preme head of the church of England, and is
 so recognised by the clergy in their convoca-
 tions. And it is enacted, That the king and
 his successors shall be taken, &c. the only
 supreme head in earth of the church of Eng-
 land. And shall have and enjoy annexed to
 the imperial crown all jurisdiction, &c. au-
 thorities, &c. to the said dignity of supreme
 head of the same church belonging. And that
 the king and his heirs and successors, kings of
 this realm, shall have full power and authority
 from time to time to visit, repress, redress, re-
 form, order, correct, restrain and amend all
 such errors, heresies, abuses, offences, con-
 tempts and enormities whatsoever they be,

' and figure 2 before, and the R. after the
' same, with a ring or circumference about the
' same seal, containing as followeth, ' Sigillum

' ' Commissionariorum Regiæ Majestatis ad
' ' Causas Ecclesiasticas.' Finally, we will
' and command all and singular other our mi-

which by any manner of spiritual authority or jurisdiction ought, or may, lawfully be reformed, repressed, ordered, redressed, &c. Any usage, custom, foreign laws, foreign authority, prescription or any thing to the contrary notwithstanding.

Note, This act doth not make the king to be the supreme head of the church of England, but acknowledges, that he ever hath been so (as it is recited by the statute made in the same parliament of 26 H. 8, c. 3. the act for the first fruits. See the preambles towards the latter part, being the first paragraph.) See also the oath prescribed by the statute of 35 H. 8, cap. 1, for the succession, paragraph the 11th in Mr. Kettle's Edition of the Statutes at large, very full to this purpose, to shew that the act of 20 H. 3, cap. 1, gave the king no new title, but only acknowledged, that he ever had a right to it, and that the bishop of Rome had but usurped it.

And as the act of 26 H. 8, cap. 1, gave the king no new title, so it gave him no new, nor further authority in spiritual and ecclesiastical things, nor over spiritual and ecclesiastical persons, than what he had before.

Therefore it is to be enquired what jurisdiction or authority the king had before the making of that act, and how the ecclesiastical jurisdiction was of right and duly before exercised and administered, viz. in what courts, by what rules, laws or canons, and by what persons.

It is clear in law, that the king himself merely in his own royal person could never take to himself the hearing of any cause ecclesiastical or temporal, and adjudge and determine the cause himself: For by the law and constitution of the realm, the king hath committed all his power judicial to divers courts, some in one court, some in another, as is held in sir Ed. Coke's 2d Institutes fol. 186 at the lower end of that folio, and in the middle of fol. 187. All matters of judicature and proceedings in law are distributed to the courts of justice, and the king doth judge by his justices. See the Reports that pass by the name of sir Edward Coke's 12th Reports, fol. 63, the case of prohibitions: Which is true as to ecclesiastical causes as well as temporal; for every man knows, that there have been from the first constitution of the kingdom certain courts and jurisdictions erected within this realm for deciding and determining of spiritual and ecclesiastical causes. Selden's History of Tythes, fol. 412.

All this is excellently well set forth by the preamble of the statute of 24 H. 8, cap. 12 concerning appeals. That as the king hath ever been the supreme head of the realm (which word head is by way of metaphor, and must have relation to some (Body;) therefore the statute in the preamble proceeds to tell you what the body is to which the

head relates, viz. The body politic of the realm ' consists of all sort and degrees of people (within this realm) divided by names of spirituality and temporality. The statute proceeds to mention the plenary power, authority and jurisdiction the king hath within the realm in all causes. It shews us how that power is distributed, and by whom to be exercised. Not by the king in person, nor at his will and pleasure in any arbitrary way; but as that preamble further instructs us, The body spiritual hath power in all causes divine and spiritual to determine and to administer all such offices and duties as to their rooms spiritual doth appertain; the like is declared as to temporal causes to be in the other part of the said body politic, called the temporality. And both their authorities and jurisdictions do concur in the due administration of justice, the one to help the other.

The preamble of the stat. of 24 H. 8, c. 12, of appeals, further shews, how that this ecclesiastical and spiritual jurisdiction, had been confirmed and defended by several ancient acts of parliament against the usurpations of the bishop of Rome (and that long before the reformation of religion.) Then comes the enacting part, which does ordain, That all causes determinable by any spiritual jurisdiction, whether they concern the king himself (as the case of the king's divorce) or any of the subjects, shall be heard, examined, discussed, clearly, finally and definitively adjudged and determined, within the king's jurisdiction and authority, and not elsewhere in such courts spiritual and temporal of the same, as the nature of the cases shall require.

Then the same statute shews us in what courts, and by what steps and methods, suits and proceedings concerning spiritual and ecclesiastical matters ought to be handled, see paragraph 5, 6, 7, 8, 9, 10. It begins with the arch-deacon's court, which is *in fini gradus*, and process gradually from the arch-deacon to the diocesan, from him to the metropolitan, and at last it mentions the convocation, as the supreme.

Note. That further appeals have been given by several acts of parliament, as by 25 H. 8, c. 19, from the arch-bishop or metropolitan to the king in Chancery, which is by commission of Delegates, &c. And it hath been resolved, That though the act of 24 H. 8, cap. 12, and of 25 H. 8, cap. 19, do upon certain appeals, make the sentence definitive as to any further appeal, yet the king (as supreme head) may grant a commission of review: See the case of Halliwell against Jervois, sir Francis Moore's Reports, fol. 462. and in the same Reports, fol. 782, in the case of Bird against Smith, and in sir Edw. Coke's 4th Institutes, fol. 341.

And as the king's ecclesiastical power and jurisdiction are by the fundamental laws of the realm distributed into several courts, which are

‘nisters and subjects in all and every place and
‘places, exempt and not exempt, within our
‘realm of England, and dominion of Wales,

‘upon any knowledge or request from you, or
‘any three or more of you, as is aforesaid, to
‘them, or any of them, given or made, to be

mentioned and confirmed by the said several acts of parliament, and may not therefore be exercised by any other, but by such courts, and in such method and manner as by law, and the said acts of parliament it is provided: So also those courts cannot proceed arbitrarily, but by the known and settled ecclesiastical laws, constitutions and canons that are in force.

By the act of 1 Eliz. cap. 1, entitled, An act for restoring to the crown its ancient jurisdiction over the estate ecclesiastical and spiritual, &c. the seventeenth paragraph in Keble's Book of Statutes, it is enacted, That such jurisdictions, &c. spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been, or may lawfully be, exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, &c. abuses, offences, contempts, and enormities, shall for ever by authority of this present parliament, be united to the crown.

By the 18th paragraph of that act the queen and her successors have power by virtue of this act, by letters patents under the great seal, to assign, &c. (as often as they shall think meet and for such time) such person or persons, as the queen, &c. shall think meet to exercise all manner of jurisdictions ecclesiastical or spiritual; and to visit, reform, redress, order, correct and amend all such errors, &c. abuses, offences, contempts, and enormities whatsoever, which by any manner of spiritual or ecclesiastical power, authority or jurisdiction can, or lawfully may be, reformed, ordered, redressed, corrected, restrained or amended; and such person or persons so to be named, &c. shall have full power by virtue of this act, and of the said letters patents, to exercise, use and execute all the premises according to the tenor and effect of the said letters patents.

See sir Edw. Coke's 4 Inst. in his chapter of Ecclesiastical Courts, fol. 324, 325, and see the 3d Observ. fol. 326, observe the words, viz. It was enacted out of necessity, &c. and *ibid.* Necessity did cause this commission, and it was not to be exercised, but upon necessity; for it was not intended, That it should be a continued standing commission, &c.

That the main object of that act was to deprive the Popish clergy. See fol. 332 Almere's case, and Taylor and Massies case, left to the proper discernment.

Upon the last recited clause in that of 1 Eliz. was grounded the late court called, The High Commission Court: From which act it may be observed and collected, that it needed an act of parliament to give such authority to the queen to grant such letters patents, or commission; and that without an act of parliament such commission could not have been

granted: For if the queen by her meer prerogative and supreme power in ecclesiastical causes could have granted such commission, an act of parliament had been unnecessary. And the express words of the act are, That the queen, &c. shall have power, (by virtue of this act) and the law had (as hath been before observed) distributed the king's ecclesiastical power and jurisdiction into several courts: So that, without a new law, the like power could not be put into any other hands in derogation of those ordinary ecclesiastical courts.

Secondly, note, this act makes no new crimes nor offences, but gives the commissioners or patentees power to visit, reform, redress, &c. all such errors, &c. abuses, offences, contempts and enormities, which by any manner of spiritual or ecclesiastical power can, or lawfully may be, reformed, redressed, corrected, &c.

In sir Edw. Coke's 12 Rep. fol. 49: It was resolved, Trin. 6 Jac. 'Per totam Curiam,' in the court of Common Pleas (there being then five judges of that court, Coke being chief justice) that the high commissioners by virtue of their commission, and that act of parliament, ought to proceed according to ecclesiastical law. Secondly, if their commission gave them any power, which was not allowed or warranted by that act of parliament, it was not legal (which proves that such power cannot be exercised by a commission under the Great Seal merely, without an act of parliament) see Drake's case in justice Croke's Reports of the time of king Charles, fol. 220.

There it is also resolved, That the king by his commissioners cannot alter the ecclesiastical law, nor the proceedings of it.

And if the word (lawfully) had not been in that act of 1 Eliz. yet it must have been so intended, and the judges of the common law (who are proper judges, expositors and interpreters of acts of parliament) would have so understood it; as appears by the resolution of the judges in the case in the same 12 Rep. of the lord Coke, fol. 84, 85, and little regard therefore was given by the judges to commissions under the Great Seal, which the archbishop of Canterbury (Abbot) said, had been made in like cases in the times of king Hen. 8. and Ed. 6.

In the last case, *ibidem*, fol. 85. the chief justice Coke says, he had seen the commission made to Cromwell (by king Hen. 8.) to be vicegerent, and other commissions to others (by his appointment) and he refers to the commission at large inserted in his book of precedents.

See in the same 12 Rep. of sir Edw. Coke, f. 88. Excellent rules to be observed upon such extraordinary commissions, viz. They ought to be solemnly read; for they may possibly contain many things against the law (as the commission in that case mentioned did.)

' aiding, helping, or assisting upon our com-
' mandments, in and for the executing your

' precepts, letters, and other processes, requi-
' site in and for the due executing of this our

The commissioners may every one of them require copies of the commission: The commissioners ought to sit in an open place, and at certain days.

Note also, that such commissions ought not to be kept secret, but they ought to be enrolled in the chancery, that the subjects may be under a known authority. See sir Edw. Coke's 4 Instit. fol. 332, the middle of that fol. And upon irregular and illegal commissions in ecclesiastical causes, the remedy is prohibition out of the courts at Westminster.

In the same 4. Instit. fol. 340. the author hath this note, *Nota*, Stephen Gardiner bishop of Winchester was deprived at Lambeth by commission from king Edward the 6, made to ten persons, proceeding upon it, 'ex Officio mero mixto vel promotio omni appellatione remotâ, summarie de plano, absque omni forma et figura Judicii sola Facti Veritate inspecta.' The author passes no opinion upon it. *Quære*, by what law this was warranted. It must be rare and extraordinary, otherwise sir Edw. Coke would not have so specially mentioned it, but 'a Facto ad Jus non valet Argumentum.'

Note, That part of the act of 1 Eliz. viz. the 18th paragraph (before *verbatim* transcribed) viz. of the queen Eliz. and her successors granting such letters patents or commissions in ecclesiastical causes, is repealed by the act made 16 Car. 1, cap. 11. See it in Mr. Keble's book of statutes at large. See the last paragraph or clause in that act of repeal of 16 Car. 1. It is enacted, That no new court shall be erected or appointed, which shall have the like power or jurisdiction, as the high commissioners had or pretended to have; but that all such letters patents, commissions and grants, and all powers and authorities thereby granted, and all acts, sentences and decrees to be made by virtue or colour of them shall be void.

Note, The late act of 31 Car. 2, cap. 12, in Mr. Keble's book of statutes, does declare that the ordinary power of archbishops and bishops was not taken away by that repealing act of 17 Car. 1, cap. 11, (as this last act dates it.)

But by this act of 13 Car. 2, cap. 12, in the second paragraph. The aforesaid repealing act of 17 Car. 1. and all the matters and clauses therein contained (excepting what concerns the high commission court; or, the new erection of some such like court by commission) are repealed. See the third paragraph also of the act of 13 Car. 2. That the high commission court shall not be revived.

So that I conceive, no such commission nor letters patents can now be granted, but the repealing act of 16, or 17 Car. stands in force against it.

By what law or rules Cromwell in the time of king Henry 8. and by what instructions he acted, does not appear; the commissions to

make him vicar general (which was surely in imitation of what had been used by the pope in the time of his usurpation) or that of vicegerent in ecclesiastical matters (which seems to be new and *prima impressionis*) are not now to be found, of which Dr. Burnet in the history of the reformation of the Church of England, makes some probable conjectures, fol. 181. and wherein consisted the difference between those two authorities and titles, and the commissions for the exercise of them, is not easy to find out: but the thing then principally design'd was to suppress the religious houses belonging to the regular clergy, which were great supports to the Popish hierarchy, not at all to impeach the lawful power and jurisdiction of Episcopacy; for we find at the same time as Cromwell's commissions were in force, and had been then but newly passed, that Crammer archbishop of Canterbury, made his metropolitane visitation; under which (as I conceive) most properly falls the conusance of any contempt or abuse committed by any of his suffragan bishops; if not in a provincial synod, "Archiepiscopi Jurisdictioni subsunt immediate suffraganti." See Lind. Provin.

The exclusion of the pope in the time of king Hen. 8. made no diminution of the power or jurisdiction of the clergy, as to determining of ecclesiastical causes, or making canons, constitutions, and other synodical acts, as is rightly observed by Dr. Heylin in his Introduction to the History of Laud late archbishop of Canterbury; upon this ground it is, that to this day they exercise all manner of ecclesiastical jurisdiction in their own names, and under the distinct seals of their offices, the statutes that made some alteration in the matter being all repealed: see Dr. Heylin's Introduction, aforesaid, *ibid.* fol. 341.

The legislative power in matters ecclesiastical continues in the convocation for making canons and constitutions confirmed by the king and parliament; discipline and the admonition still resides in the bishops and those under them.

In case of any irregularity in the metropolitan, resort must doubtless be to the head of the church upon earth, (the king) as it was in the case of archbishop Abbot, who shooting at a deer unfortunately killed the keeper; and his jurisdiction (he being suspended) was supplied by commission, as you may read in Dr. Heylin of the life of archbishop Laud, in the 87th fol. of the book itself, but more fully, fol. 170.

The bishop of London is next in place and dignity to the metropolitans, see his privileges, *ibid.* 185.

See Dr. Heylin's judgment in the work of reforming the church, either in doctrine or exercise of the discipline, pertinent to the matter now in hand, but in point of law it would be no very difficult thing to discover him to be mistaken, fol. 327.

‘ commission, as they and every of them tender
 ‘ our pleasure, and will answer the contrary at
 ‘ their utmost perils. In witness, &c.’

THE KING'S LETTER.

Dated Monday, June the 14th.—Delivered
 at Fulham on Thursday, being the 17th
 of the same June, in the afternoon, by
 Mr. Atterbury the messenger.

“ JAMES R.

“ Right Reverend Father in God, we greet
 you well. Whereas, we have been informed,
 and are fully satisfied, that Dr. John Sharp,
 rector of the Parish Church of St. Giles in the
 Fields, in the county of Middlesex, and in
 your diocese, notwithstanding our late letter
 to the most reverend Fathers in God the arch-
 bishops of Canterbury and York, and our di-
 rections concerning preachers, given at our
 court at Whitehall, the 15th of March, 1685,
 in the second year of our reign; yet he, the
 said Dr. John Sharp, in contempt of the said
 orders, hath in some of the sermons he hath
 since preached, presumed to make unbecoming
 reflections, and to utter such expressions as
 were not fit or proper for him; endeavouring
 thereby to beget in the minds of his hearers an
 evil opinion of us and our government, by in-
 sinuating fears and jealousies to dispose them
 to discontent, and to lead them into disobedi-
 ence and rebellion. These are therefore to
 require and command you immediately upon
 receipt hereof forthwith to suspend him
 from further preaching in any parish church
 or chapel in your diocese, until he has given
 us satisfaction, and our further pleasure be
 known herein: And for so doing, this shall
 be your warrant: And so we bid you heartily
 farewell.

“ Given at our court at Windsor, the 14th
 day of June, 1686, in the second year of our
 reign. By his Majesty's Command,

“ SUNDERLAND.”

The BISHOP of LONDON'S ANSWER,
 Sent by Dr. Sharp to the earl of Sunderland,
 then at Hampton Court, upon Friday,
 June 18, who could have no answer.

To the Right Honourable the Earl of Sunder-
 land, Lord President, &c.

“ My Lord,

“ I always have, and shall count it my duty

See the power of the metropolitan, and of the
 appeal from him to a provincial synod, and a
 stop put there, and a *ne ultra*, and that there is
 no vicar upon earth appointed to be the
 supreme judge in ecclesiastical matters in the
 opinion of the Council of Nice, discoursed of by
 Dr. Stillingfleet in his antiquities of the British
 Churches, fol. 100. but still it must be under-
 stood, that this fixed power in the ecclesiastical
 judges and courts in England, is derived from
 the crown: but now under the crown settled in
 this method not to be interrupted; this is
 “ *quoad potestatem jurisdictionis non ordinis.*”

to obey the king in whatever commands he
 lays upon me, that I can perform with a safe
 conscience: But in this, I humbly conceive I
 am obliged to proceed according to law; and
 therefore it is impossible for me to comply;
 because though his majesty commands me
 only to execute his pleasure, yet, in the capa-
 city I am to do it, I must act as a judge; and
 your lordship knows no judge condems any
 man before he has knowledge of the cause,
 and has cited the party. However I sent to
 Mr. Dean*, and acquainted him with his ma-
 jesty's displeasure, whom I find so ready to
 give all reasonable satisfaction, that I have
 thought fit to make him the bearer of this an-
 swer, from him that will never be unfaithful to
 the king, nor otherwise than, My lord, your
 lordship's most humble servant, H. LONDON.”

On Sunday after, Dr. Sharp carried a Petition
 to Windsor, which was not admitted to be
 read: Which is as follows:

TO THE KING'S MOST EXCELLENT MAJESTY.

The humble PETITION of John Sharp, clerk,

“ Sheweth,

“ That nothing is so afflictive to your peti-
 tioner, as his unhappiness to have incurred
 your majesty's displeasure; which he is so
 sensible of, that ever since your majesty was
 pleased to give notice of it, he hath forborn all
 public exercise of his function, and still con-
 tinues so to do.

“ Your petitioner can with great sincerity
 affirm, that ever since he hath been a preacher,
 he hath faithfully endeavoured to do the best
 service he could in his place and station as
 well to the late king, your royal brother, as
 your majesty, both by preaching and other-
 wise.

“ And so far he hath always been from vent-
 ing any thing in the pulpit tending to schism
 or faction, or any way to the disturbance of
 your majesty's government, that he hath upon
 all occasions in his sermons, to the utmost
 of his power, set himself against all sorts of do-
 ctrines and principles that look that way: And
 this he is so well assured of, that he cannot but
 apprehend that his sermons have been very
 much misrepresented to your majesty.

“ But if in any sermon of his, any words or
 expressions have unwarily slipped from him, that
 have been capable of such constructions, as to
 give your majesty cause of offence, as he so-
 lemnly professes he had no ill intention in those
 words or expressions, so he is very sorry for
 them, and resolves for the future to be so care-
 ful in the discharge of his duty, that your ma-
 jesty shall have reason to believe him to be
 your most faithful subject.

“ And therefore he earnestly prayeth, that

* Dr. Sharp was at this time dean of Nor-
 wich, he succeeded Tillotson as dean of Can-
 terbury, and in 1691 was made archbishop of
 York.

your majesty, out of your royal grace and clemency, would be pleased to lay aside the displeasure you have conceived against your humble petitioner, and restore him to that favour

which the rest of the clergy enjoy under your majesty's gracious government.

“ So shall your petitioner ever pray, &c.”

In the Council-Chamber at Whitehall, &c.

Mercurii, 4 die Augusti, 1686.

Present in Council, Lord Chancellor, Lord Bishop of Durham [Crew,] Lord Treasurer [Earl of Rochester,] Lord Bishop of Rochester, [Sprat; see vol. 9, p. 362] Lord President [Earl of Sunderland], Lord Chief Justice Herbert.

UPON my Lord Bishop's appearing before them, according to a summons sent unto him, the Lord Chancellor Jeffereys began, viz.

Lord Chancellor. My lord bishop of London, the lords here present have received orders from the king to inspect all ecclesiastical affairs and persons; and he hath commanded us to cite you before us; and I desire you would give a positive and direct answer to it: What was the reason you did not suspend Dr. Sharp, when the king commanded, and sent you express orders so to do, and told you what it was for, viz. for preaching seditiously and against the government?

Lord Bishop. I have received such an order; and if what was done in that affair was done amiss, and contrary to my duty, it was my ignorance and inadvertency, and not a wilful fault: I have been always ready to express my duty to his majesty; and if in this particular I have not complied, it was because, as I was told, I could not. I was not so shallow as to go on my own head, but took the best advice I could get: I consulted those whose business it is more perfectly to understand these proceedings; all told me I could not legally do it, but by way of citation and hearing him.

Lord Chanc. ‘Ignorantia juris non excusat;’ you ought to have known the law, and it was a wonder you did not: the king is to be obeyed, and if you have any reason to shew in this particular, we are ready to hear you.

Lord Bishop. I knew not what would be laid to my charge, and therefore was not provided to make such a defence as I might have done; but if your lordships will give me a copy of your commission, and a copy of my charge, and allow me some time, I will endeavour to give your lordships satisfaction.

Lord Chanc. My lord, I would not misinterpret your words, but shall desire you to explain their meaning. If by desiring a copy of our commission, you design to quarrel with the jurisdiction and legality of the court, I have another answer for you; but till I know your meaning here, my answer is, that no copy of the commission can be granted, and it is unreasonable to desire it; it is upon record; all the coffee-houses have it for a penny a-piece, and I doubt not but your lordship has seen it.

Lord Bishop. I have never seen it, nor have I desired it for such ends, to dispute the lega-

lity of it: but your lordships know it is a thing altogether new to this generation, and, it may be, something may be found in it, whereby I may be instructed and directed in my answer and behaviour in the matter. But, my lord, if I may not have a copy of it, will your lordships please I may either read, or hear it read?

Lord Chanc. That is a thing I cannot grant of myself, I must ask my lords commissioners' judgment; and if you will be pleased to withdraw, you shall hear it.

The Bishop and all the company withdrew for a quarter of an hour; then returning, the Lord Chancellor said:

My lord, all the commissioners are of opinion, that your request is not to be granted, and that it is unreasonable. Might every one that appears here challenge the sight of our commission, and the reading of it, all our time will be spent in the reading, and we have something else to do. The proceedings of courts in this kind are never by libel and articles; ‘Sapientem succintim ore tenus,’ by word of mouth only; and it is a short question I ask, Why you did not obey the king?

Lord Bishop. It is a short question, but requires more words to answer it. I pray your lordships to consider I am a peer, a bishop, and have a public trust, though unworthy, under a public character; and I would behave myself as becomes one in these capacities.

Lord Chanc. We know very well your lordship's quality and character, and are willing to shew all due respect to your lordship; but yet we must have a due regard for the king and government too: his majesty must not be neglected.

Lord Bishop. My lord, I suppose there is no appeal from the court; and when a man is to be condemned at one bar, and is in danger of being knocked down at one blow, you would think it unreasonable he should not have some time to make his defence.

Lord Chanc. My lord, I suppose their lordships will be willing to grant some time: I pray what time does your lordship desire?

Lord Bishop. My lord, it is the assize-time, and most of the counsel, upon some occasion or other (either business or diversion) are in the country: I pray you, my lord, I may have till the beginning of the term.

Lord Chanc. Hah! That is unreasonable:

his majesty's business cannot admit of such delays; methinks a week should be enough: what say your lordships? Is not a week enough?

The Commissioners being asked, signified by the Chancellor that a week was enough.

Lord Bishop. Since your lordship will grant no more, I will ask no more.

Lord Chanc. Adjourn until Monday next, the 9th of August, 1686.

Upon the 9th day his lordship came, attended with his nephew, the earl of Northampton, his brother in law, sir John Nicholas, and his brother, sir Francis Compton, &c.

There being present in council, the same as before in the same proceedings.

Lord Chanc. My lord, we are here to hear your reasons.

Lord Bishop. My lord, I have lost no time for preparing my answer, but am not so ready as I might have been, because I could not light of the commission your lordship told me was upon record, and in every coffee-house, but employed a whole week to search for it, and could not have a sight of it until last night: if your lordship doubts the truth of this, I have the person ready to make oath here of it.

Lord Chanc. My lord, you are a person of honour, and we will not question the truth of what you say, there needs no oath: but, my lord, I must tell you, that we will not admit of any quarrelling with our commission, we are well assured of the legality of it, otherwise we would not be such fools as to sit here.

Lord Bishop. My lord, I have other reasons why I desire a sight of your commission; it may be, it may not reach me, being a peer and a bishop; and it may be, it may not reach this particular case; and therefore I desire a sight of it, in regard I could not see it until the last night. I have not had time to take advice what to answer; if your lordship will not be satisfied, I must give such an answer as I have prepared; but it is my desire to have longer time for it.

Lord Chanc. Is this all you have to say?

Lord Bishop. This is the first thing: I do not desire to prolong the time, the necessity of the case requiring it, the counsel being out of town in whom I think to confide.

Lord Chanc. If your lordship will withdraw, we will give you an answer. [He withdrew for a quarter of an hour.]

Lord Chanc. My lord, as I formerly told you, we will not endure any quarrelling at our commission; it will be an odd thing in us to give you time to pick holes in it; but we are willing to pay all due respects to your lordship: what time do you require?

Lord Bishop. I shall submit to your lordships; but I hope a fortnight will not be unreasonable.

Lord Chanc. Agreed: You shall have it until to morrow fortnight in the morning.

To which my Lord Chancellor added,

Lord Chanc. My lord, when I told you our commission was to be seen in every coffee-house, I did not speak with any design to reflect on your lordship, as if you were a haunter of coffee-houses. I abhorred the thoughts of it, and intended no more by it, but that it was common in the town.

[Note, When the bishop spake concerning the commission, sir Thomas Clarges spake with a loud voice, saying 'Well put, well put; my lord speaks nothing but truth.' There was also another gentleman, sir John Lowther of Lincolnshire, who as he was coming away in the crowd, said, 'There are some who have represented me as a Papist, but the contrary shall appear; I will not be afraid, nor ashamed, to vindicate my lord bishop's cause before the commissioners themselves.']

Tuesday, August 23, 1686.

There being present in council the same as in the former proceedings: The lord bishop attending, the proceedings were as follow:

Lord Chanc. My lord, we are now ready to hear your lordship's answer.

Lord Bishop. My lord, notwithstanding the time hath been very short, considering the weightiness of the matter, and the absence of many of the learned counsel, I have taken what advice I could, and have consulted those that are very learned in the laws. I hope there will be no misinterpretation of my words, I do not intend any thing which is derogatory to the king's supremacy, that is undutiful to his majesty, or disrespectful to your lordships. My counsel tells me, that your proceedings in this court are directly contrary to the statute law, and are here to plead it, if your lordships will admit them.

Lord Chanc. We will neither hear your lordship nor your counsel in the matter; we are sufficiently satisfied of the legality of our commission, as we often told you.

Lord Bishop. My lord, I am a bishop of the church of England, and by all the law in the Christian church in all ages, and by the particular law of this land, I am, in case of offence, to be tried by my metropolitan and suffragans: I hope your lordship will not deny the right and privilege of Christian bishops.

Lord Chanc. My lord, you know our proceedings are according to what has been done formerly, and that we have an original jurisdiction: this is still questioning our court.

Lord Bishop. It is partly.

Lord Chanc. Nay, it is absolutely so.

Lord Bishop. My lord, I hope you will interpret every thing in your commission in favour of the person that is brought before you: I humbly conceive that your commission doth not extend to the crimes laid to my charge, for you are to censure faults which shall be committed: this that I am accused of, was before the date of your commission.

Lord Chanc. I confess there is such a clause, but there are general clauses, that take in things that are past, as well as those that are to come. Hath your lordship any thing more?

Lord Bishop. My lords, protesting in my own right to the laws of the realm as a subject, and the rights and privileges of the church as a bishop, I shall, with your lordships' leave, give you my Answer.

Which was accepted; and the bishop withdrew, and left Dr. Sharp's Petition, which the king had refused to accept.

Lord Chanc. My lord, we have read the paper.

Lord Bishop. My lord, it is Dr. Sharp's petition to the king.

Lord Chanc. My lord, be pleased to take it again, we are not concerned in it; will you please that your lordship's Answer be read?

Lord Bishop. Yes, if your lordship please. My lord, I have this to say further, what I did in this matter was *Jurisperitorum Concilio*. I consulted my counsel, who is the judge of my courts, as well as others; and the law says, That what is done by the advice of counsel, shall not be interpreted to be done maliciously, or obstinately. The law, in this case, requires, that if a prince require a judge to execute an order, which is not agreeable to the law, he shall 'Rescribere et Reclamare Principi.' Now, my lord, I conceived I acted in this according to my duty, for I wrote back to my lord president, in as becoming words as I could; and acquainted him, that an order to suspend before citation and hearing the person, is against law, and expected his majesty's further pleasure. In the next place, my lords, I did in effect what the king commanded to be done; for I advised Dr. Sharp to forbear preaching till his majesty had received satisfaction concerning him; and accordingly he hath forborn in my diocese.

Lord Chan. My lord, will you have your paper read?

Lord Bishop. Yes, if your lordship please. Which contained the King's Letter, and the Bishop's Answer thereto.

Lord Chanc. Hath your lordship any more to say?

Lord Bishop. My lord, I desire your lordship would hear my counsel, by whom you may have more clear and full satisfaction concerning what I have said.

Whereupon the Bishop was desired to withdraw, and after half an hour, he and his counsel were called in; who were Drs. Oldish, Hodges, Price, and Newton. A brief account of what they pleaded.

Dr. Oldish. My lord, the question before your lordship is, whether the bishop of London hath been disobedient to the king's command? Concerning which, it must be considered?

First, What was commanded to be done?

Secondly, What he did in obedience to it?

Thirdly, What judgment ought to have been given by him?

It is apparent by the letter, that the king did not take cognizance of the cause, for the words are, 'being informed that Dr. Sharp, &c.' So that it could not be an absolute suspension; for that supposeth a proof of the crime charged upon him: then let us consider the words themselves:

That you suspend him from preaching. Now, my lords, we have no such thing in our laws; so that the meaning must be silencing of him. Where there is an absolute suspension, there ought to be citation, form of proceeding, judgment and decree; to act otherwise is contrary to the law of God, of nature, of all nations in all ages, and was never known in the world.

Lord Chanc. I am loth to interrupt you; but I must tell you, this is an unnecessary harangue; we know that it was not an absolute suspension: but the question is, whether the bishop could suspend him from preaching?

Dr. Oldish. Then, my lords, I have gained another point; if it were only silencing him, the question is, whether the bishop did not execute the king's commands? I think he did, and in such a method as is observed in our courts.

When any eminent person is accused, the judges send to him by a letter; and if he appears and complies with the judges order, the law is satisfied.

'Judicium redditur in invitum non in volentem.' The bishop did send for Dr. Sharp, shewed him the king's letter, adviseth him not to preach till the king had received satisfaction; in which he promised to observe his lordship's command, and hath not preached to this day; so that his majesty's command was, in effect, fulfilled. My lord, there is the like proceedings in the common law; for if an attorney takes a man's word for his appearance, there lies no action against the attorney.

Lord Chanc. 'Cujus contrarium.' There lies an action of escape against the attorney.

Dr. Hodges. My lords, the matter of fact hath been stated, and the question is, whether the bishop hath been disobedient to the king's command? It appears that he has not; because, upon the receipt of his majesty's letter, he required the doctor not to preach, and he hath obeyed him in that which the king commanded. To suspend him the bishop could not do, the act of suspension is a judicial act: the king writes to him as to a bishop, to suspend as a bishop and as a judge, which could not be done without the hearing of the cause. If the prince sends to a person that is not a judge, that is only in a ministerial office, that officer is to execute his commands: but when the king commands a judge, he commands him to act as a judge. This is no light matter the doctor is accused of; it is for preaching sedition and rebellion, which requires a severe censure. And if the bishop, as a judge, had suspended him, he had begun at the wrong end, for this had been judgment before process: in this cause there ought to have

been a citation, our books giving many instances, which would be too tedious to your lordships—I will give this one: the emperor's proceedings against the king of Sicily upon information which he had received; and giving him no citation, the king appealed to the pope, who declared the proceedings to be void; and that it was against the law of nature, which is above all positive laws, to pass sentence before citation. This is the method of proceeding before all courts, and I humbly conceive it is, and will be, the method of this court; for otherwise, the bishop need not to have been cited before you. The bishop has done what was his duty, he was bound to return his reason to the king, why he did not do that which he commanded, and to expect his further answer; which was done. I affirm, that if a prince, or a pope, command a thing which is not lawful, it is the duty of a judge *rescribere*; which is all he can do, quoting his author.

Dr. Price. The question is *ut supra*: A citation is *jure gentium*, and can never be taken away by any positive command or law whatsoever: the bishop hath obeyed the king so far as he could, and did *rescribere*, expecting his majesty's further pleasure. If the bishop could have suspended him, it must have been done *in aula*; but in regard it was only silencing him, which was required, it might be done in a private room: the advice of a bishop is in some sense an admonition, which is a judicial act, and this was given by a bishop, and obeyed by the doctor.

Dr. Newton. My lord, the question is *ut supra*, the bishop hath not been disobedient. As in nature no man can be desired to do that which is impossible, so no man can be obliged to do an unlawful act. ('*Id non fit quod non legitime fit.*') This rule obliges all men, at all places, and at all times. The charge against Dr. Sharp is of a very high nature; and he desired to be heard before he was condemned.

My Lords, the bishops are *Custodes Canonum*, and therefore must not break them themselves. I affirm, the bishop was so far from being disobedient, that he was obedient to the king; For where he did *rescribere*, and heard not the further pleasure of the king returned, he ought to conclude, the king was satisfied with what he had written, according to his duty, and the king had altered his commands. A citation, as your lordships have heard, is according to all laws, in all places, in all judicial acts; there is something to be done according to law, and somewhat according to the discretion of the judges, and for that reason, as well as these, the offenders ought to be cited before him; that which was in the bishop's power to do, he hath done, and it was in effect what the king commanded to be done.

Lord Bishop. If through mistake I have erred in any circumstance, I am ready to beg his majesty's pardon, and shall be ready to make any reparation I am capable.

The bishop withdrew for half an hour and was then called in.

L. Chanc. We will be here again on Wednesday next, and I desire your lordship to be here again about ten in the forenoon.

Lord Bishop. My Lord, I desire that care may be taken concerning the minutes, which are taken by the clerks, of what hath passed, and that I may not be misrepresented to the king by the mistake of the penman.

Lord Chan. My lord, you need not fear it; I hope you have a better opinion of us; there shall be no advantage taken by them or us.

Bishop Roch. There shall be no advantage taken, but all imaginable care taken concerning it.

Note, When the counsellors were pleading, Dr. Pinfold, the king's advocate, stood at the chancellor's elbow, and took notes; by which it was expected that he should make a reply, but he said nothing: and it is supposed that he staid with the council, when the bishop withdrew, and gave them reasons for his silence.

Die Luna, 6 September, 1686.

There being present in council the same as in the former Proceedings.

Lord Chanc. My lord, pray sit down. You were desired to appear this day to hear your sentence, which (to prevent mistake) we have ordered to be put in writing.

Lord Bishop. My lord, may I have leave to speak before sentence is read?

L. Chanc. My lord, we have heard you and your counsel already.

Then the following Instrument, whereby the bishop of London was suspended, was, by the Commissioners order, read by Mr. Bridgman, their lordships' register.

'By his Majesty's Commissioners for Ecclesiastical Affairs.'

'Whereas Henry, lord bishop of London, hath been convened before us for his disobedience, and other his contempts mentioned in the proceedings of this cause; and the said bishop being fully heard thereupon, We have thought fit, upon mature consideration of the matter, to proceed to this our definitive sentence, declaring, decreeing, and pronouncing, that the said Henry, lord bishop of London, shall for his said disobedience and contempt, be suspended during his majesty's pleasure; and accordingly we do, by these presents, suspend him the said lord bishop of London, peremptorily admonishing and requiring him hereby, to abstain from the function and execution of his episcopal office, and from all episcopal and other ecclesiastical jurisdiction, during the said suspension, upon pain of deprivation and removal from his bishopric.

'Given under our hand and seal the 6th day of September, 1686. Sealed with the seal

' of the court, C. J. 2. Rose and Crown, with
' this inscription round it, viz. Sigillum Com-
' missionariorum Regiæ Majestatis ad Causas
' Ecclesiasticas. Signed by nobody at all.'

Some days since, one of the messengers at-
tending the court, delivered to the dean of St.
Paul's a warrant, the tenor whereof followeth :

' By his Majesty's Commissioners for Eccle-
' siastical Affairs.'

' Whereas we have given sentence of sus-
' pension against Henry lord bishop of London,
' a copy of which sentence, under our seal, is
' hereunto affixed : We have thought fit and
' do hereby enjoin and require you, to cause
' the said sentence to be affixed on the door of
' that chapter house, and on the place now
' called the south door of the said church, to
' the end that public notice may be taken of the
' said suspension. And you are to certify us,
' under your common seal, of the due execu-
' tion of what is hereby required.

' At our council chamber at Whitehall, on
' Tuesday the 28th of this instant September,
' at eleven o'clock in the morning. Given

' under our seal this day of September,
' 1686. Sealed with the same seal as the sen-
' tence, but no persons names. Subscribed to
' the dean and chapter of London.'

Dr. Sharp was also suspended about the
same time, but he was soon after restored to
the exercise of his function ; and when the
king received advice of the prince of Orange's
intended expedition, the bishop's suspension
was taken off.*

* Crew and Sprat [two of Bishop Compton's
judges] together with White, Bishop of Peter-
borough (see the Case of the Seven Bishops
A. D. 1688) were appointed commissioners to
exercise all manner of ecclesiastical jurisdiction
within the diocese of London during the sus-
pension of the bishop.

" Dr. Sharp was likewise judicially suspend-
ed, but in pretended mercy was soon after
restored to the exercise of his function." Kennett,
who in a note adds, that he, by means of Mr.
Pepys, obtained this restoration for Sharp, 3
Complete History, 483, 2d Edition.

650. The Trial of Sir EDWARD HALES, bart.* for neglecting to take
the Oaths of Supremacy and Allegiance, with his Plea thereto,
upon the King's dispensing with the Stat. 25 Car. 2, and the
Opinion of the Judges thereupon. 2 JAMES II. A. D. 1686.†

Paschæ, 2 Jac. 2. In the King's-Bench.

Arthur Godden Plaintiff, in an Action of Debt
of 500*l.* grounded upon the Act of 25 Car. 2,
for preventing Dangers from Popish Recu-
sants.

Sir Edward Hales, bart. Defendant.

THE plaintiff declares, That the defendant,
after the first day of Easter term 1673, sc. 28

* It appears by the Case of the Seven
Bishops that he was at that time lieutenant of
the Tower, and when king James, on the 10th
(Hume says the 12th) of December, 1688,
departed from London, Hales accompanied
him. The king was disguised as Hales's ser-
vant.

† This was one of the early steps taken by
king James for the advancement of Popery.
Whether he had at the commencement of his
reign, a fixed design to establish that religion,
has lately been much discussed in Mr. Fox's
Historical Work, Mr. Rose's Observations upon
it, and Mr. Serj. Heywood's Vindication.

As to the measures which James the Second
adopted in Scotland in favor of the Papists, See
the King's Letter and Proclamation of Febru-
ary the 12th, 1687, the Council's Answer of
February the 24th, and the King's Letter of
March 31st, in the same year, vol. 10, pp. 735,

Nov. 1 Jac. 2, at Hackington in Kent, was ad-
mitted to the office of a colonel of a foot-regi-
ment.

That being a military office, and a place of
trust under the king, and by authority from
the king.

And the defendant held that office by the
space of three months, next after the 28 Nov.
1 Jac. 2.

And from thence, till the time of this action

et seq. of this Collection. Farther particulars
are related in the following detached passages
in Fountainhall's Decisions :

" May 22, 1685. A commission from his ma-
jesty is read to the earl of Dumbarton, to com-
mand our forces. Nota, He is Roman Catholic,
and takes not the test. His hazard is only his life-
rent escheat, which if any attempted to seek,
would be gifted to himself. If the penalty of the
act had been made treason, and declared irremis-
sible, it would have been more certain : but it was
alledged, that encroached on the king's prerog-
ative ; and when a country is in combustion,
Papists or any may quench it."

" October 20. The Synod of Edinburgh met,
where Mr. Monro the first minister of Stirling
preached. There was a report made from the
Presbytery of Haddington, that sir John Seton
of Garmilton had some servants who had been
debauched to apostatize and make defection

begun, he was, and still is an inhabitant and resident of the parish of Hackington.

from the Protestant religion to Popery; and that not only by the canons of our Church, but by our acts of parliament, (vid. act 47. 1572.) Apostates after admonition by their pastor are to be excommunicated. The bishop signed a warrant to proceed in their process of excommunication; though it is like it will sleep. This lays also a platform against Doctor Sibbald, and Hugh Brown, who had also revolted. But to qualify this zeal, the bishop in his speech ordered them in their sermons to forbear all personal reflections, but only to handle the Popish controversies in general; and if they pleased to turn their afternoon's sermon to a catechetick discourse, as was the custom of the Protestant Church of France, now sadly persecuted; that our fears needed not be so panical for Popery, because, 1mo, We had the promises and providence of God to rely on. 2do, The king's promise and assurance to protect our religion, (though some cannot find where the king has promised it) 3tio, We have strong laws in favours of our reformed religion."

"October 28. A letter came signed by secretary Murray, to the bishop of Edinburgh, signifying that the king was informed that seditious speeches were uttered in the pulpits of Edinburgh, tending to stir up the people to a dislike of the king, or the Popish religion, and ordaining him to advert thereto on his peril. He convened his ministers, and intimated this to them, that it had arisen on the public reflecting on doctor Sibbald, and the ladies of Errol and Meldrum had threatened him, &c."

"Nov. 12. At Privy Council, the king's letter was read, dispensing with the test to some Papists, who had been named in the new act of parliament 1685, anent the supply and excise, to be commissioners in their respective shires, for uplifting and ingathering of that subsidy. The letter bore, that the said act, by a mistake had enjoined the said commissioners to take the oaths of supremacy and the test; whereas by the act of the test itself, and the additional act in 1681, they were *de industria* omitted and left out, seeing the king's service must not be stopped by that; and therefore he names about 26 Papists who were commissioners of supply, and exemts and relaxes them from the test, dispensing therewith, and empowering them to act without taking it; which seemed a downright derogation to the act of parliament 1685, and not in the king's power; for it was said, whatever that dispensation might operate to secure them for all proceedings, yet if they acted after it, they incurred and contracted a new guilt. It had also another clause, but prejudice to his majesty to dispense with any others he pleased; but ordained the oaths to be imposed on all others: which is conform to the 13th act 1685, ordaining all Protestant heritors to take the test. The true case was the Duke of Queensberry, when commissioner, had it par-

And the plaintiff taking it by protestation, that the defendant within three months next

ticularly in his instructions, to suffer nothing to pass to the prejudice of the Roman Catholics more than was already; yet lord Kintore treasurer depute, and the clerk register, slipt that clause into the act of the supply, which, being challenged by the king, the chancellor and treasurer purged themselves of it upon oath, so it landed at Tarbet's door, which made the duke of Gordon do him all the bad offices he could for some time. This letter alarmed some people, as an essay that the king intended, by little and little, to put Papists in the government, and which they thought seemed clear from his speech to the English parliament on the 9th of November 1685, when they sat down."

"Jan. 5, 1686. There is a letter from the king, ordaining all the Protestant heritors to be pursued and fined before the privy council, who had not taken the test within the days prefixed by the 13th act of parl. 1685. This may serve to humble and weaken that party who are looked on as secret enemies to his majesty's succession to the crown; but by the principles of our loyal religion his majesty had undoubted right."

"Jan. 8. At Exchequer, the high treasurer produced a list of the pensions his majesty had granted, extending to 52 persons, whereof there is above 12,000*l.* sterling payable to Papists; as to lady Mary Gordon, now countess of Perth, ladies Errol, and Largo, lady Margaret Hay, lord Traquair, colonel Whitefoord, Doctor Sibbald, &c. and some in the former list were kept out here. Some grudged that their taxes paid to the king, and particularly the additional three months cess, should be thus distributed and exhausted among Papists."

"Jan. 11. The collectors of the king's customs, and their searchers having apprehended in a ship from London, some Popish crucifixes, beads, priests vestments, and the furniture and ornaments of an altar, they were in some doubt if they should let them pass, seeing the acts of parliament ordain all such baggage to be seized on; yet the 25th act 1587 only mentions Popish and erroneous books; but sir George Mackenzie, in his observations on that act, acknowledges it has been also used as a warrant to apprehend and confiscate such trash; but being for the chancellor, they would not meddle with them."

"Jan. 12. At privy council, there was a letter from the king read, wherein he empowers his privy council to give abatement of the fines they had imposed upon persons for church irregularities and delinquences, if they saw cause, and that the parties merited it; providing the abatement did not exceed the half of their fine, if they paid presently, and a 3d part in other cases.

"The privy council sent up a letter to the king, in answer to his of the 5th January, signifying that there were many who had not refused the test out of contumacy, but from

after his admission into the said office of colonel, did not receive the sacrament in manner as the act directs, but neglected to receive it ;

ignorance of the diet prefixed, the acts of parliament in 1685. having been long of printing, and making public ; and therefore desiring he would allow a farther diet and prorogation for taking it.—And, on the 28th of January, there came another letter from the king. in answer to this, whereby, instead of prorogating the diet for taking the test, (as is enjoined to Protestant heritors by the 13th act of parliament 1685.) he dispensed with the taking it during his pleasure.—There was also a letter a part, dispensing with the earl of Forfar's taking the said oath of the test, which was unnecessary, he being included in the general exemption.

“ Jan. 9. The printers and stationers were by the privy council's order, at least the chancellor's, discharged either to print or sell any books reflecting on Popery. And a copy of this was given to every bookseller.—When it was intimated to James Glen bookseller, he answered the macers of privy council, that he had one book in his shop which condemned Popery very directly, and he desired to know if he might sell it, meaning the bible. The order ran in general terms, that nothing should be printed or sold without a licence from the chancellor, or the ordinary, or the clerks of privy council ; but it was thought obvious that this was meant against Protestant books of controversy, because they stirred up the minds of the people against the king's religion.”

“ March 26. A letter comes down to the royal boroughs from secretary Melfort, signifying that the king desired to know what shipping belonged to each of them, in regard he resolved, by his prerogative to give them a free trade with England, which many thought could not be done without an act of parliament there : But this was trusted now to amuse and flat er the boroughs into a compliance with the statesman's design of tolerating Popery. To the same end the duke of Queensberry got a letter from the king, full of gracious expressions, that he would never forget the many services he had done him.

“ April 13. The convention of the royal boroughs, and the synod of Edinburgh met.

“ There was a paper posted on the convention-door, advertising the members to beware of Kenne ty provost of Edinburgh, and of Alexander Miln of Linlithgow, who were to lead them to perjury by breaking the test ; so that to begin, they caused such as had not formerly been members, take the test ; And the king's letter to the royal boroughs, mentioned 29th March last, was read, to which they returned an answer intreating his majesty to empower his commissioner to restore their privileges, invaded by the burghs of barony and regality, and to procure them a free trade with England : And accordingly the commis-

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Avers, that the defendant did neglect to take the oaths of supremacy and allegiance, either in the Chancery, or in the King's-bench, or at

sioner mentioned these particulars in his speech ; but the boroughs misbehaving to the court, none of these things were performed to them.

“ As to the synod, professor Strachan had the *concoad clerum*, who much pressed toleration to all who differed from us in judgment, insinuating a charitable accommodation with the Papists, and cited the two Reynolds. The people was so dissatisfied with him, that they withdrew from his church thereafter. The bishop in his speech told them, that the king would graciously defend our religion, and only craved the exercise of his own, to these of his own persuasion, in private, without hazard of the laws ; which, he said, could not be denied him, because he might take it by his prerogative of the church supremacy, as settled by the 1st act of parliament 1669 ; and that the archbishop of St. Andrews and he had got an ample commission to suspend and deprive, by themselves alone, any who preached seditious, though they should be bishops. And Mr. George Shiell, minister at Prestonbough, having preached rudely against Popery in the abbey church the Sunday before, was sharply reprov'd ; though he said, 1. That he had obeyed the bishop's old instructions, allowing them to preach against Popery, sparing persons. 2. That a ridiculous religion might be treated in ridicule ; for he had said, the pope was as little infallible as the bishop of the isles, who was one of the silliest bishops in the world ; and that he would believe the moon to be made of green cheese as soon as believe transubstantiation. Then the bishop, by a strict act, prohibited them to employ any in their pulpits of Edinburgh, or the suburbs, without his license.”

“ May 6. The draught of the parliament's answer to the king's letter was read twice, and by paragraphs ; And that part which mentioned the present king's and his brother's innate clemency was amended, and extended as so to their progenitors, else it might have born a tacit reflection and exclusion of them, as if the whole race and stem had not been so. The great debate arose upon the appellation of Roman Catholics which the letter gave the Papists ; it was urged, that it was not fit for a Protestant parliament to give them this title, which they assumed to themselves as their due ; that Bellarmine de Ecclesia proved they were the true church, because their very enemies, and heretics, gave them the designation of Catholic, which he makes the first note of the true church ; that Roman Catholic was *contradictio in adjecto*, being a particular universal ; that the common stile they gave us was heretics. I represented, that there was no man within the house more desirous to have these odious marks of division buried, and that we might be all united in the general name of

any quarter-sessions in Kent, or in the place where he was resident, either the next term

after his admission to his said office, or within three months after.

Christian; it was true, the names under which they were known in our law, were the designations of the Papistical kirk, heresy, error, superstition, Popish idolatry, and maintainers of the cruel decrees of the council of Trent; (Vid. act 5th 1567, and act 47th 1572. &c.) and though it was not suitable to the wisdom and gravity of the parliament to give them a title implying as if they were the true church, and we but a sect; yet I wished some soft application with the least offence might be fallen on; and therefore I proposed it might run, "Those commonly called Roman Catholics." And that the most part of all our divines call us the Catholics: and so Chamier begins his 'Panstratia, vortuntur controversia Catholicos inter et Papistas.' The chancellor called this a nick-naming of the king, and proposed it might run in general terms thus; As to those subjects your majesty has recommended, &c. The archbishop of Glasgow's overture was, That we might call them Roman Catholics, not as acknowledging them to be such, but only as a bare repetition of the king's words: So it went to the vote, and by the plurality of 37 votes, it carried that these words should stand in the answer. But though it was urged in the case of Halgreen's election, that the electors should be fined conform to the act of parliament, for electing without taking the test; and that it should be marked, that the calling them Roman Catholics was only as using the king's words, by way of compliment and civility to him; yet none of the two were marked in the books of Parliament, for any thing I can hear. It was also urged, that some words of the letter seemed to give his majesty hopes and assurance of some concessions and favour, which the parliament would shew to the Papists, viz. as far as their consciences would allow, not doubting, &c. Which naturally imported some length; whereas sundry members of parliament thought themselves obliged in duty and ingenuity, to declare, that they had fully examined the case, and found they could go no length at all. The parliament's answer was so little satisfactory at court, that though these answers used always to be printed before, yet they would not suffer this to be made public.

"As for the matter designed in this parliament, about the private toleration of popery, there were many who were about it. Duke Hamilton proposed that might be a general indulgence to popery, relating not all; it is affrighted the archbishop of St. Andrews, Sir George Jacobson President thereof, that I should not belong to any concert after that. 2. That if they presumed to assume the public exercise, they should *proseque* to confer the private.— Yet some might be thought out to make them more fit. 3. That the Papists should be barred from all public employments and offices, under the pain of treason, and

that to be irremissible even by the king, except with the consent of parliament. 4. That by a declaration in writ all persons in public trust should own, assert, and acknowledge the justice and lawfulness of this toleration. And it was moved by some, that if the toleration passed, a declaration should be required, not only of those in public trust, but of all persons, approving the lawfulness thereof, that none might escape, but all be equally guilty.

"Many things concurred at this time to awaken mens spirits, and to heighten their expectations on both sides. Strachan's sermon to the synod, in favours of moderation, alarmed many, and made them more firm and zealous. 2. There were papers on both sides, some giving reason why an ease should be granted to the Papists; others giving reasons why our penal laws against Popery should not be taken away, nor weakened at this time. 3. Alexander Miln, of Linlithgow (on whom they laid much stress for making the burrows), deserted, and declared openly against Popery. 4. Dr. Sibbald, from an inward remorse, and trouble of conscience, (being now come from London) called for the bishop of Dunkeld, and declared he can find no safety, nor security of salvation in the Popish religion, and desired to be re-admitted to the Protestant Church: and offered to make a public recantation: but the bishop of Edinburgh refused it as unseasonable; though others called it a very reasonable act and dispensation of divine providence, for strengthening staggering protestants. 5. Ramsay bishop of Ross preached a sermon in the High Church to the members of parliament, which scandalized the Papists extremely; wherein the chancellor caused pannel him before the bishop of St. Andrews and Edinburgh, for defaming him and his brother Melfort, by saying to Murray the commissioner, that they had put this bone in his foot of being commissioner, to out him of his secretary's place; and that they designed him no kindness by this advancement; and that he was not concerned to promote their self-ends. This left a great fish on the commissioner, to reveal a secret; though others advised it, that he did it of purpose to let them see he was on his guard. Thus stood on his defence, that by the canons he believed to be synodically tried; but they not being able to prove it on him, it was let fall.

"There were also at this time sundry pamphlets published to strengthen the Popish faction: as the philosophic Theses of Mr. Thomas Burnet, Reprint in the Marshial College of Aberdeen, dedicated to the duke of Gordon, wherein he asserts the king may abrogate and annul laws, and that the three estates cannot question his pleasure: Item, Cartwright dean of Rippon's sermon, that the king could dispense with the laws in cases of necessity, and whereof he was the sole judge: Item, a

And that the defendant after such neglect, ac. 10 Mar. 2 Jac. 2. at Hackington in Kent, did exercise the said office, and still doth, con

Persuasive to Moderation, by Pen the Quaker, as was believed: Item, Reflections on the Bulls of Pope Paul the III. and Pius the V. against king Henry the VIII. and queen Elizabeth of England, mitigating the case of these papal excommunications, and proving the Popish loyalty, against Barlow bishop of Lincoln his *Brutum fulmen*, wherein he discovers the villainy of their king-deposing doctrine, and why they ought not to be called Roman Catholics: Item, a silly pamphlet called a Net for catching the Fishers of men, by a cadet of Dumbar-ton's regiment: Item, Sundry Catechisms, with the bishop of Meaux's Pastoral Letter to those Protestants in his diocese who had changed, where he impudently avers, that they had suffered violence neither in their persons nor goods: Item, a pasquil called Popery anatomised, proving the Church of England could not charge idolatry on the Romanists, without impeaching themselves as guilty of the same crime.

"Some who were for pleasing the court, and giving them something, proposed that any Papists who should take the benefit of the toleration, should first abjure the pope's power of deposing kings, and take the oath of allegiance, at least making the king supreme within his own dominions; and that they should declare they were not obliged by the principles of their religion to persecute and extirpate us as heretics; and that this indulgence should only last during the king's life, or a few months after, that if they cannot comply, they may retire and go abroad: for they apprehended that a Protestant successor would rescind all; and if this parliament would be obstinate, yet it might be granted by another, if the king should assume the nomination of all the provosts of Scotland, (the burrows being the brazen wall which the Papists found hardest:) and least they should chuse another to be their commissioner to parliament, beside their provost, which they might do, then for prevention of that, he might name the whole town-council; and so it could not miss."

"June 3. At Privy Council, a letter from the king is read, depriving Robert Bruce bishop of Dunkeld of his bishoprick, without giving any reason, (save it was notour that it was for his opposing the establishment of Popery,) albeit his gift was *ad vitam et culpam*. Some asked, if the spiritual supremacy given the king by the first act of parliament 1669, was not to a king *qua* Protestant; for a Papist repudiates that supremacy, and will not have the title of the head of the Church? Voet jurisprudent. sacr. cap. 1. Sect. 3. § 12. denies this power to princes."

"Many think, if they had brought in the act for toleration of Popery in the very beginning of parliament, it is probable that it might have passed, the Protestants then being neither so

alarmed, united, nor fortified with arguments and courage, as they grew afterwards. In the narrative of the draught of that act, some complained of the word sanguinary as odious, and not a term of our law. 2. That the estates should presume to say, these laws were not executed by their predecessors; seeing the executive power is not lodged in them, but in the king. 3. In affirming (without the king) that they were resolved to adhere to the Protestant religion; the three estates, without the king, not being *nomen juris*, and having no power; and so it looked like the style of the late rebellious parliament. But the point was, the king would not concur with them in that resolve; next it is *protes utro contra:ia facto*. It is remarkable, that the draught of the act says, those that are of the Roman religion shall have liberty, which is *presentis temporis*; ergo in propriety of grammar construction, those who turned Papists after the act are not included.

"The methods of solicitation to obtain consent to this act were very strange and extraordinary. 1. The laying aside of men from their places, who could have no interest but serving their consciences. 2. The commanding Mar, Ross, Kilsyth, sir John Dalziel, &c. to their charges: but they offered to give up their commissions. 3. The ordering Orbiston, &c. to go the highland commission of justiciary, which he refused; the king's writ to attend the parliament being more necessary. 4. The staging the bishop of Ross. 5. The imprisoning my two servants; I being a member of parliament. 6. The offering to remove Mr. John Dempster, sir Patrick Murray, Broomhall, &c. as not actual burghesses, and so incapable; and yet they had been allowed to sit and vote. 7. The bringing in of new members, as Newark, &c. though he turned against them. 8. The importunities used by sir William Paterson, Mr. Thomas Gordon, Bailie Auld in Aberdeen, in concussing members of parliament. 9. The printing and spreading of sundry papers at this time; as Burnet's Theses, &c. 10. Their dealing with members not clear, to stay away or go home; as with Brollas, tutor of M-Lean, &c. And then prolonging the meeting to weary out the poorer sort who had exhausted both their money and credit. 11. The letters were one post all broken up and searched, to see if any correspondence or intelligence could be discovered between Scotland and England, they knowing so perfectly well all that passed here. The Harlem gazette from Holland bore also a good account of what passed in our Scots parliament: then it was reported as if his majesty had been once resolved to come down himself by a surprize, on two or three days posting, and to have it managed in his own presence.

"Sundry providences concurred also at this

the assizes held 29th Mar. 2 Jac. 2, was duly indicted for such his neglect, and for executing

time, to defeat this project of toleration; as doctor Sibbald's turning Protestant; the lord Doun's the commissioner's son, turning Papist; Alexander Milu's deserting that side; and God's raising up men to appear for the Protestant interest, who were not very strict in any religion: and the boasting of some, and the turning out of others, contributed rather to harden than to frighten; together with the bishop of Ross's sermon, and his usage, &c. and their hindering the other bishops to preach, particularly Douglas of Dumblain, because he would not give assurance to forbear preaching against Popery, nor show his papers. The earl of Callender, and sir John Maitland, by the old politic, differed from their fathers Lintlithgow and Lauderdale, who stood for the Popish side. The commissioner, in his return from Dunyhirsel, knighted James Caddel of Muirton, and he was his only knight, except Mr. Robert Colt his advocate, whom he knighted on the night the parliament rose, when his power is expired. It was wondered how the chancellor and secretary came to employ him in so critical an affair; but they had promised themselves no opposition; and the Papis's had a good omen in it, that as one earl of Murray made the first penal laws against them in 1567 (but they were made in 1500,) so another earl of Murray his great grandchild should take them away; but this presage failed them for this time. The crown and other honours were immediately on the rising of the parliament lodged in the castle, and the commissioner departed for London that afternoon. The chancellor followed him a few days thereafter; and each of them blamed one another for the miscarriage of the toleration act: but much blame was cast on Tarbet in this act of religion, for he had possessed his majesty with an opinion of its being attainable, and shewn him the rolls of the members of parliament, and marked down those whom he thought would be for and against it. He did cast much of the blame on the two bishops, and they devolved it on Tweeddale and him; however he took in parliament a ratification to himself and his son of the barony of Tarbet, with an erection into a regality: which duke Hamilton opposed; but Tarbet shewed, that the duke's own regality of Kinnaird had more unusual clauses. Before the 17th of August, to which the parliament was adjourned, it was again prorogated to the 21st of October; and a little before it, by proclamation it was dissolved: for by a new one, the Popish party hoped to get the boroughs more rightly constituted, by the king's assuming the nomination of the magistrates; yet the other party bragged, that these commissioners of shires who had appeared for Popery would not be chosen again; and particularly some complained of electing lords of the session for members of parliament, whereof there were none in this parliament, viz. the clerk-register,

the said office contrary to the said statute. And thereupon duly convicted, as by the re-

(who was absent except a day or two, though they pretended his sickness was but simulate,) and the justice-clerk, (both of whom sat not as commissioners, but as officers of state;) and the president, Rediord, Forret, Balcasky, Drumcairn, Boyne and Pitmedden; which last, as Athanasius, only opposed the court. One said of this parliament, what the Irish Tague said of the earl of Feversham, when the king was making him a knight of the garter for his defeating Monmouth, 'That God only deserved the garter; so the finger of God was much seen in the steadfastness of this parliament, who had not one great man in public place to own them; and it behoved to be from some higher principle, that noblemen, gentlemen, bishops and others, cheerfully laid down their places, rather than violate their consciences. And amongst others, Mr. Robert Innes writer to the signet, was put off from being lay-clerk, because of his not compliance.

"Some Papists complained, that sir William Paterson, Mr. Thomas Gordon and Baillie Auld, their indiscreet meddling with members of parliament to influence them, did wrong to their cause and interest. This excuse was made for duke Hamilton and the president's going amongst; that by staying in that party and giving them moderate counsels, they could do the Protestant religion better service than to cast themselves out of employment, by refusing all concessions whatsoever. Yet others say from Paul, "We must not do ill, that good may come thereof;" and, by their complying, they scandalize and ruin many weak ones, their example being infectious.

"When the parliament is now risen *re infecta*, it is said that the bishop of Edinburgh, lord Sinclair, Boyne, and many others who appeared for the toleration, boast that if the act had come in, they would have been against it; which is a tacit acknowledgment that they blush to own avowedly what they did. Yet when a king by his letter to a parliament desires a thing, it is equivalent to a command: 'est rogare occum species violenta jubenit:' but it is a great misfortune where subjects are necessitated to differ from their prince; and they are to refuse him with all the discretion, humility, sorrow and regret imaginable. One maliciously said, that the bishop of Edinburgh resembled Steven Garretter bishop of Winchester in queen Mary of England's reign for craft and subtlety; and they compared our archbishop of St. Andrews to Bonner then bishop of London, who was headstrong, temporizing and cruel; but in some lucid intervals, he begins to think he has been too much led and imposed upon.

"The new-converted Papists stirring at this time for a toleration, (for the old ones were not so forward till forced,) had this good effect, to cause the ignorant Protestants (even of the

cord thereof appears; whereupon the plaintiff became entitled to this 500*l.* as forfeited by the defendant.

ministry) study the controversies betwixt us better: but would to God the only emulation were, who should lead the most godly and holy life! this present king when duke of York, was used to say, the Scots Papists having so much private liberty of their religion, without any punishment applied, had no reason to complain.

"The Protestant party wearying of the length of this parliament, were said to be thinking on stratagems to blow it up: As to bring in an act for ratifying all our laws against Popery: or to stage the bishop of Edinburgh, 1. For saying in his last synod, that God had set a Popish king over us for a judgment; which if true, then we cannot pray for the continuance or long life of a judgment. 2. That in plain parliament, in answer to my lord Blantyre, he reviled our confession of faith in 1567, to which we are sworn, saying it contained several things Popish, and other things bordering on fanaticism; which was a miscon-structing the laws, and alienating the hearts of the people from the king, and leasing-making, contrary to the 10th act in 1585; and many others: but the rising of the parliament superseded this work."

"September 9. At Privy Council, there is a letter from the king, making the earl of Traquair (a youth little past minority) a privy counsellor; and he being Popish is admitted without the test. This is in imitation of the English Privy council, where the Popish lords who were in the Tower, as Powis, &c. are received."

"September 14. The king's letter was read in favour of the Papists, taking them under his laws and protection; and giving them the private exercise of their religion, with a chapel in the Abbey; and he commands his Privy Council, and all his judges and magistrates, to maintain them in their rights and privileges; (which some asked what they were;) and indemnified them against all the penal laws, and, *per expressum* those against trafficking and drawing others to their religion; which seemed to some an odd and unreasonable allowance. See act 24th 1587. He also named his chaplains and others, which is the inferior orders of 'Acolythi, ostiarii, &c.' The narrative of this letter extolled the Roman Catholic services to the crown, and declaimed on the disloyalty of many Protestants; and reflects on some of the members of the late parliament; and all are discharged to disturb the Popish worship.

"An answer was appointed to be prepared against the 10th of September; and accordingly two draughts came in; the one formed by the bishop of Edinburgh, and the other by Tarbet. Against the last, duke Hamilton excepted, that it called the king's prerogative a legal security and warrant for introducing this

The defendant pleads, that the king within the three months, in the declaration mentioned, and before the next term or quarter-sessions,

ease and favour to the Papists; for he said, a thing might be a security, and yet not legal; as a protection against a caption secured the debtor, yet it could not be termed legal. The chancellor asked briskly, who would question his majesty's power to relax the laws? So duke Hamilton retiring said, he was not doubting the king's prerogative, but what needed the Privy Council declare it to be law? sir George Lockhart president sat mute; but whispered privily he would quit the head ere he signed it so; thus the word 'legal' was delete and 'sufficient' put in its place. Their answer ran in general terms, acknowledging the king to be an absolute sovereign, and unaccountable to any but God; and that they acquiesced in his pleasure; which not coming up the full length, did not absolutely please; however the Chancellor would not sign alone as head of the court, but got all their hands to it on the 16th of September, and it was sent up. Thus they granted what the parliament had refused. They say the bishop of Edinburgh, in a speech this day, insinuated as much as if he called the last parliament a seditious meeting."

"September 16. At Privy Council, Watson the Popish printer, is by a letter, made printer to the king's family, though Anderson's heirs have a gift to be the king's printer; and the Privy Council gave him the right to print all the prognostications in Edinburgh, but afterwards the clerks were allowed to extend it to all the kingdom; and more will follow."

"Nov. 11. At Privy Council, there is a letter from the king, nominating the earl of Seaforth, a Papist, (by the marquis of Powis his father-in-law's power,) a privy counsellor, with a dispensation from the oath of the test. There was also a letter making the duke of Gordon one; but he being sent for to the castle, and demurring to accept at that time, it was continued till the next council day, Nov. 18."

"Nov. 18. At Privy Council, the king, by a letter to the bishops of St. Andrews and Edinburgh, impowered them to admit any of the conformist ministers (who had deserted their kirks for the test) to any churches of their presentation within their dioceses, as also in Glasgow, without the test; so far was the archbishop of Glasgow beginning to be neglected. Some thought they should not embrace it, because it was a strengthening of the prerogative on which the toleration of Popery and dispensing with our laws were founded. Others argued, this being a consideration extrinsic to their entry, and the sin only *per accidens*, they ought not to refuse a call or door opened to them by providence. 'Væ mihi si non evangelizavero.'"

"Nov. 20. The king's yaug arrived from London to Leith, with the altar, vestments, images, priests, and other dependers, for the Popish chapel in the Abbey."

after his admittance to the said office, and before his suit began, sc. 9 Jan. 1 Jac. 2, by his

“ November 30. Being St. Andrews day, the Papists consecrated, at least initiated, their chapel in the Abbay by holy water, and a sermon preached by Wiclinton. They bragged this was a great providence, that it fell on the festival dedicated to the patron of Scotland; but they can easily contrive, and make themselves authors of such providences as these. Some affirmed they would not solemnly consecrate this chapel; for probably it would return to the vulgar, profane, and common uses again: and seeing such multitudes flock to them, they behoved to have a larger place for worship, meaning the Abbay-church, which they took afterwards.”

“ December 16. At Privy Council, Niddry, a Papist, is admitted a privy counsellor.”

“ Jan. 18, 1687. Mr. Alexander Swinton of Mersington, and Mr. James Daes of Coldenknows, who had laid themselves aside from being advocates in November 1682, because of the test, are now, upon letters from the king, re-admitted by the Lords, without putting the test to them, in respect the king, by his letter, declared that he dispensed therewith by his prerogative royal. The Lords did not vote it, and have not yet recorded their letters. They paid for each of them 7*l.* sterling to Mellfort, who passes nothing gratis, but exacts even from the officers of state and president, for their letters. *Quaritur*, How far this entry is a strengthening the king's power, to dispense with and relax the laws against Papists.”

“ The commission granted by the king, under his great seal, to near 50 persons to visit all our colleges and universities, was read, and the members kept their first meeting. The president sir George Lockhart declared he could not act till he took the test, according to law, which the members present did; but this scrupulosity displeased the Chancellor. Some think they will purge our colleges, and reduce them to their foundations, and inquire into their mortifications, and plant whom they please in them.”

“ Feb. 17. At Privy Council, sir John Dalrymple is admitted king's advocate, and by a special letter the test is discharged to be administered to him; though this was not very necessary, because the king's letter for a toleration was also read, which discharged the test in general, and substituted a new oath in its place, and gave indulgence and permission to some of the Christian persuasion, viz. the moderate Presbyterians, Quakers and Papists, and dispensed with the penal laws against them.”

“ Feb. 21. At Privy Council, the answer to the king's letter and proclamation of indulgence is brought in and read, declaring, they conceive his majesty may employ whom he pleases in offices civil and military, (but did not mention ecclesiastic) and thanks him for his reiterated promises to secure our religion; which the Papists on the Privy Council meant

letters patent under the Great Seal, and here produced in court, did dispense with, pardon,

of their own. Duke Hamilton craved it up to see till the next day. This was opposed; but they allowed him time to peruse it presently, he not having been called to the drawing of it: On this, he and his two sons-in-law Dundonald and Penmuir retired. Tweeddale, Yeaster and Drummelzier were also absent. The counsellors remaining signed it; and to make the absent as deep, they passed an act, that the rest shall be required to sign it. And accordingly Hamilton, &c. being required, they refused. Vid. 10th March 1687.

“ A sub-committee of the new commission for the visitation of Universities met, and drew up three overtures to be presented to the court, to be past into acts; 1mo. That in their ethick dietates, they should instruct the youth in the unawfulness of defensive arms and resistance to the king; which seemed to set the curious spirits on a question deserving rather to be buried. 2do. That the regents in all times coming are to be unmarried persons; seeing, by the foundations of our colleges in the time of Popery, they were designed for churchmen; and it was a rule and statute then, that they should be unmarried: But Edinburgh college, erected since the Reformation, has no such restriction: And l. 2. and 11 C. ‘ Do professor,’ extend the privileges given thereby to professors of liberal sciences, to their wives and children; ergo, they were allowed to marry. 3tio. That no regent stay above eight years in the University. Yet ‘ per l. unic. C. de professor. in urbe Constantinopolitana,’ great dignities are conferred on them who had taught 20 years together. Thir two were to begin at Michaelmas 1688; and it was doubted if they should extend to primars and professors. There was a bill given in by the college of Edinburgh against their overtures, which put a stop to them.”

“ April 11. At Privy Council, his majesty's new letter is read, explaining and enlarging his indulgence to the Presbyterians, that they may now preach without taking the oath, which he had required to be put to them by his former letter of the 10th of March, Vid. 5th July 1687.”

“ June 1. The lords of session met, and a new commission from the king is read, nominating the same lords, with this difference, that it not only dispensed with the test, and all oaths, except that *de fidei*, but expressly discharged them to take the test; to which commission they gave obedience, considering they had taken the test already, and that this could not loose them from the obligation of it; and that the king may suspend the laws during his own lifetime. The Popish design was to make the Protestants acting thus in public offices as deeply guilty of the transgression of their great idol, the test, as the Papists who had accepted to act in public stations without it, on the king's dispensations. Then it was proposed

remit and discharge (among others) the defen-

that the clerks might enter of new: To which the chancellor answered, by any means; so they and the macers were of new sworn *de fidei*; which was a surprise, there being no new warrant from the king for dispensing with the other oaths as to them: but they loved not to boggle, and knew the oath *de fidei* might be required of them each session, and they would not put themselves in the register's reverence for new commissions. This commission of the session by a mistake named duke Hamilton before the marquis of Athole, privy seal. So he talked as if the advocates places were also to be declared void, and they to be re-admitted without the test: but others said, the declaring them void (though in order to an instant re-admission) could not be, advocates places not being from the king, but a part of our property, which could not be annulled without a fault."

"June 16. The king's new commission of privy council is read, and the duke of Hamilton being now present, they are all received without the test, only taking the oath *de fidei*. Prince George and the earl of Sunderland, the English secretary are added, to make a Scots council in England when needful."

"July 5. At privy council, the king's new and ample indulgence of toleration and liberty of conscience is read, and ordained to be proclaimed and published. It is much of the strain of the English one, but wants an indemnity for hygones."

"July 12. At privy council, there is a letter read from the king, bearing, that the abbey-church was the chapel belonging to his palace of Holyrood-house, and that the knights of the noble order of the thistle, which he had now erected, could not meet in St. Andrew's church, (being demolished in the rebellion, as they called our reformation,) and so it was necessary for them to have this church; and the provost of Edinburgh was ordained to see the keys of it given them. After a long silence, the archbishop of Glasgow told it was a mensal and parsonial church of the bishopric of Edinburgh: and though he was now translated, and the see was vacant, yet it belonged not to the provost to deliver the keys: this was understood that he was seeking the compliment to be employed himself, to keep some possession in Edinburgh, whereof he was seeking to be commendator; however it was adjusted that the keys should be immediately delivered to the chancellor himself; and the inhabitants of the Canongate (whose parochial church it was not of old before the reformation, but belonged to the convent there,) were ordained to go to the July Yester's church; and the French minister and congregation were put out of it to the High-school, or Common-hall. So this is the first Protestant church taken away from us."

"July 27. This day the chancellor, the duke of Gordon, and the marquis of Athole, on

dant from taking the said oaths, and from re-

a letter from the king, are installed by duke Hamilton as knights of St. Andrews, or the thistle. They gave their oaths on the Popish missal: which the marquis of Athole stumbled a while to do."

"August 2. Lady of Balquaine, a Papist, is made a privy councillor."

"August 3. At privy council, the printers and booksellers of Edinburgh are called upon oath to declare what books they had during these twelve months past imported, printed, or sold, and to produce their catalogues; because the chancellor alledged they had sold sundry scandalous and seditious pamphlets; meaning, it is likely, Dr. Gilbert Burnet's Travels, and the books from England against Popery: and sundry of them were imprisoned and fined; and all of them discharged to print or vend any without a special licence and approbation from the chancellor, or the archbishop of Glasgow. But James Watson, the Popish printer in the abbey, is excepted from this act; so he and his son may print or sell what they please against the Protestants."

"August 16. At privy council, the master of Balmerino is admitted a privy councillor, on a letter from the king, procured by his father-in-law the archbishop of St. Andrews."

"November 3. At privy council, a letter from the king is read against Mr. John Hardy doctor of medicine, now one of the Presbyterian ministers, for the expressions mentioned, 18th October last. He was dealt with to retract; and finding him obstinate, it was not judged fit to make an example yet of the Presbyterians, till they saw what they would do; therefore he was continued, with a reprimand.—But a new letter from the king was read on the 22nd of November, ordaining him to be pannelled criminally before the justices, for his preaching; whereon he is imprisoned (for he would not fly, though he had leisure, and advertisement,) and a libel is raised against him on the 194th act, parliament 1584, act 10, 1585; the privy council's proclamation in September, 1686, against leasing-masters, (ordained to be read by ministers quarterly,) and on the quality of the king's late toleration and indulgence to the Presbyterians, that they should preach nothing that might alienate the hearts of the people from the king or his government, nor meddle with his proceedings: and, on the first of December, 1687, the king's advocate proposed to the privy council, that, before he should give him an indictment, he might take a pre-cognition of the witnesses who heard him say these words. This was granted, though needless; for at first, Dr. Hardy boldly owned what he had said, (till he was intreated by his brethren to put them to a proof,) and it is the Presbyterian principle, that idolatry, even under the gospel, is punishable by death, and that Popery is such; and so they can never think but laws against Popery are both just, lawful and necessary. Qdo, He crawled

ceiving the Sacrament, and from subscribing

that sir George M'Kenzie might be also adjoined to him as pursuer in the process, for he foresaw some hazard to pannel a man for owning the standing laws, and that it might be called at another time treason to impugn the authority of the three estates, and the legislative power. But the president opposing it, it was not granted.—On the 5th of December, the witnesses were examined at the criminal court, on the precognition, who did not prove the expressions libelled, but others: several deposed they did not hear him, because he preached so low. He himself in the general said, he conceived he had preached nothing but what was agreeable to the word of God, laws of the land, and his duty to the king; for he had suffered for the king.

“On the 13th of February, 1683, he was pannelled, and they insisted against him for these seditious expressions against the king's design of having the penal laws rescinded, viz. that he was sorry others, (meaning the Papists,) enjoyed the king's liberty and indulgence, as well as the Presbyterians; and that no Presbyterian in his principles would approve of it. It was alledged for him, that, by the 2nd act of parl. 1663, speaking of the king's supremacy in church matters is not treason, but only arbitrarily punishable. 2do, The expressions had no sedition in them, seeing he might regrette, that Socinians and others had liberty to vent their doctrine against Christ's Deity, &c. The criminal lords took the courage to find the expressions libelled not relevant to infer sedition; and therefore assoltized him from the crimes libelled, and liberated him from prison. He had freedom all the day-time before to come abroad. This displeased the Papists as much as it satisfied the Protestants.”

“Nov. 22. There is a letter from the king, narrating his toleration to the Presbyterians, and that it was not his purpose, when they marry, baptise, and bury, that the emoluments which used to be paid in these three cases should be withdrawn from the readers and precentors at the regular churches; and therefore ordains these dues to be paid as formerly, else there should be no registers for such baptisms or marriages, as were kept at the churches; which were a prejudice.—But for this, the meeting-houses would offer to keep exact registers also.”

“Jan 19, 1688. At exchequer, a new list of pensions comes from the king, most of them in favours of Papists, only Robert Barclay, for the Quakers, and James Stuart, for the Presbyterians, are classed in with them; and the first got 200*l.* sterling, and the second 300*l.*—The last was found not to be yearly, but only for defraying his expences to London.”

“March 22. The rules of the Popish college in the abbay were printed, inviting all children to be educate there gratis; as mountebanks promise great things with their programs. Colleges need an erection and patent

the declaration against transubstantiation or

under the great seal. I know not if there was one here.”

Wodrow, p. 578, says:

“November 12. A very extraordinary letter is read, dispensing with an act of the very last parliament, requiring the commissioners of supply to take the test. Most part of the persons, if not all in the underwritten list, were Papists. In favours of those his own friends, the king very frankly breaks through a law, to which he had given his assent a few months ago. Such steps need no observations, they are what Protestants may expect from a bigotted Papist; and so I just insert the council's act, king's letter, and list, as they stand in the registers.

“The letter underwritten directed from the king's most excellent majesty to the privy council, for dispensing with some persons, commissioners for supply, their taking of the test, conform to the list therewith sent, being read, was ordered to be recorded, and an act ordered accordingly to be transmitted to the persons therein mentioned, and to the conveners of the commissioners of the respective shires therein concerned; of which letter and list the tenor follows:

‘JAMES R.

‘Right trusty, &c. we greet you well. Whereas in the 12th act of our current parliament, intituled ‘act of supply,’ there is a clause ordaining all the commissioners therein named, to take the oaths and test appointed by law, which clause we judge fit, for our service, to require you to put vigorously in execution, excepting these in the list here inclosed, whom we have dispensed with from taking the same, and such as we shall hereafter dispense with under our royal hand. For doing whereof this shall be your warrant, and so we bid you heartily farewell Given at our court at Whitehall, the 7th day of November, 1685, and of our reign the first year.—By his majesty's command,

‘MELFORD.’

A List of the Persons who are to be dispensed with from taking the Test, conform to our Letter (of the date of these Presents) directed to our Privy Council of our ancient Kingdom of Scotland.

‘JAMES R.

‘The duke of Gordon, the earl of Seaforth, the earl of Traquair, the lord Oliphant, Richard Cockburn of Clerkingtoun, Alexander Irvine of Drum, John Gordon of Rothemay, Patrick Lesly of Ba'quhain, sir George Gordon of Gight, William Menzies of Pitfoddels, James Innes of Drumgask, Adam Gordon of Auchinacoy, Francis Gordon younger of Craig, Mr. Alexander Irvine of Lairny, Mr. Richard Irvine of Kinktoun, the laird of Fetterneir, the laird of Wartle-lesly, Alexander

tests in the act of 25 Car. 2^o, for preventing dangers from Popish recusants, or in any other

‘ Frazer of Kinmaries, ——— Macdonald of Binbecula, ——— Macdonald of Largy, ——— Macdonald of Cassiltoun, Patrick Gordon of Glastyrum, John Grant of Ballindallach, James Gordon of Caudel, John Gordon of Baldorny, Alexander Gordon of Auchintoul. Given at our court at Whitehall, the 7th day of November, 1685, and of our reign the first year —By his majesty’s command. MELFORD.’

The proclamation, or first indulgence, Feb. 12, 1687, with the council’s answer, and the king’s letter to the council, March 31, or the second toleration, are in the case of Spruell and Ferguson, vol. 10, pp. 735, et seq.

When king James, having appointed Papists to be judges in Ireland, directed that their taking the oath of supremacy should be dispensed with, the lord lieutenant (Clarendon) wrote home to the president of the council (Sunderland), his desire, that the king’s letter directing him to dispense with the judges’ taking that oath might be entered at the Signet-office: and in a letter of the same date, April 24th, 1686, to his brother (lord treasurer Rochester), he says, “ You will see, I have written to my lord president, that the king’s letter, which directs me to dispense with giving the oath of supremacy to the new judges, should be entered at the Signet-office at Whitehall, as well as the letters for giving the judges their places. I would not be thought scrupulous, and therefore I have done the business already; but I desire, it may now be supplied. I am advised, it is fit it should be so; and, I suppose, there will be no great difficulty made in granting what I desire. Though I do not expect any alteration (in my time) of public affairs; yet I would not be willing to be questioned for having obeyed the king: which possibly may be the case, if all letters and instruments are not exactly according to the form. You will please to take that notice, you think fit, hereof. This is the first time the oath of supremacy has ever been dispensed with in a judicial place; and it is in breach of a law: which I may say to you, though to nobody else, at this time, as the world now goes.” See the State Letters of Henry earl of Clarendon, published in 1763, from the originals in the possession of Mr. Powney.

* The Act, 25 Car. 2, cap. 2, is as follows:

“ For preventing dangers which may happen from Popish recusants, and quieting the minds of his majesty’s good subjects, Be it enacted, &c. That every person that shall bear any office, civil or military, &c. or shall have command or place of trust from or under his majesty, &c. within the realm of England, &c. shall personally appear in the court of Chancery, or of the King’s bench, or at the court of quarter-sessions in

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act, and from all crimes, convictions, penalties, forfeitures, damages, disabilities, by him incurred by his exercising the office of colonel:

Or by the act intituled, ‘ An act for the preventing of the king’s person and government, by disabling Papists from sitting in either House of Parliament:’ Or by the acts made in the first or third years of king James 1, or the acts made 5 Eliz. or 23, or 29, or 35 Eliz.

And the king by his letters patent, granted, that the defendant should be enabled to hold that office in any place in England, or Wales, or Berwick, or in the fleet, or in Jersey or Guernsey, and to receive his pay or wages;

Any clause in the said acts, or in any other act notwithstanding, *et non obstante*, that the defendant was or should be a recusant convict, As by the said letters patent doth appear.

Whereupon the defendant prays judgment of the court, whether the plaintiff ought to maintain this action.

The plaintiff demurred generally to this plea.

The defendant joined in demurrer.

The questions are two, 1. Whether the defendant ought to have pleaded this pardon and dispensation to the indictment, or whether he may not plead it in bar to the action?

2. Admitting he may plead it to the action, whether it be a good bar, and whether the king by his prerogative may dispense with the statute.

that county where he shall reside, within three months next after his admittance into any of the said offices, and there, in open court, take the several oaths of Supremacy and Allegiance, and shall also receive the Sacrament of the Lord’s Supper, according to the usage of the Church of England, in some parish-church, upon some Lord’s day immediately after Divine Service.

“ And every the person aforesaid, that doth or shall neglect or refuse to take the said oaths and the sacrament in the said courts, and at the respective times aforesaid, shall be *ipso facto* adjudged incapable, and disabled in law to all intents and purposes whatsoever, to have, occupy or enjoy, the said office or employment, and every such office and place shall be void, and is hereby adjudged void.

“ And every person that shall neglect or refuse to take the said oaths or the Sacrament as aforesaid, and yet after such neglect or refusal, shall execute any of the said offices, after the said times expired, wherein he ought to have taken the same, and being thereupon lawfully convicted upon any information, &c. in any of the king’s courts at Westminster, or at the assizes, every such person shall forfeit 500*l.* to be recovered by him that shall sue for the same

“ And at the same time when the persons concerned in this act shall take the said oaths, they shall likewise subscribe the petition against the belief of transubstantiation under the same penalties as by this act is appointed.”

Mr. Northey, who argued for the plaintiff, held that the defendant may not be permitted to plead this matter in bar of the action, because he ought to have pleaded it to the indictment; and he having not pleaded it then, the law will construe it to be waiving of it, as the case in Brook's Abridgment, Charter of Pardon, 15. That in case of an indictment for murder, one that has pleaded not guilty, cannot plead the pardon after, unless dated since this plea of not guilty. So 3 Croke in a *Fieri Facias*, if the defendant appears, and has a release, and does not plead it, he has lost the benefit of it, and shall not be released by *Audita Querela*: now the defendant shall not be permitted to plead it against the plaintiff, no more than he could have pleaded it against the king; for this action is in the nature of an execution upon a judgment, and may be likened to this case; an administrator *de bonis non*, by 17 Car. 2. is enabled to sue forth an execution upon a judgment, recovered by an executor of the first testator, and the statute doth put the administrator in the same case as the executor was; and the defendant in that case can allege no other matter against the administrator, than he could have done against the executor, neither can he avoid this execution by any plea that he might have pleaded to the first action. And if this defendant shall be received to plead this plea now, he will falsify the indictment, that was found against him; for if the offence be pardoned, he ought not to have been indicted: but admit this defendant may well plead this plea, yet I hold it no bar to the plaintiff's action.

I do allow that the king may dispense with several penal laws in some cases, but that prerogative of the king is bounded, so that with some statutes he cannot dispense, wherein the subject is interested, as in 4 Inst. (135.) So the king cannot licence a man to make a nuisance or commit a murder, as 11 Henry 7. 11, 12. And that this is an act wherein all the subjects have an interest, I humbly submit to the judgment of the court.

The king cannot dispense with the statute 31 of Eliz. chap. 6. against simony, nor with the statute 17 Edw. 6. 1. against buying and selling of offices, as appears by the 1 Inst. 12^a. a. 3 Inst. 154. 2 Croke, 385. Hobart

* Mr. Hargrave in his Annotation upon this passage of Co. Lit. has the following very important remarks:

"When the famous case of sir Edward Hales in the reign of James 2d was argued, these two cases [The king against the bishop of Norwich, and sir Arthur Ingram's case] were urged to prove, that the king could not dispense with the disability for not taking the oaths and sacrament according to the 25 Cha. 2. usually called the test act; and lord Coke himself in his Third Institute applies them to a like case on the 5 Eliz. in respect to the oath of supremacy. 3 Inst. 154. The principal judicial authority relied on for the dispensation was the case in the year-book of

75. 1 Inst. 234. a. A man that is disabled by law to take such an office, the king cannot capacitate him: as if the king should grant to

2 H. 7. 6. b. in which, notwithstanding the statutes making void a grant of the office of sheriff for more than a year, the judges are represented to have held a grant for life with a *non obstante* to be good. But trusting to such an authority only exposed the weakness of the cause it was intended to sustain. The book cited, so far from containing any judgment of the point, ends with an adjournment of the case, accompanied with this remarkable declaration, that both judges and counsel agreed, what they had then said should be taken for nothing. As far too as perhaps, the grant in question might have been adjudged good on the ground of being within an exception of the statutes. The king also had been specially enabled by the 9 H. 5. c. 5. to dispense with the statutes for four years on account of the wars and a pestilence. But, lastly and principally, it was an insuperable objection to the authority of this case, that the 23 H. 6. to remove all doubts, provides, that the king's grant for more than a year should be void, notwithstanding any *non obstante*. What respect could be due to a judicial opinion, declaring a dispensation good, which the legislature itself had positively enacted should be void? Yet it is not to be concealed, that in the report of Calvin's case, lord Coke justifies the king's dispensation in this instance on the principle of its being beyond the power of parliament to take away his right to the service of his subjects. Calvin's case, 7 Co. 15. This strange language is the more unaccountable, as it is inconsistent with his own doctrine here, and in the case on the statute against the sale of offices."

And in observing upon lord Coke's position in the same page, "that when any thing is prohibited *sub modo* as upon a penalty given to the king, a party may be dispensed withal by a grant, &c. with a *non obstante*," that very learned annotator enters more deeply into the subject of the king's dispensing power as follows:

"By the Bill of Rights, 1 W. & M. it was declared, that from the then session of parliament, no dispensation with any statute should be valid, unless such statute allows it, and except in such cases as should be specially provided for the then session. 1 W. and M. sess. 2. c. 2. s. 12. The occasion of this excellent provision was the equally extravagant and unwarrantable exercise of the dispensing power by James the second, who, having procured the sanction of a judicial opinion to a dispensation with the test act in favour of sir Edward Hales, madly proceeded to a suspension of the principal laws for the support of the established religion; an excess, in which, monstrous as it was, several of the judges, to the great scandal of Westminster-hall, gave him countenance, the priests of the temple of

one to sell an office, within the statute Edw. 6, and to another to buy that office, these grants would be void, as in Vaughan 534, in the case

justice treacherously aiding to pollute it, instead of manfully opposing the sacrilege. Till the time of this prince the doctrine of dispensation was received with very important qualifications, of which the principal were these—1. It was said, that the king could not dispense with the common law; though lord chief justice Vaughan seems to deny this position. Dav. 75. 3 Inst. 154. Vaugh. 334.—2. It appears to have been generally agreed, that the king could not dispense with a statute, which prohibited what was *malum in se*.—3. *Malum prohibitum* was not deemed universally dispensable with; for some held, the king could not dispense with a statute, if the prohibition was absolute, and not *sub modo*, as under a penalty to the king, or, as others express it, where the statute was made for the general good, and not with a view merely to the king's profit or interest.—4. None contended, that the royal dispensation could diminish or prejudice the property, or private right of the subject.—5. It was understood, that the king could dispense, not generally, but only in favour of particular persons, and, according to some, for these only in particular instances.—But some of these distinctions had great uncertainty and subtlety in them, and were so open to controversy, that they only tended to create embarrassment; and though the others greatly restricted the largeness of the claimed prerogative, yet they were far from obviating the chief objection to so formidable a pretension. Had the boundary of the dispensing power been ever so clearly marked, still it was wise and prudent to annihilate it. So far as it resembled the power of repealing laws, it was an intolerable corruption, wholly irreconcilable with the first principle of our constitution, by which the power of legislation cannot be exercised by the king, without the two houses of parliament. So far as it did not fall within this idea, it was unnecessary: for those acts, which were the fruits of it, might have derived their force from other acknowledged powers of the crown, such as the right of waiving penalties and forfeitures belonging to itself, and the prerogative of pardoning.—It is worthy of notice, that the declaration of rights, which the lords and commons made on tendering the crown to William and Mary, distinguishes between suspending laws by regal authority, and dispensing with them. The former, being a general and absolute abrogation for a time, is condemned without any exception; but the latter, being only a special exemption of certain individuals, is merely declared illegal, as it had been exercised of late. Also the Bill of Rights, though it declares against the future exercise of a dispensing power in any case, except where the king is specially authorised by act of parliament, yet contains a proviso saving from prejudice all

of Thomas and Sorrel, there are several cases put, wherein the king cannot dispense with a statute.

prior charters, grants, and pardons. 1 W. and M. s. s. 2. ch. 2. sec. 12. & 13. If the condemnation of the dispensing power for the time past had been unqualified, it might have destroyed the titles under numerous subsisting grants from the crown, the validity of which it was deemed most equitable to leave to the decision of the courts of justice in the ordinary way.—Such as wish to go more deeply into the controversy about the dispensing power, may find the following references useful.—For the history of dispensations, see Dav. 69. b. Pryn. on 4 Inst. 128 to 133. Atkyns on power of dispens. with pen. stat.—For the cases on the subject, see the case of the merchants of Waterford in 2 R. 3. 11. 1 H. 7. 2. the sheriff's case in 2 H. 7. 6. b. the doctrine in 11 H. 7. 11. b. 12. a. Grendon and the bishop of Lincoln, Plowd. 502. case of the aulnager, Dy. 303. Calvin's case, 7 Co. 15. the prince's case, 8 Co. 29. b. case of the taylor of Ipswich, 11 Co. 53. case of monopolies, *ibid.* 84. Irish case of commendam, Dav. 68. case of customs, 12 Co. 18. the cases cited ante note 3. Colt and Glover v. the bishop of Litchfield, or English case of commendam, Mo. 898. 1 Rol. Rep. 151. Hob. 246. Evans and Kiffins v. Askwith, W. Jo. 158. Palm. 457. Latch. 31. 233. Noy 93. 2 Rol. Rep. 450. case of clerk of the court of wards, Hob. 214. Needler and the bishop of Winchester Hob. 230. Lord Wentworth's case, Mo. 713. case of dispensation with 3 Jam. 1 c. 5. against a recusant's holding an office, Harlr. 110. cases of dispensation with statutes against retailing wine without licence, namely Young and Wright, 1 Sid. 6. Thomas and Waters, Harlr. 443. 2 Keb. 425. Thomas and Boys, Harlr. 464. Thomas and Sorrell, Vaugh. 330. 1 Lev. 217. 1 Freem. 85. 115. 128. 137. 2 Keb. 245. 280. 322. 372. 416. 790. 3 Keb. 76. 119. 143. 155. 184. 223. 233. 264. sir Edward Hale's case on the test act of 25 Cha. 2. in 2 Show. 475. Comberb. 21. 4 Bac. Abr. 179. and case of the seven bishops in the reign of Jam. 2. Of these cases, Thomas and Sorrell, and sir Edward Hale's are the principal. The former was argued with the greatest solemnity in the exchequer chamber, the delivery of the opinion of the judges, of whom the majority was for the dispensation, taking up a day, in four several terms. The latter was treated with less form; but gave occasion to some considerable publications on the subject; particularly lord chief justice Herbert's account of the authorities on which the judgment was given in sir Edward Hale's case, Mr. Atwood's answer to it, and a tract by lord chief baron Atkyns against the king's power of dispensing with penal statutes. In a manuscript report of sir Edward Hale's case, sir Bartholomew Shower is mentioned to have replied to lord chief baron Atkyns. But we

Now by this statute that we are upon, it is enacted, that every officer shall take the oaths, that every person that does neglect, shall be disabled to hold the said office; now this act does not work upon the taking, but upon the holding; and if such conditions be not performed, he is thereby rendered incapable to hold his office, and the king can never enable a man whom the law hath disabled, 3 Instit. 154. But I foresee the case in 12 Coke 12. will be objected against me, where it is said, that no act of parliament can bind the king from any prerogative which is solely and inseparably annexed to his person, but that he may dispense with it by a Non Obstante; and the book doth instance in the case of sheriffs, upon the statute 23 Hen. 6, which does enact, that all patents made or to be made of any office of a sheriff, &c. for term of years, &c. within any county of England, &c. shall forfeit 200*l.* Yet says that book, the king may dispense with that statute, and cites 2 Hen. 7, 66, to be there so adjudged by all the judges of England; and that this is the only authority that seems to countenance this case. But this is the opinion only of my lord Coke, for the book which he cites and depends upon was never adjudged, as appears by Brook 5 pt. 45, 109. and what was said in that case, was only said by one judge, and never judicially determined, nor so much as spoken to by any other judge; therefore the foundation that my lord Coke has laid, failing, the superstructure must needs fall, and so, with submission, that single opinion in 12 Coke, fol. 18. is not law. But admitting the case to be law, that can be no rule to guide this case by, for that statute was made, rather to deprive the king of his power of making sheriffs, and so consequently commanding his sheriffs not to serve him, than to disable the subject, and thereby restraining the king's prerogative, which is so inherent in him. But by the statute 25 Car. 2. c. 2. the prerogative of the king is not touched, for the king may grant the office to any of his subjects, and it is only a direction to the subject to qualify himself for the king's service; and if he be incapable to serve the king, it is through his own fault and neglect, and may be punishable for the same, as in the case of sir John Reade, in 27 and 28 Car. 2, in the Exchequer. He was made and sworn sheriff of Hertfordshire, and neglected to take the oaths according to this statute; by reason of which, the office became

have not yet met with any such piece. Mr. Hume's state of the arguments for and against the dispensing power, though written with an evident bias in favour of the crown's prerogative, is worth consulting. Hume's Hist. 8vo. ed. v. 8. p. 242, 254. See also Tyr. Bibliothec. Politic, 539 to 597.—For the proceedings in parliament after the Revolution, in respect to sir Edward Hales's case and the dispensing power, see Grey's Deb. v. 9. p. 297 to 307. 314 to 332. 335 to 344. 396. 5 Cobb. Parl. Hist. 503. 332. 351."

void, and afterwards there was an information exhibited against him upon this statute we are now upon, for neglecting to take the said oaths, and executing his office, and upon this he was convicted and fined. And the court was of opinion that no subject could put himself out of a capacity to serve the king, but for so doing he is punishable; and in the law of the sheriffs the dispensation is in the patent, but in our case the dispensation is after the patent, and so a difference between the two cases: and for these reasons, I pray your lordship's judgment for the plaintiff.

Arguments for the Defendant.

Sir Thomas Powys,* the king's solicitor, argued for the defendant.

As to the first point, that supposing the defendant ought to have pleaded the dispensation to the indictment, it does not appear by this record, but that he did; for the declaration is, that he was *legitimo modo convictus*, and does not say whether he pleaded Not guilty, or how he pleaded; and for any thing that appears, he did plead it against the king, yet he may be admitted to plead it against the plaintiff who is a stranger.

If they stand upon this as an estoppel, they ought to have relied upon it, and replied, that he had the dispensation at the time of the indictment, and refused to plead it; for he that

* " Mr. Jones, son to the Chief Justice lately turned out, told me that sir Robert Sawyer, the Attorney General, had been directed by the king, to draw up a warrant, by virtue of his prerogative, to invest a priest of the Church of Rome with a benefice, and to confirm one Walker, head of a house in Oxford, and some fellows of the same, who had erred over to the papal communion, by a Non Obstante: that the attorney said this would not be against one statute only, but against all the laws since the days of Elizabeth; that he therefore durst not do it, and desired the king to weigh the matter a little with himself; for that it struck at the very root of the Protestant Church, quite contrary to his majesty's late gracious promises; in short, that the attorney farther said, he doubted not but as soon as another could be found to do the work, he should lose his place; such a slave was the king to the priesthood of Rome.

" But whatever the attorney at present expected, the solicitor Finch was now turned out, one Powis appointed in his stead, who was ready and willing to do what the other refused, which was, to draw up a warrant for confirming of Walker, in his office of head of University College in Oxford, and three fellows of the same; and another in behalf of the parson of Putney, which afterwards passed the Great Seal, though the parties were Papists as strong as could be. And to complete, as it were, all, most of the Protestant officers in the army in Ireland, were removed, and Papists substituted in their stead." Heresby, 233.

pleads an estopple, must rely upon it, as the authorities are which treat of estopples. And therefore as to the first point, I think, with submission, we have very well pleaded the pardon and dispensation in bar of the action.

As to the second point, whether the king can dispense with the statute or no; I humbly conceive, with submission, the king may very well dispense with the statute; it is admitted that the king may in many cases dispense with an act of parliament, and let us consider why not this? It is well observed in 2 Instit. 496, that the king's prerogative is as much the law of England as any other law whatsoever; and the king may upon any cause moving him in respect of time, place, or person, by a Non Obstante dispense with any particular person, and that he shall not incur the penalty of the statute, 7 Coke 36, 37. Vaughan 333. 347. Glanvil in his argument *ante*, p. 205, doth admit a power in the king to dispense with Penal Laws, and yet he was no friend to the prerogative. Though the consent of the Lords and Commons be requisite to the making of the act of parliament, yet it is the king that gives the sanction to the said laws, and most of the ancient statutes began in form of charters, as it appears in 8 Coke 19, and the intents and meanings of acts of parliament, are every day by the judges extended and changed according to a better rule of reason and justice than the words will bear, Hobart 299: and the judges have an authority over the statute-laws, to mould them according to the trust and best sense, Hobart 346: and statutes which have been made against common right, have been construed void. 8 Coke 118.

There is a distinction taken in our books between *malum in se*, and *malum prohibitum*.

The former the king cannot dispense with, the latter he may; as where the statute generally prohibits any thing upon a penalty, which was lawful before, (the subject receiving no injury by such a dispensation) the king there may dispense with such an act. Vaughan 343. Dyer 52. The king granted a licence to carry hell-metal out of the realm, notwithstanding the statute, Dyer 54. It was enacted by statute, that none should convey wine, into England out of Gascoigne, but in English ships; and the king granted a licence to a man, that he, his deputies and factors might convey, &c. in any ship, notwithstanding the statute, 8 Coke 32. Vaughan 352, 353, 354. Now to apply the cases to the case in question, this is *malum prohibitum*, whether is the dispensation any damage to the subject? If it were any wrong, it were to the king himself, and sure the king may very well dispense with that, which only relates to himself.

I must distinguish between those acts of parliament which concern property, and those which concern government. Acts of parliament which concern property, the king cannot dispense with; but those which concern government he may; and this for the great inconveniencies which may happen, or urgen-

cies of state which may force him to it, and those unforeseen at the time of making the law: for it may happen, by a vicissitude of times, those laws that were made for the preservation of Government, should turn to the destruction of it, if the king could not dispense with them.

The common law in some cases does so very much respect the prerogative, that it leaves the private interest of the subject unregarded, and the king may dig in any of his subjects land for saltpetre to make gunpowder. Now this statute 25 Car. 2. was made to diminish the king's prerogative, but to secure him from his enemies, and for the preservation of the government; and the king is best judge what will be most for his own security, and the government's preservation. No act of parliament can discharge the subject from his allegiance which he owes to the king, every one is bound by his allegiance to serve his prince when he shall be required. Therefore no act of parliament can disable any man to serve the king. But they object, that this act doth make no one incapable, but at his own election.

If this were so, it would be in the election of some or all of the subjects or incapacitate themselves to serve the king, and the king would be unserved; for if it were not in the power of the king to force the subject, he would not (it may be not) be served at all; as in the case of sir John Reade, cited by the other side; he neglected to take the oaths, and thereby the office became void; so that the next elected might refuse, and the next. In the mean time the king's service lies neglected, and no business of the county can proceed, for want of a sheriff. To pardon murder, is a prerogative solely and inseparably incident to the king, who may dispense with statutes restraining it, 12 Coke 19. He may dispense with *non residente*. Hobart 146. 3 Instit. 339. In 3 Instit. the lord Coke speaking of acts of parliament that were made to restrain the king's power of pardoning murder, says, that such acts are good for kings to follow, but not binding, Coke 18, 19. There are several statutes cited with which the king by his prerogative may dispense, as the statute 36 Hen. 6, which does enact, that no man shall be sheriff of one county two years together. Yet it was adjudged by all the judges of England, says that book, that the king may dispense with it; the statute of 4 Hen. 4, 31, that no Welshman shall be justice, or other officer whatsoever in any part of Wales; and yet the king may dispense with it. The statute 8 Rich. 2. and 33 Hen. 8. 24. do enact, that none shall be justice of the assize in the county where he was born, and yet the king with a special Non Obstante may dispense with that statute. And in Powden 502, 3, the king may grant to a man to be an escheator for life, notwithstanding that statute.

To answer the statutes which have been cited, which the king cannot dispense with: I say, as to the statutes of simony and usury, the king cannot dispense with them; but what

is that to the matter in hand? For there is no restriction of the subjects service, but the king may have the benefit notwithstanding. Then as to the statute 5 Ed. 6. 16. against buying and selling of judicial offices, of which statute there is a clause in the 1st Institut. 134. that the king may not dispense with that statute. There is a difference between that statute and this; for that does enact that if any person shall bargain and sell any office, &c. shall lose the office, &c. and all such bargains and contracts shall be void; and that he that shall give any sum of money, &c. for any such office, &c. shall be a disabled person in law, to have, occupy, or enjoy the said office, &c.

Now the statute doth disable the party upon doing such an act, to take the office; for the making the bargain is prior to taking the office, and thereby he is disabled to take it, so that he can never have the office legally vested in him, if the king cannot dispense with a conditional subsequent, and so that does not come near this. And for this reason I humbly pray judgment for the defendant.

Then the Lord Chief Justice Herbert* spake thus:

Chief Justice. This is a case of great conse-

* "There was a new chief justice found out, very different indeed from Jefferies, sir Edward Herbert. He was a well bred and a virtuous man, generous, and good natured. He was but an indifferent lawyer; and had gone to Ireland to find practice and preferment there. He unhappily got into a set of very high notions with relation to the king's prerogative. His gravity and virtues gave him great advantages, chiefly his succeeding such a monster as had gone before him. So he, being found to be a fit tool was, without any application of his own, raised up all at once to this high post. After the coachman's cause had been argued with a most indecent coldness, by those who were made use of on design to expose and betray it, it was said, in favour of the prerogative, that the government of England was entirely in the king: That the crown was an imperial crown, the importance of which was, that it was absolute: All penal laws were powers lodged in the crown to enable the king to force the execution of the law, but were not bars to limit or bind up the king's power: The king could pardon all offences against the law, and forgive the penalties: And why could not he as well dispense with them? Acts of parliament had been oft superseded: The judges had some times given directions in their charges at circuits to enquire after some acts of parliament no more: Of which one late instance happened during the former reign: An act passed concerning the size of carts and waggons, with many penalties upon the transgressors: And yet, when it appeared that the model prescribed in the act was not practicable, the judges gave direction not to execute the act." Burnet.

quence, but of as little difficulty as ever any case was, that raised so great an expectation: for if the king cannot dispense with this statute he cannot dispense with any penal law whatsoever.

As to the first point, whether he shall be admitted to plead this dispensation and pardon to this action of debt: (having not pleaded it to the indictment) I think he may: for this court shall not be bound by the finding of the jury below, for he (for any thing that does appear) did plead it there, and the jury might have gone against the direction of the court, yet that shall not conclude us: but if the party has good matter to discharge himself, he may shew it: as if a man be convicted of an assault and battery against the defendant, the plaintiff may give the former conviction in evidence, but yet he must also prove the battery, or else he shall not recover.

And this being an estoppel, it shall not bind, because the plaintiff was not party to the first suit.

As to the second point, whether the king can dispense with the act or no, I think it a question of little difficulty. There is no law whatsoever but may be dispensed with by the supreme law-giver; as the laws of God may be dispensed with by God himself; as it appears by God's command to Abraham, to offer up his son Isaac: So likewise the law of man may be dispensed with by the legislator, for a law may either be too wide or too narrow, and there may be many cases which may be out of the conveniencies which did induce the law to be made; for it is impossible for the wisest law-maker to foresee all the cases that may be, or are to be remedied, and therefore there must be a power somewhere, able to dispense with these laws. But as to the case of simony, that is objected by the other side, that is against the law of God, and a special offence, and therefore *malum in se*, which I do agree the king cannot dispense with. And as to the cases of mury and non-residence, those cases do come in under that rule, that the king cannot dispense with them, because the subject has a benefit by them; for in case of usury the bond is made void by the statute, and therefore if the king should dispense with it, the subject would lose the benefit of the avoiding the bond. And as to the cases of buying and selling of offices, which are objected, there is no need of resolving, whether the king could dispense with that statute or no, because the party was disabled to take any such office by the contract, and the disability was attacked by force before the office was vested, so that the king could not remove the disability; and so I do agree that it would have been in this case, if the defendant had by his neglect or refusal to take the oaths, rendered himself incapable before he had taken the king's dispensation; for the king's dispensation coming before the disability attacked, it does prevent it.

The case of the sheriff is much a stronger case than this, and comes up to it in every particular, for that statute doth disable the

party to take, and the king to grant; and there is also a clause in that statute, which says, that the patent shall be void, notwithstanding any Non Obstante to the contrary; and there is a penalty of 200*l.* like to our case: and yet by the opinion of all the judges of England, the king has a power of dispensing with that statute; yet that statute does expressly say, the king shall not dispense with it by a Non Obstante: so if an act of parliament had a clause in it that it should never be repealed, yet without question, the same power that made it, may repeal it. Besides, that statute makes the patents void at the time of granting them; but by this statute the patents are good at the time of granting them, and continue so 'till the neglect to take the oaths, for doing of which the patentee has three months time. And if the case of the sheriff be law, as it hath been taken ever since Hen. 7th's time, and is cited for good law in many of our books, and never 'till now questioned; for the common course and experience have been according to it: then I defy all the world to shew me any material difference between that and this, only that this is the stronger case of the two, in many particulars. But because the case has been denied by the plaintiff's counsel, it does concern us to take the opinion of our brethren, it being a matter of so great consequence in the circuits; for if it be not law, then there are some sheriffs that be not lawful, and so have not power to return the juries, and then we have no power to try and give judgment upon any offenders; and it also concerns us who go into our countries, to take advice of it: for if that case is not law, our patents, which are Non Obstante's to 23 Hen. 8. 24. may not be good, and so we have no authorities to go the circuits; and therefore I will ask the opinion of all the judges, as well in that case as this.*

On Monday the 21st of June, after having consulted with all the judges, his lordship delivered their opinions in open court, thus:

' In the case of Godwin and Hales, wherein the defendant pleads a dispensation from the king; it is doubted, whether or no the king had such a prerogative? Truly, upon the argument before us, it appeared as clear a case as ever came before this court: but because men fancy I know not what difficulty, when really there is none, we were willing to give so much countenance to the question in the case, as to take the advice of all the judges of England. They were all assembled at Serjeant's-Inn, and this case was put to them; and the great case of the sheriffs was put, whether the dispensation in that case were legal? because upon that depended the execution of all the law of the nation: and I must tell you, that there were ten upon the

place, that clearly delivered their opinions, That the case of the sheriffs was good law; and that all the attainders grounded upon indictments found by juries returned by such sheriffs, were good, and not erroneous; and consequently that men need not have any fears or scruples about that matter. And in the next place, they did clearly declare, that there was no imaginable difference between that case and this; unless it were, that this were the much clearer case of the two, and liable to the fewer exceptions.

' My brother Powel said, he was inclined to be of the same opinion; but he would rather have some more time to consider of it: but he has since sent by my brother Holloway, to let us know, that he does concur with us. To these eleven judges, there is one dissenter, brother Street*, who yet continues his opinion, That the king cannot dispense in this case: but that's the opinion of one single judge, against the opinion of eleven. We were satisfied in our judgments before, and having the concurrence of eleven out of twelve, we think we may very well declare the opinion of the court to be, that the king may dispense in this case: and the judges go upon these grounds;

* "October 9, 1686. Mr. Justice Street hath lately married a wife with a good fortune, since his opinion against the king's power of dispensing." Narcissus Luttrell's MS. "Brief Historical Relations, &c."

"December 27, 1688. Thursday, in the morning, I went to St. James's with Judge Street, to present him to the prince; but I was told the prince was busy, and I could not get admittance. While I was in the outward room, my lord Coote came to me, and told me, he was sorry to see me patronise Street. I told his lordship, I had long known the judge, and that I took him to be a very honest man. My lord answered to this effect—I know, he did not join in the judgment for the dispensing power: he has married my relation; but he is a very ill man. I have given the prince a true character of him; and therefore I desire, your lordship will not concern yourself any more for him. I told my lord Coote, that I knew no business the judge had with the prince, but to kiss his hand, as others did; that I had no request to make for him; and that I would not present any one to the prince to be affronted. December 28. In the morning Judge Street came to me again: I had appointed him so to do yesterday, before the conference with my lord Coote. I told him, I found the prince had ill impressions of him, and therefore I advised him to defer waiting on him for some time, for my presenting him would do him no service." Diary of Henry Earl of Clarendon.

In Shower's Report of this Case, it is stated, that the Chief Justice "declared that he and all the Judges (except Street and Powell, Justices, who doubted) were of opinion, that the kings of England were absolute sovereigns," &c.

* See Comberbach's Reports, p. 21, et seq. where this Case is largely reported. It is also reported, 2 Shower, 476.

' 1. That the kings of England are sovereign princes.

' 2. That the laws of England are the king's laws.

' 3. That therefore 'tis an inseparable prerogative in the kings of England, to dispense with penal laws in particular cases, and upon particular necessary reasons.

' 4. That of those reasons and those necessities, the king himself is sole judge: and then, which is consequent upon all,

' 5. That this is not a trust invested in, or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet was taken from them, nor can be. And therefore such a dispensation appearing upon record to come time enough to save him from the forfeiture, judgment ought to be given for the defendant*.

" Quod querens nil capiat per billam."

* Bishop Burnet, in his History of his Own Times, vol. 1, p. 660, says: " Sir Edw. Hales, a gentleman of a noble family in Kent, declared himself a Papist, though he had long disguised it; and had once to myself so solemnly denied it, that I was led from thence to see, there was no credit to be given to that sort of men, where their church or religion was concerned. He had an employment, and not taking the test, his coachman was set up to inform against him, and to claim the 500*l.* that the law gave to the informer: when this was to be brought to trial, the judges were secretly asked their opinions; and such as were not clear to judge as the court did direct, were turned out; and upon two or three canvassings, the half of them were dismissed, and others of more pliable and obedient understandings, were put in their places: some of these were weak and ignorant to a scandal. The suit went on in a feeble prosecution, and in Trinity-Term judgment was given."

And in page 671, the Bishop says, " But judges, who are before-hand determined how to give their opinions, will not be much moved, even by the strongest arguments. The ludicrous ones used on this occasion at the bar, were rather a farce, fitter for a mock trial in a play, than such as became men of learning in so important a matter: great expectations were raised, to hear with what arguments the judges would maintain the judgment that they should give; but they made nothing of it; and without any arguing gave judgment for the defendant, as if it had been in a cause of course." See also, Echard, 1077. 2 Rapin, (fol.) 755. 1 Oldmixon, 709. 1 Ralph, 922, 923: and 3 Hume 244, (ed. of 1807) as referred to by Mr. Hargrave in the passage cited, p. 1191.

The following particulars respecting this Case occur in Narcissus Luttrell's MIS. ' Brief Historical Relation,' &c. in the Library of All Souls' College, Oxford:

This Judgment naturally excited much animadversion. Sir Robert Atkyns published (see p. 1190) the following

ENQUIRY INTO THE POWER OF DISPENSING WITH PENAL STATUTES.

THE Order I shall observe in speaking to this case, as to the point upon the dispensation, shall be this:

First, I shall open this act of 25 Car. 2, and shew the great occasion and necessity for the making of it: the scope and design of it; the excellent remedy it does prescribe; and the great benefit and security that might arise to the nation from it, were it duly observed.

Secondly, I shall then discourse briefly of the nature of law in general, as far only as may be useful and pertinent to our present case, and of the great force and authority that a law ought to have, and of the great veneration that should be paid to it, especially if the true religion, and the honour of Almighty God, the safety of the government, and the public good and peace of the nation depend upon it, as they all do upon this act of 25 Car. 2.

Thirdly, In the next place, I shall give an

" June 10, 1686. Came on in the King's-Bench Court, the Great Case between Godden and sir Edward Hales, in an action of debt upon the Test Act, made 25 Car. 2, c. 2, for 500*l.* for not taking the Sacrament and the Oaths according to that Act, within the time limited, having executed an office: the plaintiff is only the defendant's servant, and the action brought barely to have the opinion of the judges; there were two or three motions to the court, that they would assign them counsel for the plaintiff, for no one would appear in such a pretended matter. The court assigned Mr. Northey and sir George Treby, the latter absolutely refused it: at another time they assigned Mr. Wallop: Mr. Trinder and sir Fran. Winnington were added: it was this day argued for the plaintiff by Mr. Northey (but very loosely), and by the solicitor, sir Thomas Powis, for the defendant, or rather for the king's power of dispensing with all penal laws by a clause of Non Obstante; and on the whole matter, the court were of opinion clear, that the king might dispense with this law, however they would advise with the rest of the judges.

" Aug. 16. The judges, since their opinion of the king's dispensing power, have not in their circuits had that respect as formerly.

" Jan. 1690. Sir Edward Hales and Mr. Obadiah Walker came to the court of King's-Bench by Habeas Corpus from the Tower, being committed for high treason, in being reconciled to the Church of Rome. They were after some difficulty admitted to their liberty upon very good bail.

" Jan. 24. Mr. Charles Hales, brother to sir Edward, came up by Habeas Corpus from the Tower, and was bailed by the Court of King's-Bench."

account of the true nature (as near as I can) and of the original and growth of the notion or invention called a dispensation, and who were the first authors of it, and about what time it began, I shall endeavour to shew the right use of it, (if there be any) and where the just power of granting dispensations does reside, as also the abuse of it, and how that according to the late practice, these dispensations are contrary and repugnant to the nature and properties of law, though they pretend themselves to be law, they have a different original and foundation, and do indeed subvert law.

First, for the occasion and necessity for making of this act of parliament, and the scope and design of it, and the ends aimed at, they all appear in the Preamble.

The Preamble distinguishes the king's subjects into two sorts:

1. Some from whom there are great dangers.
2. Those who are the persons subject to those dangers.

The dangers are from Popish recusants; those who are threatened by those dangers, the act terms them his majesty's good subjects.

It would be needless to tell what those dangers are, and whence they arise.

All the times since the reformation, have abundantly discovered what the dangers are. There have been a multitude of acts of parliament made that have still been fencing against those dangers, which do sufficiently point them out: so do the frequent and incessant addresses from every parliament for many years, setting forth the dangers; and all our histories and public writings, and especially those written and published by his now majesty's royal grandfather, king James the first, and a multitude more, but above all, the sad event of things, and what we all see is come to pass; these disclose to all the world, what the dangers were, and the great need of a further remedy.

Their destructive principles, and their desperate designs and practices, do abundantly testify the danger from the one sort, and the just fears of the other sort of subjects.

The scope therefore, and the great end that our act of parliament had, is to prevent the dangers from the one, and to quiet the minds of the other; many former acts of parliament which had the same end and purpose proving ineffectual.

The remedy provided is very suitable, and the likeliest and most effectual that either the wisdom or supreme authority of the king and parliament could devise, and the very remedy points out the danger.

The danger would be at the height of it, if the dangerous principles and practices should but arrive at the power and authority, and gain that into their hands, (and it was growing apace towards it.)

The wise and proper remedy therefore provided by the king and parliament, is first to discover who are Popish recusants; to offer a trial and test to all that should be in any public

trust and authority, for it was suspected that there were many Papists under the disguise of Protestants.

And in the next place, so to fence and guard the power and authority and all public trusts in the nation, that they might by no means come into the hands of the Papists.

Persons entrusted with the power and authority over the nation, had need give a signal testimony of their loyalty and fidelity to the king and government, and of their true zeal for the religion established by law.

The test, as to their loyalty, are the two oaths of Supremacy and Allegiance, (and neither of these are new tests.)

The test, as to religion, and the true worship of God, are likewise two, the receiving of the blessed sacrament, and the subscribing a declaration against the doctrine of transubstantiation.

The temper and moderation shewn by his late majesty and both Houses, in this act of parliament, deserves to be observed: It is not like the *Leges Draconis*, written in blood; this is no sanguinary law. It does not proceed against them with fire and faggot.

It does not disturb them in their estates and possessions; it does not deprive them of the liberty of their persons. Nay, it does not hinder them from the exercise of their own religion (if it may be so called) (I speak as to our present act of 25 Car. 2. only.)

It lets them live quietly in their habitations, without so much as putting any oath or test upon them, so long as they live private men. It only requires, that if they will be entrusted with power and authority, they should give some just and reasonable security and assurance, that they will be true to the religion and the government established.

If they will be meddling with the power, without giving such security, then at their peril be it: The law pronounces them incapable, and disabled, and inflicts penalties upon such as shall presume to violate this law.

And it is worth the noting, how solicitous and intent the makers of this law were, that this test and trial might be taken and performed with great solemnity, and that the law might not be eluded with any arts and tricks, that no cheat might be put upon it. All this shews, that the law-makers had great expectation from this law.

The oaths are to be taken in one of the two highest courts of Westminster-Hall; the very hours of the day are limited when they must be taken, that is when the courts are usually fullest; during the taking of them, all pleas and proceedings are to cease.

There is the like care taken concerning the receiving of the sacrament, and of the certifying of it, and plentiful proof to be made of it, and then the recording of it. And the like for subscribing the declaration against the doctrine of transubstantiation.

It were great pity, that after all these pains, they should signify just nothing, and that so high an authority should be made ridiculous.

But after all this securing against the danger from Popish recusants, how shall we do to secure against the danger of dispensations? Suppose this act had contained a clause in it, declaring, that all dispensations and grants, with Non Obstantes to the contrary of this law, should have been *ipso facto* void, and had inflicted penalties upon such persons as should have procured them, would this have made it stronger?

No: several acts of parliament have been made in divers cases, with express clauses inserted in those acts, to make void all Non Obstantes to the contrary of those laws, (which one would have thought would have been strong enough) and yet they all came to nothing: for the judges heretofore have resolved, that if the king grant a dispensation from such laws, with a special Non Obstante to any such special law, mentioning the very law, that presently the force of that law vanishes.

Therefore, beside the disabilities and incapacities put upon them, further to obviate this mischief also, and to frustrate all contrary judgments, and to prevent the allowance of any such grants and dispensations with this act, by the opinion of the judges, or future resolution of any court in Westminster-Hall to the contrary, (as if the law-makers had foreseen this danger too) and to give a rule to judges in such cases, when any should happen to come before them.

There is this further provision made by this law, that the granting or conferring of any such office and place is by express words adjudged void. The words are; And is hereby adjudged void.

It does not leave the courts below to judge it, but this law beforehand gives the very judgment. It directs the way of trying the matter of fact by indictment, &c. and then declares the judgment upon it, and leaves it only to the judges to apply that judgment to the particular case.

May the judgment of any inferior court controul the judgment of the supreme courts.

Here is more than a threefold cord to tie it. An oath, a sacrament, a declaration subscribed. I look upon the two oaths as one cord. And these two oaths are so much alike, and to the same effect, that Cardinal Bellarmine, purposing to refute the oath of allegiance, by a gross mistake, bent all his forces against the oath of supremacy, not minding the gift rence. As king James the first, in his answer to the Cardinal, hath observed in the collection of his majesty's works, fol. 263.

The next cord is the sacrament. The third subscribing a declaration to remain on record to all posterity.

And at last, a judgment in the very point by the king and parliament, (the supreme court of the nation) which must not be contradicted by any other court, nor by all the courts of the nation put together; this supreme court exercises its legislative and judicial power both at once, and shall it all at last be lost labour?

Secondly, having given an account of this particular law, upon which the present case does arise, I shall in the next place briefly speak concerning law in general, of what force and authority it ought to be, which will make way for those arguments that I shall raise from it.

For when we know the true nature of a law, the nature and use of a dispensation will be better understood.

The name does oftentimes denote the nature of a thing.

The truest derivation is that of *Lex à Ligando*, from its binding quality and the obligation it puts upon us; and this is most pertinent to the matter in hand.

The laws of England (as all just and righteous laws) are grounded originally upon the divine law, as their foundation or fountain. The supreme and sovereign God among the heathen is supposed have to the name of Jupiter 'quasi Juris pater:' But more immediately human laws have their force and authority from the consent and agreement of men.

All public regimen (says learned Hooker in his Ecclesiastical Polity) of what kind soever, seemeth evidently to have arisen from deliberate advice, consultation and composition between men. To live, says he, by one man's will becomes the cause of all mens misery; this constrained men to come to laws.

A people whom providence hath cast together into one island or country are in effect one great body politic, consisting of head and members, in imitation of the body natural, as is excellently set forth in the statute of appeals, made 24 H. 6, c. 12, which stiles the king the supreme head, and the people a body politic, (these are the very words) compact of all sorts and degrees of men, divided into spirituality and temporality. And this body never dies.

We ourselves of the present age, chose our common law, and consented to the most ancient acts of parliament, for we lived in our ancestors 1,000 years ago, and those ancestors are still living in us.

The law is the very soul that animates this body politic, as learned Hooker describes it, the parts of which body are set to work in such actions as common good requires. The laws are the very ligaments and sinews, that bind together the head and members, without which this body is but a rope of sand, or like the feet of Nebuchadnezzar's image, iron mixed with clay, that can never cleave one to another, nor cement.

And so properly laws have their name, *à ligando*, in this respect too, viz. from knitting together, for as they bind by their authority, so they unite in affection and strengthen.

And these laws are made by public agreement, not imposed upon men against their wills, but chosen by the prince and people: They are (that I may express it in our familiar and ordinary terms) the articles of agreement, chosen and consented to by prince and people,

to be the rule by which all are to square their actions. Hence the law is termed, the act and deed of the whole body politic. The rule by which the prince governs and the subject obeys.

From whomsoever the designation of the royal person is that governs, whether from heaven or of men, be it the one or the other, the consent and agreement of the whole body politic, both head and members, is the rule of the government.

David was made king by God's immediate appointment, yet he himself called all Israel together to Hebron, and there they made a Covenant with him: This is that I am now speaking of, (the law of the nation) made by general consent; or a scheme for the government, as a late lord chancellor terms it in his Survey of the Leviathan. Every just king in a settled kingdom is bound to observe the paction made to his people by his laws.

But nothing can more lively describe it than the preamble of the statute of 25 Hen. 8, c. 21, where the Lords and Commons addressing themselves in their speech to the king, thus deliver themselves: namely,

“Where this your grace's realm recognising no superior under God, but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made and obtained within this realm, for the wealth of the same, or to such other, as by sufferance of your grace, and your progenitors, the people of this your realm, have taken at their free liberty, by their own consent, to be used amongst them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of the laws of any foreign prince, potentate, or prelate: but as to the customed and ancient laws of this realm originally established, as laws of the same, by the said sufferance, consents and customs, and none otherwise.”

Upon the same ground it is that learned Hooker says, that the lawful power of making laws to command whole politic societies of men, belongs so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth (I use his very words too) to exercise the same of himself, and not either by express commission immediately and personally received from God, or else by authority derived at first from their consent, upon whose persons they impose laws, it is no better than mere (tyranny). King James the First, in his before-mentioned speech, speaks much the same words.

Laws therefore (says Hooker) they are not, which public approbation hath not made so. Approbation may be declared (says he) either by a personal assent, or by others, by a right derived from them, as in parliaments. This hath the more authority, being the judgment in a point of religion, not of an historian or lawyer, but of a reverend divine, and such an one as hath been so great a champion for authority and government, and for exact conformity to ecclesiastical laws.

Some of our late writers and preachers have discoursed quite in another strain. The noble author I just now cited, calls the laws, condescensions and voluntary abatements of the king's original power, (supposing his power at first was absolute). Now that preamble of that statute which I just now read, is directly contrary in the very word (original.)

Another, (a certain lawyer, a knight) in a small, but bold, treatise of his, will by no means allow of any limitation of power, and holds it absurd, to say a government can be mixed or limited.

A certain divine and geographer, in his history of the life of a late archbishop, declares himself much of the same mind with both these, and many others have trod since in their steps.

I therefore thought it very proper and reasonable, to shew the judgment in these matters of an eminent divine too, a person in all respects without exception, and his judgment is concurring with all the ancient authors in our profession of the common law, who being so learned and so ancient, are therefore the most competent witnesses of our English constitution.

That ancient author of ours, whose book is stiled ‘Fleta quia in Cartere Fletæ de jure Anglico conscripsit,’ in the time of king Edward the First, (as learned Mr. Selden has noted in his ‘Dissertatio ad Fletam,’ c. 10, sect. 2, 3.)

This author, l. 1, c. 5, tells us, ‘Superiorem non habet rex in regno nisi Deum et legem. Per legem factus est rex temperent reges potentiam suam per legem. Non quod principi placet legis habet potestatem. Non quicquid de voluntate regis sed quod magnatum suorum consilio regia autoritate prestant et habita super hoc deliberatione et tractatu recte fuerit diffinitum.’

Bracton, who was a judge in the time of king Henry the Third, but wrote his book in the time of king Henry the Second, stiles the laws of England, the ancient judgments of the just. And Briton, bishop of Hereford, who published his book 5 Edw. 1, by the command of that king, and as written in the king's name. And sir Gilbert de Thornton, who was a chief justice in Edward the First's time, and reduced the book of Bracton into a compendium. And sir John Fortescue, another chief justice, and afterwards chancellor in the time of Henry the Sixth, writ all to the same effect, and almost *totidem verbis*.

These authors discourse altogether of the Imperia Legum, as Livy calls it.

And laws thus made by an universal consent, must needs be most equal, and have a far greater veneration paid them by all sorts of men.

The best men are but men, and are sometimes transported with passion.

The laws alone are they that always speak with all persons, high or low, in one and the same impartial voice. The law knows no favourites.

Hence it is, that Aristotle most significantly and elegantly says, That the law is a mind without affection; that is, it binds all alike, and dispenses with none, the greatest flies are no more able to break through these cobwebs than the smaller.

'Imperatoria majestas legibus armata est,' says the introduction to the imperial law, these are the surest arms and guard about a prince.

Baldus, the great lawyer, says, 'Digna vox est majestate regnantis legibus alligatum principem se profiteri.'

Sir Edward Coke, in his 2 Inst. fol. 27, observes, that the nobility of England have ever had the laws of England in great reverence, as their best birth-right, and so (says he) have the kings of England, as their principal royalty belonging to their crown.

He there mentions our king Henry the First, (the son of him that is stiled Conqueror.) He wrote to Pope Paschal in this manner:

'Notum habeat sanctitas vestra quod me vivente (auxiliante Deo) dignitates et usus regni nostri Angliæ non imminuentur. Et si ego (quod absit) in tanta me dejectione ponerem. Optimates mei et totus Angliæ populus id nullo modo pateretur.'

And fol. 98, there is mention of the letters which all the nobility of England, by assent of the commonalty, in the time of Edward the First, wrote to Pope Boniface, viz. 'Ad observationem et defensionem consuetudinem et legum patrum nostrorum ex debito prestiti Sacramenti astringimur quæ manutenebimus toto posse totisque viribus (cum Dei auxilio) defendemus.'

'Nec etiam permittimus aut aliquatenus permittemus tam insolita indebita prejudicialia et alias in audita dominum nostrum regem (etiam si vellet) facere seu quomodo libet attemperare.' Sealed with the several seals of arius of 104 earls and barons.

And the noble king Edward the First took no offence at the stout and resolute penning of this letter: but wrote himself to the Pope to the same effect.

And yet it contains in it a kind of a Non Obstante to what the king should do by way of submission and compliance with the Pope.

Nor is a just law any restraint to a just liberty, it rather frees us from a captivity and servitude, viz. to that of our wills and passions. It is true, this obligation and binding of the law is very uneasy to such men as will be slaves to their lusts and appetites.

They cry out, let us break these bonds asunder, and cast away these cords from us; but to such as are virtuous and just and pious, the laws are a direction and protection.

The orator truly says, 'Legum id circo omnes servi sumus ut liberi esse possimus.' The true English of which is, that such service is perfect freedom. Hence our English laws in Magna Charta are called liberties. 'Concessimus omnibus hominibus regni nostri has libertates subscriptas,' (says king Henry

the Third, in the first chapter of Magna Charta), which sir Edward Coke expounds to be meant of the laws of England; 'quia liberos faciunt,' says he.

And though this statute of Magna Charta run in the stile of a grant from the king, in the word *concessimus*, for the honour of the king; yet as he says, they were the common laws and rights of the people before, and it was made by the king, lords and commons, as is recited by the statute of 15 Ed. 3, c. 1.

Thus it appears what the true nature and properties of a just law are; of how great force and authority a law ought to be; how dear and precious laws have been heretofore to prince and people, and whence they have their birth and original.

Thirdly I come now to that notion or invention of a dispensation, the power of relaxing or dispensing with a law, and enquire into the original and nature of it, and the great mischief that hath arisen from it.

The pretence for the use or need of a power of dispensing is this, viz. There is no providence or wisdom of man, nor of any council of men, that can foresee and provide for all events and variety of cases, that will or may arise upon the making of a new law.

But a new law may sit heavy upon some particular persons, or in some extraordinary case that may happen, let what care can be taken in the penning of it.

It is enough to commend a law, if it be beneficial to the greater number, and be for the public good; laws are fitted 'ad ea quæ frequentius accidunt,' and not for rare and extraordinary events and accidents, as the Romans had no law against parricide.

And the law says, better is a mischief than an inconvenience.

By a mischief is meant, when one man or some few men suffer by the hardship of a law, which law is yet useful for the public.

But an inconvenience is to have a public law disobeyed or broken, or an offence to go unpunished.

Now from this supposed and imaginary defect of law, or some particular mischief or hardship sometimes (though very rarely) happening to some men, which hardship was not foreseen by the makers of the law, (although this is oftener pretended and feigned than happening in truth) occasion hath been taken to assert a power in the prince or chief ruler, to dispense with the law in extraordinary cases, and to give ease or relaxation to the person that was too hard bound or tied to a law; for, as I observed before, the law is of a binding and restraining nature and quality. It hath the same specious pretence as a law made 31 H. 8, c. 8. had, which was of most desperate and dangerous consequence, had it not speedily been repealed by the statute of 1 E. 6, c. 12.

The title of that mischievous act of 31 H. 8. is this: 'An act that proclamations made by the king's highness, with the advice of the honourable council,' (meant of the privy

council) 'shall be obeyed and kept as though they were made by act of parliament.'

The preamble recites the king, by advice of his council, had thenceforth set forth sundry proclamations concerning articles of religion, and for an unity and concord to be had among his subjects, which nevertheless many froward wilful and obstinate persons, have wilfully contemned and broken, not considering what a king by his royal power may do; and for lack of a direct statute and law to coerce offenders to obey those proclamations, which being still suffered, should encourage offenders to the disobedience of the laws of God, and found too much to the great dishonour of the king's most royal majesty, (who may full ill bear it.)

Considering also, that sudden occasions fortune many times which do require speedy remedies, and that by abiding for a parliament, in the mean time might happen great prejudice to ensue to the realm: and weighing that his majesty (which by the regal power given him by God, may do many things in such cases) should not be driven to extend the supremacy of his regal power, by wilfulness of froward subjects: It is therefore thought necessary, that the king's highness of this realm for the time being, with the advice of his council, should make proclamations for the good order and governance of this realm of England, Wales, and other his dominions, from time to time, for the defence of his regal dignity, as the cases of necessity shall require.

Therefore it is enacted, that always the king, for the time being, with the advice of his council, whose names thereafter follow, (and all the great officers of state are mentioned by the titles of their offices only) for the time being, or the greater number of them, may set forth at all times by authority of this act, his proclamations, under such penalties, and of such sort as to his highness and his council, or the more part of them shall seem requisite. And that the same shall be obeyed, as though they were made by act of parliaments, unless the king's highness dispense with them under his great seal.

Here, at one blow, is the whole legislative power put into the king's hands, and there was like to be no further use of parliament had this continued.

Then there follows a clause, that would seem to qualify and moderate this excess of power, but it is altogether repugnant and contradictory in itself.

And the conviction for any offence against any such proclamation is directed not to be by a jury but by confession or lawful witness and proofs.

And if any offender against any such proclamation, after the offence committed, to avoid the penalty, wilfully depart the realm, he is adjudged a traitor.

And the justices of peace are to put these proclamations into execution in every county. And by another act of 34, and 35 H. 8. c. 23.

Nine of the great offices are made a *quorum* &c. for they could not get half the number to act under it.

The act of 1 E. 9, c. 12, (which repeals the terrible law) begins with a mild and merciful preamble, and mentions that act of king H. 8. which as this act of E. 6. does prudently observe, might seem to men of foreign realms, and to many of the king's subjects, very strict, sore, extreme and terrible; this act of king E. 6. does therefore, by express mention of that terrible act, wholly repeal it. And so that law (to use the lord Bacon's phrase) was honourably laid in its grave.

And God grant it may never rise again.

It is very probable, that this terrible law was drawn by king Henry the eighth's own hand by that expression in it, 'that the king may full ill bear the disobeying of his proclamations, and the dishonour done to him by it;' and by several other clauses. The history of the Reformation, fol. 262, mentions the draught of a bill intended for an act of parliament, concerning giving the king power of erecting many new bishopricks, by his letters patents; upon which the author of that history says, that the preamble, and material parts of it, were drawn by king H. 8 himself, and the first draught of it, under his hand, is still extant; and this passed the lords, and was sent down to the commons; and this is the very same parliament of 31 H. 8, when this terrible law passed.

Sir Edward Coke, in his first Inst. fol. 99, defines a dispensation thus: 'Dispensatio est mali prohibiti provida, relaxatio utilitate seu necessitate pensata.'

So that great utility, or necessity, are at least pretended for the granting of them; now public utility and necessity are the true grounds and foundation of all laws, (which I have already shewn, bind all men alike, without respect of person.) But a dispensation does untie that knot, or slackens and lets loose that obligation, as to some particular persons, and in some cases, and for some limited time, at the will and pleasure of the prince that exercises that power.

It looks like a dispensation which Naaman the Syrian obtained from the prophet Elisha. 'In this thing' (that is in one particular) 'the Lord pardon thy servant to bow down himself in the house of Rimmon, when his master the king did so.' He calls it a pardon, but it rather was an indulgence or dispensation that he craved. A pardon is properly of an offence already committed. See Dr. Field, dean of Gloucester, in his Treatise of the Church, printed at Oxford, 1628, fol. 475, what a dispensation is, viz. it is in respect of certain persons, times, places, and conditions of men and things. So that a dispensation, permitting the law to retain her wonted authority, only freeth some particular person or persons, at some times, in some places, and in some condition of things, from the necessity of doing or leaving undone that which (unless it be in considera-

tion of such particular circumstances) ought to be done.

A dispensation is of a thing future, to allow of a thing to be done, that it may not be accounted for a crime, and makes the thing prohibited lawful to be done. And thereupon the chief justice Vaughan, in his argument of the case of Thomas and Sorrel, seems to take it in its right reason, when he says a dispensation obtained, *esse potest*. 'Though here, argues with sir Edward Coke's objection of it, and says, it is *signatum per iudicium*. But, under his favour, if he disliked that, he should have given us a better. *Capere vel non nostra*, &c.

1. I know very well, that there are some of late, that do ground this upon the sovereignty of the prince, as if to be sovereign, and to be absolute, and *'solutus à legibus'*, were one and the same thing. As if it were inconsistent for a sovereign prince to be bound to law.

A prince may be a sovereign, i. e. no subordinate or subject prince. *'Rex est qui regem maxime non habeat'*, and yet not absolute and unlimited in power. It is a frequent argument, and often disputed in our books, what law the king is bound to, and where he is not included in the law.

2. It might be argued, that because the laws are the king's law, that therefore the king may dispense with the laws: this argument is of a vast extent in the consequence, as that of the sovereignty is. But it is not the king alone that makes the laws, and though they are indeed his laws *'per eminentiam'*, and *'Denominatio similiturè majore'*, yet others have a hand in the making our laws, and a propriety and interest in them when once they are made.

We shall be let to see, that in the use and nature of a dispensation, we give some instances of particular cases, where our dispensations have been allowed legal by our judges, against the penalties of some particular acts of parliament. For example,

By a certain statute, Gascoign wines and other foreign goods were prohibited to be imported into this kingdom, but in English ships, under the penalty of forfeiting the goods, and it was a penalty for the increase of our money, and to prevent of our own manners, which are to be considered for the safety of the kingdom, as to the importing of foreign goods, and foreign ships was the *'malum'*, but it was only a *'non prohibendum'*; that is, it was not made a crime by the law, but it so. It was not made a crime. It was therefore resolved by all the judges in R. 3. c. 11. that the king might dispense with this law, *'Sine conditione non obstante'*, and might give license to some particular persons to import such foreign goods in foreign ships.

The whole liberty of this act of parliament was a common liberty, and truly, by occasion of this law, applying the prerogative of dispensing to it, was now engrossed into some few

hands, from whence a revenue its likely was raised; so that it might be said, sin took occasion by the law.

By the statute of 17 R. 2, c. 5, no aulnager or weigher of wool shall have any lease for life or years of his office, and if any charter or letters patents be made to the contrary, (the statute says) they shall be null and void: so that the makers of this law did not allow of any dispensing power, but provided against it, which shews what opinion a parliament hath of dispensations. Yet it was resolved, Dyer 303, that the king, by a Non Obstante, might dispense with this law. The judges indeed were of that judgment, but the parliament, who are the supreme judges, plainly appear to be of a contrary judgment.

By a statute made 1 H. 4, be that petitions to the king for lands, &c. in his petition is to mention the value of the thing, &c. or else the king's letters patents, &c. shall be of no effect: and yet letters patents to the contrary, are good with a Non Obstante.

By the statute of 33 H. 8, c. 24, for avoiding partiality and favour in administering justice, no man is to exercise the office of a judge of assize in the county where he was born or dwells, under 100*l.* penalty; and divers former acts had been made to the same purpose, as 3 R. 2, c. 2, &c. yet this we know is frequently dispensed with by a special Non Obstante; so that these statutes are seldom or never observed, and are of little use. So likewise is the statute of 7 Ed. 6, c. 5, for retailing of wine, according to the resolution in the case of Thomas and Sorrel.

These may suffice to shew what is meant by the term dispensation, and what the nature of a Non Obstante is.

It is an indulging of a privilege to some particular person, or to a corporation, allowing him or them to do a thing that is prohibited by some act of parliament, (under a penalty) without incurring the penalty. The doing whereof was lawful to all, till that particular law did make it an offence to do it.

The chief justice Vaughan, who argued in his turn the last but one of all the twelve judges, in the late great case of Thomas and Sorrel, (and there was hardly a case in all the books under that title, but what had been cited by one or other, and all the rules and distinctions were there remembered) yet that chief justice, after all, says, that not one steady rule had been given either by the books, or any of the judges, that argued before him. And for that trite distinction, so generally used, of *'malum in se et malum prohibitum'*, the chief justice Vaughan professes, that rule hath more confounded mens' judgments than rectified them: yet he himself gives us no other.

Which shews that the notion of dispensation is not very ancient with us in our law, and is but rare, and as yet unformed, not licked into a perfect shape, (I mean still dispensations with some acts of parliament, such as this of 25 Car. 2, not the granting Non Obstantes as to

mis-recitals or non-recitals in grants of lands, &c.)

It having yet no steady rule, and yet being frequently used, it is the more fit for the supreme court to give some certain rule in it that may regulate and guide the judgment of inferior courts: and this is the proper work of the king and parliament.

And because we find it a growing mischief, and getting ground upon the law, and every day brings forth new precedents, it is high time that a stop were put to it.

So much for the nature of a dispensation.

I shall in the next place endeavour to trace out the original of this invention of a dispensation, when it first began, and who was the author of it, and shew, that it was looked upon as a monster, and exclaimed against by kings and states and all good men, and yet the precedent was followed, and the abuse of it spread and increased, and hath been ever since growing.

I am not the first that have undertaken to make this discovery: in the argument of the case of Comendani, in sir John Davy's Reports, fol. 99, b. It is said, that the Non Obstante was invented and first used in the court of Rome, and they bring an author that denounced a woe against that court, for introducing so ill a precedent, mischievous to all commonwealths in Christendom; for the temporal princes perceiving the pope to dispense with his canons, in imitation of him, have used it as a prerogative to dispense with their penal laws and statutes, where before they caused their laws to be religiously observed, as the laws of the Medes and Persians, which might not be changed. Thus says that report: here we see from whence it was borrowed.

The late chief justice Vaughan, in his report of the case of Thomas and Norrel, fol. 318, does acknowledge, that the use of dispensations was principally derived to us from the pope.

Now, to make some conjecture about what time it began, that we may discover how old it is, and which of the popes was the author of it.

The History of the Reformation, fol. 101, says, this power of dispensing with the laws of the church by the popes, was brought in, in the latter ages. Popes Zozimus, Damasus, Leo, and Hilarinus, do freely acknowledge they could not change the decrees of the church.

It is supposed, it was first invented by pope Innocent the third, about the beginning of the thirteenth century, and about the times of our king John, and his son king Henry the third; and it is observable, that in this pope's time the doctrine of transubstantiation was first decreed to be an article of the faith, and this at the council of Lateran. that doctrine, which by this very act of ours, is to be declared against, and is now dispensed with. This is that pope that excommunicated Otho the emperor, and our king John, and forced him at last to resign his crown, and to take it back from him again so hold it of him at the rent of 1,000 marks:

what good issue can we expect from such a father?

After the time of this Pope, dispensations began more frequently to be practised by the successors of Pope Innocent the third, by Honorius, and by Pope Gregory the ninth, and Innocent the fourth, but they were exclaimed against by all kings and princes, and by all the good and learned writers of that age, which shews, that they had not been ancient, and that the kings and princes themselves had not then followed the ill example in dispensing with their laws; for had they done so, they could not with any confidence have condemned the Pope for using them.

And we may see how odious these dispensations were, by the vile epithets the learned and good men of that age gave them.

We have a full relation of it from one of their own order, a monk, but an historian of very good esteem, that is, Matth. Paris; he tells us, that our king Henry the 3d sent earl Bigod and other nobles to the council at Lyons and amongst others, one William de Powic, one of his procurators and a clergyman, who made an elegant oration, ripping up the horrible oppressions used by the Pope upon England, and then delivered in an epistle, directed to Pope Innocent the fourth, by the 'Magnates et Universitas Regni Anglie,' to the same effect. After this had been openly read in the council, and a mighty silence followed, and the Pope gave no answer to it. The king's proctors, 'Prioribus adeant querimoniam gravem et seriam videlicet de violenta oppressione, intolerabili gravamine, et impudenti exactione, et injuria, quæ per hanc invisam adjectionem papalibus literis frequenter insertam (Non Obstante) &c. exercetur per quam jus pro nihilo habetur et authentica scripta enervantur,' says that historian.

The same author says that the reformation of many things was obtained from Pope Innocent: 'Sed omnia hæc et alia, per hoc Repugulum (Non Obstante) infirmantur ubi vero fides! ubi jura, quæ scriptis solebant solidari?'

Our king Henry 3 convened his parliament, and spread before them the articles of the grievances which he had so sent to Rome, and amongst others one in these words: viz. 'Gravatur Regnum Anglie ex multiplici adventu illius infamius nunciæ (Non Obstante) per quem Juramenti religio, consuetudines Antiquæ, scripturarum vigor, concessioum auctoritas, Jura et privilegia debilitantur et evanescunt.'

We find it frequently termed, 'Detestabilis Adiectio Non Obstante,' we find the form of his dispensation running in these words: viz. 'Indulgentia quæcumque vel privilegio quolibet, aut constitutione in Generali Concilio edita, Non Obstante.'

The Pope afterwards required a third part of the goods of all the beneficed clerks, and (says that historian) 'Multis adjectis durissimas Conditionibus;' and (amongst other) 'per illud verbum et adjectionum detestabilem

'(Non Obstante) que Omnem Extinguit Justitiam.'

In another Bull he requires the payment of a sum of money from the English clergy, 'Quocumque Privilegio seu indulgentia Non Obstante, Licet presentes expression de ipsis non faciant Mentionem.' This very phrase is grown most familiar in letters patents with us, and we see from whence it hath been borrowed.

That temporal princes at that time did not practise the like, does evidently appear not only by their frequent complaint of them; but the Historian tells us, it was then grievously feared, that the kings and great men would in time be infected with the ill example of the pope: his words are, 'Quod multi formidabant vehementer, ne Principes Laici et Seculares exemplo Papae Edocti Non Obstante talis vel talis Chartae tenore;' would revoke their concessions too, therefore as yet it was not in practice by temporal princes, no not in letters-patents, much less in laws.

I shall give one instance, wherein we shall find the pope teaching this very lesson to the king of England, (Henry 3.) and instructing him as his scholar to write after his copy.

King Henry 3. had made several grants to his subjects (bishops, noblemen and others) and had obliged himself by oath never to revoke them.

Pope Gregory the ninth, by his bull, (which Mr. Prynne (who had the keeping of the records in the Tower) says he found in the white tower, under seal) commands the king to revoke these grants, 'Juramento et Instrumentis praedictis nequaquam obstantibus.'

King Henry 3. was easily taught this lesson, and did soon put it in practice; and being reproved by some about him, for using of Non Obstantes, the king justified himself by the example the pope had given him: 'Nonne Papa,' says he, 'facit similiter, subjungens in Literis suis manifeste Non Obstante aliquo Privilegio vel indulgentia.' But as yet it was not exercised as to acts of Parliament, till a long time after.

What sad apprehensions it raised in good men may appear by an example or two: when one of these patents with a 'Non Obstante' in it, was produced in the courts of Westminster, one Roger de Thurkeby, (who was a judge of the court of common pleas, in the time of king Henry 3.) upon the hearing of it (says the Historian) 'Ab alto ducens suspiria' (he fetched a deep sigh) and, 'De predicta adjec-tionis appositione,' (that is, concerning this clause or addition of 'Non Obstante.) Dixit 'heu! heu! has ut quid dies expectavimus ecce jam Civilis Curia exemplo Ecclesiasticae Coinquinatur et a Sulphureo fonte Rivulus intoxicatur.'

This plainly shews the time when the use of them was first introduced into England in civil and temporal cases, they were not used before the time of Henry the third, which is not ancient enough to make a prescription by the

rules of our law, and we see from whence they learn it.

I shall now cite the judgment of a famous and learned bishop of those times, concerning these 'Non Obstantes;' that of Robert Gros-test, or Greathead, who 'per excellentiam,' was generally stiled no more, but 'Lincolnensis' in the book of his that is intitled, 'De Cessatione Legalium,' published by the late dean of Windsor (Dr. Reeves): There are some testimonies given of the bishop, out of authors in the beginning of that book: Among others, it is remembered of him that he sent a smart epistle to the then Pope, wherein he does cry out upon the Pope, for that the Pope's Bulls did not superaccumulate, as he terms it, the words (Non Obstante) which words, says that good bishop of Lincoln, did, 'Christianae Religionis puritatem et hominum tranquillitatem perturbare.' And he does thereupon affirm the Pope to be Antichrist: 'Nonne,' says he, 'Antichristus merito dicendus est?' And to prove him to be Antichrist, he further charges him: 'Privilegia Sanctorum Pontificum Romanorum praedecessorum suorum Papa impudentur annullare, per hoc Repugnum (Non Obstante) non erubescit; sic diruit, et reprobat, quod tanti et tot Sancti edificaverunt.'

When Innocent the fourth read this bishop's letter, he fell a swearing by Peter and Paul, that he would confound him: 'In tantam confusionem praecipitaret ut totius mundi fabula foret, stupor et prodigium!' and that he would command the king of England, (whom he there insolently termed, Noster Vasallus, a tenant or vassor): 'Et ut plus dicam mancipium (his property) illum nutu nostro in carcerare.'

But the cardinals then about the pope, advised him to consider better of it; for, said they 'Ut vera fateamur vera sunt quae dicit, Catholici est, imo et sanctissimus.'

Of this bishop, says Mr. Camden in his Britannia, he was, 'Terrificus Papae et Regis Reclargitor manifestissimus, et veritatis amator.' Henry de Knighton adds this of him. 'Ad Innocentium Papam misit Epistolam satis tonantem,' (a thundering epistle) 'qua de re ad curiam vocatus et Excommunicatus appellavit a Curia Innocentii ad Tribunal Christi.'

And this usurped power, though used with more modesty at first, yet in a short time it grew to that height, that it proved intolerable and insolent.

The Bull of Pope Pius the fourth, publishes decrees, 'Non obstantibus Constitutionibus et Ordinationibus Apostolicis.'

Another dispensation of the same pope's runs in these words, viz. 'Licet Christus post eorum instituerit sub utraque Specie Panis et Vini Venerabilis Sacramentum; tamen hoc Non Obstante, &c.' The Pope takes upon him to dispense with that sacred institution: 'A conscientibus' (for so he prophanely expresses it) 'sub utraque; et a Laicis tantummodo sub Specie Panis suscipiatur.'

In the oath of a bishop to the Pope (extant in the Roman pontifical, set out by Pope Clement the eighth) the bishop upon his oath doth acknowledge amongst other *Regalia Petri*, that the Pope can make void promises, vows, oaths and obligations to laws, by his dispensations.

Dr. Marta, de Jurisdictione, affirms, that
 ‘Papa de Plenitudine potestatis potest Dispensare contra jus Divinum, et contra Apostolum, est super omnia Concilia, quæ interpretatur, tollit et corrigit.’

The Glossator upon the canon law avowed by the Rota of Rome, as the history of the Council of Trent does quote him, holds the Pope can dispense against the Old Testament, and the four Evangelists, and against the law of God.

Bishop Jewel, in his defence of The Apology of the Church of England, against Harding, brings in one of their canonists that holds, that the Pope, ‘Privilegium dare potest contra jus Divinum: Papa Dispensare potest de Omnibus præceptis Veteris et Novi Testamenti.’ It is part of the description given of Antichrist, by the prophet Daniel, chap. 7. He shall think that he may change times, and laws, and they shall be given into his hands.

Bishop Jewel’s exposition upon the epistle to the Thessalonians, fol. 131. Antichrist, says the bishop, is there called *ἀνομος*, a man without order or law, that man of sin; which is one of the peculiar notes of antichrist. He shall seek to be free and go at liberty, he shall be tied to no law neither of God nor man. Hence it is said of the Pope, that he is ‘solutus omnia Lege humana. In iis quæ vult, est ei pro ratione voluntas nec est qui dicat illi, Domine cur ita facis? Ille potest supra jus, dispensare, et de Injustitia facere justiciam corrigendo jura et mutando.’

Pope Martin the fifth dispensed with a man that married his own sister.

In this last instance the Pope did directly write after the copy of an heathen king. The story of Cambyzes is the same case in the very point with this last of Pope Martin. Sir Walter Raleigh mentions it in his History of the World. Cambyzes inquired of his judges whether there were any law among the Persians, that did permit the brother to marry his own sister. It was the intent of Cambyzes to marry his own sister too. The judges who (as sir Walter Raleigh observes) had either laws or distinctions in store to satisfy kings and times, they make a subtil answer, that there was not any thing written allowing any such marriage: but they notwithstanding found it in their customs, that it was always left to the will of the Persian kings to do what best pleased themselves. This was a Non Obstante with a witness.

This surely, and the Pope’s practice together, gave the occasion to Mr. Chillingworth’s observation. He that would usurp, says he, an absolute lordship over any people, need not put himself to the trouble of abrogating or annulling the laws made to maintain the common

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liberty, for he may frustrate their intent, and compass his design as well, if he can get the power and authority to interpret them as he pleases, and to have his interpretations stand for laws; if he can rule his people by his laws, and his laws by his lawyers: therefore, says he, there is a necessity of a frequent resort to be had to the law-makers, not only to resolve difficulties of judgments, but to keep the power of interpretation within its due bounds; which is excellent advice.

I shall give but one instance more, and that is of the most impious sort of dispensations that could possibly be devised; I find it in the history of the church of Scotland, written by archbishop Spotswood. He tells us that in anno 1580, dispensations were sent from Rome into Scotland, whereby the Catholics were permitted to promise, swear, subscribe and do what else should be required of them, so as *in mind* they continued firm, and did use their diligence in secret to advance the Roman faith.

Thus we see the monstrous abuses brought in by dispensations: I have been something long upon this subject; but it was necessary to shew how that it is in the very nature of it, to be stretching and growing, and at last to be altogether unlimited, and will totally subvert the law.

Having thus laid my foundation, I shall now proceed from thence to raise my arguments against dispensations in general, to prove, that they are not law, but indeed contrary to law and destructive of it.

I hold there is no just nor lawful power of dispensing with any act of parliament, in any other hands than in those that are the law-makers, that is, in the king and parliament in conjunction: (I confine myself to dispensations with acts of parliament.)

1. My first argument shall be from the nature of a law, (whereof an act of parliament is the highest and of greatest authority.) A law hath its name, as I said before, from its nature, ‘Lex à Ligando:’ it binds and compels to obedience, and it binds together and cements, it knits and unites a multitude of people, and makes them all as it were but one body.

Now a dispensation is of a quite contrary nature, and is destructive of law: as the law does ‘Ligare,’ a dispensation does ‘Relaxare.’ It is defined to be, ‘Relaxatio Juris:’ it does unbind and set loose the obligation of the law, and by consequence tends to the dissolving of the body politic. Whatsoever is destructive of the law cannot itself be law; for then the law would be *felo de se*, ‘Lex quæ Leges evertit ipsa Lex esse non potest,’ a thing divided against itself, and therefore will not stand. ‘Ubi non est pudor, nec cura juris, instabile Regnum est,’ says Seneca.

Law is made by an universal consent and agreement of prince and people.

I have already shewn, how that the common law (which is as ancient as the nation itself) is that covenant which was agreed upon by

prince and people at the first framing and institution of the government.

The statute law, hath its force and authority from the like consent, and nothing is law without that consent, as appears by the preamble of 25 H. 8, c. 21, concerning the very point of dispensation; Sir John Fortescue says, 'Rex leges sine subditorum assensu mutare non potest; potestas regia lege cobibetur,' in his book *de Laudibus Legum, &c.*

Now for the prince alone, without the like consent, to depart from that agreement, and at his will and pleasure to break any article of it, is in effect to put the sole power of the law into the hands of one person, which received its force and vigour from the consent of all; which is irrational.

Bracton,* who, as sir Edward Coke says, in his Preface to the ninth Report, was a famous judge of the Common Pleas, in the time of king Henry 3, is of this judgment. Leges, says he, 'cum fuerint approbate consensu utentium, et Sacramento Regum confirmate, mutari non possunt nec destrui sine Comuni consensu et Concilio eor,' quor' concilio, et consensu fuerint promulgate.'

2. The laws of England (both common and statute law) have (as I have already shewn) a different original from that of the power of dispensation (as it is exercised now among us): they have not the same father. The king, (who is *Pater Patria*) with the consent of the people, is the father of our laws, he is *Juris Pater*: but he that is called the holy father, and from thence hath his name of Pope, is the father and first inventor of dispensations; so that there is no kindred nor affinity between the law and dispensation.

3. The laws amongst us and this faculty of dispensations, as they have a different original, so they have no resemblance one of another: 'facies non omnibus una est,' they have contrary qualities and dispositions. The law is equal and impartial, and hath no respect of persons, and (as before I observed from Aristotle) is a mind without affection. Now the nature of a dispensation is to favour some, to set some at liberty from the obligation of the law, and is a kind of prerogative of others, leaving them still under the yoke and obligation, and obnoxious to the penalty if they transgress. Whereas, in a well governed kingdom there ought to be *una pondus* and *una mensura* in distributive, as well as commutative justice.

It was part of the oath that was taken by king William 1st, (who is commonly stiled the conqueror) that he would, 'Aequo jure Anglos et Francos tractare.' Which oath savours nothing of a conquest, nor does it run in the stile of a conqueror.

And it is the oath of a judge at this day, That he shall truly serve the king and his people, &c. That he shall do right to every person, notwithstanding the king's letters, that is, notwithstanding any Non Obstante.

* No Law or Custom of England can be annulled but by Act of Parliament.

It is a maxim in law, 'Quo modo aliquid Ligatur, eo modo dissolvitur.'

Now a law being made by consent of all, should not be dissolved again, but by the like consent; that is, by authority of the king and parliament, who have the legislature. Dr. Willet in his *Synopsis Papismi*, makes a difference between a toleration, and a dispensation. That of Moses, in case of divorces, was a toleration. A dispensation (says he) must be of as high a nature as the institution: None but the law-maker can dispense with the law, not he that hath but a share in the legislature.

And from hence I shall take occasion to assert, and shall endeavour to make good my assertion by law, that the lawful power of dispensing with an act of parliament, that concerns the public, is only in the hands of those that have the legislative power. I confine myself to such acts only as concern the public (as the present act, we have now to do with, does in a very high degree.) And therefore I hold that none can dispense with such a law, but the king and parliament, and such as they entrust with it.

I shall begin to prove this by an act of parliament, which is the highest resolve and authority in our law: it is in the preamble of the act of 25 Hen. 8, c. 21, (the statute of dispensations) and the preamble of a statute is law, as well as the enacting part, or body of the law. It is in effect a declaration of what was law before, at least it shews the opinion and judgment of the law-makers; which is of high authority.

It first utterly disowns and renounces the pope's long usurped claim and pretence of dispensing with any person within this realm, even in matters spiritual, though by him practised for many years. I desire to observe upon this, that long usage by an usurpation, gives no lawful right: but I would further observe too, that where it hath been long admitted and used, it is in such case reasonable for none but the supreme court to undertake it, and declare against it.

In the next place, this act of parliament does affirm, that this realm of England is subject to no laws, but such as have been made and taken by sufferance of the king and his progenitors, and the people of this realm, at their free liberty, by their own consent, to be used amongst them, and have bound themselves by long use and custom, to the observance of them, as to the customary and ancient laws of this realm originally established, as laws of the same, by the said sufferance, consents, and customs, and none otherwise. This shews the original of our common law. This likewise clearly proves, that whatever is imposed upon the people without their consent, hath not the authority of a law: and it cannot be shewn that ever the people did consent to this power or practice of granting dispensations. But it plainly appears that our acts of parliament are so far from approving or countenancing of it, that they have often feuced against it, although in vain hitherto.

And though the usage have been very ancient (as I have shewn) yet that gives it no lawful authority; for this preamble declares, those only are laws binding to the people, that have been originally established as laws. The word (originally) refers no doubt to our very primitive institution, which is common law, or at least to a time so ancient, as that the original cannot be traced out, nor shewn, and then it shall be presumed to be the common law. Now I have, I hope, clearly evinced that the very first invention and practice of dispensations, by the bishop of Rome, is not time out of mind, nor can the usage of it here by imitation of the Pope, reach up to a prescription, in the judgment of our law, nor by the rules of it. For sir Edward Coke in his first Instit. fol. 115, treating of a prescription, and the nature of it, says, That if there be any sufficient proof of record or writing to the contrary, albeit it exceed the memory of any man living, yet it is within the memory of man, in a legal sense, it had its original since the beginning of the reign of our king Richard 1st, (that is in the time of king John, and king Henry 3d.).

But that which makes it much the stronger is, that this declaration of the king and parliament against such dispensations and laws introduced without the king and people's consent, does conclude with negative words, viz. 'and not otherwise' and is exclusive of all other; that is, that nothing is law without their consent.

And this statute of dispensations proceeds further to shew, where the true and lawful power of granting dispensations is vested, in these words, viz.

It stands with natural equity, and good reason, that in all laws human within this realm, the king and both houses representing the whole state of the realm, have full power to dispense, and to authorize some person to dispense with those, and all other human laws of this realm, and the same laws to abrogate, annul, amplify, and diminish, as it shall be seen unto the king, the nobles, and the commons of the realm present in parliament, meet and convenient for the wealth of the realm. And then it does dispose of the power of dispensation in matters ecclesiastical to the archbishop of Canterbury; some whereof are to be confirmed by the king, and others that may be good without the king's confirming.

And although the body, or enacting part of this statute, extend only to causes ecclesiastical, yet the preamble does reach expressly to all human laws.

This statute of 25th of Henry the eighth, was made in the time of such a king, as we all know, by reading our histories, stood highly upon his prerogative, and would never have consented to such a declaration, concerning the power of dispensing, if it had been a special prerogative in the crown; and had there been such a power in the crown, the king would never have suffered himself to have been deprived of it, and to have it disposed of into other hands, by the parliament, and there would have

been no need of passing such a law: the king himself alone could easily have transacted all this matter provided for by this act of parliament, had he had the sole power.

It is true that the lord Hobart, in his reports, fol. 146, mentioning this act of dispensations, and taking notice that, by the express words of the act, all dispensations, &c. shall be granted in manner and form as is prescribed by that act, and not otherwise; yet he holds that the king is not thereby restrained, but that his power remains full and perfect as before, and that he may still grant dispensations as king: for, says he, all acts of justice and grace flow from him.

This and such like statutes (says the lord Hobart) were made to put things into ordinary form, and to ease the king of labour, not to deprive him of power.

This opinion of his is grounded upon a presumption, that the power of dispensing with laws, was always from the beginning a prerogative inherent in the crown; not examining who was the first author, and the time when it first began, and whence we borrowed the use, and how there was a time within evident proof of credible and authentic writers, when dispensations were not in use; and so they are within the time of memory in a legal construction, and cannot be by prescription.

And it is plain every legal prerogative must be so by prescription, that is, used time out of memory of man, and whereof there is no sufficient writing to the contrary.

But I may appeal to any unbiassed and equal judgment, upon the reading of this act, especially the preamble of it, whether this act merely intended to put things into an ordinary form, and to ease the king of labour; or whether it was not to put an absolute stop to the former practice, and does not directly declare and determine where the true power of dispensing ever was; and therein uses those exclusive words 'and not otherwise,' for those words are in the preamble, as well as in the body of the act.

So that this construction of the lord Hobart's, That still the king may dispense alone by himself, and that he might have done so by his prerogative, before the making of this statute, and may do so still, notwithstanding this statute, is directly against the very words of the statute, which say it shall not be otherwise than as the statute directs, and being in the negative are the stronger.

And the three instances, or cases cited by the lord Hobart, all out of Dyer, do not come home to the case of the king's granting dispensations in other manner than the statute of 25 H. 8, c. 21, hath directed, which expressly enacts that they shall not be granted otherwise.

1. His first instance is out of Dyer, 211. The statute of 28 H. 8, c. 15, appoints, that the commissioners for tryal of piracy, shall be named by the lord chancellor; now it happened there was no lord chancellor, but a lord keeper, and it was held that he might name the commissioners, by the meaning of this statute, as well as the lord

chancellor. This is, under favour, but a weak proof of the king's power or prerogative, of varying from the directions of an act of parliament, or dispensing with the rules prescribed by it; for it is a mere imaginary variation, the lord keeper ever having the same power as the lord chancellor: and it is not merely so enacted, but declared by the act of 5 Eliz. c. 18, which proves it was law before. And yet some judges held the commissioners were not well named, but that the commission was void.

2. The second instance or authority that the lord Hobart uses to prove his assertion, that the words 'and not otherwise' in the statute of dispensations, do not restrain the king's power, but that he may do otherwise, is out of Dyer, 225. That queen Elizabeth might make sheriffs without the judges, notwithstanding the stat. of 9 E. 2. This I shall have occasion to examine and speak to more fully hereafter, and therefore shall reserve it till then, and doubt not to shew, it is a mistake: and it was done by the queen in a case of necessity, it being in the time of the plague, when the great officers could not safely meet in the Exchequer, (as the statutes require for the choosing of sheriffs) and the term was held at Hertford; and the report says, no sheriff was named by the queen, for the most part, but out of those names that remained in the bill for the former year. And the book only says, it was held, the queen might do it by her prerogative.

3. The last instance that the lord Hobart gives, is out of Dyer, 303. b, that the king may grant the aulnagers office without a bill sealed by the treasurer, though the statute of 31 H. 6, c. 5, says the grant of that office shall be void, without a bill sealed by the treasurer.

The resolution of that point is very obscurely reported: but however take it at the strongest, this is in a matter that concerned the king's revenue, and where it may more reasonably be said by the king, 'May I not do what I will with my own?' And this statute may easily be understood to be to put the granting of this office into an ordinary form, and to ease the king of labour, and not to restrain his power. If that may be said in any case against the express words of a statute, it may be in a case that concerns merely his revenue, as this of the aulnage was.

In the next place I shall shew, that the stream of dispensations did anciently run in this channel, till afterwards it found out another course, and that dispensations with laws, were only in the same hands as had the legislature that is, in the king and parliament, in former times, and this answers that example that hath been used, that Almighty God dispensed with his own law of the sixth commandment, when he commanded Abraham to sacrifice Isaac. God was the great and only legislator. Now the king is not the sole legislator.

I shall present you with a very full precedent and proof of the power of dispensing with acts of parliament to be no where else but where the very legislative power is. And that the

king's have sometimes accepted it from them in some particular cases, and for some limited time, and with divers restrictions; which is a full acknowledgement that it belongs only to the legislative power to dispense with laws.

The Commons, for the great affiance which they repose in the king, granted, that he, by advice of his lords, might make such toleration touching the statute of provisions, as to him shall seem good, until the next parliament, so as the statute be repealed in no part thereof. So also as the Commons may disagree therunto at the next parliament, with this protestation too, that this their assent being indeed a novelty, (these are the very words) be taken for no example. [15 R. 2. nu. 8.] This is granted with abundance of caution and jealousy, and proves it is not ancient.

The Commons disagree to the power granted to the king, for the moderation of the statutes touching provisors in the last parliament, beseeching the king, that the same may not licence any cardinal or stranger to enjoy any benefice within the realm. [2 H. 4. nu. 26.]

It was enacted by the lords and commons, that Tydenan late abbot of Beaulieu, and elect of Landaff by the Pope's provision, should enjoy the same bishoprick, notwithstanding any act, so always as this be taken for no example. [R. 2. nu. 22.]

That the sale of tin may be at Lestwithiel in Cornwall, and shall not continue at Calais. Notwithstanding the council may grant licence to merchants, to carry the same tin to what parts they will, as to them shall seem good. [17 R. 2. nu. 34.] Here the power of dispensing is delegated to the council.

Upon the request of the commons, the king promiseth that he will not from thenceforth dispense with the statute of provisions to benefices. [2 H. 4. nu. 63.]

This implies, that the king had practised it, and we know who began the practice, and who taught it to others, and this record shews it was without consent, and was a cause of complaint, and the king promises to reform it for the future. But what signifies a promise, where a law and an oath is too weak to secure it? This promise doth not confer a new right, but is to reform an unjust practice.

I shall use one argument more against this exercise of the power of dispensing with acts of parliament, as it hath of late been practised, and that argument shall be raised from the great inconvenience and mischief that will ensue upon it to the kingdom. It may occasion the infrequency of parliaments, by taking much of their power out of their hands.

Laws are many times made but probationers and temporary, to the end, that if upon experience of them they be found to be too severe or strict, and to sit hard upon any persons, that the parliament at their next meeting may moderate or relax the severity or inconvenience that may arise by them. But if there be another way allowed for the doing of this work, there will be the less need of a parliament, and

so other work, that requires also their meeting, may remain unremedied.

If we consider how frequently the parliament ought to meet, and how often they did anciently meet, we shall easily be convinced, that the relaxing of a law, or giving remedy, (where the law was upon experience found inconvenient) was a work properly belonging unto them, and there was no need of resorting to any other help: for who should cure or reform a law, if any thing were amiss in it, but the law makers? See the statute of 6 H. 8, c. 18, the book of statutes at large, concerning Bristol.

Our Saxon king Alfred and his wise men (that is, the great council of the kingdom) ordained, that a parliament twice a year, and oftener in time of peace, should meet in London. Thus, says that ancient book, stiled, *The Mirrour of Justices*, c. 1, sect. 3, pag. 10, by 4 E. 3, c. 14. It is accorded that a parliament shall be holden every year once or more often if need be; this does not abrogate nor alter king Alfred's law.

By 36 E. 3, c. 10, (many laws had passed in that parliament of 36 E. 3, which are there called articles, as anciently our statutes were drawn into certain articles, and so passed as being articles of agreement betwixt the king and his subjects, as I had occasion to observe in the beginning of my discourse) and this statute of 36 E. 3, provides, that for maintenance of the said articles and statutes and redress of divers mischiefs and grievances, which daily happen, a parliament shall be holden every year, as another time was ordained by a statute, referring to the statute of the fourth of this king.

The act of 16 Car. 2, c. 1, for repeal of the triennial act made 16 Car. 1, in the last paragraph recites, that by the ancient laws and statutes of this realm, made in the reign of king Edward the 3d, parliaments are to be held very often; and this act of 16 Car. 2, makes a new provision, to the end (as the words are) there may be a frequent calling, assembling and holding of parliaments once in three years at the least.

Now let us enquire what the proper work of a parliament is, which the said statute of 36 E. 3, mentions in part, viz. for maintenance of the articles and statutes and redress of mischiefs and grievances that daily happen (as that statute recites).

Sir Tho. Smith, (who was principal secretary of state) in his treatise de Republica et Administratione Anglorum, l. 2, c. 2, fol. 50, 51, says thus of the parliament,

In Comitibus Parliamentariis posita est omnis augustæ absolutæque potestatis vis. Veteres leges jubent esse irritas, novas induunt, presentibus modum constituunt. (There is the true dispensing power) *Incerti juris controversias dirimunt.*

Bracton writes of this high court, *Habet Rex Curiam suam in concilio suo in Parlamento suo, ubi terminantur sunt dubitationes*

Judiciorum; et novis injuriis emeris, nova constituuntur remedia.

The *Mirrour of Justices*, c. 1, p. 9, says, that parliaments were instituted to hear and determine the complaints of the wrongful acts of those, against whom the subject otherwise could not have common justice, that is, against great and powerful delinquents.

Nihil prudens (says Bracton) *Jura concedere nisi sit qui Jura teneantur.*

So that there is need of a frequent resort to be had to the law-makers, not only to resolve difficulties of judgments, but to keep the power of interpretation within its due bounds: and the law hath taken care for frequency of parliaments.

Sir Francis Bacon, in his *Advancement of learning*, gives this excellent advice to law-makers, and to those to whom it belongs to defend the laws.

Let not, says he, Prætorian courts (speaking of courts of equity) have power to decree against express statutes, under pretence of equity; for, says he, if this should be permitted, a law interpreter (that is a judge) would become a lawmaker, and all matters should depend upon arbitrament, that is upon an arbitrary power. And arbitrament would encroach upon, and at last swallow up law.

The power of extending or supplying or moderating laws, little differs, says he, from the power of making them.

Courts of equity sometimes, under the pretence of mitigating the rigor of the laws, (and such is the power of dispensing) relax the strength and sinews of laws, by drawing all to arbitraments. He was well able to judge of this, having been lord chancellor. And it is his 40th Aphorism, that is the best law which gives the least liberty to the judge; he is the best judge, that takes least liberty to himself.

Therefore where any new law sits uneasy and too hard and heavy in some particular cases, it were much safer to suffer the mischief for a time, (if any such happen) and let it wait till those that gave the wound come to cure it. *Una eademque manus vulnus openique feret.* The overhasty cure, arising from the impatience of enduring pain, makes the case the worse; frequency of parliaments is a proper cure. Other ways of cure are apt to cause infrequency of parliaments.

And in matters of great difficulty which come before the judges in the courts of Westminster, or if there be no great difficulty, yet if it be of mighty concernment and not clearly concurring with the intent* and words of law-makers, but the law in the scope of it, is like to be frustrated by an hasty determination, it is, under favour, the duty of the judges in such cases of *Dubitationes Judiciorum* † to rest till the parliament meet, and then to propose it to the parliament for their resolution. Thus it is

* Hob. 157.

† Sir R. Cotton's Abridg. 1 R. 2. nu. 95. 2 Inst. 498.

expressly provided in the statute of treasons, 25 E. 3, to defer doubtful cases till the parliament resolve them, being in a matter of so high concernment as that of treason.

And in cases of much lesser consequences, especially upon a new law, (as that is that we have before us) in several cases cited in Blackmore's case, the judges have sought to the parliament for a resolution in smaller matters.

8 Rep. 158. In doubts arising before the judges in their courts, upon the construction of acts of parliament, the judges resorted to the council, (which is there said to be meant of the great council, the parliament) that made the act in the case there cited.

The question* did arise upon the statute of 14 E. 3, c. 6, which gives power to courts to amend misprisions of clerks in process, in writing a letter or syllable too much or too little. But whether these words in the act, gave power to amend where there was a whole word too much or too little, was the question, and the lords declared, 39 E. 3, 21, that their meaning was, that in such cases the process should be amended: this shews the tenderness of the judges in those times, in construction of new acts of parliament, and the frequency of parliaments, and the resort still had to them in case of doubts. And this was in the time of E. 3, the most flourishing time of the law; and a case that the then archbishop said had no great difficulty in it.

But I presume it will be said against me, that this is a clear case in law which is now before us, and that there was no doubt nor difficulty in it, but that the king by his prerogative could dispense with this act of 25 Car. 2, and that all the twelve judges (but one or two) were of that opinion, and that the point hath formerly been resolved in the case of continuing a sheriff in his office longer than one year, notwithstanding the several acts of parliament to the contrary, and that was so resolved by all the justices in the exchequer chamber, 2 H. 7, and by the opinion of sir Edward Coke, 12 Rep. 18. and repeated in Calvin's case, 7 Rep. 14, which are the only authorities that come home to the case, and none of them ancient.

Before I speak to these authorities in the case of dispensing with a sheriff to continue longer than a year, I shall make it appear, that the case now in question, or the point in law of this case, was very much doubted, if not clearly held on the contrary, that the king could not dispense with this act of 25 Car. 2, and that by no mean judgments.

If the king could have dispensed with it by his prerogative, and it had been so clear, what need was there of his majesty's proposing it to the two Houses, at the opening of a session, to allow him a power of dispensing with this law? or that they themselves would dispense with it? why would the two Houses, after long debate about it, excuse themselves from consenting to that which the king could

do without them? were there no judges that did scruple the doing of it?

If it were a prerogative in the king, how came it to be so long before the king's learned counsel could start it? we heard nothing of this, till all other ways were tried.

Let me add to this what was spoken by the late king's own command and direction in the House of Lords, before the king and both Houses, and all the judges present, by a late lord chancellor, who, as he was an excellent orator, so he was a very learned lawyer, and my honourable friend.

It was in his speech made to both Houses, the 23d of May 1678, (about five years after the making of this act of 25 Car. 2.) and it was spoken in reference to this very act of parliament.

'Hath not the late act,' says he, 'made it impossible, absolutely impossible for the most concealed Papist that is, to get into any kind of employment? And did ever any law since the reformation give us so great a security as this?'

Hereupon, in the same speech, that noble lord does declare it now a stale project to undermine the government, by accusing it of endeavouring to introduce Popery, that a man would wonder to see it taken up again. This law had so abundantly secured us against the danger of it.

And yet, after all this, do we hear the judges openly and judicially declaring, that it appeared to them to be a very plain case, that the king alone could dispense with this act of parliament by his prerogative: and though it was acknowledged to be a case of great consequence, (as the truth is) yet it was pronounced withal to be of as little difficulty as ever any case was, that raised so great an expectation.

These are strong arguments to prove the doubtfulness of it. After all these refusals or hesitations, it might very well be accounted a doubt or difficulty, worthy to be referred to the judgment of the parliament, if the parliament had not already in effect given their judgment to the contrary.

As I remember, it was in February 1663, that the two houses make an address to the late king, for revoking a declaration, whereby his late majesty had granted a toleration and indulgence to some Protestant dissenters, as being against law, and such a toleration was declared illegal by the parliament in 1672. These are two resolutions in the point by the supreme judicature.

If this prerogative of dispensing with acts of parliament were in the crown by prescription, (as it ought to be if it were a legal prerogative)* it ought then to be confined and limited to such cases only wherein it had been anciently and frequently exercised: and there ought to be no extension of cases where they are depending upon a prescription, nor is there any arguing a *Paritate rationis* in such cases,

* 39 E. 3. 21. 40 E. 3. 34.

* 13 H. 7. 19. Plowd. 319. 322.

and which have their force merely from ancient and constant usage.

It is a rule at common law, 'Ubi eadem est ratio ibi idem Jus:' but this rule doth not hold in customs and prescriptions.

In the case of Bayly and Stevens, in Croke, Jac. 1. fol. 198, it was held 'per Curiam,' that where lands in Borough English descend to the youngest son, and he dies without issue, that the land in such case shall not go to the younger brother without a particular custom; but the elder brother shall have it, for the usage had been in the one, but not in the other case; yet these two cases are very near of kin.

Now this prerogative of dispensing with acts of parliament, in the original use and exercise of it, was but in very few cases, and those which more directly concerned the king himself immediately, in his revenue, or the like, which were cases of no great consequence, and such wherein the law makers, in making their laws, might be easily understood not to intend to abridge the king of his power, but to ease him rather of labour, and to put things into an ordinary course, which yet the king might depart from, if he were so minded, and if he did accordingly signify his pleasure, by granting an express Non Obstante the act of parliament to the contrary, and making particular mention of the act: 'Unusquisque re-nunciare potest Juri pro se introducto.'

Or in cases where there is no disability imposed upon a person by the act, but only a pecuniary penalty given to the king, and forfeited by the subject, transgressing the act, where the king is 'Creditor pœnæ;' it seems more reasonable that the king may dispense with the penalty that will be due to himself. And these, and such like, are the only instances given in that great Case of 2 H. 7.

But to dispense with an act of parliament, made in a case of the highest concernment to the public that can be, wherein religion and the government are so deeply concerned, and where the king himself, and the parliament have thought fit to disable any person to do to the contrary, and so pronounced it, and have put an incapacity upon persons, and adjudged the thing done to the contrary void; this hath been of latter times, and but of late found out and practised, and is not warranted by any prescription.*

I shall cite some resolutions to this purpose, that the king cannot dispense with disabilities and incapacities imposed upon any person by act of parliament.

The lord Hobart's reports, fol. 75, in the case of the king against the bishop of Norwich, † Res. That if an incumbent were guilty of symony in obtaining a benefice, he was made incapable of that benefice for ever, by the words of the statute of 31 Eliz. c. 6. par. 5. And the case of sir Arthur Ingram was cited,

* A prerogative that tends to the great prejudice of the subject is not allowable. Mo. 239.

† S. C. Cro. Jac. 385.

who bought the office of cofferer; he was holden by Egerton lord chancellor, and Coke chief justice, incapable of that office, by force of the statute of 5 E. 6, c. 16, though he had a Non Obstanta; and the reason there given is in these words:

For the person being disabled by the statute, could not be enabled by the king: and yet the office of cofferer is a special service about the king's person, and his treasure.

The lord chief justice Vaughan, in his Report of the case of Thomas and Sorrel, fol. 354, 355, gives this for the reason why the king cannot dispense with a man to buy an office contrary to the statute of E. 6, nor with one simoniacally presented, to hold that living, or to be at any time after presented to it; nor with any of the House of Commons not to take the oath of allegiance, according to the statute of 7 Jac. 1, c. 6. Because (says he) the persons were made incapable to hold such office or living, and a person incapable is a dead person, and no person at all, to that wherein he is incapable.

And a member of the House of Commons is by 7 Jac. 'Persona inhabilis.'

1 Inst. fol. 120. In the case of the Simonist, sir E. C. says, the act so binds the king, as that he cannot present him that the law hath disabled, for ever after, to be presented to that church. The words of the act be: 'He shall be from thenceforth adjudged a disabled person in law, to have or enjoy the same benefice.' And the party being disabled by the act (says sir E. C.) cannot be dispensed withal by any grant by a Non Obstante, as it may be where any thing is prohibited *sub modo*, as upon a penalty given to the king.

The case of sir John Bennet does not at all contradict these authorities. It is Croke, Car. 55. Sir John Bennet by sentence in the Star Chamber, was made incapable of any office of judicature for bribery, Res. by all the judges and barons, that by the king's pardon, all incapacities are discharged, because the sentence could not take the office from him being freehold, over which the Court had no power.

So that after so often declaring by several acts of parliament, grants, and patents made contrary to their acts to be void, and all dispensations, and Non Obstantes, to the contrary of the laws made by them, to be void, and inflicting penalties upon such as should obtain those grants, and Non Obstantes, or make use of them as appears by a multitude of acts; and all these too weak, and all in vain by the judges' allowance of these Non Obstantes, the parliament had no other fence against these Non Obstantes, but to fix a disability in the persons, and to make them incapable of taking the benefit of such grants; and this hath held good till now, but now they break through this too.

And as I observed in the Pope's exercise of his power of dispensing, that it was used with some moderation at first, in cases that seemed to be of great necessity only, but at last, by

degrees, it grew to be intolerable and unlimited: so the like may be observed in the use of this prerogative.

3. Instit. fol. 236, in the chapter of pardons, by divers acts of parliament, the king's power of granting charters of pardon hath been restrained, as by 2 E. 3. c. 2. 10 E. 3. c. 2, 14 E. 3. c. 14, 15 R. 2. stat. 2. c. 1, these are ancient statutes. It hath been conceived (says sir E. C.) which we will not question (says he) that the king may dispense with these laws by a Non Obstante. Yet sir E. C. there declares, that he found not any such clauses of Non Obstante, to dispense with any of these statutes, but of late times. This shews that it is a growing mischief, and had not been anciently used, as it ought to have been, to make it a good prescription and prerogative.

I shall now examine the authorities and cases that are cited in defence of this prerogative and power of dispensing with a disability imposed by act of parliament; for I do not purposely dispute it in any other case, but as they are coincident with this.

The first that we meet with, is that of 2 H. 7, fol. 6, and it was by all the justices in the exchequer-chamber. The case thus:

King Edward the fourth granted the office of sheriff of a county to the earl of Northumberland, for the life of the earl, and the justices held the patent good, there being a Non Obstante in it to the statutes.

Let us look into the statutes * that forbid a sheriff to continue in his office longer than one year: there had been several ancient statutes made to that purpose,† but they all proved to be of little effect, for patents were still granted to hold the office of a sheriff, for a longer time than one year.

At length came the stat. 23 H. 6, c. 8, which recites the former statutes forbidding any person's continuance in the office of sheriff, above one year; and observing the great oppressions and abuses to the people, that did arise from it, and how that yet they were granted contrary to those statutes. This statute therefore of 23 Hen. 6, ordains that those statutes shall be duly observed. And further ordains, That if any occupy that office contrary to those statutes, or to the effect or intent of any of them, he shall forfeit 200*l.* yearly, as long as he occupieth contrary to any of those statutes, and that every pardon granted of that forfeiture shall be void, and that all patents made of the office of sheriff, for years, or any longer time, shall be void, any clause or word of Non Obstante in any wise put, or to be put in such patents notwithstanding; and every such person is thereby disabled to bear that office.

Nothing could be penned stronger than this statute, and it is a law made by the supreme

legislative power of the nation, and it expresses the former granting of Non Obstantes to be a great abuse, and to be contrary to law. Yet contrary to the express words, and clear intent and meaning of this statute, did all the judges resolve in 2 H. 7, that by a Non Obstante, a patent for a longer time than a year should be good, of the sheriff's office.

The king, and both Houses were of opinion, that they could make a Non Obstante in such case void. The judges are of a contrary opinion, that a Non Obstante shall make void the statute. Here is an inferior court over-ruling and controuling the judgment of a superior court. The judges, who are but 'jura dicere,' contradict those who have the power 'jura dare,' as well as 'jura dicere,' and of correcting the errors of the highest court in Westminster, and controuling their judgments.

The statute was a mere idle nugatory thing, if it were not to restrain the granting of a Non Obstante: if it did not that, it did nothing. The king himself alone, (if he had pleased) could without any act of parliament, have reformed the abuse, by refusing to pass any such patents for a sheriff's continuing in his office longer than a year. But the king was sensible of the abuses, and therefore willing to be restrained from passing any more such patents, and to avoid any impertunity that might be used for the obtaining any such patents, and therefore consented that a law should pass to make such patents void. And after all, shall the king (if he pleases) still make the like grants? Why then the act was of no manner of use, and operates nothing; and the resolve of the judges has made the act a mere idle vain thing.

But the twelve judges in 2 H. 7; have so resolved, and the only use they would allow to all these acts of parliament is no more than this, that if the king grant a patent to one of the sheriffs' office for more than one year, and there be no Non Obstante in the patent, that then, for want of a Non Obstante, the patent should be void by those acts of parliament; which otherwise would have been good, had not those acts made them void.

But how easy would it be for one that obtains such a patent, to get the Non Obstante to be inserted? and who would accept such a patent without a Non Obstante? and to whom would the Non Obstante be denied to whom such a patent is granted? the lord Hobart, in the case of Needer against the bishop of Winchester, fol. 230, says, it is denied to none, and that it is in the power of the attorney general.

The reasons given by the judges in 2 H. 7, for that resolution, are, because the king had always used such a prerogative of dispensing with the acts of parliament that required the true value of the lands, and the certainty of the lands to be mentioned in his grants of lands, and with the acts concerning the ship-

* 14 E. 3. c. 7. 28 E. 3. c. 7. 42 E. 3. c. 9. 1 R. 2. c. 11.

† Sir R. Cotton's Abr. 18 E. 3, nu. 54.

* 1 H. 4, c. 6.

ing of wool,* and pardoning of murder, without express mentioning of the murder.

These cases are nothing alike, but of a trifling consideration in respect of the act we have in hand of 25 Car. 2. And in these cases the penalty and forfeitures are given to the king,† and they concern the king's profit only to dispense with them: but in our case the safety of the government, 'et salus populi,' and the maintaining of the true religion established by law, are all concerned, and so the case is not alike. And to compare this with those cases, is 'parvis componere magna.'

This opinion and resolution of the judges in 2 H. 7, has been the foundation of all the like opinions that have since that time been given of the king's power of dispensing with disabilities and incapacities imposed by acts of parliament. Upon what ground the justices held the patent of the sheriff's office, good to the earl of Northumberland for life, does not appear, whether because it had formerly been an office of inheritance, and so within the exception in the statute of 23 H. 6, or whether by virtue of a Non Obstante to the statutes, as Ratclif only argues, for the rest say nothing of the Non Obstante. Some resolutions have been to the contrary of that of 2 H. 7, as in the case that I cited of the king against the bishop of Norwich, in the lord Hobart's Reports, and the case of sir Arthur Ingram, where it was adjudged, that the king could not dispense with a disability.

And the book of 2 R. 3, fol. 11 and 12, concerning Waterford in Ireland, is of the king's power to dispense with an act of parliament where the forfeiture is given only to the king: so it comes not home to our case.

This resolution of the judges in 2 H. 7, was the precedent and leading case to all the subsequent opinions, and was the foundation of them, and they all must stand and fall by it.

Now it will be very evident, that the king had no such power or prerogative of continuing sheriffs in their offices longer than a year. For, under favour, the making of sheriffs, doth not, nor never did, belong to the king, neither at the common law, nor by any act of parliament; so that all these opinions and resolutions are built upon a sandy foundation, and have but 'debile fundamentum,' and they take that for granted, which is not a truth.

The election of sheriffs, at the common law, even from the very first constitution of the kingdom, and by the original institution of the government, was in the freeholders in the several counties, ever since there was any such office as a sheriff, and ever since the kingdom hath been divided into shires, that is, in the time of the Saxons, (from whom we derive most of our common law) and long after their time, in the time of the Normans, till being neglected by the freeholders, it came at length, by an act of parliament, made within the legal

time of memory, to be taken from the freeholders, and the power of naming and choosing sheriffs every year lodged in the hands of certain great officers of state, and so it continues to this day; but neither is, nor never was in the king.

Mr. Lambard, in his book de Priscis Anglorum Legibus in his Lemma de Heretochiis, fol. 147, says, that those Heretochii were 'Ductores exercitus.' ('Here,' signifying an army in the Saxon tongue.) The same as in the dialect of this present age may be called lord lieutenants or deputy lieutenants. The law of king Edward (which I take to be the Confessor) speaks of these Heretochii, in these words: 'Isti vero viri eligebantur per commune concilium pro communi utilitate regni per provincias et patrias universas et per singulos comitatus in pleno Folkmote sicut et vice-comites provinciarum et comitatuum eligi debent.' This law mentions this election, as an use and custom.

If the king did not make the sheriff, he could not continue him sheriff; if he could not make him for a year, he could not grant him the office for longer than a year: the sheriff had his authority and office from the election, not by commission or patent, and that but for a year.

Sir Edward Coke, in his Second Institutes, in his exposition of the statute of Westminster 1, cap. 10, concerning the election of the coroners by the freeholders, (which ever was so, and so still continues) says, there is the same reason for election of sheriffs, and so, says he, it anciently was by writ directed to the coroners. [Fol. 174, 175.]

In like manner were the conservators of the peace chosen, in whose place the justices of the peace now succeed, and so the verderors of the forest are to this day.

These were great and high liberties, and did belong to the freeholders from all antiquity, and are strong arguments to confute those late authors, that will by no means allow of a limited government, but leave us under an absolute and arbitrary power, and who call our laws and liberties, but the concessions and condescensions from the regal and absolute power.

Sir Edward Coke discourses largely of these elections, in his exposition of the statute of 'articuli super chartas,' in his Second Institutes, or Magna Charta, fol. 558.* By this statute, it is said, the king hath granted to his people, that they have the election of their sheriff in every county where the sheriff is not of fee, if they will. Sir Edward Coke says, by this act, that ancient right the people (that is, the freeholders) had, was restored to them; and the words (if they will) import, that they formerly had it, but neglected it.

By a statute made in the next king's reign, viz. 9 E. 2, styled, 'the statute of sheriffs,' upon pretence, that insufficient persons were commonly chosen for sheriffs: by that act it

* 11 E. 3, c. 1, 13 H. 7, 8 B.

† 13 H. 7, 8 B.

* 28 Eliz. 1, c. 8, and chap. 13. See the Reports of E. 2, int' Memoranda Scac' fo. 28. 4 K

is ordained, that from thenceforth the sheriffs shall be assigned by the chancellor,* treasurer, barons of the exchequer, and by the justices.

And by the statute of 14 E. 3, c. 7, some change is made of the persons that are to have the election, and the day and place of such assigning of sheriffs is prefixed, viz. yearly in the morrow of All souls, and in the exchequer.

By the statute of 12 R. 2, c. 2, the assigning of the sheriff is put into the hands of more great officers, who are to be sworn to execute this trust faithfully, but it is not vested in the king all this while, nor never was.

It is true, that out of reverence to the king, these great officers, who had the assigning of sheriffs, did afterwards use to name three persons, out of which number they left it to the king to chuse one for every shire. But this was more out of deference to the king, than out of any strict obligation so to do, and the election made by the king, was in law to be accounted an assignment by these great officers.

Nor could the king chuse any other for sheriff than one of those three so assigned by those great officers, though it is sometimes otherwise practised. And this hath been a resolution of all the judges of England, and is mentioned in Sir Edward Coke's Second Institutes, fol. 559, it was in the 34th year of Henry the sixth, and it is in these words, viz.

'That the king did an error, when he made another person sheriff of Lincolnshire than was chosen and presented to him by these great officers, after the effect of the statute.' So that the right of electing sheriffs by these great officers, we see, continued so lately as the latter end of King Henry the sixth, and I know of no law since, that hath altered it: therefore we may conclude, it is no prerogative in the king.

And we may further observe, what plain language all the judges used in those days, as to tell the king and the lords of the council, that the king had erred in what he had done. I observe this the rather, that it may be some excuse to me for the plain language I am forced to use in the arguing upon this subject. The lawyers are not always courtiers, nor will the subject-matter bear compliments and courtship. 'Ornari res ipsa inquit, contenta doctri.'

I cannot reconcile this resolution of the twelve judges, given in the time of King Henry the sixth, with that opinion that is delivered in the lord Dyer's Reports, fol. 225, b. and it is but an opinion, 5 and 6 of Queen Elizabeth. In the time of the plague, the sheriffs were named and made without assembling the judges 'ad crastinum antmarium' at the exchequer, according to the common usage, but for the most part none was made but one of the two that remained in the hill the last year. Though it was held, says the Report, that the queen, by her prerogative, might make a sheriff, without such election, by a 'Non Obstante aliquo sta-

'tuto in contrarium,' which crosses the resolution I now mentioned. It is but an opinion against a solemn resolution of all the twelve judges.

I find, that some who had transgressed that act of 23 H. 6, and had continued above one year in that office of sheriff, soon after the making of that act, did not think themselves secure against the penalty of that act by any Non Obstante from the king,* but procured an act of parliament to indemnify them for what they had done; for, by another act made the 23th of the same king Henry the sixth, it is ordained, that the sheriffs for the year then last past, should be quit and discharged against the king and his people, of the penalties of the 200*l.* which they incurred by the statute of 23 H. 6, by exercising the office of sheriff longer than a year, from the day next after the day of All-souls, on which day, by the statute, a new election was to have been made.

I have one great authority more, and that is of an act of parliament too, which, in my judgment, clearly proves, (against this resolution of the twelve judges in the time of 2 H. 7.) that the king had no such prerogative to dispense with the sheriff's continuing in his office longer than a year. But that the only dispensing power was in the king and parliament, as I have affirmed, and in the king, when any special act of parliament shall for a time limited enable him so to dispense. And it is an act in the time of a wise and powerful king, who would not lose his prerogative, where he had right to it.

It is the statute of 9 H. 5, c. 5, in the statutes at large, this statute recites the statute of 14 E. 3, whereby it was ordained, that no sheriff should continue in his office above a year. And it recites further, that whereas at the making of that statute, there were divers valiant and sufficient persons, (I suppose it is ill translated 'valiant' and it should have been (men of value) in every county of England, to exercise the said office well, towards the king and his people: But by reason of divers pestilences within the realm, and wars without the realm, there was not now such sufficiency of such persons. It is therefore ordained, that the king by authority of this parliament of 9 H. 5, may make the sheriffs through the realm, at his will, until the end of four years, notwithstanding the said statute made 14 E. 3, or any other statute or ordinance made to the contrary.

Here the king is entrusted with the power, and that but for a short time, in the very case of continuing sheriffs in their offices longer than a year, and that in a case of great and absolute necessity, and this by a special act of parliament, which plainly shews, he could not do it by any prerogative he had of dispensing, for then he would never have taken it under an act of parliament.

* See the Stat. of 6 H. 8, c. 18, in the Statutes at large, concerning the Under-Sheriff of Bristol.

* Sir Rob. Cot. Abr. 18 E. 3, nu. 54.

What ground therefore the judges had in the second year of Henry 7th, to adjudge it to be a prerogative in that king, I cannot see: and that resolution is the leading case to all the opinions that have been delivered in the point, since that time, and the opinions still justify themselves by that one first resolve, and cite that for their great authority: That opinion seems to be delivered upon a sudden question, put to the judges by the king's council, not argued nor deliberated on, nor upon any case that came judicially before them, and the judges there take notice only of two ancient statutes, viz. 28 E. 3, c. 7, 42 E. 3, c. 9, both which barely forbid the sheriffs to continue longer than a year in their office, but no penalty is imposed; and the earl of Northumberland's case had a Non Obstante in it only to these two statutes, as appears by the abridgment of that case by Brook, Tit. Patent's case, 109. So that they did but, 'ad pauca respicere et de facili pronunciare.' But they do not take the least notice of the statute of 23 H. 6, c. 8, which makes the disability, nor do the judges in that case, give that reason for their judgment, as sir E. C. hath since found out to justify it, viz. His prerogative inseparable, &c.

Something may be observed from the time when that strange resolution passed: 'Judicis Officium est ut res ita tempora rerum querere.' It was in 2 Henry 7th, in the beginning of the reign of that king, who stood high upon his title and power (if we may believe a late historian, Mr. Buck in his History of the Life and Reign of Richard 3d,) who in his second book, fol. 54, discourses likewise of king Henry 7th, and his title to the crown, says of him, That he seemed to waive all other titles, and stuck to that of his sword and conquest, and at his coronation he caused proclamation to be made with these titles, 'Henricus Rex Angliæ Jure divino, Jure humano, et Jure belli, &c.' Which yet the barons could not agree to, though the king peremptorily avowed he might justly assume it, having as a conqueror, entered the land, fought for the crown, and won it. The barons answered (says the historian) as peremptorily, that he was beholding to them both for his landing and victory. But the more they opposed it, the more he insisted upon it.

Now that king that made his title by conquest, might carve out to himself what prerogatives he pleased; and who durst dispute it with him? And this probably might have some influence upon that resolution of the judges, being so early after his claim, viz. 2 H. 7.

But I find sir E. Coke, a chief justice of great learning, and of as great integrity, taking up the same opinion: It is in the reports that go by the name of sir Edward Coke's, 12 Rep. fol. 18. No act, says he, can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a Non Obstante, as a sove-

reign power to command any of his subjects to serve him for the public-weal; and he instances in that of a sheriff, and quotes the resolution of the judges of 2 H. 7, and urges that of judges of assize, that they may go judges of assize in the counties where they were born, or did inhabit, if the king dispense with it by a special Non Obstante.

But he gives another instance, which I presume none in these days will subscribe to; and if he mistook himself in this instance, he may be supposed to mistake and err in all the rest: Purveyance (says he) for the king and his household is incident solely, and inseparably to the person of the king: And for this cause the act of parliament of Henry 3d, 'de tallagio non concedendo,' which bars the king wholly of purveyance, is (says he) void. If this be law, what a case are the subjects in, that have given a recompence by a revenue of inheritance (in part of the excise) to the king, in lieu of purveyances.

It is sober advice given by learned Grotius, in his book 'De Jure Belli et Pacis,' 82. Let us not (says he) approve of all things, though delivered by authors of greatest name, for they often serve the times, or their affections, and bend the rules as occasion requires.

This resolution of all the judges, in the 2d of Henry 7, is again cited in Calvin's case, in sir Edward Coke's seventh report, and there a reason is given to justify that resolution, which is not so much as touch'd upon in the report itself, of 2 H. 7, but it has been studied and found out since that resolution, viz. That an act cannot barr the king of such service of his subject, which the law of nature did give him.

And this is the main reason insisted on in the late judgment given in sir Edward Hales's case (as I am informed); which is the only case, that I find, which came to be argued upon the very point, yet it was but lightly spoken to, for that of 2 H. 7, which is the first of the kind, was not upon a case that came judicially before the judges, but was upon a consultation only with the judges, and without argument.

Nor in any other authorities that I have cited, grounded upon that resolution of 2 H. 7, did the point directly come in question judicially.

And Calvin's case is the first that I find, which offers this special reason, viz. That no act of parliament can restrain the king from commanding the service of his subject, but it is an inseparable prerogative in the king; and as sir E. C. speaks in his 12 Rep. Though an act makes the king's patent void, and though the king be restrained to grant a Non Obstante, by the express words of the act, and though the grantee is disabled by the act to take the office, yet the king (says sir Edward Coke) may by his royal sovereign power of commanding, command a man by his patent, to serve him and the weal-publick, in the office of sheriff for years, or for life: And this the king may do for such causes as he in his wisdom

shall think meet and profitable for himself, and the common-weal, of which he himself is solely judge, says sir E. C. So though the king and parliament have adjudged and declared by a law, such a person, or such a sort of persons to be altogether unfit for such a service or office. As for example: They have adjudged Papists (who own a foreign authority and jurisdiction, and who hold doctrines destructive and contrary to the religion established in this kingdom) to be very unfit and incapable of being entrusted with the maintaining of the government, and the religion established by law, in this kingdom. Yet according to late opinions and resolutions, though the king himself by the advice of his great council, have so adjudged and declared, yet he may do otherwise, and he may employ a Papist to defend the Protestant religion; and he is the sole judge of the fitness of persons for his service. This is the discourse, this is the argument and reason used.

Will this reason be allowed of, shall the king be the sole judge of the persons fit to serve him in all cases, and is it an inseparable power and prerogative in the person of the king?

I shall put a case wherein the judges depart from this opinion, and appear to be of another mind.

In the lord Anderson's Reports, the 2d part, 118. It is there said, if an office in the King's Bench or Common Pleas be void, and the placing of the officer belongs to the king, if the king grant it to a person not able to execute it, the grant is void; as it is there held by many of the justices.* And there a case is cited out of 5 E. 4. Rot. 66, where one Thomas Wynter was placed by the king in the office of clerk of the crown in the King's Bench.

The judges, before the king himself, did declare him to be 'Inhabilem ad Officium illud pro communi Regis et populi sui Exercendum,' and he was laid by, and one Roger West (at the commendation of the judges) was put in.

Will any man presume to say the person is unfit, when the king, who is the sole judge of the fitness of persons to serve him, hath adjudged him fit? yes, the judges in a case that concerns the courts where they sit, (it seems) will controul the king's own judgment, and judge the person *inhabilis*, and hold the grant void in such case.

To compare our present case with this: the king and parliament by a law have adjudged the Papists unfit to be entrusted with the government, and with the preserving of the reformed religion: but (says the judges) if the king, without the parliament, judge otherwise, his judgment shall prevail: why not as well in the case of an office in the courts at Westminster, which does belong to the king to dispose of, as in an office that immediately concerns the safety of the king and kingdom and the great concernment of religion?

So here is one command of the king's set up

in opposition to another command of the king. A command of the king upon private advice, or (it may be possible) gained from him by surprize, by an importunity or an undue solicitation, against a serious solemn deliberate command of the king, upon advice with his great council, and with the consent of the whole kingdom; this is the very case before us.

This is against all reason, and against the examples of the greatest, wisest and most absolute of kings and princes, who commanded their judges to have no regard to any commands of theirs, that were contrary to law.

Vinius, the civilian, in his Commentary on the Imperial Institutes, fol. 16, gives this rule, 'Rescripta principum contra jus vel utilitatem publicam, cetera à iudicibus improbari etiam ipsorum imperatorum constitutionibus jubentur.'

'Princeps non creditur,' says he) 'aliquid velle contra utilitatem publicam concedere,' 21 H. 8, c. 13, sect. 10, 11. 27. Dispensations for pluralities, contrary to act, are declared to be void, Hob. 82. 146. 149. 155. The king is never by law supposed ill affected, but abused and deceived, for 'Easlem præsumentur mens regis quæ est juris.'

Grotius de jure belli & pacis, 112, 113. Amongst the Persians, the king was supreme, yet he took an oath at his entrance, and it was not lawful for him to change certain laws made after a particular form.

If the king establish the decree, and sign the writing, it may not be changed, according to the law of the Medes and Persians, which altereth not, as we read in the book of Daniel, Dan. vi. 8. 12. 15.

By the act of 2 E. 3, c. 8, it is accorded and established, that it shall not be commanded by the great seal, nor the little seal, to disturb or delay common right, and though such commandments do come, the justices shall not therefore leave to do right in any point.

Grotius ubi supra, 117. Antiochus the third, sent a rescript to the magistrates, that they should not obey him, in case he should command any thing against law.

And Constantine published the like, that orphans and widows be not constrained to come to court for justice, no, not if the emperor's rescript be shewed.

In the story of Daniel, we read, that king Darius signed the writing, and the decree, which indeed was but a snare laid for Daniel, and Daniel had fallen into the snare: the king was his friend, but could neither dispense with him, nor pardon him, though he were sore displeased with himself for signing the decree, 'And the king set his heart on Daniel to deliver him, and he laboured,' says the history, 'an whole day, till the going down of the sun to deliver him: he wanted such judges as Cambyes had, to find out an evasion; but the king himself sealed the stone that was laid upon the mouth of the den with his own signet, and with the signet of the lords, that the purpose might not be changed concerning Daniel.'

* Palmer's Rep. 451.

' Nihil opus est' says a learned author, writing of the government of England, ' licentiam dominandi in rege coerceri, quoniam quicquid in administranda rerum summa vel contra patriæ leges vel minus ex populi commodo gestum fuit id omne ministeria luendum rejicitur adeo ut non ab adulatione sed ab æquitate summa fluxerit notum axioma apud nostrates rex nunquam potest errare aut cuiquam injuriam facere quippe in administratos & conciliarios quorum est admonere principem iniqua volenti, denegare operam, aut officio renunciare, potiusquam contra leges quicquam jubenti parere tam culpa omnis quam pœna derivari solet & debet.'

And we have seen examples of such in our times, many that have left good places, rather than act against their judgments.

There is a rare example of this in the French history.

Lewis the eleventh, king of France, at the pope's importunity, had signed a concordate for setting aside the pragmatical sanction which was made in defence of the liberties of the Gallican church, and the king had undertaken to the pope, that his parliaments should approve of what he had done, and the king sent a command to the parliaments accordingly, and required them to give a punctual obedience to his order. The king's advocate, Johannes Romanus, argued stoutly against it, and being threatened to be turned out of his place for his pains, he said,

' The king had freely bestowed that office on him, and he would discharge it faithfully, as long as the king thought fit to continue him in it, and should be ready to lay it down, whenever it pleased the king: but he would suffer all things, rather than do any thing against his conscience or the king's honour and the good of the kingdom: * and out he went.

It will be admitted by those that argue for the prerogative of dispensing, that though the king without the parliament, cannot dissolve nor repeal, no nor so much as suspend the law totally, though but for a time, but he may dispense with it, as to some particular persons, and for some limited time, and so the law will still remain in force against all others.

Those that will argue thus, do yet hold, that the king is the sole judge who are to be dispensed with, so that he is not limited to any number, nor to any time, so that though he may not in the gross dispense with the law, yet he does the same thing by retail, which comes all to one, or it is in his royal will and pleasure to do so: we are nothing beholding to the judges if the king uses his prerogative with moderation.

According to that sort of argument that is called ' Inductio: ' which is a ' particularibus ad Universalia progressus. ' He that can dispense with A, B, C, and so with the 24 letters, one by

one, does in truth dispense with the whole alphabet; but he must not do in Uno lctu.

And we find it by experience. What signify those several acts of parliament that forbid a judge of assize to execute that office in the county where he was born or dwells, they are easily and daily dispensed with?

How many acts have been made against pardoning of murder, and to make void such pardons, and what fruit have they had? Let us hear a learned judge plainly speaking his experience and his mind in it: Stamford, in his pleas of the crown, fol. 101, says, that though there are words to null and make void these charters of pardon, yet by putting into the charters of pardon these words, viz. Non Obstante ' aliquo Statuto in trarium Editio, ' the force of these statutes is taken away, and not only of these (says he) but also of all others, in which this clause of Non Obstante is put, and it is put (says he) in every letters patents.

And fol. 102, he says, that the statute of 13 R. 20 stat. 2, c. 1, and the rest of the statutes to the same effect, have always been destroyed by the clause of Non Obstante; and so false suggestions have continued, says he, to this day without redress, and abound from one day to another, to the great detriment of the public weal, and do not cease till princes have more regard what charters they pass; and he might have added, till the king's attorney and counsel at law shall have more fidelity and courage.

I hear, that in justification of such a dispensation as this, it was said in the argument of the case of sir Edward Hales, in the court of King's Bench, That there is no law whatever, but may be dispensed with by the supreme lawgiver, as the laws of God may be dispensed with by God himself, as appears by God's command to Abraham, to sacrifice his son Isaac.

So likewise may the laws of man be dispensed with by the supreme legislator.

I fully agree to this, and have already argued upon this ground, That the legislators (and no other) can dispense with their own laws, and I have given several instances and examples wherein it was so practised; that is, by king and parliament.

But does this justify the present dispensation now in dispute? I agree the king hath a great and most eminent part in the legislature, and in the passing of laws, it is he that quickens the embryo, and first gives it life, but under favour, and with all due reverence to the king, I may affirm it, That the king hath not the sole legislature, such as Almighty God hath over his creatures, but the whole kingdom hath a share in that power, as I have fully proved, as well as the king.

I would cite one case, not so much to prove what I have said herein, but rather to illustrate it: It was a case in Hill. 11 Jac. B. R. Dominus Rex, and Allen against Tooley, in the second part of Bulstrode's Reports, 186, to

* Dr. Burnet's Hist. of the Rights of Princes, 239. King James in his Premonition to all Christian Monarchs, 298.

191, in an information brought upon the statute of 5 Eliz. for using the trade of an upholsterer, in which he had not served as an apprentice seven years. The defendant pleaded, That he was a freeman of London, and that by the custom of London, a freeman might use any trade; and he alleged that the custom was confirmed 'per Regem in Parlamento.' It was holden first, that there can be no good act of parliament, without the three consents viz. Of the king, lords, and commons. 2. That though divers acts of parliament do not specify these three assents, but only mention, the king as 'Dominus Rex Statuit;' and as it is in the prince's case, 'Dominus Rex de Communi Concilio Statuit (and the like): Yet when the party will plead, he ought to plead it according to law, and to set forth all the assents, that is, of the king, lords, and commons: And this was the opinion of the whole court. Now pleading is an exact setting forth of the truth. We are not to raise arguments from forms of speaking, but rather from exact pleading, and the resolutions of judges: And though Magna Charta in the stile, seems to be spoken by king Henry 3, as by the word (*concessimus*); yet the act of 15 E. 3, c. 1, recites that it was made a law by the king, lords, and commons, and that what is said to be granted, was but their former right. Lambert's Archion, 267, &c.

I hear, that in speaking to the case of sir Edward Hales, it was observed that by this act of 25 Car. 2, there is no incapacity, or disability at the first, and upon the admission to the office put upon any person from taking of an office, but that he is well admitted to it, and the grant is good, and that time is given to take the tests, and if by the times given he fail to take them, then he is to be disabled, and the grants are to become void, but not before: Like a condition subsequent that defeats the estate, which yet was well vested; and then before the grant is defeated, and the party become disabled, the king's dispensation steps in and prevents the penalty and disability: And herein, it was said, it differs from the case of symony, and buying of offices, where the interest never vested, but the person was first disabled.

There is indeed a difference, but none that is material, for it is all one whether the party be disabled to take, or whether having well taken, and been well admitted, he is afterward disabled to hold, and retain, by not performing the condition: For when he is first admitted, it is *sub modo*, and under a condition, that if he fail to perform what the law requires, his office shall be void.

Another argument, as I hear it reported, was raised from the king's being a sovereign prince, and from thence it was inferred, that he might dispense with laws that are penal upon necessity, whereof he is the sole judge.

The ground of this argument, namely, That the king is a sovereign prince; if it serve for the point in question, it may also ex-

tend a great way further than to this question we have before us, it is hard to limit the extent of it, it seems to speak that we must obey without reserve.

The word sovereign is French, and in Latin is 'Supremus, id est qui in alios potestatem habet.' The correlate whereof is, *Subditus*, or a subject, and is attributed frequently to some sorts of subjects, especially to the heads or superiors of religious orders.

But among us, though now frequently used in our humble addresses to the king, or in our reverend mention of him, yet we find it very rarely, if ever, used in our ancient acts of parliament, or in our law books.

I find no mention of the very word among the many attributes and titles ascribed to kings and princes, in Mr. Selden's Titles of Honour: He hath that which is synonymous, as supreme monarch, as it signifies in opposition, or in distinction to princes that are subordinate and feudatory, such as Tacitus speaks of, that the Romans (when their government was popular) had 'instrumenta servitutis, Reges.'

But properly he is a king that is a sovereign, and hath no superior upon earth: according to Martial, 'Rex est qui Regem (Maxime) non habet.'

And such we freely and cheerfully acknowledge the king to be, and the best and most of his subjects do swear that he is the only supreme governor of this realm, and of all other his dominions, as well in all spiritual, or ecclesiastical, as temporal causes, and that no foreign prince hath any power within this realm. And I wish that all the rest of his subjects would heartily take this oath: but this amongst others is that which sir Edward Hale's dispensation extends to.

Yet how from hence it can be argued that the king can dispense with his laws, I do not see. I mean laws of the same nature as that we have now before us.

Therefore those that used this argument surely meant the word of (sovereign) in another sense, viz. 'Absolute et Solutus a legibus.'

If they mean by (sovereign) a prince that is 'absolute,' and 'solutus a legibus, (and they must understand it so, or else I do not see how it is pertinent to the present argument) this of a mighty consequence, and ought to have been well considered before it had been used.

I find the word in this sense (as I take it) propounded in addition or saving to the petition of right, 3 Car. 1. viz. Not to infringe sovereign power: but it was not liked, and upon reasons given at a conference, those that did propound it were satisfied to lay it aside. It may be read in the memorials of the English affairs, fol. 10.

If the word (sovereign) be meant in this sense, it is opposed by all our ancient authors, judges, and others, by plain and express language, whose very writings I have before cited, and I will but only touch upon them again.

Fleta says, 'Superiorem non habet Rex in Regno nisi Deum et Legem per Legem factus est Rex.' [L. 1, c. 5.] This fully expounds the word sovereign.

Both Fleta and Bract. and sir Gilbert Thorn-ton (who was chief justice in Edw. the first's time) take notice of that: 'Jus Cæsarium, or 'Lex Regia', as it is called by the civilians, 'Nec obstat quod dicitur quod Principi placet 'Legis habet vigorem.' For it never was received in England, but in a restrained sense.

And with this agrees the ancient coronation oath, That the king shall hold the laws and customs of the realm, which the people have chosen. But king H. 8. with his own hand, corrected the old oath, to the effect following, viz. That he shall hold the laws and customs of the realm, not prejudicial to his crown or imperial jurisdiction: the original of this correction is in sir Robert Cotton's library.* See the history of the reformation: sir John Fortescue, sometime chief justice, and afterwards lord chancellor, in his book 'De Laudibus Legum Angliæ: The civil law (says he) runs thus, Quod principi placuit legis vigorem habet, sed longe aliter protest, Rex politice imperans quia nec Leges sine subditorum assensu mutari poterit: Potest as regia Lege Politicia cohibetur.'

Sir Edward Coke, in his 12 Rep. fol. 53, 64, and 65. (says) it was greatly marvelled that the archbishop Bancroft durst inform king James† that such absolute power and authority, (as is there mentioned) belonged to the king, by the word of God, and there sir E. C. cites the sayings of these ancient authors in our law: but he says that the king was greatly offended with him.

A learned civilian gives some restraint even to the 'Lex Regia' in this point: Vinius in his comment upon the Instit. fol. 381. 'Populus Romanus jura Majestatis omnia abdicative in principem transtulit, hinc Principes Romani Legibus soluti fuerant.' But he utterly opposes that opinion of the school-men: 'Principem Legibus solutum esse quoad vim coactivam sed etiam quoad vim directivam.' Rot. Parl. 11 R. 2. The king and parliament declare, that the realm of England never was, nor was it intended by the king and lords, that ever it should be governed by the civil law.

In the deciding of the great and royal controversy, in the time of K. E. 1. concerning right of succession in the crown of Scotland; it was debated by the commissioners, according to what law that case should be determined by, whether by the law of England or of Scotland, the civil law, as being the 'Jus gentium,' before the king of England, as being the superior lord: they all at last concluded, that the civil

law by no means should be admitted: 'Ne inde Majestatis Anglicanæ Juri fieret detrimentum. Seld. dissertatio ad Fletam,' 539.

Mr. Selden, mentioning John of Salisbury, who said, that in his time there were those that did prefer the civil law before all other laws, especially, that 'de absoluta principis potestate quæ in lege habetur Regia;' he says it was meant of none but 'de assentatoribus illius sæculi ex genere Hieratico, non de gente Anglicana aut de aliis qui Judicis tunc præfuerunt,' it would have been far from any of the English nation, especially from any of the judges to have maintained any such opinion.*

But let it be understood ('sano sensu') and in a proper and literal sense too, and it is very true and agreeable to our law, 'quod Regi placuit legis vigorem habet;' without the king's placet, and his royal consent, nothing is law amongst us. The laws already in force have had the consent of his predecessors, and no new law can pass without the royal assent; nay, they are his royal words, 'Le Roy le veut,' that first gives life to any new law.

And the judges oath in the time of H. 3. was, that they should judge 'Secundum Legem et consuetudinem regni;' which words (as Mr. Selden there says) seem designedly to exclude the 'Jus Cæsareum' then lately brought in: whereof, as he says, some were fond in those times; and he tells us of what order they were, but they were not common lawyers nor judges, but the hierarchy.

But should judges give countenance to any such law in the latitude of it, they should be put in mind of what was done by king Edward the confessor, which we are taught by sir Roger Twisden, in his preface to the laws of William the first, annexed to Mr. Lambert's treatise, 'De priscis Anglor' Legibus, fol. 155.' 'Omnes (says he) qui Leges iniquas adinvenerant & injusta judicii judicaverant multaq; concilia contra Anglos dederant, exlegavit: such enemies to the laws of England should be put out of the protection of the laws of England. 'Rode caper vitem, &c.'

It is said amongst the laws of king Henry the first, c. 28. (and it is in the very body of that law) Lambert, ibid 186. 'Gravius Lacerantur pauperes, à pravis Judicibus, quam a cruentis hostibus.'

The lords of parliament, when any attempt is made to introduce the Cæsarian law, (as once in the time of k. H. 3. there was an endeavour to bring in part of the Pontifical law) and it was by the bishops, I make no doubt but they will answer 'Una voce,' as there ancestors then did 'Eolumus Leges Angliæ mutare quæ hucusq; usitate sunt et approbate.' The statute of Merton, c. 9. 2 Instit. fol. 96.†

The act of 25 Car. 2. one of the principal ends and aims of it, is to keep out that foreign power, that would pretend to a sovereignty or supremacy over our sovereign, but the dis-

* Archbishop Laud, too, did the like.

† King James 1, in his Speech to both Houses, 1609, in his Works, fol. 533, says the king with his parliament, are absolute in making or forming of any sort of laws. Sir Walter Rawleigh's Hist. of the World, fol. 245.

* Seld. Dissert. 539.

† Seld. Dissertat. ad Fletam. fol. 537.

pensing with this law (which is maintained to be right incident to the sovereign prince) seems to be the likeliest way of setting up again that pretence and claim of a foreign bishop, which was so long usurped, and against which pretence so many acts of parliament have been made, and which our ancient kings did of old utterly renounce and disclaim, and we know the same foreign bishop hath made another pretence to England, besides that ecclesiastical power, by colour of a resignation, made by king John. But king Hen. 3. son and next successor to king John, in the general council at Lyons, anno 1245, by his ambassador and advocate, made a special protestation against that pretended resignation made to Pandolpius,* the Pope's legate, (Innocent the third) as a mere nullity, 'In quod nunquam consensit Regni Universitas,' and afterwards upon the Pope's issuing out of process against K. E. 8. and the whole kingdom, for the homage and the arrears of the 1,000 marks rent due to him.

The parliament declared, That king John† nor no other, could put himself or his realm, into such a subjection, without their consent.

And that it was against the oath king John had taken at his coronation.

This record expounds the word (sovereignty) in the true sense of it, namely, that our sovereign is no way subject to the bishop of Rome, or to any foreign power. But it doth no way import, that the king can dispose of his people 'ut placuit Regi,' or alter the government, without the people's consent, nor dispense with his coronation-oath, but proves the quite contrary.

To which he added, 'A SHORT ARGUMENT upon the Pleadings of the aforementioned Case of sir Edward Hales,' as follows :

The first point argued by the plaintiff's council was, That it appears by the declaration, and it is now confessed by the defendant's joining demurrer, that the defendant had been indicted for this offence, in exercising the office of a colonel without having taken the tests.

And upon the indictment he either did plead this dispensation, or might have pleaded it. And he is now convict, according to the direction of the act of 25 Car. 2. so that he now comes too late to plead it to this action : for he cannot falsify the conviction, nor aver any thing against the record of it, and bring the fact to be tried over again in this action ; but is concluded and estoppel in law to say any thing to the contrary of that record, by which he is found guilty of the offence against this act of parliament.

The defendant either did plead this dispensation or pardon to the indictment, in discharge of the indictment, and it hath been over-ruled by the judges at the assizes (as by law it ought

to be, being no good plea) : or he might have pleaded it, if he had been advised it had been a good plea. And not having done it, he had elapsed his time, and now comes too late to plead it, being convict of the crime.

To this it was objected (as I hear) that the plaintiff, if he will take the advantage of an estoppel, ought to have it set forth by way of replication to the defendant's plea, and to have relied upon it.

For the rule is, That he that pleads an estoppel, must rely upon it as an estoppel.

It is true, if a man will plead an estoppel, he must rely upon it.

But in this case the plaintiff does not plead the estoppel, but the estoppel appears by the declaration, and the defendant's own plea together : so that there was no need for the plaintiff to set that forth by way of replication, which doth sufficiently appear by the defendant's own plea, viz. That he did not take the tests within the time limited by the act, and the conviction is confessed by his plea, and joining in demurrer.

If a man recover a debt upon a bond, and before execution dies, if his executor sue a 'Scire facias' upon that judgment, the defendant cannot plead any plea that he might have pleaded before, as 'non est factum,' or by Duress, or the like : for he is concluded by the judgment.

In Jason and Kete's case, in Syderfin's Rep. fol. 43. by Bridgeman, chief-justice, a man shall never help himself by 'Audita Que-rela' (though that is an equitable suit at law) for any matter that he might have pleaded before.

There is no estoppel in this case, for the conviction is upon an indictment, which is the king's suit : and this is the suit of another, viz. the now plaintiffs, and so they are two distinct suits.

The conviction upon the indictment is an estoppel against the defendant himself, of which any man may take the advantage, and he himself shall never be admitted to aver against it : as in Maynye's case, in Leonard's first part fol. 3.

An attainder for treason is an universal estoppel ; of which any stranger may take the advantage, not only against the party attained, but against his wife too, if she sue for dower. And it does not run in privity : By Manw. Ch. Bar.

Where a man is attained by his own confession of a felony, a stranger is not estopped to say he was not guilty : * but if A. commit felony, and after encoff J. S. of his land ; and after A. is attaind of this felony by verdict, there J. S. is estopped, and may not aver that A. was not guilty, because he claims under him : much less shall A. himself aver against the verdict, that he is not guilty. †

* Pryn's second tome, fol. 290. 292. 299, and 301, 302.

† 46 E. 3, Rot. Parl. nu. 7, 8.

* 7 E. 4. 1 Br. Estoppel, 163.

† Knoll and Haymor's Case, 3 Kebl. 528, by Chief Justice Hale.

If a man be acquitted of felony, all the world, says Grevil, in Keilwey Rep. 81. b. is estopped to say the contrary.* So *vice versa*, if he be convict, by the same reason †.

As to that which is objected, that the conviction is upon an indictment (which is the king's suit): but this is another suit, and therefore the verdict shall not conclude the defendant in this suit:

This is not another suit, but in effect an execution upon the conviction, and grounded upon that record, and therefore not merely a new suit, but a dependant action; as a writ of error, or an 'Audita Querela,' or a 'Scire Facias' upon a record, are dependant suits, or an action of debt upon a judgment.

The act of 25 Car. 2, c. 2, hath made it criminal in any person, after his neglect of taking the two oaths, or of the sacrament, by the times limited, to execute any such office, or place of trust; and for such offence hath made him indictable at the assizes: and upon a conviction the offender incurs (among other penalties) the forfeiture of 500*l.* and gives it to any one that will sue for it in an action of debt.

So the statute hath directed the method of trying the offence, and of convicting the offender, by indictment at the assizes.

And if he that sues for the forfeiture shall be driven to prove the offence over again, then the conviction at the assizes serves for nothing, but was all in vain. And such construction defeats the intention of the law-makers; for they intended this for the only trial, and not to have several trials: For suppose it should be tried again in this action, and a verdict pass for the defendant, here shall be trial against trial, and verdict against verdict: and such construction ought to be made of acts of parliament, as may not elude, but agree with the intent of the law-makers; and so as that no words, clause or sentence, shall be altogether idle and insignificant.

And this conviction upon the indictment is the very ground of the action of debt brought by the now plaintiff; for the words of the act are, And being thereupon lawfully convicted upon an indictment, every such person shall from thenceforth forfeit 500*l.*

So that till there be such a conviction, there is no forfeiture incurred of 500*l.* nor no action can be brought for the 500*l.* The offence must be proved and determined before any action can be brought; and therefore the proof of the offence, whereof the defendant is convict, must not be made in this action over again: if it must, what serves the conviction for?

Suppose the plaintiff here had brought this action, after the neglect of the defendant of taking the oaths, and of receiving the sacrament, and his acting in his office after such neglects, and before any conviction upon indictment, and had only averred, that the defendant had so neglected, and yet acted, would

this action have been well brought? or, suppose there had been a conviction, but the plaintiff had not set it forth in his declaration, but had only averred the offence committed, would this have been a good declaration? surely it would not. This proves that the record of the conviction is the very ground and foundation of this action, and the action would not lie without such conviction; so that it is not a mere new action, but a dependant action.

And the usual difference is where the action is a dependant action, depending upon a record, and grounded upon it; and where it is a collateral suit, not depending upon that record.

An action against the sheriff for an escape of one taken in execution; this is a dependant action, and is grounded upon the record of the judgment given against the party that escaped. The sheriff cannot aver any thing against that record, and examine it over again; nor can he take any advantage of error, or erroneous proceeding, in obtaining that judgment. Saunders's Rep. 2 part 101.*

So in an action of debt grounded upon a judgment, or in an *audita querela*, to be relieved upon a judgment.

And so in our case, this action of debt for the 500*l.* is grounded upon the conviction; which must stand for truth as long as it remains in force, not avoided by error or attain.

A writ of error to reverse a judgment, is a dependant action: in error, the plaintiff may not aver any thing against the record. Mullens *versus* Weldy. Syderfin's 1st part, 94. Error was sued in the king's-bench to reverse a judgment given in the palace court: and the plaintiff in error assigned for error, that the duke of Ormond (who is principal judge of that court by patent) was not there. It was agreed by the court, that it might not be assigned for error; for it was contrary to the record.

But per Cur. in an action of trespass, or false imprisonment, which, (says that report) are collateral actions, he may falsify and assign that, if he be taken upon such judgment.

So if a man be indicted and convict of an assault and battery, and afterwards the person so assaulted brings his action for the battery, this hath no dependance upon the indictment or conviction; for it may be sued, though there were no indictment, but is a distinct and collateral suit. The indictment and verdict is no estoppel, nor can so much as be given in evidence: as is held by the whole court, in the case of Samson *v.* Yardley, and Tothill, 19 Car. 2, B. R. Keble's 2 part, 381. The like in an appeal of murder, Keble's 2 part, 223.

Another penalty upon the offender against this statute of 25 Car. 2, is, that he shall be disabled to sue in any action. Now suppose a person convict at the assizes, sues an action, may not the defendant in that action take the advantage of that disability, and plead the conviction? as in case of an outlawry pleaded in

* Rol. Abr. first part, 362.

† Dr. and Stud. 68. a. ad fin, et b.

* Jacques *versus* Cæsar. And Dr. Drury's Case, 8 R. 142. And Mackelly's Case, 9 R. 68.

disability; there need not be set forth all the proceedings in that suit wherein the plaintiff was outlawed, but he may plead the record of the outlawry and rely upon it; and it shall not be examined whether there was any just cause to sue him to the outlawry, or not.

The indictment, the defendant's plea to it, and the verdict upon it, have determined the matter of fact, that the defendant is guilty of the offence against this act of parliament.

The act itself hath pronounced the judgment, which consists of many particulars; one whereof is, that the defendant shall forfeit 500*l.* to him that will sue for it; and the action of debt for the 500*l.* brought by the plaintiff, grounded upon all these, is in the nature of an execution.

And all these put together, are not several and distinct suits, but in effect all but one suit and process, one depending upon the other.

The second point is, whether the dispensation pleaded by the defendant be a good bar to the action of debt? and this is properly called, the great point of the case:

Lord Chief Justice Herbert also published the following Vindication of the Judgment:

**A SHORT ACCOUNT OF THE AUTHORITIES
IN LAW, UPON WHICH JUDGMENT WAS GIVEN
IN SIR EDWARD HALES'S CASE.
WRITTEN BY SIR EDWARD HERBERT,
CHIEF-JUSTICE OF THE COMMON-PLEAS,
IN VINDICATION OF HIMSELF.**

HAVING been called to a place of judicature in difficult times, and after my most sincere resolutions and uttermost endeavours of discharging the duty of that place, with a good conscience, having yet had the hard fortune to fall under the greatest infamy and reproach that is possible for any man to lie under, of perjury and breach of trust; in giving a judgment in sir Edward Hales's Case, contrary to law, and contrary to my knowledge and opinion (for that only can make it criminal); and which, they say, tends to the subversion of all our laws, contrary to the oath that every judge takes, and to that high trust reposed in him, to judge to the best of his understanding, according to law: although I cannot hope to wipe off that universal ill impression that the malice of some people, who understand the nature of this case very well, has made upon most men who do not understand it; yet in order to clear myself to all just and disinterested persons who are only my enemies by mistake, I think myself obliged to give some short account of that judgment, and the grounds upon which it was given: and this I will do, not by making an elaborate and legal argument, to make out by reasons of my own, that the judgment then given is consonant to law; which whether it be or no, is like to be considered in parliament, and to whose determination I shall as entirely and cheerfully submit, as any other

person in the nation. But I shall set down, not all the variety of cases that we meet with in our books, touching the king's power of dispensing with acts of parliament; for that would swell this paper to an unreasonable length, and discourage many from reading any part of it; but only some few of the chiefest and plainest authorities in law, upon which the resolution in the Case of sir Edward Hales was grounded. I shall not only cite the books and pages where those cases are to be found, but transcribe the very words, that every body may be convinced, that if we were in a mistake, it was no wilful mistake, but that we had the authority of former judgments given by great men that went before us (and for which they were never questioned) to lead us into it.

The Case (for I must state it upon my memory, not having any copy of the Record by me) was shortly this:

An action popular was brought against sir Edward Hales, upon the statute 25 Car. 2, c. 2, for the penalty of 500*l.* wherein the plaintiff declares, that whereas it was provided by the statute, &c. (setting forth the statute): notwithstanding which, the defendant having a commission to serve the king as a colonel of foot, and not having received the sacrament, nor taken the oaths and tests, &c. within the times prescribed by the act, and after the times expired wherein he ought to have received the sacrament, and taken the oaths and tests as aforesaid, he did execute the said office, and continued to act by colour of the said commission; of which he was indicted and convicted at the assizes in Kent, &c. whereby the action accrues to the plaintiff for the penalty of 500*l.* The defendant pleads, that before the time expired, &c. he had a dispensation under the broad seal to act, Non Obstante that statute.

To which the plaintiff demurs.

And judgment was given for the defendant, that his plea was good.

And first, it will be necessary to shew what this dispensing power is, which is warranted by our judgment; and that will best appear by the definition of it, which is given in the 11th Report of my lord Coke, p. 88, in the Case of Monopolies; 'Dispensatio mali prohibiti est de jure Domino Regi concessa propter impossibilitatem praevidendi de omnibus particularibus; et dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensata.' 'For true it is,' says the Book, 'that in as much as an act of parliament, which generally prohibits any thing upon a penalty that is popular, or only given to the king, may be inconvenient to divers particular persons, in respect of person, time, or place; for this purpose the law gives a power to the king to dispense with particular persons.'

And in the 7th Rep. p. 63, in the Case of Penal Statutes, which was the opinion of all the judges of England, 2 Jacobi, it is resolved, 'That the king may dispense with any particular person; that he shall not incur the penalty of the statute, though it be an act

'made *pro bono publico*; and that this is a trust and confidence inseparably annexed to the royal person of the king.' I cite these two first cases, chiefly to shew, that a dispensation in its nature is particular, and given to particular persons by name; which is all the power that is attributed to the king by our judgment. And this I mention, because of an unreasonable mistake of most people that talk of the dispensing power, as though the king's Declaration of Liberty of Conscience, whereby all the laws that concern religion are at once totally suspended and laid asleep, were warranted by it: let that declaration stand or fall upon its own bottom, I am sure the case I am now speaking of has nothing to do with it. And having by these cases cleared the nature of all dispensations, which are always granted to particular persons (as sir Edward Hales's was in our case, who was the first, and I think the only person who then had such a dispensation), I shall now cite some of the chief authorities upon which our judgment was given in that case: and the first and great case that I cite, wherein the king's dispensing power is described and limited, is in the year-book of Hen. 7, fol. 11, and Hen. 7, fol. 12, in these words: 'There is a diversity,' says the Book, 'between *malum prohibitum* and *malum in se*, as a statute forbids any man to coin money, and if he does he shall be hanged; this is *malum prohibitum*; for before the statute coining money was lawful, but now it is not so, and therefore the king can dispense with it. So if a man ship wool in any place but Calais, it is *malum prohibitum*; because it is prohibited by act of parliament, and the king can dispense with it, and so in like cases: but that which is *malum in se*, the king, nor no other person can dispense with; as if the king would give a man power to kill another, or license one to make a nuisance in a highway, this were void; and yet the king can pardon these things when they are done.' These are the very words of that Book; and my lord Vaughan discoursing of, and explaining this case in the case of Thomas and Sorrell, in his Rep. p. 333, first shews, how a dispensation differs from a pardon. For a dispensation does *jus dare*, and makes the thing prohibited (to all others) lawful to be done by him that has it. And therefore the king cannot dispense with *malum in se*, because they never were, and never can be, made lawful: but even these (says the Year-book) may be pardoned after they are done.

From these cases results this plain syllogism; whatever is not prohibited by the law of God, but was lawful before any act of parliament made to forbid it, the king, by his dispensation, granted to a particular person, may make lawful again, to that person who has such dispensation, though it continues unlawful to every body else.

But to execute any office without taking the oaths and the tests antecedent to any acts of parliament made to forbid it, was lawful.

Therefore the dispensation granted to sir Edward Hales, did make it lawful for him to do so, though it continued unlawful for any body else.

In this argument the premises are none of our own, we have them out of our law-books; and the authority of those books have never yet been questioned. I appeal then to any indifferent person, whether it can be criminal in judges, to draw a necessary conclusion from premises and book-cases that have been taken for law for so many ages together.

The next great case is the resolution of all the judges of England, in 2 Hen. 7, in the Exchequer-chamber, upon the king's power of dispensing with the statute of 23 Hen. 6, cap. 8, That no man should be sheriff for above one year. The recital in the preamble, and the whole purview, if compared with our statute of 25 Car. 2, cap. 2, equals it in every particular, and in some goes beyond it: for the mischiefs recited in this latter statute are only in these words, For preventing dangers which may happen from Popish recusants, and quieting the minds of his majesty's good subjects. The cause of making the statute of 23 Hen. 6, is for preventing the importable damage of the king and his people, perjury, manslaughter and great oppression. The purview enacts,

1. That no man shall be sheriff for above a year.

2. That all letters patent made for years or lives shall be void.

3. That no Non Obstante shall make them good (which shews that the parliament thought the king could otherwise have dispensed with this act by a Non Obstante.)

4. Whoever acts by colour of such letters patent shall forfeit 200*l*.

5. He shall be utterly disabled to bear the office of sheriff in any county of England.

6. That every pardon for such offence shall be void.

Notwithstanding all this, it was adjudged in that case before-cited by all the judges of England, (who were at that time as learned as ever sat upon the bench); I say it was adjudged by all the judges in the exchequer chamber, that the king's dispensation with that statute was good.

Having then this case before us, if we should have judged the dispensation not good in sir Edward Hales's case, it must have been upon one of these two grounds: that is, either, 1. In the first place, we must have found some difference between the king's power in that case and in this, which I confess, after the wisest enquiry, does not appear to me, and I wish any man would shew me any such difference if he can: or else, 2. We must have adjudged that solemn resolution given in the Exchequer-chamber by all the judges of England so long ago, and which has been taken for good law ever since, we must adjudge no law: whereas the known rule is, that after any point of law has been solemnly

settled in the Exchequer-chamber by all the judges, we never suffer it to be disputed or drawn in question again.

But our enemies seeing the force of this argument, have had the confidence to say, that that point is not resolved in that case; they might with as much modesty affirm, Thou shalt not bear false witness against thy neighbour, to be none of the ten commandments; we can only reply in this case as in that, that if we have eyes to read, and common sense to judge, it is there resolved. Indeed there is another point about the sheriff's passing his accounts, which the judges were divided in; but in the point of the dispensation they all agreed: or else, that other point could never have come in question.

But to put this beyond all controversy, we have two things to offer:

First, That it has been cited as adjudged in several books of great authority.

Secondly, It has been the constant practice to have such dispensations in all king's reigns ever since that resolution.

As to the first, though I might cite many books, yet I will only cite three or four of the clearest and greatest authorities: and the first shall be Fitzherbert, in his abridgment of this very case, Tit. Grant. 33. who lived near this time, and could not easily be mistaken in the sense of the year-book: The patent, says he, was adjudged good by all the justices; but the statute says expressly, it shall be void; therefore it is only made good by the king's dispensing.

2. Next to him shall be Plowden, who, as all lawyers will confess is as little like to be mistaken in the sense of the year-books, as any reporter we have; and he, in his Commentaries, p. 502, in the case between Greendon and the bishop of Lincoln, after citing the case both out of year-book, and out of Fitzherbert's Abridgment, has these very words where the statute was, 'That the king's grant to any man to be sheriff of any county for longer time than a year shall be void, notwithstanding any clause of Non Obstante to be put into the patent: 'There it is held, that the king's grant to the earl of Northumberland, to be sheriff during life, must have a clause of Non Obstante, because of the precise words of the statute before-mentioned; and with such a clause of Non Obstante, the patent to the earl was good.

3. Next is my lord Coke, who asserts the king's prerogative touching this matter in much higher terms than we could presume to do, in giving judgment in sir Edward Hale's case: for in his twelfth report, page 18, he has these words: "No act can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a Non Obstante, as a sovereign power to command any of his subjects to serve him for the public weal; and this solely and inseparably is annex to his person: and his royal power cannot be restrained by any act of

parliament, neither in Thesis nor in Hypothesis, but that the king by his royal prerogative may dispense with it: For upon the commandment of the king, and obedience of the subject, does his government consist; as is provided by the statute of 23 Hen. 6, cap. 8, That all patents made or to be made of any office of sheriff, &c. for term of years, for life, in fee simple or in tail, are void and of none effect, any clause or parol de Non Obstante, put or to be put into such patents to be made notwithstanding. And further, whosoever shall take upon him or them, to accept or occupy such office of sheriff, by virtue of such grants or patents, shall stand perpetually disabled to be or bear the office of sheriff within any county of England, by the same authority. And notwithstanding that by this act, first, The patent is made void. Secondly, The king is restrained to grant Non Obstante. Thirdly, The grantee disabled to take the office: yet the king by his royal sovereign power of commanding, may command by his patent (for such causes, as he in his wisdom doth think meet and profitable for himself and the commonwealth, of which he himself is solely judge) to serve him and the weal public as sheriff of such a county for years, or for life, &c. And so it was resolved by all the justices of England in the Exchequer-Chamber, 2 H. 7. And after some other cases to this point of the king's prerogative, he has this farther; says he, see 4 Hen. 4, cap. 31, in which it is ordained, that no Welshman be justice, chamberlain, treasurer, sheriff, steward, constable of a castle, escheator, coroner, or chief forester, nor other officer whatsoever, nor keeper of record, &c. in any part of Wales, notwithstanding any patent made to the contrary, with clause of Non Obstante licet sit Wallicus natus: And yet without question the king may grant with a Non Obstante." Thus far that book, and I have transcribed the book at large, that every body may see that the king's power of dispensing with such acts of parliament as restrain his granting offices, stands upon a peculiar reason, besides the general one upon which his power of dispensing with other penal laws is founded. And that if this be a pernicious opinion, we are not to suffer as the first authors of it. But lest it should be objected, that this is my lord Coke's single opinion, or that the twelfth report is not of so great authority as the rest of his reports are; the same is resolved by all the judges of England, (if my lord Coke be a faithful reporter) in Calvin's case, in the seventh report, p. 14, in these words: Every subject is by his natural allegiance bound to serve and obey his sovereign, &c. It is enacted by the parliament of 23 H. 6, That no man should serve the king as sheriff of any county above one year, and that notwithstanding any clause of Non Obstante to the contrary; that is to say, notwithstanding that the king should expressly dispense with the said act; howbeit it is agreed, 2 H. 7. that against the express purview of that act, the king may by a special

Non Obstante dispense with that act. For that the act could not bar the king of the service of his subject, which the law of nature did give unto him. This is reported (unless my lord Coke had a mind to deceive the succeeding judges, and draw them in to give pernicious opinions) as the sense of all the judges in England in king James's time, in the exchequer chamber.

And now I would ask, These cases thus solemnly resolved, are they law? Or are they not? If it shall be said, that they are not law, what foundations have the judges to stand upon? or what certain measures can they take in giving judgment, either between the king and his subjects, or between party and party: if so many solemn resolutions by all the judges in England, in the exchequer chamber, are not to be relied upon? If they are law, then I appeal to all mankind, whether our case does not come up in every tittle to the reason of those resolutions: whether the act of 25 Car. 2, do not bar the king of the service of some of his subjects; and whether therefore for great reasons, and in particular cases, he may not dispense with it?

But besides the authority of this case, we have the constant practice, that this statute of sheriffs has been constantly dispensed with ever since it was made; and if those dispensations were not good, then all persons convicted upon indictments found by grand juries, returned by such sheriffs, are illegally attainted: then all pannels of juries returned, and other process executed in civil causes, by such sheriffs, was altogether erroneous; and it is strange that nobody in so long a time should hit that blot.

Obj. The only objection that I hear is made to this, by eminent men of our profession, (who freely acknowledge the authority of these cases, and the resolution in them, that no act of parliament can debar the king of the service of his subjects which the law of nature gives him, to be good law;) is this, that say they, It is not the act of parliament that debars the king of the service of his subjects in this case, but it is the default of those subjects who will not qualify themselves for his service, by doing those things that the statute requires. But for a full and plain answer to this, I say,

First, We are not now considering these grants of offices, as they are beneficial to the subjects, on whom they are conferred, but as the king has an interest in the service of those subjects; and it is a known rule in law, that among common persons, no man shall suffer by the default of another; much less shall the king be prejudiced by the default of any of his people.

But, secondly, Pray, where is the difference between an act of parliament's barring the king directly of the service of his subject, and doing of it by necessary and inevitable consequence? As, if an act of parliament were made, that no man that is lame or deaf should serve the king in any office, though they were otherwise well

qualified for it; the king were as effectually debarred of the service of such subjects, as though they had been expressed by name. I know it will be said, that these are natural defects, which the subject cannot help; but the others are wilful impediments, that may be removed if they please.

But to prove that this is not so: I ask, whether when the act requires declarations and subscriptions to be made, it should be done contrary to a man's opinion, or according to it? Certainly no man will say, contrary to a man's opinion; for that would be high dissimulation, and more elude the ends of the act, than not doing it at all. If then it must be done according to a man's opinion, it is no more in any man's power to change his opinion, than to cure himself of deafness or lameness. Every man believes, not because he will, but because he must believe. Error is a disease of the mind, as much as those before-mentioned are of the body. It is true, a man may seek for instruction, and use all means to be better informed; and so may a man, in the other case, try all proper remedies to cure his distempers; but proper remedies do not always effect the cure, and often when they do, there is much time taken up in the operation: And the king, who is in no default at all, loses the service of his subject in the mean time. And if this prerogative be, as my lord Coke says, 'Proprium quarto modo,' and that it belongs to our kings, as he says, 'Omni, soli et semper;' the king can be no more debarred of the service of his subject for a month or a year, than he can be debarred of it for ever; especially since in that month or year may happen such occasions, which afterwards, during the joint lives of the king that is to command, and of the subject to be commanded, may probably never happen again.

Many other cases of acts of parliament might be cited, as 8 R. 2, 2, that no man should go judge of assize into his own county. And 10 E. 3, 3, That whoever has a pardon of felony, shall find sureties for the good behaviour, or his pardon shall be void; which statutes have been constantly dispensed with ever since they were made. But I resolve not to heap up all the cases of dispensations, but to confine myself to those that were, as they are before cited, the principal ground of our giving judgment in sir E. Hales's case: only after I have answered some objections, I have two authorities more to offer, which I take to be of the greatest weight in this case; and that is, two concessions of the Commons of England in parliament, acknowledging this power of dispensing to be in the king.

But first, To answer an objection or two that I hear is made:

1. *Obj.* This act was made, *pro bono publico*, and in the case before cited, of 11 H. 7, the king cannot dispense with a common nuisance; and this case dispensed with, would be as bad as dispensing with a common nuisance.

Ans. Though this will receive an easy an-

swer, yet I shall avoid giving it in words or reasons of my own, as I do all along, because I know they would be suspected and misconstrued, but in the words of my lord Vaughan; whom I cite the offender, because every body remembers him, and it is very well known, he was never guilty of straining the king's prerogative too high. In Thomas and Sorrel's case, the chief reason why the king cannot dispense with a public nuisance, is said by him to be, because every particular person who has received damage by it, may have his action, which the king cannot bar. 'Nor see I any reason,' says he, page 335, 'why the king may not dispense with those nuisances by which no man has a right to a particular action, as well as he may with any other offence against a penal law, by which no third person has cause of action: from whence it follows, that if an act of parliament call an offence a nuisance, from whence no particular damage can arise to a particular person to have his action, the king may dispense with such a nominal nuisance.'

Now to apply this to our case, for exercising an office without taking the test, no particular person can have an action, because no particular person can have any damage by it, (for an action, as an informer, is not meant, that being the case of all popular statutes) and therefore the king may dispense with it, before the action brought; and in page 341, he explains this very well: 'No offence, says he, against a penal law could be dispensed with, if the reason of not dispensing were because the offence is 'contra bonum publicum;' for all offences against penal laws are such.'—P. 342, 'Though such laws are 'pro bono publico,' they are not laws 'pro bono singulorum populi,' (which are the laws that the king cannot dispense with, as will appear at large in the concession of the Commons, 3 Caroli, which I will cite by and bye), but 'pro bono populi complicati,' as the king in his discretion shall think fit to order them for the good of the whole. In this notion the estate of every 'Pater-familias' may be said to be 'pro bono communi' of his family, which yet is but at his discretion and management of it; and they have no interest in it, but have benefit by it.'

Obj. 2. But it is again objected, That in statutes that are 'pro bono publico,' in a less degree, the king may dispense. But this statute was so highly necessary for the public, that it could not be dispensed with.

Ans. To which my lord Vaughan answers in the case before-cited, page 344.

1. 'All penal laws, when made, and in force, are equally necessary; and in things necessary, there is no gradation of more or less necessary.'

2. If any penal laws were possibly less dispensible than others, those capitally penal were less dispensible than those less penal. But it is not so; for coining money of right alloy, in imitation of the king's coin, is capitally penal

without licence; but it may be licensed, &c. It is capital to multiply gold or silver by the statute 5 H. 4, c. 4. but may be licensed, as was done to John Faceby, *tcapote* H. 6. The dispensation with a Non Obstante to that statute may be seen, *Coke, Placita Coronæ*, fol. 74, cap. 20.

Obj. 3. But if the king have a power to dispense with one, he may dispense with twenty, with an hundred, and so the statute may become of little force.

Ans. From the abuse of a thing to draw an argument against the thing itself, is no consequence at all; it is, as is resolved in the cases above cited, a high trust reposed in the king, and if the king will violate his trust, there is never a one of his prerogatives but may be abused, to the ruin of his people. To instance in one or two:

1. Every body will grant, that the king can pardon murder and robbery; yet if he should pardon every murder and every robbery that is committed, it were better to live with the cannibals in America, than in our native country; and the human laws that are made to punish those crimes, would be rendered of as small force and effect, as it is objected the law in our case would be by frequent dispensations.

2. There is no doubt but the king may create any man a peer of England, and thereby give him a vote in Parliament; yet if the king should abuse his power so far as to create ten thousand peers, or confer this honour upon every body that asks it, no doubt it were a total destruction of the legislative power of the nation. And yet in either of these cases, (or in any other branch of the king's prerogative) if the judges should judge the king had such a prerogative, it were an unreasonable objection to say, these prerogatives may be abused; *ergo*, the judges have given a pernicious judgment.

When we were to give judgment in sir Edward Hales's case, we could neither know, nor hinder, if we did, any ill use the king might make of this power; we were only to say upon our oaths, whether the king had such a power or no, and for that we had the great authorities above cited, and two much greater than those; I mean, two several clear concessions of all the commons of England in parliament assembled, of this dispensing power to be in the king; and that not in a submissive, complying temper, but when they were in a high debate with the crown (especially in the latter case) about the violation of other laws.

And the first of these is Rot. Parl. 1 H. 5. n. 15. and it is printed in Roll's second abridgment, tit. prerogative, 180. the record is in these words: 'The Commons pray, that the statutes for voiding of aliens out of the kingdom, may be kept and executed: To which the king agrees, saving his prerogative, that he may dispense with whom he pleases. And upon this the commons answered, that their intent was no other, nor never should be by the grace of God.' Thereby

were as great apprehensions of dangers and inconveniences from aliens then as there is from Roman Catholicicks now.

And afterwards, in the same parliament, [Rot. parl. 1 Hen. 5, n. 22.] when the Commons prayed that the statutes of provisors, statutes of the same nature with this in our case; (for they were made against the court of Rome's encroaching jurisdiction in England); I say, when they made the like prayer, that these may be put in execution, being admonished by the king's answer in the former case, they themselves insert in their very prayer, a saving for this prerogative of the king, and then the king agrees to it.

But the plainest concession of the commons of England assembled in parliament, was that 3 Caroli, upon a debate between the two houses, upon the Petition of Right; as it was delivered by Mr. Glanvil, in a full committee of both houses of parliament, 23d May 1628,* in the painted chamber: and that what he says as to this matter, may not pass for the single opinion of Mr. Glanvil, (though he was a learned man) he in the presence of the commons, addresses himself to the lords in these words, 'Having thus reduced to your lordships memory the effects of your own reasons; I will now, with your lordships favour, come to the points of our reply, wherein I most humbly beseech your lordships to weigh the reasons which I shall at present, not as the sense of myself, the weakest member of our house, but as the genuine and true sense of the whole house of commons, conceived in a business debated there with the greatest gravity and solemnity, with the greatest concurrence of opinions, and unanimity, that ever was in any business maturely agitated in that house.' And then coming to speak of the point in question, he delivers the sense of the commons in these words: 'there is a trust inseparably reposed in the persons of the kings of England, but that trust is regulated by law; for example, when statutes are made to prohibit things not 'mala in se,' but only 'mala quia prohibita,' under certain forfeitures and penalties to accrue to the king, and to the informers that shall sue for the breach of them: the commons must, and ever will acknowledge a regal and sovereign prerogative in the king, touching such statutes, that it is in his majesty's absolute and undoubted power, to grant dispensations to particular persons, with the clauses of Non Obstante, to do as they might have done before those statutes, wherein his majesty conferring grace and favour upon some, doth not do wrong to others. But there is a difference between those statutes and the laws and statutes whereon the petition is grounded: by those statutes the subject has no interest in the penalties, which are all the fruits such statutes can produce (that is, to such informer) until by suit or information commenced, he become entitled to the particular forfeitures, whereas the laws and statutes mentioned in our petition are of

another nature. There shall your lordships find us to rely upon the good old statute called Magna Charta, which declareth and confirmeth the ancient common laws of the liberties of England. There shall your lordships also find us to insist upon divers other most material statutes, made in the time of king Edward 3, and king Edward 4, and other famous kings, for explanation and ratification of the lawful rights and privileges belonging to the subjects of this realm: laws not inflicting penalties upon offenders 'in malis prohibitis,' but laws declarative or positive, conferring or confirming, 'ipso facto,' an inherent right and interest of liberty and freedom in the subjects of this realm, as their birthrights and inheritances descendable to their heirs and posterity: statutes incorporate into the body of the common law, over which (with reverence be it spoken) there is no trust in the king's sovereign power, or prerogative royal, to enable him to dispense with them, or to take from his subjects that birthright or inheritance which they have in their liberties, by virtue of the common law, and of these statutes.'

I have the rather cited this at large, because it is a clear acknowledgment of the king's dispensing power in as large a manner as we have adjudged it, and does at the same time vindicate it from one of the most clamorous, the most malicious, but withal, the weakest objections that ever was made against it. By this judgment, say they, you have cancelled all our laws, and given up our lives, liberties, and estates, to be disposed of at the king's pleasure. It is plain, that this is of no consequence at all; for the commons here in parliament, at the same time that they expressly grant that the king has undoubted power of dispensing with laws prohibiting things that are not *mala in se*, but only *mala quia prohibita*; laws that are made, as my lord Vaughan expresses it, 'pro bono populi complicati;' yet they utterly deny, as they had good reason to do, that the king can dispense with one title of Magna Charta, or any of those other laws whereby the lives, the liberties, the interests of any of the subjects are conferred upon, or confirmed to them; for these are laws 'pro bono singulorum populi,' which the king can never dispense with. And as to this matter, I do not know whether it will be proper, but any man, so sensibly touched in his reputation, may be provoked to commit some indecencies. I must appeal to all men that have observed my actions and behaviour since I have had the honour to sit upon the bench, whether I use to be guilty, in laws of this kind, to strain the construction of them for the king's interest. First, in such laws wherein the lives of men have been concerned, I confess I have been scrupulous even to a fault; for in some cases upon statutes that had been adjudged felony by wiser and better judges than myself, and it was highly for the king's service they should be so; yet I could never give judgment of death, because I could not satisfy my own

* See 2 Cobb. Parl. Hist. 364.

conscience that those statutes were now in force. And in other cases, wherein the rights of the subjects have been brought in question, how strictly I have kept to that substantial difference taken by the house of commons, that though the king in laws of government, in penal laws of public nature, has a power to dispense in particular cases, yet he cannot dispense with laws which vest any the least right or property in any of his subjects, will appear by the opinion I gave in the case of Magdalen College, (for the truth of which, I appeal to all that know any thing of the transactions in that case) wherein, when the king's right against the College was endeavoured to be asserted by a dispensation granted by himself, I utterly denied that dispensation to be of any force at all, because there was a particular right and interest vested in the members of that college, as there is in the members of many other corporations, of chusing their own head. So far have I been from giving up all men's lives, liberties, and properties to the king's pleasure.

I had forgot to take notice of two or three objections more, that are usually made.

Obj. First, here is a disability, and the king cannot dispense with a disability. As the statute against buying offices, the king, say they, cannot dispense with for that reason.

Ans. There is the same disability in the case of sheriffs; and yet resolved that the king can dispense in that case; and the reason in the statute of buying offices, or sitting in parliament without taking the oaths, is because there is a disability actually incurred; and when any person is actually disabled, he cannot have his disability taken off but by act of parliament. But in the statute dispensed with, in the case of sir E. Hales, there is no disability actually laid upon any man; but certain things are required to be done, and as a penalty for disobeying the said act, and omitting the doing those things required by it; the disability with the other forfeitures are to be incurred after conviction. Now the nature of dispensations being, as was shewed before, to make the thing lawful to him who has it, which is unlawful to every body else; it does plainly prevent the committing any offence by that person, and consequently the incurring any penalty or disability at all. But in the case of buying offices the person is disabled before the dispensation comes; for he is disabled, *ipso facto*, by contracting or dealing for the office. So the true difference between the case of sheriffs, and the case of buying offices, is this, That the king in the one case can prevent the incurring a disability, but cannot purge it in the other after it is incurred. To illustrate this by a case of the like nature, the king may prevent an attainder, but he cannot purge an attainder. If a man has committed treason or felony, the king by granting his pardon may infallibly prevent the offender's ever being attainted; but after he is once actually attainted, the king can by no means take off that attainder, or purge the corruption of blood, but by act of parliament;

provided the judgment by which he is attainted be not erroneous.

Obj. But it is objected, that these laws were made for the interest of religion, and all offences against religion are *mala in se*, and therefore not to be dispensed with.

Ans. I answer, that true it is, all offences that are directly against religion, as it is constituted such by the divine law, are *mala in se*, and not to be dispensed with, and in this case the parliament is bound, as well as the king; for an act of parliament made against religion in that sense is utterly void, as is instanced in Doctor and Student, of an act, That should forbid the giving of alms upon any occasion, &c. But human and politic constitutions, though made for the interest of religion, as they had a beginning, so they are alterable by the same power that made them; and therefore the breaches of them are in their nature *mala prohibita*, as was resolved in the great case of dispensations, in 11 H. 7, above cited, and instances given; 'as the king may dispense with a priest holding of two benefices,' though the laws against pluralities were made for the interest of religion, and the better edification of the people. 'So the king may dispense with a bastard's entering into priest's orders,' &c. These instances are taken for law in that year-book.

But to all this I know it is said, that these high trusts and prerogatives might be always safe, and sometimes useful in a Protestant prince's hands, who would faithfully discharge the duty of one that ought to be *custos utriusque tabule*; but when these prerogatives are asserted to a prince who is of a contrary religion to that established by law, there would be always danger of their being abused to the prejudice or destruction of the established religion.

To which I answer, that it cannot be forgotten, that the promoters of the bill of exclusion used the same argument: If you leave him king, say they, he will have all the prerogatives of a king, and those prerogatives may be made instrumental to the ruin of your religion; which could not be denied by the gentlemen on the other side, who opposed that Bill. Their only reply was, 'fiat justitia, ruat cælum,' it is his right, and we must not do evil that good may come; we must not do wrong, no not to promote the interest of religion itself. The same argument that weighed with them to assert the right of succession to the crown of England, and consequently to all the prerogatives together, was the rule we had to guide us in giving judgment in this case concerning a particular branch of them. We must not break our oath, nor give judgment contrary to what seemed to us to be law, let the consequence be what it will.

But it has been farther objected to me, by some of my friends, that, though I could not in conscience have given judgment against the king, being of the opinion that I was, yet I should rather have parted with my place, than

to have given a judgment, even according to law, which might be so prejudicial to that excellent religion that I profess; and of which when I cease to be, let me cease to be at all.

I answer, That neither in prudence nor in conscience I could have taken that course.

First. Not in prudence; for I confess that saying, 'Omnia dat, qui Justa negat,' had great weight with me in the case: and that I was of opinion, since an incroachment of jurisdiction was feared, there could not be a greater, nor more dangerous provocation to it, than for Protestant judges to refuse to give judgment for a prince of a different persuasion, in that which he could not deny to be his right.

And next, in conscience, I could not decline giving judgment in this case, for by our oaths we are as much obliged to give judgment one way or other, as we are to give what we think a righteous judgment in all cases that come before us.

It has been objected, that all this was a contrivance, an informer set up, and all but a feigned action.

As to this matter, I can truly say, that I don't remember that I ever heard of this action, untill after it was actually brought; but in this there seems to be no hurt or inconvenience at all. The law is as well tried and settled in a feigned action, as in a true. There are feigned actions directed every day out of chancery to this very purpose, that great and difficult points of law may be settled by them; and why the king might not direct such an action to be brought to satisfy himself whether he had such a power, and if he had, that the people might be satisfied, and acquiesce in it; I confess I see no difference at all. If there were indirect means used for procuring opinions, or the like, I have nothing to say to it. I stand upon my innocence, and challenge all the world to lay any thing of that kind to my charge. My part was only to give my own opinion, in which, if either by misunderstanding the books that I have cited, or by drawing weak conclusions from them, I have erred in the judgment that I gave: How can I for this be charged as a criminal? The law neither supposes, nor requires an infallibility in any of his majesty's courts of justice; it were very uneasy sitting in them, if it did. We can but judge according to the books that lie before us, and according to the measure of our understanding of these books: we have not always so much light to guide us, as we thought we had in this case. We often meet with cases new and rare, and very ill settled by former judgments, where we are forced to dig truth, as it were, out of the mine, to compare and distinguish, to skreen and sift, and gather the sense of the law out of the confusion of disagreeing, and very often contradictory opinions, as well as we can: and if after all our labour and our pains, we happen to be mistaken, it was never yet imputed as a crime. The judgment is reversed in a writ of error, not only without any accusation, but

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without the least reflection upon him that gave it. Nor can a mistake in judgment be more criminal in a matter of a greater concernment, than it is in matters of the least consequence: It would be very mischievous and very dangerous, if it should. For if in questions of prerogative, any mistake shall be made capital on the one hand, when judgment is given for the king; why succeeding princes may not be as angry at any mistakes on the other hand, I cannot imagine. And when once affairs are come to that pass, there will be great encouragement for any man, that can make the least shift to live without it, to undertake those very necessary, but very difficult, and very troublesome employments; great freedom for men to give judgment according to their opinion and their conscience; and great reliance upon the resolutions of those, who know they shall be sure to pay with their lives and fortunes for any mistake of theirs, either to the king or the people, as either of them shall happen to get the upper hand. For my own part, I thank God, I can say these two things: First, That for these ten years together, wherein (with very little intermission) I have sat as a judge in several courts, though I may be justly accused of many weaknesses and mistakes, yet I have never given judgment in any one case against the clear dictates of my reason and my conscience. And the second thing is, that I never gave judgment in any controverted point, wherein I had so many, and so great authorities to warrant it, as I have to warrant that judgment which was given in sir Edward Hales's case. And this I say not to set up that opinion again in a pamphlet, which was so ill relished in a court of justice, nor to oppose my sense to the judgment of the nation; for I think it is very fit that this dark learning (as my lord Vaughan calls it) of dispensations, should receive some light from a determination in parliament; that judges for the time to come, may judge by more certain rules, which acts of parliament the king may, and which he may not dispense with. But I have cited these authorities at this time in my own defence, and for these particular purposes; in the first place to shew,

1. That we are not the first inventors of this dispensing power, but that it has been allowed without controversy, to the kings of England in all ages, that they might dispense with many acts of parliament.

2. That if our judgment was erroneous, and that the king could not dispense with that act of parliament; yet that error was but an error in that single case, and had no such large and mischievous consequences as is pretended. For that, because we judged that the king could dispense with that statute, for others to conclude from thence, that therefore he had a power to dispense with all other statutes; especially such as confer, or vest in any of the subjects any manner of interest whatsoever, in their lives, liberties, or estates; or that, because the king may dispense with a penal law,

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wherein a disability is annexed to the breach of it as a penalty, and that penalty not to be incurred before a legal conviction, and where the king's dispensation makes the thing done lawful, and consequently prevents any conviction or penalty at all: For others to conclude from thence, that therefore the king may dispense with such statutes, where a precedent disability is actually laid upon any man, as there is upon the members of both houses, till they have taken the oaths and tests prescribed; and therefore without question, is not in the king's power to dispense: I say, these are consequences which may flow from the heated imaginations of angry men, but have no warrant or foundation at all from the judgment given by us.

I have one thing more to say in my justification, which is, that if I have been guilty of so heinous offences as I am accused of, where is the temptation or the reward? If it was to keep in my judge's place, which otherwise I might have lost, I can only answer, That if that were the case, I then became the worst man in the world, only to keep that, which it is pretty well known, I was with much difficulty, with the persuasion of my friends, prevailed with to accept: and for any other reward, whoever is acquainted with the circumstances of my fortune, will, I am confident, notwithstanding the false and idle reports, of I know not what great reversions lately fallen to me, as easily acquit me of having been corrupted by the king, to give a pernicious judgment in this case, as of having enriched myself by taking bribes in cases between party and party.

All that I have to add more, is, that howsoever this that I have said in my defence may happen to be understood at present, yet I could not deny myself the satisfaction of having put in a plea of innocence at least; that whatsoever shall happen to me now, may perhaps meet with a more equal judgment in after-times; since it ought to be much less uneasy to me to lose my life, if any body be very fond of taking it, than to let the aspersions that are every day cast upon me, to pass in silence; or suffer myself to be transmitted to posterity under the character of a betrayer of my religion, or a subverter of the laws and liberties of my country.

In answer to this sir Robert added:

A POSTSCRIPT: BEING SOME ANIMADVERSIONS UPON A BOOK WRIT BY SIR EDWARD HERBERT, LORD CHIEF JUSTICE OF THE COMMON PLEAS, ENTITLED, A SHORT ACCOUNT OF THE AUTHORITIES IN LAW, UPON WHICH JUDGMENT WAS GIVEN IN SIR EDWARD HALES'S CASE.

Since the finishing of my Argument about the power of dispensing with penal statutes, a book came to my hands touching the same subject, entitled, 'A short account of the au-

thorities in law, upon which judgment was given in sir Edward Hales's case;' written by sir Edward Herbert, chief justice of the common pleas, in vindication of himself.

And although I am of opinion, that the substance of all the arguments contained in the said book, are fully answered in my aforesaid discourse, yet I hold it necessary to make some animadversions upon the said book, and to point out readily to the reader the several pages of my discourse, wherein the arguments of the chief justice are more directly and particularly treated of, and answered.

And there being great reverence justly due to a person that bears so high a character, as also to a judgment given in that superior court of the king's bench, and by advice of all but two of the rest of the judges, as I now hear, some short apology had need be used for that freedom I have taken to animadvert upon it, being, as I am, but in a private station.

In short, therefore, I have not undertaken it out of any vain conceit of my own abilities, but out of a sincere desire to inform such as in the approaching parliament are like to have this great case in judgment before them; and some may possibly not be at leisure, as I have been, to study the case, the matter being of a mighty importance.

Nor have I entered the lists upon any contentious humour, or taking any advantage of the late happy change of public affairs. I am, I thank God, more inclined to commiserate the distress that may befall any persons by the change of the times, it having been my own case so lately, although they differ from me in judgment or interest. I am very far from insulting over any, whatever hard usage I myself have met with.

'Nemo confidat nivium secundis,
'Nemo desperet meliora, lapsus.'

My Apology is this:

1. I was engaged in the Argument before the coming forth of this book, and it happening into my hands before my publishing of my discourse, I could not decline the observing something upon it, without being suspected to have given up the cause.

2. The lord chief justice himself hath by his book given fresh occasion fairly to discuss the point again, by declaring that he expects, as we all do, that it will receive a disquisition in parliament.

3. And as the chief justice hath endeavoured, with as much as can be said, to give the world satisfaction in the justice and right of the case to maintain the judgment given; so he is well known to be of that ingenuity, and good temper and candour, as willing to receive a satisfaction, if any further argument to the contrary may be so happy as to convince him.

The chief justice Herbert, ante page 617, gives us the definition of a dispensation out of sir Edward Coke's 11th Rep. fol. 88, viz. 'Dispensatio mali prohibiti est de jure domino regi

'concessa, propter impossibilitatem prœvidendi de omnibus particularibus.'

And again, 'Dispensatio est mali prohibiti provida relaxatio utilitate ceu necessitate compensata.'

Upon the word 'concessa,' I would gladly be satisfied, when, or by whom that power was ever granted to the king; where shall we find that grant?

It is clear, that whoever hath the entire power of making a law, may justly dispense with that law. And therefore Almighty God, being the sole and supreme law-giver, might dispense even with the moral law; as he did with the sixth commandment, when he commanded Abraham to sacrifice his son Isaac; and with the eighth commandment, when he commanded the Israelites to borrow the jewels of the Egyptians, and to go away without restoring of them.

But it stands not with reason, that he who hath but a share with others in making of a law, (as the king hath no more) should have the power, by himself alone to dispense with that law, unless that power were expressly intrusted with him by the rest of the law-makers; as sometimes hath been done.

Sir Edward Coke, in his 7th Rep. in the Case of Penal Statutes, fol. 36, towards the lower end, does affirm, that this dispensing power is committed to the king, by all his subjects. So that it is not claimed *jure divino*, but by grant from the people. But where to find any such grant we know not.

I have, as I conceive, made it appear in my larger Argument, p. 14, that the first invention of dispensation with laws, began with the pope, about the time of Innocent 3, and by our king Henry 3, in imitation, and by encouragement from the pope; so that it was not by the grant of the people, but ever exclaimed against by all good men, and generally by all the people; and ever fenced against by a multitude of acts of parliament.

It is true, the dispensing with laws hath ever since been practised; and they began at first here in England to be used only in cases where the king alone was concerned, in statutes made for his own profit, wherein he might have done what he pleased. But it is but of later times that they have been stretched to cases that concern the whole realm. See my Argument, fol. 13. Hence it evidently appears, it cannot be a legal prerogative in the king; for that must ever be by prescription, and restrained to those cases that have been used time immemorial, and must not be extended to new cases.

Now there hath been no such usage as will warrant the dispensing with such an act of parliament as is now before us, that of 25 Car. 2, c. 2.

The chief justice Herbert, from the definition before recited, and those two authorities of sir Edward Coke, in his case of Monopolies, and that other of penal statutes, frames an argument to prove, that the dispensation granted to sir Edward Hales, was good in law.

Because a dispensation is properly and only in case of a *malum prohibitum*; he thence infers, that the king can dispense in all cases of *mala prohibita*.

Which is a wrong inference, and that which logicians call, 'Fallacia à dicto secundum quid ad dictum simpliciter.' Because he can dispense with some, that therefore he can dispense with all, is no good consequence.

It appears by the late chief justice Vaughan's Reports, in the case of Thomas and Sorrel, (so often cited by the chief justice Herbert) Vaughan's Rep. fol. 333, the fourth paragraph, that his opinion is, That the king cannot dispense with every *malum prohibitum*; and he gives many instances of such *mala prohibita* that are not dispensable, fol. 342, and 334, paragraph 4.

Therefore the lord chief justice Herbert should, as I conceive, regularly first have given us the distinction of *mala prohibita*, into such as are dispensable, and such as are not dispensable; and then have shewn, that the dispensation granted to sir Edward Hales, fell under the first part: But that learned reporter, the chief justice Vaughau (so often cited by our now lord chief justice) in the aforesaid case of Thomas and Sorrel, fol. 332, the last paragraph save one, quarrels with the very distinction of *malum prohibitum*, and *malum in se*, and says it is confounding.

From whence I would observe, and from the whole report in Thomas and Sorrel's case, that the notion of dispensation is as yet but crude and undigested, and not fully shaped and formed by the judges.

The Pope was the inventor of it, our kings have borrowed it from them; and the judges from time to time have nursed and dressed it up, and given it countenance. And it is still upon the growth and encroaching, till it hath almost subverted all law, and made the regal power absolute, if not dissolute.

I must agree, that our books of late have run much upon a distinction, viz. Where the breach of a penal statute is to the particular damage of any person, for which such person may have his action against the breaker of that law; there, though it be but *malum prohibitum*, yet the king cannot dispense with that penal law, according to the rule in Bracton:

'Rex non potest gratiam facere cum injuriâ et damno alterius.'

As for instance, there are several statutes that prohibit one man from maintaining another's suit, though in a just cause. See 'Poulton de pace Regis et Regni,' in his chap. of Maintenance, fol. 55.

Now it is held that the king cannot dispense with those laws, because it would be to the prejudice and damage of that particular person, against whom the suit is so maintained by another; for there can be no maintenance, but it is to the wrong of a particular person.

So of carrying a distress out of the hundred. But there are many other penal laws, where, by the transgressing of them, no subject can

have any particular damage, and therefore no particular action for the breach of them.

As upon the statute that prohibits the transportation of wool, under a penalty. By the breach of this law, that is, by the exportation of wool, no one particular man hath any damage, more than every other man hath, but it is only against the public good.

And the breach of such a penal law is punishable only at the king's suit, by indictment or presentment.

And the like where such a penal statute gives an action popular, to him that will sue for the penalty, who hath no right to it more than another, till his suit be commenced.

In these cases it is commonly held, that the king may dispense with such penal statutes, as to some particular persons, and for some limited time, (whereof they make the king the sole judge:) because, as the reason is given in the chief justice Vaughan's Reports, fol. 311, paragraph 2, such offence wrongs none but the king. This is now the common received opinion and distinction. And the breach of such kind of statutes, are said to be only the king's damage in his public capacity, as supreme governor, and wronging none but himself. Lord Vaugh. Rep. 312, parag. 3.

But if we will narrowly search into this distinction, and weigh the reasons so given, we shall find it is without any just ground.

The damage done to the particular person in the cases past, in the first part of this distinction, are merely his own proper and peculiar damage; and he is intitled to his particular action for it, in his own proper personal right; and therefore if he discharge and dispense with them, it is no wrong to any other man: he may do what he will with his own.

But the cases in the second part of this distinction, are where the king hath a right to the suit, and the offence and damage are said to be to him only.

But are they so (as the former) in his own personal right, as his lands and other revenues are? or are they to him but as a trustee for the public, for which reason he is called *creditor publicus*? and may he therefore, upon the like reason dispense with them, or dispose of them, as a subject may do with his own particular interests?

Again, shall a public damage and injury to the whole nation, be more dispensable by the king, than the loss of one private man?

— *fall hinc sapientia quondam
Publica privati secretiore* —

And therefore, in my apprehension, the king cannot, in such cases of dispensations, be truly said to wrong none but himself; and it is not agreeable to the definition before given, *utilitate commensata*, for the king wrongs the whole realm by it. Whereas if he grants a dispensation with a penal law of the first sort of this distinction, he only wrongs some particular persons.

Two cases and authorities for dispensations

in our books that were granted in ancient times, will generally be found to be only where the penal statutes were made for the king's own proper interest and benefit at his dispensing with the statute of Mortmain. For in such cases it was to the king's own loss only, in cases where the king might by law have given away his lands or services. So the king may in his patent of grant of lands, dispense with the Statutes, 1 Hen. 4, cap. 6, that require there shall be mention of the true values of them. And by a Non Obstante to those statutes (which is now generally used) the king doth in effect declare, that it is his pleasure to grant those lands, whatever the value of them be, more or less: and the statute does by express words save a liberty to the king in that case.

The king is not a trustee for others in such cases, nor can these dispensations be said to be directly to the damage of the public. And such penal laws as merely concern the king's own revenue or profit, may justly be thought to be intended, to be made only to put the king's matters into an ordinary method and course, and so save the king a labour, as the lord Hobart says; and so prevent the king's being surprized or misinformed, when patents are granted from him, and not designed to tie the king's hands, or to restrain his power; as out of all doubt was done and intended by the law-makers in our act of 25 Car. 2.

But in all the late cases and authorities which we meet with in our books concerning Non Obstantes, and dispensations, as in the time of king Hen. 7, and so downward to this day, we shall find them practising upon such penal statutes as merely concern the public good and benefit, and the laws of such a nature, by the breach of which the whole nation suffers: while some particular persons, it may be, by giving a large fine, or a yearly sum, obtain the favour to be dispensed with and exempt from a penal law, while all others continue to be bound by it.

As for example; where a statute forbids the exportation of wool, or of cloth undyed or undressed, under a penalty; such a law is greatly for the public good, and it takes care that our own people shall have employment and maintenance. Yet this is such a law, as according to the received distinction, the king may dispense with, there being no particular damage to one man more than to another, by breach of such a law, although it be a mighty damage to the whole nation: for by such a dispensation, the person so dispensed with to export such whit. cloth undyed, will have the sole trade, which before the making of that penal statute was equal and common to all. I wish the House of Commons would enquire what vast riches have been heretofore gotten by such as have obtained the dispensations with this penal statute, besides the sums they paid to the crown for them. These are mere monopolies.

In such a case it may rightly be applied, that *siu tacet* occasion by the law. It had

been better for the nation, that such laws were never made, being no better observed; for here again the dispensation is neither *utilitate* nor *necessitate pensata*.

Look into the case of Thomas and Sorrell, and you will find few or no cases of dispensations cited out of our books, but of the time of king Henry 7, and much more of very late times: so that the ill practice is still improving and stretching.

The lord chief justice Herbert, in the next place, (p. 1256,) proceeds to mention the great case of 2 Hen. 7, a resolution of all the judges in the exchequer-chamber, upon the king's dispensing with the statute of 23 Hen. 6, cap. 8, that no man should be sheriff above one year. This is the great leading case and authority, upon which the main stress is laid to justify the judgment given in sir Edward Hales's case.

I would avoid repeating what I have already so largely said to this authority, to which I must refer my reader, by which I hope it is most evidently made out, that the king neither hath, nor never had any just right or power to elect sheriffs: but the right of electing was anciently and originally belonging to the freeholders of the several counties: and since it was unjustly taken from them as they have ever been on the losing hand; it hath been lodged in the great officers of the realm, as the lord chancellor, lord treasurer, lord privy-seal, and the judges, &c. as appears by the several statutes.

And they are to make such choice every year in the Exchequer, on a day appointed by the statute for that purpose. So that the sheriffs are by those statutes to continue in their offices for one year only; and the king cannot hinder such election.

Only by his patent or commission to the sheriff, hath he used to signify to the sheriff himself that is so chosen, and to publish to publish to all others who the person is that is so chosen. This is all the use of the patent; but it is the proper election of those great officers that truly vests them in their office.

And it does as clearly appear, that when former king's have dispensed with a sheriff's continuing in his office for longer than one year, contrary to the several statutes so forbidding it, the king hath so done it by virtue (not of his prerogative, but) of a special act of parliament enabling him to do it, for some limited time only. See for this the statute of 9 Hen. 5, cap. 5, in the statutes at large, and my larger argument, fol. 34.

The truth is, the power of dispensing is originally in the legislators. He only can dispense with a law, that can make a law. The power is equal; and the legislators can confer the same power upon the king or any others, for some convenient time, &c. as appears by the last instance of the sheriff, and divers other like cases, mentioned in my foregoing argument, where I have also observed many other

things upon that resolution of 2 Hen. 7, concerning sheriffs.

The chief justice Herbert supposes the mischiefs recited in the preamble of that statute of 23 H. 6, cap. 8, concerning sheriffs continuing in their offices longer than one year, to be equal, if not greater (as he judges) than the mischiefs recited in the statute of 25 Car. 2, by Papists being in offices; and from thence I presume, would infer, that the case of sir Edward Hales is not so fatal in the consequence, as the case of a sheriff.

I may appeal to any ordinary judgment, and to the sad experience and trial we have so lately had, and to the danger we were so lately in (from which Almighty God, by no less than a miracle, hath in great mercy delivered the nation), whether the mischiefs that could any way possibly arise from the dispensing with the former (I mean the statute concerning sheriffs) be comparable to the infinite mischiefs arising from putting Papists into office, and intrusting them with our religion, and all our civil rights.

The chief-justice, upon those words of the statute concerning sheriffs, viz. That no Non Obstante shall make them good, infers (p. 1256) that those words do shew, that the parliament which made that act concerning sheriffs, was of opinion, that had it not been for that clause, the king could otherwise have dispensed with that act by a Non Obstante.

Ans. This to me seemed a strained inference, and that it is very far from shewing any such opinion in that parliament. It rather signifies, that had not the parliament inserted that clause into the act, the king might have done again, as he had frequently practised before, viz. granted dispensations upon that statute: which ill practice they endeavoured to prevent for the future, nor approving the practice, nor owning the power of doing it. 'Ex malis moribus bonæ oriuntur leges. A good law rather condemns a contrary practice before used.

I heartily desire my reader (as I have done in my foregoing larger Argument) carefully to observe and examine of what sort of nature those several cases are, which the resolution of the case of 2 H. 7, urges to warrant that resolution; as those cases concerning the true value of lands, which the king grants; and that concerning the shipping of wool to a certain staple, &c. and let the reader judge how vast a difference there is between those statutes in the nature, and import, and reason of them, and this weighty important statute now before us; and how little that resolution of 2 Hen. 7, can be warranted by the cases there cited, being of so inferior and minute a consideration, in comparison of the principal case.

It is true, sir Edward Coke (if the twelfth report which goes by his name, be truly his) hath since that resolution given in 2 Hen. 7, found out new and different reasons and arguments, which are not urged, and therefore I presume never so much as thought on, at that

time by the twelve judges, who gave the resolution in that case of 2 Hen. 7.

Thus says sir Edward Sandys, in his relation of the religion used in the west parts of the world. those of the Roman religion made their greatness, wealth and honour, to be the very rule by which to square out the canons of their faith; and then did set clerks on work to devise arguments to maintain them.

Sir Edward Coke seems to justify that resolution concerning sheriffs, from this ground, viz. That the king hath a sovereign power, to command any of his subjects to serve him for the public-weal. And this is (says he) solely and inseparably annexed to his person, and that this royal power cannot be restrained by any act of parliament, 12 rep. fol. 12.

That it is not solely annexed to the king's person, appears by the several acts of parliament, which I have cited to this purpose in my larger Argument, fol. 34, where the power of dispensing with some particular acts, was given to the king by the parliament, and by him accepted for some short time. And the whole parliament have in divers cases themselves exercised this very power.

Judge of the weight of the reasons said to be given there by sir Edward Coke, by that one instance of his in the case he puts of purveyance, 12 rep. fol. 19. which (he says) cannot be taken from the king, no, not by act of parliament.

Yet we have lived to see it lately taken away by act of parliament; which in the judgment of a parliament (which is of the highest authority in law) may therefore be taken from the king.

And is the king in truth restrained from commanding his subjects to serve him for the public-weal, either by those statutes that disable sheriffs to continue in their offices longer than one year, or by our statute of 25 Car. 2, that disables popish recusants to bear public offices: because some very unfit, incapable, and dangerous persons are disabled to bear offices of trust and power (and this by the king's own consent to the act, and by the advice of the great council, the parliament), and indeed of the whole realm?

Does the king by this (which the judges miscall a restraint) want for choice of fit persons to serve in offices? Doth the public-weal suffer by this restraint? Is it not rather preserved by it? Hath not the king protestant subjects enough to bear offices? And are popish recusants (who account protestants heretics, and to be rooted out and destroyed, and with whom they hold no faith is to be kept, and against whom they have been continually plotting mischief) are these the fittest to be intrusted with the defence of the protestant religion, and with our lives and estates, which are all concerned, more or less, in every public office and trust?

And are those persons (the papists) that have a dependance upon the see of Rome, and a foreign power, fit to be intrusted with the

power of the nation, with the militia, and the sea-ports?

Is not this to commit the lamb to the custody of the wolf?

This act that disables papists to bear offices, cannot be justly said to be a restraint upon the king; that expression sounds ill, and takes the matter by the wrong handle. It rather imports the king's declaration and resolution, by advice of his great council, to employ none in offices and places of trust, but such as are most capable and fit, and will most faithfully answer the great ends for which they are so intrusted, that is, the preservation of the Protestant Religion, which is the true English interest.

And this agrees with the rules of the common law, that if an office be granted to one that is Inidoneus, the grant is void, though granted by the king himself. Of this I have treated more largely in my Argument, fol. 37.

The lord chief justice Herbert, (p. 1257,) asks the question, Whether so many solemn resolutions of all the judges of England in the exchequer chamber, are not to be relied upon for law? and I answer, that if they were ten times as many more, yet they are not to be relied on against many express positive acts of parliament directly to the contrary. For what words could the parliament use more emphatical and express, and more to the purpose, than by saying, that a Non Obstante, or a dispensation, or a grant of such a thing (prohibited by that law) shall be absolutely void, and *ipso facto* adjudged void, and the person made incapable to take? And is not a judgment in parliament, and by act of parliament, of the highest authority?

But, says the Chief Justice, (p. 1257,) the constant practice hath been, to dispense with the statute of sheriffs. I answer, it hath also been a very frequent practice too for the king, to make such persons sheriffs, as were none of the number nominated or chosen as aforesaid by the chancellor, treasurer, judges, and other great officers; and it passes for current that he may so do, though it be a vulgar error: for it hath been resolved by all the twelve judges, to be an error in the king. See sir Edward Coke's 2 Instit. or Magna Charta, fol. 559, and yet it is practised to this very day.

The Chief Justice, (p. 1258,) seems to excuse Popish recusants for not qualifying themselves for offices, by taking the oaths and the test, &c. for that no man (saith he) hath it in his power to change his opinion in religion as he pleaseth, and therefore it is not their fault. It is an error of the mind, &c.

Ans. Here is no occasion taken to find fault with them for their opinion; let them keep their religion still, if they like it so well, who hinders them. This act of 25 Car. 2, imposes no penalty upon them for their opinion; but is there any necessity of their being in offices? Must they needs be guardians of the Protestant religion? The penalty upon them by this act is not for their opinion, but for their presuming to undertake offices and trusts, for which they

are by king and parliament adjudged and declared unfit.

(Page 1259.) The Chief Justice Vaughan is brought in, arguing for the king's power of dispensing with (nominal) nuisances (as he is pleased to call and distinguish nuisances). The word nominal, as there understood, imports, that though a parliament declares any thing to be a nuisance, (as sometimes they do in acts of parliament, to render them indispensable) which yet in its proper nature would not otherwise be so conceived to be; that such a nominal nuisance (as he holds) may however be dispensed with by the king, though regularly by law the king may not dispense with any nuisance.

Ans. Shall any singular or particular person, though a chief justice, presume to call that a mere nominal nuisance, which a parliament by a solemn act and law have adjudged and declared to be a real nuisance? Are we not all concluded by what a law says? This arrogance is the mischief now complained of.

The chief justice Herbert, (p. 1260.) says, that from the abuse of a thing, an argument cannot be drawn against the thing itself. I agree this is regularly true; yet we have an instance to the contrary in the Scripture, in that point of the Brazen Serpent. But in our case the abuse doth arise from the very nature of the thing itself, from the constitution of it.

For the king practises no more in dispensing, than what these resolutions of the judges allow him to do by this pretended prerogative. The error is the foundation.

They have made his power to be unlimited, either as to number of persons, or as to the time, how long the dispensation shall continue. Sir Edward Coke says, and so the other books, That the king is the sole judge of these.

Nec metas Rerum, nec Tempora ponunt.

The chief justice Herbert, (p. 1260.) cites two clear concessions (as he is pleased to call them) of all the commons of England in parliament, which he esteems much greater authorities than the several resolutions of all the twelve judges.

But how far these are from concessions, will easily appear to an indifferent reader. They are no more than prudent and patient avoiding of disputes with the several kings. And there are multitudes of the like in the old parliament rolls.

It is but an humble clearing of themselves from any purpose in general, to abridge the king of any of his prerogatives (which have always been touchy and tender things); but it is no clear nor direct allowance of that dispensing there mentioned, to be any such prerogative in him.

However, I am glad to see an House of Commons to be in so great request with the judge. It will be so at some times, more than at others.

Yet I do not remember, that in any argument I have hitherto met with, a vote, or order,

or opinion of the House of Commons hath been cited for an authority in law, before now. Will the House of Peers allow of this authority for law?

It will be said, that this is but the acknowledgment of parties concerned in interest; which is allowed for a good testimony, and strongest against themselves.

Ans. I do not like to have the king and his people to have divided interests. Prerogative and the people's liberties should not be looked upon as opposites. The prerogative is given by law to the king, the better to enable him to protect and preserve the subject's rights. Therefore, it truly concerns the people to maintain prerogative.

I could cite several parliament records wherein the poor House of Commons have been forced to submit themselves, and humbly beg pardon of the king, for doing no more than their duty, merely to avert his displeasure. See the case of sir Thomas Haxley, whom the king adjudged a traitor, for exhibiting a Bill to the Commons for the avoiding of the outrageous expences of the king's house, 20 R. 2, num. 14, 15, 16, 17, and 23, and the Commons were driven to discover his name to the king, and the whole House in a mournful manner craving pardon for their entertaining of that bill.

No doubt, as good an authority against the Commons for so saucily meddling in a matter so sacred, and so far above them. Yet afterwards, 1 Hen. 4, num. 91, that judgment against sir Thomas Haxley was reversed.

As for the distinction, (p. 1262.) of a disability actually incurred before the meddling in an office, and where the disability is prevented by the coming of a dispensation; I answer, that its being so prevented, is but *Petitio Principii*, and a begging of the question. And to this distinction I have, I think, fully spoken in my larger Argument, fol. 40.

The late parliament, in making this act of 25 Car. 2, had, no doubt, a prospect that probably the crown would descend upon a Popish successor; and they levelled this act against the dangers that might then befall our religion and liberties, and they thought it a good security: but it is all vanished and come to nothing, by occasion of this judgment in the case of sir Edward Hales. And that must be justified by a *Fiat Justitia*.

As to the objection that the Chief-Justice's fancies might have been made against him, or advice given him that he should rather have parted with his place, than to have given a judgment so prejudicial to the religion he professes, (p. 1262.)

This, I say, that for my part I should never have advised him to have parted with his place, much less to have given a judgment against his own opinion. But let his opinion be what it was, yet seeing the clear intention of the makers of the law contrary to that his opinion, and knowing the desperate effects and consequences that would follow upon the dispensing with that act (for we were upon the brink of

destruction by it) and taking notice (as this Chief-Justice and the rest of the judges needs must) that the king had first endeavoured to have gained a dispensing power in this matter from both Houses (which was the fair and legal course,) and that yet that very parliament which, out of too great a compliance with those times, had over-looked so many grievances, and connived at the king's taking and collecting of the customs, (though in truth the collectors, and all that had any hand in the receiving of them, incurred a Præmunire by it) not to mention the ill artifice used in gaining the excise; yet that parliament of the king's boggled at the dispensing with the act of 25 Car. 2, knowing the mighty importance of it.

And though they could not but take notice that so many judges at once had been removed, because they could not swallow this bitter pill, and others brought into their places, as might be justly suspected, to serve a turn, and the king's learned counsel could not at first find out this prerogative to do his work with, till so many ways had been attempted, and all proved ineffectual; sure in such circumstances it had been prudence, nay the duty of the judges to have referred the determination of it to a parliament; and the rather, because it was to expound a law newly made, and the consequences so dreadful, and the intent of the law-makers so evident.

And this hath been frequently practised by judges, in cases of far less difficulty and concernment. This I have also enlarged upon in my large Argument, p. 26.

Object. But it might have been a long time before any parliament had been called.

Answer. We ought to have parliaments once a-year, and oftener if need be; and 'eadem præsumitur esse mens Regis, quæ Legis;' and we then stood in great need of a parliament even for the sake of this very case.

And these hasty judgments are one ill cause why parliaments meet no oftener; the work of parliaments is taken out of their hands by the judges. And it is the interest of some great officers, that parliaments should not be called, or else be hastily prorogued or adjourned.

As to the point of the feigned action, which the Lord Chief-Justice seems to justify, I conceive he mistakes the force of the objection. Feigned actions may be useful; but this action against sir Edward Hales, is suspected not only to have been feigned and brought by *covisa* between him and his servant and friend, but it was feignedly and faintly prosecuted, and not heartily and stoutly defended.

This solemn resolution was given upon a few short arguments at the bar, and without any at the bench, and upon other reasons (as I have heard) which were then made use of, are now given by the Chief-Justice; but the times will not bear them.

After all, I intend not by this to do the office of an accuser, nor to charge it as a crime. But

as I think myself bound in duty, on the behalf of the whole nation, of myself, (though a small part and member of it) and of my friends, I humbly propose, that the judgment given in sir Edward Hales's Case, may, after a due examination, (if there be found cause) be legally reversed by the House of Lords, and that reversal approved of and confirmed by a special act of parliament.

[But as that judgment of the Lord Chief-Justice was of the utmost consequence, and his vindication far from satisfying the people; Mr. Atwood, a very considerable man in his profession, at that time, undertook the answering the Chief-Justice: therefore to set the whole matter in a true light, and to observe an exact impartiality, Mr. Atwood's Examination of the Chief-Justice's Account, is here inserted, as follows:

THE LORD CHIEF-JUSTICE HERBERT'S ACCOUNT EXAMINED BY WILLIAM ATWOOD, ESQ. BARRISTER AT LAW, WHEREIN IS SHOWN, THAT THOSE AUTHORITIES IN LAW, WHEREBY HE WOULD EXCUSE THE JUDGMENT IN SIR EDWARD HALES'S CASE, ARE VERY UNFAIRLY CITED, AND AS ILL APPLIED.

WERE it not the reproach of our times, to have had men advanced to courts of judicature for other merits besides integrity and learning in the laws of their country; it might seem a great piece of vanity in me, to answer a book stamped with the name and authority of a chief justice.

Yet, perhaps, I might be thought, not without cause, to take this as my more immediate province; having been the first of the profession who ventured in public companies to shew, how wofully that innocent book-case, 2 Hen. 7, in relation to sheriffs, has been mistook, or wrested, to serve for colour to that hasty judgment in sir Edward Hales's feigned case.

Wherefore, how needful soever the chief justice may find it, to make protestations of his sincerity, vide Account, (p. 1251,) this may supersede any such from me. Nor would I willingly call his a protestation contrary to apparent fact (especially considering that weakness of judgment manifested by this defence), did he not give too great occasion for it. 1. From the large steps which he took to precipitate, and, as I am well assured, to solicit that resolution. 2d. The manner in which he delivered it, widely differing from what he now prints. 3. The unfairness of his present quotations. And, 4. The unhappiness, not to say worse, of those instances which he is pleased to give of his sincerity.

I shall not dispute, or repeat his lordship's state of the case: but the question upon it being, Whether the king may by his prerogative dispense with the statute 25 Car. 2, cap.

2. requiring all persons in any office under the king, to take the test against Popery, I shall enquire,

1. Whether those books, which he relies on as authorities for his judgment, give any colour to it?

2. Whether, admit they did, they would countenance the resolution as he delivered it.

3. Whether those instances which he offers of his sincerity, may reasonably be taken for such?

4. Whether he in any measure clears himself from the imputation of being highly criminal?

His lordship, like a master-disputant, begins, as he thinks, with a definition of a dispensation, which he says, Account, p. 1253, is given by the lord Coke: * *Dispensatio mali prohibiti est de jure Domino Regi concessa, propter impossibilitatem prævidendi de omnibus particularibus; et dispensatio est mali prohibiti provida relaxatio, utilitate, seu necessitate pensatâ.*

Where, I must say, he very unlearnedly clogs the definition of a dispensing power, with the person in whom it is supposed to be lodged: nay, and the reason too why it should be so, which neither the lord Coke, nor common sense, gives him any warrant to bring into the definition. However it seems, according to this, a dispensing power, in some case or other, is vested in the king; which yet is far from proving any thing to his purpose; for either the king may in all cases dispense as to particular persons, and then his distinction of *malum prohibitum*, v. p. 1253, and *malum in se*, falls to the ground; or else it reaches only to those cases, in which the judgment or flattery of judges have ascribed it to him.

He adds out of the lord Coke, 11 Rep. f. 88. as an enlargement upon what he calls the definition, Inasmuch as an Act of Parliament, which generally prohibits any thing upon a penalty that is popular, or only given to the king, may be inconvenient to divers particular persons, in respect of person, time, or place; for this purpose the law gives a power to the king to dispense with particular persons. Where the lord Coke manifestly restrains the penalty, to such as is given the king as head of the people, upon which account only he calls it popular: nor, indeed, can be thought to take in what is granted to any subject that will inform; it being mentioned without distinction, whether before or after an information commenced.

And that the lord Coke's words here, 7 Rep. f. 36, ought not to be restrained farther, is yet more evident, from the case of Penal Statutes, on which sir Edward Herbert's misrepresentations will occasion my more particular remarks.

As sir Edward, considering what interest he has served, may be presumed something conversant with priests and jesuits, he might, among others of less use, have consulted the

learned Suarez (a), who after the definition, which he makes to be *Legis humane relaxatio*, in a distinct chapter shews, with whom the ordinary power of dispensing (which he distinguishes from that which is delegated) is lodged, where he says, ib. c. 14. fol. 395. *Certum est eum habere ordinariam potestatem dispensandi, qui legem tulit:* and he gives the reason, *Quia ab ejus voluntate et potentia pendet.* So that none can have this power, but he, or they who are vested with the legislative exclusive of others, or such as have it delegated from thence. That the king has not the legislative exclusive of others, is what I have formerly proved at large; (b) and it lies on the other side to shew, that the dispensing power has been delegated to him. Yet thus much may be said on the contrary:

First, That the king could not in law be presumed to have exercised such a power by himself; for that the ancient law provided, that he should have a council chose in parliament, who (as the charter affirmed to be declaratory of the ancient law, and sworn at the coronation of Hen. 3. has it) (c) were sworn *quod negotia Domini Regis et Regni fideliter tractabunt, et sine acceptatione personarum omnibus justitiam exhibebunt:* and that it was accounted the law long after that, appears by the impeachment of Roger Mortimer, 4 E. 3. part of which was, that, Whereas it was ordained in the parliament next after the king's coronation, that four bishops, four earls, and four barons, should stand by the king, Pur luy counseiller; without whose assent Nul gros Busoign ne se Feust: nevertheless Mortimer would undertake to manage all by himself, accroaching royal power: (d) and it is easily to be shewn, that such a council was in use, or continually insisted on, as the right of the kingdom, from the time of the charter, confirmed 28 Hen. 3. till the end of the reign of Hen. 6.

2. A power to grant Non Obstantes to statutes, could not have been a right in the crown at common law; for we have clear proofs of its odious and condemned beginning from the sulphurous fountain of Rome, as an honest popish lawyer confessed with a deep sigh, 35 Hen. 3. This Non Obstante Matthew Paris calls, a detestable addition against all reason

(a) Suarez de Legibus, lib. 6, cap. 10, fol. 384, lib. cap. 14, fol. 395.

(b) V. Jus. Angl. ab Antiquo. et Jani. Angl. fa. Nov.

(c) Vid. Mat. Par. de anno 28 H. 3. So Rot. Par. 42 H. 3, m. 4, m. 10, V. Jan. An. fa. Nov. p. 244. Rot. Par. 4 E. 3.

(d) Vid. Rot. Par. 5 E. 2. Ryley pl. parl. fol. 317. Rot. Par. 8 E. 2. n. 55. 4 E. 3. n. 16. 17. E. n. 12. Walsingham, fol. 243. Vid. Knighton, the 1st Art. against R. 2. fol. 2747. Vid. etiam 5 H. 4. n. 37. 11 H. 4. n. 15. 1 H. 6. n. 16. 24. 30. 11 H. 6. n. 17. 31 H. 6. n. 38. Vid. Rolls Ab. 2 part 179. Mat. Par. ed. Tig. fol. 784. Vid Mat. Par. fol. 827. illepidum.

* Coke 11 Rep. fol. 88.

and justice: and when, the year after, king Henry urged the example of the Pope for Non Obstantes, the prior of Jerusalem says, God forbid you should use this unpleasant and absurd word; as long as you observe justice you may be king, and as soon as you violate it, you will cease to be king; which shews how little foundation in law it then was thought to have; and what the whole nation thought of the Pope's use of it, may be seen at large in Mathew Paris, and Mr. Prynne's Animadversion on the 4th Institute. (c)

Farther, the reasons given why the king ought to have this power, fail here upon many accounts.

1. In that the interest of the whole, of which the legislators are the best judges, when they make the law without exception, ought to outweigh all private inconveniencies.

2. The Law has provided a more certain and equal remedy; having taken as sufficient care for the meeting of parliaments, once a year at least, and I may say (f) sitting too, as it has for the sitting of the common courts of justice; as appears from the several statutes in print, and others in the Rolls, which avoid the common cavil upon the words, oftner if need be.

And these were, like the famous triennial act, provisions for the greater certainty of meeting so often at least, but no recessions from the old law; which, as appears both by the Mirror, and the life of king Alfred, (g) was for the great council to meet twice a year at London.

3. The great reason assigned in the Latin quotation from the lord Coke, 'propter impossibilitatem providendi de omnibus particularibus,' which is after distinguished, as to person, time, and place, can by no means be applied to the case in question: For, 1. The law was made but very few years before their lordships resolution, and not grown more inconvenient by length of time, to any particular person, than it was at the making of the act. 2. The law makers had in their immediate prospect every particular person of the Romish communion; and the time when, and place where the danger would happen if any such were commissioned.

Let us see now what help he can have from his second quotation from the lord Coke, which

(e) Prynne's Animad. fol. 129, 130. Vid. etiam Sir John Davis's Rep. fol. 69, b.

(f) Vid. Mod. ten. Parl. Parliamentum separari non debet, dummodo aliqua Petitiopendeat indiscussa vel ad minus ad unam non fuit determinatum responsam; et si Rex contrarium permittat, perjurus est. As I find it in an ancient MS. of the Medus. Vid. etiam 4 Instit. fol. 11. Vid. 50 E. 3. n. 177, 178. 1 R. 2. 95. This is acknowledged for law in the king's name. 2 R. 2. n. 4.

(g) Vid. Spelm. Vit. Alfridi, fol. 115. Mirror, p. 282. Where it is placed among the abuses of the law, that parliaments are not held twice a year.

is 7 Rep. fol. 73. But he intends, I suppose, fol. 37. and would have it believed that it was the opinion of all the judges in England, 2 Jac.

1. that the king may dispense with any particular person, that he shall not incur the penalty of the statute, though it be an act made *pro bono publico*; and that this is a trust and confidence inseparably annexed to the royal person of the king, Account, p. 1253. In which, 1. He again overthrows his distinction of *malum in se*, and *prohibitum*, making that power at large, in relation to any statute *pro bono publico*. 2. He manifestly perverts the lord Coke's sense, whose words are, 7 Rep. fol. 36. When a statute is made *pro bono publico*, and the king, as head of the common wealth, and the fountain of justice and mercy, is by all the realm trusted with it; this is a trust and confidence inseparably adjoined and annexed to his royal person, in so high a point of sovereignty, that he cannot transfer it to the disposition or power of any private person, or to any private use; for this was committed to the king, by all his subjects, for the public good, &c. But true it is, that the king can, upon any cause moving him, in respect of time, place, or person, &c. make a Non Obstante to dispense with any particular person, that he shall not incur the penalty of this statute.

Where the sole question was, of transferring over a penalty granted to the king, as entrusted by all the realm to see the statute put in execution, by inflicting the penalty. This trust is adjudged inseparable, and not to be transferred over; but that however the king may dispense with the penalty granted to himself: upon which, I must say, our chief justice has made a very foul stretch; for what is this to the informer's part, concerning which the question before him was? But surely there is a mighty difference between these two propositions: 'Where the subjects have entrusted the king with a statute made for the public good, this trust is inseparable, and cannot be transferred to another: but the statute so intrusted, may be dispensed with;' which is all that is to be gathered from my lord Coke: And this, 'Though an act be made for the public good, yet the king may dispense with it, and this is a trust and confidence inseparably annexed to the royal person of the king;' which is Sir Edward Herbert's perverse comment. In short, lord Coke says, where the king is entrusted with the execution of a statute made for the public good, he may dispense with that statute. Sir Edward Herbert says, he may dispense with any statute made for the public good. Upon which it is to be observed, that the question in the lord Coke, was not of dispensing, but granting over the penalty; which penalty, he says, is not to be transferred over: the other would make it of dispensing, and that that power is inseparable, and not to be transferred; so apparently changing the state of the question.

His next step is to the year-book of H. 7, f. 11, and 12, in which he leaves us to seek the

year, which is 11. This he calls the first, and great case which he cites, wherein the king's dispensing power is described and limited.

'There is a diversity, says the book Account, p. 1253, between *malum prohibitum* and *malum in se*; as a statute forbids any man to coin money, and if he does, he shall be hanged; this is *malum prohibitum*: For before the statute, coining money was lawful, but now it is not so, and therefore the king can dispense with it. So if a man ship wool in any place at Calais, it is *malum prohibitum*, because it is prohibited by act of parliament. But that which is *malum in se*, the king, nor no other person can dispense with: as if the king would give a man power to kill another; or license one to make a nuisance in the highway, they were void, and yet the king can pardon these things when they are done.' Upon this case it is observable, that the power of dispensing is here asserted in relation to things, and not persons: wherefore according to this, taken in sir Edward Herbert's latitude, the king may grant dispensations to all in general, where the matter is only *malum prohibitum*: Whereas he himself owns, that the nature of a dispensation is particular, and given to particular persons by name. 2. Many things in Magna Charta, nay the most, are but *mala prohibita*: and so Magna Charta itself may be dispensed with, when he himself owns, that the king cannot dispense with one title of Magna Charta: And methinks he could not but observe this contradiction. Wherefore the rule there, admit it were a judgment in law, as it was not, being only spoken *obiter*, by one of the judges (*h*), can be applied only to such cases as are there cited. The first is that of coining money, which goes upon the ground in Moor's Reports (*i*), where it is said, that such statutes as give a prerogative may be dispensed with: And that of shipping wool at Calais, the king's staple, is of the same nature; and both sufficiently shew the distinction of *malum prohibitum* from *malum in se*, to relate barely to such things as become evil by accident, as they are against an accidental prerogative: which no way interferes with the rights of the subjects in general, or particular.

And I much wonder that sir Edward Herbert should cite my lord Vaughan, in the case of Thomas and Sorrel, as confirming what he would infer from the year-book, when lord Vaughan says, fol. 332. That old rule has more confounded men's judgments on the subject, than rectified them: and fol. 333, himself denies that the king can dispense with every *malum prohibitum* by statute, though prohibited by statute only.

Oh, but my lord Vaughan shews, that a dis-

(*h*) Chief justice Fineaux, 11 H. 7, f. 12, 2.

(*i*) Moor's Rep. f. 714. Indeed the book speaks also of dispensing with statutes, restraining the prerogative; but that concerns not the instances here of things forbid the subject for the limitation of that power, *vid. infra*.

dispensation does *ius dare*; and makes the thing prohibited to all others lawful to be done by him that has it. Does he say this of every *malum prohibitum*? By no means: Wherefore we must apply it to the case then in question, which concerned wise-licenses; about which the king had a prerogative by statute law: and the dispensing with that, falls within the rule in Moor (*k*), agreeing with the lord Coke, in the case of penal statutes (*l*). Yet even thus much was a point gained by the prerogative, since the 1st of H. 7, for it is then made a doubt before all the judges of England, in the Exchequer Chamber, and adjourned over for the difficulty (*m*), Whether the king could license the shipping wools elsewhere than at Calais; one of the very instances which sir Edward Herbert relies on: And chief justice Hussey was positive that the king could not license; though indeed the chief baron, and some others, held as Fineaux did afterwards. Wherefore nobody of less assurance than our chief justice can say, from these cases results this plain syllogism:

Whatever is not prohibited by the law of God, but was lawful before any act of parliament made to forbid it, the king by his dispensation may make lawful again, to that person who has such dispensation, though it continues unlawful to any body else, &c. (Acc. p. 1253.) In which, if we grant his major, I will own, the conclusion to bring it to sir Edward Hales's case is not criminal. Yet the proposition is so pernicious, striking at the very foundation of our government, that if there were a resolution, instead of an extra judicial opinion, giving that countenance which even that loose opinion does not; yet it ought to be rejected: for if all acts of parliament, contrary to Magna Charta, are void, as some have held, I am sure much more so would such resolutions of judges be. And that such an one would be contrary to that Great Charter, is evident: for no man can say, that all things prohibited by Magna Charta, are prohibited by the law of God.

To come to sir Edward's next great case, as he calls it (Acc. p. 1254) but indeed the only one which has coloured the resolution to the world; which is that 2 H. 7. Notwithstanding his promise, he has not been so fair to give the words of that case, or so much of them as is material, lest every body might judge of how little use it would be to him; nay, lest men should be for satisfying their own eyes, he has not directed to the folio.

The English of the material part is thus (*n*):
'In the Exchequer-chamber all the justices were shewn for the king, how king Edward the 4th, by his letters patent, had constituted the earl of N—— sheriff of the same county; and had granted the said earl the office of sheriff of the said county for the term of his

(*k*) Sup. f. 714.

(*l*) 7 Rep. f. 36, b.

(*m*) 1 H. 7, f. 2, b. and 3, d.

(*n*) 2 H. 7. f. 6. b. & 7 a.

‘life, with all the other offices tended, thereto belonging; rendering to the king at his exchequer, annually, 100*l.* without any account, or any other thing to be given, for it, &c.

‘Now, 1. Whether this patent was good? And also, 2. How this patent shall be intended? were the points in question. And as to the first point, the justices held the patent good; for it is a thing which may well be granted for term of life or inheritance; as divers counties have a sheriff by inheritance; and this commenced by a grant of the king. Then was shewn a resumption: and then was shewn a proviso for H. earl of N. so that the patent remains in its force. Radcliff shews the statute of 28 E. 3, c. 7. and 24 E. 3, c. 5. That no sheriff shall be more than one year, &c. although he had a Non Obstante. And notwithstanding this, that the king shall always have his prerogative, as of the value and certainty of the land, and other things granted by the king, and of wools shipped, and of charters of murder, and many other cases where the statutes are, That patents that want these things shall be void; yet the patents are good with a Non Obstante: But without a Non Obstante the patents are void, by reason of the statutes. So here the patent, with a Non Obstante, &c.’

This is all that is said in the book upon the first point; upon which it is observable,

1. By the book it would seem, that this Radcliff was but a serjeant at law; for at the end of the case Brian Justice demands of Brian Radcliffe, &c. Yet indeed I find upon search, that he was a baron of the exchequer.

2. What Radcliff says, is after the resolution of the judges is over, and no way influenced that.

3. Whereas sir Edward Herbert says, the resolution was upon 23 H. 6, c. 1. Radcliff, who should better know the subject of debate, discourses only concerning the statutes, 28 E. 3, c. 7, (o) and 24 E. 3, c. 5, which are barely prohibitory, without any mention of Non Obstantes, or any avoiding or disabling clause. Indeed Radcliff, it being upon a sudden discourse, as the book shews, mistakes the statutes, as if they had such clauses, and Brook (p), who cites part of the patent, which it seems he had seen, says, there was in it a Non Obstante to the statutes 23 E. 3, c. 7. and 12 E. 3, c. 9.

Fitzherbert (q) indeed says, R. objected the 23 H. 6, but for that *sit liber judex*.

4. But above all, though our chief justice calls them the judges enemies, (Acc. p. 1255.) who say, the point of Non Obstante is not resolved in this case, which he calls confidence; and that they may as well deny one of the ten commandments: It is manifest beyond contradiction, that the resolution ended at ‘*issint que*

‘le patent demurr en sa force:’ after which comes Radcliff’s discourse, and the resolution went upon two grounds:

1. That this was a thing grantable for inheritance, or for life; which if it were, it could not be presumed to be touched by the prohibitory statutes: and besides, if the question had been upon the other, the case had been an exception out of the statute; for the (r) statute excepts such counties in which divers of the king’s liege people be inheritable to the office of sheriff at the making of the statute; and also such persons who have estate of freehold in the office of sheriff, at the making of the letters patent made to them of the office of sheriff, &c. Now whether this were really a county so inheritable, or of an estate of freehold, at the time, or no, is not so very material; being at least it was so looked upon by the judges, nay, and by the parliament too, as will appear by their second ground.

But that this county was such an one, I take to be also true in fact: for it is to be considered, that this was the county of Northumberland (s), which was a Palatinate; upon which reason this, with other counties under it, was left out of the survey in Doomsday-Book, as being *penituntionibus liberi*: This Palatinate comprized Cumberland and Westmoreland, among other counties: in the last of which, the sheriffwick is at this day enjoyed in fee. Indeed Northumberland came soon into the crown, as early as the time of William 2, upon the rebellion of Mowbray, constituted earl thereof in the time of William the first: But the authority in law is much clearer, that this sheriffwick, if ever held in fee, would remain in the crown as an inheritance in gross, and was not merged, than any sir Edward Herbert has produced on his side: for which we may observe the rule taken in the case of the abbot of Strata Mercella, 9 Rep. f. 25. b. which is this: ‘When a liberty, franchise, or jurisdiction was at the beginning erected and created by the king, and there was no such flower in the crown before; there, by the accession of them again to the crown, they are not extinct.’

Where instances are given of the cases of markets, hundreds, and carldous; nor can any one say, that sheriffwicks are ancient flowers of the crown: but more directly to our case, is that between sir Robert Atkins and Robert Holford (t), which, though not in our books, is well known. The case was of the grant of the seven hundreds of Cirencester, with the returns of writs to the abbot and convent of Cirencester: this came to the crown by the dissolution of monasteries, 31 H. 8, but yet that it was not merged thereby, but re-

(r) 23 H. 6, c. 8.

(s) Vid. Caub. Brit. f. 115. Vid. Dugdale’s Baron. f. 2. Brompton, a. f. 779, ad 798, de Regno Northumb.

(t) Sir Rob. Atkins, v. Rob. Holford in Scacchario, Hil. 22 & 23 Car. 2. Vid. Rep. penes doctissimum Dominum Ward.

(o) It should be c. 9.

(p) F. 7. a. Brook’s Patents, n. 45.

(q) Fitz. Ab. tit. Grant, n. 22.

remained as an inheritance in gross, without the help of any statute, was the opinion of the great Hales, then chief-baron, and of two other barons, Windham and Turner. Part of Hales's words, as I find them excellently well reported, and full to this point, are:

'Such hundreds as were anciently severed from the counties, and come again to the crown by escheat or forfeiture, were sometimes, but rarely committed to the sheriff, and rejoined to the county, but for the most part kept as distinct: Rot. Brevium, and the hundred to which it was annexed, without an actual and special re-annexion to the county, remains in the king in gross; for the Rot. Brevium is a thing created *de novo*. Suppose it were a court of jurisdiction merely created by the king, and the hundred itself, though ancient, yet by return to the crown it is not merged or annexed: This I know in the case of the courts belonging to the honours of Gloucester and Hereford, that came to H. 5, by marriage of a coheir, it is still in *esse*.'

This were enough to shew, that the judges resolution 2 H. 7, had a better legal foundation than what sir Edward Herbert would suggest.

2. But then, besides that, there was another ground mentioned in the book, which was, that a resumption was shewn before the judges; and then was shewn a proviso for H. earl of N. and so, says the book, the patent remains in its force. This resumption was an act of resumption 1 H. 7, and if this act provided for that earl's grant, as the judges, it seems, thought it did, who can doubt but the grant was good? The act of resumption is to be seen upon record, Rot. Parl. 1 H. 7, part 2. It is a resumption of grants made by Edward the 4th; and among others of the yefts, that is, gifts of offices: The proviso runs thus:

'Provided always, that this act of resumption, or any other act made, or to be made, in this present parliament, be not in any wise prejudicial or hurtful to the several grants and letters patents made to Henry earl of Northumberland, &c. Which indeed does not make good any void grant, but supposes all the grants to him to be good in law; nor would the judges dispute their supposal.

I admit with him, (Acc. p. 1255,) that Fitzherbert says, and that truly, that the patent was adjudged good; but the reason he gives agrees with what I have shewn: his words are, for such a thing may be grantable for inheritance, or for life. And then I am sure that the statute does not say expressly, the patent shall be void, though sir Edward affirms that it does.

Obj. It may be objected, that the exception in the statute relates to estates in the subject; but if this were an interest in gross in the king, that it could not be taken from him without express words, cannot be denied me.

What he cites from Plowden, (Acc. p. 1255,) can be of no more service; for he only says,

there it is held; and I agree it is held by Radcliff, with a mistake of the statute, That the king can grant a sheriffwick for more than a year: Yet whereas he magnifies this as cited by Plowden, who, as he supposes, well understood the sense of the year-book:

It does not (u) appear that it was Plowden, but one who was of council in the case for the defendant, who mentions this.

2. He mentions it only as a case in Fitzherbert, Plowden, f. 502, without referring to the book, 2 H. 7.

But the second point raised before the judges, 2 H. 7, which occasioned the main debate in that case, as appears by the book, shews, that the resolution could not be upon the point of prerogative; for they questioned whether the king could dispense with his own profit: and all the judges, except Brian and Catesby, held, that the patentee shall account for the green wax, and other things, notwithstanding the clause of *absque redendo computum*: but the debate concerning other things arising upon that second point was adjourned; the first resolved upon the grounds above.

Though hitherto there is no proof, that any one of authority in the law has taken the book 2 H. 7, in sir Edward Herbert's sense, which yet would be of no moment if they were express, being the book is to be seen, and clearly otherwise; yet he thinks my lord Coke will bear him out, and to this purpose he cites two places: one, where he supposes that the lord Coke not only authorizes this sense of the case, but asserts the prerogative, Acc. p. 1256, in much higher terms than they would presume to do: and by the second he would have it believed, that if the lord Coke be a faithful reporter, all the judges of England took that case in the same sense.

The first is the case of customs, 24 Eliz. which is pregnant with many objections against its being of any force in this case.

1. The book, 12 Rep. f. 17, is of suspected authority, being printed in the late times, and what the lord Coke never owned, or thought fit to print in his life time.

2. This comes foisted in among cases in the time of king James, without any parallel case which might occasion the placing of it there.

3. It was when the lord Coke was but a young reporter, it being ten years before he was king's solicitor (x).

4. It is not only no point in question relating to the case where it is cited, and so extrajudicial, but wholly foreign to it: For the question was, whether goods sold before they were landed, were to pay custom within the statute 1 Eliz. c. 11. Wherefore being barely a memorandum of a young reporter, no way occasioned by what went before, it cannot possibly have any weight.

5. The fancied reason here given why the

(u) Grenden, v. evesque de Lincoln.

(x) Was made solicitor 16 June, 34 Eliz. Dugd. Chron. Series, f. 99.

king may dispense with the statute of sheriffs, is none at all: for whereas it says, 12 Rep. f. 18, 'That the king has a sovereign power to command any of his subjects to serve him for the public weal, and this solely and inseparably annexed to his person: and this royal power cannot be restrained by any act of parliament:' There is no authority cited for this, but the case of 2 H. 7, which, as appears to any body that reads it, neither has that reason been mentioned so much as by any one judge, nor in the least goes upon the point of the prerogative. Besides, if the king can command any subject to serve him for the public weal, either he is to be judge, or the laws: if the latter, then no person, not qualified by law, is obliged to act; nor though qualified, to do any thing forbid by the laws: if the former, as the words imply, then the king's commands may be pleaded to justify any ill minister who has rendered himself obnoxious to the laws. But that this cannot be, is sufficiently evinced by necessary examples in all ages. And this, by the way, may shew how false, as well as pernicious, that doctrine is which tells us, that *hæc* in the New Testament, always signifies the authority of a person, not of a law. Or, as another has it to the same purpose, 'By higher powers, it is evident, we are to understand the persons of sovereign princes, or governors, not the laws and constitutions, as our republican doctors pretend.'

Of the same batch is another memorable position, 'That the king's most illegal acts, though they have not the authority of the law,' (for indeed, to say they have, would be a blunder with a witness,) 'yet they have the authority of sovereign power.' Some will say, that this is qualified by what follows, 'which is irresistible and unaccountable:' as if the king had this power only so far as it is irresistible and unaccountable. Whereas it is evident the proposition is entire before, being the medium whereby he would prove, that the king's illegal acts are not inauthoritative: in proof of which medium, he afterwards affirms, that the sovereign power which made the laws, and can repeal and dispense with them, is inseparable from the person of the prince.

Reduced to a syllogism, it runs thus; 'The authority of sovereign power is irresistible and unaccountable; but the king's most illegal acts have the authority of sovereign power.' This is an entire proposition upon which he concludes, *ergo*, 'the king's most illegal acts are irresistible and unaccountable.' This assumption he goes on to prove from the supposition, that such a sovereign power as he describes, is inseparable from the person of the prince; upon which, or the like doctrine, another raises this comfortable use: 'In all sovereign governments' (and such he at large endeavours to shew England to be) 'subjects must be slaves as to this particular; they must trust their lives and liberties with their sovereign.'

But for the honour of our gown, this may be said, That such heretics never appeared among lawyers, till divines began first to wrest the laws and scriptures to their own damnation. But as the former quotation out of the lord Coke can do sir Edward Herbert no service, upon the reasons above shewn; much less can the other, which is one of sir Edward's usual perversions: He tells us, (Acc. ante p. 1256) 'That it is resolved by all the judges (if my lord Coke be a faithful reporter), that it is agreed 2 H. 7. that the king may, against the express provision of the act 23 H. 6. dispense with that act; for that the act could not bar the king of the service of his subjects, which the law of nature did give unto him. He adds, this is reported (unless my lord Coke had a mind to deceive the succeeding judges, and draw them in to give pernicious opinions) as the sense of all the judges of England, in king James's time, in the exchequer-chamber. Whereas the lord Coke, on purpose to prevent such an abuse of his words, says in the beginning of the case, 7 Rep. f. 3. 'I shall give no just offence to any, if I challenge that which of right is due to every reporter; that is, to reduce the sum and effect of all to such a method, as upon consideration had of all the arguments, he himself thinketh to be fittest and clearest for the right understanding of the true reasons and causes of the judgment, and resolution of the case in question.'

Upon which it is evident, that if any one of the judges mentioned this, the lord Coke is a faithful reporter; but had he been silent as to this matter, no man could suppose, that such a tedious argument as that in Calvin's case was the resolution in which the judges concurred in every expression.

But sir Edward Herbert's own eyes might, and ought to have satisfied him, that the judges 2 H. 7. gave no determination upon the 23 H. 6. nor does the book say, that so much as any one person spoke to that statute, or mentioned the reason devised in Calvin's case; For that the act could not bar the king of the service of his subject, which the law of nature did give unto him. Nor could sir Edward chuse but know the absurdity of that ground: for according to that, all ought to be left in the state of nature, as it was before any law made; so that not only any person might act, though prohibited by subsequent laws, but he might act any thing forbid by any positive law; which would make a mad world. And this would come of a natural allegiance due to the person of a king, without respect to the laws of his government (*y*). And the resolution of the judges in Calvin's case is quite contrary to this supposal; for it is there resolved, 'That they who were born under king James's allegiance, before he had the crown of England,

(y) Vid. archb. Abbot's Exceptions to Sibthorpe's serm. Rushw. part 1 f. 439 and 442. touching the grand quest. a. p. 210 to 214. 1 Inst. f. 58. b.

were allens here, notwithstanding that accession (x).

But my lord Coke is so far from giving any real countenance to such a resolution, as that in sir Edward Hales's case, that he, in concurrence with all the judges of England, is express to the contrary; for in relation to the court of admiralty, he and the rest of the judges declare, 4 Inst. f. 135. 'That the statutes of 13 R. 2. c. 3. 15 R. 2. c. 5, and 2 H. 4. c. 11. being statutes declaring the jurisdiction of the court of the admiral, and wherein all the subjects of the realm have interest, can not be dispensed with by any Non Obstante.' Nay, he gives another resolution of judges, though not so solemn as the former; yet what he says is warranted in the books, and the resolution comes up to our case in *terminis*, 3 Inst. f. 154. his words are, 'When an act of parliament is made, that disabled any person or maketh any thing void, or tortious, for the good of the church or common-wealth; in that law all the king's subjects have an interest, and therefore the king cannot dispense therewith, no more than with the common law.'

All the chimerical foundation of solemn resolutions being thus destroyed, I need not concern myself with the vain, airy superstructure, which must vanish *in fumo*; and instead of the appeal, What may be relied upon, if such resolutions may not? Acc. ante p. 1256. I appeal to all mankind, whether our senses are not sufficient judges against these accidents, subsisting without any subject, mere transubstantiation nonsense? Such are reasons devised for a resolution which never was to be seen.

But we are told, That besides the authority of the case, we have constant practice that this statute has been dispensed with ever since; and if it were not so, the consequences, would be dreadful, 'illegal convictions,' &c. But to this I say,

1. 'A facta ad jus non valet argumentum,' till there be legal determinations on the side of the fact.

2. The fact cannot be shewn, for any sheriff to have enjoyed the office for more than one year by the same patent.

3. However the consequences would not necessarily follow (a); for we know, even laws made by kings *de facto*, have always been looked on as binding, and so have the admittances to copy-hold estates, made by disseisors, and others without title. And though I love not to lay any great stress upon precedents of our own time, yet it may serve to sir Edward; and we well know, that notwithstanding the late illegal choice of sheriffs in the city of London, yet no challenges were allowed, because they were sheriffs *de facto*.

That I may not be here unnecessarily detained, with what he says to real or fancied

objections; I shall hasten to his other pretended authorities, and shall begin with his last, as having the most immediate reference to the cases above-cited, and which he seems to be most proud of; and that is serjeant Glanvil's argument, delivered at a conference between the Lords and Commons; wherein he owns, that in such things as are only 'mala quia prohibita,' Acc. ante p. 1261. under certain forfeitures and penalties to the king and the informer, there the king may dispense. This indeed is more than appears from any case that sir Edward Herbert has cited, as I have shewn above; yet is no more than what the lord Coke said elsewhere (b), immediately after he had denied that power in things made void or tortious, for the good of the church or commonwealth; in which, he says, all the king's subjects have an interest, and therefore the king cannot dispense therewith, no more than with the common law.

All that is more, in serjeant Glanvil, relates only to the nature of those laws which were then insisted upon; if he went further, it could no more be an evidence of the opinion of the House of Commons in that point, not being the point put to the question, than his quotation out of Calvin's case, is of the opinion of all the judges. But the first part of his speech cannot be stretched farther than *mala prohibita* had formerly been taken, that is, in relation to new prerogatives, or at least things wherein the subjects in general have no interest vested in them; and he expressly restrains it to such cases, wherein his majesty, by conferring grace and favour upon some, doth not do wrong to others; As it is in my lord Coke above, and in Moor (c), where it is held, that statutes which give a prerogative, or restrain the prerogative, may be dispensed with; but not such as give or dispose of interests. And as to what restrains the prerogative, not coming within the *mala prohibita*, though it falls not under consideration here; yet we may observe the difference taken in lord Hobart (d) where a statute is made to ease the sovereign of labour, not to deprive him of power. In the first case the king may dispense, not in the other.

And I think no man can doubt but the statute, 25 Car. 2, cap. 2, which only requires officers to take the oaths, and test, to distinguish them from Papists, but disables them that do not take them within three months, vests an interest, not only in several particular persons, who may be reversioners, but in all the subjects in general; and is of the nature of those statutes insisted on in the Petition of Right, and pressed for by serjeant Glanvil, Acc. ante p. 1261. 'not laws inflicting penalties in *malisprohibitis*; but laws declarative, or positive,

(b) Vid. supra. 3 Inst. f. 154.

(c) Moor, sup. f. 714.

(d) Hobart, f. 146. Vid. Vaughan f. 57, speaking of lord Hobart's judgment, which is always accurate for the reason of the law.

(x) 7 Rep. f. 27. Vid. Vaugh. f. 286.

(a) Vid. Consid. touching the Grand Quest. a. p. 210. to 214. 1 Inst. f. 58. b.

' conferring, or confirming *ipso facto* an inherent right and interest of liberty, and freedom in the subjects of this realm, as their birth-right, and inheritances descendable to their heirs and posterity.' A freedom I may add, from Popish slavery and tyranny; Statutes incorporate into the body of the common law, over which, with reverence be it spoken, there is no trust in the king's sovereign power or prerogative royal, to enable him to dispense with them, or take from his subjects that birth-right or inheritance which they have in their liberties, by virtue of the common law, and of these statutes, I may say, this statute.

And such a statute it is, that no man that wishes well to the protestant interest, not only here, but through Christendom, would consent to the abrogating or impairing the force of it; without obtaining such laws for restoring the ancient constitution, both for the choice of sheriffs and counsellors, among other things, as might more effectually keep out the Booted Apostles; than any other means, next to the glorious expedition of his highness the prince of Orange; whose miraculous success are not only the subject of present admiration, but have been plainly foretold in past ages, and will be celebrated in all future.

But to return from this short digression: it is manifest that serjeant Glanvil speaks as well of such laws as are positive, as those that are declarative; such as confer an inherent right as that confirm it; and of statute, as well as common law, not to be dispensed with: so that he is manifestly on our side, and seems not in the least to have exceeded the lord Coke, where he makes so express an exception of our case, from that dispensing power which he allows. By inherent, the serjeant can mean no more, considering the import of confer, than actually vested, and inherent, and inseparable by any less power than that from which it was derived. Thus in relation to those prerogatives that have been counted inherent, and inseparable in relation to penalties, and the like (*e*) the true meaning can be only, that while they continue, they are not to be separated and transferred over to another. Yet no thinking man will doubt the power of a parliament, in relation even to them; and if they cannot be receded from in particular, at least they may in gross; when a king does *cedere imperio*, or *abdicare regnum*, which most prerogative casuists (*f*) own may be,

(*e*) Vid. Lord Coke's Cap. of Penal Statutes, 7 Rep. f. 36.

(*f*) Vid. Grot. de Jure Belli & Pacis. Vid. Falkner's Christian Loyalty, p. 544, 545, speaking of the Parisian massacre, &c. But if ever any such strange case as is proposed should really happen in the world, I confess it would have its great difficulties. Grotius thinks, that in this utmost extremity, the use of such defence, as a last refuge *ultimo necessitatis presidio*, is not to be condemned, provided the care of the common good be pre-

not only by actual cession from the government, but by acts amounting to an abdication, and shewing a fixed intention no longer to treat his people as subjects. Nor perhaps could there be greater evidence of such intention, than the dispensing at a lump, not barely by retail to particular persons, with those laws which were made by the united wisdom of the nation to secure it, as much as they thought human means could, or at least the court would yield to against those real dangers which were in their immediate prospect. Nor in all probability had this enclosure been laid waste, if the dispensing judges had not made the first gap.

As to sir Edward's supposed clear concessions of this power from all the commons of England, 1 H. 5, Acc. ante p. 1260, they are quite otherwise than he represents them, nor would be conclusive to his point however.

In the first, says sir Edward, 'the commons pray, that the statutes for voiding of aliens out of the kingdom may be kept and executed: to which the king agrees, saving his prerogative, that he may dispense with whom he pleases; and upon this the commons answered, that their intent was no other.'

But the recorder says, *savant a luy sa prerogative*, 'saving to him his prerogative.' Whatever that was, they declared they never intended to injure it. Then it goes on with the copulative 'and,' which adds new matter, and is dishonestly left out by sir Edward, *et qu'il parra dispenser avecqu'eux queux luy plerra*. 'And that he may dispense with whom he pleases.' Which is an additional grant or licence to that king; but that this saving is but a general saving of the prerogative, appears by the very next record, which he cites of the same parliament.

Sir Edward's words are, 'In the same parliament, when the commons pray, that the statutes of provisors, statutes of the same nature with this in our case (for they were made against the court of Rome's encroaching jurisdiction in England), I say, when they make the like prayer, that these may be put in execution; being admonished by the king's answer in the former case, they themselves insert in their very prayer, a saving for this prerogative of the king's, and then the king agrees to it.' Where he would insinuate, that this prerogative of dispensing with particular persons is there saved, when the record is express to the contrary: the words in English are,

served. And if this be true, it must be upon this ground, that such attempts of ruining do *ipso facto* include a dis-claiming the governing those persons as subjects, and consequently of being their prince or king. Vid. Bishop Bilson, of Christian subjection, ed. 1586, p. 280. I never denied, that the people might preserve the foundation, freedom, and form of their commonwealth, which they foreprized when they first consented to have a king.

' Also the Commons pray, for the good and profit of the realm, that all the statutes made against provisors, in the times of the most noble king, E. 3. R. 2. H. 4. (g) your father, whom God be merciful to, may stand in their force, and may be held and executed in all points; and that no protection, nor other grant, to any person, by our lord the king, working to the contrary, in forbearance of the execution of the said statutes, be allowable or available to any person whatsoever in this matter. And if any thing be done to the contrary, let it be held for null or void; saving all times the prerogative of the king.'

The king answers, ' Let the statutes thereof made, be held and kept.' Which is plainly meant according to their prayer, without the king's impeding the execution of them by any protection, or other grant to any person whatsoever; and if such grant be, that it shall be void. Is not this as much to say, (Vid. Acc. ante, p. 1256) That no Non Obstante shall make any such grant good? Oh, but sir Edward will tell us, That this shews that the parliament thought the king could otherwise have dispensed with those acts. By no means: it only argues an abuse crept in (which Matthew Paris shews to have been as early as the time of H. 3.) and likely to be allowed of by the judges; but the parliament would prevent even that; and surely they would never provide, that a Non Obstante or grant to a particular person shall be void, if they thought the king had a prerogative to defeat this when he pleased: much less, when they expressly pray against such an abuse, can they be thought to contradict themselves, and in the same breath that they desire that no person whatever may be dispensed with, yet leave the king a prerogative to dispense with whom he pleases. The absurdity of which reasoning he might have seen in that excellent speech of serjeant Glanvil, (h) which he himself receives as the sense of the Commons of England, assembled in parliament.

Wherefore the saving in both the records, can be but general savings of such prerogative as the kings had, whatever it were; which the kings, as they began to encroach upon the people or to be jealous of their encroachments, would have inserted out of abundant caution, before they would yield to several acts. And these being acts of parliament, which could pass but as the king consented, the people were forced often to gild the pills with such savings; but it was otherwise of judgments in parliaments to which no consent of the king was requisite.

Farther yet, admit the king had a prerogative of dispensing with particular persons, both as to aliens and provisions; yet there could no general rule be taken from thence, because it

would only argue, that the fondness for aliens, and fear of displeasing the court of Rome, had at first occasioned the reserving the power of easing some particular persons, without which the king would pass no act against them. However it was, the frequent complaints of the Commons, (i) and acts made against both the one and the other, shews that those laws were little regarded or executed, and yet that the king had not a prerogative allowed him any more for particular persons, than for all in general.

Sir Edward has five other trivial instances of the dispensing power, which, however, I shall not omit. One is the dispensing with the statute, 8 R. 2. c. 2. Account, p. 1258, which requires that no man should go judge of assize into his own country: but for this there is only practice, which has passed *sub silentio*, and so could be of no authority in law. Besides the statute is barely prohibitory, and does not render the patents void if otherwise; yet I cannot say but an information would lie, though there were a Non Obstante in the case.

The second is of dispensing with the statute 10 Edw. 3. cap. 3. Acc. ante, p. 1258, which provides, That whoever has a pardon of felony, shall find sureties for the good behaviour; of which he says, as of the other, that it has been constantly dispensed with ever since it was made. But if the practice had been so, which he does not prove, it would not avail, unless it had come in question judicially, whether the pardon would be valid to one who had not given, or at least tendered sureties. Indeed there is a case in our books, where the court did not require sureties, because of a particular clause in the pardon dispensing with it: but this was no earlier than 16 Car. 1: (k) the judges of which time paid sufficient deference to prerogative; but that case seems to be not only *prima impressionis* and without any reason given, but in effect condemned by the reporter, as he shews that the court abused their discretion, if they had any, in the matter: It was the case of sir Matthew Mints, who appeared to be guilty of several misdemeanors, for which he deserved to be bound to the good behaviour, committed after the time to which he was pardoned.

The third and fourth instances, scattered from the rest, are of dispensing with pluralities, and bastards entering in priests orders; which if possible will be less serviceable to him: For,

1. Such dispensations are never granted by the king (l), but by the archbishop; and the king only licenses, or confirms, the archbishop's dispensation in unusual cases.

2. That the king's licence or confirmation in Cases unwont, as the statute has it, is of any

(i) Vid. Dr. Stillingfleet against Cressy, from p. 426, to 451.

(k) Sir Matthew Mint's Case, Croke. Car. fol. 597.

(l) Vid. Vaughan's Rep. f. 20. Edes v. Evesq; d'Oxford.

(g) Rot. Parl. 1 H. 5. n. 22.

(h) Vid. serjeant Glanvil's speech, ante, p. 1261.

force, is owing to the statute, 25 Hen. 8. cap. 21.

3. Even in usual cases, where the archbishop might dispense, though the king's confirmation be added, yet unless it come in due time, it will not prevent a lapse incurred upon the statute 21 Hen. 8, cap. 13, against pluralities; as was adjudged in Digby's case, (*m*) though the dispensation came before induction. And this comes up fully to one of the points in sir Edward Hale's case, which our chief justice has not been so fair as in the least to mention to be a point in the case: Nay, quite contrary, he supposes it to be a case, where a disability is annexed as a penalty, and that penalty is not to be incurred before legal conviction, and where the king's dispensation makes the thing dispensed with lawful, and consequently prevents any conviction or penalty at all; forgetting that in the very state of the case, he owns there was a conviction before the dispensation came. So that here was a disability actually incurred, and that upon record, as appears in the pleadings; and while that record remains, there is no falsifying of it, though in fact the conviction were before the three months given in the statute to prevent a disability; (*n*) and he had no other means, than either to plead no such record, or to bring his writ of error. Wherefore this dispensation comes clearly within Digby's case, as being too late, supposing otherwise it were valid.

As sir Edward shews that he has read Thomas and Sorrell's case, he might have known another reason of these two cases, viz. (*o*) "That the king may dispense with a bastard to take holy orders, or with a clerk to have two benefices with cure, which were *mala prohibita* by the canon law, and by the council of Lateran, not by act of parliament;" which is most true. For these are mentioned in the book of Hen. 7, before any act made against pluralities.

There is another instance in that wild annotation, upon the case of customs in the 12 Rep. where it is said, "See (Acc. p. 1256) 4 Hen. 4, cap. 31, in which it is ordained, that no Welshman be justice, &c. in any part of Wales, notwithstanding any patent to the contrary, with clause of 'Non Obstante licet sit 'Wallicus:' And yet without question the king may grant with a Non Obstante."

Nor do I question it neither, even before 21 Jac. 1, cap. 38, when that statute was repealed, provided the Welshmen use not Welsh speech; and this by 27 H. 8, cap. 26.

(*m*) 4 Rep. f. 78, b.

(*n*) Vid. Rolls Abr. Brook. Fitz. tit. Estoppel, particularly Statham. 'Si homo soit obligé de garder le Pace et puis Seire Facias issist de vers lui de ceo quil bat. une que viet et est trove coup. et puis cet port. brief de trans. vers luy de mesme le batie et ill. pled de rien coup. ill luy estoppera per matter trove la soule le Roy, &c.' So Brook, n. 59.

(*o*) Vaughan, f. 353.

But as to these three last instances, it might be said farther, that if they were stronger than they prove, yet they might fall under the difference received by him from lord Vaughan, where he says, the king may dispense with laws made 'pro bono publico complicati,' but not with such as were made 'pro bono singulorum populi;' in which the lord Vaughan is not so absurd, as to mean, that though the king cannot dispense with a law in which any man in particular is so far interested, as to be entitled to an action for himself alone, yet he may with those in which all the subjects are interested. But his meaning, to make him consistent with himself, must be restrained to lord Coke's sense upon the penal statute, which makes this power to be only where the king, as head of the commonwealth, is trusted by all the realm; (*p*) in which sense he alone is to look after the interest of the *populus complicatus* under him as head. Thus lord Vaughan, 1. expressly qualifies it, when he says, "They are 'pro bono populi complicati,' as the king in his discretion shall think fit to order them for the good of the whole." 2. He illustrates it by the example of a *Paterfamilias*; (*q*) "Whose estate, he tells us, may be said to be 'pro bono communi' of his family, which yet is but at his discretion and management of it, and they have no interest in it, but have benefit by it." 3. Both he and sir Edward Herbert allow instances, where every particular man is not entitled to his action, and yet the statutes are owned to be 'pro bono singulorum populi,' and not to be dispensed with; and such are Magna Charta, and those other laws mentioned by serjeant Glanvil and sir Edward. And if some difference can be found between the interest *singulorum populi* in all those statutes, and in ours, to use his words, I wish any man would shew me any such difference; or else we must say, that not only the former resolutions, but lord Vaughan here, as well as where I before observed, is full against him; nay, he is even against himself: which I would be loth to think that lord Vaughan is, (*r*) who owns, That the king cannot dispense in any case but with his own right, and not with the right of any other; which he confines not to individual persons considered singly; for he says expressly, (*s*) "If the wisdom of the parliament hath made an act to restrain, 'pro bono publico,' the importation of foreign manufacturers, that the subjects of the realm may apply themselves to the making of the said manufactures for their support and livelihood, to grant to one or more the importation of such manufacture, without any limitation, Non Obstante the said act, is a monopoly, and void." For this I am sure, particular persons are not entitled to actions upon their own ac-

(*p*) Vid. 7 Rep. p. 36.

(*q*) Vaugh. p. 342.

(*r*) Thomas v. Sorrel, f. 350.

(*s*) Ib. f. 347.

counts. Indeed he supposes the king may license, limiting the quantity, and that for private uses, (t) not by way of merchandize, as not being against the end of the act. Wherefore in our case all subjects being interested as Protestants, their support and encouragement being provided for by the act, and the letting Papists into the government against the end of it, who can doubt but lord Vaughan would have pronounced sir Edw. Hale's dispensation void?

And whereas our judge pleads in his excuse, Account, p. 1263. That though this law was made for the interest of religion, the offence is not directly against religion, but against a politic constitution, though made for the interest of religion; he might not only have learned from lord Coke, that the subjects have such an interest as the king cannot dispense with, in what is made void or tortious, that is, unlawful, for the good of the church; but lord Vaughan shews, (u) that there are *mala politica* not to be dispensed with, and instances in some things, which are nuisances *in specie*.

Now, besides what already has been shewn, to disable these three last instances urged by sir Edward, that they are not 'pro bono singulorum populi,' as that rule is vindicated from misapplications, may appear, in that neither of them affect all the people in general. As to the clergymen, they can only do injury in their respective parishes where they are beneficed, and the Welshman in that part of Wales where he is an officer; nor besides, can the clergymen be supposed much to prejudice the interest of religion, being the pluralist cannot supply his cure but by one qualified, and the bastard might be a good man, and good preacher. And yet even these would fall under lord Vaughan's acceptation of his own rule; (s) for he shews that laws made for the benefit of but part of the kingdom, artificers and husbandmen, cannot be dispensed with to any one person, to frustrate the ends of the statutes.

This leads to another flourish which he makes with the lord Vaughan's authority, in answer to the objection, that the law was made *pro bono publico*, Acc. p. 1262, and it was highly necessary for the public. Indeed lord Vaughan will have it, that the sole reason why a statute cannot be dispensed with, is not, that the law was made *pro bono publico*, because all laws were made for public good; and yet dispensations had been allowed in some, nor was the degree of public good that which altered the case; yet he shews that the extent of it does: and seems still to keep to lord Coke's rule, where the people had entrusted the king with the law, as head of the complicated body, there the trust was entirely in him; but when the law extended in interest not only to individual persons, but to a considerable part of the na-

(t) Vaugh. f. 346.

(u) Vide lord Vaughan, f. 339, 340.

(s) Lord Vaughan, f. 344, 345, 346, 347.

tion, much more when to all, in either of which cases the statute is 'pro bono singulorum populi,' in neither of these can the king dispense. And that the statute in question is of the largest extent, appears as the nation is a Protestant nation, this the religion established by law, and these provisions necessary means to preserve it; and therefore though the Papists have no benefit by it, they are not in law, in this respect, any part of the people; for people always is taken for them that have legal interests. Thus when the statute provides (y) that the people of counties shall choose their sheriffs, it relates not to all the people in general, but only to freeholders.

Secondly, Having thus shewn that those grounds which our judge pretends to have gone upon, afford no countenance even to his palliation of the judgment, they will appear much less to countenance it as it was delivered; which to evince, I shall here set it down *ipsis verbis*, from that faithful reporter Mr. Blaney.

It was on that memorable day, when, as another mark of his sincerity, he directed the willing jury, and concurred in the infamous sentence against that excellent author Mr. Johnson; when the jury was gone out, the chief justice took occasion to inveigh against spreading of scandalous reports about cases depending in the court; and to prevent any thing of that nature in the case of sir Edward Hales, he thought fit to deliver the opinion of the judges in this manner:

Chief Justice. 'In the case of Godwin and Hales, wherein the defendant pleads a dispensation from the king, it is doubted, whether or no the king had such a prerogative? Truly, upon the argument before us, it appeared as clear a case as ever came before this court: but because men fancy I know not what difficulty, when really there is none, we were willing to give so much countenance to the question in the case, as to take the advice of all the judges in England. They were all assembled at Serjeant's-inn, and this case was put them, and the great case of the sheriffs was put; whether the dispensation in that case were legal, because upon that depended the execution of all the law of the nation? And, I must tell you that there were then ten upon the place, that clearly delivered their opinions, that the case of the sheriffs was good law, and that all the attainders grounded upon indictments found by juries returned by such sheriffs, were good, and not erroneous; and consequently, that men need not have any fears or scruples about that matter. And in the next place, they did clearly declare, that there was no imaginable difference between that case and this, unless it were, that this were the much clearer case of the two, and liable to the fewer exceptions. My brother Powel said, he was inclined to be of the same opinion, but he would rather

(y) 2 Inst. f. 559.

‘ have some more time to consider of it ; but
 ‘ he has since sent by my brother Holloway to
 ‘ let us know that he does concur with us. To
 ‘ those eleven judges, there is one dissenter,
 ‘ brother Street, who yet continues his opinion,
 ‘ that the king cannot dispense in this case.
 ‘ But that is the opinion of one single judge,
 ‘ against the opinion of eleven : we were satisfac-
 ‘ ed in our own judgments before, and hav-
 ‘ ing the concurrence of eleven out of twelve,
 ‘ we think we may very well declare the opi-
 ‘ nion of the court to be, that the king may dis-
 ‘ pense in this case ; and the judges go upon
 ‘ these grounds :

‘ 1. That the kings of England are sovereign
 ‘ princes.

‘ 2. That the laws of England are the king’s
 ‘ laws (z).

‘ 3. That therefore, it is an inseparable prero-
 ‘ gative in the kings of England, to dispense
 ‘ with penal laws in particular cases, and upon
 ‘ particular necessary reasons.

‘ 4. That of those reasons, and those neces-
 ‘ sities, the king himself is sole judge : and
 ‘ then, which is consequent upon all,

‘ 5. That this is not a trust invested in, or
 ‘ granted to the king by the people ; but the
 ‘ ancient remains of the sovereign power, and
 ‘ prerogative of the kings of England, which
 ‘ never yet was taken from them, nor can be.
 ‘ And therefore such a dispensation being
 ‘ pleaded by the defendant in this case, and
 ‘ such a dispensation appearing upon record to
 ‘ come time enough to save him from the for-
 ‘ feiture, judgment ought to be given for the
 ‘ defendant, ‘ Quod querens nil capiat per bil-
 ‘ lum.’

It is evident, that these propositions are very
 wide from any thing that he has, or could have
 urged from the books, unless where a brand of
 infamy has been set upon the judges. The
 examples of which, made in several ages, one
 would have thought, might have given suffi-
 cient caution ; yet indeed, he might have had
 enough of this kind from those of the other
 gown, who, I think, are now pretty well
 ashamed of these notions. Whatever power of
 dispensing the king has, the books suppose it
 to be entrusted by the people ; but according
 to this resolution, it came down from heaven
 the Lord knows how. And as he goes upon
 the supposition of an absolute sovereignty in
 the king (a), inseparable from his person, as
 such will have it, unless that be granted, all
 that he builds upon it are but castles in the air :

(z) So Salthorp, Rushworth, vol. 1, p. 422.

(a) Vid. Case of Resistance, p. 200. See
 there such a sovereignty as makes laws, can-
 not be dispensed with them. Fortescue, p.
 52. ‘ Ad tutelam namque legis subditorum,
 ‘ ac eorum corporum et honorum rex hujus
 ‘ modi creatus est, et ad hanc potestatem a po-
 ‘ pulo eam ipse habet quo ei non licet po-
 ‘ testate alia suo populo dominare.’ See this
 condemned 13 and 14 Car. 2, cap. 29. Vid.
 Rushworth, part 2, fol. 603.

for this we are to have recourse to our consti-
 tution, to see what that power in the prince is ;
 which the great Fortescue says, is, *a populi
 effluxu*, ‘ derived from the people.’ But for
 that we have no occasion, from any so much
 as pretended proof of his assertions ; nor can
 any be offered but from the resolution of the
 infamous Ship-money Judges, which seems to
 run parallel to this, but is indeed far short of
 it : for though they made the king the sole
 judge of the kingdom’s necessity, yet they
 supposed it to be at a time when there was a
 real danger to be prevented by the exercise of
 this judgment ; whereas here it is abused to
 the bringing in what the parliament laboured
 to prevent.

But I must observe, (vide Account, p. 1262.)

1. That whereas sir Edward Herbert owns the
 dispensing power to be of dark learning, and
 that ‘ it is very fit it should receive some light
 ‘ from a determination in parliament, that
 ‘ judges may judge, by more certain rules,
 ‘ which acts of parliament the king may, and
 ‘ which he may not dispense with.’ Grant his
 premisses, and there can be no darkness in it ;
 for the power will extend to all cases, as far as
 the legislative does ; and that he has deter-
 mined positively in this point, when he makes
 all things, not forbid by God’s law, to be
 dispensable by the king. Nay, if he might
 dispense with every *malum prohibitum*, that
 is not *malum in se*, without such qualifica-
 tion as I have shewn ought to be, it would go
 farther, even as far as God’s power (b), who
 never dispenses with more than his own posi-
 tive laws, not such as are founded upon eternal
 reasons ; and thus the positive laws of God
 and man would be subject to the pleasure of
 the prince. 2. He has taken it out of the
 power of the parliament to settle the bounds of
 this extravagant power : for, what he ascribes,
 he says, never was taken from the crown, nor
 can be ; because, forsooth, it is the ancient re-
 mains of the sovereign power and prerogative
 of the kings of England. Wherein by the
 way, there is an implication contrary to what
 he would infer ; for this implies, that it is
 the remains of a power diminished and im-
 paired. 3. His printed and parol resolu-
 tions are not only very different, as is
 obvious by the comparison, but very contra-
 ry : One says, it is a dark learning ; the
 other, the case is as clear as ever came before
 the court.

Thirdly, Though his insincerity is suffi-
 ciently evident from every part of his defence,
 yet it may not be unprofitable for the public,
 that he should be followed to those instances
 in which he glories ; for which, it is not
 enough for him to shew some one act wherein
 he is singular, if he follows the multitude to

(b) Vid. Grot. de Jure Belli et Pacis, l. 1,
 c. 1. ‘ Sicut ut bis duo non sint quatuor, ne a
 ‘ Deo quidem effici potest ; ita ne hoc quidem
 ‘ ut quod intrinsicè ratione malum est malum
 ‘ non sit.’

sin in others, even of the same kind; which if he does, he can no more acquit himself of perjury and breach of trust, Account, than the rest of the tainted herd.

In matters of blood, Account, he affects the reputation of great tenderness, and thinks he has been scrupulous even to a fault. 'For,' says he, 'in some cases upon statutes, that had been adjudged felony by wiser and better judges than myself, and it was highly for the king's service that it should be so, yet I would never give judgment of death, because I could not satisfy my conscience, that those statutes were now in force.' It is a fault, it seems, not to give judgment against his conscience, when the narrow interest of the court exacts it, and other judges, influenced from thence, would countenance it: but we may observe, that those statutes concerning soldiers (c), of which he is to be understood, not only give no warrant for such judgment, as is obvious to the meanest capacity; but if they could admit of any question, the unbiassed judgment of the then recorder of London, sir John Holt, ought to outweigh the whole bench.

But I wish our chief justice could as well acquit himself in the case of lord Brandon. The father's heroic merits of the crown, too great to be rewarded; and the son's hereditary valour, dangerous to those who had reason to fear brave spirits, occasioned the rigorous prosecution of both. The father was obliged to change his soil, till it might become more equal, not unmindful of our Saviour's advice, or rather precept, 'When persecuted in one country to flee into another; that though he contemned death, he might not provoke it. The son falling into their hands, both his life and honour, which the severest trials approved to be most valued by him, were designed for a sacrifice. In subserviency to which, our chief justice directed the willing jury to find him guilty of high treason, chiefly upon a supposed conspiracy to seize the castle of Chester; which, if true, were but felony by a statute (d) as to that part, yet in force, and so could be no evidence of treason. Nor would he suffer the fact to be found specially, though he pretended not to answer the cases and records, which were cited to shew, that the matter alleged could not be treason: nor did the then solicitor undertake the task, notwithstanding that shew of reasoning, with which he laboured to set aside the authority of lord Coke (e), pleading

(c) The case Crook, Car. 15 and Hutton 134, is of one prest to serve beyond sea.

(d) Vid. 14 Eliz. c. 1, Rastal, f. 411.

(e) L. Russel's Trial, vol. 6, p. 378, 'To conspire to levy war is an overt-act to testify the design of the death of the king; and the error of my lord Coke has possibly misled my lord.' This he goes to retute by the cases of Story and lord Cobham, which were not of levying war within the kingdom, and besides were expressed by the overt-act of writing. Vid. 3 Inst. f. 12. *Ruler's Pleas of the Crown*,

expressly and unanswerably for that injured hero, (of whom the age was not worthy) the lord Russel.

Nor was the proof in lord Brandon's case less defective than the matter; for besides the scandalous Sexton, who swore to designs against another king, there was but one witness in the eye of the law: he indeed is so far legal, as that he might be heard, being an approver (f); but no way credible, considering how far he had been drawn with his letters about his heels, even to (g) contradict himself. The other by no means legal, being under an outlawry for High-Treason, unrevered: For though the execution of that judgment (for so in law it is) was pardoned by the king, yet the crime was by no means purged, to set him right as to fame; which though the counsel offered to make good, they were not suffered to speak to it: and yet the point is very (h) clear by ancient authorities, and confirmed by later, without any thing really to the contrary. Nay, farther, though besides all these things, another matter was urged in arrest of judgment, upon which judgment had (i) formerly been arrested; yet, without enquiring whether the fact were true, or the book law, that, with the rest, was over-ruled, to come at the life of a person obnoxious to the government, as some called themselves. Such was sir Edward's great scrupulousness and tenderness where the life of man was concerned.

He adds a scruple in a case before himself, and the other usurpers of the high-commission-court; but his singularity therein can be no excuse for his acting at all upon a commission apparently against the statute; which took away not only the power of liting and imprisoning, which that court illegally pretended to, but the spiritual authority which it really had: and such a commission it was, as never received countenance till the act (k) long since repealed; which not only made H. 8. head of the church, but gave him power, which he afterwards delegated to lord Cromwell, (V. 31 H.

p. 13. Dyer, f. 298, l. Saunderson's Hist. of K. James, f. 283.

(f) Lib. Assiz. 27 pl. 20. Of an approver shared, says, Il ne duist passer sans estre detenuement purge, car tout sont en male.

(g) At lord Russel's Trial, I am not certain whether I did hear something about a declaration, &c. At Mr. Cornish's, *è contra*.

(h) That such are not *probi et legales*, for witnesses or juries, vid. 2 Bulst. f. 144, alias 154. 1 Brownlow, p. 34, part 2, 47. Roll's Ab. tit. Chal. 657. Brook tit. Temoins, penult. Fitzher. tit. Process, 208. Dyer, f. 34. a Owen. f. 29. Castlemain's Trial, l. 8. 11 H. 4. 41. b. Godbolt 288. Fortescue, p. 60. b. Fitzh, lib. 4. c. 8. Bracton de Corona, cap. 3. p. 116. b. Roll's Ab. tit. Pror. f. 223. Vid. de roden Baluzium, tom. 1. f. 887. 2. 302.

(i) Arundel's Case, 6 Rep. f. 14.

(k) 26 H. 5, c. 1, repealed 1 and 4 P. c. 11.

8. c. 10.) to redress all errors, heresies and abuses, by spiritual authority.

Fourthly, I suppose it is by this time pretty evident, that sir Edward's crime will admit of no extenuation; but the aggravations are many, it appearing,

1. That he and his brethren were the inventors of this dispensing power, in such extent as he contends for in the print; but much more in his real resolution.

2. That the error (V. ib) was an error in that single case, but of large and mischievous consequences: and if the king could dispense with that statute upon the reasons given, and circumstances appearing in sir Edw. Hales's case, others may well conclude from thence, that therefore he has a power to dispense with all other statutes, even such as confer or vest in any of the subjects any manner of interest whatsoever, in their lives, liberties, and estates, And there being a conviction, and consequently a disability actually incurred before the dispensation, therefore, by reason of this case, the king may dispense with such statutes where a precedent disability is actually laid upon a man, as there is upon the members of both Houses, till they have taken the oaths and tests prescribed. These are not consequences which may flow from the heated imaginations of angry men, but such as have warrant and foundation from their judgment.

3. His so far undervaluing the wisdom of the nation, as to make the benefit of a law against the undue continuance of sheriffs, equal, nay, go beyond what they could devise for the security of their religion; or rather, so to undervalue the holy religion, which I think he yet professes, when however it would not come up to the point, according to the differences which himself receives. Acc. p. 1256, speaking of the statute 23 H. 6, c. 1, he says, 'The recital in the preamble, and the whole purview, if compared with our statute of 25 Car. 2, c. 2, equals it in every particular, and in some goes beyond it: For the mischiefs recited in this latter statute are only in these words, 'For preventing dangers which may happen from Popish recusants, and quieting the minds of his majesty's good subjects.' The other, 'For preventing the importable damage of the king and his people, by perjury, manslaughter, and great oppression.' Then he goes on to the purview, express against Non Obstantes, and creating a disability: but according to his usual haste, he stays not here to make the comparison, but hastens to his sham resolution, as has been sufficiently evinced already. The questions here will be, 1. Whether the mischiefs intended to be prevented are equal in both? 2. Admit they were equal in degree, whether they are in extent? Which if they are not, still the resolution, if real, will fail him; according to the difference which he himself receives, of 'pro bono populi complicati,' and *singularum populi*.

1. For the first, I suppose he thinks the epithet importable gives the odds; as if Popery

wanted an epithet to represent it to Protestants, for what they ought to do their utmost to prevent; as if it did not carry in the belly of it perjuries, manslaughters, and great oppressions, by wholesale; or that mischiefs more remote and accidental, as the continuance of sheriffs, may habituate to corruption, and that occasion the other fatal train, could equal the more immediate and certain consequences, unless by good laws prevented, of French conversions, proceeding from fixed principles. But then to give judgment to frustrate this necessary law, at a time when the Papists had a king of their own superstition to head them, is to make the king as much above the law as our ancient lawyers tell us, the law and his court by way of emineuce, that is, the great council, or parliament, are above him (1).

2. As this proves the interest of the subject in the law about sheriffs, to be neither equal, nor so immediate as in our statute, there needs not many words to shew the difference of the extent: the peace only of particular counties, and that by small insensible degrees, is there concerned. Nay, admit the king had this power, and should so violate that trust which sir Edward will have to be reposed in him, as to extend it to all counties, where he puts in the sheriffs, yet this could not affect all the people; because there might be a retreat to London, Middlesex, and Westmoreland; in neither of which has it been pretended that the king had such a power, till the late violence of some, and treachery of others, gave that unhappy inlet of perjury, manslaughter, I may say murder and oppression; before which, London was a perfect Goshen in an Egyptian kingdom.

3. But what can excuse our chief justice's so apparent falsifying both records and law books? Or if not, at least, his shameful negligence in not going to the fountain-heads, but setting up the recitals of cases against the cases themselves; and the extrajudicial opinions or arguments of judges, nay the very annotations of reporters, foreign to any matter in question, against solemn resolutions; which either wilful falsifications, or criminal negligence has occasioned the answering objections with a case which never had a resolution, but what he and his brethren gave, when it was brought in by head and shoulders, only to be a leading case to this.

4. He could not but know, that the case was faintly argued against sir Edward Hales; either he or the late Empson and Dudley, having given the fees on both sides: wherefore it was comical for the chief-justice to say 'that the case appeared clear upon the argument.'

(1) Bracton, l. 2, c. 16. Rex habet Superiorem, Deum S. item legem per quam factus est Rex, item Curiam suam, viz. Comites, Barones, qui Comites dicuntur quasi socii, &c. Fleta, l. 1, c. 17, p. 17, 2, has Superiores. Which avoids the cavil in the Royal Apol. ed. Anno 1683, p. 36, supposed to be Dr. Ashton's.

I am sure he is inexcusable, that when causes of less consequence, and of less dark learning used to be argued twice at least; this was but once. And the learned Mr. Wallop, who could have set it in the truest light, was refused to be heard to it, though he required it.

5. Our chief justice might easily have found that the beginning of Non Obstantes was within time of memory, which would not be enough to entitle the king to a prerogative: For as it is in Plowden, every prerogative contains a prescription, for it rests in usage; (m) that is such as are not derived from known grants of the people. And he might have learnt from that great man, whom he would fain draw to his side, 'That precedents are useful to decide questions; but in such cases as these, which depend upon fundamental principles, from which demonstrations may be drawn, millions of precedents are to no purpose.' (n)

Time of legal memory is well known to extend to the reign of R. 1. (o) And though Non Obstantes, as I observed before, are complained of within that time, as early as 35 H. 3, yet that diligent and faithful searcher into antiquity, Mr. Prynne, shews, That they were then made use of, only to revoke some indiscreet grants or privileges, but not to elude, subvert, or dispense with any penal laws, or acts of parliament, till they were introduced by religious persons, after the statute of Mortmain, 7 E. 1, to elude and frustrate the act. And if this be true, I am sure thus far there is no colour for the late resolution; for they might have seen in lord Vaughan f. 356, that the king in that case dispenses only with his own right, and concludes not the mean lords.

Though successive resolutions of judges are but evidences of the law, and such as are to be examined and rectified by the constitution and fundamental maxims of the inherent rights and liberties of a free-born people; yet if sir Edward had had the diligence to read what might have occurred on this subject, or the honesty to hear it from others, he might have known, that it is far from being a settled point, that the king might dispense with particular persons, as to whatever is not prohibited by the law of God; and that his dispensation makes the thing prohibited lawful to be done by him that has it. (p)

(m) Plowden of Mines, f. 322. 10.

(n) Vaughan, f. 419. Nota, This was in a case of less consequence, the sending process into Wales.

(o) Brook Prescrip. n. 6. Stat. West. 1. 3 E. 1, c. 39. Stat. de quo Warranto, 18 E. 1, Prynne's Animad. f. 133.

(p) Vide *è cont.* Dr. Brady's Complete Hist. dedicated to king James 2, Pref. All the liberties and privileges the people can pretend to, were the grants and concessions of the kings of this nation, and were derived from the crown: Founded upon his supposed proofs, that W. 1, obtained this land by conquest, and governed it accordingly. Vide Brady's first book, p. 23, in marg. refuted in Jus Anglorum.

The farther we look back since this power has come in question, the less does it seem allowed.

Edward 3, (q) with the assent of that council, which, as I observed before, was chosen in parliament, had granted to merchants-denizens, for a time, the same liberty about staple commodities which merchants-aliens had: though this was not by the king alone, and for the benefit of natives, yet the merchants, fearing that they might be impeached in time to come for their merchandize, which they so had passed by virtue of such grants, forasmuch as they were made out of parliament, for their surety, obtained a ratification and confirmation in parliament.

But the *verata questio* (r) was about licensing the shipping of wool elsewhere than at Calais: that the king might do this, the pretence was specious. Calais was no part of the ancient demesne of the crown, but a new acquisition, whose interests the king seemed to have more absolutely at his disposal; according to the resolution of our judges, anno 1667, before the House of Lords, who declared, That though the Canaries were the dominion of the king of Spain, (s) they were no part of the dominion of Spain. And if sir Edward had taken notice of lord Coke, where he is against, as well as where he seems to favour him, he ought to have observed, 3 Inst. f. 186, that one Lyons, a merchant, and lord Latimer, were sentenced in parliament, for procuring of licences and dispensations for transporting of wool. And this they laid to the destruction of the staple, and of the money of Calais, to the great damage of the king and realm. (t) Indeed the year after the lord Latimer's sentence is remitted at the request of the Commons, alledging that the charge against him was not true, not for defect of matter; 51 E. 3, n. 75. So that here is a judgment of the House of Lords in point, against one of those very cases; upon which court judges have since founded their distinction of 'malum prohibitum,' and 'malum in se:'. And it is an easy thing to know which ought to turn the scale.

After this, 37 H. 6, f. 4, it came to be a question before all the judges in the Exchequer-Chamber, Whether this offence, being pardoned, (which that the king might do after it was committed, has not been disputed) the pardon, before an information brought, would defeat the informer of his share? There the court held, that if the suit were the party's, the pardon should not bar him: But the sole question was, Whether the party was entitled to any suit, being the advantage was given to the discoverer, which he might have by a suggestion in the Exchequer, but the statute gives no ac-

(q) Vide Roll's Abr. tit. Prer. f. 180. 34 E. 3, c. 21.

(r) Nota, This is one of the cases mentioned by Fineux ante.

(s) Vide 3 Jac. c. 6, forbidding trade to the dominions of Spain.

(t) Rot. Parl. 50 E. 3, n. 17. 24. 28.

tion?(u) However, this received no determination at that time.

But if the question had then been of a dispensation, and whether that would bar the informer's action given by statute, can any man doubt but that they would have adjudged it could not; when, notwithstanding a pardon, and that in case where an action was not expressly given? Yet it was so doubtful, that they would not determine against the informer. But that the dispensation would not have availed with them; or at least they would not have looked upon it to authorise what was prohibited by any statute, appears from other passages there: as where it is said, (r) that in a recognizance of the peace, (which is not confined to one entered into at the request of a subject) the king cannot pardon or release, till the peace is broken. And where a man ought to repair a bridge, the king can pardon only for the fine due to himself: but however the party shall be obliged to repair the bridge, because this is to the damage of all the people. And to the same purpose is that 3 H. 7. (y) that though the king may pardon, or free from a pecuniary mulct before the occasion happen, yet he cannot pardon or discharge the trespass itself: an instance is given in voluntary escapes. So far were they from believing that the king, in remitting the pecuniary mulct, could make the thing lawful: nor could this in the least be inferred from the other, because, however, an act may be made void or tortious. Indeed in the reign of R. 3. (2 R. 3. fol. 12.) whose character blemishes the judgments of his time; it was held by all the judges in the Exchequer Chamber, that the king might licence the shipping of wool elsewhere than at the staple; yet even they were not of opinion that the licence made the thing lawful, for then the discoverer could not have had his share, which they agreed that he ought to have, and so the licence was only as far as it concerned the king. They also settled the other point, which before was a doubt, (z) that a pardon before an information brought, would defeat the informer. But then the authority of the first point is suspended by a doubt remaining before all the judges, afterwards assembled upon a re-hearing of this cause, in a more settled time. Indeed they agreed the other, of an information after a pardon; but hitherto there is no matter of proof of any case, wherein the king by his dispensation could discharge the penalty given not only to himself, but also to an informer, who has his action given by sta-

tute. But for this we must take a leap downwards, as far as 13 Jac. 1. which we may balance with the 7th of his reign, when it is held by lord Coke, 3 Instit. 154. that where a statute concerns the benefit of the king alone, he may dispense with it by a Non Obstante: and by the court, That where it concerns the benefit of the subject, the king cannot dispense. Roll's Ab tit. Prer. fol. 179.

7. Whereas our chief justice thinks, that a statute's providing against Non Obstantes, shews that the king could otherwise have dispensed with the act by a Non Obstante, it is not only unconvincing, because it might be no more than an argument of an abuse of the law; but to us very strong against him: for, admit the resolution of the judges, 2 H. 7. were as he contends, yet he, who makes so much of a concession in the commons of England, assembled in parliament, when he thinks it of his side, ought surely to yield, that the judgment of king, lords and commons, is of uncontrollable authority. Wherefore when not only one, but several parliaments provide, that all Non Obstantes shall be void, is it not plain that their judgment was, that such Non Obstantes could not be set up by any resolution of judges? And for this we have the judgment of king, lords and commons, and that of but late days, that even where a grant is made to the king, where it will be said he is solely entrusted for the public good, yet it may be out of his power to defeat it by a Non Obstante. This appears by the statute 19 Car. 2. c. 8. (a) which provides, That no letters patent granted to any person, of exemptions from subsidies, &c. shall free them from the charges of any sum granted by that act: and all Non Obstantes in letters patent, made, or to be made in bar of any act or acts of parliament, for the supply or assistance of his majesty, are thereby declared to be void and of none effect.

And even where statutes have not expressly provided against Non Obstantes though the statutes were such as restrain what many take to be the king's prerogative; yet if we receive the sense of Lords and Commons, the king has no prerogative warranting Non Obstantes to them, as appears by the articles against king Richard the second; (b) one of which is, for that the king, contrary to the laws and wills of the justices, suffered sheriffs to continue longer than one year, &c.

This were enough to set aside all pretences taken from Calvin's case, though, as sir Edward Herbert pleasantly suggests, it were resolved there, that that was resolved 3 H. 7. which was never mentioned till after the resolution. Here is the authority of Lords and Commons in competition with that of mercenary judges: and if the

(u) This is not rightly abridged by Brook, tit. Charter de Pardon, u. 24, 37 H. 6, f. 5, adjudicatur.

(r) 37 H. 6. 46. V. 5 E. 4. fol. 34. a. Where a statute concerns only the king himself, which the king may chuse to use at his will, &c.

(y) 3 H. 7. fol. 15. b. Chief Justice Hussey citing Fortescue.

(z) 1 H. 7. fol. 2. b. et 3. a.

(a) According to Keble, c. 7. but not printed there.

(b) Vid. the Stat. barely prohibitory. 28. E. 3. c. 7. et 12 E. 3. c. 9. V. Knighton.

concessions of the commons, alone assembled in parliament, are of weight with him, I know not why their denials ought not as well to be urged against him; which if we may do, not only the fictions and loose reasonings in Calvin's case, (c) but the main resolution there, may be justly called mere court law. Such I am sure it is, that the honest House of Commons, 4 Jac. 1. (d) would not bear it: and any one that reads the arguments of those learned men who managed the conference with the lords upon the question of the union of the two kingdoms, may easily see how inexcusable the judges of that time were, to proceed to the judgment in Calvin's case, after they had been so enlightened. Nor could they but know, that the then parliament was broke up; because they were not so complying as the judges shewed themselves both then and afterwards. But they secured their cushions by it, while sir John Bennet, (e) father of the present lord Ossulton, lost his in the prerogative court, and had a swinging fine imposed upon him into the bargain, several years after, upon pretence of extortion; but as I am well informed, the real ground was, his disrelishing speech in parliament upon this subject. It is well known, some princes used to have good memories that way. 'Manet altâ mente repostum, &c.'

8. Non Obstantes having no other foundation than in the encroachments of princes, and servility of judges, especially if we except cases concerning the king alone; they ought not to be strained to any new case. The advice of Bracton (f) will rise up in judgment against such men, who tells them, if such things never happened before, and the judgment is without light from former cases, and difficult, let it be adjourned to the Great Court. According to which, adjournments to ensuing parliaments have been frequent in former days, when there were more learned judges; and that as often for the weightiness of the matter, as intricacy of the points.

9. But for the closing aggravation, acc. p. 622, whereas our chief justice denies all indirect means for procuring opinions, and stands upon his innocence, challenging the world to lay any thing of that kind to his charge; I think, by this time, few will the less suspect him, because of his assurance; if either threats or solicitations can be proved upon him, the world will judge either of them indirect means;

(c) See them censured in Vaughan, fol. 227. 285. 401.

(d) Moor, a. fol. 790 to 805.

(e) Vid. his Censure. 4 Instit. fol. 336.

(f) 2 Inst. fol. 408. l. 1. c. 2. Si autem talia nunquam prius evenerint, et obscurum et difficile sit eorum iudicium, tunc ponantur iudicia in respectum usque ad Magnam Curiam. Vid. 1 E. 3. 7. b. 33 H. 6. 18. a. C'est un Act de Parlement et nos volumus estre bien avis devant que nous adnullamus aucun act fait en le Parlement, & peradventure le matter doit at-tender jusque ad prochein Parlement.

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and I am much misinformed, if both cannot be justly charged.

If after all, he can excuse himself without renouncing infallibility, Acc. p. 623, and making asseverations of keeping to the clear dictates of his conscience, I must say, judges in former ages have had hard luck, and been made examples to little purpose. King Alfred would lose the reputation of his justice, in hanging above thirty judges; (g) and parliaments have been very barbarous to proceed against others as traitors, who yet, either were so ingenious to confess their faults, or, at least, not so provoking as to justify them.

It is well known in story, (h) that six judges, and two of the king's counsel at law, suffered for treason, upon a parliamentary prosecution, 11 R. 2, for delivering their opinions, that they were to be punished as traitors who hindered the king from exercising his sovereignty and prerogative over a statute, and an ordinance and commission made in the foregoing parliament. (i) The substance of their crime lay in ascribing to the king a power to defeat the provisions of the parliament for the safety of the nation; and is a direct precedent, at which our judges ought to tremble. Nor can it avail them, that the express words of the statute 25 E. 3, c. 2, do not condemn them, since that act transmits common-law treasons to the judgment of parliament: and the statute 1 Mar. c. 1, leaves that power untouched. And who can doubt but such a resolution, and that justified in print, and published to the world, is an overt-act of treason, as it tends to the subverting the fundamental rights of parliaments: nor can they have any colour for asking, with the lord Strafford, where is the buoy? when they see so many shipwrecks to admonish them.

Nor ought sir Edward to wonder at a treason against the government, though not directly against the person of the king, his relatives, officers, or his coin; nor yet an actual levying of war within his kingdom, or adhering to his enemies; (k) for he may find among the articles against the lord Kimbolton, and others, exhibited anno 1641, by his father, then attorney general,

'That they have traitorously endeavoured to subvert the very rights and beings of parliaments.'

But since sir Edward pleads conscience for what he did, Acc. p. 623, and might have urged the authority of spiritual guides, who would make the scripture notion of higher powers a sufficient warrant for such a judgment; I shall conclude with the good queen Elizabeth's

(g) Vid. Mirrour, a. p. 296 to 300.

(h) Treaslyan, Bealknappe, v. vol. 1, p. 1.

(i) Knighton, f. 2726, 2727. ib. f. 2695. Regalian. Ib. f. 2694.

(k) Vid. Glanvil, p. 1, Crimen læsæ majestatis, ut de nece vel seditione personæ domini regis vel regni. Exact. Collect. ed. anno 1613, p. 35. V. Dugdale's Chron. Ser.

4 P

doctrine of the famous Bilson, afterwards bishop of Winchester. (l)

'By superior powers ordained of God, we understand not only princes, but all politic states and regiments; some where the people, some where the nobles have the same interest to the sword that princes have in their king-

doms; and in kingdoms where princes bear rule by the sword, we do not mean the prince's private will against his laws, but his precept derived from his laws, and agreeing with his laws.' (m)

(l) Bilson of Christian Subjection, p. 280.

(m) Glanvil, Prolog. Bracton, vol. 3, c. 9. Fleta, lib. 1, c. 17. Fortescue, c. 9. Mir. p. 9.

351. Proceedings against Dr. JOHN PEACHELL, Vice-Chancellor, and the University of Cambridge,* for not admitting Alban Francis, a Benedictine Monk, to the Degree of Master of Arts. April and May, 3 JAMES II. A. D. 1687.

ON the 9th day of February, being Ash-Wednesday, came a letter under his majesty's signet manual, dated the 7th of the same month; the substance whereof was, That

* See the case of Magdalen College, Oxford, this same year, *post*, and Gutch's Collectanea Curiosa. Of this Case, the Proceedings against Magdalen College, and other measures connected with them, Burnet writes as follows:

"The see of Oxford was given to Dr. Parker, who was a violent independent at the time of the restoration, with a high profession of piety in their way. But he soon changed, and struck into the highest form of the church of England; and wrote many books with a strain of contempt and fury against all the dissenters, that provoked them out of measure: of which an account was given in the history of the former reign. He had exalted the king's authority in matters of religion in so indecent a manner, that he condemned the ordinary form of saying the king was under God and Christ, as a crude and profane expression; saying, that though the king was indeed under God, yet he was not under Christ, but above him. Yet, not being preferred as he expected, he writ after that many books on design to raise the authority of the church to an independance on the civil power. There was an entertaining liveliness in all his books: but it was neither grave nor correct. He was a covetous and ambitious man; and seemed to have no other sense of religion but as a political interest, and a subject of party and faction. He seldom came to prayers, or to any exercises of devotion; and was so lifted up with pride, that he was become insufferable to all that came near him. These two men (Parker and Cartwright) were pitched on, as the fittest instruments that could be found among all the clergy, to betray and ruin the church. Some of the bishops brought to archbishop Sancroft articles against them, which they desired he would offer to the king in council, and pray that the mandate for consecrating them might be delayed, till time were given to examine particulars. And bishop

hearing much in commendation of one Alban Francis, a Benedictine, the king was pleased to command the University, that they should admit him to the degree of master of arts, with-

Lloyd told me, that Sancroft promised to him not to consecrate them, till he had examined the truth of the articles; of which some were too scandalous to be repeated. Yet when Sancroft saw what danger he might incur, if he were sued in a Premunire, he consented to consecrate them.

"The Deanery of Christ's-Church, the most important post in the University, was given to Massey, one of the new converts, though he had neither the gravity, the learning, nor the age that was suitable to such a dignity. But all was supplied by his early conversion: and it was set up for a maxim, to encourage all converts. He at first went to prayers in the chapel: But soon after he declared himself more openly. Not long after this the president of Magdalen College died. That is esteemed the richest foundation in England, perhaps in Europe: For though their certain rents are but about 4 or 5,000*l.* yet it is thought that the improved value of the estate belonging to it is about 40,000*l.* So it was no wonder that the priests studied to get this endowment into their hands.

"They had endeavoured to break in upon the University of Cambridge in a matter of less importance, but without success: and now they resolved to attack Oxford, by a strange fatality in their counsels. In all nations the privileges of colleges and universities are esteemed such sacred things, that few will venture to dispute those, much less to disturb them, when their title is good, and their possession is of a long continuance: for in these, not only the present body espouses the matter; but all who have been of it, even those that have only followed their study in it, think themselves bound in honour and gratitude to assist and support them. The priests began where they ought to have ended, when all other things were brought about to their mind. The

out administering to him any oath or oaths whatsoever, any law or statute to the contrary in any wise notwithstanding, with which his majesty was graciously pleased to dispense in

jesuits fancied, that, if they could get footing in the university, they would gain such a reputation by their methods of teaching youth, that they would carry them away from the university tutors, who were certainly too remiss. Some of the more moderate among them proposed, that the king should endow a new college in both universities, which needed not have cost above 2,000*l.* a year, and in these set his priests to work. But either the king stuck at the charge which this would put him to, or his priests thought it too mean and below his dignity not to lay his hand upon those great bodies: so rougher methods were resolved on. It was reckoned, that by frightening them they might be driven to compound the matter, and deliver up one or two colleges to them: and then, as the king said sometimes in the circle, they who taught best would be most followed.

“ They began with Cambridge upon a softer point, which yet would have made way for all the rest. The king sent his letter, or Mandamus, to order F. Francis, an ignorant benedictine monk, to be received a master of arts; once to open the way for letting them into the degrees of the University. The truth is, the king's letters were scarce ever refused in conferring degrees: and when ambassadors or foreign princes came to those places, they usually gave such degrees to those who belonged to them as were desired. The Morocco ambassador's secretary, that was a Mahometan, had that degree given him, but a great distinction was made between honorary degrees given to strangers, who intended not to live among them, and those given to such as intended to settle among them: for every master of arts having a vote in the convocation, they reckoned, that, if they gave this degree, they must give all that should be pretended to on the like authority: and they knew, all the king's priests would be let in upon them, which might occasion in present great distraction and contentions among them; and in time they might grow to be a majority in the convocation, which is their parliament. They refused the Mandamus with great unanimity, and with a firmness that the court had not expected from them. New and repeated orders, full of severe threatenings in case of disobedience, were sent to them: and this piece of raillery was every where set up, that a Papist was reckoned worse than a Mahometan, and that the king's letters were less considered than the ambassador from Morocco had been. Some feeble or false men of the university tried to compound the matter, by granting this degree to F. Francis, but enacting at the same time, that it should not be a precedent for the future for any other of the like nature. This was not given way to; for it was said, that in all such

the behalf of the said Alban Francis. On Monday the 21st, the vice-chancellor having summoned a congregation, read his majesty's letter, purporting as before, and superscribed

cases the obedience that was once paid would be a much stronger argument for continuing to do it, as oft as it should be desired, than any such proviso could be against it.

“ Upon this the vice-chancellor was summoned before the ecclesiastical commission to answer this contempt. He was a very honest, but a very weak man. He made a poor defence. And it was no small reflection on that great body, that their chief magistrate was so little able to assert their privileges, or to justify their proceedings. He was treated with great contempt by Jefferies. But he having acted only as the chief person of that body, all that was thought fit to be done against him was, to turn him out of his office. That was but an annual office, and of no profit: so this was a slight censure, chiefly when it was all that followed on such heavy threatenings. The university chose another vice-chancellor, who was a man of much spirit: and in his speech, which in course he made upon his being chosen, he promised, that, during his magistracy, neither religion, nor the rights of the body, should suffer by his means. The court did not think fit to insist more upon this matter; which was too plain a confession, either of their weakness in beginning such an ill grounded attempt, or of their feebleness in letting it fall, doing so little, after they had talked so much about it. And now all people began to see that they had taken wrong measures of the king, when they thought that it would be easy to engage him into bold things, before he could see into the ill consequences that might attend them, but that being once engaged he would resolve to go through with them at all adventures. When I knew him he seemed to have set up that for a maxim, that a king when he made a step was never to go back, nor to encourage faction and disobedience by yielding to it.

“ After this unsuccessful attempt upon Cambridge, another was made upon Oxford, that lasted longer and had greater effects; which I shall set all down together, though the conclusion of this affair ran far into the year after this that I now write of. The presidentship of Magdalen's was given by the election of the fellows. So the king sent a Mandamus, requiring them to choose one Farmer, an ignorant and vicious person, who had not one qualification that could recommend him to so high a post, besides that of changing his religion. Mandamus letters had no legal authority in them: but all the great preferments of the church being in the king's disposal, those who did pretend to favour, were not apt to refuse his recommendation, lest that should be afterwards remembered to their prejudice. But now, since it was visible in what channel favour was like to run, less regard was had to such a letter. The fellows of that house did

'To our trusty and well-beloved vice-chancellor of our University of Cambridge, to be communicated to the senate there;' on the reading whereof, the senate, who made the best ad-

upon this choose Dr. Hough, one of their body, who as he was in all respects a statutable man, so he was a worthy and a firm man, not apt to be threatened out of his right. They carried their election according to their statutes to the bishop of Winchester, their visitor; and he confirmed it. So that matter was legally settled. This was highly resented at court. It was said, that in case of a mandamus for an undeserving man, they ought to have represented the matter to the king, and staid till they had his pleasure: it was one of the chief services that the universities expected from their chancellors, which made them always choose men of great credit at court, that by their interest such letters might be either prevented or recalled. The duke of Ormond was now their chancellor; but he had little credit in the court; and was declining in his age, which made him retire into the country. It was much observed, that this university, that had asserted the king's prerogative in the highest strains of the most abject flattery possible, both in their addresses, and in a wild decree they had made but three years before this, in which they had laid together a set of such high flown maxims as must establish an uncontrollable tyranny, should be the first body of the nation that should feel the effects of it most sensibly. The cause was brought before the ecclesiastical commission. The fellows were first asked, why they had not chosen Farmer in obedience to the king's letter? And to that they answered, by offering a list of many just exceptions against him. The subject was fruitful, and the scandals he had given were very public. The court was ashamed of him, and insisted no more on him: but they said, that the house ought to have shewed more respect to the king's letter, than to have proceeded to an election in contempt of it.

"The ecclesiastical commission took upon them to declare Hough's election null, and to put the House under suspension. And, that the design of the court in this matter might be carried on without the load of recommending a Papist, Parker bishop of Oxford, was now recommended: and the fellows were commanded to proceed to a new election in his favour. They excused themselves, since they were bound by their oaths to maintain their statutes: and by these, an election being once made and confirmed, they could not proceed to a new choice, till the former was annulled in some court of law: church benefices and college preferments were freeholds, and could only be judged in a court of record: and, since the king was now talking so much of liberty of conscience, it was said, that the forcing men to act against their oaths, seemed not to agree with those professions. In opposition to this it was said, that the statutes of colleges had

vantage they could of the vice-chancellor's delay, in order to get advice, resolved to testify their common and almost unanimous sense of the thing, and in a matter of such consequence

been always considered, as things that depended entirely on the king's good pleasure; so that no oaths to observe them could bind them, when it was in opposition to the king's command.

"This did not satisfy the fellows: and, though the king, as he went through Oxford in his progress in the year 1687, sent for them and ordered them to go presently, and choose Parker for their president, in a strain of language ill suited to the majesty of a crowned head, (for he treated them with foul language pronounced in a very angry tone;) yet it had no effect on them. They insisted still on their oaths, though with a humility and submission, that they hoped would have mollified him. They continued thus firm. A subaltern commission was sent from the ecclesiastical commission to finish the matter. Bishop Cartwright was the head of this commission, as sir Charles Hedges was the king's advocate to manage the matter. Cartwright acted in so rough a manner, that it shewed, he was resolved to sacrifice all things to the king's pleasure. It was an afflicting thing, which seemed to have a peculiar character of indignity in it, that this first act of violence committed against the legal possessions of the church, was executed by one bishop, and done in favour of another.

"The new president was turned out. And, because he would not deliver the keys of his house, the doors were broken open: and Parker was put in possession. The fellows were required to make their submission, to ask pardon for what was past, and to accept of the bishop for their president. They still pleaded their oath: and were all turned out, except two that submitted. So that it was expected to see that House soon stocked with Papists. The nation, as well as the university, looked on all this proceeding with a just indignation. It was thought an open piece of robbery and burglary, when men, authorized by no legal commission, came and forcibly turned men out of their possession and freehold. This agreed ill with the professions that the king was still making, that he would maintain the Church of England as by law established: for this struck at the whole estate, and all the temporalities of the church. It did so inflame the church party and the clergy, that they sent over very pressing messages upon it to the prince of Orange, desiring that he would interpose, and espouse the concerns of the church; and that he would break upon it, if the king would not redress it. This I did not see in their letters. Those were of such importance, since the writing them might have been carried to high treason, that the prince did not think fit to shew them. But he often said, he was pressed by many of those, who were afterwards

and novel matter to interpose; accordingly there was a paper, it is commonly called a Grace, the original paper whereof I have seen, drawn up in order to be put to the vote of the House after the ordinary and usual way; but the constitution of that body being such, that this must then of necessity have been first proposed to what we call the Head, which consists of six persons, each of which has an arbitrary voice and power, upon dislike to stop any proceedings finally, and hinder it being put to the House at all; this method was laid aside as impracticable upon that occasion; because Mr. Basset, a declared Roman Catholic, and one that had openly asserted Mr. Francis's cause, happened to be one of the six who compose the Head for this year; it was therefore presumed, with great appearance of reason, that he would put a bar to the proceedings; so the Grace not being suffered to be offered to the House, the senate's sense could never have been fully and particularly known thereupon.

This consideration constrained them to the use of another course, which was, without the formality of a suffrage, voluntarily to testify their concurrence with the vice-chancellor, and advise him to forbear the admitting Mr. Francis till the king had been petitioned to revoke his mandate. As soon as the letter came to town, the vice-chancellor wrote a letter to the duke of Albemarle, our chancellor, to beg his intercession with the king, which he returned word was tried with none effect, but possibly such a body as the University concurring and signing a petition, if that could be admitted, might prove better and more successful. Now, perhaps, if every single man present, to the number perhaps of one hundred and fifty or two hundred, should address in person the vice-chancellor, this might look tumultuary, and it was thought the more quiet, decent, and respectful way to send up their sense by messengers from each house: to this purpose Dr. Suwolt, professor of casuistical divinity, was made choice of by the non-regents, and Mr. Norris, a fellow of Trinity-College, by the regents. The substance of what they delivered, was, That the House thought the admission of Mr. Francis without the usual oaths, illegal and unsafe, and for that reason advised the king might be petitioned, in the doing which they were ready to join and make it their act. The opinions were given freely to the two messengers of each house, and the thing was so unanimously approved of, that the only persons taking notice of it, were three

his bitterest enemies, to engage in their quarrel. When that was communicated to me, I was still of opinion, that, though this was indeed an act of despotical and arbitrary power, yet I did not think it struck at the whole: so that it was not in my opinion a lawful case of resistance: and I could not concur in a quarrel occasioned by such a single act, though the precedent set by it might go to every thing."

Papists, and one or two besides: afterwards there was a gentleman admitted doctor of physic, having first taken the oaths; and the esquire-beadles and registers were sent to let Mr. Francis know, that the senate were ready to admit him also, provided that he would swear as the law appointed; but he refused, insisting on the king's dispensation: and this was the business of the first meeting about this matter.

Immediately upon the congregation's breaking up, Mr. Francis took his horse for London, to represent at Whitehall what had been done; and the same afternoon the heads met in the consistory, to consult what letters should be sent, and to whom: they agreed upon one to the duke of Albemarle, and another to the earl of Sunderland, being the secretary of state, through whose hands the mandate passed: an esquire-beadle was dispatched presently to London, who after having waited on the duke of Albemarle, endeavoured several times to get access to the lord Sunderland, but could not; at last having sent his letter, the main whereof was a most humble submission to his majesty, with very solemn and unfeigned protestations, that what was now done, proceeded from no principle of disobedience and stubbornness, but a conscientious sense of our obligation to laws and oaths, and a respectful intimation that we were ready to petition the king that it might be admitted; but not daring to approach him without some significations that it would be acceptable, we applied ourselves to his lordship, desiring him to do the University the favour to mediate for them, &c. He was dismissed without any particular answer: within a few days came a second letter, dated February 24, which by reason of the assizes and some other public business intervening, was not read in the senate till Thursday, March the 11th: the university and the vice-chancellor in the mean time received a letter, wherein they found great satisfaction by the opinions of some eminent lawyers, who concurred in the approbation of what was already done, and for the future, could advise no better course than humbly to represent the case to his majesty, and entreat him not to think amiss of so loyal a body, always as the university has shewed herself to be. The second letter being read the day aforesaid, which was exactly the same as the former, excepting only the addition of a clause, to do it at our own peril; the Senate proceeded as before, to advise the vice-chancellor to some expedient form, representing the case fully and clearly to the king, as well with respect to the illegality of such admission, as the many ill consequences that were likely to ensue from it; this the Non-regent House did by Mr. Billers fellow of St. John's college (the public orator) and Mr. Newton, fellow of Trinity college (the mathematical professor); the Regent House by Mr. Henry Finch, son to the late lord chancellor, Mr. Burton of St. John's College, and Mr. William Bowles of King's College; all which was done

without the least hurry or irregularity, without so much as asking an opinion; but every man went and gave it quietly and of his own accord, so that no manner of inducement was put upon any one to declare himself in the business, but what proceeded merely from his own conscience, and a due sense of things. Another large letter being prepared for the duke of Albemarle, wherein was every thing that could be thought of to prevail with his majesty; and one likewise shorter and less particular to the earl of Sunderland: that very afternoon Mr. Braddock, fellow of Katharine hall, and Mr. Stanhope of King's College, were desired by the vice chancellor to go to London with these letters, and other instructions, to apply themselves to several persons of quality and character, that they would join forces, and think it a common cause; for so addressing to the king, the success would be more probable, and the honour done to the university the greater. Sunday, March the 13th, the two gentlemen waited on the duke of Albemarle their chancellor, who received them with all the goodness in the world, with assurance, that notwithstanding he had waited on the king before, and he knew his inclinations; nay, though he had been received with something of displeasure, yet considering the relation he bore us, he would make another attempt, and thought himself obliged to omit no endeavours for the university's safety and advantage. Monday the 14th in the evening, the duke of Albemarle waited on the king, and in the passage towards the bed chamber, took the two Cambridge gentlemen into the antichamber, that they might be introduced if occasion were: the king, on the duke of Albemarle's acquainting him with the affair, told him he had not then leisure to talk, but he commanded the letter which the vice chancellor sent to the duke of Albemarle, with which in his hands he passed through the rooms; and making that evening a visit to the queen dowager, gave the duke no further opportunity of knowing his pleasure at that time. At the duke's return from the inner room, the gentlemen desired him to give leave that they might use his name to procure an easy admittance to the earl of Sunderland; for they resolved to deliver their letter to no hands but his own, if that might be: the duke immediately sent his gentleman of the horse to one of the lord Sunderland's secretaries, making it his desire that Mr. Braddock and his companion might see the earl, who accordingly appointed them to attend next morning, and then conducted them to the earl of Sunderland's bed side, who took the letter, and after some further application to him by word of mouth, he promised to acquaint his majesty, and tell them his pleasure. On Thursday, at that time when Mr. Braddock and Mr. Stanhope came, the account they received was only this, That the king had seen the vice chancellor's letter, and was offended at the proceedings of the university, and would take care very shortly to give a further answer.

Saturday the ninth of April, Mr. Atterbury came down with a summons from the ecclesiastical commissioners to this effect: That whereas complaint to them was made against the vice chancellor and senate of Cambridge, for having refused to comply with his majesty's royal letters in behalf of Mr. Francis; they were therefore commanded to appear, the vice chancellor in person, the senate by themselves, and deputies before the lords commissioners, in the council chamber, the 21st of April, to answer to such things as shall be objected against them in his majesty's behalf upon the premises, &c. Monday, April the 11th, a senate was called, and persons nominated to represent the university, together with the vice-chancellor; all which being unanimously approved by the senate, they empowered them, by an instrument under the common seal, to answer in their behalf, and be their full actors, attorneys and proctors, as to what should arise from the commission upon the late summons. And Mr. Atterbury having received private instructions to stay, and cite every man that was chosen personally, he came accordingly into the senate house, and summoned as many as were present, waiting on the rest on a convenient time. The persons deputed by the senate to represent and act were these:

Dr. John Peachell, Vice Chancellor, master of Magdalen college.

Dr. John Eachard, Master of Katharine hall.

Dr. Humfrey Babington, Fellow of Trinity College.

Dr. Thomas Smout, Fellow of St. John's College, and Professor of Casuistical Divinity.

Dr. William Cook, Doctor of Civil Law, and Fellow of Jesus College.

Mr. John Billers, Fellow of St. John's College, and the Publick Orator.

Mr. Isaac Newton, fellow of Trinity College, and Mathematical Professor.

Mr. James Smith, Fellow of Queen's College.

Mr. George Stanhope, Fellow of King's College.

Thursday, April the 21st, 1687.

Council Chamber.—Commissioners Present.

L. Chancellor Jefferys.

L. President Sunderland.

L. Mulgrave.

Earl of Huntington.

L. Bishop of Durham.

L. Bishop of Rochester.

L. Ch. Justice Herbert.

L. Chanc. Is Mr. Vice Chancellor here? — Which is he?

He standeth over against the lord Chancellor, bowed and shewed himself.

L. Chanc. Is there any one come from the senate to attend him?

Mr. Stanhope. Yes, my lord, we are eight of us here deputed by the senate to answer what

shall be objected against them, according to your lordships summons.

The noise and crowd being great, Mr. Bridgman the Register was forced to repeat that again to the lord chancellor.

L. Chanc. Read the summons. [Which was done.]

L. Chanc. Now, Mr. Vice-Chancellor, what have you to say, why you did not obey his majesty's command, in behalf of the gentleman mentioned there?

Vice-Chanc. My lord, you enquire of me why I did not admit Mr. Francis, according to the king's letters?

Lord Chanc. Yes, that's the question I ask you.

Vice-Chanc. Is this the only question your lordship is pleased to ask me?

Lord Chanc. Nay, Mr. Vice-Chancellor, we will not capitulate in the very beginning: Pray answer the first, and then you shall know what we have to say more.

Vice-Chanc. It is but a little while since we met in town, and this is a question of great concern; I am not prepared to answer it on a sudden.

Lord Chanc. Why, Mr. Vice-Chancellor, my lords specified it in their summons what would be questioned, on purpose you should not come unprepared; but it may be Mr. Vice-Chancellor did not attend sufficiently to that part of the summons, therefore let it be read to him once more. [Which was done.]

Lord Chanc. Now, Sir, you hear it is for refusing to comply with the king's commands:

Vice-Chanc. My lords, I beg time to answer you. My lords, I am a plain man, not used to appear before such an honourable assembly, and if I should answer hastily, it may be I might speak something indecent or unsafe, which I should be afterwards sorry for; therefore I beg leave, my lords, to have time allowed us for giving in such answer, as may be both for our safety, and your lordships honour.

Lord Chanc. [smiling.] Why, Mr. Vice-Chancellor, as for your own safety, my lords are willing you should take all the care you can; but for what concerns our honour, do you not trouble yourself; we are able to consult that, without any interposition of your's.

Vice-Chanc. My lords, I beg your pardon if I have said any thing unbecoming; I mean only the honour that is due to your lordship's quality, my lord; and therefore being to answer before persons of quality, I beg leave to do it with counsel, and in writing.

Lord Chanc. Well, withdraw a little, and my lords will consider of your request.

Then all the company withdrew, and about three quarters of an hour after the Vice-Chancellor was sent for into the anti-chamber, where Mr. Bridgman told him, the lords commissioners had given him time till Wednesday next, till four in the afternoon, and leave to put his answer in writing, and with counsel, and by what counsel he would.

When the counsel had heard the commis-

sioners had granted it, they were something surprized, and loth to move in the thing without a rule of court; therefore on Friday morning Dr. Eachard and Mr. Stanhope went to Mr. Bridgman's office, to desire such an order, or at least a copy of what had been said to the Vice-Chancellor; but he told them he had no power to give either; only he repeated the words over again for the satisfaction of them and the counsel, which was the same the Vice-Chancellor had related from his mouth before.

Wednesday, April 27, 1687.

In the council-chamber.—Commissioners present as before.

About a quarter of an hour before the lords met, Mr. Bridgman came to the Vice-Chancellor, and desired to know of him, whether he gave his answer in writing only, or whether any counsel would appear to argue it? To which the Vice-Chancellor answered, That his Answer was drawing out in writing, and that he did not expect any counsel there that day. Mr. Bridgman replied, the lords had commanded him to ask these questions, and would expect to know so much before they began to proceed. When the delegates were called in, the lord chancellor said,

Lord Chanc. Mr. Vice-Chancellor, the last time you were here you desired time to put in your answer in writing: my lords have indulged you so far, now where is your answer?

Vice-Chanc. My lord here it is—

And gave it to Mr. Bridgman, who after a whisper put it round the table.

Lord Chanc. Read it.—[To Mr. Bridgman.]

The ANSWER of the University and Senate of Cambridge, to the Question, Why they did not admit Alban Francis to the degree of Master of Arts in the same University according to his Majesty's mandatory letters under his Signet manual? The Vice-Chancellor and Senate of Cambridge, for, and in behalf of themselves, and the said University say,

That by the statute made primo Eliz. and entitled, an act to restore to the crown the ancient jurisdiction over the state ecclesiastical and spiritual, and abolishing foreign power repugnant to the same; it is enacted, amongst other things, that every person that shall be promoted to any degree of learning in any University within this kingdom, before he shall receive or take any such degree, shall, before the Chancellor or Vice-Chancellor of the University, take the oath in the statute mentioned and appointed; purporting, that he doth thereby testify and declare in his conscience, that his majesty is the only supreme governor of this realm, as well in all spiritual and ecclesiastical things and causes, as temporal: that no foreign state or potentate hath, or ought to have, any jurisdiction, superiority or authority, ecclesiastical or spiritual, within this realm; and that

therefore he doth renounce and forsake all foreign jurisdiction and authority, and promise to bear faith and true allegiance to the king, his heirs and successors, and to his power assist and defend all jurisdictions and authorities granted, united or annexed to his majesty's imperial crown of England. That by the statute made quinto Eliz. entitled, an act for the assurance of the queen's royal prerogative over all the estates and subjects within her dominions, it is likewise enacted, That every person that shall be admitted to any degree of learning in any of the Universities, before he shall be allowed or suffered to take upon him such degree, shall take the aforementioned oath before such person or persons as shall have authority by common use, to admit him to such degrees.

That by the statute made by his majesty's royal grandfather, king James the first, in the third year of his reign, entitled, An Act for the better discovering and repressing of Popish recusants, another oath is commonly prescribed, the oath of obedience; by which oath is the person that takes it, among other things, enjoined to swear, that his majesty is lawful and rightful king of this realm, and all other his dominions and countries; and that the pope neither of himself, or by any other means, hath power or authority to depose his majesty, or dispose of him, his kingdoms or dominions; or to authorise any foreign prince to invade him or them, or to discharge his subjects from their obedience or allegiance to his majesty, or to give leave to bear arms against him; and that he, with true faith and allegiance to his majesty, will defend him to the utmost of his power. And afterwards, in the statute made in the ninth year of his majesty's said royal grandfather, entitled, An Act for administering the oath of allegiance, in it is enacted, that the said last mentioned oath shall be taken by the vice-chancellor and principals of houses in the university, in the convocation before the senior masters, and by every other person that shall be permitted or promoted to any degree in schools, before the vice-chancellor for the time being, in the congregation-house.

That the vice-chancellor, and every member of the senate, have taken the said oath, and the vice-chancellor and senate are entrusted to put them in execution in the said university.

That the vice-chancellor, by his oath of office, has also sworn duly to execute his office, according to the laws, and cannot admit to any degree without the senate.

That the said statutes were made for the preservation of doctrine and religion, professed by the church of England, and established by the laws of this realm, and of the prerogative and rightful power of his majesty; that upon the receipt of his majesty's royal letters mandatory, the same were by the vice-chancellor communicated to the senate; and in order to the admitting the said

Alban Francis to the degree of master of arts, the said oaths were offered to be administered to the said Alban Francis, if he would take the same; but he refused.

That the admitting him without the said oaths had been contrary to the said statutes, and a breach of the trust in the vice-chancellor and senate reposed, and a violation of their oaths; and therefore they could not admit him to the said degree of master of arts: and by humble application to his sacred majesty, did, and now again do, humbly desire your lordships to represent this their case to his majesty, that they may not lie under his majesty's displeasure upon any misapprehension thereof. But whether your lordships will, as a court, take cognizance of this matter, they humbly pray your lordship's consideration, since that the taking a degree of master of arts in the university, or the admitting and refusing to such a degree, is not any cause or matter ecclesiastical or spiritual, but of lay and temporal cognizance.

And they further offer to your lordships, that in the statute made in the sixteenth of the reign of his majesty's most royal father king Charles the first, entitled, An Act for repealing of the branch of a statute, primo Eliz. concerning commissioners for causes ecclesiastical; and whereby the said branch is repealed, it is enacted, "That no new court shall be erected, ordained, or appointed within this realm, which shall or may have like power, jurisdiction, or authority, as the high commission court then had, or pretended to have; but that all and every such commissions and grants, and all powers and authority granted, or pretended to be granted thereby, shall be void and of none effect, as in and by the said statutes more fully appears."

Which being read, my Lord Chancellor said, Is it signed?

Mr. Bridgman. Yes, my lord.

Lord Chanc. Read their names. _____

[Which was done.]

Lord Chanc. Well, have you any more to say?

Mr. Vice Chanc. No, my lord, not at this time.

Lord Chanc. Then withdraw.

All the company withdrew, and about an hour and a half after the court rose; and afterwards Mr. Bridgman desired to speak with the vice-chancellor and delegates in the council-chamber, to whom he said, That their lordships had commanded him to tell them, they put off all further consideration of this matter till Saturday come seven-night, and then they expected their attendance again. Mr. Vice-chancellor asked him, If counsel would be expected to plead on their answer? He replied, Their lordships had given him no commission to say any thing to that. So they all withdrew.

Saturday, May 27, 1637.

This day it was publicly discoursed through

the town, that the lords had received a new commission; and immediately lawyers were consulted, whether it were proper to urge that at this appearance. What could be gathered thereupon, was to this effect: That it were a good plea, if it could be well proved; for in receiving a new commission in the midst of process, especially if there be any alteration in it as to the extent of their power, would at least be a good pretence to begin the whole cause again, and gain time; but that it was by no means safe to alledge the thing, for a flying report is no evidence; and if that report were false, it might be a great prejudice to them and their cause.

Council Chamber.—Commissioners present as before.

Lord Chanc. Mr. Vice-chancellor, the last time you were here, you gave in a paper to my lords, signed by yourself, and several others coming from the university, which consists of several parts; but there is one thing I must crave leave of my lords to discourse you on, which concerns yourself. The lords took notice, that you alledge an oath: That oath, it seems, hindered you from obeying the king's mandate.—Pray what was the oath?

Vice Chanc. My lord, this is a new question which you were pleased not to put before, and I beg leave and time to answer it.

Lord Chanc. Why, Mr. Vice-chancellor, this requires no time. My lords, I tell you, took notice of an oath you pleaded for yourself, and now they desire to know what the oath is?

Vice Chanc. I beg I may not answer hastily, but that your lordships would let me know what questions you would ask me, and let me answer them in writing, and by counsel.

Lord Chanc. Why did you not consult counsel when you took your oath? I am really concerned for the university of Cambridge, whereof I myself was once a member, that the vice chancellor, who is the head, and the representative of so learned a body, should come here before the king's commissioners, and not be able to give an account of the oath by which he acted all this time, but desires counsel and time to tell what the oath is.

Dr. Cook. My lord, if your lordship pleases, I think I remember the words of the oath.

Lord Chanc. Nay, good doctor, how came you, who never were vice-chancellor, and so never took this oath, to know it better than one that is vice chancellor, and hath taken it?

Vice Chanc. I cannot call to mind the very words of the oath, but the substance of it is this, That I should well and faithfully, *prestare, or administrare munus, or officium procellarii.*

Lord Chanc. Ay, *munus, or officium*: Well, what then?

Vice Chanc. And, my lord, this office I take to be stated by the statutes of the university, and the laws of the land.

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Lord Chanc. Well, and how long has this been the vice-chancellor's oath?

Vice-Chanc. Indeed, my lord, I am not able to tell you exactly.

Lord Chanc. How long do you think? I will not tie you to any time.

Vice-Chanc. Ever since I knew what belonged to it; ever since I was head of a college.

Lord Chanc. How long have you been head of a college?

Vice-Chanc. Six or seven years, my lord.

Lord Chanc. Have not other Vice-chancellors admitted to degrees without oaths, who have taken the obligatory oath as you have done?

Vice Chanc. Indeed, my lord, I cannot tell; I cannot remember every particular thing that has been done.

Lord Chanc. Well, because we will keep close to the question, don't you remember any Master of Arts made without oaths?

Dr. Cook. Not under the quality of an university nobleman, my lord.

Lord Chanc. Nay, good Doctor, you never were Vice-chancellor yet; when you are, we may consider you.

Vice Chanc. The answer to your question will depend upon our University book and records; and if you will allow us time to consult them, we can give your lordship an account.

Lord Chanc. Nay, look you, Mr. Vice-Chancellor, you have given in an answer in writing already, and because there is something in that my lords would be further satisfied in, they have left it to me to ask you some questions. I ask you, therefore, if you remember any master of arts who hath been admitted heretofore without these oaths?

Vice Chanc. I cannot say, I remember any, my lord.

Lord Chanc. Did you never hear of one Dr. Lightfoot?

Vice Chanc. I think, my lord, I have heard of such a one.

Dr. Cook. My lord, I beg leave to speak a few words.

Lord Chanc. Well, Doctor, what is it you have to say?

Dr. Cook. My lord, Dr. Lightfoot did subscribe.

Lord Chanc. What subscription do you mean?

Dr. Cook. To the 39 articles; and the first of them is the king's supremacy.

Lord Chanc. Is subscribing swearing, doctor? But Mr. Vice-Chancellor, how many have you admitted by mandate?

Vice Chanc. Never but one, my lord, and he took the oaths.

Lord Chanc. Do you never admit without oaths them who have such particular letters patent from the king?

Mr. Stanhope. Never, my lord.

And as for Dr. Lightfoot, they were aware before of this particular person's being objected, and therefore had provided an answer to it.

Mr. Stanhope undertook it, because the books and university papers had been committed to his inspection and care. In answer, had he been permitted to speak, he had this to offer, That the register of subscribers was then in court, and had a paper ready in his hands to be produced, where Dr. Lightfoot subscribed with his own hands to the 39 articles, the first whereof is the king's supremacy; and that he could not refuse the oath upon a principle, because the same must have hindered his subscription. And as a farther proof, he did offer, they were ready to swear this, That two gentlemen, Roman Catholics, servants to the queen-dowager, did by virtue of the same Letters from the King, at the time of his coming to Cambridge, desire their Master of Arts Degree. Their names were Perara and Stephens. These gentlemen were proposed and granted, but upon refusal to swear, were not admitted. Of this they could have produced, First, A testimony upon oath of a gentleman then in court; and besides that, the university papers and graces, which shew these gentlemen's names, among the persons passed in the House, but wanting in the list of subscribers and commencers. After which they would have referred it to the court, whether it was probable that the University should admit one of the queen's servants without oaths, and yet refuse two more who had the same title every way, because they would not take the oaths? But the lord chancellor would not hear him.

Lord Chanc. Nay, look you now, that young gentleman expects to be vice-chancellor too; when you are, Sir, you may speak, but till then it will become you to forbear. Mr. Vice-Chancellor, when was it, pray, that you received the king's letters? the first I mean.

Vice-Chanc. I do not perfectly remember, my lord; I cannot call to mind the day of the month.

Lord Chanc. When were they dated, do you know? [To Mr. Bridgman, my lord pausing.]

Vice-Chanc. My lord, I remember it was Ash-Wednesday.

Lord Chanc. And when was it these letters were published in the Senate?

Vice-Chanc. It was the seven-night after, my lord.

Lord Chanc. What is the meaning of the delay, Mr. Vice-Chancellor? The king's business used to have a quicker dispatch.

Vice-Chanc. It was a novel thing, and I was willing to give myself and others time to consider on it.

Lord Chanc. But when you had read the letters, why was not the gentleman admitted?

Vice-Chanc. My lord, the senate sent to me, to desire me, that I would forbear admitting Mr. Francis, till I had petitioned the king to revoke the mandate.

Lord Chanc. Why, does the king's mandate use to be disputed? Did you ever see a mandate voted in the House, whether it should be obeyed or not?

Vice Chanc. No, my lord, usually they are not; but the House sent to me to forbear, for they have not had any of this nature before.

Lord-Chanc. Did you ever know any mandates of the king's refused by the University before?

Vice Chanc. (After some pause)—Yes, my lord, several.

Lord Chanc. Pray, give us one instance.

Vice Chanc. My lord, one Tatnell.

Lord Chanc. When, pray? how long was that ago?

Vice Chanc. I cannot recollect just the time, but it was in his late majesty's reign; I believe, about fourteen or sixteen years ago.

Lord Chanc. How was that?

Vice Chanc. My lord, the mandate was given to one Tatnell, a non-conformist minister, and he refused to subscribe and take the oaths; whereupon, my lord, the university petitioned the king, and represented the matter to him, and the king was pleased to recal his mandate.

Lord Chanc. Mr. Vice Chancellor, had not you a mandate for another gentleman at the same time with this, which you refused?

Vice Chanc. Yes, my lord, it was to make a gentleman doctor of physic.

Lord Chanc. And he was admitted upon it, was he not?—*Vice Chanc.* Yes, my lord.

Lord Chanc. Did the senate vote his mandate?—*Vice Chanc.* No, my lord, they did not.

Lord Chanc. Why should they interpose in the one, and not in the other?

Vice Chanc. That had no dispensation, my lord, for the oath in it.

Lord Chanc. But however, if they did not vote it, nor do any others of the king's letters, how do you know their consent?

Vice Chanc. My lord, it is presumed upon their being silent, and offering nothing to the contrary.

Lord Chanc. Ay, we have a proverb, Mr. Vice Chancellor, silence gives consent; but it seems he was admitted immediately, was he not, before you could know whether they consented to it or no?

Vice Chanc. No, my lord, he was not admitted till the house desired me to forbear in Mr. Francis's case.

Lord Chanc. But, as to this business of the senate, desiring you (my lords) I hope you will indulge me to speak a little of that; for having been formerly a member of that university myself, I think I have some small remembrance of the manner of the proceedings there: pray, Mr. Vice Chancellor, how was it that you knew their minds in this business?

Vice Chanc. My lord, the House sent up their opinions.

Lord Chanc. How, pray! By whom!

Vice Chanc. The Non-Regents by Dr. Smoult the first day; and Mr. Billers the orator, and Mr. Newton the mathematical professor, my lord, the second day.

Lord Chanc. By whom do you say the first day?

Vice Chanc. By Dr. Smoult, my lord, from

the Non-Regent House, and Mr. Norris from the Regent House.

Lord Chanc. Well: what said these two to you?

Vice Chanc. My lord, I do not know the very words, but it was to this effect, that I should forbear admitting Mr. Francis till the king was petitioned.

Lord Chanc. Is that Dr. Smoult in court?

Vice Chanc. Yes, my lord, he is here—

[Then he shewed himself.]

Lord Chanc. Come, Sir, what was it, I pray you, that you told the Vice Chancellor?

Dr. Smoult. I have forgot, my lord, the words, but it was to the same purpose the Vice Chancellor told you just now, that the House desired me to acquaint him they were petitioning, that the mandate might be recalled.

Lord Chanc. And pray, Sir, who are you, that you should be thought fit to represent a whole House? Why should they choose you rather than any body else?

Dr. Smoult. My lord, I suppose because I was one of the seniors.

Lord Chanc. One of the seniors! If you come to that, why was not the very senior chosen?

Dr. Smoult. I cannot tell, my lord, they came to me.

Vice Chanc. My lord, he is one of our professors.

Lord Chanc. Nay, when I ask you questions, they prompt you, and now you prompt them; but I must tell you, Mr. Vice Chancellor, you ought to take an account of what is done in the House yourself, and not from others.

Vice Chanc. My place is at a great distance from the Non-Regent House, and I could not see what was done there.

Lord Chanc. But should you take the sense of a whole house from one man?

Vice Chanc. He came and told me, my lord, the house was of that opinion, and I thought I had no reason to question what he said.

Lord Chanc. How loud did he speak when he told you this?

Vice Chanc. Pretty loud, my lord.

Lord Chanc. Was it so loud, that all the house might hear it?

Vice Chanc. No, my lord.

Lord Chanc. Did you send afterwards to enquire whether he had told you their opinions true or not?

Vice Chanc. No, my lord, I confess I did not.

Lord Chanc. But how came this new way of giving opinions, are not the proctors usually the men that bring the sense of the House to the Vice Chancellor?

Vice Chanc. Not the Non-Regent, my lord, they are not admitted into that House, nor have at all to do there.

Lord Chanc. Have you any thing else to offer to my lords?

Dr. Cook. My lord, if the answer that we gave in the last day be not satisfactory, we

desire to have time allowed us to make a farther defence, and do it with counsel.

Lord Chanc. Have you nothing to say besides?—*Dr. Cook.* No, my lord.

Lord Chanc. Nor you gentlemen?—then withdraw.

After the Vice Chancellor, and three or four of the Delegates were gone off, and the crowd was retiring, Mr. Billers, being a person engaged in carrying up the sense of the House, would have informed the court (who seemed under a mistake) more particularly of the senate's proceedings; and how it came to pass that the usual way of suffrages was impracticable at that time.

Mr. Billers. My lords, I beg leave to speak one word.

Lord Chanc. Who are you?

Mr. Billers. My name is Billers, my lord.

Mr. Bridgman. My lord, he is one of the gentlemen that signed the paper in which was the answer.

Mr. Billers. I am one of the persons, my lord, that signed the paper in which was the answer.

Lord Chanc. Nay, hold Mr. Billers, give me leave to compare your memory with Mr. Vice Chancellor's a little; Mr. Vice Chancellor tells me, Mr. Billers and Dr. Smoult went up both of a day; then comes Mr. Billers, and says, that Dr. Smoult and he went up two several days.

Mr. Billers. My lord, I could not possibly go up from the House; I do not belong to the Regent-House.

Lord Chanc. Indeed he said so, Sir; indeed he did, my lords—Did he not? [To Mr. Bridgman.]

Mr. Bridgman. Yes, my lord.

Mr. Stanhope, behind the bishop of Rochester. My lord, under favour, my lord chancellor is mistaken; the person Mr. Vice Chancellor told your lordship went up from the Regent-house the same day with Dr. Smoult, was Mr. Norris.

Bishop of Rochester. My lord, I think your lordship forgets; it was Mr. Norris that went up from the house the same day with Dr. Smoult.

Lord Chanc. Well, Sir, was this that you would say?

Mr. Billers. I was only just acquainting your lordship what was done, and there was no other way—

The thing Mr. Billers intended to urge, was, that the usual way of suffrage could not be practised at that time; so the other was taken.

Earl of Sunderland. We heard that before.

Lord Chanc. Ay, Sir, we took both what was done, and what was not done; therefore withdraw.

Then all the company retired, and after an hour and a half's attendance, they were called in again, and the lord chancellor pronounced

the sentence upon Mr. Vice-Chancellor in the following manner.

Lord Chanc. Mr. Vice-Chancellor, the Lords have commanded me to tell you, that they have taken some time to consider your answer, and are at last come to a resolution upon it: my business is to tell you what the resolution is, Mr. Vice-Chancellor. My lords consider you have been guilty of an act of great disobedience to the king's commands, and other crimes and contempts, and such, that now you appear before us, you have little to say in excuse of it; therefore as a mark of his majesty's and their lordships' displeasure, they have thought fit to appoint, that you be henceforth deprived of the office of vice-chancellor of Cambridge. They likewise order, that you do not presume, at any time hereafter, to meddle with any of the public business of the university. Likewise, Mr. Vice-Chancellor, their lordships consider you have a headship of a college; and because the example of so ill a man may be a pernicious consequence to all under your government, they have likewise thought fit that you be deprived of it, during his majesty's pleasure: but because they have a tenderness for the college, for which all along you have shewed little regard, my lords are pleased to appoint, that the revenues of your headship shall go to the benefit of the society. This is their lordships' pleasure, and to this they require your obedience. There are likewise some other gentlemen that have signed a paper here, but my lords expect their attendance when they sit next, which will be on Thursday next; then we shall take them into consideration.

On Monday, Dr. Peachell wrote by an esquire headle, who attended him, to desire a copy of the sentence; but answer was returned, the sentence as yet was not committed to writing, but verbal only, and so he could not have a copy; but he repeated the heads only with this alteration, that he was suspended his mastership, and not deprived; which was an error in the lord chancellor's delivering it.

The beginning of the next week was employed in making enquiries after the new commission; the hanaper six clerks, and the riding six clerks office knew nothing of it, nor any court of record could be directed to. Mr. Bridgman did own there was such a thing, but did not instruct them how to come to the sight of it. Those that spoke best of the commissioners, urged the removal of the lord chief justice of the king's bench to the common plea, as a thing that made a new commission necessary for rectifying his title: but a gentleman, who pretended to have read it, gave them private intimations that there were very large alterations, and very considerable alterations in it at my lord chancellor's own house. The servants brought word, that my lord would speak with the person himself that desired to see it, and appointed him a time; the solicitor went at the hour, but did not gain access to my

lord, and so they could not see it at all, for it was Wednesday night, or Thursday morning.

Thursday, May 12th, 1688.

Council Chamber. Commissioners present as before. The Delegates appear with Dr. Peachell.

Lord Chanc. The last time you appeared here before us, my lords thought fit to set a mark of their just displeasure upon the vice-chancellor. Gentlemen, you cannot but be sensible, and so must all the world, how pernicious and obstinate the university has shewn themselves in refusing the king's commands, and such commands, I must tell you, that ought to be obeyed.

There was a time you may remember instances, if you do not, I'll turn you to one in the year 1667, when the letters were so far from being disputed, that they passed for a law among you, and do this day stand recorded among the solemn acts, and public statutes of the university. Gentlemen, my lords consider there is a difference between the vice-chancellor's case and yours, and therefore did not conclude you, who represent the senate, with him, but have required your attendance at this time: they impute the miscarriage of the body to the head disease chiefly; though neither are you without fault, for being so much as uneasy under the king's commands. Gentlemen, I must tell you, my lords understand very well the sly insinuations in your paper, and have commanded me to tell you, that they know upon what grounds they go, though they do not think fit to descend to particulars: they know too how far that authority extends, not only to you of the university, but to the societies within this kingdom. Gentlemen, your best course will be by a ready obedience to his majesty's command for the future, and by giving a good example to others, to make amends for the ill example that has been given you. Therefore I shall say to you what the scripture says, and rather because most of you are divines; Go your way, and sin no more, lest a worse thing come unto you.

[The late king's letters, mentioned by my lord chancellor, anno 1667, concern the regulating some of the public exercises in the university; the meaning whereof is this: The king is their visitor, and whenever there is any thing belonging to the local statutes and customs which they think ought to be altered, or any abuse which should be rectified and redressed, their way is to beg the king's royal injunction in the case, which they keep upon record, and obey as a statute. How good an argument is this against them, for not obeying a private mandate, contrary to four known laws of the land; and how parallel the case, is easy discerned.]

As they were drawing off, he called them again, and said,

Lord Chanc. Hold, gentlemen, I know

something more to say to you. My lords require, as a testimony of your obedience, that you, who represent the senate, should take care they have the university statutes brought to lie before them here.

Dr. Cook. My lord, we do no longer represent the senate; our delegation is determined with the Vice Chancellor's deprivation, my lord.

Lord Chanc. Well, if your commission be expired, we will give you a new one; we are able to give you a commission: We suppose you had sufficient authority for appearing here.

Dr. Cook. Does your lordship expect that we should attend with the statutes ourselves?

Lord Chanc. No, no, send them up by a proper officer: You are only to carry a message from us to the senate, and tell them what we expect.

Dr. Eachard. In what time does your lordship expect them?

Lord Chanc. In a convenient time; we will not tie you up; but if you be tardy, my lords will take care to quicken you by an intimation; I mean only a copy, not original statutes. You are now discharged from any farther attendance here.

The delegates, upon the Vice Chancellor's deprivation, being no longer capable of acting as public persons, and consequently of deriving any ill consequence upon the body they have represented, thought they might venture their own persons more boldly: Therefore, in order to satisfy the world, they were mighty desirous to bring about a second hearing of the same points, which, before the Vice Chancellor's sentence, they were not suffered to speak to, and which, when the Vice Chancellor was asking, they had not an opportunity of answering so very particular as they could have wished, confining themselves to such questions, all the while, as did not concern the Vice Chancellor solely and personally, but affected the whole senate jointly with him: Which order they had likewise observed in interposing at the trial. This answer they had ready to offer in writing, if that could be admitted; but if not, resolved to argue it by word of mouth: The substance of it may be reduced to two heads:

First. The business of admitting others, and particularly Dr. Lightfoot, without oaths. As to Lightfoot's case, what they intended to have urged in court, you have seen already; but as to others,

1. 'That Peers are by the very act of parliament 5 Eliz. exempted from the oath.

2. 'That all such as the University calls 'noblemen, have time out of mind enjoyed the 'privilege of Peers.

3. 'That under that quality they never admit any without oaths.

4. 'That if at any time, upon the entertaining of a prince, or any such solemnity, any one has slipped out in the crowd, which they are not conscious of, this is to be imputed to 'hurry and inadvertency, and cannot be par-

ralled to this case, where the senate acted with leisure and deliberation.

5. 'That even these degrees, given to noblemen and strangers, are honorary and complimentary, and so different from what the statute calls degrees of learning, and men use, exercise and make a gain of their profession.

6. 'That supposing never so many to be admitted without oaths, this they acknowledged to be irregular, and the breach of a law in one can be no precedent for another to follow.

7. 'That however, they are very fully and particularly assured, no man was ever admitted, who positively refused the oaths, which this Mr. Francis did.

1. 'That every man who is a member of that, or any other senate, hath such a right to propose, debate, and advise, as occasion shall require, and protest against any irregular proceedings in it.

2. 'That in a matter contrary to the laws, and so highly concerning their University and religion, as the opening such a gap for the men of any persuasion to become members of their body and senate (which every resident Master of Art is), it had been the greatest infidelity and negligence to have sat still.

3. 'That their suffrage not being asked by the common way, ought not to have been a bar, because every man in his matriculation oath, obligeth himself to be assisting to the Chancellor and Vice Chancellor, and to defend the state, honour, and dignity of the University, according to his power and capacity; and this to do 'Suffragio et Concilio, 'rogatus et non rogatus.'

4. 'That representing the whole Houses opinions by a few, is a practice common to all numerous congregations, and usual in this, for any single man, voluntarily to go and address the Vice Chancellor in behalf of his whole college, or otherwise.

5. 'That the late king commanded, by his royal letters, that all address to the Vice Chancellor should be made in the most quiet, decent, and respectful manner: And this way was thought more conformable to that command, than the hurry of every man applying himself personally.

6. 'To give the better reputation to the thing, and make it unexceptionable, the persons sent from the senate to the Vice Chancellor, were all men either of public character in the body, or the seniors of their Houses, or some way eminently known in the University; but they being admitted, as you have seen, on Thursday, there was no opportunity at all of offering a dispute.'

Animadversions on Wednesday, April 27.

This day the plea was given in, and the only thing new to be remarked, is, the usual way of demurring to the court's jurisdiction, which is commonly either the only, or first plea, in such cases: But the delegates looked

upon themselves as obliged not only to defend their cause, but to satisfy the world; therefore they were desirous that all people should be satisfied upon what reasons they acted; and to this purpose they first insisted upon them, which they did not at all doubt but it would be patiently heard; whereas, if the court's jurisdiction had come first, that would, in all probability, have occasioned the whole plea to be stifled and over-ruled.

Saturday, May 14, 1687.

Mr. Atterbury came to Cambridge, with two orders under the commissioners seal; one to the proctors to proceed in the choice of a new Vice Chancellor, and the other to Magdalen-college fellows: To each of which was annexed a copy of the sentence to be fixed upon the school doors, and Magdalen college gates: And on Thursday, May 17th, Dr. Balderson, master of Emanuel college, succeeded in the office of Vice Chancellor.

A Copy of Dr. PEACHELL'S SENTENCE, as it was fixed on the Public School Doors, and Magdalen College Gates.

By his Majesty's Commissioners for Ecclesiastical Causes, and the Visitation of the University, and of every Collegiate and Cathedral Churches, Colleges, Grammar Schools, Hospitals, and other the like Incorporations, or Foundations, or Societies.

• Whereas John Peachell, Doctor of Divi-

• nity, Vice Chancellor of Cambridge, master
• of Magdalen college, in the said University,
• has been convened before us, for his disobe-
• dience to his majesty's royal letters manda-
• tory, and other his contempts; and the said
• Dr. John Peachell having been fully heard
• thereupon, we have thought fit, after mature
• consideration of the matter, to declare, de-
• cree and pronounce: That the said Dr. John
• Peachell shall, for the said disobedience and
• contempts, be deprived from being Vice
• Chancellor of the said University, and from
• all power of acting in the same: And also,
• that he be suspended 'ab Officio et Beneficio'
• of his Mastership of the said college, during
• his majesty's pleasure; and accordingly we
• do by these presents deprive him, the said Dr.
• John Peachell, from being Vice Chancellor
• of the said University, and from all power of
• acting in the same. And we also suspend
• him 'ab Officio et Beneficio' of his master-
• ship of the said college, peremptorily admo-
• nishing and requiring him hereby, to abstain
• from the function of master of the said col-
• lege, during the said suspension, under pain
• of deprivation from his mastership. And we
• also farther order and decree, that the profits
• and perquisites belonging to his said master-
• ship, shall, during the same suspension, be
• applied to the use and benefit of the said col-
• lege.

• Given under our seal, May 7, 1687.'

352. The Proceedings against Mr. SAMUEL JOHNSON,* who was tried at the King's Bench Bar, Westminster, for High Misdemeanors (and found guilty of writing and publishing two seditious and scandalous Libels against the Government):

2 JAMES II. A. D. 1686.

SAMUEL JOHNSON having been arraigned upon an Information for high misdemeanours, in writing, printing and publishing two scandalous and seditious libels, &c. and thereto pleading not guilty, was, by a rule of court, brought again to the court of King's-Bench, Westminster, on Munday, June the 21st, in order to take his trial: when a jury of knights

* I find the following passages concerning this Case in Narcissus Luttrell's 'Brief Historical Relation, &c.' in the Library of All Souls' College, Oxford:

"Nov. 16, 1686. Samuel Johnson, Clerk, convicted upon an information of writing and publishing two libels, was this day brought to the Court of King's-Bench, where he offered something in arrest of judgment? but the Court over-ruled it, and the Chief Justice told him he blasphemously wrested scripture; so the Court pronounced judgment on him, to stand thrice in the pillory, pay a fine of 500

and gentlemen of the county of Surrey being sworn, the Information was read; the substance of which was, That he, the prisoner, had, in the parish of St. George's, Southwark, on the 25th of May, in the second year of his majesty's reign, maliciously and designedly published two pernicious, scandalous and seditious libels, to raise and stir up sedition and

marks, and to be whipped from Newgate to Tyburn.

"Feb. 1690. The bishop of Durham having been one of the Commissioners that degraded Mr. Samuel Johnson, author of Julian, out of a sense of that action and the barbarity thereof, by consequence and his punishment, has made him a present of 200*l.* promised to allow him 100*l.* per ann. for three years, and to give him a good living that shall first fall."

See, too, 3 Kennett, p. 450, 2d edit. 1 Ralph, 926, 927.

rebellion in his majesty's liege subjects, &c. The title of one being, 'An Humble and 'Hearty Address to all the English Protestants 'in this present Army.' Which is as follows :

An Humble and Hearty ADDRESS to all the English Protestants in this present Army.

Gentlemen; Next to the duty which we owe to God, which ought to be the principal care of men, of your profession especially, because you carry your lives in your hands, and often look death in the face: the second thing that deserves your consideration, is the service of your native country, wherein you drew your first breath, and breathed a free English air. Now I would desire you to consider, how well you comply with these two main points, by engaging in this present service.

Is it in the name of God, and for his service, that you have joined yourselves with Papists; who will indeed fight for the mass-book, but burn the bible: and who seek to extirpate the Protestant religion with your swords, because they cannot do it with their own? And will you be aiding and assisting to set up mass-houses, to erect that Popish kingdom of darkness and desolation amongst us, and to train up all our children in Popery? How can you do these things, and yet call yourselves Protestants?

And then what service can be done your country by being under the command of French and Irish papists, and by bringing the nation under a foreign yoke? Will you help them to make forcible entry into the houses of your countrymen, under the name of quartering, directly contrary to Magna Charta, and the Petition of Right? Will you be aiding and assisting to all the murders and outrages which they shall commit by their void commissions? Which were declared illegal, and sufficiently blasted by both Houses of Parliament (if there had been any need of it), for it was very well known before, that a Papist cannot have a commission, but by the law is utterly disabled and disarmed. Will you exchange your birth-right of English laws and liberties, for martial, or club-law; and help to destroy all others, only to be eaten last yourselves? If I know you well, as you are Englishmen, you hate and scorn these things. And therefore be not unequally yoked with idolatrous and bloody Papists: 'be valiant for 'the truth, and shew yourselves men.

The same considerations are likewise humbly offered to all the English seamen, who have been the bulwark of this nation against Popery and slavery, ever since eighty-eight.*

* In the 2nd volume of State Tracts, &c. which was published in 1692, is inserted after this Address, the following article:

SEVERAL REASONS FOR THE ESTABLISHMENT OF A STANDING ARMY, AND DISSOLVING THE MILITIA. BY MR. S. JOHNSON.

" 1. Because the lords lieutenants, deputy

And the other, viz. 'The opinion is this, that 'resistance may be used, in case our religion 'and rights should be invaded:' "Tending to

lieutenants, and the whole militia, that is to say, the lords, gentlemen, and freeholders of England, are not fit to be trusted with their own laws, lives, liberties, and estates, and therefore ought to have guardians and keepers assigned to them.

" 2. Because mercenary soldiers, who fight for 12 pence a day, will fight better, as having more to lose than either the nobility or gentry.

" 3. Because there are no Irish Papists in the militia, who are certainly the best soldiers in the world, for they have slain men, women, and children, by hundreds of thousands at once.

" 4. Because the dragoons have made more converts than all the bishops and clergy of France.

" 5. The parliament ought to establish one standing army at the least, because indeed there will be need of two, that one of them may defend the people from the other.

" 6. Because it is a thousand pities that a brave Popish army should be a riot.

" 7. Unless it be established by act of parliament, the justices of peace will be forced to suppress it in their own defence; for they will be loth to forfeit 100*l.* every day they rise, out of compliment to a Popish rout. 13 H. 4, c. 7. 2 H. 5, c. 8.

" Because a Popish army is a nullity. For all Papists are utterly disabled (and punishable besides) from bearing any office in camp, troop, band; or company of soldiers, and are so far disarmed by law, that they cannot wear a sword, so much as in their defence, without the allowance of four justices of the peace of the county: And then upon a march they will be perfectly enchanted, for they are not able to stir above five miles from their own dwelling house. 3 Jac. 5 sect. 8. 27, 28, 29. 35 Eliz. 2, 3 Jac. 5. sect. 7.

" 9. Because persons utterly disabled by law are utterly unauthorised; and therefore the void commissions of killing and slaying in the hands of Papists, can only enable them to massacre and murder."

In the same Collection (and in others) I find the following article ascribed to Mr. Samuel Johnson. But whether the opinion mentioned in the next paragraph of the text be extracted from this or from some other of Johnson's writings I know not. I do not possess his works.

" CHAP. I.—Of Magistracy.

" 1. Relation is nothing else but that state of mutual respect and reverence, which one thing or person has to another.

" 2. Such are the relations of father and son, husband and wife, master and servant, magistrate and subject.

" 3. The relation of father, husband and master, are really distinct and different; that is, one of them is not the other; for he may be any one of these, who is none of the rest.

"withdraw them from their duty and allegiance, and to excite and stir up the soldiers, &c. to mutiny and rebellion, &c." After this, the information was, by the king's

"4. This distinction proceeds from the different reasons, upon which these relations are founded.

"5. The reason or foundation, from whence arises the relation of a father, is from having begotten his son, who may as properly call every old man he meets his father, as any other person whatsoever, excepting him only who begat him.

"6. The relation of an husband and wife is founded in wedlock, whereby they mutually consent to become one flesh.

"7. The relation of a master is founded in that right and title which he has to the possession, or service, of his slave or servant.

"8. In these relations, the name of father, husband, and master, imply sovereignty and superiority, which varies notwithstanding, and is more or less absolute according to the foundation of these several relations.

"9. The superiority of a father is founded in that power, priority and dignity of nature, which a cause hath over its effect.

"10. The distance is not so great in wedlock, but the superiority of the husband over the wife, is like that of the right hand over the left in the same body.

"11. The superiority of a master, is an absolute dominion over his slave, a limited and conditionate command over his servant.

"12. The titles of *Pater Patrie*, and *Sponsus Regni*, father of the country, and husband of the realm, are metaphors and improper speeches: For no prince ever begat a whole country of subjects; nor can a kingdom more properly be said to be married, than the city of Venice is to the Adriatique Gulph.

"13. And to shew further, that magistracy is not paternal authority, nor monarchy founded in fatherhood; it is undeniably plain, that a son may be the natural sovereign lord of his own father, as Henry 2d had been of Jeffrey Plantagenet, if he had been an Englishman; which, they say, Henry 7 did not love to think of, when his sons grew up to years. And this case alone is an eternal confutation of the patriarchate.

"14. Neither is magistracy a martial power, for the husband may be the obedient subject of his own wife, as Philip was of queen Mary.

"15. Nor is it that dominion which a master has over his slave, for then a prince might lawfully sell all his subjects, like so many head of cattle, and make money of his whole stock whenever he pleases, as a patron of Algiers does.

"16. Neither is the relation of prince and subject the same with that of a master and hired servant, for he does not hire them, but, as St. Paul saith, 'They pay him tribute,' in consideration of his continual attendance and employment for the public good.

counsel, opened to the jury, as to the nature and circumstances, together with the evil consequences that might attend such bold and dangerous attempts: which being rendered

"17. That public office and employment is the foundation of the relation of king and subject, as many other relations are likewise founded upon other functions and administrations, such as guardian and ward, &c,

"18. The office of a king is set down at large in the 17 chap. of the Laws of king Edward the Confessor, to which the succeeding kings have been sworn at their coronation: And it is affirmed in the preambles of the statutes of * Marbridge, and the statutes of Quo Warranto, made at † Gloucester, That the calling of parliaments to make laws for the better estate of the realm, and the more full administration of justice, belongeth to the office of a king. But the fullest account of it in few words, is in chancellor Fortescue, chap. 13, which passage is quoted in Calvin's case. Coke 7, Rep. fol. 5. 'Ad Tutelam nainque legis Subditorum, ac eorum Corporum, et bonorum Rex hujusmodi erectus est, et ad hanc potestatem a populo effluxam ipse habet, quo, ei non licet potestate alia, suo populo Dominari.' For such a king (that is of every political kingdom, as this is) is made and ordained for the defence or guardianship of the law of his subjects, and of their bodies and goods, whereunto he receiveth power of his people, so that he cannot govern his people by any other power.

Corollary 1. A bargain is a bargain.

2. A Popish guardian of Protestant laws is such an incongruity, and he is as unfit for that office, as Antichrist is to be Christ's vicar.

"CHAP. II.—Of Prerogatives by Divine Right.

"1. Government is not matter of revelation; if it were, then those nations that wanted scripture, must have been without government; whereas scripture itself says, That government is, The ordinance of man, and of human extraction. And king Charles the first says, of this government in particular, That it was moulded by the wisdom and experience of the people. Answ. to 19 Prop.

"2. All just governments are highly beneficial to mankind, and are of God, the author of all good; they are his ordinances and institutions, Rom. 13. 1. 2.

"3. Plowing and sowing, and the whole business of preparing bread-corn, is absolutely necessary to the subsistence of mankind; This also cometh forth from the Lord of Hosts, who is wonderful in counsel, and excellent in working, Isa. 28 from 23. to 29th verse.

"4. Wisdom saith, counsel is mine, and sound wisdom; I am understanding, I have

* Prout Regalis Officii exposcit utilitas.

† Ficombe le profit de office Demande. The kingly or regal office of this realm. 1. mo. Mar. Sess. 3. Cap. 1.

largely and exactly, as to the particulars mentioned in the said information, wherewith the prisoner was charged, they proceeded to call their witnesses to prove the fact.

strength : By me kings reign, and princes decree justice : By me princes rule, and nobles, even all the judges of the earth, Prov. 8. 14.

" 5. The prophet, speaking of the plowman, saith, His God doth instruct him to discretion, and doth teach him, Isa. 28, 26.

" 6. Scripture neither gives nor takes away mens civil rights, but leaves them as it found them, and (as our Saviour said of himself) is no divider of inheritances.

" 7. Civil authority is a civil right.

" 8. The law of England gives the king his title to the crown. For, where is it said in scripture, That such a person or family by name shall enjoy it? And the same law of England which has made him king, has made him king according to the English laws, and not otherwise.

" 9. The king of England has no more right to set up a French government, than the French king has to be king of England, which is none at all.

" 10. Render unto Cæsar the things which are Cæsar's; neither makes a Cæsar, nor tells who Cæsar is, nor what belongs to him; but only requires men to be just, in giving him those supposed rights, which the laws have determined to be his.

" 11. The scripture supposes property, when it forbids stealing; it supposes mens lands to be already butted and bounded, when it forbids removing the ancient land marks: And as it is impossible for any man to prove what estate he has by scripture, or to find a terrier of his lands there; so it is a vain thing to look for statutes of prerogative in scripture.

" 12. If Mishpat Hamelech, the manner of the king, 1 Sam. 8. 11. be a statute of prerogative, and prove all those particulars to be the right of the king, then Mishpat Haccobhanim the priests custom of sacrilegious rapine, chap. 2, 3. proves that to be the right of the priests, the same wood being used in both places.

" 13. It is the resolution of all the judges of England, that even the known and undoubted prerogatives of the Jewish kings, do not belong to our kings, and that it is an absurd and impudent thing to affirm they do. Coke 11 Rep. p. 63. Mich. 5. Jac. 'Note upon Sunday the tenth of November, in this same term, the king upon complaint made to him by Bancroft, archbishop of Canterbury, concerning prohibitions, was informed, that when question was made of what matters the ecclesiastical judges have cognizance, either upon the exposition of the statutes, concerning tythes, or any other thing ecclesiastical, or upon the statute 1 Eliz. concerning the high commission, or in any other case, in which there is not express authority by law, the king himself may decide it in his royal person;

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And 1st, Mr. *Belamy*, at the Three Brushes in Southwark, being sworn, gave evidence, That coming acquainted some time since with the prisoner, and about a fortnight before

'and that the judges are but the delegates of the king, and that the king may take what causes he shall please to determine from the determination of the judges, and may determine them himself. And the archbishop said, That this was clear in divinity, That such authority belongs to the king, by the word of God in scripture. To which it was answered by me, in the presence, and with the clear consent of all the justices of England, and barons of the Exchequer, that the king in his own person cannot adjudge any case, either criminal, as treason, felony, &c. but this ought to be determined and adjusted in some court of justice, according to the law and custom of England. And always judgments are given, 'Ideo consideratum est per curiam,' so that the court gives the judgment: And it was greatly marvelled, That the archbishop durst inform the king, that such absolute power and authority, as is aforesaid, belonged to the king, by the word of God.'

" CHAP. III.—Of Obedience.

" 1. No man has any more civil authority than what the law of the land has vested in him; Nor is he one of St. Paul's higher powers any farther, or to any other purposes than the law has impowered him.

" 2. An usurped, illegal and arbitrary power is so far from being the ordinance of God, that it is not the ordinance of man.

" 3. Whoever opposes an usurped, illegal, and arbitrary power does not oppose the ordinance of God, but the violation of that ordinance.

" 4. The 13 of the Romans commands subjection to our temporal governors, because their office and employment is for the public welfare. For he is the minister of God to thee for good.

" 5. The 13 of the Hebrews commands obedience to spiritual rulers, Because they watch for your souls.

" But the 13 of the Hebrews did not oblige the martyrs and confessors in queen Mary's time, to obey such blessed bishops as Bonner and the beast of Rome, who were the perfect reverse of St. Paul's spiritual rulers, and whose practice was murdering of souls and bodies, according to the true character of Popery which was given it by the bishops who compiled the thanksgiving for the fifth of November, but archbishop Laud was wiser than they, and in his time blotted it out.

" The prayer formerly run thus: To that end strengthen the hands of our gracious king, the nobles and magistrates of the land, to cut off these workers of iniquity (whose religion is rebellion, whose faith is faction, whose practice is murdering of souls and bodies) and to

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Whitsuntide last, discoursing with him the second of these libels was mentioned: and soon after he sent him a box with some reams of them in it, to be dispersed, and gave him notice that he had a second paper in the press; and withal, a caution not to publish those he had sent before, till he had received that which proved to be the former libel before-mentioned.

root them out of the confines of this kingdom.

"7. All the judges of England are bound by their oath, and by the duty of their place, to disobey all writs, letters, or commands which are brought to them, either under the little seal, or under the great seal, to hinder or delay common right. Are the judges all bound in an oath, and by their places, to break the 13 of the Romans?

"8. The engagement of the lords attending upon the king at York, June 13, 1642, which was subscribed by the lord keeper, and thirty nine peers, besides the lord chief-justice Banks, and several others of the privy-council, was in these words:

"We do engage ourselves not to obey any orders or commands whatsoever, not warranted by the known laws of the land. Was this likewise an association against the 13 of the Romans?

"9. A constable represents the king's person, and in the execution of his office is within the purview of the 13 of the Romans, as all men grant; but in case he so far pervert his office, as to break the peace, and commit murder, burglary, or robbery on the highway, he may, and ought to be resisted. [See what arch-deacon Paley says of Divine Right.]

"10. The law of the land is the best expositor of the 13 of the Romans, here, and in Poland, the law of the land there.

"11. The 13 of the Romans is received for scripture in Poland, and yet this is expressed in the coronation oath in that country; 'Quod si sacramentum meum violavero, incolæ regni nullam nobis obedientiam præstare tenebuntur.' And if I shall violate my oath, the inhabitants of the realm shall not be bound to yield me any obedience.

"12. The law of the land, according to Bracton, is the highest of all the higher powers mentioned in this text; for it is superior to the king, and made him king, (Lib. 3, cap. 26, Rex habet superiorum Deum, item legem, per quam factus est rex, item curiam suam, viz. comites et barones) and therefore by this text we ought to be subject to it in the first place. And according to Melancthon, it is the ordinance of God, to which the higher powers themselves ought to be subject. Vol. 3, in his commentary on the fifth verse, (Wherefore ye must needs be subject, not only for wrath, but also for conscience sake.) He hath these words, "Neque vero hæc tantum pertinent ad subditos, sed etiam ad magistratum, qui cum fuerit tyrannus, non minus dissipant ordinationem Dei, quam seditiosi, ideo & ipsorum conscientia

And further, that about six or eight months before that, the prisoner had sent him other libels to disperse: and being shewed the libels mentioned in the information, he deposed, they were the same that had been sent him. His man likewise gave evidence, That he had received a box nailed up, but could give no account of what was in it, as to particulars.

fit rea, quia non obediunt ordinationi Dei, id est legibus, quibus debent parere. Ideo comminationes hic positæ etiam ad ipsos pertinent. Itaque hujus mandati severitas moveat omnes, ne violationem politici status putent esse leve peccatum." Neither doth this place concern subjects only, but also the magistrates themselves, who when they turn tyrants, do no less overthrow the ordinance of God than the seditious; and therefore their consciences too are guilty; for not obeying the ordinance of God, that is, the laws which they ought to obey; so that the threatenings in this place do also belong to them; wherefore let the severity of this command deter all men from thinking the violation of the political constitution to be a light sin.

"Corollary. To destroy the law and legal constitutions, which is the ordinance of God, by false and arbitrary expositions of this text, is a greater sin than to destroy it by any other means; for it is seething the kid in his mother's milk.

CHAP. IV.—Of Laws.

"1. There is no natural obligation, whereby one man is bound to yield obedience to another, but what is founded in paternal or patriarchal authority.

"2. All the subjects of a patriarchal monarch are princes of the blood.

"3. All the people of England are not princes of the blood.

"4. No man who is naturally free can be bound, but by his own act and deed.

"5. Public laws are made by public consent, and they therefore bind every man, because every man's consent is involved in them.

"6. Nothing but the same authority and consent which made the laws, can repeal, alter, or explain them.

"7. To judge and determine causes against law, without law, or where the law is obscure and uncertain, is to assume legislative power.

"8. Power assumed, without a man's consent, cannot bind him as his own act and deed.

"9. The law of the land is all of a piece, and the same authority which made one law, made all the rest, and intended to have them all impartially executed.

"10. Law on one side, is the back-sword of justice.

"11. The best things, when corrupted, are the worst; and the wild justice of a state of nature, is much more desirable than law perverted, and over-ruled, into hemlock and oppression."

Ann Whitney, sometime servant to the prisoner, being sworn, gave evidence, That by her master's or mistress's direction, she was not certain which, she took a porter, and caused him to carry a box, wherein one of the libels mentioned, viz. the second, was inclosed to Mr. Belamy: and that she had, by the like order, carried other papers loose: some of which were the Address, &c. And being asked by the prisoner, how she knew that? Her reply was, That she knew it, insomuch that she had read the title, and very well remembered it.

The porter that carried the box gave evidence, That the maid had hired him to carry a box to the Three Brushes, and that she went with him, and paid him according to agreement, and that he took it up in Spitalfields. After this, the messenger, who searched the prisoner's lodging with the right honourable the earl of Sunderland's warrant, being sworn, gave evidence, that he found a paper in writing, upon a table or shelf, which appeared in court to be part of the copy, or the same with the paper, entitled *The Opinion*, &c. he swearing, upon sight thereof, that it was the same he found in the prisoner's lodging. Then was the book of the vestry, or parish affairs of St. Paul's, Covent-garden, produced; wherein the prisoner, sometime past, had given an acquittance for money received, as an assistant curate, &c. which being compared with the paper, seemed not to differ in the hand. But no other evidence appeared in that case, than that the book had been always kept in the vestry, and for the most part under lock and key, and it being put to the prisoner, he did not greatly deny it. When for a further confirmation, John Darby, a printer, and his wife, were sworn: the former deposing, That he had printed a book for the prisoner from a manuscript, and that hand was very like that of the libel produced in court: but he had never seen him write, and therefore could not be positive that that manuscript was his own hand.

As for his wife, her evidence was, that the prisoner paying her some money, she had given him an acquittance; but that, as she conceived, he wrote all but her name; for going up stairs, he soon returned with an acquittance, which she subscribed.

This being what materially was given in evidence for the king, the prisoner had leave to make his defence; who after some discourse, alleged, That he had been confined, and had not had opportunity to prepare for his defence, as not having leave to go to his counsel. To which the court replied, That he had leave upon the motion made on his behalf, to send for counsel; and that they ought not to be refused coming to him. Then he urged several other matters, which being over-ruled by the court, he proceeded to intimate, that he hoped, that seeing he was indicted for a seditious and scandalous libel, &c. the jury would consider whether those papers, they had heard read, were so or not; but was told, that the jury

ought to consider it only as to the matter of fact, whether he was guilty of writing or publishing them, &c. ? and that the rest lay in the breast of the court to consider. Thereupon he urged, that though they might be sent, yet it was no publication, as it was laid in the indictment, because the box was nailed. But being fully answered in that point, and loose papers appearing likewise to be sent, the counsel for the king summed up their evidence to the jury, none appearing on the behalf of the prisoner.

After which, the court gave the charge, putting the prisoner, as well as the jury, in mind of the great mischief that such libels might occasion: And minded him likewise, that it was within a small matter of high-treason; and might have been raised to that degree, were not the laws, and those who managed them, tender of life, &c.

After the charge was given, the jury withdrew; and returning within a quarter of an hour, brought in the prisoner guilty of the high misdemeanour.

Nov. 16, following, Mr. Johnson's sentence was pronounced by sir Francis Withins, as follows; To pay 500 marks to the king, and to lie in prison till it was paid; to stand three times in the pillory; on the Monday following, in the Palace-yard, Westminster; on Wednesday, at Charing-Cross; and the Monday after at the Royal-Exchange; and to be whipt by the common hangman from Newgate to Tyburn.*

After sentence was past upon him, in order to load him with the greater ignominy, the courtiers, on pretence of respect to the church, moved, That before the execution of the sentence, he should be degraded from the order of priesthood. This ought to have been done, according to the canons, by his own diocesan, the bishop of London; but that prelate was then under a suspension himself, because he would not obey the king's orders to suspend Dr. Sharp, now archbishop of York, for preaching against Popery, in his own parish church of St. Giles's in the Fields. Dr. Crew, bishop of Durham, Dr. Sprat, bishop of Rochester, and Dr. White, bishop of Peterborough, being then commissioners for the diocese of London, in the place of the suspended bishop, were appointed to degrade Mr. Johnson; which they

* "Mr. Johnson, 1683, was tried on an Information, in the King's Bench, for writing '*Julian the Apostate*,' and fined 500 marks; and committed prisoner to the King's Bench till he should pay it; which they knew was the same with perpetual imprisonment, since he was not able to pay that sum. Thus he was condemned and committed, to the great joy of the Papists; when in him they saw the laws of England condemned by the judges, who studied more to oblige the court than to do their duty." See London Gazette of Nov. 20, 1683. See, too, 3 Kennett, 411. 450, 2d edition. This Case is also reported, Comb. 36. 2 Shower, 488.

performed in the Chapter-house of St. Paul's, where Dr. Sherlock and other clergymen attended: but Dr. Stillingleet, then dean of St. Paul's, refused to have any hand in it.

When they came to the formality of putting a bible in his hand, and taking it from him again, he was much affected, and parted with it with difficulty, kissing it, and saying with tears, that they could not however deprive him of the use and benefit of that sacred depositum. It happened that they were guilty of an omission, in not stripping him of his cassock; which, as slight a particular as it might seem, rendered his degradation imperfect, and afterwards saved him his benefice.

On the 1st of December, 1686, the sentence was put in execution; which Mr. Johnson endured with as firm a courage, and as christian behaviour as ever was discovered on any such occasion: though at the same time he had a quick sense of every stripe which was given him, with a whip of nine cords knotted, to the number of 317.

In the first parliament after the revolution, when the House of Commons was preparing an act of indemnity, Mr. Johnson was advised by his friends to get a clause put into it, that he might have his remedy at law against such as had been his illegal oppressors. They seemed to be sensible that they were obnoxious, and could not justify what they had done. About that time the lord bishop of Durham gave Mr. Johnson and his lawyer a meeting, and made his peace with him, to their mutual satisfaction.

Sir Francis Withins, who pronounced the sentence against him, sent a relation of Mrs. Johnson's to tell him a feigned story, that sir Francis lay dangerously ill, and could not die in peace, unless Mr. Johnson would forgive him: to which he reply'd, that he heartily forgave him what injury he had done to him. Some few days after, the same person brought sir Francis to Mr. Johnson, as he was walking in Westminster-hall; where sir Francis saluted him, and told him, That his Christian and kind answer had proved a reviving cordial to him. To which Mr. Johnson replied, That he heartily forgave the injury done to himself; but as he had been an enemy to his country, he hoped he would be made accountable for it: it being a common saying with him, That he was obliged to forgive his own enemies, but not the enemies of his country.

The parliament taking Mr. Johnson's case into consideration, resolved, June 11, 1689, That the judgment given against him in the king's bench, upon an information for a misdemeanor, was cruel and illegal.

A committee was at the same time appointed to bring in a bill for reversing that judgment: and being also ordered to enquire how Mr. Johnson came to be degraded, and by what authority it was done; Mr. Christy, the chairman, some days after, reported his case to this purpose:

“That in Trinity-term, 1686, an informa-

tion was exhibited against Mr. Johnson, in the name of sir Robert Sawyer, Attorney-general, for writing and publishing a scandalous and seditious libel, intitled, *An humble and hearty Address, &c.* That the same term they forced him to plead, got a jury to find him guilty, and sir Francis Withins pronounced the following sentence upon him: To pay 500 marks to the king, and to lie in prison till it was paid: To stand thrice in the pillory, in the Palace-yard, at Charing-cross, and at the Old-Exchange: and to be whipt by the common hangman from Newgate to Tyburn. That the judges then in court, were the lord-chief-justice Herbert, sir Francis Withins, sir Robert Wright, and sir Richard Holloway. That apprehending it would be a scandal to the clergy to have so infamous a punishment inflicted on a minister, they desired Mr. Johnson might be first degraded: in order to which, being a prisoner in the King's-bench, in the diocese of the bishop of Winchester, he was summoned to appear the 30th of November, in the convocation-house of St. Paul's, in the diocese of London, his living being within that diocese, and brought thither by Habeas Corpus: where he found the bishops of Durham, Rochester, and Peterborough, commissioners to exercise the jurisdiction of the bishop of London, during his suspension; with some clergymen, and many spectators. A libel was exhibited against him, charging him with great misbehaviours, though none were specified or proved. That Mr. Johnson demanded a copy of the libel, and an advocate, both which the bishops denied, and immediately proceeded to sentence, That he should be declared an infamous person, that he should be deprived of his rectory, that he should be a mere layman, and no clerk, and be deprived of all right and privilege of priesthood; that he should be degraded thereof, and of all vestments and habits of priesthood. Against which proceedings Mr. Johnson protested, as being against law, and the 132d canon; not being done by his own diocesan. But his protestation was refused, as was also his appeal to the king in chancery.

“After which, they proceeded to degrade him, by putting a square cap on his head, and then taking it off: by pulling off his gown and girdle, which he demanded as his proper goods, bought with his money, which they promised to send him, but he could not get them till he paid twenty shillings. Then they put a bible into his hands, which he not parting with readily, they took it from him by force.* That on the 23d of November, the judgment in the king's-bench began to be executed with great rigour and cruelty: that Mr. Rouse, the undersheriff, tore off his cassock on the pillory, and put a frize coat upon him: that he was whipped with a whip of nine cords, knotted, which was shewed to the committee. That Mrs. Johnson had also an information exhibited

* As to the forms of Degradation, see in this Collection, Vol. 1, p. 841, et seq.

against her, for the like matter as that against her husband.

“ On all which, the Committee came to the following resolutions; which, on the report, were all agreed to by the House; That the judgment against Mr. Johnson was illegal and cruel: That the ecclesiastical commission was illegal, and consequently the suspension of the bishop of London, and the authority committed to the three bishops null and illegal. That Mr. Johnson not being degraded by his own diocesan, if he had deserved it, was illegal: That a bill be brought in, to reverse the judgment, and to declare all the proceedings before the three bishops null and illegal. And that an Address be made to his Majesty, to recommend Mr. Johnson to some ecclesiastical

preferments, suitable to his services and sufferings.”

The House likewise ordered, That in the said bill the proceedings upon the Ecclesiastical Commission should be declared void.

The House presented two Addresses to the king in behalf of Mr. Johnson: but though his majesty was inclinable enough to have complied with their request, Mr. Johnson could not obtain any church preferment. Mr. Johnson, however, being a man of such merit, did not pass altogether without a reward; for the king gave him 300*l* a-year out of the Post-office, for his and his son's life; besides 1,000*l*. in money, and likewise bestowed a place of about 100*l*. a year on his son.

353. The Case of WILLIAM Earl of DEVONSHIRE, on an Information in the King's Bench, for assaulting Colonel CULPEPPER in the King's Palace: 3 JAMES II. A. D. 1687.

[“ The following statement of this remarkable Case, and of the arguments against the Proceedings of the King's-bench, is from a volume of miscellaneous pieces by the lord Delamer, who was acquitted of a charge of High Treason in the reign of James the second, and after the Revolution was created earl of Warrington. See his Trial at p. 509, of this Volume. The book, from which we extract the case, was published as the Works of the earl of Warrington in 1694; and though the publication appears to have been posthumous, yet there is not the least reason to suspect the authenticity of the contents, as the book was dedicated to lord Warrington's son and heir by Mr. De la Heuse the gentleman entrusted with his education. The case in question, from the stile of it, is evidently addressed to the House of Lords; but whether it was by way of speech, or how otherwise, is not explained. After the earl of Devonshire's Case we give the proceedings of the House of Lords upon it. In the article of duke of Devonshire in Collins's Peerage there are some anecdotes relative to this Case, which deserve to be remembered, though they are not noticed in the account we shall lay before the reader.”] Hargrave.

ON Sunday the 24th of April, 1687,* the said Earl meeting with colonel Culpepper in

the drawing room in White-hall, who had formerly affronted the said earl in the said king's palace, for which he had not received any satisfaction, he spake to the said colonel to go with him into the next room, who went with him accordingly: and when they were there, the said earl required of him to go down stairs, that he might have satisfaction for the affront done him, as aforesaid; which the colonel refusing to do, the said earl struck him with his stick, as is supposed. This being made known to the king, the said earl was required by the lord chief justice Wright, by warrant, to appear before him with sureties. Accordingly April 27, he did appear, and gave bail in 30,000*l*. to appear the next day at the King's-bench, himself in 10,000*l*. and his four sureties in 5,000*l*. a piece, who were the duke of Somerset, lord Clifford the earl of Burlington's son, lord Delamere, and Tho. Wharton, esq. eldest son to lord Wharton. The earl appeared accordingly next morning, and then the court told him, that his appearance was recorded, and so he had leave to depart for that time. But upon the sixth of May he appeared there again, and being then required to plead to an information of misdemeanour for striking the said colonel in the king's palace, he insisted upon his privilege, that as he was a peer of England, he could not be tired for any misdemeanour during the privilege of parliament; and it being then within

* See Comp. Rep. 49. The following records in Tremaine relate to these proceedings:

REX versus COMM' DEVON'

Pusch. S. Jacobi Secundi.

Midd' ss. Quod Willielmus Comes Devon' nup' de Paroch' Sancti Martini in Campis in Com' Midd' 24 die April' Anno Regni nostri Jacobi Secundi Dei Gra' Anglice Scotie Franc'

et Hibernie Regis fidei Defens', &c. 3. Vi et Armis, &c. apud Civit' Westm' in Com' Midd' infra Palat' dicti Domini Regis ibidem videlicet infra aulam dicti Domini Regis communit' vocat' Whitehall (eodem Domino Rege adtunc et ibidem in eodem Palatio suo in Regali p'sona sua existen' commoran' et manente Anglice abiding) quendam Thomam Colepepper Ar' in pace Dei et dicti Domini Regis adtunc

time of privilege, he refused to plead. The court took time to consider of it till Munday,

which was the last day of the term, and the earl then appeared, and delivered in his former

et ibidem existen' ad pugnand' cum eodem Willielmo Comite Devon' provocavit et calumpniavit Anglice *challenged* ea intentione ad prefat' Thoma' Colepepper interficiend' et inurdrand' quodq; pred' Willielmus Comes Devon' postea scilicet eisdem die et Anno apud Civit' Westm' precl' in Com' pred' infra pred' palatii dicti Domini Regis nunc videlicet infra pred' aulam dicti Domini Regis communit' vocat' *Whitchull* (eodem Domini Rege adtunc et ibid' in eodem Palatio in Regali persona sua ut preferret existen' commoran' et manente Anglice *abiding*) Vi et Armis, &c. in et sup' pred' Thoma' Colepepper in pace Dei et dicti Domini Regis nunc adtunc in eodem Palatio existeu' insult' fecit et ipsum Thoma' Colepepper adtunc et ibidem Vi et Armis, &c. malitiose percussit verberavit et maletractavit ita quod de vita ejus maxime desperabatur Et all'enormia eidem Thoma' Colepepper adtunc et ibidem Vi et Armis, &c. intulit ad grave dampn' ipsius Thome Colepepper in manifest contempt' dicti Domini Regis nunc legumq; suar' ac contra pacem dicti Domini Regis nunc Coron' et Dignitat' quas, &c.

Et modo scilicet die Lune prox' post Crastinum Ascension' Domini isto eodem termino coram Domino Rege apud Westm' ven' tam Thomas Powis Mil' Solicitor' Domini Regis nunc general' qui pro eodem Domino Rege in hac parte sequitur in propr' p'sona sua quam pred' Willielmus Comes Devon' in propr' persona sua Et idem Willielmus Comes Devon' dicit quod ipse 19 die Maii Anno Regni Domini Regis nunc primo et diu antea et continue extunc hucusq; postea fuit et adhuc existit Comes Devon' in' proceru' magnat' et pariu' hujus Regni Angl' Quodq; ad presens Parliament' dicti Domini Regis nunc inchoat' et ten' apud Westm' in Com' Midd' dicto 19 die Maii Anno Regni dicti Domini Regis nunc primo suprad' et ibidem per seperal' p'rogationes continuat' usq; ad 23 diem April' Anno Regni dicti Domini Regis nunc tertio et tunc apud Westm' pred' Assemblat' et eod' die ulterius p'rogat' usq; ad 22 diem Novembr' prox' futur' idem Comes de Summonition' ejusdem Domini Regis nunc veniebat attendebat et moram suam fecit ut un' pariu' hujus Regni Et idem Comes ulterius dicit quod secundum Legem et consuetud' Parliament' a tempore cujus contrar' memor' homin' non existit usitat' et approbat' omnes pares hujus Regni Angl' ad Parliament' Domini Regis de Summonition' ejusdem Regis venien' per aliquam Cur' eidem Cur' Parliament' inferior' durante tempore hujusmodi Parliament' seden' vel infra usual' tempus privileg' hujusmodi Parliament' prox' ante vel prox' post aliquam prorationem hujusmodi Parliament' fact' ratione vel p'textu alicujus transgr' contempt' malegestur' sive al' cause vel materia cujuscuq; (p'dition' Felon' vel recusation' ad invenniend' securitat' de se bene gerend' erga Dom'

Regem et cunctum populu' suu' tantummodo except') arrestari imprisonari vexari seu inquietari seu ad aliquod hujusmodi transgr' contempt' malegestur' sive al' causam vel materiam quancunq; (except' precept') respond' compelli non debeant nec a toto tempore suprad' consuever' Et hoc parat' est verificare unde ex quo pred' informatio versus ipsum comitem exhibit' fuit infra usual' tempus privileg' ejusdem Parliament' scilicet infra quadraginta dies prox' post pred' ult' p'rogation' ejusdem present' Parliament' qui nondum preterier' idem Comes pet' Judic' si Cur' hic placitum p'd modo infra usual' tempus privileg' ejusdem Parliament' cognoscere velit aut debeat, &c.

Et pred' Thomas Powis Mil' Solicitor' Domini Regis nunc general' qui pro eodem Dom' Rege in hac parte sequitur p' eodem Dom' Rege dicit quod placitum p'd p' p'dict' Willielmum Comitem Devon' modo et forma p'd superius placitat' materiaq; in eodem content' minus sufficien' in lege existunt ad precludend' Cur' Dom' Regis nunc hic a procedend' sub' information' pred' et hoc parat' est verificare prout Cur' hic cons' unde pet' judic' et quod idem Willielmus Comes Devon' ad informacion' pred' respondeat, &c.

Et pred' Willielmus Comes Devon' dicit quod placitum pred' per ipsum Willielmum Comit' Devon' modo et forma pred' superius placitat' materiaque in eodem content' bon' et sufficien' in lege existunt ad precludend' Cur' dicti Domini Regis hic a procedend' sup' information' p'd Quod quidem placitum materiaq; in eodem content' idem Willielmus Comes Devon' parat' est verificare et probare prout Cur' hic Cons' Unde ut prius pet' Judic' si Cur' Domini Regis hic super informationem pred' ulterius procedere vult, &c. Et sup' hoc lect' et audit' omnibus et singulis premiss' pro eo quod videtur Cur' hic quod placitum pred' p'tat' Comit' Devon' modo et forma pred' superius placitat' materiaque in eodem placito content' minus sufficien' in lege existunt ad precludend' Cur' dicti Domini Regis nunc hic a procedend' super information' pred' ideo dicit' est' eidem Willielmo Comit' Devon' quod ipse idem Willielmus Comes Devon' ad informacion' pred' respondeat, &c.

As to striking in the King's Courts and Palaces, See in this Collection the Cases of sir Edmond Knevett, A. D. 1541, vol. 1, p. 443, and of lord Thanet and Mr. Ferguson, A. D. 1799.

"John Davy had his hand stricken off at the standard in Cheape, because he had smitten a man before the king's judges at Westminster, wherefore the king commanded him to have the law in example to others." Stow's Annales, 416.

In the year 1575 one Birechet or Burchet was executed for a murder committed in the Tower of London. It appears, that before he was hanged his right hand was cut off and nailed to the gallows.

plea in parchment. The judgment given by the House of Lords, in the case of the earl of Arundel, 3 Car. was urged on the behalf of the earl, viz. that no lord of parliament, the parliament then sitting, or within the usual times of privilege of parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason or felony, or for refusing to give surety for the peace: and also, that the like privilege was, about two years before, allowed in the case of my lord Lovelace. The court over-ruled the earl's plea, and required him to plead to the information the first day of the next term, and to be a plea as of this term; and so he had leave to depart, but his sureties were not called, for to see if they would continue as his bail. The next term he appeared, and pleaded guilty to the information, and so the last day of the term the court did award, that he should pay a fine of 30,000*l.* be committed to the King's-bench till it be paid, and to find sureties for the peace for a year.

To all which Proceeding and Judgment three notorious errors may be assigned.

1. The over-ruling of the earl's plea of privilege.

2. The excessiveness of the fine.

3. The commitment till it be paid.

1. The over-ruling the Earl's plea of privilege is a thing of that vast consequence, that it requires a great deal of time to comprehend it aright, and is of so great an extent, that more may be said of it than any one man can say. The judgment seems to be very unnatural, because an inferior court has taken upon it to reverse a judgment given in a superior, of which no such precedent is to be found in regular times, scarcely in the most confused and disorderly.

2. Because it is in case of Privilege, which is the most tender part of every court; for if the rights and privileges of any court are made light of, the court itself will soon come to nothing, because they are as it were the most essential part of it, if not the very essence of the court; for what signifies a court, if its orders cannot be executed? It is better that a court were not, than that its privileges should not be duly observed, for without that it becomes a snare and mischief to the people, rather than an advantage.

3. Because by this they have set the feet above the head; for as they have by this declared themselves to be superior to the lords, so it will naturally follow, that a quarter sessions may reverse their orders, or suspend their privileges, and a more inferior court should supersede what the quarter sessions does: and thus it must go on till the course of nature is inverted.

4. Because they may as well deny a lord, or over-rule any other privilege, as well as this, and so consequently, when the House of Lords is not actually sitting, every peer must be beholden to the judges for every privilege that he enjoys.

If this judgment be according to law, then

may the King's-bench try a peer for misdemeanor, at the very time when the House of Lords is sitting; and consequently the House must not want a member, if the King's bench sees it good to have it so; and what a confusion would it make, and the consequence of it would be, is easily discerned. The want of one member makes that House think itself to be lame: as was seen in the case of the earl of Arundel, 3 Car. How many petitions did the lords make, and how many messages passed to and fro, between the king and them, who would not proceed to any business till he was restored to his place in that House? For they told the king, that no lord of parliament, the parliament sitting or within the usual times of privilege of parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason or felony, or for refusing to give security for the peace. Surely the judges did not give that judgment for want of understanding that judgment of the lords; for nothing can be more express and plain for it: for it says directly, that sitting the parliament, or within the usual times of privilege, no peer shall be molested, unless for treason or felony, or for refusing to give security for the peace. The earl of Devonshire did all that the judges could require of him, by finding sureties for the peace; and what the judges did more, was not grounded upon that judgment of the lords, but was a manifest and presumptuous invasion and violation of the privileges of the whole peerage of England.

It is very obvious, how the peerage has been undermined ever since Hen. 7's time, what endeavours have been used to make it less and less; first, by multiplying the number of them; secondly, by raising people of mean extraction to that dignity, both which tend to render it contemptible. But nothing can make it more despicable, than that its privileges should depend upon the beck of the King's-bench: and therefore considering how groundless and without precedent it is, what they have done in the case of the said earl, it is no more than probable, that they thereby aimed at pulling down the peerage. For, what seems so likely as it does? It carries its evidence in its face, for it manifestly takes away the privilege of the peers, and till it does appear for what other end it was done, all men of sense, and that are unprejudiced, must believe it was to pull down the peerage; for all that can be pretended, is, either to secure the peace, or to punish the offence. The earl did give security for the peace, and he did not design to shift off his trial, but that it should be in its proper season; for though it delayed the trial, yet it brought it to the proper time, and so consequently the more legal and reasonable: but the judges must go out of the way of reason and the law, to make a breach in the privilege of the peers. It is too commonly the discourse every where, and I fear with too much reason, that the judges make very hold with the law; but it is plain

by this judgment, that they have stuck the privileges of the peers under their girdle. Whether it did proceed from ignorance or corruption, will appear upon what they shall say for themselves. It is too plain from one of them it is, and either of them renders them unmeet to sit in that place.

I do remember, that the puny judge gave this reason for over-ruling the earl's privilege. Says he, 'your lordship, and all the peers, receive all your privileges from the king, and therefore it would be very unreasonable to make use of them against him: and seeing the king is concerned in this case, I am of the opinion, that the plea be over-ruled.' It is said, that he has some law, and therefore it is the greater presumption in him to judge upon the lords' privileges, who is not qualified by law to sit as a judge in any case; for he is a Papist, as every body says, and so consequently has not taken the oaths and test, that the law enjoins, before he take his place on the bench.

But as to his doctrine which he laid down, since it does not properly come into this debate, I will only ask him a few questions: whether there was not a people before there was a king? whether the king begot all his people? and if people of several nations should be cast upon an island, and seeing no probability of getting thence, they agree upon certain laws and rules for the common good, and make choice of the wisest man amongst them as their king, to rule and govern them according to those laws, can it then be said that the people received their privileges from him, or that he is not strictly bound to govern them by those laws and no other? I desire to ask this one question more: whether the king is not bound, as well by his oath as by the nature of the government, to protect and defend every subject in his just rights and properties? But allowing his doctrine as orthodox, yet his reason is admirable; for the subject is not to make a defence in any case, if the king have any title or concern in it, all corporations must deliver up their charters of course, whenever a *quo warranto* is brought; and why? Because it was a grant from the king, and it would be very hard to oppose him with his own gift. Whoever holds any thing by gift from the crown, and though made as sure as the broad seal can make it, yet if the king think good to question it, the party must yield it up without insisting upon his right, for the reason given by the learned judge. For the same reason every peer, if denied his writ, must not demand it; nay, he must surrender his patent, and renounce his title, as far as in him lies, if the king require it: and for the same reason, when any man is called to an account for his life, he must make no defence, but submit himself to the king's mercy; for all we have is from the king, and nothing must be disputed when it is his pleasure to question it. This is indeed to make the king as absolute as any thing on earth can be, yet is withal to make

him the most unjust prince that ever sat on the English throne. This sort of justice is learnt from children, whose gifts continue good no longer than the donor remains in that kind mood. Surely nothing can more reflect dishonour upon the king; for it makes him as unjust and uncertain as any thing can be, both which should not be in the temper, much less in the actings of a prince.

Another reason was given, I think, by the Chief Justice, or else by Mr. Justice Holloway, 'because it was absolutely necessary for the securing of the peace, it was urged so far, as if the peace could not be secured without it.' Surely all this must be but *gratis dictum*, for my lord Devonshire, by finding sureties, had done all that the law does require for securing the peace, unless they had clapt him up a close prisoner; which they could not justify, if he tendered sureties: and therefore, either my lord Devonshire is different from all mankind, and a different method must be made use of to secure the peace, or else this argument of theirs savours not so much of reason as of something else, that ought to be no ingredient when they give judgment in any case. And it surpasses common sense to understand, how over-ruling the lord's plea could tend to the securing of the peace. Either the security which he had given must awe him to keep the peace, or the other could not; for had he broke the peace again, and repeated it several times before he came to his trial, yet that could not affect the merits of the cause, neither could it be given in evidence at the trial, so as to alter the state of the fact; neither could the judges, by reason of it, enhance his punishment if he were found guilty, but they must look upon it as a distinct offence, and so might require the greater security for the peace, and for a longer time.

Indeed it is an effectual way to prevent a man from breaking the peace, to lay such a fine upon him as is impossible to be paid immediately, and to commit him till payment.

It is too probable, that the judges, being conscious how liable they have made themselves to be called in question for this sauciness and trampling upon the law, would debase and bring under the credit and authority of this court; because no other can take cognizance of their proceedings, so as to correct their errors and mistakes. It is only here that they can be called to an account for what they do amiss; no court can punish them but this; so that if they can once top your lordships, there is nothing they need stand in awe of, nothing to restrain them, but they may act *ad libitum*, not *per legem*; for, let this court be deprest, and they may say, of whom then need we be afraid? By what they have done already, they have sufficiently shewn to what extravagances they will proceed, when they think themselves to be out of the reach of this court.

If once the king's-bench can set itself as high as the judges have attempted by this proceeding against my lord Devonshire, then must

the whole nation (your lordships not excepted) stoop to all the extravagances and monstrous judgments that every corrupt and ignorant fellow shall give, who shall chance to get up to the bench; and not only this present age shall feel and undergo the mischief, but it will be entailed upon all succeeding generations. Well then, did the judges attempt that which would bring your lordships so low, and raise their court so high, to set it above all reach or controul; especially if they did promise to themselves impunity, if not reward, which they might have expected, had it been in the reign of an arbitrary prince, who would be a great gainer by the fall of this court, because then the skreen betwixt the king and people is taken away.

This is the first time, that an inferior court did take upon it to invalidate the privileges of a superior. Superior courts do sometimes set aside the orders and proceedings of inferior courts; and yet in that case they proceed with that caution, that it is never done but when there is manifest error, and the law not duly pursued and observed; but in no case was it known that they ever meddled with their privileges.

If what the judges have done is good, I cannot tell what power and jurisdiction they may not pretend to, for no bounds nor limits can be set to the king's bench; it may assume as great a power in civil affairs as the high-commission does in ecclesiastical, in their actings not to be tyed up to any rules or method, but to vary and alter them as well as the law, when occasion or humour serves. The proceedings shall be as summary, or as dilatory as they think fit, and your lordships shall no more than other people be exempted from the exercise of that power.

Therefore if your lordships will not prevent the mischief from spreading itself over the whole nation, yet I hope you will take notice of the injury you have suffered in the case of my lord Devonshire, and to do yourselves right.

The law has for the most part left fines to the discretion of the judges, yet it is to be such a discretion as is defined by my lord Coke, fol. 56, 'discretio est discernere per legem quid sit justum;' not to proceed according to their own will and private affection, for 'talis discretio, discretionem confundit,' as Wingate says, fol. 201. So that the question is not whether the judges could fine my lord Devonshire, but whether they have kept themselves within the bounds and limits which the law has set them.

It is so very evident, as not to be made a question, whether in those things which are left to the discretion of the judges, that the law has set them bounds and limits, which, as God says to the waves of the sea, Hitherto shalt thou go and no farther. For either they are so restrained, or else the law does suppose them to be exempted from those frailties and passions which do attend the rest of mankind: but as they cannot be supposed to be void of

passions and infirmities, no less than other men, so it cannot be imagined, that the law has left men to so wild a justice as is guided by passion and affection; for it had been so great a defect in the constitution of this government, that long before this it would have been reformed. And as it is most clear, that they are thus restrained, so those bounds and limits are no less known to them that are acquainted with the law. There are two things which have heretofore been looked upon as very good guides, 1st, what has formerly been expressly done in the like case; 2dly, for want of such particular direction, then to consider that which comes the nearest to it, and so proportionably to add or abate, as the manner and circumstance of the case do require. These were thought very good and safe directions, till it was declared, and ever since has been practised in the king's bench, that they did not regard precedents, but would make them; and for ought that I can learn or find, this of my lord Devonshire is an original.

What obscurity soever may be pretended in other cases, yet in this the law has given so positive and plain a direction, that it seems very strange, how they came to lay a fine of 30,000*l.* upon my lord Devonshire.

The court of star-chamber was taken away, because of the unmeasurable fines which it imposed, which alone was a plain and direct prohibition for any other court to do the like, for otherwise the mischief remained; for what advantage was it to the nation, if it had not been wholly suppressed? The shifting of hands gave the people no ease in the burden that lay upon them. It was all one, whether the star-chamber or king's bench did crush them by immoderate fines. But to put all out of dispute, the statute 17 Car. says expressly, that from henceforth no court, council or place of judicature shall be erected, ordained, constituted, or appointed within this realm of England, or dominion of Wales, which shall have, use, or exercise the same, or the like jurisdiction, as is or hath been used, practised, and exercised in the said court of star-chamber: and this was upon very good reason, because those great fines, imposed in that court, were inconsistent with the law of England, which is a law of mercy, and concludes every fine which is left at discretion, with 'salvo contentamento.' If the fines imposed in the star-chamber were an intolerable burden to the subject, and the means to introduce an arbitrary power and government, as that statute recites, the like proceeding in the king's bench can be no less grievous, and must produce the same evil. Laws that are made upon new occasions, or sudden emergencies, the reason upon which they were made may cease, and consequently they do cease also. But laws that are grounded upon the ancient principles of the government cannot cease, because the reason of them will ever continue; and this statute of 17 Car. being such, no doubt holds good, and is now in as much force as the first moment in which it

was made; and therefore this fine imposed on my lord Devonshire is in open defiance of that statute.

I think no man can altogether excuse my lord Devonshire; for my part I do not but think it was a very inconsiderate rash act, and I believe the indiscretion of it abstracted from the fine is a very sensible trouble to him. Yet if those things were wanting which may be urged in his excuse, the offence and punishment do not seem to bear a proportion. Could not the merits of his father be laid in the balance, nor the surprise of meeting col. Culpepper? For my lord having been abused by him, a man of so great courage and honour as my lord Devonshire, must needs feel and remember it a long time, having received no satisfaction or reparation made him for it. But if there were nothing of this in the case, could all that may be said to alleviate his offence be urged against him with a double weight, were the circumstances of the fact as foul and aggravating as the malice of his enemies could wish, yet surely a less fine might have served; for the law casts in a great many grains of mercy into every judgment, and has ever looked upon an over-rigid prosecution of the guilty to be no less tyranny than the prosecution of the not guilty, because it is *summum jus*, and has declared that to be *summa injuria*.

But besides all this, I do conceive with submission, that where the law has intrusted the judges with a power to fine, it is in a much less degree than they have done in this case.

First, because the law is very cautious whom and with what it does intrust. It reposes a great confidence in the king, yet in some cases his acts are not regarded by it; as the king can do no ministerial act, a commitment 'per speciale mandatum dom. regis,' is a void commitment. Where there lies an action in case of wrong done to the party, the acts of the king in those cases, according to the old law phrase, are to be holden for none.

Secondly, because liberty is so precious in the eye of the law, it is of so tender a regard, that it has reserved the whole dispose thereof to its own immediate direction, and left no part of it to the discretion of the judges; and what the law will not suffer to be done directly, it does forbid that it shall be done indirectly, or by a side wind; and so consequently the judges cannot impose a greater fine than what the party may be capable of paying immediately into court. But if the judges may commit the party to prison till the fine be paid, and without set so great a fine as is impossible for the party to pay into court, then it will depend upon the judges pleasure, whether he shall ever have his liberty; because the fine may be such as he shall never be able to pay; and thus every man's liberty is wrested out of the dispose of the law, and is stuck under the girdle of the judges.

Thirdly, because the nation has an interest in the person of every particular subject; for every man, either one way or other, is useful

and serviceable in his generation. But by these intolerable fines the nation will frequently lose a member, and the person that is fined shall not only be disabled from doing his part in the commonwealth, but also he and his family will become a burden to the land; especially if he be a man of no great estate, for the excessive charge that attends a confinement will quickly consume all that he has, and then he and his family must live upon charity. And thus the poor man will be doubly punished, first, to wear out his days in perpetual imprisonment; and secondly, to see himself and family brought to a morsel of bread.

Fourthly, because in all great cases, and such as require a grievous punishment, the law has in certain awarded the judgment; and next to life and corruption of blood, a severer punishment cannot be imposed, than to be fined more than a man can pay, and lye in prison till he does: but if some great cases did happen, which could not be foreseen, it was always usual with the judges, when any such case came before them, to adjourn it to the parliament, which had been needless, if they could have punished at the rate that our judges have of late done.

Fifthly, because wherever the law has set down a fine, either by way of punishment or caution, it seldom exceeds 2,000*l.* Nay, even in that tender place of liberty, if a judge shall not relieve with an Habeas Corpus, but let the person languish in prison, yet the third offence is but 2,000*l.* penalty; and I suppose that that is but inconsiderable, in comparison of what any of the judges are worth, yet it being taken as a punishment, is by the law looked upon as a great sum.

Sixthly, because the law of England being a law of mercy, and very careful to prevent violence and oppression, and to that end having for almost every offence appointed its particular punishment, it cannot be supposed to have left so great a power in the judges, as they have exerted in this case. True it is, some things are left to their discretion; because it was not possible to foresee every particular case that might happen. Yet they are things of the least size that are so intrusted to their judgment; for (as was said before) matters of any considerable moment were still referred to the parliament; as also the review of what the judges should do in those lesser matters, which were left to their discretion.

As these proceedings are a great wrong to the subject, so are they no less a disadvantage to the king; because they will make his government look very rigid and severe, and gives it a grim fierce countenance, which, though I don't say that it will make the people rebel, yet I am apt to believe that it will set them upon their guard. It is fair and gentle usage, that prevails upon reasonable and free born men. It is an easy government that will bow the hearts of the people of England; for, says the statute of William and Mary, the estate of a king standeth more assured by the love of

his subjects than in fear of laws; so that the king will be on the losing hand by these proceedings, because it spoils the complexion of his government.

And the king will yet be a farther sufferer, for if 30,000*l.* be the price of a blow, it will make Whitehall very empty, for he that goes thither must approach it with fear and trembling, because he does not know but he shall be ruined before he comes thence; for though a man arm himself with all the resolution he can, yet it cannot be proof against the contrivance of those that intend to do him a mischief. Especially if he is not upon very good terms at court, there will never want those who will endeavour to draw him into the snare, hoping to merit by it; and though perhaps they mistake their aim; yet however, revenge, that is so sweet, will be greatly encouraged to provoke him, because he cannot hope to reek his malice so plentifully as this way, because if his attempt succeed, the other is ruined: nay, if he do not strike, but only defend himself, yet if the judges don't like the complexion of the man, they will call the fox's ears horns, and lay all the blame on his back, and pronounce him more guilty that looks over the hedge, than he that steals the horse.

Since the business of my lord Devonshire happened, I have heard him blamed as the author of his own misfortune, and that he drew the mischief upon himself; and the reason given, was, because he ought not to have gone to court; for, said they, he knew there were many there who wished him ill, and therefore sooner or later he would meet with an affront, and if he once fell into their hands, he must expect no quarter, because colonel Culpepper who, without any provocation of my lord's part, had so unnecessarily fallen upon him; and had by drawing blood upon my lord forfeited his hand; yet not only that, but all the rest of the judgment was pardoned; and therefore as well that as this are looked upon as businesses that were laid. But in saying this, I only tell your lordships what is said without doors, and I don't speak it as my opinion; but setting the tattle without doors aside, I do conceive, that can never be a just judgment which injures the king as well as the party that is punished.

But the true nature of my lord Devonshire's offence has not yet been thoroughly considered. The law does in all cases give great allowances to what is done on a sudden heat, where there does not appear any premeditation; and for this reason, when a man is indicted for murder, if upon the evidence there does not appear *malice prepense* either expressed or implied, the party accused shall have his clergy. And for the same reason, though it be death to maim or disfigure another, yet if it be done on a sudden heat, the party shall not die for it; for in these and the like cases the law thinks him to be more blame-worthy who gave the provocation, than he that was so provoked; because it was not the effect of an evil mind, but of pas-

sion; 'et actus non sit reus nisi mens sit rea.' If therefore it be true which I have heard, that the king promised my lord Devonshire, that colonel Culpepper should never come to Whitehall, it will then follow, that my lord Devonshire's striking colonel Culpepper was the effect of passion, and not of intention, because he could not expect to meet him where he did. If so, I conceive with submission, that the punishment and offence don't in any measure bear proportion.

But I am persuaded, that the judges were resolved upon what they have done before they heard the cause, in case my lord was found guilty; and the rather, because my lord chief justice was haranguing the offence beforehand; for when my lord Devonshire appeared May 6, he told him, that to strike in the king's palace was little less, or next door to pulling the king out of his throne. Indeed, on the last day of the term he did explain them thus; that the time and circumstances might be such, as it would be little less than the assaulting the king in his throne. But several have told me, who heard him, and they say, the first words of time and circumstances were not mentioned by him May 6; and in particular, a noble lord of this House is one from whom I had my information; and if it were so, those words savour too much of a prejudging the cause.

There is no doubt, but in case of a fine set, the court may commit the party, in case of obstinacy, for not paying the fine into court. Yet this is to be taken *cum grano salis*; for if the fine be immoderate, or else he has not the money then ready, but either offers security to pay it, or else prays for some time, and in the interim to stand upon his recognizance; in either of these cases, to commit for not paying the fine into court is not justifiable.

First, because it is to punish for not doing an impossibility, for 'lex non cogit ad impossibilia.'

Secondly, it is not justifiable, because if the fine be paid, the law is as much satisfied if it be paid five years hence, as if it be paid then immediately into court; for the law does not suppose, that the most wealthy man does carry so much money about him.

Thirdly, it is very unreasonable, because it does in a great part disable the person to pay the fine; for if he be a man, that manages his own affairs, his writings, that are necessary to make the security, may be so disposed of, that it will be difficult to come at them. Besides, there being a necessity upon him to have the money, those of whom he is to have it will be very apt to hold him to harder terms; for the world is so unnatural and brutish, that one man is but too prone to make his advantages upon the misfortunes and necessities of another; and that proverb, *homo homini lupus*, is in no case more true than in the business of money.*

* "October 24th 1687. On the motion of the Solicitor General, process was ordered against

PROCEEDINGS IN THE HOUSE OF LORDS ON THE
CASE OF THE EARL OF DEVONSHIRE AFTER
THE REVOLUTION.

Extracted from the Journals of the Lords.

April 22, 1689.

The earl of Huntingdon reported from the committee of privileges the case of the earl of Devon, which was read, viz.

"Ordered to report, that their lordships are of opinion, that the proceedings against the earl of Devon, in the court of King's-bench, in Easter-term, in the third year of king James the second upon an information for an assault upon Mr. Culpepper, wherein his lordship's plea of privilege of parliament was over-ruled, and he was fined 30,000*l.* and thereupon committed to the King's-bench in execution, was a great violation of the privileges of the peers of this realm.

"Their lordships are likewise of opinion, that those Judges,* who sat in the said court, when the said judgments were given, and the said commitment made, should be required to attend at the bar of this House to answer for the great offence which they committed thereby."

the Earl of Devon. for his fine that it should be estreated into the Exchequer, and a tipstaff was ordered to go into Derbyshire, and fetch sir Paul Jenkinson the high sheriff up in custody, for refusing to raise the posse for apprehending his lordship when he was in the county this summer.

"The earl of Devon hath made his peace at court, and hath kist the king's hand, he hath given his own bond for the fine, and satisfaction is ordered to be acknowledged on the same." Narcissus Luttrell's MS. Brief Historical Relation, &c. in All Souls library. Some particulars respecting Privilege and Breach of Privilege are to be found in this Collection, in the cases of Elliot and others, vol. 3, p. 293. Barnardiston v. Soame, vol. 6, p. 1063. Shirley v. Fagg, vol. 6, p. 1121, earl of Shaftesbury, vol. 6, p. 1269, Richard Thompson, vol. 8, p. 1, and the other cases noticed in those. Lord Hale, "Jurisdiction of the Lords House or Parliament," chap. 17, in considering how far the Lords could exercise a decisive or judiciary determination in the first instance, observes that, 'two or three judgments given by themselves in disaffirmance of their own jurisdiction are of more weight and value than a whole cartload of instances of private causes heard and determined by them in the first instance, where possibly the defendant durst not or did not plead or except to their jurisdiction.'

* As to calling Judges to account in parliament for their judicial conduct, see in this Collection the Case of Knollis. See also the Proceedings in the great Case of Ship-money, vol. 3, p. 325.

Hereupon the House made these Orders following:

"Ordered by the Lords spiritual and temporal in parliament assembled, that the clerk of the Crown-office in the King's-bench, do bring into this House the records of that office, wherein the proceedings in the court of King's-bench against the earl of Devon are entered in Easter-term, 3 Jacobi secundi, upon an information for an assault upon Mr. Culpepper, on Saturday the 4th of May next, at ten o'clock in the forenoon."

"To sir Samuel Astry, clerk of the crown in the King's-bench, his deputy and deputies, and every of them."

"Upon report from the committee of privileges concerning the prosecution of the earl of Devon, upon an information in the King's-bench, it is ordered by the Lords spiritual and temporal in parliament assembled, that the keeper of the prison of Newgate be and is hereby required to bring in safe custody to the bar of this House sir Robert Wright now in his custody, on Saturday the 4th of May next, at ten o'clock in the forenoon, and this shall be a sufficient warrant on that behalf."

"To the keeper of Newgate, his deputy and deputies, and every of them."

"Upon report from the committee for privileges concerning the prosecution of the earl of Devon upon an information in the King's-bench, it is ordered by the Lords spiritual and temporal in parliament assembled, that sir Richard Holloway be and is hereby required to attend this House on Saturday the 4th of May next, at ten o'clock in the forenoon; and hereof he may not fail."

"Ordered that Mr. Petyt and Mr. Bradbury do attend this House on Saturday the 4th of May next, at ten o'clock in the forenoon."

"Ordered that Mr. Justice Powell do attend this House on Saturday the 4th of May next, at ten o'clock in the forenoon."

May 3, 1689.

"Ordered that the keeper of the prison of Newgate be, and is hereby required to bring in safe custody, to the bar of this House, sir Robert Wright now in his custody, on Monday the 6th day of May instant, at ten o'clock in the forenoon; and this shall be a sufficient warrant on that behalf."

"To the keeper of Newgate, his deputy and deputies, and every of them."

"Ordered that Mr. Petyt and Mr. Bradbury do attend this House on Monday next, at ten o'clock in the forenoon."

May 6, 1689.

This day being appointed to hear sir Robert Wright, sir Richard Holloway, and Mr. Justice Powell, concerning the proceedings in the

court of King's-bench against the earl of Devon, in Easter-term, 3 Jac. 2, upon an information for an assault upon Mr. Culpepper in Whitehall.

And the said sir Robert Wright, and sir Richard Holloway, being at the bar, and Mr. Justice Powell in his place, and Mr. Bradbury and Mr. Petyt (who were appointed by the House to attend this day) being permitted by the House to stand at the end of the clerk's table, where also stood the clerk of the Crown-office in the King's-bench, and his deputy, with the records relating to this matter; which deputy having publicly read the said record,

And being asked, "What they had to say for themselves in this business?"

Mr. Justice Powell said to this effect: "It was his great misfortune, that he was misguided by some books, which he looked on as authorities, which he finds by their lordships judgments are not so, and he humbly begged their lordships and the earl of Devon's pardon. As to the fine, he looked on 3,000*l.* to be fine enough. His silence in that business was his greatest fault, for which he also begged pardon."

Then Sir Robert Wright said to this effect: "That as to the breach of privilege, they were misguided by precedents, and as to the fine (which is usually set according to the quality and estate of the person fined) it came from the puny judge 30,000*l.*; and so to him last, according to the course of the court. And if he was mistaken, he begged pardon; for he never had the least disrespect to the lord of Devon."

Then Sir Richard Holloway spake to this effect: "He, as second judge, pronounced the fine 30,000*l.* which was set *nem. con.*; and if a lesser fine had been proposed, he should have accepted it; and did not justify the proceedings, but looked on it as an excessive fine; and begged my lord Devon's pardon, and submitted all to their lordships."

And then they being asked, "Whether they had no discourse together before, concerning the said fine?"

Sir Robert Wright said, "We discoursed not of the fine, but in court."

Sir Richard Holloway also declared, "He had no direction from either the king or chancellor about the said fine."

Whereupon Mr. Justice Powell said, "Sir Richard Holloway may remember there was a discourse of the fine five or six days before at the lord chancellor's, where sir Robert Wright, sir Richard Holloway, sir Richard Aleibone, and himself were."

This Sir Richard Holloway said, he did not remember.

And Sir Robert Wright denied that they met there purposely about the fine.

Then they withdrew.

Mr. Justice Powell being asked, "What discourse they had at the lord chancellor's?" said, "The lord chancellor first proposed 30,000*l.*; but afterwards said it would be better if 30,000*l.* and then the king might abate 10,000*l.* To this he declared his dislike to the other Judges, but not before the chancellor."

Then he withdrew.—After debate the House were of opinion,

"That the court of King's-bench, in overruling the earl of Devon's plea of privilege of parliament, and forcing him to plead over in chief, it being within the usual time of privilege, did thereby commit a manifest breach of the privilege of parliament.

"That the fine of 30,000*l.* imposed by the court of King's-bench upon the earl of Devon, was excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land."

Ordered, That the Judges this day present do give their opinions to-morrow, at ten o'clock in the forenoon, how the law stands as to the commitment of a peer upon a fine to the king.

May 7, 1689.

The House heard the Judges, what cases and precedents there were in the law, for the commitment of a peer of this realm in execution for a fine.

And, after consideration thereof, it is ordered, That this House will, on Wednesday next, at ten o'clock in the forenoon, take into their consideration a question arising upon the case of the earl of Devonshire, "Whether a peer of this realm may by law be committed in execution for a fine?" and that notice be given to the king's counsel of the said order.

May 15, 1689.

Upon reports from the Lords' committees for privileges, who were of opinion, "That the proceedings against the earl of Devon, in the court of King's-bench in Easter-term in the third year of king James the second, upon an information for an assault upon Mr. Culpepper, wherein his lordship's plea of privilege of parliament was over-ruled, and he was fined 30,000*l.* and thereupon committed to the King's-bench in execution, were great violations of the privileges of the peers of this realm."

And after hearing the record of the court of King's-bench, wherein the judgment against the earl of Devon is entered, read, and also sir Robert Wright, sir Richard Holloway, and Mr. Justice Powell, (who gave the judgment against the said earl of Devon) what they could say for themselves to justify their proceedings; and notice having been given to the king's counsel, to the end that they might attend if they had any thing to offer, whether a peer of this realm might by law be committed in execution for a fine, the said counsel did accordingly give their attendance, (after a week's notice) but did offer nothing therein.

After full consideration had of the several cases and precedents wherein the privileges of the peers have been concerned; the Lords spiritual and temporal in parliament do declare and adjudge, that the court of King's-bench, in over-ruling the earl of Devon's plea of privilege of parliament, and forcing him to plead over in chief, it being within the usual time of privilege, did thereby commit a manifest breach

of the privilege of parliament; and that the fine of 30,000*l.* imposed by the court of King's-bench upon the earl of Devon was excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land; and that no peer of this realm at any time ought to be committed for the non-payment of a fine to the king.

354. The Trial of PHILIP STANDSFIELD, SON to Sir James Standfield, of New-Milns in Scotland, for High Treason, the Murder of his Father,* and other Crimes libelled against him: 4 JAMES II. A. D. 1688.

CURIA JUSTICIARIA, S. D. N. Regis, tenta in prætorio Burgi de Edinburgh, Sexto die Mensis Februarii 1688. per Nobilem et Potentem Comitum Georgium Comitum de Linlithgow, Dominum Livingstoun, &c. Justiciarium Generalem totius Regni Scotiæ, et honorabiles viros Dominos Johannem Læckhart de Castle-hill, Davidem Balfour de Forret, Rogerum Hodge de Harscæ, et Johannem Muray de Drumcarne, Commissarios Justiciarum dicti S. D. N. Regis.

Curia legitime affirmata.

Intran,

PHILIP Standfield, eldest lawful son to umquhile sir James Standfield of New Milnes, prisoner within the Tolbooth of Edinburgh, indicted and accused at the instance of sir John Dalrymple younger of Stair, his majesty's advocate for his highness's interest: that where notwithstanding by the law of God, the common law, law of nations, laws and acts of parliament of this kingdom, and constant practice thereof, the expressing of malicious and seditious words to the disdain of his sacred ma-

jesty's person, and contempt of his royal government, such as drinking or wishing confusion to his majesty, is high-treason, particularly by the 2nd act 2d Sess. Par. 1st king Charles 2, of ever glorious memory: the plotting, contriving or intending death or destruction to the king's majesty, or any bodily harm tending to death or destruction, or who shall by writing, printing, or other malicious plotting and advised speaking, express and declare such their treasonable intentions, after such persons being legally convicted thereof, they shall be deemed, declared and adjudged traitors: and the cursing, beating, invading, or assassinating of a parent by a child, above the age of 16 years, who is not mad and furious, is punishable by death and confiscation of moveables: and of all other murders, parricide is the most atrocious and unnatural; and murder under trust is punishable as treason with forfeiture of life, land and goods, and particularly by the 23 Act, 1st sess. 2d par. king Charles 2. The king's majesty and estates of parliament, considering how great and atrocious a crime it is for children to beat or curse their parents, and how the law of God hath pronounced just sentence of death against such as shall either of these ways injure either of their parents; therefore the king and estates of parliament did statute and ordain, That whatsoever son or daughter, above the age of 16 years, not being distracted, shall beat or curse either their father or their mother, shall be put to death without mercy.* And sicklike by the 51 act, 11 par. king

* As to the union in one duty, of heterogeneous charges, see the Case of Nairne and Ogilvy, A. D. 1763, of this Collection.

Arnot (Collection and Abridgement of Celebrated Criminal Trials in Scotland, &c. p. 129) gives the following short note of a trial for parricide in the 16th century:

"John Dickson, son and heir to John Dickson of Belchester, on the 50th of April 1591, was tried for the murder of his father, committed in the month of July 1588. The criminal record contains neither the particulars of the murder, nor the evidence against the prisoner, but only that he was convicted by a jury, and sentenced to be broke upon the wheel at the cross of Edinburgh. At this period, and long after, the sentences of the court of justice frequently express no time for their being carried into execution; it being customary to take the convict directly from the court to the scaffold."

* "And such as are within the age of 16 years and past the age of pupillarity to be punished at the arbitrament of the judge, according to their deservings, that others may hear and fear and not do the like." See some Observations on the Scots law, as to this matter, in Hume's Comment. on the Criminal Law of Scotland, parl. 3, chap. 4, s. 1.

"June 5th, 1683. At Stirling one pursued for cursing his father, confessed that he called him a drunken dog, and was sentenced to enter

James 6. It is statued and ordained, That the murder or slaughter of whatsoever of the leidges, where the party slain, under the trust, credit, assurance, and power of the slayer, all such murder or slaughter to be committed in time coming, the same being lawfully tried, and the person dilated found guilty by an assise thereof, shall be treason, and the person found culpable shall forfeit life and goods; as in the said laws and acts of parliament at more length is contained. Nevertheless it is of verity, that the said Philip Standsfield, shaking off all fear of God, the bonds and ties of nature and christianity, regard and obedience to the said laws and acts of parliament, did dare and presume to commit the said horrid and detestable crimes, in swa far as, upon the first, second, third, or one or other of the days of the months of June, July, August, or September last, by past, one or other of them, he did, within the house and kitchen of New Milns, call for ale to drink some healths, and in the presence of John Robison, then his father's servant, Agnes Bruce, likewise his father's servatrix, and several others, he did as a most villainous and avowed traitor, presume and dare to begin a health to the confusion of his sacred majesty, his native sovereign, and drink off the same, and caused others in his company to do the like. And sick-like sir James Standsfield of New Milns his father, having caused educat and bring him up decentlie, and in plenty conform to his rank and quality, and having left no means unesayed for his literature, education and subsistence; yet he being a profligate and debauched person, did commit, and was accessory to several notorious villainies, for which, both at home and broad, he was apprehended and detained prisoner, as in the Marshalsea-prison in Southwark, in the public prisons of Antwerp and Orleance, and several other places: and though his father, out of his natural compassion to him, did cause release him out of these prisons, in which he was so justly confined, he no sooner had his liberty, than he of new invented and went about his villainous practices and debauches: and his father at last perceiving that nothing could reclaim him from these and the like proceedings, having signified his inclination to disherish him, and in order thereto, having disponed his estate in favours of John Standsfield his second son; the said Philip did thereupon conceive, harbour and entertain ane hellish malice and prejudice against the said sir James Standsfield his father, and most barbarously did declare, threaten and vow at several times, that he would cut his throat: and particularly upon the first, second, or third, or remanent days of the months of the

into prison in the town where he dwelt, and not to come furth until his father interceded with the magistrates for him, and that he should also crave his father's pardon openly." 1 Fount. Dec. 334.

year 1680, within the house of James Smith in Nungate or Haddingtoun, and upon the first, second, or third, or one or other of the days of the months of January, February, March, and remanent months of the year 1687, within the house of James Baikbie fermorer in New-Milns; and within his father's own house of New-Milns; and in the house of William Scot there; and upon the first, second, third, or one or other of the days of the months of January, February, March, and remanent months of the year of God 1683, 1684, and 1685 years, when he was both in Brussels and Breda, and several other places, both in Holland and Flanders, and in prisous, within which he was detained in the city of London and Southwark, or upon one or other of the days, of one or other of the months of the said years, or either of them, most wickedly, un-naturally, and bitterly rail upon, abuse and curse the said sir James Standsfield, his natural and kindly parent. And being transported with rage and malice, he did, contrary to the light and ties of nature, nor once, but often and frequently curse his father, by bidding, and praying the devil to take him, and the devil rive him, God damm him, and swear, if he had a sword, he would run it through him, and if ever he came to Scotland, he would be avenged upon him. And particularly upon the — day of November last, which was the last time his father went to Edinburgh, he did most impiously and unnaturally imprecate, God let him never return, and God let him never see his face. And frequently when he saw his father's diet taken to him, he used to say, God grant he may choak upon it; and at other occasions, when his father refused to eat, he was in use to say, God let never more be in his stomach than was in it then. And upon the first, second, or third, or one or other of the days of the months of September, October, or November, last by past, or one or other of them, his mother being recovered out of a sword, and having said to him, Philip, ye will shortly want your mother, which will be a gentle visitation to sir James your father. To which he did answer: by my soul, my father shall be dead before you, mother; and about eight days after, he upon the like occasion did renew the same words: as also he was in use to declare, that though at present he had neither cloaths nor money, yet shortly (and nobody did think how soon) he would be laird of all, and then would use other persons as they did him now: and at other times declared, that before Christmas he would be laird of all; which curses and imprecations, he the said Philip Standsfield, by a continual habit used, and repeated these several years by past; and lately some few months or weeks before his father's murder. And not satisfied therewith, the said Philip did proceed to that degree of unanatural cruelty, and malicious spite and enmity against his father, that upon the first, second, third, or one or other of the days of the months of January, February,

March, and remanent months of the years of God, 1680, 1681, 1682, 1683, and 1684 years, or one or other of the days of one or other of the months, of one or other of the saids years, he did attempt to assassinate, and offered violence to his father's person, and did chase and pursue him upon the king's highway at Lotherburn, and did fire pistols upon his father: and likeways upon one or other of the days of one or other of the months of one or other of the years of God above specified, he did attempt to assassinate his father for his life, at Culterallors; and did fire pistols upon him: and his father being afraid of his life, and under the apprehension of violence, from the cruel and bloody hands of the said Philip, his unnatural son, he did to several persons both of quality and entire reputation, declare, that the said Philip, his son, had both attempted to assassinate and offered violence to his person, and that he was devising and contriving his death. And the said sir James Standsfield his father, having upon the — day of November last, gone from the city of Edinburgh to his own house of New-Milns, and about ten o'clock at night, or thereby, having gone to his own chamber, in order to his rest, and being alone in the room, under the credit, trust, and assurance of the said Philip his son, and his own servants within his own family; the said Philip did consult, and advise, and correspond with some other persons, within and about the house for the time, to assassinate and cruelly murder his said father, and particularly with Geo. Thomson in New Milns, and Helen Dickson his spouse, and Janet Johnstoun spouse to John Nicols, there, in the house of the said George Thomson many times, particularly the Saturday's night immediately preceding the murder, where he cursed his father, and said he should shortly make an end of him, and be master of all: and accordingly he and they did murder and strangle him in his bed-chamber, and in the dead time of the night, did carry and transport him from the said room to the water, near by the house, and laid his body down upon the water-side, and tied a stone about his neck to make him sink in the water; and before he was thrown therein, he went back with his accomplices to Little Kiln near by, and consulted and advised whether it was more fit to throw him in the water with the stone about his neck, to make him sink, or to take away the stone, lest when he should be found, it might thereby appear that the stone had been tied by some other hand than his own; and at last resolved to take away the stone, and throw his body in the water, which they returning, did accordingly: and some persons being accidentally lying in the house at the time, did hear a noise of many tongues and voices, to their great terror and amazement; and the next morning very early, some of the servants in the house having come to the room where his father did lie, and having missed him out of the room, gave notice thereof to some other of the servants. He declared that he had been seeking

him about the water-pools; and a noise and cry having arisen, search and enquiry was made for his said father (and by him seemingly amongst the rest): and after some time his body was found in the water hard by his own house, and being dead, and his neck broken before he was thrown in the water his body did neither sink to the ground nor receive water (as all drowned bodies are in use to do) and he knowing where his father's body had been put, went on the sabbath-morning directly to the place where his body was in the water, and stood a considerable space on the water-side, directly opposite to the body, with his eyes fixed on the same, before his body was found or known to any others than the murderers; and when John Topping (a stranger) passing that way, and ignorant of the whole matter, or that sir James was amissing, called to him, and asked, who that was in the water? He made no answer, but went away from that place strait to New Milns, and gave no intimation to him, or any other person what he had seen in the water, but appeared surprized when his body was found there by other persons; and his father's body being taken out of the water, the same was, by his order, carried to a dark out-house; and though he was desired by the friends and servants present, to suffer his father's dead body to be carried to his own house, and kept therein, and not be buried till his friends in Edinburgh, and elsewhere, and physicians in Haddingtoun, or near by, might see the same, yet he refused so to do, and caused bury the dead body of his father privately, and in haste. And the noise having spread abroad, that his father had been barbarously murdered by him, and his accomplices, order was given by these in authority, to cause open the grave, that physicians and expert chirurgions might inspect his body, and make report anent the truth of the matter: and accordingly, by the report of the saids chirurgions who inspected the body, it did appear, that his said father was cruelly strangled and murdered, and not drowned, and that he had been cast in the water of purpose to conceal the same. And when his father's dead body was sighted and inspected by chirurgions, and the clear and evident signs of the murder had appeared, the body was sewed up, and most carefully cleaned, and his nearest relations and friends were desired to lift up his body to the coffin: and accordingly James Row, merchant (who was in Edinburgh in the time of the murder) having lifted the left-side of sir James his head and shoulder, and the said Philip the right-side, his father's body though carefully cleaned, as said is, so as the least blood was not on it, did (according to God's usual method of discovering murders) bleed afresh upon him, and defiled all his hands, which struck him with such a terror, that he immediately let his father's head and body fall with violence, and fled from the body, and in consternation and confusion, cried, Lord, have mercy upon me! and bowed him-

self down over a seat in the church (where the corp were inspected) wiping his father's innocent blood off his own murdering hands upon his cloaths. By all which it is manifest, that he did most traiterously express his hatred and malice to his majesty's sacred person, by wishing and drinking to his confusion, and causing others to do the same. And likewise, that he did not only unnaturally curse, invade, attempt to assassinate or beat his said father, but under trust and assurance, barbarously and treasonably did strangle, kill and murder him in manner forsaid, and is actor, art and part of the forsaid crimes, or one or other of them, which being found by an assyse, he ought to be punished for the treasonable crimes above specified, with forfeiture of life, lands and goods, and for the other crimes above-mentioned, capitally, and with the pains of death and confiscation of moveables, to the terror and example of others to commit the like hereafter.

Pursuers.—Sir John Dalrymple, younger, of Stair, his Majesty's Advocat. Sir George Mackenzie, Advocat.

Procurators in Defence.—Sir David Thoirs, sir Patrick Hume, Mr. William Moniepenney, Mr. William Dundas.

The Pannal's procurators produced two warrants of privy council, commanding them to compare and plead the pannal's defence.

Sir Patrick Hume for the pannal (always denying the indytement, and whole members and qualifications thereof) alleadges, That as as to the first part of the indytement, in relation to the drinking an health to the confusion of his sacred majesty, as it is most calunnious, so it is not to be supposed, that any man in his right wits would have been guilty of such a thing: and it is positively offered to be proven, that at, or about the time libelled, and several times before and after, the defender did most heartily and cheerfully in several companies drink the king's health, and upon all occasions he was ready to testify his loyalty to the king, and particularly the time of the invasion by the late duke of Monmouth in England, where he did enter himself voluntarily a souldier in the earl of Dumbarton's regiment, and continued in the king's army till the rebels were defeat, and the voluntiers dismissed.

As to the second part of the libel, in relation to the pannal, his alledged committing, and being guilty of, and accessory to many notour crimes abroad, and being detained prisoner in London, Antwerp, Orleauce, &c. and that he vented and entertained malice against his father, and that he declared many times that he would cut his throat, and that he diu rail against, and curse his father, by many imprecations.

It is answered, *primo*, That it is absolutely denied, that the pannal was guilty of, or accessory to, any notorious crime abroad, or put in

prison upon that account; nor is there so much as any crime condescended upon.

2. The defender could not conceive any prejudice against his father, upon the account of disposing his estate to his second son; for he knew nothing thereof till after his father's decease, that one Alexander Ainslie told him that his father had made such a disposition.

3. As to the pretended expressions, that the defender should have had of railing, cursing, and using imprecations against his father, in so far as the samen are libelled to have been done abroad, in England, Holland, or other places, he cannot be lyable to the punishment inflicted by the law of this kingdom, because when a party commits a crime in another nation, he is only to be punished according to the law of the place where the crime was committed, and not according to the law of the nation where he is a subject, or has his dwelling: As is clear by the common law, authentic Cod. 'Ubi de criminibus agi oportet. Quia in provincia quis delinquit, aut in qua pecuniarum aut criminum reus sit, sive de terra, sive de terminis, sive de possessione, sive de proprietate, sive de hypotheca, aut de alia qualibet occasione, vel de qualibet re fuerit reus, illic jure subjaecat, quod jus est perpetuum.' In that nation where any person commits a crime, or is liable to answer upon any account whatsoever, he is to be judged by the law of that place, which is established as a perpetual law; and Mattheus de Criminibus, in his title, De Pœnis, is express of the same opinion.*

4. As to all those pretended expressions of railing, cursing, and threatening, libelled, that were before March, 1683, the defender is secured by the act of indemnity, by which all crimes are indemnified, preceeding that time, against the government and laws.

5. As to any pretended expressions of railing and cursing since that time, they being but injuries alledged done to the father, he might and did remit the samen, in so far he did not challenge and pursue the same in his own time; and this is clear from the common law, Carpzov. part 2, quest. 65. 'Actio autem injuriarum nec activè nec passivè in Hæredes transit, etiamsi mortuus illatas injurias ignoraverit.' Institut. lib. 4, tit. 12, par. 1, 'De perpetuis temporalibus action.' Leg. 10,

* "For understanding," says Mackenzie, "who is judge competent, in general, to punish crimes, and what founds his competency, or as the civil law and doctors speak, 'quod est forum competens,' it is fit to know, that he who commits a crime, may be judged either in the place where the crime was committed, which they call 'forum delicti commissi,' or in the place where he was born, which is called 'forum originis,' or in the place where he dwells, which is 'forum domicilii.'" See Mackenzie's Criminals, part 2, tit. 2, throughout. See, also, Hume's Commentaries, part 3, chap. 1, s. 4.

par. 2. ff. 'si quis cautionibus in iudicio sy-
'ten.' And Leg. 13. ff. 'de injuriis, injuria-
'rum actio neque heredi neque in heredem
'datur.' As also it is a principle in law, that
'dissimulatione tollitur injuria;' and if it could
be made appear, that the pannel had any such
expressions, the father did dissimulat and pass
from the same, in so far as by a letter, dated in
June last, written by the father to the pannel,
he orders him to take in his chamberlain ac-
counts of the rents of his lands, and of any
money he had received from the tenements, or
for the corns sold, and that he expects he will
do the same exactly, and recommends to him,
to be careful of all his affairs, and subscribes
himself to be his loving father. By which it
is evident, that all former differences (if any
were) betwixt them, were then taken away.

As to the third part of the Indytement, in re-
lation to the several acts and qualifications in-
sisted upon; to infer, that the defender had
accession to his father's death: It is answered,
prima, That the indytement, in so far as it is
founded upon the 51st act. par. k. Ja. 6, in re-
lation to the murder under trust, which is de-
clared to be punishable as treason, is not rele-
vant: because the father cannot in law be said
to be under trust and assurance of the son, and
that act of parliament takes only place in cases
where a man is invited to his neighbour's house,
or of a traveller being in an inn, and that he be
murdered under that trust; and the same act
of parliament being founded on in the case of
Swinton, who killed his wife, in the year 1666,
the indytement was restricted to simple slaugh-
ter. And in the case of master James Oli-
phant in the year 1665, the lords of the ses-
sion found, that a son killing his mother, was
not murder under trust, and so he was not
punishable by that act of parliament, as guilty
of the crime of treason.

2. The acts and qualifications condescended
on to infer the defender's accession to his fa-
ther's death, are but very remote and uncer-
tain; for as to that expression, that the de-
fender is alledged to have threatened his fa-
ther's death, it is the opinion of all lawyers,
who have written upon the subject, that that is
but a very remote presumption. And s Carp-
zovius expresses it, part. 3, quest. 121, numb.
51, 'Quod est indicium admodum periculo-
'sum, quippe cum homines sæpe nil minus fa-
'ciant quam quod minas exquantur et iracun-
'dia agitata minas de crimine perpetrando
'sæpe jactet, ipso tamen animo feroce paulo
'post discusso, cohibeat manus, et abstineat a
'facinore illo quod forsitan ab alio postea com-
'mittitur. And Paris de Fureo gives an in-
stance in his Tractat. de Syndicatu upon the
word *tortura*; and Boverius, That a woman
seeing a person going by her window, against
whom she had a prejudice, and that another
having a hatred against her, and hearing that
she had threatened to cut off that person's legs,
the party that did hear the woman use the
threatening, did the thing; upon which the
woman that did threaten, being challenged,
and put to the torture, did confess; yet there-

after it was found, that she was altogether in-
nocent, and that another had done it.

3. As to the pretended acts of the defender's
alledged pursuing, and invading his father, and
firing pistols at him, at Lothian-buru and Cul-
t-rallors, in annis 1683 and 1684. As it is
most groundless, so, if need were, it could be
made appear by the persons who were in com-
pany with him at that time, that the defender
and his father were then in entire friendship
all alongst the journey, and he was so far from
making any such attempt, that it can be made
appear, that the defender did behave himself
towards his father with all the submission and
respect that became a son to have to his father:
But as to these, and all other acts, preceeding
March 1685, the defender is secured by the
act of indemnity, and as the defender can-
not be pursued for any crime preceeding
that time, neither in judgment nor out with the
same, they in effect being no crimes, being
taken away by the act of indemnity, they can-
not be so much as made use of as qualifications
or aggravations, to another crime posterior
thereto.

4. As to that pretended qualification, that
when the defender did touch his father's dead
body after it was taken out of the grave, the
corps did bleed.

It is answered, that this is but a supersti-
tious observation, without any ground either
in law or reason. And Carpzovius relates,
part 3. quest. 122. numb. 31. That several
persons upon that ground had been unjustly
challenged, and that he in his own experience
had seen a dead body bleed in presence of the
person who was not guilty; as also that he has
seen the body not bleed in presence of the per-
son that was guilty. And Mattheus de Crimi-
nibus, is of the same opinion, Tit. 16. de
Questionibus, numb. 12. 'de sanguine porro de
'Cadavere prodente quod dicitur id de plu-
'tibus experimentis comprobatur, tamen cum
'experimenta falsa sint; ratio vero idonea
'nulla reddi possit, non putaverim indicium ad
'torturam sufficiens esse; non enim sapientis
'judicis est incerto experimento credere quod
'certa ratione datum verum est.' And the truth
is, the occasion of the dead body's bleeding
was, that the chirurgions that came out to
visit the body, did make an incision about the
neck, which might be the occasion of the bleed-
ing; and also the very moving of the dead
body, when it was taken out of the grave, and
out of the coffin, might occasion the bleeding;
especially seeing the body did not bleed for
some time after, which certainly was made by
the motion, and by the incision: As also a
further evidence, that it could not be the de-
fender's touching the body, the chirurgions
did likewise touch the body as well as he, and
several others present; so that the bleeding
could no more be ascribed to his touching, than
the touching of the other persons present. *

* See in this Collection the strange Case of
Jane Norkott, taken from the Papers of sir John
Majnard.

5. As to the other articles lybelled, relating to the pretended murder, they are but meer stories, and the truth is, and it is offered to be proven, that the defender having gone to his chamber and bed the night before his father's death, he did not stir out of his bed nor out of the room till the next morning that John Robertson his father's servant came to his chamber, where he was in bed, and told him, that he had been in his master's room, and that he could not find him. Upon which the defender immediately arose, and put on his cloaths, and went out to see where his father was. And shortly after word being brought him by some person in the town, that they did see his father's body lying in the water, and it being generally concluded by all, that he had thrown himself in the water, and the body being taken out, and laid in a low room, it was thought fit by all the neighbours about, that he should be buried the next day.

6. The particulars lybelled to infer the defender's accession to his father's death, being but remote and uncertain conjectures, it is a certain principle in law, that 'ex præsumptionibus et conjecturis nemo criminaliter condemnari potest,' especially as to a capital punishment: As is clear from the common law, leg. 5. 'Digest. de pœnis, sed nec de supplicationibus debere aliquem damnari, satius enim est impunitum relinqui facinus nocentis quam innocentem damnari.' And which is the opinion of all lawyers writing upon the subject: As Bartol. upon the foresaid law, and Farin. part 3. Oper. Crim. Quest. 86. and the lawyers by him there cited. And Muscard de prob. Conclus. 225, lays it down as a certain conclusion, 'quod argumenta quantumcumque urgentissima, etiamsi essent talia quæ mentem indicantis adeo coactarent quod aliud credere non possit, non tamen sufficerent ad condemnationem pœnæ corporalis sed duntaxat pecuniariæ.'

7. The presumptions and qualifications lybelled, cannot be sustained even to infer an arbitrary punishment; because they may, and are taken off by other presumptions, that either the father was not murdered, but that in a frainzie, or melancholy fit, he had thrown himself in the water: or, at least, if he was murdered, that the defender had no accession thereto, and the presumptions condescended upon in behalf of the defender, eleid the presumptions contained in the indictment, are these: that it is notourlie known, that his father was subject to melancholy fits, and that in the year 1679, the time of Bothwell Bridge, it is offered to be proven, that he was in a fit of distraction; and at another time in his house at the Netherbow, he was going to throw himself out over the window, and one Thomas Lindall had not come in at the time, and pulled him back by the legs, when his body was half out at the window. And some few days before he went out of Edinburgh last, he came to George Sterling, chirurgeon, and desired him to draw blood of him, for a distemper in his head, which

he refused, unless he had advice from a physician. As also a day or two before he went out of the town, he was seen reading upon the book of Burtoun's Melancholy. And that day when he went out of the town in company of Mr. Bell the minister, and Aiton, merchant in Haddingtoun, they observed him to be melancholy, disordered, and more troubled than ordinary; or if it could be made appear, that the father was murdered, yet it cannot be presumed that the defender had any accession thereto, or that he would have committed such an act against the very ties and light of nature. As also it appears by the foresaid letter, written to the defender by his father, that they were in entire friendship; as also when the surmise went abroad, that his father had been murdered, if he had been conscious to himself that he had any accession thereto, he would have certainly fled the country, and gone away. But he was so far from that, that upon the first runour of it; he came presently into England, and several days thereafter, it being told him, that he was suspected to have accession to his father's death, he came voluntarily and entered himself in prison, that he might undergo the strictest and severest trial: which alone is sufficient if it were no more, to take off all the presumptions lybelled, and to convince the world of the defender's innocence; and it being a principle in law, that 'una præsumptio tollit aliam,' the presumptions adduced for the defender ought to be preponderat. Muscard. Conclus. 1205, is positive, that 'præsumptiones quæ stant pro reis prævalent.' As also that 'præsumptio affectionis naturalis prævalet contrariis præsumptionibus.' So that upon both these considerations, the presumptions alledged for the defender ought to be sustained, to take away the presumptions lybelled, and to free him from the crime.

His Majesty's Advocate answers, that the libel consists of three articles, 1. treason, by the pannel's drinking the king's confusion, and by the murder under trust. 2. The cursing of a parent. 3. The qualifications inferring the pannel's accession to the murder of his father.

As to the first, it cannot be denied, but that the drinking or wishing confusion to his majesty, is the highest act of contempt, malice, and disdain to his royal person; and as the relevancy of this article is not expressly contraverted, -so the atrocity of the act, and the forcing others to do the same upon the common grounds of law, does clearly infer treason, and it cannot be expected, that such extravagant words should either be expressed or particularly provided against by any law in express terms; but the nature of the words in express terms of our law discharging all speeches to the disdain of his majesty, the contempt of his authority, do clearly and naturally comprehend the words lybelled, and by the common law, 'Ad leg. Jul. Maj. crimen læsæ Majestatis ad exemplum legis scriptæ est vindicandum.'

And whereas it is pretended that these words were inadvertently said, and that it appears by

the tract of the pannel's life, and his readiness to engage in his majesty's service, that the words could not be deliberat and malicious: it is replied, that it is offered to be proven, that the drinking confusion to the king, was openly and plainly proposed; and that the pannel did deliberately send out for ale to drink certain healths, and that this health to the king's confusion was the first or second, and that it was no lapse or mistake in the expression; but that he forced others to pledge and drink that same health. And the malice and disloyalty is evident, by the healths subsequent, viz. Antichrist's, &c. and it is not at all relevant (after the reiterate and deliberat expressing of these words) that he had retracted or drunk the king's health; for a crime once committed, is not retracted or taken off by such inconsistent and unsequential speeches. But to shew the sense the pannel had of the importance of his own words, the pannel being informed, that some of the persons present had divulged his having drunk the king's confusion, the pannel did conjure them to secrecy, and did menace the witnesses with a great cane, that he would beat and brain them if ever they told it.

Whereas it is answered in general, as to all crimes committed without the kingdom, that they cannot be cognosc'd or punished here: it is replied, that as to crimes against nature, or the law of nations, as every party is competent to be an accuser, so every judicature is competent; and therefore as to the crimes of treason, or cursing of parents, wherever committed, they are punishable by the justices: but because in relation to the crimes committed abroad, there is not positive probation, but declarations and testimonies; therefore as to these crimes, his majesties advocate does not insist on them as distinct crimes *per se*, but as qualifications, documents, and evidences of the habitual debauchery, and unnatural malice expressed by the pannel against his father for a tract of many years.

Whereas it is answered, That as to all crimes preceding 1685, they are taken off by the indemnity; it is replied, the indemnity 1685, is no general indemnity, neither as to persons nor crimes, but particular crimes are remitted, and particularly enumerat, without any general clause: and as cursing of parents is not particularly enumerat, so by the nature of that crime, it cannot be included or comprehended in any general indemnity: and the words of the act of parliament, 20 act. 1. par. K. Ch. 2. bears expressly, 'That the cursers of parents shall be put to death without mercy.' So that a general act of indemnity, or mercy, without a special remission, could not include this crime, which, as the act of parliament bears, is expressly against nature, and the law of God: and by the opinion of all lawyers, general indemnities do not extend to all crimes; but these crimes which are called in law 'Crimina excepta,' are never intended to be indemnified, nor such crimes, where the interest of parties is more than the interest of public justice; and in all former and general

indemnities, murder and other crimes are particularly excepted with a general clause, excepting all such crimes as use not to be comprehended in general acts of indemnity: so that this so horrid a crime, wherein the parent was more interested than the public, neither was, nor could be comprehended under a general indemnity: as also, that restricted, limited indemnity, bears expressly an exoneration for all persons below the degree and quality of an heretor, wodsetter or burgess; and whether the pannel were an heretor or not, yet it cannot be said, that he is below the degree and quality of a wodsetter or burgess; and therefore the act of indemnity is of no use to him.

Whereas it is answered, That sir James was reconciled with the pannel, and wrote kind letters to him, whereby, *dissimulando* former injuries were taken off: It is replied, That injuries are only taken off *dissimulando*, which are not atrocious, but never specifick crimes, wherein the discharge or express renunciation of the party injured cannot be liberat à vindicta publica, the punishment of crimes, especially in capital punishments, belonging to the magistrat; and the privat party has not the sole interest, nor can dispense with capital punishments: but the letter founded upon, does not in the least infer the party's forgiveness or dissimulation of the injury. And a farther ordering his son to call in for chamberlain accompts, without empowering him to discharge the same, is not the least evidence of confidence in his son, much less a remitting of his crime.

As to the second article, in relation to the cursing, it is positively offered to be proven, not in single acts, but by a tract and habit of cursing his father, in the most abominable termes imaginable.

As to the third article, in relation to the murder, that this matter may be clear, et ut constat de Corpore delicti, these undoubted qualifications are offered to instruct, that sir James Standfield was murdered and strangled, and that he did not drown himself. 1. It is offered to be proven by the minister, that was that night in the house, that long after ten o'clock at night, and that sir James had retired to the chamber, where he lay alone, the minister heard the confused whispers, murmurs, and noise of several persons, both men and women, which affrighted him; and that he heard the noise go away by the back-side of the house, which leads directly to that pool where sir James his body was thrown in the water.

2. Sir James's body was found swimming above the water; and albeit it appeared by the ice upon the top of his cloaths, that he had been several hours in the water, yet there had no water entered in his body; which is a demonstration, that he was dead before he was thrown into the water; for a person thrown alive into water, drawing in of air and respiration, being in the water, he must draw in water; and if the person draws in as much water, as fills his concavities, he becomes heavy, having so much

more weight of water, and therefore he sinks: but if a person be thrown dead into the water, when the clap of his throat is shut, the water cannot enter, and there being so much emptiness, the body is light, and supported by more parts of water, than the gravity of the body can depress. 3. There being several chyrurgeons and others sent out by order from authority to take up and inspect the body, to see whether there was any evidence of strangling or other symptoms of murder upon the body; it did appear to all these persons, who did depone before a committee of the privy council, That from the one jugular vein to the other round the neck, there was a tumour of congealed black bruised blood three inches broad, and that there was congealed blood in the throat; upon which matter of fact the college of physicians, have given an unanimous testimony in writing, that sir James Standsfield was strangled, and not drowned: and the deaconry of the chyrurgeons being convened, have emitted a declaration in writing, concurring and agreeing with the report of the physicians: so that it is as clear as the light of day that sir James Standsfield was murdered.

3. For the qualifications, that the pannal was the murderer, or accessory to the murder of his father, these clear evidences are offered, which makes his crime without possibility to be palliat or denied. 1. It is notorious, that the pannal is a most debauched, vitious, pernicious person, and has been prisoner, or condemned to die in all the places or societies he ever haunted. He entered a soldier in the Scots regiment, where he was condemned to die at Treves, but made his escape; and his being in prison, in the Marshalsea prisons, Orleanse, and Brussels, (which makes the circuit of his travels) are not denied: and his profligate life and constant drunkenness, since he came to the prison, is offered to be proven by the keepers: and as it is unnecessary to trace all his debauches; so there is one material point offered to be proven, That upon the least provocation, either by man or woman, the pannal used to swear by horrid oaths, that he would take their lives, though he should die in the Grass-mercat for it.

2. Sir James Standsfield for these debaucheries having disherished the pannal, and disposed his estate to his second son: it is positively offered to be proven, That in the Nungate of Hadingtoun, in James Smith's house, the pannal being told, that his father would disherish him, he with horrible oaths vowed to cut his father's throat.

And whereas it is answered to this qualification, That the saying that a son would cut a father's throat, is but a remot circumstance: it is replied, that the law, and all lawyers do agree that 'minæ præcedentes et damnum sequutum,' is a most pregnant qualification of that party's crime, especially where the threats were to cut a father's throat, which of itself was so horrid and unnatural a villany, that it cannot be doubted he who durst vow it, wanted but an

occasion to act it. And it is acknowledged, that though this be the clearest presumption, yet *per se*, it is not full probation: For though the son had both vowed and resolved, yet by an accident he might have been prevented; but the presumption at least lays the burden, that except the pannal could condescend, and document, that some other person killed his father, he must be reputed the murderer.

3. It is offered to be proven, That sir James Standsfield, who was a person of eminent sobriety and veracity, did declare to several persons, that his unnatural son had attempted his life, and offered violence to his person, and particularly, that he had pursued him on horseback, and fired pistols on him; and that some Friday before sir James was murdered, he did declare that it was not his debts, or any thing under heaven that troubled him, but that his son and family were plotting and contriving his destruction; and the next night he was murdered.

3. It is offered to be proven, that the pannal's mother declared, That her son had vowed to be his father's death, and that he was a vindictive person, and that she did apprehend he had murdered him. So as to this article, there is a concurrence of the pannal's own oaths, to murder his father, and of his father and mother's declarations, that he had attempted, and was still plotting the same.

The second qualification is, that that Saturday's-night sir James Standsfield came home, the pannal would not come where his father was, either to supper, or prayer; and being expressly desired by several persons to go to his father, and speak with him; he declared (that same night he was murdered) he could not endure to see, or look upon his father; and he had been all that day close with Thomson and his wife, and Janet Johnstoun. So after ten hours at even, after the family was gone to bed, he came out to Thomson's house, which is hard by the gate, and there in presence of Thomson, his wife, and Janet Johnstoun, he declared that his father would neither give him money, nor cloaths, and cursed his father, and declared that he would shortly make ridd of him; which agrees with what he had several times said in other companies, that he was to be laird before Christmas; and that he was shortly to be master of all, and none can think how soon. As also, shortly before sir James's death, the pannal's mother falling in a swoond, it was said to him, Philip, ye will shortly want your mother; to which he answered, By God, his father should be dead before her: And eight days after, his mother falling again sick, he repeated the same words; whereby it is evident the murder was deliberate and determined.

3. On the Sunday morning, before sir James's body was found, Philip came to the minister's chamber, and told him that his father was gone out in the night, and that he had been searching for him about the pools, and water-side; and when the minister reproved him for making such insinuations against his

father, he laughed at him, and went away to the pool, and stood looking upon his father in the water, but made no discovery; and thereafter a stranger coming by upon the highway likewise, seeing sir James's body in the water, he came back and discovered the matter; at which Philip seemed surprised, and told that he had seen his father's body in the water before, but he did not think fit to be the first discoverer, which shews that he was conscious of his own guilt; otherways, upon the first sight of his father in the water, he would have gone to him; but on the contrary, he never laid a hand upon his father's body either to pull him out of the water, or to carry him into the house, for the dread of some extraordinary discovery, and did not allow the corps to be brought within his father's gates, but caused carry the corps to the wake-mill, where, to carry the appearance of strangling upon his body, he entrusted Janet Johnston with the care of wounding him, who was known to be a person so odious to sir James, that he could not see her for her baseness with the pannal, and she did acknowledge, that she had not been for three quarters of a year within the house before; and yet this infamous strumpet, who has been tortured by order of the privy council, as accessory to the murder, was chiefly intrusted to see the naked body, and the cloaths put on!

4. The pannal did refuse to send for a chirurgeon, and to let his father's body be sighted, though the minister and others did expressly demand it; and the Englishmen in the manufactory, who were acquainted with the crowner-laws, they made a mutiny against the burial, till the corps were sighted; yet the pannal caused bury the corps that same night without shewing them.

The corps being raised by order, and incision being made, whereby the strangling did clearly appear, and the corps being dressed clean, and linnen put on, there did appear no blood; but to take off suspicion, the corps were lifted up, and the night-cap being wrong put on, it was altered and changed, and thereafter the corps were laid down without any blood upon the linnen; and the pannal (who to this time had never touched his father's corps) being required to assist to lift the body into the coffin, having taken his father by the right side of the head with his left hand, James now bearing the left, the pannal's hand was all together bleeding, as if his hand had been put into a vessel of blood; which notwithstanding of all his impudent resolution to the contrary, had that horrible impression, and conviction upon him, that he let his father's head fall to the ground, and cried out O God! and ran away and went to a desk in the church, where he lay groaning and in confusion, but durst never return to touch the corps; and as there can no natural reason be given, but an ordinar and wonderful providence of God, in this kind of discoveries of murder; so the fact was never more evident, and sure; though half a dozen of persons were bearing the corps, no man's hands were bloody but the

pannal's, and the corps being two intire days in the grave, in that weather and season, the blood by the course of nature was become stagnant and congealed; so that the former tossing and lifting of the corps, and even the incision itself had occasioned no such effusion, but only some water or gore; but upon the first touch of the pannal, the murderer, there appeared abundance of liquid florid blood: And though this *per se* might not be sufficient, and as Mattheus is cited, it should not infer torture; yet Mattheus acknowledges that most part do sustain this, as a violent presumption oft times experimented; yet in his opinion it is not sufficient for torture, because torture being in itself a punishment, it cannot be used, except where there is *semplena probatio*, or where the conscience of the judge is satisfied, as to the truth of the crime, and therefore uses an extraordinary course, to extort a confession, which proves that this presumption is *semplena probatio per se*, according to their own grounds.

And whereas it is alledged, that capital punishment cannot be inferred from conjectures, but from clear and positive testimonies; it is answered, That the *Lex ult. Cod. de probationibus*, clearly states that probation is either *Testibus tabulis instrumentis documentis et indicis*. And Mattheus states a particular title upon this single question, *Cap. 6. Titulo 15. de probationibus*, and does most positively determine that crimes are to be proven *Documentis, Argumentis et Indicis*. And it is most evident, that the probation which arises from the nature of the thing, which is incapable to be sophisticate, or imposed upon, as witnesses may be, that kind of probation is the surest, because it is always the same, and admits no variation. Its true, and it is acknowledged that *argumenta et indicia* must be *clara et evidencia*, and probation being *Quod facit fidem Judicis*, every man's experience tells him, that the complication and conjunction of so many evident qualifications, though none of them *per se* were sufficient, yet being all of them joined, it induces a greater certainty, than two witnesses positively deponing upon the fact. And therefore the evidence of the probation belongs to the inquest, and the relevancy that these articles conjoined, or any part of them, are sufficient to infer the crime, belongs to the judge.

As to the presumptions offered for the execution of the pannal, they are not at all relevant; for though so horrid a murder is not to be presumed against nature, yet being proved, or so strongly evinced, it does but conclude the pannal's greater guilt: and suppose that sir James Standfield was formerly melancholy, and had been frantick in the year 1679, yet it is known he recovered his health, and was of a composed, sedat temper of mind for many years thereafter, and was as capable and diligent about his affairs, these many years, as he had been formerly, and was so considered and employed by the wisest men in the kingdom; and at the time of his death there was no sick-

ness, or returning of frenzie upon him, but all that week he had composedly done his affairs; and did upon the Saturday, when he went home, discourse rationally upon all the subjects that occurred: But it being so clearly documented and proven that he was strangled, it is a ridiculous conceit, and there remains no possibility that after he was strangled, he walked out and drowned himself. And as to that presumption, that the pannal rendered himself prisoner, it was indeed suitable to the rest of his impudence, and he did not render himself till after the order to apprehend him was intimate to him, when he could not escape, and when he was under observation; and there did not want project in fixing upon this impudence when he could not escape, as a qualification of innocence, that he would render.

Sir David Thoira, without repetition of the Replies made by his Majesties Advocat, doth make his Duply to the forsaids Replis, and every member thereof, in order as follows, viz.

To the first, anent the treasonable words, the pannal's procurators oppon their former answers, and the act of parliament whereupon that part of the ditty is founded, being only in order to such treasonable speeches advisedly spoken. The constant tract of the pannal's life, in drinking his majesties good health at occasions, and offering to adventure his life in his service in the last rebellion, sufficiently demonstrates, that if any such expression did escape the pannal, as it is denyed, the same was only rash and unadvised, and not deliberat and advised, as is required by the act of parliament, to infer the pains lybelled; and the qualifications added by my lord advocat, bearing, that the pannal did conjure the persons then present to secrecy, demonstrates that the pannal was *ex incontinenti* heartily sorrowful and penitent for the same. And it is clear by that excellent law of the Code, the words whereof are, 'Si quis Imperatori maledixerit, si ex invidia maledixerit, si ex temeritate, et peccantia temeranda, si ex animo injuriantur, ad poenitentiam remittendum,' which demonstrates, that by the common law, such an rash and unadvised expression was never to be laid hold on to infer a capital punishment, where the person alledged, expressor thereof, was not otherwise suspect of disloyalty.

2. Repeats the defence as to crimes alledged committed abroad, and, it were against reason and equity, that persons for one and the selfsame crime, should be subject to the punishment of several jurisdictions, where the punishment of the saids crimes are different: but seeing my lord Advocat declares he hath no probation for these alledged crimes, but certificats and affidavits, they cannot be obruded as a part of the libel, because the saids pretended certificats and affidavits are neither insert in the libel, or given out to the pannal, and all crimes are to be proven *testibus, non testimoniis*; and if the custom of affidavits should be introduced

in this court, all pannalls (how innocent soever) might be murdered, by being deprived of their unanswerable objections against the granters of these affidavits, &c. and therefore they cannot be sustained as a qualification to load the pannal, or make the inquest have a prejudicat opinion of him.

3. As to my lord advocat's reply anent the act of indemnity, the former defence and act of indemnity is opponed, and bears expressly murders, robberies, slaughters, and all other crimes committed against his majesty, and laws of the kingdom, either by word, writ, or deed; which undoubtedly excludes all alledged crimes, said, done, or committed by the pannal before that time; and this favour, *et gratia principis*, is to be ampliand and extended, and not restricted, and all his majesties judges and officers of state are commanded to sustain the same, according to the most ample interpretations for the pannal, that the words will allow.

4. The pretence that the pannal was of the quality of a burger, or a baron, is most irrelevant, the pannal having no visible fortune at the same time; and as my lord advocat himself acknowledgeth, no expectation of any fortune whatsoever: so that if barons, burgers, life-renters, wodsetters, and likewise those who have nothing in possession at the time, shall be secluded from the benefit of that indemnity, it is scarce intelligible to whom, and from what cause the same was granted. 5. And as to that part of the reply, bearing, that this was a privat injury, and so not comprehended within the act of indemnity, the former defence is opponed, and all pretence of privat injury was taken away by dissimulation or death.

As to the pretence that the reconciliation can be no defence against the lybel, as to *vindicta publica*, and that the letter whereupon the defence is founded doth not import a dissimulation; it is duplyed, that the act of parliament being an comminatory law, and principally intended in favours of parents, the same was never yet made use of, and it were very hard to make use of the same to deprive a parent of his child, for any rash or passionate expression; especially, where upon repentance the father had remitted the injury; but the father being in effect judge of the injury, his remitting the same ought at least to assoilzie the child from any capital conclusion. And as to the alledged habitual cursing, the same is denyed, and the former defence founded upon the act of indemnity, is repeated and opponed, and the lybel is opponed, which doth not bear habitual cursing, but particular acts at particular times.

And as to the qualifications alledged by my lord advocat, for clearing that the defunct sir James Standsfield was murdered, the pannal is truly sorry, that for his own defence, and for clearing of his own innocence, his lawyers should be necessitated to plead any thing relating to his father's infirmities, or way and manner of his death. But it is duplyed, that

the whole presumptions adduced by my lord advocat are allanerly fallacious conjectures, and can neither be *separatim*, or complexly relevant to infer any such thing, because, 1. That the minister did hear a whispering noise, and was thereby terrified, his terror and consternation having (as he himself pretends) put him in a disorder and confusion, he was thereby rendered incapable to observe or judge of any thing that happened. 2. That the body was swimming above water, imports nothing, the defunct having a great coat of thick cloth about him, which was sufficient to keep him floating above. 3. The pretence that there was no water in the defunct's body when the chirurgions visited the same, imports nothing, because the defunct's body having been several times stirred before that time, by which the water might have run out, as it actually did (in case there was any water within it.)

4. Albeit where a man is drowned unwillingly, and endeavours to breathe, so long as he can, his breathing may suck in the water: yet if a man intend to drown himself, he will certainly endeavour all means for quick dispatch of himself, and thereby keep in his breath; and the keeping in of the breath after that manner was sufficient, both to keep the body floating, and the water from coming in.

5. To put the matter beyond all question, the defunct was laying in the water a considerable space from the bank; and albeit the ice was not so strong as to have carried a child, yet the ice was whole and entire betwixt the defunct and the bank, which demonstrates, that the defunct had jumped in from the bank, to that place where he was lying. 6. As to that pretence, that there was blood about the defunct's neck, all lapped and bruised before incision was made, the defunct being pulled out of the water, by a great cleik, the touching of the neck with the cleik, when his breath was just gone out, was sufficient to have made the blood where that part was, to lapper and congeal. 7. As to the declarations of the physicians and chirurgions, they are only declarations *ex auditu*, and upon report of one or two chirurgions, and hath no foundation, but the ignorance or knowledge of the saids two reporters; neither can any such declarations be obtruded against the pannal, because not given out with the lybel: but whatever may be inferred from these presumptions, whether the defunct was murdered or not, the same does not concern the pannal, unless his accession to the murder were instructed, as it is impossible it can be.

As to the qualifications alledged by my lord advocat, for fixing the murder, or accession thereto upon the pannal; it is dplyed to the first, that the pannal's alledged vicious life, and the story at Treves, his being drunk in prison, and threatening to cut throats upon small provocations, the same are extrinsic to the lybel, and cannot be respected. 2. As to the alledged threatening used in James Smith's house, the lybel is opposed, bearing these ex-

pressions, to have been used in the year 1684. or some year preceding; and therefore the former defence founded upon the indemnity, is repeated and opposed. And whereas my lord advocat pretends, that 'minæ precedentes cum damno sequuto,' is sufficient either to fix the guilt upon the person, who used the threats, or at least to burden him with the probation, that another committed the crime: it is dplyed, 1. That my lord advocat's position is absolutely denied, unless he can instruct some other positive accession against the pannal; and these pretended threats being taken away, not only by the act of indemnity, but likewise by dissimulation, which is not only offered to be inferred from the letter made mention of in the defence, but likewise by the defunct's owning, receiving, intertaining, furnishing, and providing for the pannal, in every thing suitable as his eldest son, the same doth undoubtedly take away all pretence that can be founded upon threatening, so many years preceding; and by no law can the pannal be burdened to prove who were either actors, or in accession to his father's murder.

As to the second qualification, bearing, that the defunct said to several persons, that the pannal offered to invade him (deaying the same) the father's assertion could not infer a crime against the pannal, unless the crime itself were otherways proven by witnesses, and the same is lybelled to have been said by sir James before the act of indemnity. And sir James's other assertion, that he was in trouble, for fear of prejudice from his family, cannot infer a crime, especially against the pannal; and far less can it be proven by the relict and the other son, who in sir James's apprehension were designing mischief against him, and for their own vindication, they would certainly depose partially against the pannal. And the same is repeated against the other expressions alledged spoken by the mother; and witnesses cannot be received to prove what another witness said.

As to the pretence, that the pannal refused to sup with his father the night before his death; it is dplyed, the pannal was not at all in use to sup, except on Sunday's-night. And the pannal had no kindness for the minister, because he and others of his gang had endeavoured to keep up discord betwixt him and his father.

As to the alledged bleeding of the corps, the former defences are opposed; and albeit the pannal did help to lift his father's corps before the incision, yet no blood did appear till long thereafter that the incision was made, and the pannal did fall to grip that part of his father's head where the incision was. So that the blood falling from the wound, can neither be a ground nor presumption for guilt; and though the pannal was surprized to see his father's blood, yet the same did only proceed from natural duty and affection, and not from any apprehension of guilt. And these qualifications being all lybelled and debated upon, it is hum-

bly desired for the pannel, that the lords of justiciary would give a separat interloquitor upon every particular qualification.

Sir Patrick Hume for the pannel adds, that as to the point of treason, it is offered to be proven, that it was when he was drunk, and after cups, and is so presumed, especially it being, as it is acknowledged by the lybel, in a drunken company.

2. As to the act of indemnity, it is extended to all crimes except the archbishop's murder, and *exceptio firmat regulam, &c.* And the act bears not that clause excepting other crimes, which uses to be excepted.

3. As to the qualifications condescended on in my lord advocat's answer, either they are lybeled, and so oppoues the former answer; and if they be not lybeled they cannot be considered as qualifications.

4. Whereas it is alledged, that the pannel was in use to threaten to cut throats, when in passion, the argument is retorted, for though he threatened, nothing followed; and so his threatings were but *verba jactantia*.

5. As to the citation out of Mattheus, that parties may be punished upon presumptions, it is answered, that the case there stated is, where the person who committed the slaughter was apprehended in the place where it was committed; that he was all bloody, and with a bloody sword, answerable to the wound; and that he became pale when he was apprehended, and that he had made no answer, but in terror fled away; which are such acts as do evidently make appear the slaughter, and could admit of no other construction; but that cannot be pretended in this case, where all the presumptions are remote and extrinsic. And even in the case instanced by Mattheus, and others of that nature, they are only to take effect in order to an arbitrary, but not a capital punishment, which is the opinion of all lawyers who ever wrote upon the subject, and particularly Muscard, de prob. conclus. 123, Numb. 20, and 31, where the question is stated, 'An plures presumptiones conjunguntur?' in order to infer a capital punishment: and he concludes in the negative, as a general conclusion by all lawyers, but only to infer an arbitrary punishment.

As to the bleeding of the body, it is offered to be proven, that the pannel touched his father's body before the incision, and it did not bleed.

The Lords Justice General, and Commissioners of Justiciary, having considered the libel, pursued by his majesties advocat against Philip Standsfield, the pannel: And the first part thereof, anent the treason libeled, they find the samen as it is libeled, relevant to infer the pain of treason.

And as to the pannel's cursing his father, mentioned in the indytement: They find these expressions, or either of them, viz. The devil take him, the devil rive him, God damn him, relevant to infer the pain of death: And repells the defence founded upon the act of in-

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demnity, and finds the pannel is not under, or below the quality therein specified.

As to the pannel's murdering of his father mentioned in the indytement, they found the libel as it is libeled and qualified relevant to infer the pain of death, and remits the same with the qualifications libeled to the knowledge of the assise, and allows witnesses to be led for the pannel's proving his father to have been melancholy the day before the committing of the murder, and remits to the assise to consider the import thereof, if it be proven, and repells the whole other defences proponed for the pannel.

The Lords continues the dyet against the said Philip Standsfield, till tomorrow at two of the clock in the afternoon; and ordains him to be carried back to prison, and the witnesses and assisers to attend, ilk person under the paine of 200 merks.

EDINBURGH, February 7, 1687.

Philip Standsfield, prisoner, being this day entered on pannel, dilated, indyted and accused for the treasonable drinking of the king's confusion, cursing his father, and for the cruel and unnatural murdering of him in manner mentioned in this ditty:

The Interloquitor above written was this day read again in presence of the pannel, and the assisers after named, viz.

William Bailly of Lamington.
James Glen, stationer.
Alexander Reid, elder, goldsmith.
Charles Charters, merchand.
David Hepburn of Humby.
Edward Gillespy, merchand.
Robert Sandilands, merchand.
Samuel Moncrief, merchand.
Thomas Leudall, merchand.
James Cleiland, merchand.
Hepburn of Beinstoun.
William Paton, merchand.
George Braithwood, stabler.
John Marshal, merchand.
Alexander Edgar, chirurgion in Haddingtoun.

The Assize lawfully sworn, no objection of the law in the contrary.

His Majesty's Advocat for probation adduced the witnesses deponing, viz.

John Robertson, late servitor to sir James Standsfield of New Milns, aged twenty four years, unmarried, purged of malice, prejudice, hatred, ill will, and partial counsel, and solemnly sworn, depones, a little time before harvest last, the pannel being in the kitchen of New Milns, in the deceast sir James Standsfield's house, where the deponent was likewise present, he saw the pannel, Philip Standsfield, take a cup of ale, and heard him say, There is the pope's confusion, the antichrist's, the chancelour's, and the king's confusion, and put the cup to his head, and drank a little, and then gave it to Samuel Spofforth, and commanded

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him to drink it on his knees; depones, that there were likewise besides Samuel Spofforth, Jeremy Smith, Agnes Bruce, and Elspeth Jameson; and depones, that Philip Standsfield, the pannal, was not drunk at the time; depones, that at the naming of the several confusions above mentioned, he still drank a little of the cup; and this is the truth as he shall answer to God: The deponent further depones, that he said to the pannal, after the drinking of the said confusions, that it was treason, and he answered, Ye dog, what are you concerned? Ye do not understand to whom ye speak.

Sic Subscritur, JOHN ROBERTSON.

Agnes Bruce, servant to the deceased sir James Standsfield, aged twenty four years, unmarried, purged and sworn, depones, That a little before harvest last, she being in the kitchen of New Milns with Philip Standsfield, the pannal, she saw him take a cup of ale, and drank the Confusion of the pope and the king, and heard him bid Samuel Spofforth sit down on his knees and drink the same, which accordingly he did; after this the deponent went up stairs, and knows no more what past at that time, but heard they drank more confusions. Depones, that about a week after it being talked in the house, that he had drank the confusions aforesaid, he said to the deponent, God damn him, if he knew who divulged it, he would be their death: And this is the truth, as she shall answer to God. Depones she cannot write.

Sic Subscritur, LINLITHGOW.

Samuel Spofforth, late servitor to sir James Standsfield of New Milns, aged 19 years, unmarried, purged and sworn, depones, That a little before harvest last, the deponent was in the kitchen of New Milns with Philip Standsfield, the pannal, where he heard him drink a confusion to the pope, antichrist, and the king, and to the devil; and the pannal prest the deponent to drink the same confusions upon his knees. Depones, John Robertson, Agnes Bruce, Jeremy Smith, and Elspeth Jameson were all likewise present at that time, and that these confusions were drank severally: And this is the truth, as he shall answer to God.

Sic Subscritur, SAMUEL SPOFFORTH.

John Robertson, above designed, being re-examined, purged and sworn, depones, That the deponent being at Morum castle after harvest last in order to give a call to a minister, the deponent having met with Philip Standsfield, the pannal, he said to him, Ye are a wise lad; if ye have subscribed that bond, the devil take him, and particularly the devil take his father, and named his father. Deponed, that at another time, in the midst of harvest last, the deponent and sir James Standsfield, the pannal's father, being going to Smeitoun with a minister, the pannal asked him, Where he and his father was going? and the deponent answered, that he was going to Smeitoun with his father; and the pannal, Philip Standsfield, said, Devil, let never one of them come back

again, horse nor man. Depones further, That several times, and frequently, when the deponent had been seeking the pannal to come to dinner with his father, the pannal's ordinar answer was, The devil damn him, and you both, and devil rive him, for I will not go to him, and if he had a sixpence a day, he would not go near him, for his father ginned upon him like a sheeps head in a tongs, and that he has heard him say sometimes, God damn his father: And this is the truth, as he shall answer to God.

Sic Subscritur, JOHN ROBERTSON.

William Scott, clothier in New Milns, aged 30 years, married, purged and sworn, depones, That between Michaelmass and Martinmass last, the pannal, Philip Standsfield, having come to the deponent's shop, and asked for some tobacco, the deponent said to Philip, His father would not let him want for money to buy tobacco; and the pannal, Philip, said, The devil take him and his father both, for there never came an honest man out of Yorkshire. Depones, his wife was present with him, when that discourse past. Depones he cannot write. And this is the truth as he shall answer to God.

Sic Subscritur, LINLITHGOW.

Agnes Bruce, above designed, being re-examined, purged and sworn, depones, That she did hear the pannal usually row and swear he would kill any person that offended him, and that the pannal did haunt much with Janet Johnstoun, George Thomson and his wife, and that he went frequently out of his father's house after supper to these persons; and further depones, that she has heard the pannal frequently curse his father, and bid the devil damn him, and rive him, and swell him; and that she has frequently heard him express his hatred and abhorrence of his father, and that he could not abide to see his father. Further depones, that the Monday at night before sir James came to Edinburgh, the last time he was in it, being about a fourthnight before his death, the deponent was ordered to call the pannal to his mother, after he was gone to his chamber, and that accordingly she did it; and when the pannal came down, the deponent left him with his mother alone; and when she was without the door, she heard him say to his mother several times, God damn him, if he did it not; and desired his mother to take a good heart, for as long as he had, she should not want. Depones, she knows not what he meant by these words, but knows there had been a little quarrel betwixt sir James and his lady that same night. Further depones, that on Tuesday thereafter, when sir James Standsfield was going into Edinburgh, she did hear Philip Standsfield, the pannal, say in his mother's chamber (his father not being present), God let him never return, God let him never see his father's face again, the devil go with him, the devil rive him, and take him away; and that there was nobody in the rounge at the time, but the pannal and his mother, and the

deponent was at the door. Further depones, that about a month before, sir James having reproved the pannel, upon the occasion of an accoupt given in by William Anderson, brewer, she did hear the pannel say, in his mother's chamber, (sir James not being present) God damn him, if he should not do ten times worse, and that he could not endure to see his father's face, and that he had hated his father these six or seven years. Further depones, that about a fourthnight or twenty days before sir James's death, it being said that Philip was to go to town with his father, she heard him say, he would be hanged e'er he went with him; let him go, the devil go with him, and let him never return; and this likewise in his mother's chamber, and in her presence. Depones, the pannel did ordinarily shift occasions of being in his father's company. Depones, that the Friday before sir James his death, she knows the pannel and Janet Johnstoun were a considerable time together in the pannel's chamber, where the deponent heard Janet Johnstoun's tongue, but doth not know if George Thomson and his wife were with them. Depones, that on the Wednesday before sir James his death, Philip having cursed some of the servants, the deponent said to him, God be thanked, he was not their master; and that he answered her with an oath, she knew not how soon he might be their master: and further depones, that she thought sir James not so merry as his ordinar the night before his death, but that he conveyed Mr. Bell to his chamber, and thereafter came down to his own; and the deponent having desired to speak with sir James, his servant, John Robertson, told her she could not, because his chamber door was shut, and he was gone to bed; and that she did then see light in his room, and when she was going away, found the hall-door, which was without his chamber-door, shut, and that the hall-door was not usually closed in the night time, except sir James had done it himself, and which he did but once in two or three nights. Depones, that on the Saturday's night when sir James came home, he did go to his ladies chamber, where he stayed not a quarter of an hour, and that his lady fell a quarreling of him for going to another house before he came there, and that the deponent came out of the chamber, and knows not what more past there. Depones, the next morning, when sir James was mist, the deponent went into his room to put on a fire, and found the bed better spread up than it used to be, and the curtains more drawn about it, and the candle, which usually was at the bed-head, she found it standing on a chair at the bed-foot. And further depones, that when the defunct's body was bringing up to the house, the deponent would have had him brought to his own chamber; but Philip swore that the body should not enter there, for he had not died like a man, but like a beast. Depones, that the body was then put in the Walk-Mill (but knows not if Philip caused do it,) and that the body from that was brought to a cellar

within the closs, where there was very little light. Depones, that she did not see any water come out of his mouth, and that when the deponent lifted up the linnen-sheet, which was over him in the cellar, some of them caused let it down again, for it was not fit to let the body be seen. Depones, that Janet Johnstoun was present with the body in the cellar with the rest, and though it was known that neither sir James nor his lady would look upon her for a good time before, nor was she openly seen about the house, yet that morning she went to the ladies chamber, as soon as the body was taken out, and the deponent was present and saw her come in, and well enough taken with. Depones, she heard Philip, after his father's death, greet and cry, but saw no tears. Depones, immediately after his father's body was found, he would have forced his father's chamber-door, it being shut; but the key being gotten, it was opened, and he entered in, and first took his father's gold and money out of his pocket, and then got the keys, and searched the cabinet; and that within an hour after his father was brought from the water, he got the buckles of his father's shoes, and put them in his. Depones, that on the Monday after sir James's death, the lady and Janet Johnstoun having quarrelled together about some remains of the Holland of the wounding-sheet, Philip came down out of his own chamber, and the deponent heard him say to Janet Johnstoun, Hold your peace, when I command you, for he would reward her well for the kindness she had done to him at that time. Depones, that when the order came from Edinburgh to raise the corps again, the deponent did meet George Thomson, the taylor, and perceived him shaking and trembling, and asked him what troubled him? And that his answer was, he heard the blackest news that ever he heard in his life, for sir James's body was to be raised again, and said he would sew no more in the house of New-Milas for the world, and carried the mournings to his own house. Depones she knows nothing of false keys made use of about the house, only she heard the lady say, that there were. Depones, Philip had no lockfast place in the house, except a little coffer, and that it once being opened, the deponent did see several keys within it, and that he offered once the key of one of the rooms to the deponent, but the deponent took it not, because she had the ordinar key of the room. Depones, that Philip was in use to ly alone, but that after his father's death, he would not ly in a room alone at New Milns, and that he declared to the deponent, that he was afraid to be alone in a room, either night or day, and that he slept not the night after his father died, and that he should not go into the room where his father lay, if once he had the cabinet out of it. Depones, that a short time before sir James died, the lady having fallen in a sword, and the deponent having told Philip of it, Philip came to his mother's chamber, and that his mother told him then, that he was like in a short time to lose his

mother; and that he answered, in the deponent's hearing, that his father should be dead first: and depones, that some few days thereafter, in his mother's chamber again, and in the deponent's hearing, he renewed the same words with an oath: further depones, that two nights after sir James's death, the lady told to the deponent, That something then came in her mind which she had heard, to wit, that Philip, before he went to London, when he was in his pomp, having heard that sir James was to give his estate to his second son, in the house of James Smith in the Nungate, had vowed to kill his brother, and the like or little less to his father: and that thereafter when they were coming into Edinburgh, the lady renewed again to the deponent the same words, and added, what if they should put her bairn in prison? And this is the truth, as she shall answer to God. Depones she cannot write.

Sic Subscribitur, LINDLITHGOW.

John Shand, sometime servitor to sir James Standsfield, aged 43 years, unmarried, purged, and sworn, depones, that a little after Philip Standsfield, the pannal's marriage, the pannal and deponent being in James Smith's house, in Nungate of Haddington, the pannal did expostulat with the deponent, that his father dealt too narrowly with him, he being then married; and the deponent told the pannal that his father was in straits, and exhorted him to be dutiful to his father; thereafter the pannal said, if I knew my father would give his estate to my brother John, I would cut his throat; and the landlord of the house being by, and present, and surprized, cried out, God preserve me, what means the man! the landlord understanding by the word his, his father: and though the deponent took the expression in the same sense as James Smith did, yet the deponent endeavoured to excuse it, by saying it was not his father that he meant, but his brother, or his man Donald; and the pannal being present, said nothing for clearing of the expression: whereupon the deponent went away, and left the pannal, and could not endure to stay longer in his company: depones the night before sir James's death, being the Friday, the deponent was with sir James in his chamber, in Edinburgh, where the defunct was reading a sermon-book, and appeared to be sad, and said to the deponent, I have no comfort in my wife and family. And this is the truth, as he shall answer to God.

Sic Subscribitur, JOHN SHAND.

Mr. Roderick Mackenzie, Advocat, being solemnly sworn and purged, depones, That about eight days before sir James Standsfield's death, the deponent and he having met in the Parliament Close, the defunct invited him to take his morning draught. And when they were gone to Mr. Shell's house, the deponent perceiving him to be in some concern, the deponent asked him, what troubled him? The defunct answered, that he had no satisfaction at home: Whereupon the deponent said, that

people reported that he was partly the occasion of it, having disherished his son the pannal, and acquainted him therewith: And the defunct answered, Ye do not know my son, for he is the greatest debauch in the earth. And that which troubles me most is, that he twice attempted my own person; And this is the truth, as he shall answer to God.

Sic Subscribitur, ROD. MACKENZIE.

Archibald Dunbar, merchant in Edinburgh, aged 26 years, married, purged, and sworn, depones, That the deponent having met with the deceased sir James Standsfield at Culter: but he does not remember positively the time, but it was either in the year of this king's parliament, or the harvest before; and sir James and the deponent, and some other company being in a room, sir James was discoursing of his son's undutifulness, and within a little while having heard a shot at the utter door of the house, and the deponent and other offering to go out to see what the matter was, sir James was unwilling to let them, lest they should come to hazard. And thereafter having heard another shot, they did offer to go down again, and sir James still dissuaded them, and said, that it might be his distracted son Philip. And they having enquired if he was in the country, and how he came to fear any harm from him, sir James said, he believed he was in the country, and that in his going south, he had followed him to Lothian burn, and shot two pistols, first one, and then another at him; and if it had not been that sir James was well horsed, and his son Philip upon a work horse, he had killed him. And Samuel Menzies having said, he was sure there could not be ball in them; sir James said, he had gotten too many proofs of his son's unnaturality to him, that he had no will to be in his reverence. Depones, that sir James all that night went not to bed, and the deponent sat up with him, and conveyed him into Edinburgh. And this is the truth, as he shall answer to God.

Sic Subscribitur, ARCHIBALD DUNBAR.

Mr. William Clerk, advocat, purged, and sworn, depones, That having frequent occasions to be with sir James Standsfield, and he having desired him to draw a disposition of his estate to his son John, sir James did complain of his son Philip's undutifulness to him: and the deponent having dissuaded him to do it, since his son Philip might be reclaimed; sir James said, no, for he had no expectation of it; for when he was at the Lead-hills, there was some pistol shot at him, which he was sure came from his son Philip. And this is the truth, as he shall answer to God.

Sic Subscribitur, WILLIAM CLERK.

Mr. John Bell, minister of the gospel, aged forty years, *scotus*, purged and sworn, produces a written Declaration signed under his hand, upon what he knows relating to the murder; and depones the same is truth, as he shall answer to God.

Sic Subscribitur, JOHN BELL.

crying, O God! O God! and some such other words: and that the deponent being astonished thereat, looked to the corps, and as the pannal did take away his hand from it, did see it darting out blood through the linnen, from the left side of the neck which the pannal touched, and that the deponent was amazed at the sight, partly through the darting out of the blood, and partly through the apprehension he had of the murder. Depones, he saw no body touch the left side of the defunct's head the time it bled, but the pannal; depones, that as soon as the deponent recovered out of his amazement, he cried to the boy, to give the pannal some triacle-water, which he did; but depones, he did not see Philip the pannal return again to the body of his father. Depones, when the deponent and the other chirurgeon were putting on the clean linnens, and stirring and moving the head and craig, he saw no blood at all. And this is the truth, as he shall answer to God.

Sic Subscritur, JAMES MUREHEAD.

James Murehead, and James Craufurd, chirurgions, give in their report and declaration in write, aent the murder of unquhile sir James Standfield, which they renewed upon oath, in presence of the justices and assisers, and whereof the tenor follows:

November 30, 1687.

We viewed the corps in Morum church.

EDINBURGH, December 1, 1687.

We, under subscribers, James Craufurd and James Murehead, chirurgions in Edinburgh, having order from sir John Dalrymple, his majesties advocat, to go to Morum, and there to take up the corps of sir James Standfield, and to sight and view the same exactly, and, if need were, to open up the body, and to consider whether there appeared any evidence of wounds, bruises, or strangling upon the corps, besides what might have happened by his falling or drowning in the water, &c. In obedience thereto, we caused take up the said corps, in the presence of Philip Standfield, Mr. Andrew Melvil, minister of Morum, James Hamilton, writer to the signet, James Row and Alexander Campbell, merchants in Edinburgh, Umphray Spurway, James Dick, James Mitchell, and John Robertson, indwellers in New-Milns, and some others. Having with all possible exactness viewed the corps, we observed the face a little swelled, and inclining to a dark reddish colour, some fulness of some capillarie veins in the pallat of the mouth towards the uvula, as also a large and conspicuous swelling, about three inches broad, of a dark red or blue colour, from one side of the larynx round backwards to the other side thereof; we observed the jugular veins on both sides the neck very large and distended, and full of blood; there was a large swelling under and betwixt the chin and the cartilago

scutiformis: there was also a little scratch below the left mandibula, which had rankled the cuticula, and made some little impression on the cutis: Having made incision from the chin down about the larynx, and cross upon the swelling of the neck, we found a greater laxness and distance (as we think) than ordinary betwixt the cartilago scutiformis and os hyoides; we found the tumour on the neck, containing bruised, like dark or blackish blood; the jugulars, when cut, bled considerably, especially that on the left side.

Having opened his breast, we found the lungs distended to the filling up their capacities, but free of water: his stomach, liver, &c. were all in good condition; we found no water within the corps; the corps had no smell at all; the breast, belly, privy-parts, &c. were all well coloured, there was no swelling in his belly, nor any thing by ordinary to be seen on his head. This we attest, and subscribe with our hands.

Sic Subscritur, { JAMES CRAUFURD,
JAMES MUREHEAD.

EDINBURGH, December 6, 1687.

In presence of the lord archbishop of Glasgow, lord Tarbat, president of session advocat, and Castlehill:

James Murehead, and James Craufurd, chirurgions, being solemnly sworn in the presence of the committee of council, depones, That the written report aent the body of the deceast sir James Standfield is true, according to their skill: And this is the truth, as they shall answer to God.

Sic Subscritur, { JAMES CRAUFURD,
JAMES MUREHEAD,
JOHN GLASGOW, J.P.D.C.

EDINBURGH, February 7, 1687.

In presence of the Justices and Assisers.

James Murehead, and James Craufurd, chirurgions, being solemnly sworn, depones upon the truth and verity of the above-written declaration in all points.—*Sic Subscritur,*

JAMES CRAUFURD, { Linlithgow.
JAMES MUREHEAD, }

Follows the Chirurgions of Edinburgh, their Opinion aent the said Murder.

We, under subscribers, chirurgions in Edinburgh, having fully considered the report made by James Craufurd, and James Murehead, concerning the condition of the corps of sir James Standfield, and though it be not usual to declare more than matter of fact, yet in obedience to your lordships commands, where ye desire to be informed, if these symptoms found upon the body, do import drowning or strangling; we humbly offer our opinion, so far as our art or experience will allow. And whereas the report informs us, that there was found a swelling, and preternatural redness in the face, a large conspicuous tumour, abt at three inches

broad, of a dark red, or black colour, from the one side of the larinx round backwards to the other side thereof, a large swelling betwixt the chin and the cartilago scutiformis, the jugular veines on both sides very large and distended; and when incision was made downwards, betwixt the os hyoid and larinx was observed a laxness, and distance between the os hyoid and the cartilago scutiformis, incision was made cross alongst the tumour, it was found full of bruised blood; the jugulars likewise, when opened, yielding a considerable quantity of blood, especially on the left side, no smell or corruption appearing in any part of the body. It is very probable these parts have suffered some external violence, which hath made them appear so far different from their natural figure and colour, and could not be caused by drowning simply. As to the other part of the report, the breast and belly being opened, the lungs found distended, the bronchi full of air, without any water, nor any water found in the stomach or intestines, a body, when drowned, being generally found to have much water in it, with other circumstances of the report considered, gives just ground to think he was not drowned. This we subscribe at Edinburgh, the 3d day of February, 1687.—*Sic Subscribitur,*

JOHN BALLIE, Deacon, WIL. BORTHWICK,
GEORGE STIRLING, THOMAS EDGAR,
JAMES CRAWFURD, JAMES MUREHEAD.

Follows the Report of the College of Physicians.

EDINBURGH, February 6, 1687.

The College of Physicians, being assembled at the desire of his majesties advocat, to consider a report made by some chirurgions, concerning the body of the late sir James Standsfield, and to give their opinion, whether by the said report, there is any just ground to believe, that the said sir James Standsfield was strangled or drowned? And they have accordingly considered the said report. They are of opinion, supposing the verity of the said report or declaration, that there is sufficient ground to believe, that the said sir James Standsfield was strangled, and not drowned. In testimony whereof thir presents are subscribed by sir Andrew Balfowr, president of the said college.

Sic Subscribitur, A. BALFOWR, P. C. R. M.

Umphray Spurway, clothier at New-Milns, aged 50 years, *solutus*, purged and sworn; depones upon the truth and verity of his own declaration given in by him, which is all written and subscribed with his own hand, and consists of two leaves of paper, written on all sides, which is truth, as he shall answer to God.

Sic Subscribitur, UMPHRAY SPURWAY.

Follows the Declaration of Umphray Spurway, Englishman.

I Umphray Spurway of New-Milns, clothier, being summoned to appear before the lords of his majesties privy-council in Edinburgh, the 6th of December, 1687, to declare my know-

ledge of what I had seen, and heard, relating to the death of sir James Standsfield of New-Milns, did then and there declare before the saids lords, as hereafter followeth: And after declaring what I had to say, was commanded to commit to writing my said declaration, under my own hand, which I the aforesaid Umphray Spurway do hereby humbly offer to the above-said lords of his majesties council, subscribing the same with my own hand.

About six weeks before the death of sir James Standsfield, after night I went to pay my respects to sir James, as I usually did when he was at New-Milns, at which time I found him not so free for discourse, nor so pleasant as at other times: Inso much that I used that freedom with him, to *querre* the reason why his honour was so melancholy? Who, with a great sigh, wringing his hands together, with tears trickling down his cheeks, said, Mr. Spurway, I have great cause for it; I have born my own burden, without complaining to others, but I have a very wicked family, and it is very sad, that a man should be destroyed by his own bowels; but let me be never so sparing in my expence, both at home and abroad, yet they at home of my family consume me; and condescending on some particulars, of some extravagant sums of money, monthly brought in to him, that his family had expended, besides what he allowed for them, which was very sufficient: but that which grieved him most was, that his youngest son, whom he had some comfortable hopes of, and upon whom he had settled his estate upon, his just debts being first payed, and that to the knowledge of his son; but now he was frustrated of his hopes of that son too; for his eldest son had debauched his youngest son, who had several times of late come in drunk, as the other: this he declared to me with very great grief of heart. But the Saturday's-night after sir James, and a minister, one Mr. Bell, came to New-Milns from Edinburgh, I came in at the house of one James Marr, where I saw sir James and Mr. Bell sitting by the fire, before he had been at his own house, which I wondered at, having never known the like done by him before; but since, I have had my thoughts, that he had a fear upon him (good gentleman) of going to his own house; but having sat some time with him, he desired Mr. Marr to send one of his people at his house, to know, if they had kindled a fire for him; and upon the return, the messenger gave this answer, 'May it please your honour, your fire is kindled for you;' upon which sir James and the minister arose, and took their leave of Mr. Marr; and I also accompanied sir James and the minister half the way towards his home, and so took my leave of him, wishing his honour a good night. But the next morning, being Sabbath-day, after the light well appeared, one Agnes Bruce came at my chamber-door, and knocked. I went and opened the door. Says she, 'Sir, sir James is gone out of his lodging-room this morning, and we have sought all the rooms of the

'house for him, but cannot find him.' She goes off, I immediately followed her, and when I came out of my door, I met with Mr. Philip Standsfield, and James Dick. Mr. Standsfield declares to me, 'Lord, Mr. Spurway, what should be the cause of this man's discontent, that he should thus leave his lodgings, and walk out?' To which I replied, 'Sir, do you wonder the cause of his discontent, who never gave him content, but had been the cause of grieving him, from one to the other of them, ever since I knew the family?' But he turned his back upon me, and made no reply at all. However, I went at sir James's house, but could not procure the keys of neither of the gardens, and I sent abroad of sir James's servants, and of my own, some on horseback, and some on foot, to inquire after him: at last a servant of mine, one William Bowman, found him in the river, a little by west the town. I went at the place, and saw him lying about two yards, or eight feet from the brink of the river, lying upon his belly, just at the top of the water, as it were floating, only his coat and waistcoat loose about him, and a shirt on him that I saw. I saw the place at the brink of the river, where some one had stood, all beaten to mash with feet, and the ground very open and mellow, although a very hard frosty morning; so I gave order to some to get a ladder, and to set one end into the river, as near the hinder part of sir James as they could, and the other end of the ladder to fall at the top of the brae, which was very steep, and so they might get him out easily; so I came away from the place, and desired Mr. Maer to see the body landed, declaring that I would go home, and write to Mr. George Home, merchant in Edinburgh, of the sad sight which I had seen, desiring him to communicate the same to my Lord Advocate, with desire to know by the messenger his lordship's pleasure, what of advice or direction he would be pleased to give concerning it, and it should be followed: but the messenger that I sent, after he had delivered my letter to Mr. Home, and order given by commissary Dalrymple how to proceed further with the body of sir James, which order was directed to myself by a letter, which when I read the letter, the contents was: That I should endeavour to procure two or three discreet persons of New-Mills to myself, and we together view the body of sir James; and if we found no grounds to believe that his person had been wronged by others, that then with all speed he should be buried, and that as privately, and with as little noise as could be: but this letter, which was the commissary's order to me, was sent by the hand of one James Mitchel, kinsman to sir James; for that horse that the express rode on to Edinburgh, was taken out of the stable, where he was set up: and one Mr. Patrick Smith, the brother-in-law of sir James Standsfield, mounted on him to come for New-Mills. So that my express was thereby disabled to bring me the answer of my letter; and the said James

Mitchel, who brought my letter, came home at the place by nine of the clock that Sabbath-day at night, and gave an account of the letter that he had for me: but they dissuaded him from bringing it me, so that I had it not till three hours after sir James was buried. But upon Monday morning, I arose about three or four of the clock; and coming out of my house, I saw great lights at sir James's gate, which occasioned my going down to see what the matter was; and as I went, I met with one William Robinson, coming up of home; I asked what the meaning was of these lights, and of the horses that I then saw at sir James's gate? Who answered me, That sir James's corps were brought out at the gate, and that they were carrying it at Morum, to be buried, having received orders from my Lord Advocate for that purpose. At which I returned to my house, thinking it very strange thus to proceed without having had the corps viewed by some person, as I well knew was customary in England in such cases. The next step, to my remembrance, was, that upon the Tuesday night following, after I was in bed, one Mr. Alexander Campbell in Edinburgh, with one Mr. James Row, and an gentleman, one Mr. Hamilton, with two chirurgions, came at my house, and caused me to rise out of my bed, showing me an order, which they had from my Lord Advocate, for the taking up again the body of sir James Standsfield, and commanded me to make ready to go with them; and having seen the order, readily submitted thereunto, and when coming upon the place at Morum, caused the said grave to be opened, and the coffin taken up. It was carried into the church, and there opened; and as soon as sir James's grave-cloaths were taken off him, and all his upper parts uncovered, home to his privy-parts, methought his face looked not as I expected, nor as others had insinuated, that were at the dressing of him at first; for they said, that his body and face was very fair and fresh; but I found his face, at first view, of another complexion, being blackish, with some streaks of red, like standing, or rather strangled blood; and under his left ear I saw a swelling beane to his throat, of a blackish red colour. And this I saw the chirurgions opening his body, beginning at the top of his chin, and so down to the pit of his stomach, and then cut his skin on both sides his throat, towards each ear, and coming at the place near his left ear, that I saw swollen, I there saw of coagulated or congealed blood, lying a lump of a great thickness, and two or three inches long, which proved to me he had been strangled: and one thing more I observed, that when Mr. Murrehead put off his cap at first from his head, in slipping it back, sir James's eye-lids opened, and his eyes appeared, but his eye-lids much swollen, and very red, which did also prove to me a symptom of strangling.

This being done, and his breast opened, so that his intrails appeared, and to me seemed in good order, and no appearance of water in his

body, neither then, nor when first he was taken out of the river. The like, I think, has not been ever known by any man that cast himself, or that has been cast into a river alive, and not to have his body full of water; nor that ever a dead man should lie at the top of the water, where no running stream is, but a still water of about five foot deep: but to me in this it shows, that as God is a wonder-working God, so he has in this shewen no less, to convince men, that this worthy gentleman murdered not himself, but was murdered.

But my last observation was of a wonder more, that the Lord did show, when the chirurgions had caused the body of sir James to be by their servants sewen up again, and his grave cloaths put on. A speech was made to this purpose; It is requisite now, that those of sir James Standsfield's relations, and nearest friends, should take him off from the place where now he lies, and lift him into his coffin. So I saw Mr. James Row at the left side of sir James's head and shoulder, and Mr. Philip Standsfield at the right side of his head and shoulder; and going to lift off the body, I saw Mr. Philip drop the head of his father upon the furn, and much blood in hand, and himself flying off from the body, crying, 'Lord have mercy upon me!' or 'upon us!' wiping off the blood on his cloaths, and so lay himself over a seat in the church; some supposing that he would swarf or swoon away, called for a bottle of water for him. After this we went for Morum castle, where Mr. Philip Standsfield, myself, and several others, stayed until it was day. In which time I challenged Mr. Philip for his unkindness to me, by his not inviting me to accompany the corps of his father when first buried, knowing the intimacy that there was betwixt his father and myself; and that of all the people in or about the town, his father delighted in no one's company as in mine; and that he did not give me notice of his burial, that I might do my last office of love and service to him, by accompanying his body to his burial-place; I took it very ill from him. So then Mr. Philip swore, that he had sent two of his servants to invite me, but if those damned rogues would not do it, what could he help it? and yet did declare, as is proved, and as himself since confessed before my lord advocat, that he would not invite me, assigning this as his reason, supposing that myself and James Marr had been instruments of setting his father against him, which was a false suggestion. All which particulars I have before the lords of his majesty's honourable privy council declared: so, by their command, I have in this sheet of paper written it over with my own hand, and do hereby subscribe my name, the 6th of December, 1687.

Sic Subscritur, per me, UMPHREY SPURWAY.

EDNBUROGH, February 7, 1687.

In presence of the justices and assisers, Umphrey Spurway owns his declaration above
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written to be truth in all poynts; as he shall answer to God.

Sic Subscritur, UMPHREY SPURWAY.
LENLITHGOW.

James Mitchel, nephew to the deceased sir James Standsfield, aged twenty years, unmarried, purged and sworn, depones, that about twenty days before sir James Standsfield's death, being in company with Philip, the pannal, he heard the pannal say, that if his father did dispoise his estate by him, he would kill him, though he should die in the Grass Mercat for it. Depones, that several times about a month before sir James's death, he heard the pannal say, that little thought the people had how soon the pannal would be laird; and when he was, he would then ride in their skirts that had been ill to him. And this is the truth, as he shall answer to God.

Sic Subscritur, JAMES MITCHELL.

John Topping in Monkrig, aged twenty-five years, married, purged, and sworn, depones, that upon the Sabbath morning after sir James Standsfield's death, the deponent coming from Monkrig to New Milns, by the side of the water, he discovered a body floating, and saw Philip Standsfield looking to that place of the water where the body was; and the deponent asked the pannal, whose body that was in the water? And the pannal made no answer; and when he came to New Milns, he heard that sir James's body was found in the water. Depones he saw the body taken out of the water, and went alongst with it, near to the Walk Milns, but observed no water come from the body. This is the truth, as he shall answer to God. Depones he cannot write.

Sic Subscritur, LENLITHGOW.

James Dick, in New Milns, aged forty seven years, married, purged, and sworn, depones, that the pannal, Philip Standsfield, and the deponent, being at Morum, after taking up of the corps, and discoursing about the finding of the body in the water, the deponent said to the pannal, that he saw something in the water, when they were searching after sir James, but he did not suppose it to be sir James's body; and the pannal said, I saw him before any of you. Depones, That he saw the body after it was taken out of the water at the brink of the brae, and went alongst with the body a piece of the way, and observed no water come from the mouth. And this is the truth, as he shall answer to God.

Sic Subscritur, JAMES DICK.

His Majesties Advocat desired that James Thomson, son to George Thomson in New-Milns, and Anna Mark, daughter of Janet Johnstoun, spouse to the said James Thomson, might be examined as witnesses against the pannal, for proving his accession to his father's murder. And the procurators for the pannal having-alledged, that the foresaid persons were but children, and so not by law capable to be

witnesses, the boy not being above thirteen years of age, and the girl not above ten years :

The lords justice general, and commissioners of judicary, refused to receive them as witnesses ; but in regard the persons on the inquest earnestly desired the said James Thomson and Anna Mark might be examined, aent their knowledge of the pannall's accession to the foresaid murder, they allowed the fore-named persons their declarations to be taken for clearing of the assise. And accordingly the said James Thomson being examined in presence of the justices and inquest, declared as after follows ; That Janet Johnstoun came to George Thomson's house betwixt nine and ten at night, and Philip Standsfield, the pannal, came there shortly thereafter : and the house being dark, the said Philip gave the declarant a turnor to buy a candle, which he did in the neighbouring house, and after the declarant returned with the candle, his mother ordered him to go to his bed, which was in the same room, and beat him because he did not presently obey. Declares, he heard one come to the door, and enquire for Janet Johnstoun, and desired her to come home, and give her child suck. Declares, he knew by the voice that the person who came was Agnes Mark, the said Janet's daughter, and that Janet ordered her to go away, and she should follow her. Declares, she stayed a considerable time thereafter, and the said Thomson's wife was desired to go for a pint of ale, and Philip took out a handful of money to see if he had any small money, and finding he had none, the ale was taken on upon trust. Furdler declares, That the said George Thomson and his wife, and Janet Johnstoun, did stay together, and whisper softly a considerable time. Declares, he heard Philip Standsfield complain that his father would not give him money, and pray the devil to take his father, and God damn his own soul, if he should not make an end of his father, and then all would be his, and then he would be kind to them. Declares, Philip Standsfield and Janet Johnstoun went away about eleven, and shortly after his father and mother came to the bed where the declarant was lying cross the bed foot ; and the declarant in the night-time perceiving his father and mother rising out of the bed and going out of the house, and that they stayed a considerable time away, about an hour and an half, or two hours, and that the declarant was perfectly awake when they went and were away, and he wondered what they were going about. Declares, his mother came in first, and came softly to bed, and within some time after his father came in, and put a stool to the back of the door, without locking it, for the lock made always a great noise when they locked the door, and the declarant's father called to him whenever he came in, but the declarant made no answer, that it might be thought he was sleeping ; and his mother asked, what had stayed of his father ; and thereupon his father and mother did fall discoursing of several things, and particularly his

father said, that the deed was done, and that Philip Standsfield guarded the chamber door, with a drawn sword and a bendet pistol, and that he never thought a man would have died so soon, and that they carried him out towards the water-side, and they tyed a stone about his neck, and leaving him there, came back to the little kiln, and reckoned whether they should cast him in the water with the stone about his neck or not, and whether they should cast him in far in, or near the side, and at length they returned and took away the stone from about his neck, and throw him in the water. Declares, his father said, that yet he was afraid for all that, that the murder would come out, and his mother answered, Hout, fool, there is no fear of that ; it will be thought he has drowned himself, because he will be found in the water. Declares, when sir James was missing in the morning, the declarant's mother said to his father, rise quickly, for if ye be found in your bed, they will say, that ye have a hand in the murder. Declares, the coat and wastecot which were upon sir James when he was found in the water, were sent to Thomson's house, and Thomson's wife said to her husband and Janet Johnstoun, in presence of the declarant, that she was affrighted to see the same coat and wastecot, for she thought that some evil spirit was in it, and desired her husband to send it away, which he would not : and further, that his mother said to her husband, in the declarant's hearing, that she was affrighted to be in the house alone after night fell ; and accordingly, whenever her husband went out, she went out with him, which was not her ordinary. Declares, the said George Thomson did go into Edinburgh several days before the declarant's mother was brought in, and she did immediately after he came into Edinburgh send away sir James's coat and wastecot, and that she was never in her own house after night, since her husband came in, but did lie in Janet Johnstoun's house.

Sic Subscribitur, LISLITHGOW, J. P. D.

Anna Mark, daughter to Janet Johnstoun, declares, that on the said Saturday-night Philip came up to her mother's house, and sent for George Thomson and his wife, and thereafter he sent her to see if sir James was come home ; declares, that she saw Philip with his hat off, give a low salutation to George Thomson when he came up to him ; and when she returned and told that sir James was come, Philip did take a drink, and runs down to New-Milns ; that about eleven o'clock that night, her good-father sent her to seek her mother, and that she found her mother with Philip in George Thomson's house, and that her mother had her go home, and she would come after he ; and that her good-father thereafter, finding her mother did not come, sent her for Margaret Isles to give suck to the child, and went home again ; but that her mother did not come long after that, as she thinks, about two in the morning, and that she heard her good-

father say, Bitch and whore, where have you been so long? and she answered, Wherever I have been, the deed is done, and then went to bed; and that after that, she heard them speak together, but could not know what they said: she declares also, that her mother said, she was still feared, and would not abide alone, nor lie alone in the bed, but said she was afraid.

EDINBURGH, February 7, 1687.

The said Anna Mark being examined in presence of the assise and justices, declares affirmative, conform to the above-written declaration in all points.

Sic Subscribitur, LINLITHGOW, J. P. D.

Sir George M'Kenzie's Speech to the Inquest.

Gentlemen of the Inquest; I am glad to see so strong and universal a propensity for justice in my native country, that every man upon first hearing this death, concluded it a murder, and trembled lest it should not have been discovered. Every man became solicitor in it, wished to be of the inquest; and ardent prayers were generally put up to Almighty God for this end, with as much earnestness as uses to be for removing general plagues. And the Almighty in return of those, did first make so clear impressions on all men's spirits of Philip's being the murderer, that he had fallen by these: but his divine majesty, who loves to see just things done in a legal way, furnished thereafter a full probation in an extraordinary manner, whereby we might not only convince ourselves, but all such as are not wicked enough to have been the authors. You will discern the finger of God in all the steps of this probation, as evidently as Philip's guilt; and this extraordinary discovery has been made, as well to convince this wicked age, that the world is governed by divine providence, as that he is guilty of this murder. He is accused before you for three crimes, treason, the cursing of his father*, and the murdering him: crimes in great affinity, and naturally subservient to one another; for to pray confusion to the king, who is *Pater patria*, is a cursing our great parent; and what can prove better a design to murder his parent, than the malicious hatred that prevails over a son to curse him? What restrains vitious men from murdering those, by whose death they may expect licentious liberty, and an opulent succession, save the fear of the laws of the land, or at least an innate awe of the law of nature? But here you see in the treason, a contempt of the laws of the land, and in the cursing, an abhorrence of the laws of nature.

* In the later case in Scotland of David Young (June 26th and July 24th, 1758) for cursing his mother, the like relevancy was found on these expressions, 'God damn you for an old bitch; or God damn you for an old liar.' Young, however, was not convicted. See Hume's Commentaries on the Criminal Law of Scotland, Part 2, p. 41.

There is no reason to suspect our zeal in this case from any state design; for we took pains to shun a probation of the treason. It was forced upon us, and not sought by us; so violent were and are we in the search of the murder, that even treason was not able to divert us: nor press I it at this time, but to let you see there is nothing so wicked or dangerous, which this pannel durst not attempt. He not only wishes the king's confusion, but drinks it openly; and not only drinks the king's confusion himself, but he forces others to do so; nor needed he to be drunk, to be guilty, for this was the first step of his drinking; and to convince you that he knew it was a crime, it is proved that he took his complices sworn never to detect it; the fatal encouragement which always tempts him to commit his villainies. The cursing his father is not from mere humour or dissoluteness, but it becomes yet probable by a previous design to have his estate, and from the restraint he found from him, of being debarred from the ravishing hopes of a boundless liberty. The expressions are various and execrable, such as, Devil take him, drown him, rive him, let him never come back, let him never eat more, &c. and these expressions, which should never have been once spoke, were frequently repeated, and are proved, not by suspected persons, or strangers, but by his father's, and his own servants, and such of them too as were Philip's own favourites, and who think themselves very unhappy in being obliged to depone against him.

You are then, gentlemen, in the third place to judge, how far this murder and paricide are proved; in which you need to be the less scrupulous; that the son, who is accused of it, is to die however; for either of the two former crimes are so far proved beyond all doubt, that though he should escape this, he cannot these. And as to the probation of this crime, I must first represent to you, that in occult or atrocious crimes, the law has relaxed, and remitted much of its scrupulousness in probation, because in these the ordinary probation cannot be had; and to admit none, but such, were to reject all: and therefore in hancsucken, which is the beating a man in his own house, but much more the murdering a man by way of hancsucken in his own house, wherein all means are used to cover, and few can be got for discovering, you must not expect two witnesses who saw the murder committed, but only such probation as can before God convince you, that this murder was committed by that man. No inquest ever failed to find the murder of children to be clearly proved, though there were no witnesses that saw it committed; and the murdering parents is a more atrocious crime, because we owe more duty to our parents, than any parent does to a child; and never son owed more than this did, nor can be more believed to have killed a parent. For clearing whereof you are to consider, first, that he did not drown himself, as was pretended, but was murdered by some persons; and as the law violently pre-

sumes, that no man would murder himself, so, without the help of this presumption, it is proved most convincingly, by ocular inspection, that he was strangled; the marks of strangling, viz. the congealed blood, the dislocation of one of the vertebrae in his neck, &c. being visible signs proved in the ordinary way; and we have added to this the opinion both of the chirurgions and physicians, who at once declared, that he was not drowned, and that he was strangled; the outward marks likewise of his not being drowned appearing as visibly as that he was strangled: so you must conclude, that he was strangled, except you can think, that after he had strangled himself, and broke his own neck, he drowned himself.*

In the next place, who could have murdered this innocent and obliging gentleman, except some person who had access to his house, wherein he was murdered, and had malice against himself? And these two can meet in no person, but this unnatural barbarous son; for one of the things that heightens his guilt is that he should abhor a father, who engaged meer strangers to love him as a friend! And we have proved that he not only hated his father, and that he had done so for many years, but that he vowed he would take away his life before Christmas next; and that in many various, but clear expressions, and at many several times; for sometimes he swore, if he made a disposition to his second son, he should take his life; sometimes, that he should be master of all before Christmas, and he should use the servants as they used him: That though his mother was like to die, that his father should die before her: And he scarce ever spoke of his father, without swearing he should strike a sword to his heart: Nor would his passion so much as suffer him to dissemble this, even to his mother; and he who durst owe it to her, durst certainly do it whenever he had occasion.

I proceed now to clear to you, that I have proved, that he not only designed and vowed in passion, that he would murder his father, but that he actually attempted to murder him; and for this I have led these witnesses, who prove, that when his father came from the leaden mines, he fled into Culter, as a trembling partridge pursued by a hawk, telling some gentlemen, that he had been pursued seven miles by his unnatural son, who accordingly came to the house, and shot several pistols in at the windows; whereupon the gentlemen who now depon, were forced to watch with his father all the night, and were forced to convey him the next day near to Edinburgh. We have also produced other gentlemen, to whom his father declared, that he attempted against his life; and who will not believe the best of fathers deponing against the worst of sons? Nor could any thing have drawn this from the father, save the terrifying danger to

which he was hourly exposed. All the supreme courts of Europe have found the attempt to kill sufficient to infer parricide: This is a higher degree of guilt than cursing, and yet that infers death; and to attempt to kill a father is more villainous than to kill a stranger. What shall be said then of frequent and deliberated attempts? And thus you have this son again proved guilty of death, and even parricide. That which hastened the perpetrating this crime, was, that his father, wearied out with his villainies, was at last forced to dispoise his estate to his second son; and though there be nothing more ridiculous than to ask, what reason the son had to kill his father, as he now does; for there can be no reason for so barbarous an action: yet this was a motive to him, and may be a proof to you; for so kind a father, who had tried all means and methods to reclaim his licentious son, had never proceeded to this, unless he had been driven to it by those frequent attempts made by his son upon his life, in hopes to enjoy his estate by the death that he was to give. To disappoint which hopes, his father designed to settle his estate on the second brother; after which settlement, he could gain nothing but the gallows by killing his father: Whereupon he, to prevent the delivery of the disposition, did associat to himself — Thomson, whom himself used to call the devil's taylor, Thomson's wife, and Janet Johnston, who was his own concubine, and his father's known enemy, whom he could never have frequented, except upon so barbarous a design. Thomson denied that he was in the house for eight days before; and yet it is proved he was in sir James's house the night the murder was committed. Johnston denied also before the council, that she was out of her house after nine o'clock that night, and yet it is proved, that she stayed abroad till after twelve, so that her husband was forced to send for a stranger to give suck to her infant. Why did they both deny, or she abandon her child, at so suspect a time? And it is ridiculous to pretend, as they do, that they forgot so extraordinary a circumstance, in so extraordinary a night, especially being examined upon it within two or three days thereafter. By their assistance the murder was designed to be upon Saturday, the day of January; but God, to discover, and revenge a murder (which he thought fit to suffer to be committed for the punishment of so many preceeding horrid crimes), inspired sir James to bring with him that night, a devout minister, for preparing the father, and proving against the son; and this pious and grave man, whose merit may be laid in balance with many witnesses, depones, that he heard that night the noise of many people within the house, which was inconsistent with sir James's drowning himself without it: And depones, That his attention followed this noise until it died out towards the river, into which he was thrown by them; and the brink is proved to have been broken and beat by many feet, which fortifies much this deposition. It

* See the condition of sir Edmondbury Godfrey's body as reported in the Case of Green, Berry and Hill, vol. 7, p. 159.

is also proved, that he refused that night to come to public prayer with his father, swearing, that he could not look upon him, and that the next morning, when all went to find out his father, he confessed he had first found him; but that he came away without discovering that he had found him, nor did he shew the least grief when he was found by others; whereas, if nature had not been quite devoured by vice and guilt, he had certainly thrown himself upon his dead father, and had lamented that fatal death, which no man, except he, saw with dry eyes; but whilst others were mourning for his father, this miscreant would not suffer him to be carried into his own house, saying, that he died like a dog. O criminal moderation; that never appeared in this passionate creature, save upon the death of his father. O cursed justice; never shewn, or pretended to, save in asserting, that his father deserved no respect, because he drowned himself. Upon this villainous pretext, he caused throw him into a remot house, where none were allowed to see the body, save his own accomplices, to prevent all discovery by inspection of it: and for the same reason caused bury him very suddenly, in spite of a countermmand from his friends at Edinburgh. But they, fully perswaded that *air James* was murdered by his own son, sent out some chirurgions and friends, who having raised the body, did see it bleed miraculously upon his touching it. In which God Almighty himself was pleased to bear a share in the testimonies which we produce; that Divine Power, which makes the blood circulate during life, has oft-times, in all nations, opened a passage to it after death, upon such occasions, but most in this case; for after all the wounds had been sewed up, and the body designedly shaken up and down, and which is most wonderful, after the body had been buried for several days, which naturally occasions the blood to congeal; upon Philip's touching it, the blood darted and sprung out, to the great astonishment of the chirurgions themselves, who were desired to watch this event; whereupon Philip, astonished more than they, threw down the body, crying, O God! O God! and cleansing his hand, grew so faint, that they were forced to give him a cordial. But lest any shadow of difficulty might remain with you, his Divine Providence, which oft-times reveals itself by the mouths of babes and sucklings, has brought us two little witnesses, whom, as nobody could be so unworthy as to corrupt, so none can be such infidels as not to believe, especially since they depone against their own parents, and have owned firmly in their presence, what they now depone in yours. From them we have an account, how Philip that night came into the house of their parents, and there swore, he would be rid of his father that very night: how they went out at midnight, and after their return made their reflections how easily *air James* had died, and how briskly Philip had behaved, by guarding

the door with a pistol in his one hand, and a sword in the other; how they had hung a stone about his neck, but had thereafter taken it away, and how the mother durst not stay in her own house, while *air James's* coat was there; and if you had seen this little boy upon his knees, begging his father to confess, with so much affection, so much judgment, so much piety, you had needed no other probation but himself. The father himself, before his death, was convinced, and frequently foretold, that his son would kill him; and the mother, how soon she heard of her husband's death, and some of the circumstances now insisted upon, and remembered what she had heard her son say to herself, and what he had said at *Nunland*, concluded he was the murderer, in spite even of that criminal kindness which she had for him; almost the whole nation was convinced of this before any probation was led: and the lords of the privy council, among whom many of our judges sit, did declare, that they thought that half of the probation which was led before them, sufficient to convince an inquest. How then should the least scruple remain with you, before whom so full, so clear, and so legal a probation has been led, that like a bend, every part of it supports another; and like a chain, every link draws on another?

I need not fortifie so pregnant a probation, by laying out before you how often he and his complices have contradicted one another, and even how often he has contradicted himself in the most obvious and material points, and how he denyes every thing with oaths, and with equal confidence, though never so clearly proved; albeit such as these are the chief things that make up the probation in other cases: nor how he suffered the greatest indignities imaginable from his complices in presence of the privy council; though this convinced many of their lordships, that he was at the mercy of those complices, who were too far upon his secrets, not to be slavishly submitted to. But I cannot omit, how that since he came into prison, he has lived so impiouslie, and atheisticalle, as shews, that he had no awe upon his spirit, to restrain him from committing any crime from a love to God, or a fear to hell; and that he constantly filled and kept himself drunk from morning till night, thereby to drown the voice of his conscience, and to make himself insensible of the terrors of the Almighty.

The judges have declared what was necessary to be proved, and you are only to judge, if we have proved what they have thought necessary; and therefore there is no place to doubt, if a man's life may be taken upon meer presumptions; for the judges have eased you of that scruple, by finding the grounds in this qualified libel relevant; and his own advocats have acknowledged this probation to be so strong and unanswerable, that before the half of it was led, they went away and deserted a client, whom they found they could not

defend; nor should any man doubt of a probation, which one's own advocates think irrevocable. If then such amongst you as are fathers, would not wish to be murdered by your own children; or such of you as are sons, would not wish the world to believe that you are weary of your fathers, you will all concur to find this mercant guilty of a crime that God has taken so much pains to detect, and all mankind had such reason to wish to be punished. May then the Almighty God, who formed your hearts, convince them; and may this poor nation cite you, as the remarkable carriers of vice, to all succeeding ages!

Thereafter his majesties advocat protested for an assise of error against the inquest, in the case they should smoothie the pannel.

The persons who past upon the assise of Philip Standsfield, returned their verdict in presence of the sids' lards; whereupon the tamer follows:

The whole Assise called upon the Jury of Philip Standsfield, upon the three points following, particularly lybeled against him; to wit, the crime of treason, the curving of his father, and accession to his father's murder; they unanimously, in one voice, by the mouth of William Baillie of Laxington, their chancellor; finds the pannel Guilty of the foraid crimes.

Sic Subscribitur, WILLIAM BAILLIE,
of Laxington, Chancellor.

The Lords Justice General, and Commissioners of Judiciary, having considered the verdict of the assise returned against Philip Standsfield, they, by the mouth of John Leslie, dempater of court, decerned and adjudged the said

Philip Standsfield to be taken upon Wednesday next, being the 15th of February instant, to the mercat cross of Edinburgh, and there, betwixt two and four o'clock in the afternoon, to be hanged on a gibbet till he be dead, and his tongue to be cut out, and burnt upon a scaffold, and his right hand to be cut off, and affixt on the east part of Haddington, and his body to be carried to the Gallowlie betwixt Leith and Edinburgh, and there to be hanged up in chains; and ordains his name, fame, memory, and honours to be extinct, his arms to be riven forth, and delet out of the books of arms, swa that his posterity may never have place, nor be able hereafter to bruike or jeyse any honour, offices, titles, or dignities, within this realm in time coming, and to have forfeited, amitted and tint all and sundry his lands, heretages, titles, offices, tackis, stoddings, roums, possessions, goods and gear whatsoever pertaining to him, to our sovereign lord, to remain perpetuallie with his highness in property; Which was pronounced for doom: whereupon his majesties advocat asked, and took instruments.

Sic Subscribitur, JO. LOCKHART,
DAVID BALFOUR,
ROGER HOGG,
P. LYON:

Extracted forth of the books of adjournal, by me Mr. Thomas Gordon clerk to the justice court.

Sic Subscribitur, THO. GORDON.

Which Doom and Sentence, above written, was accordingly put to due execution upon the person of the said Philip Standsfield, in manner above prescribed.

END OF VOL. XI.



